THE COMMON LAW AND THE PROTECTION OF RIGHTS, FREEDOMS AND PRIVILEGES: INSIGHTS FROM THE ALRC FREEDOMS INQUIRY

The Mayo Lecture for 2016

12 September 2016

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I INTRODUCTION

I will begin with acknowledgements — and they are most important ones. The first is to the traditional custodians of this land, paying my respect to the elders, past and present of the Bindal and Wulgurukaba People and to acknowledge Indigenous guests attending today.

The second is to honour the connection of JCU with Eddie Koiki Mabo. As I am a legal historian and former teacher of property law, Eddie Mabo's story is dear to my heart. When a gardener at JCU in 1974, Eddie chatted about his land on Mer (Murray Island) with JCU academics Noel Loos and Henry Reynolds. This conversation started a ball rolling that ended up, on 3 June 1992, in the High Court's decision in *Mabo & Ors v Queensland (No 2)*, upholding the continuity of Koiki Mabo's title to his land on Murray Island and with it, slaying the dragon of *terra nullius*. It was a fortuitous — serendipitous — meeting, combining principle, passion and champions.

The third and most particular acknowledgement is to another champion, a woman of principle and passion, Mrs Marylyn Eve Mayo (née Mason).

On my office bookshelf is a tome entitled *A Woman's Place — 100 years of Queensland Women Lawyers*, published in 2005. The cover highlighted in the suffragette colours of green, violet and white (a mnemonic of 'GVW' — give votes to women), I won the book in a silent auction at the 2006 conference of the International Association of Women Judges. Meeting in Sydney that year, with the Hon Jane Matthews AC as the then President, I was delighted to participate in the planning committee for the event and then doubly honoured by the appointment as 'Rapporteur' for the conference. A bonus was that this also gave me the chance to participate in the wonderful silent auction, a highlight of each biennial conference, where each judicial officer brings an item reflective of her home country. I won two items: the wonderful book, signed by many of the subjects it contains; and a 'toby jug' of Margaret Thatcher, from the House of Commons shop, the contribution of Dame Brenda Hale, now Baroness Hale of Richmond, for which I engaged in a quiet bidding war — as befits a 'silent' auction — with a New Zealand judge. The proceeds of such auctions go to supporting women judges from developing countries to attend future such conferences. I am delighted to assist so positively in that worthy cause! (The exceptional provenance of my prize is confirmed in Baroness Hale's signature on the box).

Marylyn Mayo was a natural inclusion in the chapter in the Queensland book, titled 'Women Lawyers at the Frontier'. Among the group, there is a section dedicated to 'Women Lawyers in Academia', including a special group credited 'for giving inspiration to future generations of

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Queensland women lawyers'. Here we find Marylyn Mayo.[1] Marylyn's academic career began in 1969, with her appointment as lecturer in law in the University of Queensland's Townsville outpost, University College — and here she stayed for over 25 years. The Hon Dame Quentin Bryce AC CVO 'pipped' Marylyn as the first woman lawyer to be appointed an academic staff member in Queensland, when Quentin joined the staff of the University of Queensland as a part-time tutor in 1968.[2] Perhaps next in this hierarchy, after Marylyn, was the Hon Justice Margaret White AO, appointed Senior Tutor at UQ in 1970.

Although Marylyn was a kiwi, a law graduate of the University of Auckland, she embraced Queensland as her home with her appointment in Townsville. She also shortly ditched her maiden name of 'Mason' and became Mrs Mayo, when Townsville brought her not only an academic career but also her husband, Dr John Mayo, then in the Department of Economics, whom she married in 1970.

Marylyn taught the first year of the LLB, located in the Department of History — the only law offering outside the Commerce department. For the latter years, students had to go elsewhere to complete their LLBs. When the Hon Justice Marcia Neave AO presented the Mayo Lecture in 2006, she recalled that when she was teaching at Melbourne law School, some of her students had had to transfer to 'the chilly depths of Melbourne' after first year law in Townsville. 'They were not pleased', Neave wrote.[3]

Marylyn was a 'much loved law teacher',[4] but she wanted more: a separate Law Faculty at JCU. And she got it, in 1989, assisted by the influence of Chancellor Sir George Kneipp, a judge of the Supreme Court,[5] with the first JCU law graduates graduating in May 1992. This is recorded as her most significant achievement and 'the realisation of her dream'.[6] Marylyn was appointed the Foundation Head of School of Law and acting Dean until 1990,[7] when Professor Ken Sutton took up the position of Foundation Professor of Law and Dean. Marylyn remained as his Deputy until 1993 and retired in 1996.

That big book writes that Marylyn was 'an inspirational mentor for many women in North Queensland'.[8] In her Mayo Lecture in 2010, the Hon Justice Margaret McMurdo AC, described Mrs Mayo as 'trailblazing' and that 'Townsville does trail-blazing women well', claiming also Queensland's first woman lawyer Agnes McWhinney, admitted as a solicitor in 1915.[9]

Hence it is wonderfully fitting that the Law Students of JCU honour Marylyn Mayo in this annual lecture, instituted in 1991 while Marylyn was still very much in harness, and that the Marylyn Mayo

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[1] *A Woman's Place — 100 years of Queensland Women Lawyers*, Susan Purdon and Aladin Rahemtula, eds (2005), 55– 56.
[2] Ibid, 45
[3] 'Making Law Reform Work — The Promise and Limits of Law Reform' (2007) 14 *James Cook University Law Review* 7. This was described as the 'feeder model' initially in place: Peter Bell, *Our Place in the Sun: A Brief History of James Cook University 1960–2010*, 42.
[4] Paul Fairall, 'Preface' (1996) 3 *James Cook University Law Review* v. Justice Keiran Cullinane, said of her in his Mayo Lecture in 2003, 'She kept the flag flying for the teaching of law at this University during the long years when only a limited number of subjects were available and when not surprisingly the whole future of teaching of law at this University was under threat': 'Years On' (2002–2003) 9 *James Cook University Law Review* 9.
[5] Bell, above n 3, 49. The Hon Justice John Dowsett, in his Mayo Lecture of 2004, spoke of the 'folklore of the Supreme Court' concerning this; and how Kneipp pressed ahead allegedly without reference to his colleagues on the Court and, 'more importantly and audaciously, without the Commonwealth's approval': 'The Law and the Legal Profession — Expectations and Reality' (2004) 11 *James Cook University Law Review* 4, 5.
[6] Purdon and Rahemtula, above n 1, 56.
[7] Ibid.
[8] Ibid 55
[9] Margaret McMurdo, '*R v KU; Ex parte A-G (Qld)* and Warwick Thornton's award winning, internationally acclaimed film, 'Samson and Delilah': life imitating art? Why we must and how we might do better' (2010) 17 *James Cook University Law Review* 6.

Medal is awarded to the student who achieves the highest results in the LLB with Honours.

But Marylyn's life was filled with more than a passion for legal education. Her mother, Mavis, was an artist and imbued in her daughter a love of the visual arts. After Marylyn's most untimely death in 2002, the Marylyn Mayo Foundation was established by her husband, Dr John Mayo, for the benefit of a number of causes, including cancer research, legal research at the University of Auckland Law School, and initiatives at the Auckland Art Gallery.[10]

She is a woman I would have liked to have met. John [Mayo], you must be very proud of her. Perhaps in adding my own contribution to the growing honour roll of Mayo Lecturers (at my count this is the 26th), I can doff my academic hat to her across time and place.

And now to my specific topic.

II THE FREEDOMS INQUIRY

I was asked to speak about the Freedoms inquiry of the Australian Law Reform Commission (ALRC), completed late last year.[11] On 2 March 2016 the Attorney-General, the Hon Senator George Brandis QC launched the Report that completed the inquiry, *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws*, ALRC Report 129, in Canberra. As the Attorney said on that occasion, giving us the inquiry to the ALRC reflected his view 'that the human rights debate in Australia, which is an extremely important debate, has in recent years been unbalanced by insufficient attention to the liberal rights, in particular by insufficient attention to freedom, the most fundamental of all the human rights'.[12]

As 2015 was the 800th anniversary of the sealing of the first iteration of what became known as the Magna Carta,[13] it was an appropriate year in which to reflect upon rights and freedoms — particularly as those rights and freedoms have become embedded in our law. The Freedoms inquiry (as we called it) was also an extraordinarily fitting way to mark the celebrations of the ALRC's 40th anniversary.[14] (It was marvellous!)

The Terms of Reference for the inquiry set out two main tasks. The first was to identify Commonwealth laws that encroach upon *traditional* rights, freedoms and privileges; the second was to critically examine those laws to determine whether the encroachment was appropriately justified. It was an extremely broad reference and also very philosophical on many levels. It was like all of your legal essays rolled into one. The anchor word in the Terms of Reference was 'encroachment'; and the central task was to determine when encroachments may be 'appropriately justified'.

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[10] Including the Marylyn Mayo Internships and *Reading Room*, a scholarly arts journal, to encourage training and research for the advancement and wider appreciation of visual arts: 'Marylyn Mayo and Mavis Mason' (2009) 3 *Reading Room* 5.

[11] This presentation is drawn from the report, *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws*, ALRC Report 129, 2015 ('Freedoms Report'). I led the Freedoms Inquiry, assisted by Professor Barbara McDonald in the early part of the inquiry; and by Emeritus Professor Suri Ratnapala, appointed as a Part-time Commissioner, for the latter part of the inquiry. Professor McDonald had been Commissioner in Charge of the Privacy Inquiry that produced the report, *Serious Invasions of Privacy in the Digital Era* (ALRC Report 123, 2014). Professor McDonald provided invaluable guidance and assistance to the team in the production of the Issues Paper in December 2014, the first consultation document for the inquiry, and thereafter on the Advisory Committee.

[12] G Brandis, 'Address at the 'Launch of the ALRC Report on Traditional Rights and Freedoms', <www.attorneygeneral.gov.au/Speeches/Pages/2016/FirstQuarter/2-March-2016-Address-at-the-launch-of-the- Australian-Law-Reform-Commission-Report-on-Traditional-Rights-and-Freedoms.aspx>.

[13] The various iterations of the document are described by J Spigelman, 'Magna Carta in its Medieval Context' (2015) 89 *Australian Law Journal* 383.

[14] See: https://www.alrc.gov.au/40-years-law-reform.

What are 'traditional rights, freedoms and privileges'? This broad, encompassing expression was explained in the Terms of Reference as covering nineteen things, including, for example laws that interfered with freedom of speech, freedom of religion and vested property rights; laws that reversed or shifted the onus of proof, abrogated client legal privilege, retrospectively changed legal rights, altered criminal law practices based on the principle of a fair trial, restricted access to the courts and denied procedural fairness — all in one inquiry. It was clearly a significant, and long, list.[15]

The inquiry provided a singular opportunity to explore rights and freedoms within the context of the common law — as many of the rights, freedoms and privileges listed in the Terms of Reference may be seen, indeed, as creatures of the common law.[16] Talking about such matters tonight can be seen to complement the Mayo Lectures over the years, many of which have had a focus on rights.

But it was an enormous challenge. How do you craft a methodology to get around all of the rights, freedoms and privileges in the list? How do you tackle the problem of identifying laws that encroach *unjustifiably* on rights and freedoms?

The Freedoms inquiry was so different from previous ALRC inquiries. Using inquiries since 2005 as examples, Terms of Reference have generally focused on: particular areas of Commonwealth law — such as Copyright, Classification, and Discovery in Federal Courts; harmonisation of laws — such as uniform evidence; interaction of laws across the federal-state legal systems — such as the 2010 Family Violence inquiry; and broad social justice issues involving Commonwealth laws — such as disability and barriers to older workers engaging in the workforce. Such inquiries have not involved canvassing all Commonwealth laws. An inquiry that did do so was the secrecy inquiry in 2009, which involved a mapping exercise to identify and analyse the multitude of secrecy provisions in Commonwealth legislation. But for establishing the list of provisions that comprised Appendix 4 of the Secrecy Report, *Secrecy Laws and Open Government in Australia* (ALRC Report 112, 2009), the ALRC was able to identify provisions quite readily, although it did involve a painstaking trawling through the Commonwealth statute book — literally from 'A New Tax System etc Act'.[17]

The Freedoms inquiry posed different challenges. The review of Commonwealth laws involved two questions: identifying those that 'encroach' on traditional rights, freedoms and privileges, and that do so unjustifiably. Both issues, encroachment and the inappropriateness of that encroachment, are not certain—and most unlike a provision to impose a criminal sanction for a breach of a secrecy obligation. Hence the methodology to undertake the tasks in the Terms of Reference required a different focus.

Our approach was to split it up. First of all we recognised that it was almost a 'hiding to nothing' to try and identify *every* law in the Commonwealth statute book that could amount to an 'encroachment' on a right. The landscape shifts so quickly — as McHugh J observed in *Malika Holdings v Stretton*, 'nearly every session of Parliament produces laws which infringe the existing rights of individuals'.[18] And then what of a law that encroaches on a right, viewed at large, but might be considered a natural *limit* to the right itself: things like freedom of speech, freedom of movement and freedom of property are not totally open canvasses in and of themselves. In terms of characterisation, is a law one that encroaches on a right, or is it rather a natural limit of it?

[15] Terms of Reference: https://www.alrc.gov.au/publications/terms-reference-13.
[16] Robert French AC, 'The Common Law and the Protection of Human Rights' (Speech to the Anglo Australasian Lawyers Society, Sydney, 4 September 2009), 2.
[17] The provisions identified were (a) those that expressly imposed criminal sanctions for breach of secrecy or confidentiality obligations; and (b) provisions that imposed such obligations without expressly imposing criminal sanctions.
[18] *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290 [28].

Important rights often clash with each other, so that some must necessarily give way, at least partly, to others. Freedom of movement, for example, does not give a person unlimited access to another person's private property; and convicted murderers must generally lose their liberty, in part to protect the lives and liberties of others. Individual rights and freedoms will also sometimes clash with a broader public interest — such as public health or safety, or, indeed, national security.

So, what we did was to undertake an extensive survey of laws that may be seen to interfere with the common law rights and freedoms in the Terms of Reference, but without making concluded judgments as to whether the laws might be considered to be 'appropriately justified'. It is a somewhat 'flat' list, but indicative of the first point: that there are many laws that may be said to 'encroach' on rights. The final Report includes 13 pages listing them. Many come up in multiple places, particularly those that are captured under the broad banner of 'counter-terror' laws.

The harder question was about the issue of justification and how you decide whether an encroachment is 'justified' appropriately or not. This took us into some methodologically difficult territory, but also the enormous practical problem: how could we achieve a law reform result with an appropriate evidence base that stretched across such a wide canvas?

We used the 18 months of the inquiry to conduct the consultative processes that are tried and tested by the ALRC, based on community consultation, and focused on two consultation documents: in this case an Issues Paper and an Interim Report. A particular highlight of this inquiry was also the national series of symposia, in September and October 2015, focusing on aspects of the inquiry highlighted in the Interim Report. The principal difference in the outcomes of the Freedoms Report from others that have considered particular areas of law was to identify laws that *may* be unjustified and meriting further review. Given the breadth of the inquiry, we considered that more detailed recommendations for reform — other than the reviews suggested — would require dedicated projects and further evidence, consultation and analysis. In a number of specific areas the ALRC has already undertaken inquiries, and the recommendations in the final reports of those inquiries provide a foundation upon which Government may act.[19] The highlighting of laws that warrant further consideration or review provides a road map for future work to ensure that encroachments on rights, freedoms and privileges are avoided or appropriately justified.

The most significant achievement of the Freedoms Report, in my view, is the contribution to the broader discussion and debate about protecting rights in democratic societies. We achieved this through providing a discussion of the source and rationale of each of the traditional rights and freedoms listed in the Terms of Reference; an analysis of the ways that protection from statutory encroachment is given to traditional rights and freedoms by the *Constitution*, principles of statutory interpretation and international law — complementing work that considers other ways to protect rights; and the ways that issues of encroachment on rights need to be interrogated and, ultimately, assessed, to ensure that laws that limit traditional rights and freedoms are thoroughly scrutinised and encroachments justified.

I found the process a most enlightening journey — particularly in relation to the deeply embedded nature of rights protection in our common law and also the extent of 'rights- mindedness' that is built into our scrutiny and monitoring processes of laws: before, during and after passage through parliament. In the next part of my presentation this evening I would like to share with you some of that journey.

[19] A list of ALRC reports referred to in the Report is included at Appendix 2.

III Contextual Landscape for the Protection of Rights

The rights, freedoms and privileges that the ALRC considered under the Terms of Reference have a long and distinguished heritage, embodying key moments in constitutional history: after Magna Carta, the landmark event was the settlement of parliamentary supremacy against the King following the 'Glorious Revolution' of 1688 with the enactment of the *Bill of Rights Act 1688*.[20] The rights and freedoms were recognised and developed by the courts and through legislation — through the common law.

But such rights now also overlap with rights collectively called 'human rights', arising principally from the wave of international conventions in the aftermath of the Second World War, such as the *Universal Declaration of Human Rights* in 1948,[21] and, more recently, the *International Covenant on Civil and Political Rights* (ICCPR) in 1976.[22] Common law rights and human rights have also influenced each other in their history and development.[23] The common law, it has been said, is 'a vibrant and rich source of human rights'.[24] Indeed, Murphy J even referred to 'the *common law* of human rights'.[25]

In the Freedoms inquiry we began the exploration of the common law's protection of rights and freedoms in Australia with the *Australian Constitution* and by considering rules of statutory construction, such as the principle of legality.

A *The Australian Constitution*

In her Mayo Lecture in 2013, entitled 'Social Justice and the Constitution — Freedoms and Protections', the Hon Justice Susan Kiefel AO explored freedoms that are guaranteed in the *Constitution*.[26] I commend her lecture to you. The *Constitution* expressly protects a handful of rights: the right to trial by jury on indictment for an offence against any law of the Commonwealth;[27] freedom of trade, commerce and intercourse within the Commonwealth;[28] freedom of religion;[29] and the right not to be subject to discrimination on the basis of the state in which one lives.[30] There is also the requirement that if the Commonwealth compulsorily acquires property, it must do so on 'just terms',[31] which may also be described as a right.[32]

The High Court has also found certain rights or freedoms to be *implied* in the *Constitution* —

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[20] *Bill of Rights 1688* 1 Will & Mary Sess 2 c 2 (Eng). The Bill of Rights remains an important element in the rule of law in Australia, as illustrated by *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195; *Port of Portland v Victoria* (2010) 242 CLR 348.

[21] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

[22] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

[23] Many social and economic rights are also recognised as human rights in international law, for example the right to work and the right to housing. As important as such rights may be, they were not the focus of the Freedoms inquiry.

[24] G Williams and D Hume, *Human Rights under the Australian Constitution* (2nd ed, Oxford University Press, Australia and New Zealand, 2013), 33.

[25] *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 346.

[26] (2013) 20 *James Cook University Law Review* 6.

[27] *Australian Constitution*, s 80.

[28] Ibid s 92.

[29] Ibid s 116.

[30] Ibid s 117.

[31] Ibid s 51(xxxi).

[32] *Bank of NSW v Commonwealth (Bank Nationalisation Case)* (1948) 76 CLR 1, 349 (Dixon J). Its operation may invalidate legislation that does not provide for just terms compensation: see Freedoms Report, [18.73].

notably, freedom of political communication.[33] This freedom is not absolute, but any law that interferes with political communication must be 'reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government'.[34] The freedom operates as 'a constitutional restriction on legislative power', rather than as a personal right.[35]

The *Australian Constitution* reflects a different approach to rights from, for example, the United States, with its codification of rights through a series of amendments to its constitution.[36] The first and the second of these amendments are regularly in the news: the first including the freedom of speech and freedom of the press; the second protecting 'the right to bear arms'.

In the 1992 High Court case, *Australian Capital Television v Commonwealth*, Dawson J suggested that those who drafted the *Australian Constitution*:

> preferred to place their trust in Parliament to preserve the nature of our society and regarded as undemocratic guarantees which fettered its powers. Their model in this respect was, not the United States Constitution, but the British Parliament, the supremacy of which was by then settled constitutional doctrine.[37]

That Australia did not go down *that* road, Professor Helen Irving argues, was due to the 'general reserve about directly including policy in the *Constitution*, instead of powers subsequently to enact policy'. 'Specifically', Irving said:

> the British legal tradition (in which in fact the ideas of freedom and 'fair play', far from being overlooked, were thought central) largely relied on the common law, rather than statute or constitutional provision to define and protect individual rights and liberties. This approach was adopted for the most part by the Australians in constitution-making. It explains in large degree the shortage (as it is now perceived) of explicit statements of ideals and guarantees of rights, and descriptions of essential human and national attributes.[38]

It is not that the constitutional tradition Australia inherited from Britain was 'opposed to rights' but, as Professor Jeffrey Goldsworthy observed, it was 'opposed to judges having power to protect them from interference by legislation'.[39]

However, while Parliament was supreme, laws it passed were not immune from judicial consideration, through the principle of statutory construction known as the 'principle of legality'. Lord Robin Cooke described this as the 'classic theory of English "public law"', that Parliament 'is sovereign, supreme, omnicompetent'.[40] But, as he quoted, '[e]ven under the British system of undiluted sovereignty, the last word on any question of law rests with the courts'.[41] And this takes us to the 'principle of legality'.

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[33] See *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322; *Unions NSW v State of New South Wales* (2013) 252 CLR 530. The High Court has said that 'freedom of association to some degree may be a corollary of the freedom of communication': *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 [148] (Gummow and Hayne JJ).

[34] This is part of the second limb of the *Lange* test, as set out by French CJ in *Hogan v Hinch* (2011) 243 CLR 506.

[35] *McCloy v New South Wales* (2015) 257 CLR 178 [30]. See also *Unions NSW v New South Wales* (2013) 252 CLR 530 at 554 [36]. Ratnapala and Crowe question the accuracy and usefulness of this distinction: S Ratnapala and J Crowe, *Australian Constitutional Law: Foundations and Theory* (3rd ed, Oxford University Press, South Melbourne, Victoria, 2012), 421.

[36] See, eg, Janet L Hiebert, 'Parliamentary Bills of Rights: An Alternative Model?' (2006) 69 *Modern Law Review* 7; and S Gardbaum, 'The New Commonwealth Model of Constitutionalism' (2001) 49(4) *American Journal of Comparative Law* 707, 710.

[37] *Australian Capital Television v Commonwealth* (1992) 177 CLR 106 [23]. See also Mason CJ [31].

[38] H Irving, *To Constitute a Nation: A Cultural History of Australia's Constitution* (Cambridge University Press, Melbourne, 1999), 162.

[39] J Goldsworthy, 'Constitutional Implications Revisited' (2011) 30 *University of Queensland Law Journal* 9,25.

[40] R Cooke, 'The Road Ahead for the Common Law' (2004) 53 *International and Comparative Law Quarterly* 273, 274.

[41] Ibid 276, quoting W Wade and C Forsyth, *Administrative Law* (8th ed, Oxford University Press, 2000), 29.

B *The principle of legality*

The Hon Robert French AC, Chief Justice of the High Court, has said that:

> many of the things we think of as basic rights and freedoms come from the common law and how the common law is used to interpret Acts of Parliament and regulations made under them so as to minimise intrusion into those rights and freedoms.[42]

By reading *down* laws to minimise possible encroachments on rights and freedoms, the common law — through statutory interpretation — plays a role in protecting them. Indeed, as the Hon James Spigelman AC QC has said, the 'protection which the common law affords to the preservation of fundamental rights is, to a very substantial degree, secreted within the law of statutory interpretation'.[43]

This has become known as the principle of legality and it may be found at least as far back as Sir William Blackstone and Jeremy Bentham.[44] In 1987, in the High Court case of in *Re Bolton; Ex parte Beane*, Brennan J stated the principle in these terms: '[u]nless the Parliament makes unmistakably clear its intention to abrogate or suspend a fundamental freedom, the courts will not construe a statute as having that operation'.[45]

The principle does not, however, 'constrain legislative power'.[46] Subject to the *Constitution*, Parliament *has* the power to modify or extinguish common law rights. As Chief Justice Robert French said, the principle does not 'authorise the courts to rewrite statutes'.[47] It will therefore have a very limited application where encroaching on a right is the clear object of a statute,[48] — where it *is* made 'unmistakably clear'. This is particularly relevant in the context of counter-terror laws, the very point of which, in many respects, *is* to encroach upon rights for a specific security objective directed against the gross violation of fundamental rights to life and safety through terrorist acts. And, indeed, 'national security' is recognised as a legitimate objective of limitations on rights, both at common law and in international human rights law.[49]

But, as Lord (later Baron, also known as 'Lennie') Hoffmann said in 2002, the principle of legality means 'that Parliament must squarely confront what it is doing *and* accept the political cost'.[50] The 'political cost' of the decision was also something referred to by French CJ: the interpretation of legislation takes place 'against the backdrop of the supremacy of Parliament', which can qualify or extinguish rights and freedoms by 'clear words' — but words 'for which it can be held *politically accountable*'.[51] Political accountability means that you can get voted out.

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[42] French, above n 16.

[43] James Spigelman AC, 'The Common Law Bill of Rights' (2008) 3 *Statutory Interpretation and Human Rights: McPherson Lecture Series*, 9. See also Robert French AC, 'The Common Law and the Protection of Human Rights', 2. Justice Kiefel's Mayo Lecture provides further discussion of this: (2013) 20 *James Cook University Law Review* 6.

[44] James Spigelman AC, 'The Principle of Legality and the Clear Statement Principle' (2005) 79 *Australian Law Journal* 769, 775. It has 'many authorities, ancient and modern, Australian and non-Australian': *Attorney-General for South Australia v Corporation of the City of Adelaide* (2013) 249 CLR 1, 66 [148] (Heydon J). Jeffrey Goldsworthy suggests that the 'principle of legality' may be a new label for a traditional principle: J Goldsworthy, 'The Constitution and Its Common Law Background' (2014) 25 *Public Law Review* 265, 279.

[45] *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 523, par [4] of Brennan J's judgment. This was quoted with approval in *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

[46] *Momcilovic v The Queen* (2011) 245 CLR 1, [43] (French CJ).

[47] R French, 'The Courts and Parliament' (Queensland Supreme Court Seminar, Brisbane, 4 August 2012), 16.

[48] *Lee v New South Wales Crime Commission* (2013) 302 ALR 363, [314] (Gageler and Keane JJ).

[49] See, eg, *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 161. For example, under the ICCPR, national security is recognised expressly as a permissible limitation in relation to freedom of movement, freedom of expression, the right to peaceful assembly and freedom of association: *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 12.3; 19.3; 21; 22.2 respectively.

[50] *R v Secretary of State for the Home Department; ex parte Simms* [2000] 2 AC 115 131, emphasis added.

[51] French, above n 16, 2. Emphasis added.

In 1994, in the case of *Coco v The Queen*, the High Court suggested that this requirement of unmistakable clarity,[52] serves to enhance the parliamentary process of rights scrutiny by securing a greater measure of attention to the impact of legislative proposals on fundamental rights.[53]

Rigorous processes for scrutinising laws are especially crucial where it is Parliament, not the courts, that is the primary guardian of rights and freedoms and has the ultimate responsibility to balance rights with the public interest. The Freedoms inquiry provided an opportunity to bring these scrutiny processes to the fore; and to interrogate their role in *protecting* rights and freedoms as part of the processes of justification engaged in to secure the passage of laws through parliament — a lens of *procedural* justification.[54]

In Australia, for example, several parliamentary committees consider whether proposed laws are compatible with rights. The Senate Standing Committee on Regulations and Ordinances, established in 1932, considers whether disallowable instruments 'unduly trespass on rights and liberties'.[55] The Senate Standing Committee for the Scrutiny of Bills, established in 1981, also considers bills from this perspective.[56] The newest of the scrutiny committees, the Parliamentary Joint Committee on Human Rights, established in 2011, has a more specific brief, focused on compatibility with international human rights instruments.[57] Then, at the same time, the Parliamentary Joint Committee on Intelligence and Security, established in 2001, while not expressly required to consider the impact on rights as part of its review of Bills, in practice, does look at matters that are relevant to whether encroachments on rights are justified, in considering whether a Bill provides adequate safeguards and accountability mechanisms.[58]

Scrutiny of laws for compatibility with rights may be seen as part of the 'democratic culture of justification';[59] or what I have called 'rights-mindedness'.

Moreover, the procedural justificatory processes are not just expressed in the work of the parliamentary committees, they extend both before and after Parliament. Policy development and legislative drafting in Australia do not take place in a rights vacuum. In developing policies, for example, government departments are encouraged to think about the effect a proposed law will have on fundamental rights. Bills and disallowable legislative instruments presented to Parliament must now have a 'statement of compatibility' that assesses the legislation's compatibility with the rights and freedoms in seven international human rights instruments (which include most of the traditional rights and freedoms in the ALRC's Terms of Reference). There is considerable guidance material available.[60] Some of it is being updated; other material needs it, particularly in light of the relatively

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[52] To use Brennan J's words from *Re Bolton; Ex parte Beane* (1987) 162 CLR 514,523.

[53] *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ). This is a classic discussion of the principle of legality, although the phrase 'principle of legality' is not used.

[54] See Ch 3 of the Freedoms Report. I acknowledge the contribution of Shreeya Smith, Legal Officer, to this chapter of the report.

[55] Senate, Parliament of Australia, *Standing Order 23* (24 August 1994). See Freedoms Report,[3.32]–[3.27].

[56] Senate, Parliament of Australia, *Standing Order 24* (15 July 2014). See Freedoms Report, [3.28]–[3.31].

[57] *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 7(a). See Freedoms Report, [3.41]–[3.49].

[58] See, eg, Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the National Security Legislation Amendment Bill (No 1) 2014* (September 2014) 2; Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (2014) 2; Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (February 2015) 2.

[59] Murray Hunt, 'Introduction' in Hunt et al, *Parliaments and Human Rights: Redressing the Democratic Deficit,* (2015) 15–16.

[60] Valuable resources about human rights may be found on the Attorney-General's Department website:

<www.ag.gov.au>. See also: Attorney-General's Department, 'A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers' (2011). Attorney-General's Department, 'Tool for Assessing Human Rights Compatibility' <http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Toolforassessinghumanrightscompatibility.aspx>. Guidance on developing rights-compatible legislation is provided in the *Legislation Handbook* (1999), published by the Department of Prime Minister and Cabinet; the *Legislative Instruments Handbook* and *Drafting Directions* provided by the Office of Parliamentary Counsel(OPC).

new role of the Joint Committee on Human Rights.

And in terms of the review processes, once laws are passed by Parliament, law reform bodies such as the ALRC also routinely consider rights and freedoms in their work. Indeed under the *Australian Law Reform Commission Act* (Cth), we have a duty to ensure that the laws, proposals and recommendations we review, consider or make:

> (a) do not trespass unduly on personal rights and liberties or make the rights and liberties of citizens unduly dependent on administrative, rather than judicial, decisions; and
>
> (b) are, as far as practicable, consistent with Australia's international obligations that are relevant to the matter.[61]

Both obligations reflect the lenses of the Parliamentary scrutiny committees.

Other bodies have ongoing monitoring briefs. The Independent National Security Legislation Monitor (INSLM), in particular, plays a key role in the vigilance concerning rights in considering the operation, effectiveness and implications of Australia's counter-terrorism and national security laws.[62] As part of its review, the INSLM must consider whether these laws contain appropriate safeguards to protect the rights of the individual, and are proportionate and necessary.[63]

In his Mayo Lecture for 2006, 'Reconciling Human Rights and Counter-Terrorism — A Crucial Challenge', the Hon Justice John von Doussa AO, then President of the predecessor to the Australian Human Rights Commission, reflected on the importance of parliamentary scrutiny and procedures for ensuring compatibility of laws with human rights.[64] He did so in comparing some of the positive aspects of justificatory processes in the UK, reflective of the influence of the *Human Rights Act 1998* (UK), noting in particular how the pre-legislative requirements for parliamentary scrutiny could 'integrate effectively human rights principles into the law and policy making process'.[65] While noting the importance of the scrutiny processes in Australia, he pointed to the then weakness in the absence of a requirement for a human rights compatibility statement — and especially in the context of counter-terrorism laws.[66] He concluded that a good way of achieving the balance between national security and human rights 'would be for Parliamentarians to follow a process that requires the consideration of human rights principles in the formulation of new laws and policies'.[67] Precisely this requirement was introduced in 2011 with the introduction of the Parliamentary Joint Committee on Human Rights.

So there is a lot of scrutiny going on: questions being asked, challenges put. But this does not mean that Parliament always gets it 'right'. This is where political accountability comes in. Institutional review mechanisms are also important in providing mid to long-term checks to balance out possible short-term overreach. But there is also room for improvement. The ALRC identified a number of possibilities, about the level of overlap in the work of the three main scrutiny committees, the time constraints, the range of rights covered by each and the differences in the scrutiny applied.[68] Rights-mindedness has improved; but there is scope for reform.

When it comes to the question of evaluating laws, we explored the emergence of the standard of 'proportionality' as a way of assessing the appropriateness of limitations on rights. Laws that

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[61] *Australian Law Reform Commission Act* (Cth) s 24(1).
[62] *Independent National Security Legislation Monitor Act 2010* (Cth) s 6(1).
[63] *Independent National Security Legislation Monitor Act 2010* (Cth) s 6(1)(b).
[64] (2006) 13 *James Cook University Law Review* 104. Von Doussa was President of the Human Rights and Equal Opportunity Commission or 'HREOC' as it was known.
[65] Ibid, 121.
[66] Ibid, 122.
[67] Ibid, 123.
[68] Freedoms Report, [3.95].

interfere with traditional rights and freedoms may be necessary for many reasons: there are reasonable limits, after all, even to fundamental rights. Only a handful of rights — such as the right not to be tortured, the right to life and the right not to be held in slavery — are considered to be 'absolute' in international human rights law.[69] A common way of determining whether a law that limits rights is justified is by asking whether the law is proportionate.[70] This concept is commonly used by courts to test the validity of laws that limit rights protected by constitutions and statutory bills of rights.[71] But proportionality tests have a wider application than in courts, providing a valuable tool for law-makers and others to test the justification of laws that limit other important — even if not strictly constitutional — rights and principles. In the Freedoms Report we discussed what a structured proportionality analysis involves, namely: the consideration of whether a given law that limits important rights has a legitimate objective and is suitable and necessary to meet that objective, and whether — on balance — the public interest pursued by the law outweighs the harm done to the individual right.[72]

Proportionality has been called the 'most important doctrinal tool in constitutional rights law around the world for decades'[73] and 'the orienting idea in contemporary human rights law and scholarship'.[74] It has been received into the constitutional doctrine of courts in continental Europe, the United Kingdom, Canada, New Zealand, Israel, and South Africa, as well as the jurisprudence of treaty-based legal systems such as the European Court of Human Rights, giving rise to claims of a global model, a received approach, or simply the best- practice standard of rights adjudication.[75]

Proportionality may now also be said to have been received to some extent into the constitutional doctrine of courts in Australia — as, for example, in the context of the constitutional implied right to political communication.[76] However, in *Roach v Electoral Commissioner*, Gleeson CJ expressed reservations about an 'uncritical translation' of proportionality into Australia from jurisdictions with human rights instruments and wider powers of judicial review.[77] In *Momcilovic*, Heydon J suggested that the proportionality test in the Victorian Charter created 'difficult tasks' that should be for legislatures, not judges.[78]

Some of these concerns may not arise when the proportionality analysis is being applied by law makers, parliamentary committees and others to test the merits of laws, rather than by courts. The application of a proportionality analysis in a non-court context is seen, for example, in the scrutiny of bills by Australian parliamentary committees. The Parliamentary Joint Committee on Human

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[69] *International Covenant on Civil and Political Rights*, n 13, arts 6, 7, 8 (paras 1 and 2) 11, 15, 16 and 18: art 4.2. See, eg, Williams and Hume, *Human Rights under the Australian Constitution*, [5.3]. See also Attorney-General's Department, *Absolute Rights* <www.ag.gov.au>.

[70] This section of the article draws in particular on Ch 2 of the Freedoms Report. I acknowledge the contribution of Jared Boorer, Principal Legal Officer, to this chapter of the report.

[71] Former President of the Supreme Court of Israel, Aharon Barak, said proportionality can be defined as 'the set of rules determining the necessary and sufficient conditions for a limitation on a constitutionally protected right by a law to be constitutionally protected': A Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012) 3.

[72] See, eg, G Huscroft, B Miller and G Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014); Barak, *Proportionality: Constitutional Rights and Their Limitations*, 3.

[73] K Moller, 'Proportionality: Challenging the Critics' (2012) 10 *International Journal of Constitutional Law* 709,709.

[74] Huscroft, Miller and Webber, 1. The Siracusa Principles, that apply to limits on rights in the ICCPR, include a proportionality test: [10], [11]. For recent discussions of proportionality in the UK High Court, see *R (Lord Carlile) v Home Secretary* [2014] 3 WLR 1404, [28]–[34] (Lord Sumption); *Bank Mellat v HM Treasury [No. 2]* [2014] AC 700 [68]–[76] (Lord Reed); and *R (Nicklinson) v Ministry of Justice* [2014] 3 All ER 843 [168] (Lord Mance).

[75] Even in the United States, which is widely understood to have formally rejected proportionality, some argue that the various levels of scrutiny adopted by the US Supreme Court are analogous to the standard questions posed by proportionality: Huscroft, Miller and Webber, *Proportionality and the Rule of Law: Rights, Justification, Reasoning*.

[76] *McCloy v New South Wales* (2015) 257 CLR 178.

[77] Human rights instruments 'create a relationship between legislative and judicial power significantly different from that reflected in the *Australian Constitution*': *Roach v Electoral Commissioner* (2007) 233 CLR 162 [17] (Gleeson CJ).

[78] *Momcilovic v The Queen* (2011) 245 CLR 1 [431].

Rights, for example, applies a proportionality test.[79]

While the ALRC Report did not propose that one particular method must always be used to test the justification for laws that limit traditional rights and freedoms, we concluded that proportionality tests offered a valuable way of structuring critical analysis, particularly as part of that rights-mindedness that should become the normal way of thinking. They call for a considerable degree of rigour, and are clearly more thorough than unsupported statements that 'a law is justified because it is in the public interest'. Proportionality is also used widely in many other countries and jurisdictions. Importantly, the use of proportionality tests suggests that important rights and freedoms should only be interfered with reluctantly — when truly necessary. Asking the questions about limitations on rights should, moreover, become part of the standard vocabulary of lawyers — and law teaching.

IV ROAD MAP FOR REFORM

What of our road map for future reform? Having undertaken the extensive survey of current Commonwealth laws that may limit each right and freedom, and considered the issue of 'justification', we identified some laws that may be unjustified and therefore warrant further review. These were selected following consideration of a number of factors, including whether the law has been criticised for limiting rights in submissions, parliamentary committee reports or other commentary. The fact that a law limits multiple rights also sometimes suggested the need for further review. Where a law was identified as being amenable to further review, the conclusion may be that the appropriate action is:

- a review of specific statutes or provisions;
- a review in a coordinated fashion across Commonwealth, state and territory laws;
- consideration as part of existing regular review and monitoring processes; and/or
- a new periodic review.

The fact that a law was identified as meriting further review did not imply that we concluded that the law was unjustified. Further evidence and analysis would be necessary to support such specific conclusions and any reforms in response. Here we made suggestions across a wide range of areas.

One area that we identified as being amenable to further review concerned freedom of speech, and, in particular, aspects of the *Racial Discrimination Act 1975* (Cth), including s 18C, which has been much in the news.[80] While we did not seek to establish whether the provision has, in practice, caused any particular unjustifiable interference with freedom of speech, we concluded that this part of the *Racial Discrimination Act may* unjustifiably interfere with freedom of speech by extending to speech that is reasonably likely to 'offend' people because of their race. We also suggested that it would be a mistake to review s 18C in isolation. While the provision may go too far in some respects, there are also serious questions about whether current laws provide adequate protection against more serious hate speech. Moreover, all Australian states have racial discrimination legislation in many ways similar to the *Racial Discrimination Act*, but the approaches to vilification and other conduct

[79] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Guide to Human Rights* (2014) 8. See also Parliamentary Joint Committee on Human Rights, 'Drafting Statements of Compatibility' (Guidance Note No 1, Parliament of Australia, 2014), 2–3. See also the guidance sheet about permissible limits on rights: Attorney- General's Department (Cth), *Permissible Limitations*, available at <www.ag.gov.au>.

[80] Freedom of speech is covered in Ch 4 of the Freedoms Report. I acknowledge the contribution of Bruce Alston, Principal Legal Officer, with respect to this part of the report.

based on racial hatred are not uniform.[81] Hence we suggested that a review of s 18C would also provide the opportunity to consider harmonising Commonwealth, state and territory laws in this area.

We also made some observations about counter-terrorism and national security laws. Given that the Government has both a right and a duty to take action to protect its citizens from acts of terrorism,[82] legislation that places limits on traditional rights and freedoms may be required.

In his Mayo Lecture, on the theme of 'Reconciling Human Rights and Counter-Terrorism',

John von Doussa commented that:

> This idea that human rights are antithetical to national security fails to recognise the fact that international human rights law was forged in the wake of devastating periods of global conflict and already strikes a balance between security interests and the rights which are considered fundamental to being human.[83]

Counter-terrorism and national security laws that encroach on rights and freedoms should nevertheless be justified, to ensure the laws are suitable, necessary and represent a proper balance between the public interest and individual rights: that is, satisfy a test of proportionality.

In the Freedoms Report, a range of counter-terrorism and national security laws that interfere with traditional rights and freedoms were identified. In addition to the laws that limit freedom of speech (for example, laws about advocating terrorism and disclosing intelligence operations); there are laws that limit freedom of association and assembly (for example, control orders, preventative detention orders, and laws about foreign incursions and recruitment); laws that impose strict or absolute liability (for example, in relation to offences for disclosing certain classified operational information); and laws that change fair trial procedures (for example, to protect sensitive information about national security). And some counter-terrorism laws engage multiple rights.[84]

Counter-terrorism and national security laws should clearly be subject to ongoing and careful review, given the extent to which they may interfere with individual rights. John von Doussa also emphasised this in 2006:

> Regular and independent review of counter-terrorism laws is vital given the potential of some laws to disproportionately curtail fundamental human rights like the right to liberty and the right to a fair trial.[85]

One of the key ideas identified by von Doussa was the establishment of a permanent independent reviewer. Four years after his Mayo Lecture, such an initiative was implemented with the establishment, in 2010, of the Independent National Security Legislation Monitor (INSLM), to which I have already referred.

While some of the laws identified in the Freedoms Report have been subject to significant scrutiny, including by parliamentary committees and the INSLM, it has been suggested that many are not proportionate, and would benefit from further consideration and analysis, using a structured proportionality approach. Vigilance; monitoring; and an appropriate standard of review.

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[81] Australian Human Rights Commission, *Racial Vilification Law in Australia*<www.humanrights.gov.au>.

[82] See, for example, United Nations Security Council, Resolution 1373 (2001), Adopted by the Security Council at its 4385th Meeting, 28 September 2001. This resolution required States to ensure that terrorists, their accomplices and supporters be brought to justice and that terrorist acts are established as serious criminal offences in domestic laws and the punishment duly reflects the seriousness of such terrorist acts.

[83] von Doussa, above n 64, 107.

[84] For example, the control order and preventative detention order regimes contained in Divs 104–105 of the Criminal Code have implications for freedom of speech, freedom of association and freedom of movement

[85] von Doussa, above n 64, 110.

V CONCLUSION

In reflecting on the nature of the achievements of our report, the Councils for Civil Liberties singled out the impact of the inquiry in generating a 'national focus on the rapidly increasing numbers of statutes which undermine our rights and freedoms'.[86] Identifying and critically examining laws that limit rights plays a crucial part in protecting them, and may inform decisions about whether, and if so how, such laws might be amended or repealed. The Report may therefore be seen to complement work that considers other ways to protect rights — such as by creating new causes of action or new offences, or even by enacting a charter or bill of rights. Whether the introduction of a bill of rights in Australia is desirable is widely debated and hotly contested,[87] and draws in part upon historical arguments about whether the courts or parliaments are better guardians of individual rights.[88] I note that the matter is currently under consideration in Queensland with strong arguments expressed in opposition by those like the New South Wales Solicitor-General, Michael Sexton SC; and in favour, by Rob Hulls, contradicting Sexton.[89] That question was not the subject of the inquiry.

The Freedoms Report therefore provides a timely contribution to a broader discussion and debate about protecting rights in democratic societies. That law and law reform have an important role to play in this discussion was recognised by the Attorney in launching the report when he said:

> I genuinely believe this to be an historic document. Not merely a body of topic specific law reform which is the usual work of the ALRC, but a benchmark document which will be serviceable to governments and parliaments in all the years to come.[90]

I trust that my presentation this evening has given you some insights into the ALRC's work in this challenging inquiry from the perspective of seeing the strength of the common law in identifying and protecting rights; and reinforcing the rights-mindedness that should be the mental state of all lawyers, indeed all citizens.

Marylyn Mayo, I am sure, would have used the Freedoms Report in her Jurisprudence lectures. Indeed it would not have surprised me at all to find her making a submission to the inquiry, perhaps even setting a task for her students like this:

> 'The ALRC Freedoms Report identifies a structured proportionality test as a widely accepted tool for analysing whether a law that limits rights is reasonable. Apply such an approach with respect to one of the areas identified as being amenable to review in the Report.'
>
> (Time frame? About 18 months. Word limit? Say, 250,000 words.)

Thank you again for inviting me to present the Marylyn Mayo Lecture for 2016. May each of us who deliver these lectures honour her memory and contribute, year by year, to the law school that was her aspiration and finest achievement.

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[86] Councils for Civil Liberties, Submission 142 to the Australian Law Reform Commission *Inquiry on Traditional Rights and Freedoms: Encroachment by Commonwealth Laws*.

[87] See, eg, discussion in Attorney-General's Department, *National Human Rights Consultation Report* (2009).

[88] See, eg, J Waldron, 'The Core of the Case against Judicial Review' [2006] *The Yale Law Journal* 1346. Professor Janet Hiebert contrasts the two 'rival paths' in liberal constitutionalism to rights protection: one is the codification of rights, as in the US; the other emphasises parliamentary supremacy, as in Westminster-modelled parliamentary systems: J L Hiebert, 'Parliamentary Bills of Rights: An Alternative Model?' (2006) 69 *Modern Law Review* 7, 7–8.

[89] *The Australian,* 22 July 2016; 29 July 2016.

[90] Brandis, above n 12.