

**THE HON T F BATHURST AC**  
**CHIEF JUSTICE OF NEW SOUTH WALES**  
**OPENING OF LAW TERM ADDRESS**  
**‘THE NATURE OF THE PROFESSION; THE STATE OF THE LAW’**  
**THURSDAY 4 FEBRUARY 2016\***

1. Good evening. I am delighted to once again have the opportunity to address you on the occasion of the opening of the new law term. Before I begin, I would like to acknowledge the traditional owners of the land on which we meet, the Gadigal people of the Eora nation, and pay my respects to their elders, both past and present.
2. Somebody once said that there are “...two things that are essential to any community. One is sewerage. The other is lawyers. If you don’t have sewerage you’re dead, but if you don’t have law, society stops. And you can’t have law without lawyers. The vast body of lawyers are just damn good professionals and they keep the sewers running.”<sup>1</sup>
3. As unflattering as an analogy between sewerage and the law is, it is one that I would like to dwell on today in detailing the nature of our profession. I do so, not to take an ideological stand on how law should be taught. Nor in response to some perceived crises in confidence in our profession’s identity.<sup>2</sup> Rather, I wish to examine the fundamental common law rights that are integral to the nature and identity of our profession and examine the state of those rights in our society.

### **The Nature of the Profession and its Identity**

4. With that disclaimer, I may pose the question, what is the nature of the current legal profession? The profession that is attracting graduates in droves, yet suffers

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\* I express my thanks to my Research Director, Miss Madeline Hall, for her assistance in the preparation of this address.

<sup>1</sup> S Gageler, ‘Pearls of wisdom’ (2015) 2(6) *Law Society Journal* 21 (**Pearls of wisdom**) quoting former Justice Dennis Mahoney’s reference to Professor Twining.

<sup>2</sup> See for instance concerns about the advent of litigation funding, alternative business structures (including the incorporation of law firms), the outsourcing of legal work and the advent of virtual legal service delivery (Office of the Legal Services Commissioner, ‘Commercialisation of Legal Practice-Regulatory Reflections from NSW’ (Paper presented at Commonwealth Law Conference, 21 April 2012); M Warren, ‘Legal ethics in the era of big business, globalisation and consumerism’ (Joint Law Societies Ethics Forum, Melbourne, 20 May 2010); J Bagust ‘The Legal Profession and the Business of Law’ (2013) 35 *Sydney Law Review* 27). More historical examples of expressions of crises include A Kronman, *The Lost Lawyer-Failing Ideals of the Legal Profession* (Harvard University Press, 1995) and M Kirby, ‘Legal Professional Ethics in Times of Change’ (1996) 14 *Australian Bar Review* 170 (**Times of Change**). Cf. W Twining, ‘Pericles regained?’ (1998) 1(2) *Legal Ethics* 131 (**Pericles regained**).

systemic mental health issues? In speaking of the profession's identity, it is of course important to acknowledge that we are not a homogenous whole. Those that are part of the profession range from solicitors, to barristers and even, in a broad sense, to judicial officers. Within each of those components are further layers of individuality, with proliferating structures and focuses of practice. A solicitor today may practice as a sole practitioner, or as part of a partnership, or as an employee in an incorporated law firm. People may work in private practice or government. The variables, although not infinite, are large. It is understandable therefore, if people express scepticism towards the very idea that the nature of the profession, made up of disparate parts, can be summarised as one.<sup>3</sup>

5. Even more likely to receive scepticism today is the simple idea that the profession is still that, a profession. There are those that fear the commercialisation of the legal industry has removed the ethical facet which marked it out as a profession. They decry that "...the typical law office...is located in a maelstrom of business life"; that "...[i]n its appointments and methods of work it resembles a great business concern".<sup>4</sup> They describe the bar with equal contempt, saying it: "...has allowed itself to lose, in large measure, the lofty independence, the genuine learning, the fine sense of professional dignity and honour...it has been increasingly contaminated with the spirit of commerce which looks primarily to the financial value and recompense of every undertaking."<sup>5</sup> I think it is important to note that that vivid description in fact was written 120 years ago. As Justice Kirby stated, that fact alone "...should make us pause before we accept, at face value, all of the criticisms directed..." to the present.<sup>6</sup> I know there are many legal fictions. But I strongly believe, the fact that we are still a profession, with all that that entails, is not one of them.
6. Of course, even if we are accepted as a profession, depending on who you are speaking to, we can be described as a noble or immoral bunch. The jokes of a hired gun and many more are familiar to us all. As I foreshadowed, today I would like to focus on perhaps not the most glorious depiction of the legal profession. That is the idea of legal professionals as plumbers. I do not claim that the analogy is my invention. It was of course popularised in 1967 when Professor Twining published a journal article on legal education titled the 'Plumber and Pericles'. Since then there have been many comments made on the similarities and disparities between the two callings.<sup>7</sup>

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<sup>3</sup> See Twining's acknowledgment of such in *Pericles regained*, 132.

<sup>4</sup> *Times of Change*, 176 quoting a writer in the *American Lawyer* in 1895.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*, 177.

<sup>7</sup> Perhaps more recently, Justice Gageler's *Pearls of wisdom*.

7. If I could be forgiven to quote one particularly humorous but lengthy comment made by a Lord Justice of Appeal in England and Wales, only a few years ago, I will do so. He specifically focused on the similarities between *judges* and plumbers and commented that: “[t]he judge approaches a case with much the same mixture of resignation and righteousness as a plumber responding to a call-out. Each knows that [they]... will not have been brought in until the efforts of those on the spot have left the place ankle-deep in water. Although, unlike the plumber, the judge cannot charge a king’s ransom for his attendance...he shares with the plumber the...pleasure of surveying the wreckage and groaning ‘Oh dear, oh dear, who installed this?’ True, the judge cannot quite match the next trope of the plumber’s monologue: ‘Had a stetson and spurs, did he?...But the judicial trope, while less vivid, is no less trenchant in its [criticisms]... of parliamentary and departmental drafting, the incompetence of contract negotiators, the folly or malice of litigants, the inability of lawyers to see the point or, on the rare occasion when they see it, to stick to it, and the otherworldliness of academic commentaries...Above all, the experienced judge shares the experienced plumber’s aversion to activism. Both know the value of shutting the water off at the mains and promising to be back as soon as other jobs permit-[this is] known...[in legal circles] as the *Mareva*...[There is also the alternative]... of plugging the leak with a bit of mastic and waiting for a further call-out...*stare decisis* as it’s called in Latin.”<sup>8</sup>
8. The point of the analogy between plumbers and legal professionals is, as Justice Gageler from the High Court has stated, to emphasise that they both provide “an essential-but essentially technical-service”.<sup>9</sup> That is, in protecting and furthering the client’s interest. Just as the plumber does as the client instructs provided it is not contrary to the laws of physics, so the legal professional acts, unless it is contrary to their paramount duty to the court. The focus on the task at hand to facilitate the client’s interests is what marks the lawyer as fundamentally a technician.
9. As mundane or unflattering as this may sound, it is ironically this very feature that embodies the more noble attributes of the profession. Honesty, diligence and dispassionate advice are all attributes that stem from a lawyer with a straightforward technician’s attitude to a task at hand. The lawyer that seeks to prioritise *their* perception of what is best or for the public good over the client’s, is not a technician. They are a paternalistic Pericles, which is not what the client, society or the justice system needs.

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<sup>8</sup> S Sedley, ‘Law and Plumbing’ (2007) 2 *Journal of Comparative Law* 192, 192.

<sup>9</sup> Pearls of wisdom.

10. There is, however, no doubt more to our profession's identity beyond this simplistic depiction of a plumber. It is unquestionably informed by the historical and fundamental freedoms of our common law system. Concepts like the presumption of innocence and the rights to legal professional privilege and against self-incrimination are fundamental common law principles, which inform our identity as legal professionals as much as anything else. They are the backdrop, the rules of the game, in which we operate. It is only because of those rights that go towards ensuring there is equality before the law, that we can have any confidence that a dispassionate attitude to legal advice will achieve justice. Without those rights we would have to re-assess the nature of our profession and who we are; what we as legal professionals are doing and what point we serve in society.
11. This inevitably prompts the question: what is the state of those rights in our society today? I would like to spend the rest of this evening, devoted to answering that question. In doing so, I shall discuss both the protections from legislative encroachment and the extent of legislative encroachments on the rights. In light of the Australian Law Reform Commission's comprehensive inquiry into Commonwealth legislative encroachments of fundamental rights and freedoms,<sup>10</sup> I will specifically focus on the law in New South Wales. Unlike the ALRC, I will limit my comments to the presumption of innocence and the rights to legal professional privilege and against self-incrimination. I think, for fairly obvious reasons, the state of these three rights, in particular, has a direct impact on the legal profession's identity.

### **The History of Fundamental Common Law Rights**

12. Before discussing the extent of protections and encroachments in this state, I think it is important to observe that fundamental common law rights have never been absolute. Their often touted ancient status is more likely a myth or legal fiction than anything else.
13. Professor Wigmore for instance, identifies legal professional, or client lawyer privilege, as "the oldest of the privileges for confidential communications".<sup>11</sup> Notwithstanding this, it has in fact only been around for 400 years since Elizabethan times.<sup>12</sup> Even in the 18<sup>th</sup> and 19<sup>th</sup> centuries it was considered only an evidentiary rule.<sup>13</sup> According to the ALRC's Freedoms Inquiry, it was only in the

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<sup>10</sup> Australian Law Reform Commission, *Traditional Rights and Freedoms-Encroachments by Commonwealth Laws*, Interim Report No 127 (2015) (ALRC127).

<sup>11</sup> J Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (Little, Brown and Company, 3<sup>rd</sup> ed, 1940) at [2290] quoted in ALRC127 at [13.15].

<sup>12</sup> ALRC127 at [13.16].

<sup>13</sup> ALRC127 at [13.18].

late 19<sup>th</sup> century that it became a substantive right, with its scope expanding significantly in the 20<sup>th</sup> century.<sup>14</sup>

14. Equally recent, is the presumption of innocence. By this I mean the principle that in a criminal case the prosecution bears the burden of proof to a standard of beyond reasonable doubt. This is often referred to as “the golden thread” of criminal law.<sup>15</sup> In 2005 the House of Lords described this right as being recognised since, “at [the] latest, the early 19<sup>th</sup> Century”.<sup>16</sup> Even if the right was in fact recognised 100 years earlier, this is still relatively recent.
15. The historical origins of the privilege against self-incrimination are more contentious and may in fact be long standing. Some point to the unpopularity of the Star Chamber in England in the 17<sup>th</sup> century,<sup>17</sup> or further back to Roman and canon law from the 12<sup>th</sup> and 13<sup>th</sup> centuries. Yet, others, including a High Court judge from Australia, identify it as not becoming established until the mid-19<sup>th</sup> century or even later.<sup>18</sup>
16. All of this should not distract from the importance of any of these rights. Regardless of the number of hundreds of years they have been recognised in society, their rationales are, to say the least, strong. However, I think it is important to bear in mind that these rights are not necessarily as ancient as may be supposed by popular culture. Or popular legal culture anyway. They are certainly not competing with the historical origins the Magna Carta can lay claim to. I think such a historical context is crucial when examining how our society currently treats such principles.

### **Formal State “Scrutiny Mechanisms”**

17. With that context established, I shall now turn to the question of what protections there are in New South Wales for the three fundamental common law rights I am focusing on tonight. In speaking of protections I will borrow the ALRC’s terminology of “scrutiny mechanisms”. The ALRC uses the term to refer to the formal processes that are in place to protect us from unintended or unjustified legislative encroachments. Accordingly, I will first describe, with reference to Commonwealth equivalents, what formal state scrutiny mechanisms there are in New South Wales.

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<sup>14</sup> ALRC127 at [13.18].

<sup>15</sup> *Woolmington v DPP* [1935] AC 462, 481-2 (Viscount Sankey LC); *Environmental Protection Authority v Caltex Refining Co Pty Ltd* [1993] HCA 74; (1993) 178 CLR 477, 501 (Mason CJ and Toohey J), recently referred to in *Lee v New South Wales Crime Commission* [2013] HCA 39; (2013) 251 CLR 196 (*Lee 2013*) at [174] (Kiefel J).

<sup>16</sup> *Attorney General’s Reference No 4 of 2002; Sheldrake v DPP* [2005] 1 AC 264 at [9] (Lord Bingham), quoted in ALRC127 at [11.5].

<sup>17</sup> J Heydon, *Cross on Evidence* (LexisNexis, 9<sup>th</sup> ed, 2013) at [25140].

<sup>18</sup> See ALRC127 at [12.13]-[12.17] for details of the competing viewpoints.

18. On a Commonwealth level, the ALRC listed the following as scrutiny mechanisms. First, what was termed a “culture of justification”. Second, policy development and legislative drafting guidelines and direction. Third, parliamentary scrutiny processes; and finally, other review mechanisms, such as by the Australian Human Rights Commission and Australian Law Reform Commission itself.<sup>19</sup>
19. The ALRC explained that in referring to a “culture of justification”, it meant there was a culture within our society. Namely, as a democracy, that “every exercise of public power is expected to be justified by reference to reasons which are publicly available to be independently scrutinised for compatibility with society’s fundamental commitments”.<sup>20</sup> Whilst this may be a legitimate expectation held by many of us, whether or not such an intangible culture is capable of, or has, translated through the political machine and election process into a protective mechanism successfully safeguarding rights, I will leave for you to decide. I would hazard to suggest though that not many elections are won on questions of legal professional privilege or even self-incrimination. I suspect therefore that such expectations are not often enforced at the ballot box, even if they do exist.
20. It is for this reason that I do not think I am being pre-emptively sceptical in thinking it is desirable to have other mechanisms than a “culture of justification”. At a Commonwealth level, parliamentary scrutiny processes include the Senate Standing Committee on Regulations and Ordinances, the Senate Standing Committee for the Scrutiny of Bills, the Parliamentary Joint Committee on Human Rights, the Senate Standing Committee on Legal and Constitutional Affairs, the Parliamentary Joint Committee on Intelligence and Security and, finally, the Parliamentary Joint Committee on Law Enforcement. In contrast, at a state level in New South Wales, there is the one joint standing Legislation Review Committee.<sup>21</sup>
21. This Committee was set up in response to the Legislative Council’s Law and Justice Committee’s inquiry in 2001. That inquiry recommended that instead of NSW having a bill of rights it have a committee to scrutinise bills.<sup>22</sup> Accordingly,

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<sup>19</sup> ALRC127 Chapter 2 Scrutiny Mechanisms.

<sup>20</sup> ALRC127 at [2.2] ft 1, quoting Murray Hunt.

<sup>21</sup> Although admittedly the Legislative Council Standing Committee on Law and Justice and the Legislative Assembly Committee on Law and Safety could also review legislation for the purpose of right encroachment. Note there was previously a Regulation Review Committee which ended on 1 January 2004. Parliamentary committees were described as part of the “integrity branch of government” by former Chief Justice, J Spigelman, ‘The Integrity Branch of Government’ (2004) 78 *Australian Law Journal* 724, 726.

<sup>22</sup> Legislation Review Committee, ‘Public Interest and the Rule of Law: Discussion Paper’ (Discussion Paper No 1, Legislation Review Committee, 10 May 2010), 1. The Committee was modelled on the Commonwealth Senate Standing Committee for the Scrutiny of Bills, as opposed to the Queensland’s model of assessing

the Legislation Review Committee is responsible for reviewing both bills and regulations. It reports to Parliament if any provisions, amongst other things, trespass unduly on personal rights and liberties.<sup>23</sup> While it only has the power, in relation to bills to, at worst, refer the issue to Parliament, it may recommend a regulation be disallowed. It is however, unclear how often the Committee has actually used the latter power.<sup>24</sup> Despite this, the Committee does clearly use its other powers frequently. For example, in relation to trespassing on personal rights and liberties in 2010 alone, the Committee had corresponded with a Minister or Member in relation to 3 bills, noted issues in 55 and referred 37 bills to Parliament.<sup>25</sup> The mandate of the Committee has been described as wider than that of any other Australian scrutiny committee.<sup>26</sup>

22. Notwithstanding this, there again may be scepticism as to whether the power scrutiny committees wield in theory translates into practical boundaries being placed on the legislative encroachment of rights. Commentators have particularly noted alterations to New South Wales's Legislation Review Committee since 2011. These have meant the membership has been almost halved with the lower house now dominating Committee members.<sup>27</sup>

23. There has been further scepticism in light of a 2015 report from the Legal Intersections Research Centre at the University of Wollongong. The report assessed what impact the Committee's recommendations had on criminal bills between 2010 to 2012.<sup>28</sup> The commentators reported, that although "the Committee performs the valuable function of identifying, and bringing to

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legislation against a set of fundamental legal principles (L Grenfell, 'An Australian spectrum of political rights scrutiny: "Continuing to lead by example?"' (2015) 26 *Public Law Review* 19 (Grenfell), 31).

<sup>23</sup> *Legislation Review Act 1987* (NSW), ss 8A and 9. Note the study of A Byrnes, which shows the Committee has largely focused on civil rights and liberties ('The Protection of Human Rights in NSW through Parliamentary Process-A Review of the Recent Performance of the NSW Parliament's Legislation Review Committee' (Revised version of paper presented at Protecting Human Rights Conference, Sydney, 2 October 2009), 6).

<sup>24</sup> Neither the Legislation Review Committee nor Parliamentary Counsel's Office had this information (Telephone inquiry 3 & 4 December 2015). Note comments that such action is "rare" in D Pearce and R Geddes, *Statutory Interpretation in Australia* (LexisNexis, 8<sup>th</sup> ed, 2014) (Pearce and Geddes), 211.

<sup>25</sup> Legislation Review Committee, *Legislation Review Digest*, Digest No 17 of 2010, 30 November 2010, Appendix 3.

<sup>26</sup> Grenfell, 32.

<sup>27</sup> Grenfell, 32. Note at times the Committee has made no further comment on provisions encroaching rights due to seemingly political justifications that mirror the message of the executive. Compare for example comments of "recent events" and "the extraordinary harm that can be caused by terrorism" that rendered encroachments on the presumption of innocence in exceptional circumstances as "appropriate" according to the Legislation Review Committee (Legislation Review Committee, *Legislation Review Digest*, Digest No 9 of 2015, 27 October 2015, 3) with identical comments in the Second Reading Speech for the Terrorism (Police Powers) Amendment Bill 2015 NSW; Bail Amendment Bill 2015 (NSW) (New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 October 2015, 48 (Attorney General Gabrielle Upton).

<sup>28</sup> L McNamara and J Quilter, 'Institutional Influences on the Parameters of Criminalisation: Parliamentary Scrutiny of Criminal Law Bills in New South Wales' (2015) 27(1) *Current Issues in Criminal Justice* 21 (McNamara and Quilter).

Parliament's attention, aspects of proposed new laws...<sup>29</sup> there is no evidence that the Committee has any impact on the *outcomes* of parliamentary decision-making processes on criminal law bills".<sup>30</sup> The report also identified an "entrenched culture" held by Parliament of "ignoring and deflecting the Committee's advice".<sup>31</sup> Hardly a "culture of justification".

24. There are also clear instances of Parliament effectively bypassing the Committee's scrutiny. For example, the *Crimes (Criminal Organisations Control) Act* was introduced and passed in 2009 within 24 hours, without any possibility of rights scrutiny.<sup>32</sup> The 2015 report concluded that in "...the absence of a legislative mandate that Parliament must debate matters referred [to it] by the Committee, or an obligation on Ministers to respond to matters raised...other viable mechanisms for producing legislative constraint" need to be found.<sup>33</sup>

25. On that note, I will now turn to the other possible scrutiny mechanisms. Again, at a Commonwealth level, in addition to reviewing draft bills, there are also various policy documents and drafting directions. These ensure that at the first stage of drafting, the degree in which provisions are compatible with rights is maximised.<sup>34</sup> Essentially, it is recommended that there be pre-emptive thought on whether a bill is likely to be the subject of comment by a parliamentary review committee. If so, the guidelines encourage stating the reasons for nonetheless proceeding in the manner proposed.<sup>35</sup> At the point of preparing drafting instructions to be given to the Parliamentary Counsel's Office, a list of matters which may need to be considered are also specified. These include various right-issues such as retrospective legislation, burden of proof and conclusive certificates.<sup>36</sup>

26. New South Wales Parliament does make a corresponding manual for the preparation of legislation and a ministerial handbook publicly available.<sup>37</sup> It does not appear though that there are any equivalent directions to pre-empt problems that may be flagged from the Legislative Review Committee, as there is on a Commonwealth level.<sup>38</sup>

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<sup>29</sup> It should be acknowledged that this alone can be an invaluable way to instil "a culture of rights 'responsibilities' in Parliament" (Grenfell, 37).

<sup>30</sup> McNamara and Quilter, 35 (emphasis in the original).

<sup>31</sup> Ibid.

<sup>32</sup> Grenfell, 32 ft 89.

<sup>33</sup> McNamara and Quilter, 35.

<sup>34</sup> ALRC127 at [2.6].

<sup>35</sup> Department of Prime Minister and Cabinet, *Legislation Handbook* (1999), [8.19].

<sup>36</sup> Ibid, [6.18]-[6.26]

<sup>37</sup> NSW Parliamentary Counsel's Office, *Manual for the Preparation of Legislation* (2000, 8<sup>th</sup> ed); Department of Premier and Cabinet General Counsel (Policy and Strategy Division), *NSW Government Ministerial Handbook* (2011).

<sup>38</sup> See the lack thereof in the 'Drafting Instructions' in Department of Premier and Cabinet General Counsel (Policy and Strategy Division), *NSW Government Ministerial Handbook* (2011), 31.



27. Finally, with respect to the last type of scrutiny mechanisms the ALRC discusses, obviously our state has no equivalent to the Australian Human Rights Commission, or a counterpart to the Victorian Equal Opportunity and Human Rights Commission. Admittedly, international human rights obligations bind the states as much as the Commonwealth.<sup>39</sup> Nonetheless, it would appear that the only other scrutiny review mechanism in this state, beyond the Legislation Review Committee, is the New South Wales Law Reform Commission.

### **Informal Common Law Protections from Encroachments**

28. In addition to these formal mechanisms, there are of course more indirect legal mechanisms of protection. Most prominently, there are Constitutions and the principle of legality. Again, to compare between the Commonwealth and this state, it is well established that the Commonwealth *Constitution* protects various fundamental common law rights expressly and by implication.<sup>40</sup> Admittedly, the High Court has rejected the idea that the privilege against self-incrimination is protected by implication.<sup>41</sup> The Court does not consider it an integral element in the exercise of judicial power by Chapter Three courts. Despite this, it is possible that the presumption of innocence or right to legal professional privilege could be constitutionalised by implication.<sup>42</sup>

29. Fortunately, by reason of the *Kable* doctrine,<sup>43</sup> if any such protections are found they can trickle down to our state level, despite the absence of any formal separation of powers in our state's *Constitution*. Already, in a 2009 case between the International Finance Trust and NSW Crime Commission, the broad right to procedural fairness received some protection in this way. The High Court held that the nature of one of the powers vested in the Supreme Court under the New South Wales *Criminal Assets Recovery Act*,<sup>44</sup> was repugnant to a fundamental aspect of the judicial process.<sup>45</sup> The provision was declared invalid because it affected the Court's capacity, as a repository of federal jurisdiction under Chapter Three.<sup>46</sup>

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<sup>39</sup> Legislation Review Committee, 'Information Paper: "Rights and Liberties" Considered by the Legislation Review Committee' (Information Paper, NSW Parliament, 2005-2006), 3.

<sup>40</sup> ALRC127 at [1.15].

<sup>41</sup> *Sorby v Commonwealth* [1983] HCA 10; (1983) 152 CLR 281, 308 (Mason, Wilson & Dawson JJ); *Lee* 2013, [22]-[24].

<sup>42</sup> See G Williams and D Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2<sup>nd</sup> ed, 2013), 376.

<sup>43</sup> *Kable v DPP (NSW)* [1996] HCA 24; (1996) 189 CLR 51.

<sup>44</sup> *1990 (NSW)*.

<sup>45</sup> See for instance *International Finance Trust Co Ltd v NSW Crime Commission* [2009] HCA 49; (2009) 240 CLR 319, [56]-[59] (French CJ), [95]-[98] (Gummow and Bell JJ) and [155]-[165] (Heydon J).

<sup>46</sup> NSW Parliament subsequently enacted provisions to ameliorate the lack of procedural fairness, see *Criminal Assets Recovery Act 1990 (NSW)*, ss 10A(4) and 10C.

30. There are obvious limitations in relying upon a Commonwealth *Constitution* as a *state* scrutiny mechanism. Beyond the awkward indirect nature of its protection, it also only ensures the actions of a *Court* (reposed with *federal* jurisdiction) are not inconsistent with the judicial process mandated by Chapter Three of the *Constitution*. There is, therefore, no way of ensuring that the obligations or rights that may exist on a Commonwealth setting can be applied on a state level when the activities are outside a relevant court arena. This is a significant inadequacy, particularly given the large number of state executive entities that have been created and the significant powers they have been given. The problem is further compounded by the fact that often these entities, tribunals or boards, not being Courts, will also not apply the *Evidence Act*.<sup>47</sup> This rules out the many other protections afforded in that piece of legislation.<sup>48</sup>

31. Given these limitations, in comparison, the principle of legality appears a far stronger informal protection mechanism. The ALRC Freedom's Inquiry devotes a significant amount of time in its interim report, discussing the nature, history and scope of this principle. I will be far more brief. As the High Court has summarised, the principle is that "[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".<sup>49</sup> The principle, by virtue of its common law origins, has greater flexibility than a doctrine predicated on the set words of a constitution. Thus, although there are lists on what constitutes a fundamental freedom, these are not set.<sup>50</sup> Moreover, as the principle of legality is fundamentally a common law principle of statutory interpretation, it is not hindered by federal and state divides, like the application of the Commonwealth *Constitution* to state courts under the *Kable* doctrine.

32. However, like many things in the law, the devil is in the detail. Although the principle of legality may be "a strong presumption" requiring "irresistible

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<sup>47</sup> 1995 (NSW) (*Evidence Act*).

<sup>48</sup> The rights to legal professional privilege and against self-incrimination and the presumption of innocence are preserved in *Evidence Act*, Pt 3.10, Div 1, Div 2 and s 141. Although note the arguable encroachment at s 128(2) and (4), particularly (4)(b). This renders the privilege subject to the court's assessment of whether "there are reasonable grounds" for objecting to give evidence and if it is in the "interests of justice" to require the evidence to be given. This encroachment is significantly counter-acted by the certificate scheme which prevents the use of such evidence, or derivative use of the evidence, in any proceeding in a NSW court or before any person or body authorised by law to hear, receive and examine evidence (s 128(7)). For another instance where the privilege is subject to someone else's assessment of reasonable grounds see *Coroners Act 2009* (NSW), s 61 or *Real Property Act 1900* (NSW), s 131(8) which makes the right to legal professional privilege subject to consideration of "the degree to which any information sought by the request is the subject of legal professional privilege". Quite how information can be subject to legal professional privilege in degrees is unclear. Generally it is understood that once the conditions for the existence of the privilege have been established, there is no room for it to be overridden or disregarded (see for instance J Campbell, 'Some aspects of privilege concerning communications with lawyers' (2006) 27 *Australian Bar Review* 264, 266).

<sup>49</sup> *Re Bolton; Ex parte Beane* [1987] HCA 12; (1987) 162 CLR 514, 523 (Brennan J) (emphasis added). See also *Coco v The Queen* [1994] HCA 15; (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

<sup>50</sup> See ALRC127 at [1.30] ft 45 for a compilation of relevant lists.

clearness” or words that are not “general or ambiguous”,<sup>51</sup> it is not all that hard to get around it. For instance, it is well established that although a provision does not *expressly* disallow a fundamental freedom, if the purpose or objective of the provision or broader act encroaches it by necessary implication, then the principle of legality’s presumption will be displaced.<sup>52</sup>

33. This appears perfectly logical as a matter of statutory interpretation and gives appropriate deference to Parliamentary sovereignty. Yet, it does have the unfortunate consequence that individuals will never be certain, upon reading a provision, of whether or not a freedom has in fact been encroached. Even if they have the time to read the whole act and deduce whether one of the multiple, often competing, purposes in their opinion, necessary implies the abrogation of a freedom, they will never know for sure. Nothing will be even close to certain until a Court considers the particular provision in question.

34. This makes the principle of legality somewhat of a smaller shield than many people may think it theoretically is. Although, it may be very strong, it can easily and subtly be side-stepped; a fact which many individuals will not be aware of until they feel the jab of the sword. If nothing else, it certainly makes any attempt to catalogue all the provisions in our state that encroach on fundamental freedoms particularly difficult. This is because searching solely for express encroachments is not sufficient.

35. I have, nonetheless, tried to catalogue all the legislative encroachments and will spend the remainder of my time tonight detailing and explaining my results. I should note a detailed copy of the results, listing all the legislative encroachments I found, will be attached to the copy of this speech and made available on the Supreme Court’s website.

### **Why is this exercise worthwhile?**

36. It is perhaps first necessary to explain why this exercise of cataloguing encroachments is worthwhile. Let us assume Parliament were to pass legislation generally abrogating, in all cases, the rights to legal professional privilege and against self-incrimination. There would be an absolute outcry, I venture to say, not only from lawyers. That is because these rights are fundamental to the rule of law as we understand it and, as I said before, partly inform our identity as legal professionals. It is important, therefore, that we, as lawyers, appreciate the extent

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<sup>51</sup> R French, ‘Human Rights Protection in Australia and the United Kingdom Contrasts and Comparisons Part Two’ (2015) 42(3) *Brief* 30, 33. See also Pearce and Geddes, 215 for a list of the different phrases used in caselaw.

<sup>52</sup> Pearce and Geddes, 238, 239 and 241 for specific application of the presumption to self-incrimination and legal professional privilege and the circumstances where the rights will be encroached by necessary implication.

of any encroachment on these rights. It is equally important to form a view, on which minds might differ, as to whether the encroachments are both individually and cumulatively justified. If we don't do that, we may end up in a position where, without protest, those rights are so substantially diminished that the underpinning of the basis on which we conduct our profession is itself substantially impaired.

### **Legislative Encroachments of Certain Fundamental Common Law Rights**

37. Before firing a whole string of numbers at you, I will say that my review of New South Wales legislation encompassed all current legislation including subordinate legislation. Despite this impression of comprehensiveness, my results are quite conservative. This is for three reasons.

38. First, in counting legislative encroachments I have not included all the provisions that mandate the supply of information. This is despite the fact that, by necessary implication, these all could, for the reasons I have just explained, encroach on the rights to legal professional privilege or against self-incrimination. For example, section 128 of the *Liquor Act* makes it an offence for someone to refuse to state their date of birth to a police officer.<sup>53</sup> In the case of someone under 18 drinking alcohol, this forces the person to self-incriminate themselves. There are of course literally thousands of these types of provisions, which is the main reason I have avoided including all of them.<sup>54</sup>

39. Instead, in addition to counting all express encroachments and some provisions which mandate the provision of information with no exceptions, I have included a smaller category of provisions that mandate information. These are the provisions which mandate the supply of information, subject to a reasonable or lawful excuse.<sup>55</sup> Of course there is High Court and other authority that whether the rights to legal professional privilege or against self-incrimination constitute a reasonable or lawful excuse depends on the individual facts, circumstances and purpose of the legislation in question.<sup>56</sup> It is therefore possible that by including all provisions in this last category, I have included some false positives.

40. However, I do not think the numbers will be too deceptive. This is because there are cases where either the rights to legal professional privilege or against self-incrimination have been found to *not* constitute a "reasonable" or "lawful"

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<sup>53</sup> *Liquor Act 2007* (NSW), s 128.

<sup>54</sup> Initial basic searches found 2,778 results.

<sup>55</sup> The search results do not include provisions which compel information which is non-testimonial in nature and for which the privilege against self-incrimination does not apply (consistent with ALRC127 at [12.8]).

<sup>56</sup> *Taikato v R* [1996] HCA 28; (1996) 186 CLR 454; *Bank of Vanetta plc v National Crime Authority* [1999] FCA 791; (1999) 164 ALR 45; and *SD v New South Wales Crime Commission* [2013] NSWCA 48; (2013) 84 NSWLR 456.

excuse.<sup>57</sup> Further, I feel that at the end of the day, any confusion as to whether I have wrongly counted a provision or not, only serves to illustrate the problems of certainty that I alluded to earlier.

41. The second reason my results are somewhat conservative, relates to the results for the presumption of innocence. Essentially, there are a lot of things I have excluded from the count. I have only really focused on criminal offences.<sup>58</sup> I have excluded provisions that imposed sanctions or constraints, such as cancelling a licence, without proof of an offence. I have not included laws imposing strict liability offences, or laws concerning the legal or evidential burden of defences. This was due to the latter generally being borne by the defendant anyway, and my desire to avoid getting caught up in a dinner debate on the distinctions of legal and evidential burdens. My results also have not included provisions which provide general evidential short cuts-such as sections concerning the issuing of conclusive certificates and the like.<sup>59</sup> The results *do* however include provisions that provide short-cuts to proving elements of an *offence* by altering the burden of proof. Thus, deeming provisions like those concerning offences for possession with intent to supply, have been included.

42. The third reason the results are somewhat conservative is because I have counted the *provisions* in which a right is encroached not the instances. This leads to conservative results, as sometimes a right will be abrogated in individual sections and other times through a general section which applies to many instances. For example, the *Water NSW Act* has the one provision at section 75 removing the privilege against self-incrimination for a whole division. This division contains three separate provisions, which mandate information in some form or another. Therefore in a sense, through the one provision, there are three separate instances of encroachment. Yet I have only counted this provision once. It is therefore quite possible that the number of individual *instances* in which the right is encroached, could be triple if not more, the numbers I will be discussing.

### **(I) Legal Professional Privilege**

43. So, without further ado, let's get down to these numbers. There were 162 provisions which arguably abrogate the right to legal professional privilege. Just under 70% of these provisions relate to the mandatory production of information

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<sup>57</sup> *Australian Securities and Investments Commission v Albarra* [2008] FCA 147; (2008) 169 FCR 448; *Corporate Affairs Commission of New South Wales v Yuill* [1991] HCA 28; (1991) 172 CLR 319; and *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* [1985] HCA 6; (1985) 156 CLR 385. Cf. *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49; (2002) 213 CLR 543; and *Valantine v Technical and Further Education Commission* [2007] NSWCA 208; (2007) 97 ALD 447.

<sup>58</sup> Although, like the ALRC Freedom's Inquiry the results do include *some* provisions which are not strictly criminal (such as bail and proceeds of crime legislation).

<sup>59</sup> See for instance *Criminal Assets Recovery Act 1990* (NSW), s 22A; *Criminal Procedure Act 1986* (NSW), ss 145 and 247M; and *Gene Technology (GM Crop Moratorium) Act 2003* (NSW), s19.

subject to a “reasonable” or “lawful” excuse. 36 provisions relate to an express obligation to provide information in strict language with no reference to an excuse or exception. For instance words such as “shall not fail” to provide are used. 13 provisions expressly removed the entitlement to legal professional privilege, or prevented it from forming. An example of the latter is section 75V of the *Crimes (Forensic Procedures) Act*.<sup>60</sup> This states a police officer need not allow a registrable person to communicate with an Australian lawyer in *private*, if the police officer suspects on reasonable grounds that the registrable person might attempt to destroy or contaminate any evidence that might be obtained by carrying out a forensic procedure.<sup>61</sup> This could very well prevent any privilege from forming.

44. Although I will not discuss all the provisions that I came across, I confess I do find section 75V somewhat confusing. Unless the provision is implying that the destruction or contamination of evidence would be *facilitated* by communicating with an Australian lawyer—that is, by a lawyer clearly acting against the law and the professional ethics which bind them, there is, to me, no apparent rationale for this provision. Even if someone had the intention to attempt to destroy or contaminate evidence (a difficult thing to be sure of in itself), why should such a fact preclude a person from *private* communications with a lawyer. Why, in that scenario, should a person’s right to confidential communication with his or her lawyer be denied? I confess it is not immediately apparent to me.

45. At least, in contrast, s 22 of the *Crime Commission Act*<sup>62</sup> identifies the rationale for refusing a person access to a lawyer. It states that the Commission may refuse permission if it believes on reasonable grounds and in good faith that the particular legal practitioner will, or is likely to, prejudice its investigation. Admittedly, despite this more clear articulation of why access to a lawyer is precluded under the legislation, quite when it will operate is still ambiguous. What constitutes likely prejudice to the Commission’s investigation? What if sound and solid legal advice would defeat the legality of one of the Commission’s investigations? Can the Commission refuse access to a lawyer in that case to prevent its investigation being “prejudiced”? Presumably, a more narrow meaning of the word “prejudice” is meant.

46. Like section 75V, it is again unclear whether the provision is focused at dishonest lawyers, as appears to be suggested by the reference to a “particular” legal practitioner. Yet, unlike s 75V, who carries the burden for establishing the

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<sup>60</sup> 2000 (NSW).

<sup>61</sup> *Crimes (Forensic Procedures) Act 2000* (NSW), s 75V(2). Note this act also encroaches on the presumption of innocence in so far as s 75W authorises the detaining of persons registered under the *Child Protection (Offenders Registration) Act 2000* (NSW) to conduct forensic tests without consent.

<sup>62</sup> 2012 (NSW).

Commission had reasonable grounds in refusing permission to a lawyer is not specified. Under the *Crimes (Forensic Procedures) Act* it at least lays this on the prosecution.

47. Before moving to the privilege against self-incrimination, I would finally like to note one thing. Interestingly, and also somewhat at odds with the principle that legal professional privilege is in fact a right of the client not the lawyer, at least one provision expressly protects lawyers from divulging privileged information, whilst seeming to force the client to provide it.<sup>63</sup> Similarly there are many provisions which could avoid encroaching on the right altogether, while still obtaining the information sought after. For instance, provisions could obtain the consent of the client to waive the right<sup>64</sup> or obtain a warrant to seize information rather than force production.

## **(II) Privilege against self-incrimination**

48. Turning now to the privilege against self-incrimination.<sup>65</sup> I found, in total, 183 provisions, which arguably encroach this privilege. Ironically, some of these were headed “protection *against* self-incrimination” or something similar.<sup>66</sup> The fact that the headings use the word “protect” rather than “abrogate” is arguably a revealing one. It could be construed as an attempt to avoid the “political cost” of these provisions? There were in fact only 6 out of the 183 provisions which had headings admitting their legal effect. These had headings stating “Abrogation of privilege against self-incrimination” or “Self-incriminatory information not exempt”.<sup>67</sup>

49. Returning to the overall statistics, a smaller proportion, around 34% of the 183 provisions, were subject to a “reasonable” or “lawful” excuse. A much larger proportion, approximately 58%, were provisions which expressly removed the privilege. There was a considerable amount of overlap between these provisions

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<sup>63</sup> Compare *Co-operatives (Adoption of National Law) Act 2012* (NSW), ss 517 and 523 with ss 500 and 521 respectively.

<sup>64</sup> For example, a client who has made a complaint under the *Legal Profession Uniform Law (NSW) No 16a* presumably would more often than not be willing to consent to waive their right to legal professional privilege to progress the investigation. This would effectively remove the need to encroach the right in those circumstances as the legislation currently does by way of s 466(1)(c) or (d) in conjunction with s 466(2).

<sup>65</sup> It should be noted that in referring to the privilege against self-incrimination I have assumed the privilege does not apply to companies and have not made any distinction between provisions allowing for the direct or derivative use of evidence.

<sup>66</sup> See *Biosecurity Act 2015* (NSW), Pt 4 Div 3 s 34 and Pt 4 Div 5 s 42; *Children (Education and Care Services) National Law (NSW) No 104a*, Pt 9 Div 4 s 211(2); *Health Care Complaints Act 1993* (NSW) Pt 2 Div 5 s 37A; *Mental Health Act 2007* (NSW), Ch 5 Pt 4 s 139; *Passenger Transport Act 1990* (NSW) Pt 4C Div 3 s 46U; *Passenger Transport Act 1990* (NSW) Pt 4C Div 3 s 46U; and *Co-Operative (Adoption of National Law) Act 2012* (NSW), Appendix Ch 6 Pt 6.4 s 503 (with a heading of ‘protection from incrimination’). Also see *Coroners Act 2009* (NSW) Ch 6 Pt 6.3 s 61 which has the heading ‘privilege in respect of self-incrimination’.

<sup>67</sup> *Combat Sports Act 2013* (NSW), s 87; *Rail Safety National Law (NSW)*, s155; *Work Health and Safety Act 2011* (NSW), s 172; *Protection of the Environment Operations Act 1997* (NSW), s 178; *Mining Act 1992* (NSW), s 246S; *Fisheries Management Act 1994* (NSW), s 275H.

and the provisions caught in the searches concerning legal professional privilege. This is unsurprising given both privileges are subsets of a broader right to silence.

50. 111 of the provisions had some form of qualification on the legislative encroachment. Usually these clarify that information or answers made that were self-incriminatory are not admissible in criminal proceedings. However, criminal proceedings are often defined to exclude proceedings under the act in question and sometimes also civil penalty provisions.<sup>68</sup> Furthermore, the information is only inadmissible in a criminal proceeding if a person had objected to providing the information on the ground that it would be self-incriminating or if they were not warned that they may so object. Moreover, this protection often does not extend to documents or further information that is obtained as a result of the information that was mandatorily provided.<sup>69</sup>

51. In contrast, the effect of legislative encroachments on legal professional privilege is sometimes limited by a catch-all provision in the act. This usually limits disclosure of information obtained under the act for specific purposes.<sup>70</sup> All the same, sometimes the limitations are not very great, or actually are of no effect at all.<sup>71</sup> At other times, they appear to be wishful thinking or paying lip service to the right. For instance a Part in the *Terrorism (Police Powers) Act* limits the purpose for which someone can contact a lawyer when they are being preventatively detained. In those circumstances, the Part states that they may only be advised on their legal rights in relation to being detained.<sup>72</sup> Despite this, section 26ZQ states that to *avoid* doubt nothing in the Part affects the law relating to legal professional privilege.<sup>73</sup> Given the otherwise clear limitations imposed on what lawyers may give advice on, this section, if anything, creates rather than avoids doubt.

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<sup>68</sup> See also *Confiscation of Proceeds of Crime Act 1989* (NSW), s 62(3) which limits even more narrowly what constitutes a criminal proceeding.

<sup>69</sup> See for instance: *Cemeteries and Crematoria Act 2013* (NSW), s 136; *Environmental Planning and Assessment Act 1979* (NSW), s 119S; *Fisheries Management Act 1994* (NSW), s 258B; *Game and Feral Animal Control Act 2002* (NSW), s 48; *Gaming and Liquor Administration Act 2007* (NSW), s 35; and *Health Care Complaints Act 1993* (NSW), s 37A. See also *Contaminated Land Management Act 1997* (NSW), s 90; and *Crime Commission Act 2012* (NSW), s 39A.

<sup>70</sup> See for instance *Animal Research Act 1985* (NSW), s 56; *Energy and Utilities Administration Act 1987* (NSW), s 41; *Entertainment Industry Act 2013* (NSW), s 34; *Environmental Planning and Assessment Act 1979* (NSW), s 148; *Home Building Act 1989* (NSW), s 121; *Mental Health Act 2007* (NSW), s189; *Property, Stock and Business Agents Act 2002* (NSW), s 219; and *Protection of the Environment Operations Act 1997* (NSW), s 319.

<sup>71</sup> See for instance *Fisheries Management Act 1994* (NSW), s 283A(4); and *Racing Administration Act 1998* (NSW), s 36A.

<sup>72</sup> *Terrorism (Police Powers) Act 2002* (NSW), Pt 2A s 26ZG.

<sup>73</sup> *Terrorism (Police Powers) Act 2002* (NSW), Pt 2A Div 6 s 26ZQ.



### (III) Presumption of innocence

52. The last specific right I surveyed and will discuss tonight was the presumption of innocence. In comparison to the rights to legal professional privilege and against self-incrimination, there were significantly less encroachments on this right. I was nonetheless able to find 52 provisions that did encroach the presumption in the narrow sense I explained earlier. The provisions ranged from reversing or altering the onus of proof for an element of an offence,<sup>74</sup> to removing the presumption of innocence for an entire offence altogether.
53. A particularly extreme example of the latter may be found in section 685 of the *Local Government Act*.<sup>75</sup> This not only reverses the presumption of innocence, it also makes mere allegations “sufficient proof of the matter[s]” alleged.<sup>76</sup> Thus the section renders someone guilty of a criminal offence by a mere accusation. As I stated, the provision then requires the defendant to prove the contrary.
54. Another extreme example is section 60E of the *Water Management Act*. This deems the occupier of premises where a contravention has occurred to be guilty of the contravention.<sup>77</sup> Reassuringly, subsection (2) says despite the deeming provision, proceedings can still be undertaken against the person who, I quote, “actually committed the offence”.<sup>78</sup>
55. There are many of these encroachments in less well known pieces of legislation. Take those that appear in the *Biosecurity Act*, *Casino Control Regulation* or the *Coal and Oil Shale Mine Workers (Superannuation) Act*.<sup>79</sup> Another example is section 20 of the *Public Interest Disclosures Act*.<sup>80</sup> This outlines a criminal offence, attracting the not inconsiderable maximum penalty of 2 years imprisonment. Under the section it is an offence for someone to take “detrimental action” against a person “substantially in reprisal” for that person making a public interest disclosure. Subsection (1A) presumes an element of the offence (the motivation for taking detrimental action was *substantially* in reprisal for the making of a disclosure), as given. The burden for disproving this element of the offence is placed on the defendant.
56. Now, it may be very easy to pass over these less well known shifts of burden as of no great import. However, what may seem like subtle shifts in insignificant acts, can have dramatic consequences for individuals and their families. They

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<sup>74</sup> See for instance *Casino Control Regulation 2009* (NSW), Sch 6 Pt 6 s 113(4); and *National Parks and Wildlife Act 1974* (NSW), s 117(4).

<sup>75</sup> 1993 (NSW).

<sup>76</sup> *Local Government Act 1993* (NSW), s 685.

<sup>77</sup> 2000 (NSW).

<sup>78</sup> *Water Management Act 2000* (NSW), s 60E(2).

<sup>79</sup> 2015 (NSW), 1992 (NSW) and 1941 (NSW) respectively.

<sup>80</sup> 1994 (NSW).

can result in criminal outcomes that may not have otherwise been reached. They can also cause a person to not take action they are legally entitled to undertake, for example in the case of the *Public Interest Disclosures Act*, defending their reputation, purely out of a fear caused by such shifts in the burden. In essence, the effect of *any* alteration to the presumption of innocence should never be made light of or under-estimated.

57. Amongst the less well known encroachments there are of course the more conspicuous provisions. For instance, the most recent permutation of the *Bail Act* still retains the show cause provisions.<sup>81</sup> These require an accused person to explain why they should be granted bail. The 2015 amendments expanded the circumstances under which a person must do this.<sup>82</sup>

58. There are also the continuing detention orders under the *Crimes (High Risk Offenders) Act*, preventative detention orders under the *Terrorism (Police Powers) Act* or control orders under the *Crimes (Criminal Organisations Control) Act*.<sup>83</sup> The control orders can be issued against members of declared criminal organisations. These are organisations that amongst other things have members which associate for the purpose of *serious criminal activity*. It is worth mentioning that serious criminal activity includes activity whether or not any person has been charged with or convicted for any of the offences that are considered serious. Suspicion of committing a serious offence therefore seems to constitute serious criminal activity.

#### **(IV) Inconsistencies exacerbating confusion**

59. Having reviewed each individual right I would now like to briefly comment on my impression of the legislation as a whole. Clearly there is more than just the occasional encroachment of one of the three rights I have looked at. Further, many provisions that encroach on the rights to legal professional privilege or against self-incrimination concern the mandatory provision of information (whether it is by answers or documents) to some executive entity performing an investigatory role. Presumably, each encroachment is considered justified by some greater good.<sup>84</sup> For instance, encroachments on the privilege against self-

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<sup>81</sup> *Bail Act 2013* (NSW).

<sup>82</sup> *Bail Amendment Bill 2015* (NSW).

<sup>83</sup> *2006* (NSW), *2002* (NSW), *2012* (NSW) respectively.

<sup>84</sup> As an illustration, it appears the encroachment of legal professional privilege for public authorities in section 21 of the *Ombudsman Act 1974* (NSW) was motivated by the Ombudsman's claim that unfounded legal professional claims were being used to withhold records. That is, instances of the privilege being misused justified its removal (see New South Wales, *Parliamentary Debates*, Legislative Assembly, 24 June 2010, Agreement in Principle to the Ombudsman Amendment (Removal of Legal Professional Privilege) Bill (the Hon Dr Gordon Moyes); and New South Wales, *Parliamentary Debates*, Legislative Council, 21 October 2011, Second Reading Speech for the Ombudsman Amendment (Removal of Legal Professional Privilege) Bill 2010 (Mr Peter Besseling)).

incrimination may be justified as a necessary strengthening of investigatory powers in the face of matters peculiarly within the accused's knowledge.

60. That particular justification makes me think of the story of George Spencer from the colony of New Haven in the 17<sup>th</sup> century. In the colony a piglet was born, dead, but highly deformed, with what appeared to be humanoid features such as a single eye. The owner of the piglet's mother complained, which led to an investigation into the household of the sow's previous owner. Investigation ended by focusing on a servant in that household, George Spencer. Spencer had only one good eye and was said, unflatteringly, to have a mirror-like resemblance to the piglet. He was imprisoned on suspicion of an abomination. When pressed by a magistrate, he confessed to fathering the piglet and ultimately went to the gallows.<sup>85</sup>
61. Notwithstanding that tale, it is not for me to comment on the appropriateness of justifications like those for self-incrimination. That is a matter for political and public debate and one in which, no doubt, reasonable minds will differ.
62. However, what I will comment upon are the very apparent inconsistencies in parliamentary drafting. Now in making that criticism I am very conscious of fulfilling the judicial stereotype which I quoted earlier tonight. Nonetheless, it is a fact that in reviewing the legislation, there are a lot of inconsistencies about how encroachments and protections are framed. These only serve to detract from the transparency of encroachments, which undermines both the rationality and principle of legality itself.
63. An example of an inconsistency causing confusion as to whether there is an encroachment or not is in the *Civil and Administrative Tribunal Act*.<sup>86</sup> Section 67 basically states that *nothing* in the act requires disclosure of a document, if it would incriminate the person. Despite this seemingly straightforward protection of the privilege against self-incrimination, Schedule 5 states that in relation to the Occupational Division of the Tribunal, a witness summoned to attend before it at a hearing is *not* excused from answering any question or producing any document or thing on the ground of privilege.<sup>87</sup> I think it is fair to say that such provisions, seemingly diametrically opposed, would cause the average punter some confusion.
64. Inconsistencies between the protections afforded to any legislative encroachment also abound. On a basic level there is the seemingly random fluctuation between

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<sup>85</sup> J Gans, 'Fair trial, procedural fairness and other traditional rights' (Speaking notes for a speech delivered at the ALRC Freedoms Symposium, Melbourne Law School, University of Melbourne, 30 September 2015).

<sup>86</sup> 2013 (NSW).

<sup>87</sup> *Civil and Administrative Tribunal Act 2013* (NSW), Sch 5, s 7.

mandatory obligations to provide information being subject to a “reasonable” excuse, or a “lawful” excuse. Section 192 of the *Road Transport Act* seems to have hedged its bets, stating a person must not comply with a notice to provide information “without lawful or reasonable excuse”.<sup>88</sup>

65. The real problem with random fluctuations in the framing of encroachments or protections is, given the accepted principles of statutory interpretation include drawing inferences from the absence or presence of provisions, there is a high possibility that significance will be assigned to such variations when it shouldn't be. For instance, if a provision expressly abrogates the privilege against self-incrimination, a court may be more likely to infer that the same provision, or another similar provision elsewhere in the act, also abrogates legal professional privilege.<sup>89</sup> This reasoning is particularly tempting given how easy it is for Parliament to insert a catchall provision that states nothing in the act affects a certain right or privilege.<sup>90</sup> The fact that several acts already do this only lends strength to this type of inferential reasoning.<sup>91</sup> Yet this form of argument, given the presence of evident inconsistencies in drafting, may constitute nothing more than a rationalisation of the irrational. More worryingly, it comes dangerously close to radically reversing the principle of legality. It assumes an abrogation of the right, unless the contrary is specified.

66. Of course in saying all this, the limitations of what I have detailed tonight must be acknowledged. I have not touched on any of the many other common law rights and privileges. Like the presumption of innocence and rights to legal professional privilege and against self-incrimination, many of these other rights may be found in our rules of evidence. Last year, being the anniversary of the *Evidence Act*, provided an opportunity to reflect on the importance of these rules.<sup>92</sup> Although many may view them as cumbersome and antiquated methods of proof, if the rules are not adhered to, we in fact become antiquated and will have regressed to become a less fair and just society. The fact is, there is an element of unfairness in any inquiry which makes serious findings not in reliance upon the rules of

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<sup>88</sup> *Road Transport Act 2013* (NSW), s192(3) (emphasis added).

<sup>89</sup> *Corporate Affairs Commission of New South Wales v Yuill* [1991] HCA 28; (1991) 172 CLR 319. Alternatively, significance may be drawn between different acts. For example, does the fact that a “reasonable excuse” in s11(2)(a) of the *Royal Commissions Act 1923* (NSW) is taken to include the privilege against self-incrimination for special inquiries under s 230 *Crimes (Administration of Sentences) Act 1999* (NSW), have any bearing on what constitutes a “reasonable excuse” in a Royal Commission under Division 1 of the *Royal Commissions Act*?

<sup>90</sup> Note Recommendation 5-2 in Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008).

<sup>91</sup> See for instance: *National Gas (NSW) Law No 31A*, ss 42(8), 62, 91FC(6) and 91FEA(4); *Government Information (Public Access) Act 2009* (NSW), Sch 1 s 5; *Rail Safety National Law (NSW) 82a*, s 245; and *Electricity Supply Act 1995* (NSW), s 156(6).

<sup>92</sup> T Bathurst, ‘Counting Ceorls and Eorls’ (Speech delivered at the 20<sup>th</sup> anniversary of the Evidence Act, Sydney, 13 June 2015).

evidence and standards of proof which encapsulate fundamental common law rights.

## **Conclusion**

67. In assessing the state of three of the fundamental common law rights in New South Wales tonight, I do not know if I have caused surprise or boredom. Perhaps many of you were aware of all I have spoken about. If so, I apologise for what has no doubt been a long hour. Essentially, like many submissions from counsel, all I wanted to say could have been condensed into five simple propositions.

68. First, the historical context and relatively recent emergence of certain common law rights needs to always be remembered. This is not to detract from their importance but does lend weight to the proposition that legislative encroachments are not necessarily unique to this era. Whether they are necessary will always be a question of degree. However, necessity should be judged by reference to the question of whether a particular abrogation of fundamental rights is in fact conducive to the maintenance of the rule of law.

69. Second, in seeking to obtain the right balance between a functioning state and liberty, formal and informal, statutory and common law based mechanisms of protection against encroachment are important.

70. Third, the number and strength of both types of scrutiny mechanisms within New South Wales, whether assessed independently or in comparison to Commonwealth counterparts, is not necessarily ideal. It is particularly questionable whether the theoretical potential of both formal and informal scrutiny mechanisms, is translating into an effective protection of fundamental common law rights.

71. Fourth, even when conservative searches are performed, there are at least 397 legislative encroachments on either the rights to legal professional privilege, against self-incrimination or the presumption of innocence. Whether this is more or less than desirable, is not a matter for me to comment on. Whether it reflects the robust operation of a culture of justification within New South Wales is also a matter for individual opinion and comment.

72. Fifth and finally, as desirable and important as it is for there to be awareness and transparency of the extent of legislative encroachments, it is particularly difficult to analyse that question. This is due to a combination of factors, including that the principle of legality may be defeated by necessary, not express, implication, the use of ambiguous headings and inconsistent drafting techniques.

73. I hope, despite these difficulties, I have shed some light on the extent of state legislative encroachments on three of the fundamental common law rights in New South Wales. As I said at the outset, the three in particular which I have spoken of tonight, directly impact upon the identity of all lawyers. To that extent, how they are faring in society is something we all should be aware of if we wish to continue to identify ourselves as a profession of dispassionate plumbers.