Traditional Rights and Freedoms: Encroachments by Commonwealth Laws

Submission to Australian Law Reform Commission on Report 127 (Interim)

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Introduction/Overview

The Castan Centre for Human Rights Law (Castan Centre) thanks the Australian Law Reform Commission (ALRC) for the opportunity to comment on its *Interim Report* on encroachments on Traditional Rights and Freedoms (TRFs).

We understand from the *Interim Report* that many parties have already made submissions on the justification for the various laws identified as potentially infringing TRFs, and that further submissions in this vein are now being solicited.¹ We believe that the provisions of greatest concern, including those addressing immigration and terrorism, already emerge clearly from the *Interim Report*.²

However, rather than address the justifications for individual pieces of legislation, we have elected to reiterate and expand on the concerns we set out in our previous submission on IP46, including that TRFs are inexact and inappropriate benchmarks for the assessment of Commonwealth legislation. We believe that the findings in the *Interim Report* support our view.

Some of the supposedly traditional rights and privileges identified in the terms of reference have been shown by the ALRC’s research to be relatively recent in origin, and the status of many is unclear due to inconsistent jurisprudence (the right to judicial review, for example).³ Overall, their scope is unjustifiably narrow compared with even the core obligations of international human rights law.⁴ In addition, the *Interim Report* identifies (correctly, we submit) international human rights jurisprudence on proportionality as the pre-eminent, and therefore most appropriate, means to assess whether laws are likely to be justified.⁵

Another cause for concern is that, as the *Interim Report* repeatedly demonstrates, many of the identified infringements of TRFs had already been flagged by one or more of the parliamentary scrutiny committees (the Regulations and Ordinances Committee, the Scrutiny of Bills Committee and the Joint Committee on Human Rights [JCHR]). The fact that so many Commonwealth laws are of (potential) concern to the present inquiry highlights the capacity for improvement in the Parliament-Executive dialogue model of rights protection which Australia has chosen to implement. The fact that the Executive has had to provide more rigorous rights-based justifications for legislation since the passage of the *Human Rights (Parliamentary Scrutiny) Act 2011* is welcome, but the high proportion of inadequate

¹ See *Interim Report*, 36.
² E.g., the character test, privative clauses and detention provisions of the *Migration Act 1958* (covered in the *Interim Report*, Chapters 6, 10 15 and 18) and the large number of terrorism-related offences introduced into the Commonwealth Criminal Code in recent years (mentioned in Chapters 3, 4, 5, 6, 9, 10, 11, 12, 13, 14, 15 and 18).
³ Ibid, 466.
⁴ Ibid, 24.
⁵ Ibid, 33.
Statements of Compatibility (SoCs) and the Executive’s subsequent unresponsiveness to the JCHR’s recommendations is cause for concern.6

We also demur from the apparent suggestion in the Interim Report that ‘procedural justification’ might suffice to found an argument that enough is already being done to ensure that Australian legislation is rights-compatible.7 Australian Public Service guidelines and procedures, in combination with relatively robust parliamentary processes and checks by external agents such as the media, the ALRC and the Australian Human Rights Commission (AHRC), are clearly important balances in the broader legislative process. However, they have proven insufficient to restrain the enactment of many laws which conflict with Australia’s human rights obligations. In particular, where the major political parties agree on a policy course in an area such as national security, advice from the AGD, recommendations from scrutiny committees and statutory authorities such as the Independent National Security Legislation Monitor (INSLM), is routinely ignored (either in full or in part). The Interim Report itself highlights this phenomenon, for example in the case of the recent Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, which encroaches on at least seven of the identified TRFs.8

In short, the Australian Government already has both the information and the means at its disposal to ensure that it does not unjustifiably infringe rights and freedoms. However, serious and significant reform will be required to effect significant improvement in this regard. As outlined below, the Government’s recent record when it comes to legislation, administration and treatment of oversight clearly indicates a need for a stronger dialogue model, such as those found in other common law jurisdictions which involve the courts as independent overseers.9

Traditional Rights and Freedoms vs Human Rights Law

As the Interim Report makes clear, many of the TRFs in the terms of reference have had questionable histories of protection under Australian law. Some, such as freedom of speech and freedom of association, are inarguably traditional and internationally-respected, yet suffer from severely limited protection in Australia. Others which concern court processes directly enjoy better protection due to the constitutional position of the courts, but even this protection sometimes falls short of international human rights standards.

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6 The author has been tracking the Government’s interactions with the JCHR as part of his PhD research.
7 See Interim Report, 33-34 and Chapter 2.
8 Ibid, Chapters 3, 4, 6, 7, 14, 15 and 18.
9 Concerns about ‘transplanting’ international human rights standards, as cited in the Interim Report at pp 31-32, could be addressed by implementing a domestic Human Rights Act, which would allow domestic human rights jurisprudence to develop.
Rights concerning the courts directly

It is no coincidence that some of the rights best protected by the common law are fair trial rights and rights concerning access to justice. Incidents of the judicial power in Chapter III of the Constitution and rights considered fundamental to the operation of justice are strongly enforced by the courts, up until the point at which they come into conflict with unambiguous legislative overrides. This is the proper approach under our constitutional arrangements, and it would be appropriate if Parliament only passed laws which interfere with these rights very rarely and in case of demonstrated necessity.

However, the Interim Report makes it clear that laws limiting access to the courts, placing the onus on the defendant in criminal trials, removing protection against self-incrimination, restricting open justice, limiting the right to legal representation – even overriding the deep-rooted principle of double jeopardy – are proliferating in Australia. Too often, the justifications advanced by the Government are vague or involve prejudgment. For example ‘protecting national security,’ ‘overcoming difficulties in prosecuting certain offences’ (in relation to strict liability) or ‘limiting fruitless appeals’ (especially in relation to immigration matters). As noted in the Interim Report, concerns have been raised continually about these kinds of provisions and the inadequate justifications provided for them by the Government.

The courts naturally do all they can to protect their ‘essential character,’ including ensuring fair trials and equality before the law. This provides an important measure of rights protection for those appearing before them. However, the Parliament’s heavy-handed regulation of many judicial processes is making this task increasingly difficult.

An extreme example of a potential circumvention of justice is the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, which would prescribe the extremely grave consequence of a permanent loss of Australian citizenship (for adults and children) in a manner which involves no administrative decision, and arguably could not therefore be subject to judicial review. A high profile parliamentary inquiry into the Bill by the Joint Committee on Intelligence and Security (possibly the only parliamentary committee to be described as ‘high-powered’ in the media) noted that Canada, New Zealand, the US and the UK all have citizenship deprivation mechanisms which preserve a role for the courts (either directly or as reviewers), and that legal expert submission expressed ‘strong concerns,’ but did not recommend the proposed Australian mechanism be changed accordingly. In the face of such legislation, the courts’ ability to protect Australians’ rights suffers.

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11 Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, ss 33AA-36AA. We note, however, that a court challenge could probably be mounted to contest whether certain jurisdictional facts had taken place.
13 See Joint Committee on Intelligence and Security, Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, September 2015, [S.101-S.105]. The Committee did recommend that the Minister be required to consider whether to exercise a discretion to exempt a person from the operation of
All Other Rights

When it comes to rights (such as freedom of speech, religion, movement and association and many others) which do not relate directly to curial processes, Australians’ prospects for enforcement are uncertain at best. A law which undermines the ‘essential character’ of a court may be ruled unconstitutional, but one which criminalises mere association with a proscribed organisation (section 102.8 of the of the Commonwealth Criminal Code) or simply visiting a certain area (section 119.2) is very difficult to challenge, unless it is ambiguously drafted.

One of the most controversial rights restrictions enshrined in Commonwealth legislation is the prescription of indefinite detention for ‘unlawful non-citizens’ (regardless of personal circumstances) in the Migration Act 1958. Since habeas corpus and personal liberty were curiously omitted from the list of TRFs in the terms of reference, and the Interim Report does not contain a Chapter 19 on ‘Other Rights, Freedoms and Privileges’ (as presaged in IP46), it seems that the justification for this and related provisions will not be examined by the present inquiry (except perhaps indirectly).

The terms of reference also specifically require the inquiry to consider workplace relations laws, and to consider their effect on, for example, freedom of religion and freedom of association, but preclude detailed consideration of other highly pertinent rights such as the work-related rights in the International Covenant on Economic, Social and Cultural Rights and various International Labor Organization treaties (even though many of the relevant submissions to the inquiry referred to these treaties).14

This selectiveness in the terms of reference underpins, in our view, one of the most powerful arguments for the inappropriateness of the Attorney-General’s selected TRFs as a benchmark for assessing the rights compatibility of Commonwealth laws. The ability of the Government to avoid (further) unwelcome recommendations by setting its own standards undermines what is otherwise a welcome and overdue audit of the statute book.

Human rights are interrelated, interdependent and indivisible. The present inquiry is one of many investigations which have revealed the enormously variable recognition and/or protection afforded to rights under Australian law, and highlight the need for a more cogent and consistent approach.

14 See Interim Report, 146 – ‘The extent to which obligations under ILO Conventions engage the scope of common law or traditional understandings of freedom of association may be contested.’
Adequacy of Existing Scrutiny/Monitoring Mechanisms

The concept of procedurally justified legislation, as presented on page 33 of the Interim Report, is sound. Australia’s current system of democratic checks and balances on legislation includes several procedures as identified by the ALRC aimed at maximising compatibility with rights and freedoms. Some of these (including the work of the JCHR and the AHRC) are specifically aimed at ensuring compatibility with Australia’s international human rights obligations.

However, most of these procedures have been in place for some time, and they have not prevented the passage of Commonwealth legislation facilitating (or even mandating) actions found to breach Australia’s obligations by independent actors such as the UN Human Rights Treaty Bodies. Examples include laws which authorise:

- indefinite administrative detention (including of children, sometimes in conditions constituting cruel, inhuman or degrading treatment);
- deportation of people without rigorous consideration of implications for refoulement prohibition or families’ rights (sometimes simultaneously rendering judicial and/or merits review unavailable);
- denial of procedural fairness in respect of security assessments, and
- denial of the right to be present during an appeal in one’s criminal case.

In Chapter 2 of the Interim Report, it is suggested that existing checks on legislative power could be enhanced. For example:

Additional procedures could be put in place to improve the rigour of statements of compatibility and explanatory memoranda to assist Parliament in understanding the impact of proposed legislation on fundamental rights, freedoms and privileges.\(^{15}\)

The Government has already stated its opposition to any requirement to provide more detailed justification in Statements of Compatibility (SoCs). The JCHR, in commenting on the National Security Legislation Amendment Bill (No. 1) 2014 and its SoC, found that it contained many overly general descriptions of proposed measures which did not enable the committee to evaluate the Bill’s human rights compatibility. It requested explanations of a rational connection and proportionality assessments for each measure.\(^{16}\) In his response to the JCHR, the Attorney-General wrote:

> I am aware that the Committee has expressed a view that the Statement does not provide sufficient information for it to conduct any assessment of whether various provisions in the Bill (now Act) constitute permissible limitations on the rights engaged and, therefore, to reach a conclusion on whether the Bill (now Act) is compatible with human rights....

\(^{15}\) See Interim Report, 51.

While acknowledging that this [an itemised analysis of measures in legislation] is the Committee’s preference based on its interpretation of [the relevant guidance materials], I do not agree with its apparent suggestion that there is a formal requirement that Statements must include “a separate and detailed analysis of each measure that may limit human rights”. More particularly, I do not agree with the Committee’s contention that such an itemised account is necessary in order for it to discharge, or to document in its reports any demonstrable attempt to discharge, its statutory mandate to undertake an analysis of the human rights compatibility of Bills introduced to the Parliament (especially those Bills which may limit human rights).17

It should also be noted that, since the advent of the 44th Parliament, not a single recommendation to amend legislation from the JCHR has been taken up by the Government.18 By comparison, during the 43rd Parliament, there were at least five commitments to amend legislation as a result of the JCHR’s reporting, along with several other concessions such as improvements to SoCs.19 The constraints on parliamentary scrutiny committees identified in the Interim Report20 may well restrict their ability to produce the highest quality reports possible. However, given the Government’s reluctance to address concerns raised in the existing (already relatively comprehensive) reports, focussing on these constraints is unlikely to increase the efficacy of scrutiny processes significantly.

We acknowledge that amendments resulting from committee reports should not be the sole indicator of efficacy,21 but their less tangible influences, including on parliamentary debate and public service behaviour/transparency, should not be overstated. The efficacy of the JCHR’s scrutiny processes, including at the Australian Public Service level, has been the subject of intensive research by this author, and the (as yet unpublished) results are not promising. For example, references in parliamentary debate could be described as vanishingly few compared with the references made in the UK Parliament to its equivalent committee (particularly since 2005).22 In addition, the UK Committee is frequently described by experts as principled, robust and well-respected,23 whereas the Australian JCHR has, since 2014, tended away from the bipartisanship24 and thoroughness of analysis25 which

17 Ibid, 35-38.
18 This assertion is based on an examination by the author of every Ministerial response to the JCHR to July 2015.
19 Amendments were made (or promised to be made) in respect of the Australian Charities and Not-for-profits Commission Bill 2012; National Disability Insurance Scheme Bill 2012; Customs (Drug and Alcohol Testing) Regulation 2013; Parliamentary Budget Office Bill 2013, and the Customs (Drugs & Alcohol) Regulation 2013 [NB only after disallowance motion initiated by the JCHR].
20 Interim Report, 51-54.
21 Ibid, 53.
22 Ibid, 54.
24 See eg JCHR, Chair’s Tabling Statement, 25 November 2014.
characterised its early years. Interviews with public servants also suggest that it has yet to earn the respect which is accorded to some other policy or scrutiny committees.  

The recommendations at the end of Chapter 2 of the Interim Report all constitute sensible, moderate reforms which could give a small boost to the current scrutiny regime, but more radical reforms such as those mooted in paragraph 2.68 will be necessary to make an appreciable difference to legislative outcomes. In fact, given the Executive dominance of parliamentary processes and the bipartisan approach of the major parties to, for example, national security legislation with serious rights implications, it is likely that nothing short of a Human Rights Act with an oversight role for the courts stands a chance of significantly reducing encroachments by Commonwealth laws on Australians’ rights and freedoms.

The Interim Report also mentions monitoring mechanisms and scheduled reviews, which are crucial in identifying whether Commonwealth legislation encroaches on rights and freedoms in practice as well as in the abstract. Reviews of the operation of legislation by, for example, parliamentary committees, are certainly valuable exercises. However, for practical reasons, they are often scheduled for a number of years after enactment, and not on a recurring basis. Moreover, reviews and sunset clauses are, as the Interim Report recognises, not prescribed for potentially rights-infringing legislation in APS drafting guidance documents as they should be.  

Ongoing independent monitoring of the operation of legislation affecting Australians’ rights and freedoms, such as that performed by the INSLM, is rare. One example of monitoring which Australia should be doing to reduce encroachments in a sensitive area is detention monitoring. Australia signed the Optional Protocol to the Convention Against Torture in 2009, but has yet to ratify it and implement the monitoring mechanism it requires of States parties. This is despite a clear recommendation to do so from the Joint Standing Committee on Treaties.

Generally speaking, enabling further independent monitoring of the operation of Commonwealth law likely to affect rights and freedoms should be a key element of any plan to reduce encroachments in this regard. Existing Ombudsmen’s offices, Public Advocates and Human Rights Institutions are well-placed to conduct such monitoring. However, as discussed below, resource allocation and Government attitudes to advocacy for reform are major obstacles.

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26 Ministerial attitudes to human rights probably have a bearing on public servants’ approach to the JCHR.
27 See Interim Report, 39.
Excluded Encroachments

The Castan Centre recognises that the present inquiry is limited by the terms of reference to a review of Commonwealth laws which, of themselves, encroach on rights and freedoms. However, we are also concerned about other encroachments, including laws which fail to guarantee independence and stability for statutory authorities and other Commonwealth-funded entities.

For example, the AHRC is funded like any other statutory agency under the Attorney-General’s portfolio, despite the UN Principles Relating to the Status of National Human Rights Institutions (Paris Principles) requiring:

...an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence.29

In December 2014, the Government announced that it would cut funding to the AHRC by approximately 30% over the following three years, in addition to cuts announced in the 2014 Budget. As the Human Rights Law Centre (HRLC) observed, the announcement closely followed the release of the AHRC’s findings in relation to children in immigration detention, which were unfavourable to the Government.30 The HLRC further asserted that:

These cuts will significantly weaken the Commission and reduce the government’s accountability on human rights at a time when rights are being severely threatened, in particular by harsh migration and counter-terror laws.31

In addition, the former Disability Discrimination Commissioner Graeme Innes, who was a formidable advocate of improved disability services, was not replaced at the end of his term in July 2014. Rather, the Age Discrimination Commissioner was asked to cover his vital role in addition to her existing duties. Similarly, former Sex Discrimination Commissioner Broderick, who made many notable strides towards equality in administration over her two terms in office, came to the end of her tenure this month and the Government is once again refusing to name a successor, or even committing to appointing one at all.32

Similarly, the offices of INSLM and Independent Reviewer of Security Assessments were both proposed to be abolished by the present Government.33 The Attorney-General’s

31 Ibid.
32 See “‘Have a thick skin’ – sex discrimination commissioner’s advice to her successor,’ The Guardian, 1 September 2015: <http://www.theguardian.com/world/2015/sep/02/have-a-thick-skin-sex-discrimination-commissioners-advice-to-her-successor>.
justification for the proposal to abolish the former office was that it would ‘streamline government processes’ and save $1.36m over four years.\textsuperscript{34} Although both plans were eventually abandoned, the Government left the INSLM role unfilled for around six months in 2014, and has still not appointed an official successor to Bret Walker SC (The Hon Roger Gyles AO QC has acted in the role on an interim basis since December 2014).\textsuperscript{35}

Finally, the Government announced in 2014 that it would abolish the Office of the Australian Information Commissioner, along with the associated roles of Information Commissioner and Freedom of Information Commissioner, held until recently by Professor John McMillan and James Popple respectively. Although the relevant legislation failed to pass, funding was reduced in the 2014-15 Budget to the point where the Commissioner began working from home.\textsuperscript{36} In recognition of the failure to disestablish the Office, funding was partially restored this year. However, Mr Popple resigned in December 2014 and it was announced in June this year that Professor McMillan would also leave the office to become the new NSW Ombudsman, leaving only Privacy Commissioner Timothy Pilgrim to fulfil the statutory functions associated with all three roles. Again, the Government has not made any announcements regarding replacements.\textsuperscript{37} This omission was seen as sufficiently serious for three former justices of the Supreme Court of Victoria to accuse the Government publicly of failing in its constitutional obligation to execute and maintain the laws of the Commonwealth in relation to this ‘crucial element in our flawed federal integrity system.’\textsuperscript{38}

In light of the observations in the Interim Report about the oversight provided by statutory authorities being a key factor in any argument that Commonwealth legislation may be considered procedurally justified, this systematic reduction in funding for oversight bodies is pertinent to the present inquiry.

Funding cuts to Commonwealth Legal Aid in criminal matters announced as part of the 2013-14 MYEFO are also relevant.\textsuperscript{39} These cuts were in addition to $3.5m of funding withdrawn as part of the 2014 Budget.\textsuperscript{40} They compelled State Legal Aid agencies to restrict


funding and tighten means tests for both criminal and family law cases. The cuts announced to date in this area have been so severe that all of the State and Territory Attorneys-General wrote to the Commonwealth Attorney-General in May 2015 warning of an impending crisis in funding for legal representation for vulnerable Australians.

This situation demonstrates that Budget bills and other appropriations, despite the Governments’ protestations to the JCHR, can raise significant rights issues and should (at a minimum) be accompanied by detailed SoCs. In addition, they should be included in the present inquiry, given they can encroach so significantly on Australians’ rights and freedoms (both traditional and human) such as the rights of access to the courts, equality before the courts and to legal representation in criminal matters.

Community Legal Centres also play a prominent role in guaranteeing the rights set out above, and they have also suffered from deep Commonwealth budget reductions. In addition, in July 2014 the Commonwealth Government began to amend their service agreements to prevent them from advocating legal reform and/or policy change. These service agreements may not constitute legislation, and therefore fall outside the ALRC’s purview, but they constitute yet another example of the Commonwealth Government encroaching on rights and freedoms; even those which it has professed to revere, such as freedom of speech. Tying Commonwealth funding to a ban on advocacy not only encroaches on Community Legal Centres’ free speech rights, but also silences suggestions for reform of the very kinds of laws in the present inquiry’s terms of reference.

The preceding examples demonstrate a pattern in the Government’s approach to oversight and accountability which is antithetical to any effort to reduce encroachment on Australians’ rights and freedoms.

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42 See Massola, Whitbourn and Willingham, above.
43 See JCHR, Eighth Report of the 44th Parliament, June 2014, Appendix 2 (Correspondence from Finance Minister Cormann received 18 March 2014).
Conclusion

The Government has stated that it is concerned about encroachments on TRFs, and initiated the present inquiry as a result, but its practice (both legislative and administrative) to date has greatly expanded the scope of such encroachments, and continually sought to remove or undermine relevant oversight and advocacy for reform as set out above.

The Government has stated that it believes oversight bodies such as the INSLM to be redundant, because it is the proper role of the Parliament (including parliamentary committees) to review Australia’s laws. This argument carries little weight, because the Government is largely unresponsive (or even hostile) to the concerns of the scrutiny committees, including the JCHR, whose role it is to examine legislation for possible encroachments on rights and freedoms.

The Government also emphasises its faith in the courts and the common law to protect Australians’ rights and freedoms. However, the Commonwealth courts are only able to address controversies between parties, not systemic policy issues. In addition, such a stance fails to appreciate that, as identified by the present inquiry, many threats to Australians’ rights and freedoms originate in the Government’s own legislation, and the courts are not empowered to change that. Even when they do favour a rights-compatible interpretation, such as in the Mabo decision of 1992, the Teoh decision of 1995 or the Malaysia Solution decision of 2011, Governments from either side of politics have bristled at what they deem ‘interference,’ and announced that they will amend legislation to close the identified ‘loophole’ preventing them from implementing their policies. These are not the actions of a polity with a culture of respect for human rights.

As stated in our previous submission on IP46, our firm view is that the terms of reference for the present inquiry are misconceived. We are particularly concerned that, by purporting to set its own benchmarks for the rights-compatibility of legislation, the Government is undermining its voluntarily adopted international obligations in this regard. Nevertheless, the Castan Centre supports the ALRC’s important work in assessing the proportionality of the many laws identified in the Interim Report, and looks forward to a Government which will take a more serious and enlightened approach to the human rights compatibility of Australian law.

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