

Submission to Australian Law Reform Commission

Traditional Rights and Freedoms— Encroachments by Commonwealth Laws (Interim Report 127)

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Executive Summary

This submission is made in response to Australian Law Reform Commission's Interim Report, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*. The submission is made on behalf of the National Association of Community Legal Centres (NACLC).

NACLC is the peak national organisation representing community legal centres (CLCs) in Australia. Its members are the state and territory associations of CLCs that represent over 200 centres in various metropolitan, regional, rural and remote locations across Australia. CLCs are not-for-profit, community-based organisations that provide legal advice, casework, information and a range of community development services to their local or special interest communities. CLCs' work is targeted at disadvantaged members of society and those with special needs, and in undertaking matters in the public interest.

NACLC welcomes the opportunity to contribute to the work of the Australian Law Reform Commission (ALRC). This submission is provided in addition to the submission NACLC provided in response to the ALRC's Issues Paper released as part of this Inquiry.

A number of state and territory associations of CLCs as well as individual CLCs across Australian have contributed to this submission, including:

- Queensland Association of Independent Legal Services (QAILS)
- Women's Legal Services Australia (WLSA)
- Townsville Community Legal Service
- Kingsford Legal Centre

NACLC also received pro bono support in the preparation of this submission. In addition, a number of individual CLCs have made submission to the Inquiry and NACLC draws the ALRC's attention to submissions made by: JobWatch, Kingsford Legal Centre; the Environmental Defenders Offices of Australia; and the Refugee and Advice Casework Service.

This submission does not respond to all issues canvassed in the Interim Report. Rather, it provides general comments on the ALRC's approach to reform, and addresses a number of particular chapters of the Report, including:

- Scrutiny mechanisms
- Freedom of speech
- Freedom of religion
- Freedom of association
- Retrospective laws
- Fair trial
- Privilege against self-incrimination
- Client legal privilege
- Procedural fairness

NACLC would welcome the opportunity to discuss these issues in more detail. The most appropriate contact person for this submission is:

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Approach to Reform

At the outset, NACLC reiterates many of the comments made in its submission in response to the Issues Paper with respect to the scope of the Inquiry and the ALRC's approach to the Terms of Reference. In particular, while recognising the role of common law in the protection of rights and the importance of examination of common law, NACLC suggests that there is also a need to recognise and refer to international human rights law and its jurisprudence more fully in the Final Report.

A Human Rights Act/Bill of Rights

In the Interim Report, the ALRC clearly articulated the existing limited framework for the protection and promotion of rights in Australia. In particular, the ALRC highlighted the limited rights provided for under the Australian Constitution and the clear ability of the Commonwealth Parliament to make laws that are specifically inconsistent with the rights and freedoms under international instruments to which Australia is a party. In light of this, NACLC again expresses the view that the most appropriate recommendation with respect to ensuring protection of traditional rights and freedoms is for the enactment of a Commonwealth Human Rights Act.

Approach to Reform

The approach to the Inquiry taken by the ALRC in the Interim Report is to:

- consider a limited number of traditional rights and freedoms;
- examine a range of Commonwealth laws;
- discuss whether limits/encroachments on the rights and freedoms in the particular laws are appropriately justified by reference to both proportionality and procedural justification; and
- highlight Commonwealth laws that seem to merit further review.

Unfortunately however, in NACLC's view the ALRC's approach is limited in a number of key ways.

Justification for Encroachment

First, the Interim Report does not propose a test for determining whether encroachment on rights and freedoms is justified in a particular circumstance, rather preferring a flexible approach.

The ALRC suggests consideration of whether there is 'substantive justification' for the breach of the right or freedom, referring in particular to the principle of proportionality; followed by consideration of whether there has been 'procedural justification', by reference to the scrutiny processes for proposed legislation and regulation. However, the ALRC does not make any definitive conclusion or recommendation as to the appropriate test.

NACLC submits that the ALRC should recommend a test for determining the appropriateness or not of encroachment on rights and freedoms. NACLC suggests that the principle of proportionality which has been recognised under both international and domestic law as an appropriate test, should form the basis for developing any such test. NACLC would be concerned about any focus on procedural justification as an element of the test in the face of significant limitations in existing scrutiny mechanisms and the absence of any Commonwealth human rights framework or legislation.

Recommendations for Reform

Secondly, and more importantly, the ALRC does not, where it considers such laws may encroach rights or freedoms, make any recommendations for reform to those laws.

In the Interim Report the ALRC indicates that it “would need more extensive consultation and evidence to justify making detailed recommendations for reform”. The ALRC goes on to conclude that “therefore, rather than make detailed recommendations for reform based on insufficient evidence, the ALRC has highlighted laws that seem to merit further review. These laws are identified in the conclusion to each chapter”.

NACLC is extremely concerned with this approach and considers that it would be a missed opportunity to make clear recommendations for reform in a number of areas. While NACLC understands the need for consultation prior to making recommendations for reform, NACLC considers that a one year inquiry by a body with the expertise of the ALRC and the contributions made by stakeholders and the Advisory Committee should be sufficient to make recommendations in relation to at least some of these areas of Commonwealth law.

It is particularly important for the ALRC to make recommendations for a number of reasons, including most notably that throughout the Interim Report the ALRC identifies many laws that infringe upon rights and freedoms, highlighting that in many cases these laws have already been identified by one or more existing scrutiny mechanisms as infringing upon rights and freedoms. As a result, making recommendations for reform is an important step towards reform, where scrutiny or comment by others means has not yet been successful in encouraging such reform.

Further, from a practical perspective and the perspective of civil society organisations in Australia, by not making any recommendations the report is not accessible, not easily summarised and it is very difficult to use the views expressed by the ALRC in further examination of, or advocacy about, the laws reviewed.

Accordingly, NACLC recommends that the ALRC, at a minimum, develop clear test or suggested steps for determining whether encroachment of rights and freedoms is appropriately justified and if such encroachment is not justified in some circumstances, make recommendations for reform to those laws.

Alternatively, or in addition, NACLC suggests that the ALRC recommend that the Attorney-General of Australia provide the ALRC with a follow-on reference which would provide it with the opportunity to make recommendations for reform in the areas identified in this first Inquiry.

Laws and Legal Frameworks

Finally, NACLC is disappointed that the ALRC has chosen not to take a broad approach, to the Terms of Reference, as it has done in a number of previous inquiries, by interpreting Commonwealth ‘laws’ to encompass both Commonwealth laws and legal frameworks. This would provide the ALRC with scope to examine a range of legislative instruments, as well as government policies, procedures and other related matters.

The ability of the ALRC to examine encroachments upon rights in government policy is vital in ensuring a thorough review of freedoms in Australia. This issue is of particular relevance to NACLC and the work of CLCs given restrictions on CLCs contained in funding agreements rather than legislation, an issue outlined in more detail later in this submission.

Scrutiny Mechanisms

In Chapter Two of the Interim Report the ALRC considers a range of scrutiny mechanisms that currently exist in Australia. NACLC considers that each of the mechanisms identified by the ALRC play an important role in scrutinising legislation with reference to rights and has a particular interest in the operation of such scrutiny mechanisms.

In addition, if as the ALRC suggests, in considering whether a limitation on a particular right, freedom or privilege is appropriately justified one of the tests might be procedural justification, then these mechanisms, to the extent that they are used to satisfy any such procedural justification, play a vital role. Importantly however and as noted above, NACLC's view is that procedural justification with the absence of any substantive consideration is not an appropriate justification for infringement of rights.

Parliamentary committee reviews, statements of compatibility and explanatory memoranda, exposure bills and consultation with external bodies are all mechanisms that play an important role in ensuring that the exercise of public power and the drafting of legislation can be justified by reference to fundamental freedoms, rights and privileges.

NACLC considers that existing processes employed to review and scrutinise proposed laws do not adequately test the compatibility of proposed laws with fundamental rights and freedoms and that even where such mechanisms identify incompatibility with such rights and freedoms, there are insufficient mechanisms in place to ensure amendment.

As a result, NACLC supports the ALRC's suggestion that the processes and mechanisms for developing and scrutinising Commonwealth laws, in particular: guidance materials and assistance; explanatory material and statements of compatibility; and the scope, relationship and procedures of committees be reviewed.

Briefly, NACLC elaborates further on four key points: statements of compatibility; timeframes; the role of 'other review mechanisms'; and monitoring and implementation of international human rights obligations.

Statements of Compatibility

NACLC considers that the introduction of statements of compatibility in 2011 was an important step towards ensuring that proposed laws are assessed for their impact on fundamental rights and freedoms. These statements assist the Minister in authorising or disallowing instruments and play an important role in influencing the drafting of the bill and its reception by Parliament.

The Attorney-General's Department (AGD) plays an important role in advising Government Departments on the preparation of such statements, including through the provision of templates. However, the Interim Reports makes note of the common practice by government departments of using templates and exemplars and referring to a non-exhaustive list of policy triggers when drafting statements of compatibility.

NACLC is concerned that this practice might undermine the rigour of review and might diminish the effectiveness of this review mechanism. It is vital that each statement of compatibility is drafted specifically so that the full range of potential effects can be assessed. This might involve including evidence-based rationales for how and why fundamental rights, freedoms and privileges will or can be justifiably encroached upon.

In addition, NACLC submits that the content of statements of compatibility should be expanded to incorporate feedback and input from the community and members of the public.

Accordingly, NACLC encourages the ALRC to make recommendations about ways in which statements of compatibility might be made more meaningful and effective.

Timeframes

The Interim Report refers to the time constraints placed on parliamentary consideration of committee reports, statements of compatibility and explanatory memoranda.

NACLC is concerned about the time constraints imposed on the scrutiny of legislation which, due to the workload of parliamentary committees and Parliament, limits the committees' ability to scrutinise bills thoroughly and limits Parliament's ability to give proper consideration to committees' reports.

For example, it is concerning that since 2000, 109 bills considered in the Scrutiny of Bills' Committee reports have passed into legislation before the committee had published its reports. Failure to consider such reports results in Parliament legislating without consideration of the views of committees, and therefore more importantly, the stakeholders who engage in committee inquiries and reviews.

These time constraints also have a significant impact on the ability of stakeholders, including bodies such as NACLC, to provide considered submissions and responses to committee inquiries and reviews. These submissions are vital in providing information about both the operation of existing laws in practice and the potential effect of new laws.

More broadly, limited consultation timeframes undermine vital participation by civil society and the general public in legislative processes, including in circumstances where legislation has a significant impact on the rights and freedoms of members of the community.

As a result, NACLC encourages the ALRC to recommend the introduction of minimum review timeframes as a fundamental step to ensuring that bills are adequately reviewed for rights compatibility. This would allow review committees to consider the impact of laws more extensively and would facilitate greater opportunity for external and community consultation.

Other Review Mechanisms

Finally, the Interim Report makes note of the role of bodies such as the Australian Human Rights Commission (AHRC) and the ALRC in reviewing proposed and enacted laws.

NACLC considers that these bodies play a key part in framing the debate around rights compatibility. The independence of such bodies and the provision of sufficient funding to allow them to undertake their statutory functions is vitally important and NACLC has serious concerns about attempts to undermine the independence of the AHRC in particular, as well as funding cuts to both the AHRC and ALRC in recent years.

In addition, NACLC considers that, for a range of reasons, there are difficulties in accurately assessing the extent to which reviews undertaken by these bodies are taken into account by Government. In the case of the ALRC, there is a statutory timeframe within which the Government must table an ALRC report in Parliament, but not requirement that such reports receive a formal response. Accordingly, in order to further strengthen their role NACLC recommends that the Government be required under legislation to provide a formal written responses to reports released by bodies such as the AHRC and ALRC.¹

¹ This is consistent with the National Human Rights Consultation Committee, Final Report, 2009, rec 13.

Monitoring and Reporting on International Human Rights Obligations

There is currently no mechanism in place to ensure proper monitoring and reporting on Australia's implementation of concluding observations, recommendations and views of UN treaty bodies and the recommendations from special procedures and Australia's Universal Periodic Review (UPR).

As a result, NACLC strongly suggests that the ALRC include in its recommendations for reform of existing scrutiny mechanisms, expanding the role of the Parliamentary Joint Committee on Human Rights to undertake this role. This is consistent with a recommendation proposed by the Australian NGO Coalition, which NACLC coordinated, as part of Australia's upcoming 2015 UPR.² NACLC notes that the Committee would need additional resources to undertake this expanded role.

Freedom of Speech

As noted in the Interim Report, freedom of speech may be characterised as a freedom without which no other freedom could survive. However, there is presently no explicit personal right to freedom of speech under Australian law analogous to the broad rights to freedom of speech that are entrenched in the constitutions or national human rights instruments of international jurisdictions such as the United States of America, Canada, the United Kingdom and New Zealand.

The High Court has recognised that freedom of political communication is implied in the *Australian Constitution* (Constitution). Whilst the scope of the implied freedom of political communication is adequately articulated in the Interim Report, NACLC considers it important to note that the existing freedom acts as a fetter on the exercise of legislative power by the Commonwealth rather than to protect any personal right to freedom of speech. The implied freedom applies only to political communication and is limited to that which is necessary for the effective operation of the system of representative and responsible government provided for by the Constitution. Accordingly, and as outlined earlier in this submission, NACLC considers that the best means of guaranteeing the right to free speech in Australia is through a Bill of Rights or Commonwealth Human Rights Act. This approach has been adopted successfully in comparable jurisdictions including New Zealand, Canada and the United States.

NACLC is particularly concerned with the impact that criminal, secrecy and anti-discrimination laws may have upon freedom of speech in Australia and considers that it is essential that the right balance is struck between protecting freedom of speech and prohibiting or deterring speech and expression that is not in the public interest or results in discrimination or vilification. Accordingly, these categories of laws are considered below.

Formulating a General Test

In examining whether an encroachment on freedom of speech is justified, the ALRC considers "some of the principles and criteria that might be applied to help determine whether a law that interferes with freedom of speech is justified, including those under international law", but does not determine whether appropriate justification has been advanced for particular law. In particular, the ALRC considers two key elements: legitimate objective and proportionality.

As outlined above, NACLC supports the use of a proportionality test to determine whether a breach of the right to freedom of speech may be justified. The principle of proportionality is generally consistent with the approach taken under international human rights law and in other common law jurisdictions

² See, eg, Australian NGO Coalition, *Joint Submission on Australia's 2nd UPR*, March 2015 http://www.naclc.org.au/cb_pages/International%20Engagement.php

with entrenched rights and freedoms, such as Canada and New Zealand. Proportionality is also the test adopted with respect to the human rights legislation enacted in the Australian Capital Territory and Victoria: the *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

In addition to adopting an appropriate test of proportionality, NACLCL agrees with the view expressed by the United Nations Human Rights Committee (as extracted in the Interim Report) that, in invoking a legitimate ground for restricting free expression, a state must “demonstrate in specific and individualised fashion the precise nature of the threat and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat”.

NACLCL submits that any restriction on free expression must be specifically justified in terms of both its purpose and its means in order to be permissible.

Existing Laws Impacting on Freedom of Speech

NACLCL agrees with the suggestion by the ALRC in the Interim Report that counter-terrorism offences provided for under the *Criminal Code*, terrorism-related secrecy offences under the *Criminal Code* and the *Australian Security Intelligence Organisation Act 1979* (Cth) (ASIO Act) and anti-discrimination laws are areas of particular concern as existing Commonwealth laws that encroach upon on freedom of speech.

As a result, NACLCL strongly supports the Interim Report’s suggestion that the legislative provisions enacted to protect national security be reviewed. The Independent National Security Legislation Monitor (INSLM) is the obvious body and is the one identified by the ALRC. However, NACLCL notes the need for ongoing support and funding for the statutory position would be required in order to facilitate the INSLM undertaking such a review. This is particularly important given that to date, there has been no Government response to any of the INSLM’s recommendations.³ Alternatively, the Attorney-General could provide the ALRC with Terms of Reference to undertake such a review.

Criminal Laws

As acknowledged, freedom of speech and expression of individuals cannot be unlimited and national security and the protection of the community are legitimate purposes. However, NACLCL considers that many existing criminal laws are disproportionate and may be subject to abuse. In particular, NACLCL has significant concerns about certain sections of the *Criminal Code* that criminalise particular forms of speech and expression.

For example, as noted in the Interim Report, s 80.2C of the *Criminal Code Act 1995* (Cth) came into effect in December 2014, and creates an offence where a person advocates the doing of a terrorist act or the commission of a terrorism offence, and is reckless as to whether another person will engage in that conduct as a consequence.

Section 80.2C unfairly encroaches upon the right to be free from discrimination, even with the good faith defence. NACLCL suggests that the breadth of s 80.2C does not adequately strike a balance between the competing interests of protecting the community on the one hand, and freedom from discrimination on the other. This is because of the unnecessarily broad range of conduct which may fall within s 80.2C and the class of individuals that are likely to be subject to this type of prosecution. In particular, NACLCL expresses concern over the following:

³ See, eg, Independent National Security Legislation Monitor, *Annual Report*, 28 March 2014, 2.

The meaning of "advocate" includes counselling, promoting, encouraging and urging and encompasses a vast spectrum of expression. These elements of the offence pose a significant risk of criminalising legitimate exercises of free speech by seriously impacting on the confidence of individuals and organisations to voice radical and controversial (albeit not illegal) views regarding overseas conflicts and terrorism. For example, the Bills Digest Notes for the legislation note the possibility that a general statement of support for terrorism posted online, even if there is no specific audience, could invoke s 80.2C.⁴

Further, the broad definition of "terrorist act" in the *Criminal Code* suggests that any person who encourages civil disobedience or political protest that subsequently results in violence could be guilty of this offence, even though the incitement of violence was not their intention.⁵

NACLC also submits that the offence under s 80.2C is unnecessary, as the offences of inciting violence at s 80.2 or urging violence at s 11.4 of the *Criminal Code* adequately cover the situation where a person intentionally incites others to engage in violent acts.

Although the Human Rights Committee raised concerns about this offence, unfortunately no amendments were made to take into account such concerns.

NACLC has similar concerns relating to div 102 of the *Criminal Code* which allows an organisation to be banned as a terrorist organisation if it can be shown that it is directly, or indirectly, engaged in, preparing, planning or fostering the doing of a terrorist act, or advocates the doing of a terrorist act. This could mean, however, that whole groups could be banned (thereby criminalising the actions of all members involved in the group) due to the actions of a few individuals within the group. NACLC is concerned about the proportionality of such a response and the level of procedural fairness afforded to members of the group.

NACLC considers that s 80.2C and div 102 may also place certain individuals or groups of individuals at risk of racial profiling, which is a form of discrimination that may lead significant violations of human rights.⁶

Accordingly, NACLC submits that the ALRC should recommend that s 80.2C and div 102 of the *Criminal Code* should be repealed and prosecutions under s 11.4 of the *Criminal Code* should be limited to serious offences, being those involving violence.

Secrecy Laws: Australian Border Force Act 2015 (Cth)

Community legal centres provide assistance and advice to vulnerable and disadvantaged members of the community. Some CLCs provide assistance and advice to refugees and asylum seekers, including those in immigration detention. Accordingly, NACLC has significant concerns about the disclosure provisions under the *Australian Border Force Act 2015* (Cth) (ABF Act) which disproportionately and unjustifiably infringe on freedom of speech.

The ABF Act punishes unauthorised disclosures made by "entrusted persons", which includes any Immigration and Border Protection Department workers, with up to 2 years imprisonment.⁷ Most significantly, as Department workers can include consultants, contractors or service providers, this provision can extend to silence any doctor, welfare worker or employee of an immigration detention centre located offshore.

⁴ Bill Digest no. 34 2014-15, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014.

⁵ *Criminal Code*, s 100.1

⁶ See: Flemington & Kensington Community Legal Centre, Racial Profiling, <http://www.communitylaw.org.au/flemingtonkensington/cb_pages/racialprofiling.php> (accessed 6 October 2015).

⁷ *Australian Border Force Act 2015* (Cth) s 24.

NACLC considers that it is unjustifiable to stifle the free speech of workers who may wish to disclose their experiences, for example, of the conditions in offshore immigration centres.

This concern is reflected by the recent cancellation of a visit to Australia by the Special Rapporteur on the Human Rights of Migrants on the basis that the ABF Act “would have an impact on my visit as it serves to discourage people from fully disclosing information relevant to my mandate” ... that “this threat of reprisals with persons who would want to cooperate with me on the occasion of this official visit is unacceptable” and that “the Act prevents me from fully and freely carrying out my duties during the visit”.⁸

NACLC considers that the exemptions under the ABF Act are not sufficient to protect legitimate exercises of free speech. Accordingly, NACLC submits that the ALRC should make a recommendation that the disclosure provisions under the ABF be repealed or that clear public interest exceptions be introduced.

Anti-Discrimination Laws

The Interim Report notes that anti-discrimination law may ‘benefit from more thorough review in relation to implications for freedom of speech’.

In April 2010, as one of the initiatives proposed in Australia’s Human Rights Framework, the Australian Government announced its intention to consolidate federal anti-discrimination legislation—*Racial Discrimination Act 1975* (Cth) (RDA); *Sex Discrimination Act 1984* (Cth); *Disability Discrimination Act 1992* (Cth); and *Age Discrimination Act 2004* (Cth)—into one piece of legislation.

In 2012, an exposure draft of the Human Rights and Anti-Discrimination Bill was released, which was referred to the Senate Legal and Constitutional Affairs Committee for inquiry and report in 2013. NACLC and CLCs across Australia expressed support for consolidation and improvement of anti-discrimination legislation and actively engaged in the consolidation process. Unfortunately however, the Government discontinued the consolidation process.

NACLC supported the consolidation process and as a result would support wholesale review of anti-discrimination law, but cautions against review only of the RDA, or review considering only implications for freedom of speech.

With respect to the RDA, in the Interim Report the ALRC notes that s 18C of the RDA has attracted significant controversy.⁹ NACLC and a range of CLCs made submissions in relation to the Exposure Draft of the *Freedom of Speech (Repeal of s 18C) Bill 2014* (Cth) released by the Australian Attorney-General’s Department consultation with respect to proposed amendments to the RDA.

NACLC considers that s 18C of the RDA to be a good example of legislation which is proportionate, justified and strikes the right balance between respecting freedom of speech and protecting communities and individuals from racial vilification and abuse.

NACLC is concerned that the reintroduction of the amendments to section 18C first proposed in 2014 could legitimise hate speech in Australian society and contribute to racially motivated violence. As a result, NACLC reiterates its opposition to amendment to the RDA as proposed in the *Freedom of Speech (Repeal of s 18C) Bill 2014* (Cth).

⁸ Special Rapporteur on the Human Rights of Migrants, *Migrants / Human rights: Official visit to Australia postponed due to protection concerns*, 25 September 2015,

<http://ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16503&LangID=E#sthash.4pUw1wuR.dpuf>

⁹ Interim Report, 3.191.

Restrictions on Civil Society

As outlined above, NACLC is disappointed that the ALRC has not interpreted the Terms of Reference broadly to encompass both laws and legal frameworks. This is of particular importance to CLCs because a key mechanism for Government limitation on the work and activities of CLCs is contained in a funding agreement rather than in legislation.

NACLC highlighted in its submission in response to the ALRC's Issues Paper particular concern in the context of the right to freedom of opinion and expression about the decision by the Australian Government to no longer fund CLCs to undertake most law reform and policy advocacy work.¹⁰

As noted in NACLC's earlier submission, while such restriction does not technically breach the *Not-For-Profit Freedom to Advocate Act 2013* (Cth), this restriction and earlier iterations of the restriction expressed by the Government have the same effect of stifling CLCs advocacy work and their willingness to make public comment. By way of example, in 2013-2014, CLCs funded under the Commonwealth's CLSP undertook 1084 law reform activities. In 2014-2015 this number dropped to 824 law reform activities.

NACLC reiterates the need for the ALRC to consider such restrictions as they raise serious concerns with respect to freedom of opinion and expression in Australia, and unjustifiably limit the right of freedom of speech for NGOS and individuals.

¹⁰ See further information in: NACLC, Submission 66 to Australian Law Reform Commission, Issues Paper 46 (2015).

Freedom of Religion

In the Interim Report, the ALRC considered a range of submissions with respect to freedom of religion, noting that stakeholders raised concerns about the scope and application of the religious exemptions under anti-discrimination law. The ALRC concluded that the provisions “do not, on their face, interfere with religious freedom” but noted the arguments of some stakeholders, including NACLC, that the exemptions are an unjustifiable encroachment on the principle of non-discrimination and the rights and freedom of CLC clients.

Unfortunately, the ALRC did not appear to draw any firm conclusions about the appropriate test for determining whether an encroachment on the freedom of religion is justified, or make recommendations for reform to any Commonwealth laws, including the SDA.

NACLC reiterates comments made in previous submissions about the religious exemptions under anti-discrimination law and reiterates its view that such exemptions do not strike an appropriate balance between the freedom of religion and the freedom from discrimination in a range of areas that directly affect the lives of CLC clients, including for example in the provision of accommodation, as well as in education and work.

Freedom of Association

In the Interim Report, the ALRC identified several areas of particular concern with respect to freedom of association, including: various counter-terrorism offences provided under the *Criminal Code*; workplace relations laws and the operation of Commonwealth anti-discrimination laws.

As outlined above, NACLC supports further and broad review of Australia's counter-terrorism laws for compatibility with human rights, including to the extent that they encroach freedom of association.

With respect to workplace relations laws, NACLC draws the ALRC's attention to submissions made by CLCs including JobWatch and the Kingsford Legal Centre on these issues.

With respect to anti-discrimination law, NACLC reiterates the comments made above in relation to exemptions and suggests that any review of anti-discrimination law should constitute a wholesale review and consolidation of anti-discrimination law.

In addition, while recognising the limitations on the ALRC with respect to making recommendations about state and territory laws, NACLC considers that anti-consorting laws in place in a number of Australian jurisdiction unjustifiably encroach upon freedom of association.

Fair Trial

In Chapter 10 of the Interim Report, the ALRC notes that "given the practical scope of this Inquiry, this report does not seek to identify all Commonwealth laws that might affect the fairness of a trial, but rather highlights particular examples of laws that interfere with accepted principles of a fair trial".¹¹

A number of components of a fair trial are discussed in other chapters of the Interim Report and dealt with separately in this submission, including the burden of proof and the right to be presumed innocent; the privilege against self-incrimination; and client legal privilege.

More broadly however, the underlying difficulty with the ALRC's approach to the issue of fair trial is that by focussing exclusively on the fairness inherent in the trial process the ALRC has neglected the equally fundamental question of whether the courts are in fact practicably accessible to all members of our community. No matter how thoroughly statutes theoretically allow for a fair trial, if justice is not open to all; then we must question the fairness of the judicial process.

While the broader question of access to justice is not the focus of this Inquiry and has been the subject of recent reports by the Attorney-General's Department¹² and the Productivity Commission¹³, it is essential to appreciate the integral link between access to justice and the protection of traditional rights and freedoms. Practical limitations on an individual's ability to use (or use effectively) legal processes affects the fairness of a trial.

The scope of the ALRC's inquiry is limited further by the narrow approach taken to the consideration of a fair trial in the Interim Report, which focuses almost exclusively on the rights of people accused of crimes, neglecting the areas of family and civil law. On this point NACLC draws the ALRC's attention to the submission made by Women's Legal Services Australia in response to the Issues Paper which notes particular concern about such an approach in light of the gender dimensions of such a focus.¹⁴

¹¹ Interim Report, 10.7

¹² See, eg, Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009).

¹³ See, eg, Productivity Commission, *Access to Justice Arrangements*, Final Report, (December 2014).

¹⁴ Women's Legal Services Australia, Submission 5 to Australian Law Reform Commission, Issues Paper 46 (2015), 2.

Right to a Lawyer

One of the key elements of a fair trial is the right to a lawyer. The Interim Report distinguishes between two senses in which a person may have a right to a lawyer- “the first (negative) sense essentially means that no one may prevent a person from using a lawyer. The second (positive) sense essentially suggests that governments have an obligation to provide a person with a lawyer, at the government’s expense”.¹⁵

The ALRC suggests that this second positive sense is less secure and concludes that it is not a traditional common law right. However, consistent with the decision in *Dietrich v The Queen*, while people accused of a serious criminal offence may not have a right to the provision of counsel at public expense, the ALRC does not adequately recognise the emphasis the Court placed on the availability of legal representation in ensuring access to a fair trial.¹⁶

Inability to access a lawyer puts individuals at a serious disadvantage in the court system. In the context of criminal proceedings, *Dietrich* recognised this, and provided that “Australian law acknowledges that an accused has the right to a fair trial and that, depending on all the circumstances of the particular case, lack of representation may mean that an accused is unable to receive...a fair trial”.¹⁷

Unfortunately, no such protection exists in the context of the civil law, despite the potentially significant impact of civil disputes and decisions on individuals. As the Productivity Commission noted:

“For disadvantaged Australians...unresolved civil law problems, such as a dispute about social security payments, can ultimately result in a person not having any money for food or not having somewhere to live. Civil legal needs for disadvantaged people involve essential human needs”.¹⁸

A person forced to commence or continue an action without legal assistance is placed at a significant disadvantage, particularly if the other party is professionally represented. In such instances, the disparity in knowledge of the law, court procedure and lack of familiarity with courtroom practice is such as to jeopardise a fair trial. In addition, where legal action is not pursued at all because of a lack of legal assistance the unfairness is even greater; the individual has not even been able to pursue a trial, let alone have a fair one.¹⁹

Accordingly, NACLC submits that in examining the right to a fair trial it is vital for the ALRC to consider in more detail the right to a lawyer in this second sense, and in particular access to and funding for legal assistance in the Final Report. Failure to consider it in more detail will in NACLC’s view unfortunately have the effect of excluding from the scope of the Inquiry a serious encroachment upon the rights of people in Australia to access legal assistance. This encroachment inevitably impacts upon the most vulnerable and disadvantaged members of the community.

In particular, the ongoing failure of governments to provide sufficient funding for legal assistance services, including CLCs, directly impacts on an individual's right to a fair trial. The notion of a “fair trial” requires access to legal assistance services to be meaningful, and NACLC urges the ALRC to clearly acknowledge this connection in its Final Report.

Open Justice

¹⁵ Interim Report, 10.108.

¹⁶ *Dietrich v The Queen* (1992) 177 CLR 292.

¹⁷ *Ibid.*

¹⁸ Productivity Commission, *Access to Justice Arrangements*, Draft Report (April 2014), 627.

¹⁹ See, eg, Women's Legal Services Australia, Submission 5 to Australian Law Reform Commission, Issues Paper 46 (2015), 5.

NACLC limits its submission on open justice to one key point. The Interim Report makes passing mention of s 121 of the *Family Law Act 1975* (Cth) (FLA).²⁰ However, consistent with the focus of the chapter on criminal law the issue is not considered further. As outlined above, NACLC is concerned about the impact such a focus may have on precluding from review encroachments upon the rights of women.

In particular, s 121 of the FLA makes it an offence to publish an account of proceedings under the Act that identifies a party to the proceedings or a witness or certain others. The prohibition also includes “disseminat[ion] to the public or a section of the public”. A breach of this section is a criminal, indictable offence.

NACLC considers that this provision restricts victims and survivors of violence from speaking openly of their experiences of the family law system. As a result, NACLC suggests that the ALRC consider this issue further and recommend that review of s 121 be referred to the Family Law Council for inquiry.

Burden of Proof

NACLC only considers the burden of proof in the context of anti-discrimination legislation and the Fair Work Act 2009 (Cth).

Fair Work Act 2009 (Cth)

As outlined in the Interim Report, the general protections provisions under s 361 of the *Fair Work Act 2009* (Cth) (*Fair Work Act*) contain a reverse burden of proof in that adverse action taken against an employee will be presumed to be action taken for a prohibited reason unless the employer proves otherwise. As the ALRC notes, this placement of the burden of proof on an employer is not novel, indeed the first industrial relations statute, the *Commonwealth Conciliation and Arbitration Act 1904* (Cth) contained such a reversal.

NACLC considers the reversal is justified and necessary in particular given the “monopoly of knowledge” held by employers and therefore difficulty of meeting the burden; the particular vulnerability of employees; and that the presumption is easily rebutted, as demonstrated by case law. Indeed the Productivity Commission in its Draft Report as part of the Workplace Relations Framework Inquiry did not recommend any changes to the onus of proof under s 361(1)²¹ and commented that as “employees cannot be in a position to acquire the information to prove intent, there is reasonable justification for such a reverse onus.”²²

Accordingly, and in light of both recent and ongoing inquiries and reviews of workplace relations legislation, NACLC would not support the ALRC suggesting or recommending that there be any further review of these provisions.

NACLC also draws the ALRC’s attention to submissions made on this issue by CLCs including JobWatch and Kingsford Legal Centre.

Anti-Discrimination Legislation

²⁰ Interim Report, 10.79.

²¹ Productivity Commission, *Workplace Relations Framework Inquiry*, Draft Report, (August 2015), 260-262.

²² *Ibid*, 29.

The Interim Report states at paragraph 11.100 that Commonwealth anti-discrimination laws, with the exception of the *Racial Discrimination Act 1975* (Cth), contain a "reverse legal burden of proof" with respect to indirect discrimination. The Interim Report notes that "if a defendant is shown to have imposed a condition, requirement or practice that has a disadvantaging effect on persons with a relevant attribute, they may avoid liability by establishing that the condition, requirement or practice is reasonable in all the circumstances".

NACLC considers that it is not entirely correct to state that Commonwealth anti-discrimination laws impose a "reverse legal burden of proof". Rather, with the exception of the *Racial Discrimination Act 1975* (Cth), the complainant bears the initial burden of proving that the respondent has imposed a condition, requirement or practice that has a disadvantaging effect on persons with a relevant attribute. If this is established, the onus then shifts to the respondent to prove that his or her act does not constitute discrimination as the condition, requirement, or practice is reasonable.²³

The Interim Report states at paragraph 11.101 that a number of submissions considered the burden of proof in anti-discrimination laws to be unjustified, including on the basis that the description of the accused as the 'discriminator' suggests an assumption of guilt, and that the requirement that the alleged discriminator prove that he or she did not discriminate is inconsistent with the criminal law burden of proof and raises the prospect of vexatious litigation.

In response, NACLC submits that because Commonwealth anti-discrimination legislation imposes civil, not criminal liability, statements about 'assumption of guilt' and the removal of the 'presumption of innocence' are not applicable in this context. NACLC also reiterates that the applicant still bears the onus of adducing prima facie evidence that the act occurred and that without any other explanation, the reason for that act was a prohibited purpose, which is sufficient to deter vexatious claims.

NACLC considers that the current burden of proof in anti-discrimination law is justified, particularly in light of the power imbalance and information asymmetry between the complainant and respondent. In the experience of NACLC, the burden of proof is often impossible for complainants to satisfy in the absence of ready access to evidence, which is usually held by the respondent.

Case Study

A Community Legal Centre received a number of complaints against a bowling club about discrimination on the basis of race. The CLC then acted for an Aboriginal woman in a complaint against the bowling club under the RDA. The woman's membership of the club was suspended because she used minor offensive language. Her membership was then suspended for a further 12 months for no apparent reason.

Not only was the punishment completely disproportionate to the breach of the club rules, the woman believed that Aboriginal members of the club received harsher penalties than non-Aboriginal members for the same or similar breaches of the club rules.

This type of racial discrimination is very difficult for a complainant to prove. The woman had enough evidence to establish a prima facie case of discrimination but did not have any of the evidence concerning causation. For example, she did not have access to the minutes of the meeting where her membership status was discussed and the decision taken to suspend it.

Further, she did not know about the total number of memberships suspended and the race of the affected members. She only had anecdotal evidence regarding those issues. She decided to settle the

²³ See, eg, *Sex Discrimination Act 1984* (Cth) s 7C.

matter, partially because of these difficulties with the onus of proof. The onus of proof to provide such evidence should fall on the respondent once the complainant has outlined a prima facie case of discrimination.

NACLC submits that in relation to discrimination laws in general, it is appropriate that the burden of proof operates so that once the complainant has raised a prima facie case of discrimination, a rebuttable presumption of discrimination should arise. The respondent must then prove that the conduct was not unlawful. This is consistent with the approach taken in section 361 of the *Fair Work Act 2009* (Cth) discussed above.

Privilege against Self-Incrimination

NACLC supports the rationales for the privilege against self-incrimination identified by the ALRC in its Interim Report, namely that the privilege: protects freedom and dignity; is necessary to preserve the presumption of innocence and to ensure that the burden of proof remains on the prosecution; and reduces the power imbalance between the prosecution and a defendant.

The maintenance of the privilege against self-incrimination is a key protection in common law for vulnerable individuals facing the weight of state resources in prosecution. As a result, given CLCs provide legal assistance to particularly vulnerable and disadvantaged members of the community, and in light of what appears to be a general trend towards limiting the privilege, NACLC considers that greater caution should be taken to ensure the privilege is protected and not unduly abrogated by legislation.

NACLC reiterates its submission that the introduction of a Bill of Rights or Human Rights Act at a Commonwealth level would provide additional and necessary protection of the rights of people in Australia, including stronger protection of the privilege against self-incrimination such that it cannot be overridden by statute.

Where Commonwealth legislation impinges on the privilege against self-incrimination, statutory protections provide for use or derivative use immunities. However, such immunities may not be sufficient and NACLC considers further review of the issue of derivative use immunity may be of some benefit.

Client Legal Privilege

NACLC supports the rationales for client legal privilege identified by the ALRC in its Interim Report. In particular, the privilege:

- encourages full and frank disclosure between clients and their legal representatives, facilitating a relationship of trust and confidence;
- assists in the efficient resolution of disputes through settlement and alternative dispute resolution rather than costly litigation; and
- ensures that legal advice provided to a client is informed and effective.

Maintaining client legal privilege is an essential safeguard to an effective adversarial system. In addition, in the context of the work of CLCs with disadvantage and vulnerable clients, the protection (and perceived protection) provided by client legal privilege is particularly important in safeguarding the client's trust in their legal advisor. Accordingly, caution should be taken to ensure the privilege is protected and not unduly abrogated by legislation.

NACLC supports stronger protection of client legal privilege so that it cannot be overridden by statute. NACLC is concerned that the principle of legality cited by the ALRC²⁴ as protecting the privilege is insufficient. The principle of legality provides no protection where the legislature seeks to abrogate or diminish the privilege through statute. As emphasised throughout the submission, a greater level of protection could be achieved through a Bill of Rights or Human Rights Act that incorporates the privilege and recognises that its existence is a fundamental characteristic of the lawyer-client relationship.

NACLC considers the provisions of the *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* (Cth) result in an abrogation of client legal privilege and that such mandatory and indiscriminate data retention is neither necessary nor proportionate and cannot be justified.

In its submission to the Issues Paper, NACLC raised concerns in relation to the *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (Cth) which requires metadata to be kept by telecommunications providers for two years. This Bill has now passed Parliament and is due to commence full operation on 13 October 2015.

The ALRC suggests in the Interim Report that “in the absence of a clear and unambiguous legislative intention to abrogate client legal privilege, these laws arguably do not abrogate the privilege”. At common law client legal privilege attaches to the content of the privileged communications, not to the fact of their existence.²⁵ However, privilege may apply to telecommunications data where it would disclose a client’s identity and where it is provided for the purpose of obtaining or giving legal advice.²⁶

More broadly on this distinction between the content of communications and metadata, NACLC notes the Office of the United Nations High Commissioner for Human Rights report on privacy in the digital age expressed the view that “this distinction [between data about a communication and content] is not persuasive”.²⁷ In addition, as noted in the Interim Report, the Parliamentary Joint Committee on Human Rights expressed some concern about the implications of this regime as potentially abrogating client legal privilege.

NACLC is particularly concerned that the abrogation of client legal privilege under the Act may lead to clients of CLCs deliberately withholding information which would adversely impact resolution of legal issues. For example, in the context of family law matters there is a risk that clients could fear that misuse of information disclosed to a legal representative may result in the heightened risk of removal of children, police involvement or domestic or family violence. Additionally, in criminal matters, an accused may decide not to seek legal assistance on the basis that the mere fact of seeking such advice, if obtained by the relevant authorities, may be used to evidence guilt.

In light of the above, NACLC encourages the ALRC to give further consideration to whether, and to what extent, the data retention laws violate client legal privilege in the Final Report and to recommend the need for further safeguards under the Act, including for example an exception or requiring agencies to obtain a warrant to access a lawyer’s metadata.

Procedural Fairness

Migration Law

²⁴ Interim Report, 13.24

²⁵ *National Crime Authority v S* [1991] FCA 234.

²⁶ See, eg, *National Crime Authority v S* [1991] FCA 234, 103.

²⁷ Office of the United Nations High Commissioner for Human Rights, *The right to privacy in the digital age*, 27th sess, UN Doc A/HRC/27/37 (30 June 2014) [19].

Procedural fairness is a fundamental rule of common law.²⁸ The High Court of Australia has stated that "when a statute confers power to destroy, defeat or prejudice a person's rights, interest or legitimate expectations, principles of natural justice generally regulate the exercise of that power".²⁹

NACLC is concerned about changes to the *Migration Act 1958* (Cth), particularly since the introduction of the Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Amendment Bill), passed on 24 November 2014, which limits procedural fairness in a number of ways.

By way of example, since the assent of the Amendment Bill, the Minister no longer has a discretionary power to cancel a visa when the visa holder has a "substantial criminal record". The visa must be cancelled.³⁰ The operation of natural justice is specifically excluded from the provision.³¹

NACLC has concerns about the "automatic" cancellation of visas. The concern is exacerbated where there is no entitlement to procedural fairness. The automatic cancellation of a visa fails to take account of the individual circumstances of the person and the mandatory (and therefore blind) application of any law is an invitation to injustice. Its application in this context, where a person might face deportation to a country they have no real connection with, and without even the fundamental entitlement to procedural fairness, has the potential to work extraordinary injustice.

Further, the people to whom this law would apply are often vulnerable with complex backgrounds and causes of offending. It is unacceptable that vulnerable people face cancellation of a visa in these circumstances without any opportunity to be heard.

Case Study

X is a citizen of the United Kingdom who has lived in Australia for nearly 60 years. X served for Australia in the Vietnam War. X developed post-traumatic stress disorder, alcohol dependency and service related brain injuries. X was arrested and detained for 12 months for alcohol related minor offences. The length of the incarceration was sufficient to categorise the offences as a 'substantial criminal offence' and satisfy the automatic cancellation of visa under the Migration Act.

The matter received wide spread media attention with a specialist community legal centre advocating with the Minister to prevent the deportation.

X ultimately had his visa reinstated.

Unfortunately, there are a range of other examples in the Migration Act that exclude procedural fairness, including:

- 501BA – power to set aside a decision to revoke decision to cancel a visa
- Decisions under Part 2, Division 3, Subdivision FB - Emergency cancellation on security grounds
- 133A - Minister's personal powers to cancel visas on section 109 grounds
- 133C - Minister's personal powers to cancel visas on section 116 grounds
- 198AE - Ministerial determination that section 198AD does not apply

²⁸ *Kioa v West* (1985) 159 CLR 550.

²⁹ *Plaintiff M61/2010 v Commonwealth* (2010) 243 CLR 319, [74].

³⁰ *Migration Act 1958* (Cth) s 501(3A).

³¹ *Ibid*, s 501(5).

- 500A - Refusal or cancellation of temporary safe haven visas

In many of these examples the Minister may override an independent decision if he or she thinks it is not in the national interest. This is essentially an unfettered power, without constraints, checks or balances. These powers are especially concerning when a person had previously satisfied an independent body that a visa should not be cancelled, or that a visa should be granted, thereby overriding principles of transparency and accountability in decision-making.

NACLC submits that procedural fairness is a fundamental protection of our legal system, that these provisions place already vulnerable people further at risk and encourages the ALRC to make recommendations about reform of these provisions.

National Security Legislation

National security legislation that denies procedural fairness can only be justified on the basis that such laws are proportionate and reasonable. In NACLC's submission to the Issues Paper, NACLC expressed the view that the protection of Australia from threats to national security and the protection of human rights are complimentary goals. Both are fundamentally concerned with protecting the community and individuals from harm. Legislation should strike an appropriate balance between the protection of national security and the right to procedural fairness. It should contain safeguards and be the subject of appropriate scrutiny.

NACLC is concerned that there are certain national security laws that do not deliver a benefit sufficient to justify the derogation from procedural fairness. In particular, NACLC considers that sections of the *Australian Security Intelligence Organisation Act 1979* (Cth) (ASIO Act) deny procedural fairness in the interests of security, including for example sections 38 and 34ZQ(4)(b) of the ASIO Act as well as certain provisions of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).

As outlined above, NACLC supports further review and recommendation for reform of provisions that undermine procedural fairness.

NACLC acknowledges the traditional owners of the lands across Australia and particularly the Gadigal people of the Eora Nation, traditional owners of the land on which the NACLC office is situated. We pay deep respect to Elders past and present.