ALRC's Traditional Rights and Freedoms Report: Implications for Australian Migration Laws

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Introduction

On 2 March 2016, the Australian Law Reform Commission released its final report, *Traditional Rights and Freedoms — Encroachment by Commonwealth Laws* (ALRC Report 129).[1]

The report was the culmination of a two-year project, in which the ALRC was asked to identify and critically examine Commonwealth Laws that encroach upon traditional rights, freedoms and privileges recognized by the common law. The report canvasses a suite of Commonwealth laws that might be said to encroach on such rights and freedoms, and also provides a framework for analysis of whether such laws are justified.

Unlike other ALRC Reports, there are no concrete recommendations for reform. Rather, in each of the areas examined, the ALRC makes conclusions as to whether laws would benefit from further review. Importantly, the ALRC found many migration laws to encroach on rights and freedoms, and concluded that they be subject to further review.[2]

In this note, I will examine the report's findings and briefly examine whether the laws identified by the ALRC are justified, with reference to the ANU Migration Law Program's submission.

Rights and Freedoms in Context

Common law rights and freedoms have their roots in key documents such as the *Magna Carta*, and have been further developed over the years by the courts. 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*

[1] A full copy is available at <https://www.alrc.gov.au/publications/freedoms-alrc129>

[2] Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws,* ALRC Report 129 (2016), 23.

> *interpret Acts of Parliament and regulations made under them so as to minimise intrusion into those rights and freedoms.*[3]

The ALRC report notes that some common law rights can also be found in international agreements and bill of rights in other jurisdictions, and to a lesser extent, the Australian Constitution.[4] However, the *Constitution* 'does not directly and entirely protect many of the rights, freedoms and privileges listed in the ALRC's terms of reference'.[5]

Rather, the courts can protect common law rights and freedoms through the 'principle of legality'. The principle of legality holds that the courts will not construe legislation as encroaching upon fundamental rights, unless the legislation provides clear and unambiguous intention to do so.[6] The principle also holds true that legislature does not intend to legislate contrary to Australia's international obligations, unless there is clear and unambiguous words to that effect.[7]

Common law rights and freedoms might also be protected through the process by which laws are created. There is a useful discussion in the report on legislative scrutiny mechanisms and how they might be better improved to protect rights.[8]

Justifying limits on rights and freedoms

The ALRC identified that interference with traditional rights and freedoms are sometimes necessary, for example, to protect public safety or health.[9] Further, rights will often clash with each other, so it is necessary for some rights to give way to others.

The ALRC notes that the mere fact of interference is rarely ground for criticism.[10] While noting that no one particular method should always be used to test whether laws are justified, it pointed to the principle of proportionality as a 'valuable tool' to structure its analysis.[11]

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[3] Robert French, 'The Common Law and the Protection of Human Rights' (Speech, Anglo Australasian Lawyers Society, Sydney, 4 September 2009).
[4] See Ibid, 38-42 for a discussion of the foundations of common law rights and freedoms.
[5] Ibid, 34.
[6] *Potter v Minahan* (1908) 7 CLR 277, 304. See also, *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 523.
[7] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J).
[8] ALRC, above n 2, ch 3.
[9] Ibid, 43.
[10] Ibid.
[11] Ibid, 44.

Proportionality assessment involves considering whether a law has a legitimate objective and is suitable and necessary to meet that objective, and whether the public interest elements of the law outweigh the harm done to the individual.[12]

Migration laws that encroach on fundamental rights and freedoms

Freedom of Association and Assembly

In Chapter 6, the ALRC concludes that the provisions of character test in s 501 of the *Migration Act* should be reviewed to determine whether they unjustifiably limit freedom of association.

Under s 501(1), the Minister for Immigration and Border Protection may refuse or cancel a person's visa if the person does not satisfy the Minister that he or she passes the character test. The definition of character test is found in s 501(6)(b). The provision was recently amended in 2014 to include circumstances where the Minister *reasonably suspects* that a person *has been or is a member* of a group or organization, or *has had or has* an association with that group, organization or person; and that group, organization or person *has been or is involved* in criminal conduct.[13]

Section 501(6)(b) now has two elements: 'association' and 'membership'. The 'association' ground has been considered by the Full Federal Court in the case of *Haneef*. In that case, the court held that 'association' in s 501(6)(b) is an association 'involving some sympathy with, or support for, or involvement in, the criminal conduct of the person, group or organization'.[14] The 'membership' element of s 501(6)(b) gets around this requirement entirely. The Explanatory Memorandum makes it clear that mere suspicion of membership is enough to trigger visa cancellation.[15]

The government appears to already be using this power widely, and has said to cancel the visas of 80 members and associates of bike gangs.[16]

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[12] See eg, G Huscroft, B Miller and G Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014).
[13] *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth) sch 1, emphasis added.
[14] *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414, [130].
[15] Explanatory Memorandum, *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth). This is also reflected in Ministerial Direction No 65 — Visa Refusal and Cancellation under s 501 and Revocation of a Mandatory Cancellation under s 501CA. Directions issued under s 499 are binding on all visa decision-makers.
[16] Michael Keegan, Minister Assisting the Prime Minister for

There are real questions as to whether s 501(6)(b) would meet the test of proportionality. While there is no denying that the protection of the Australian public is a legitimate objective, cancellation on the basis of 'reasonable suspicion' and 'mere membership' is problematic. As we argued in our submission, it is entirely possible that the ground can be used to remove someone from Australia who has committed no crime, and presents little, to no appreciable risk, to Australian society.[17] If the purpose of the provision is to protect Australians from those who engage in criminal conduct, it follows that the standard should be commensurate with what the criminal law considers to be unacceptable. Mere membership is not, in any criminal law in Australia, a punishable offence.

Further, the law has potential to operate with disproportionate impact on individuals, in particular, permanent residents who have resided in Australia for long periods of time. Many will be removed to countries they have never been, separated from their Australian families and face an uncertain future, despite many years of living and contributing to Australian society and economy.

The ALRC picked up on our suggestion that the Act could be amended such that both 'association' and 'membership' require a finding that the visa holder was somehow involved in, or supportive of the criminal conduct'.[18]

Denial of procedural fairness

The character cancellation regime also attracted criticism as encroaching on the duty to provide for procedural fairness.

A decision made personally by the Minister to refuse or cancel a person's visa on character grounds under s 501(3) can be made without affording the visa holder procedural fairness.[19] Similarly, the new mandatory cancellation power under s 501(3A) also operates without having to afford the visa holder procedural fairness. Under s 501(3A), a non-citizen's visa is automatically cancelled if the Minister is satisfied that:

- The person has been sentenced to death, life imprisonment, or a sentence of 12 months or more; or

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Counter-Terrorism and Peter Dutton, Minister for Immigration and Border Protection, Disrupting the threat of outlaw motorcycle gangs (Press Release, 11 March 2016).

[17] ANU Migration Law Program, Submission No 59 to the ALRC Inquiry into Traditional Rights and Freedoms.

[18] ALRC above n 2, 185.

[19] This includes notifying the visa holder of an intention to cancel and allowing a time for response.

- an Australian or foreign court has convicted the person of one or more sexually based offences involving a child, or found the person guilty of such an offence, or found a charge proved for such an offence, even if the person was discharged without conviction; or

- the person is serving a sentence of imprisonment, on a full time basis in a custodial institution, for an offence against a law of the Commonwealth, a state or a territory.

Section 503(3A) is the first time that mandatory cancellation powers have been inserted into the *Migration Act*. As the Law Institute of Victoria argued, the objective of ensuring that a person remains in criminal or immigration detention while revocation is pursued is not a legitimate objective. They argue persuasively that if a person has been in prison for 12 months, there is ample time to use existing discretionary cancellation powers to cancel the visa.[20] The difference is that the use of discretionary cancellation powers allows the Minister to take into account a range of mitigating factors in making decision to cancel.

As we argued in our submission, the consequences of visa cancellation for an individual are serious. It involves detention and removal from Australia with a bar on re-entry,[21] or in the case of refugees who cannot be removed to their home countries, indefinite detention.[22] This reason alone necessitates the provision of natural justice.

The other area of singled out by the ALRC was the 'fast-track' review process, which applies to unauthorized maritime arrivals who form part of the 'legacy caseload'.[23] Under the 'fast track' process, those who have their decisions refused by the Department cannot access merits review by the AAT, but are instead referred to a new body within the AAT called the IAA (Independent Assessment Authority). The natural justice provisions governing the IAA process can be found in Part 7AA, Division 3. Of particular note are sections 473DB, and 473DC. These provisions require that IAA *not* conduct a hearing and is review decision without accepting new evidence or information from the applicant, unless there are exceptional circumstances.

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[20] Law Institute Victoria, Submission No 12 to the Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Migration Amendment (Character and General Visa Cancellation) Bill 2014, 3 November 2014.

[21] Migration Act 1958 (Cth) s 189. See also *Migration Regulations 1994* (Cth), Schedule 5, clause 5001(c).

[22] *Al-Kateb v Godwin* (2004) 219 CLR 562.

[23] See *Migration Act 1958* (Cth) s 473BA. The Legacy Caseload include unauthorised maritime arrivals who entered Australia on or after 13 August 2012, but before 1 January 2014, and who were not transferred to a regional processing country.

The government has sought to justify the new process as improving the 'efficiency and cost-effectiveness' of merits review.

However, we argue that, given the grave consequences of visa cancellation and a wrong decision as to a person's refugee status, the denial of procedural fairness on the grounds of expediency and efficiency are neither for a legitimate objective or proportionate. That is, in matters of life and death, efficiency and expediency should not be pursued ahead of procedural fairness.

Retrospective laws

The ALRC highlighted that retrospective laws are not uncommon in the migration area, but that such laws are only justified to the extent that they meet the proportionality test.

Of most concern to the ALRC was s 45AA of the *Migration Act*. This 'conversion provision', inserted by the Legacy Caseload Act, provides that an application for one class of visa, is taken to be application for a visa of a different class, as provided for by the Regulations.[24] This provision, and the associated regulation (2.08F) converts all applications made by those who form part of the legacy caseload for a permanent protection visa to an application for a temporary visa.

The Refugee Advice Casework Service (RACS) argued that these changes 'destabilize an administrative framework that should be certain, predictable and impartial'.[25] We agree, and further argued that:

> *This policy position is an inadequate justification for retrospectively removing the accrued rights of those who applied for a permanent protection visa. The retrospective nature of the provision will mean that those found to be genuine refugees [will be] on rolling temporary protection visas, which in our view, may give rise to breaches of fundamental rights, including the right to freedom of movement.*[26]

Being granted a temporary protection visa instead of a permanent visa results in a diminished sets of rights, including inability to sponsor family members for resettlement in Australia, inability to travel overseas unless there are compelling and compassionate circumstances and limited access to support services.27 It's hard to see how the government's policy of deterring people

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[24] *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth), sch 6.
[25] Refugee Advice and Casework Service, Submission no 30 to the ALRC Inquiry into Traditional Rights and Freedoms.
[26] ANU Migration Law Program, Submission no 59 to the ALRC Inquiry into Traditional Rights and Freedoms.
[27] Andrew and Renata Kaldor Centre for International Refugee Law, *Factsheet: Temporary Protection Visas*, <

coming by boat is justified by effectively punishing those who are already in Australia and who have made valid applications for a permanent protection visa.

Conclusion

The ALRC report provides a timely reminder of how migration laws encroach on traditional rights and freedoms. While there are other areas of migration law could have been addressed —including mandatory detention, offshore processing, and the use of force in detention centres — the ALRC is to be commended for tackling the issues within its remit with care and diligence.

We can only hope that its recommendation leads to further and necessary review.

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http://www.kaldorcentre.unsw.edu.au/publication/temporary-protection-visas>