



**Submission to the Australian Law Reform
Commission, *Traditional Rights and Freedoms*
– *Encroachments by Commonwealth Laws*
Interim Report**

29 September 2015

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1. Introduction

The Public Interest Advocacy Centre (**PIAC**) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues. PIAC has many years of experience across its policy and legal casework focusing on human rights and freedoms. Accordingly, PIAC welcomed the opportunity to respond to the Australian Law Reform Commission's *Freedoms Inquiry*.

PIAC made a detailed submission to the *Traditional Rights and Freedoms* Issues Paper.¹ PIAC notes the Interim Report now invites submissions addressing whether the laws it identifies need further review, and whether there are any other laws that should be reviewed.²

PIAC notes, with some concern, that the ALRC has taken a limited or restrictive approach to the Terms of Reference (**ToR**) for this inquiry. This brief submission first comments on the general principles forming the foundation for the report, notes the dangers of over-reliance on parliamentary procedures as a means by which to measure whether encroachments on rights and freedoms can be justified, and, finally, provides input regarding the areas the ALRC believes warrants further review.

1.1 The Public Interest Advocacy Centre

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia.

Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from NSW Trade and Investment for its work on energy and water, and from Allens for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

1.2 PIAC's work on human rights

As outlined in our submission to the Issues Paper, PIAC has extensive experience in the protection and promotion of human rights and freedoms.³ PIAC has, for example, responded to the various inquiries into human rights protection conducted in recent years.⁴

¹ Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (Issues Paper 46), 10 December 2014, available at <https://www.alrc.gov.au/publications/traditional-rights-freedoms-ip46>. See Farthing, S and Santow, E *Submission to the Australian Law Reform Commission Inquiry into Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Public Interest Advocacy Centre, 3 March 2015, available at <http://www.piac.asn.au/publication/2015/03/submission-alrc-inquiry-traditional-rights-and-freedoms>.

² Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (ALRC Interim Report 176), 3 August 2015, available at <https://www.alrc.gov.au/publications/alrc127>, at [1.96].

³ See, above note 1, at pages 2-3.

⁴ See, for example, Farthing, S and Santow, E *Rights and Responsibilities: Submission to the Australian Human Rights Commission Discussion Paper*, Public Interest Advocacy Centre, 31 October 2014, available at <http://www.piac.asn.au/publication/2014/12/rights-and-responsibilities-2014>.

PIAC also has policy and casework experience in a number of areas that form the focus of this inquiry, including freedom of expression, freedom of association⁵ and judicial review.⁵

All of the recommendations made in this submission and PIAC's submission to the Issues Paper are based on the evidence gleaned from its casework. As such, PIAC only comments on areas where it has this evidence base.

2. General principles

2.1 Limitations of the ALRC's approach

In its submission to the Issues Paper, PIAC acknowledged the potential significance of the ALRC's *Freedoms Inquiry*, noting, as had the ALRC's President, that it was likely to lead to a 'charter' of some kind.⁶ PIAC also noted the potential dangers of such an outcome given the limited focus of the ToR on a particular formulation of 'traditional' rights and freedoms which exclude a number of human rights and freedoms protected by the major international human rights instruments.

It is clear from the Interim Report that no such 'charter' has been proposed by the ALRC. The ToR require the ALRC to identify Commonwealth laws that encroach upon the listed traditional rights, freedoms and privileges; and critically examine those laws to determine if any encroachment is 'appropriately justified'. The Interim Report sets out that the ALRC has opted not to determine whether encroachment on rights and freedoms by a number of statutes is justified, but rather has highlighted laws that 'may merit closer review'.⁷

More broadly, however, PIAC notes that the ALRC did not consider that the timeline in the ToR was sufficient to allow the extensive consultation necessary to 'justify making detailed recommendations for reform'.⁸ PIAC accepts that the ToR set a very broad terrain for the ALRC to cover, and the realities of limited resources within the ALRC itself mean that pragmatic decisions about the scope of its ambition need to be made.

Nonetheless, PIAC is concerned that the ALRC risks missing a rare opportunity to set out a more definitive approach to the encroachment of rights and freedoms. This is particularly so where an unjustified encroachment or limitation has already been identified in a previous ALRC report, or detailed government-initiated review, and been the subject of community consultation and recommendations. PIAC urges the ALRC to make more direct recommendations in its final report where it has identified that there may be an unjustifiable breach of a right or freedom. Giving the Federal Government an opportunity to respond to more forthright recommendations will go some

⁵ For detail of PIAC's work in this area see PIAC's submission to the Issues Paper, above, note 1, at pages 2-3.
⁶ See Farthing, S and Santow, E *Submission to the Australian Law Reform Commission Inquiry Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (IP 46), Public Interest Advocacy Centre, 3 March 2015, available at <http://www.piac.asn.au/publication/2015/03/submission-alc-inquiry-traditional-rights-and-freedoms>. See Professor Rosalind Croucher, 'ALRC Inquiry into Freedoms' (Speech delivered at the Free Speech 2014 Symposium, Australian Human Rights Commission, Sydney, 7 August 2014), available at <https://www.humanrights.gov.au/sites/default/files/document/publication/free-speech-report2014.pdf>, at page 6 of the *Symposium Papers*.

⁷ Interim Report, above note 2, at [1.87].

⁸ Interim Report, above note 2, at [1.87].

way to remedying the serious deficiencies in Australia's human rights framework – deficiencies that, on the whole, are already well known and are in urgent need of remedy.

2.2 The proportionality principle

In general terms, the Interim Report establishes that the principle of proportionality is 'often a valuable way of structuring critical analysis', but stops short of recommending this be the generally applicable standard by which the permissibility of encroachments on rights and freedoms should be assessed by government, the judiciary or parliament.⁹

Under international law, the proportionality test is unquestionably the principal means by which the lawfulness of impingements or encroachments on human rights are judged. Over the past two decades, the same has also become true in the domestic law of common law countries that have long provided jurisprudential inspiration to Australia, such as the United Kingdom, New Zealand and Canada. Indeed, in Australia itself, the proportionality principle is well established in constitutional law, as well as in consideration of the legality of delegated legislation. Most recently, again in Australia, proportionality has become the touchstone in the assessment made about the accommodation of human rights and other interests under the two 'dialogue model' human rights statutes: the *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

Proportionality could be more deeply embedded in Australian law and in the processes by which draft legislation is drafted, presented and considered. The proportionality test could, for example, be enshrined in relevant interpretive legislation, such as the *Acts Interpretation Act 1901* (Cth). Similarly, the proportionality test could be introduced into specific legislation where judges and other decision makers must adjudicate on conflicting human rights, or human rights that come into conflict with other legitimate interests. An obvious example of such legislation is Australia's suite of anti-discrimination statutes, where arguments over the scope of exemptions have long marred their operation.

There is also scope to ensure that the proportionality principle is better understood across government departments and agencies, particularly with regard to the process by which statements of compatibility are prepared. Education for decision makers with regard to the proportionality principle could clearly fall within the education functions of the Australian Human Rights Commission (AHRC),¹⁰ and it would be within the ALRC's ToR to recommend that the AHRC undertake such work.

2.3 The limitations of procedural justification

The Interim Report approaches the question of whether a limit on a traditional right or freedom is 'appropriately justified', as required by the ToR, on 'two broad levels'. First, it asks whether there is 'substantive justification' for the breach of the right or freedom, such as by applying the legal

⁹ Interim Report, above note 2, at [1.75]-[1.76]. The ALRC states that it does not consider in this report whether testing of proportionality is better left to the judiciary or legislature, nor did it consider it 'necessary, in this Inquiry, to find a perfect method – if such a method exists – for testing the justification of laws that limit rights': at [1.75].

¹⁰ Section 11(1)(h) of the *Australian Human Rights Commission Act 1986* (Cth) requires the AHRC to 'undertake research and educational programs and other programs, on behalf of the Commonwealth, for the purpose of promoting human rights, and to co-ordinate any such programs undertaken by any other persons or authorities on behalf of the Commonwealth'.

principle of proportionality. Secondly, the ALRC asks whether there has been ‘procedural justification’, which focuses on the scrutiny processes for proposed legislation and regulation.¹¹

PIAC cautions against over-reliance on the processes constituting ‘procedural justification’ to protect against disproportionate interference with our rights and freedoms. In Chapter 16, ‘Delegating legislative power’, for example, the Interim Report notes:

Given the quantity of delegated law in Australia, careful and ongoing scrutiny – built into the process of making delegated legislation – may be the most suitable way to limit inappropriate delegations of legislative power.¹²

However, without an enforceable legal standard of human rights protection in the federal jurisdiction, the process of procedural justification cannot provide a sufficient bulwark against unjustified encroachment of a right or freedom. This is not to assert that government consultations, parliamentary scrutiny and independent review such as that undertaken by the ALRC and AHRC are not vital to the development of Australian law and policy. Indeed, such scrutiny is essential in order to incorporate the views of civil society and other stakeholders, allowing for the participation of organisations such as PIAC in the scrutiny of policies and reform of legislation.

PIAC simply points out that procedural justification is only capable to a certain extent, and on some occasions a very limited extent, of protecting our rights and freedoms. An analogy from public law might be the distinction between merits review (which allows re-consideration of the *substance* of the decision under review) and judicial review (which allows more limited review of the *legal procedure* by which the decision is made). Just as judicial review cannot cure a decision that is simply bad morally, ethically, economically or in some other substantive way, nor can the process of procedural justification referred to in the Interim Report ensure that human rights are given due consideration. Indeed, procedural justification cannot even ensure that Australian laws and policies comply with international human rights law – albeit that it might make it more likely that such compliance is achieved.

PIAC has been disappointed, for example, by the minimal impact the Joint Committee on Human Rights (**PJCHR**) has had on the parliamentary process. In rejecting the National Human Rights Consultation’s principal recommendation for a statutory bill of rights, the main legislative reform introduced to address the problems identified in the Consultation was the PJCHR. PIAC was hopeful that the PJCHR would have a significant influence on the development of an influential human rights dialogue in the federal jurisdiction. It is disappointing that there are, as pointed out in the Interim Report,¹³ so many instances where the PJCHR’s influence has been completely undermined by, for example, the passing of legislation before the PJCHR has even assessed and commented on the bill or before the Minister has responded to concerns the PJCHR has raised in a report. Its role is in clear contrast to the corresponding parliamentary committee in the United Kingdom, where recommendations made by the committee are often debated in parliament and

¹¹ Interim Report, above note 2, at [1.59].

¹² Interim Report, above note 2, at [16.42].

¹³ Interim Report, above note 2, at [2.59], [2.62] citing research and commentary by Professor George Williams which states that over 50 bills have been passed by Parliament before the JCHR has even completed its review.

where amendments to ameliorate or eliminate a breach of the *Human Rights Act 1998* (UK) in proposed legislation are often tabled and put to a vote.¹⁴

Further, throughout the Interim Report the ALRC defers a number of questions regarding whether an encroachment is justified to the review function of the Independent National Security Legislation Monitor (**INSLM**). PIAC is concerned that important questions of rights and freedoms are left to a body that only recently was entirely defunded by the Government, the position only being restored when the Government sought to pass a number of controversial counter-terror laws.¹⁵ The role is also a part-time one, without resources comparable to a body such as the ALRC. PIAC believes that the body more suited to a comprehensive review of counter-terrorism laws is the ALRC itself.

National security legislation is of course particularly noteworthy for the tendency of parliament to breach rights and freedoms with the legitimate aim of protecting public safety, but without conducting the important balancing exercise central to the questioning of whether the law is substantively justified. There are numerous examples of counter-terrorism legislation recently passed in relation to which the Government has bypassed the parliamentary committee scrutiny process, guillotined parliamentary debate and relied on bipartisan support to ignore human rights concerns raised by civil society. The *National Security Legislation Amendment Act (No. 1) 2014*, for example, was passed with bipartisan support, without public consultation on an exposure draft as recommended by the Joint Committee on Intelligence and Security and with minimal parliamentary debate.

2.4 Recommendations – procedural justification

Of the recommendations set out in Chapter 2 of the Interim Report, PIAC believes the most important review to be undertaken relates to the

procedures of scrutiny committees, particularly in relation to minimum timeframes for committee scrutiny, and the role of committee members in bringing the committee's concerns to the Parliament's attention.¹⁶

In its submission to the inquiry into the future direction and role of the Scrutiny of Bills Committee, PIAC noted its concern that Standing Order 24(1)(a), which guides the work of the Committee, provides no guidance as to *how* the Committee should address draft legislation against human rights standards.¹⁷ PIAC submitted that as human rights are rarely absolute, it is important to have a carefully constructed, transparent and principled means of reconciling competing human rights, and of dealing with derogation from human rights in favour of other interests. PIAC

¹⁴ See, for example, debate on the Justice and Security Bill 2012 in the House of Lords: Bowcott, O 'Secret courts plans savaged in House of Lords', *The Guardian online*, 22 November 2012, available at <http://www.theguardian.com/law/2012/nov/21/secret-courts-house-of-lords>.

¹⁵ The Independent National Security Legislation Monitor Repeal Bill 2014 proposed to abolish the office; it was tabled on 18 March 2014 and discharged from the Notice Paper on 17 July 2014. The new INSLM was appointed on 7 December 2014.

¹⁶ Interim Report, above note 2, at [2.71].

¹⁷ Santow, E *Inquiry into the future direction and role of the Scrutiny of Bills Committee*, Public Interest Advocacy Centre, 8 April 2011, available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Completed_inquiries/futuredirection2011/submissions/sublist.

therefore recommends that further guidance be given to the Scrutiny of Bills Committee along these lines.

With regard to the role of parliamentary committees generally, PIAC notes the ALRC's recommendation that the 'role of committee members in bringing committee's concerns to the parliament's attention' be reviewed.¹⁸ PIAC would add that the role of parliament in relation to those concerns be included in any such review. For example, PIAC would recommend that no legislation be passed, unless within the confines of a clearly defined emergency, before the appropriate parliamentary committee has considered the bill, had the opportunity for parliament to read and debate its recommendations and where the Minister has responded to questions raised. It is vital in particular that the role of the PJCHR be promoted rather than relegated to a box-ticking exercise, with its concerns considered and debated by parliament when passing laws that will impact on rights and freedoms.

Similarly, PIAC endorses the recommendation made by the National Human Rights Consultation Report that, in respect of non-absolute, or 'derogable', human rights, the Commonwealth Parliament should subject itself to the same limitations that are set out in the Victorian and ACT human rights statutes.¹⁹ That is, subsection 7(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) states

A human rights may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including:

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

3. Freedom of speech

The Interim Report refers to a number of specific pieces of legislation that encroach on rights and freedoms, the justification of which it considers beyond the practical scope of this inquiry.²⁰ As outlined in its submission to the Issues Paper, PIAC supports applying a proportionality test to determine if breach of a right or freedom can be justified.²¹

The Interim Report makes a number of recommendations in relation to areas of law that may warrant further review.

3.1 Review of counter-terrorism laws

PIAC supports the Interim Report's recommendation that the legislative provisions enacted to protect national security be reviewed. In recent times, rights and freedoms have received minimal

¹⁸ Interim Report, above note 2, at [2.71].

¹⁹ Frank Brennan et al, *National Human Rights Consultation Report* (2009), Recommendation 23.

²⁰ Interim Report, above note 2: 'it is beyond the practical scope of this inquiry to determine whether appropriate justification has been advanced for particular laws': at [3.162].

²¹ See above, note 1.

consideration in the pursuit of tough national security policies. As noted above, with bipartisan support for counter-terrorism measures and the shortened timeframe for parliamentary consideration, serious concerns raised in relation to the human rights implications of counter-terrorism provisions have received minimal parliamentary scrutiny.

The PJCHR, for example, concluded that because of the breadth and low threshold of the offence under s 35P of the *Australian Security Intelligence Organisation Act 1979* (Cth) (**ASIO Act**), it would impermissibly limit free speech. Similarly, the Senate Standing Committee on the Scrutiny of Bills also noted the breadth of the offence would potentially criminalise behaviour not intended, as well as noting that existing criminal offences would also encompass the behaviour sought to be addressed.²² Notwithstanding these concerns the amendment to the ASIO Act was rushed through Parliament.

As acknowledged in the Interim Report, the Independent National Security Legislation Monitor (**INSLM**) may be the obvious body to undertake a comprehensive review. As noted above, however, much will depend on the continued funding of the statutory position, as well as the approach taken by the individual appointed to the role. Given the breadth and depth of counter-terror legislation approved by parliament in recent years, PIAC believes that a comprehensive, transparent review of counter-terror laws should be undertaken and that the body to undertake such a review should be the ALRC.

3.2 Anti-discrimination law

The Interim Report notes that anti-discrimination law ‘may also benefit from more thorough review in relation to implications for freedom of speech’, noting in particular that s 18C of the *Race-Discrimination Act 1975* (Cth) (**RDA**) has attracted significant controversy.²³

PIAC notes the extensive consultation that recently was undertaken in relation to proposed reform of federal anti-discrimination laws under the former Labor Government.²⁴ When comprehensive reform of anti-discrimination law was apparently abandoned, this represented a missed opportunity to recast the current broad exemptions, so that they better complied with orthodox principles of international human rights law. An obvious example is the breadth and contours of the current exemptions for religious organisations under the *Sex Discrimination Act 1984* (Cth).

Regarding the issue of s 18C of the RDA, PIAC does not support any further review. This issue was extensively debated for much of 2014, with the exposure draft subjected to community scrutiny.²⁵ The issue was also widely debated by the general public and in the media; there were 4100 submissions made to the Exposure Draft of the Freedom of Speech (Repeal of s 18C) Bill

²² Interim Report, above note 2, at [3.43]-[3.44].

²³ Interim Report, above note 2, at [3.191].

²⁴ See Cohen, M et al *Aligning the pieces: consolidating a framework for equality and human rights*, Submission to the Senate Legal and Constitutional Affairs Committee on the exposure draft Human Rights and Anti-Discrimination Bill 2012, Public Interest Advocacy Centre, December 2012, available at <http://www.piac.asn.au/publication/2013/01/aligning-pieces>.

²⁵ See Roth, J and Santow, E *Protecting people from racism AND ensuring freedom of speech*, Public Interest Advocacy Centre, 30 April 2014, available at http://www.piac.asn.au/sites/default/files/publications/extras/protecting_people_from_racism_and_ensuring_freedom_of_speech.pdf.

201, with 76.2 per cent opposing the suggested changes.²⁶ The proposal was emphatically dropped by the Prime Minister, after intense public scrutiny and reported concern in Cabinet.²⁷ Given the intense debate over this issue PIAC does not consider further review of s 18C of the RDA would serve any fruitful purpose.

PIAC also notes the apparently contrasting approach taken by the Interim Report in relation to anti-discrimination law. While the Interim Report states that anti-discrimination law may benefit from further review as it relates to freedom of speech, it does not make a recommendation regarding other areas in anti-discrimination law, which raise similar concerns, such as the broad exemptions under the *Sex Discrimination Act 1984* (Cth) (discussed further below).²⁸

4. Freedom of religion

The freedom to practise one's religion is of paramount importance in Australian society, which equally values equality and non-discrimination. When discussing contemporary debates, such as proposals to legalise same-sex marriage, PIAC believes the two freedoms are often unnecessarily characterised as being in conflict. As stated in its response to the Issues Paper, PIAC believes that the application of the proportionality test can appropriately balance the two freedoms where a law appears to impose limitations.²⁹

The Interim Report notes that a number of stakeholders raised concerns about the scope and application of broad exemptions for religious organisations in ss 37 and 39 of the *Sex Discrimination Act 1984* (Cth). PIAC does not reiterate its concerns here, but notes that the ALRC may consider recommending that the Commonwealth Government revisit the extensive consultation and recommendations made in relation to the exposure draft of the Human Rights and Anti-Discrimination Bill 2012.³⁰

The Interim Report seeks further views as to whether and to what extent the solemnisation provisions in the *Marriage Act 1961* interfere with freedom of religion.³¹ These provisions impose a criminal sanction on individuals who solemnise a marriage ceremony when not authorised to do so.³² PIAC in principle supports the regulation of marriage by the State. PIAC is not aware through its work of whether the solemnisation provisions are disproportionately interfering with the freedom of religion in practice, but this issue is likely to become relevant as the same-sex marriage debate continues to build in Australian society. PIAC notes that the issue of religious

²⁶ See Aston, H "Few back change to race laws" 1 August, 2014, *Sydney Morning Herald*, available at <http://www.smh.com.au/federal-politics/political-news/few-back-change-to-race-laws-20140731-3cx9a.html>.

²⁷ See Aston, H "Tony Abbott dumps controversial changes to 18C racial discrimination laws" 5 August 2014, *Sydney Morning Herald*, available at <http://www.smh.com.au/federal-politics/political-news/tony-abbott-dumps-controversial-changes-to-18c-racial-discrimination-laws-20140805-3d65l.html>.

²⁸ Regarding concerns raised regarding these concerns in submissions to the Issues Paper, in its conclusions to Chapter 4 (Freedom of Religion) the Interim Report states 'There have been several recent inquiries conducted by the Australian Human Rights Commission and by parliamentary committees into the operation of anti-discrimination legislation': above, note 2, at [4.116].

²⁹ As cited in the Interim Report, above note 2, at [4.113].

³⁰ See PIAC's submission to the Senate Legal and Constitutional Affairs Committee's inquiry into the draft bill: Cohen, M et al *Aligning the pieces: consolidating a framework for equality and human rights*, Submission to the Senate Legal and Constitutional Affairs Committee on the exposure draft Human Rights and Anti-Discrimination Bill 2012, Public Interest Advocacy Centre, 21 December 2012, available at <http://www.piac.asn.au/publication/2013/01/aligning-pieces>.

³¹ Interim Report, above note 2, at [4.117].

³² See the Interim Report, above note 2, at [4.76].

freedom is the subject of an on-going inquiry being conducted by the Human Rights Commissioner;³³ it may be that this issue would be best reviewed in the context of that process.

5. Freedom of association

In reviewing the limitations on the right to freely associate with others, the Interim Report identifies a number of areas of concern in relation to counter-terrorism, workplace relations laws, migration law and in the context of Commonwealth anti-discrimination laws.³⁴

PIAC supports further consideration of the impact of counter-terrorism laws on freedom of association. We do, however, again caution against over-reliance on the INSLM, for the reasons outlined above. Given counter-terrorism laws are raised throughout the Interim Report as engaging or breaching a number of rights and freedoms, PIAC would support a stand-alone reference to the ALRC to investigate the impact of counter-terrorism laws on human rights and the broader implications for the community. There has been an influx of counter-terrorism legislation in recent years. It is evident that insufficient attention has been paid to breaches of human rights during the process of parliamentary scrutiny.

As noted by Professor George Williams, the impact of these laws has been to ‘produce a sense of grievance and alienation in the Muslim community’ which ‘has produced a dangerous dynamic that advantages those who wish us harm’.³⁵ Professor Williams argues that this trend could have been avoided or mitigated by ‘drafting anti-terror laws more consistent with community values and human rights standards’.³⁶ PIAC believes that a stand-alone reference to the ALRC, to enable the kind of forensic analysis that the ALRC conducts, would be of great benefit.

PIAC also supports further consideration of migration laws. Again, given migration laws are referred to throughout the Interim Report, the body best placed to conduct this review may well be the ALRC itself.

Finally, PIAC repeats the concerns raised in its submission to the Issues Paper about the impact of anti-consorting laws on freedom of association,³⁷ which the ALRC has not highlighted in its recommendations for further review. PIAC notes that concern about the impact of anti-consorting laws in Queensland has led to a review being undertaken in that State.³⁸

6. Delegating legislative power

The significance of the practice of delegating legislative power cannot be understated in the context of protecting rights and freedoms. As noted in the Interim Report,

³³ Information on the AHRC Religious Freedom Roundtable available at <https://www.humanrights.gov.au/our-work/rights-and-freedoms/projects/religious-freedom-roundtable-call-submissions>.

³⁴ Interim Report, above note 2, at [5.129].

³⁵ Williams, G ‘Weekend raids raise questions about counter-terrorism laws’, 19 April 2015, *Sydney Morning Herald online*, available at <http://www.smh.com.au/comment/weekend-raids-raise-questions-about-counterterrorism-laws-20150419-1mo51z.html>.

³⁶ Ibid.

³⁷ See PIAC’s submission to the Issues Paper, above note 1, at page 18.

³⁸ See Terms of Reference for the Taskforce into organised crime legislation, 2015, which will consider the various laws impacting on the right to freely associate. ToR available at <http://www.justice.qld.gov.au/taskforce-into-organised-crime/terms-of-reference>.

Although it is not clearly a right, freedom or privilege, the principle that legislative power should not be inappropriately delegated to the executive may be an important way of protecting other rights, freedoms and privileges.³⁹

Given the possible infringement on rights and freedoms by inappropriately delegated legislative powers, PIAC urges the ALRC to consider in its Final Report more concrete recommendations to ensure more effective and robust scrutiny of proposed subordinate legislation. Recommendations made by PIAC in its submission to the Issues Paper would strengthen the current guidance and legislative scrutiny structures governing the procedures around delegated legislation. Given the Interim Report's reliance on 'procedural justification' to protect rights and freedoms, PIAC believes there is significant merit in making those procedures as robust as possible. To this end, PIAC urges the ALRC to adopt its recommendations made in its submission to the Issues Paper:

- amendments should be made to the *Legislative Instruments Act 2003* (Cth) (**LIA**) to set out a non-exhaustive list of powers (including Henry VIII clauses) and matters that should not be delegated unless there is a public interest in doing so;
- where delegated legislation affects human rights and freedoms, an affirmative resolution procedure should be adopted;
- there should be a limitation inserted into sections 38 and 42 of the LIA so that a legislative instrument can only be in operation for a maximum of 45 calendar days before it must be tabled in Parliament; and
- parliamentary procedure should be strengthened by providing for a stronger role for the Senate Standing Committee on Regulation and Ordinances.⁴⁰

7. Judicial review

The Interim Report refers to a number of legislative provisions imposing restrictions on judicial review, such as under the *Migration Act 1958* (Cth). The Interim Report also refers to practical or procedural limitations, such as the challenge of judicially reviewing administrative decisions where there is a restrictive approach taken to standing.

Of the recommendations made by the ALRC for further review, PIAC supports the Final Report making a decisive recommendation (rather than requesting the Government consider) that the limitations on standing under the ADJR Act be addressed by the Government introducing

- a rule of open standing in public law proceedings, as recommended by the ALRC in its 1996 report on standing in public law proceedings; or
- a provision in the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**) which would give representative organisations standing to apply for judicial review under the ADJR Act.⁴¹

The issue of standing for representative organisations seeking to challenge an administrative decision is one that PIAC raised in its submission to the Issues Paper.⁴²

PIAC also supports a more decisive recommendation that the restrictions on access to the courts under the *Migration Act 1958* (Cth) be the subject of further review.⁴³ (The Interim Report

³⁹ Interim Report, above note 2, at [16.11].

⁴⁰ See PIAC's submission to the Issues Paper, above note 1, at page 22.

⁴¹ Interim Report, above note 2, at [18.93].

⁴² See Recommendation 18, in Farthing, S and Santow, E, above note 1, at page 28.

currently notes that the limited access to the courts in migration legislation is an ‘area of particular concern’, but does not recommend that there be any further review of the relevant legislative provisions.⁴⁴)

PIAC also urges the ALRC to consider making recommendations that would address other restrictions on judicial review discussed in the Interim Report that it does not include in the conclusions to Chapter 18. In relation to privative clauses, for example, the Interim Report notes that these are a ‘classic example of restrictions on access to the courts’⁴⁵ and notes the submissions made to the Issues Paper emphasising that ‘restrictions should only be imposed in exceptional circumstances’.⁴⁶ The Interim Report also notes:

To remove or significantly restrict judicial oversight allows governmental power without restriction, and is at odds with Australia’s constitutional and Westminster traditions.⁴⁷

Despite this strong recognition that ouster clauses are counter to Australian democracy, the Interim Report makes no definitive recommendations. As noted in its submission to the Issues Paper, PIAC argues that

the constitutional validity of privative clauses is questionable and the High Court’s restrictive interpretive approach to them renders them largely ineffective, as well as complicating statutory interpretation. For reasons of principle and practice then, PIAC considers ouster or privative clauses to be an unjustified incursion on judicial review.⁴⁸

The Interim Report does not decisively state that privative clauses can be justified, either generally or specifically in relation to the legislative clauses identified in the chapter. PIAC urges the ALRC in its final report to assert that privative clauses cannot be justified, given it is clear that ouster clauses will invariably and unjustifiably impede the Rule of Law and access to justice.

⁴³ Interim Report, above note 2, at [18.91].

⁴⁴ Interim Report, above note 2, at [18.91].

⁴⁵ Interim Report, above note 2, at [18.57].

⁴⁶ Interim Report, above note 2, at [18.52].

⁴⁷ Interim Report, above note 2, at [18.60].

⁴⁸ See PIAC’s submission to the Issues Paper, above note 1, at page 26.