Refugee Council of Australia

September 2015

AUSTRALIAN LAW REFORM COMMISSION

RESPONSE TO THE TRADITIONAL RIGHTS AND FREEDOMS INQUIRY INTERIM REPORT

The Refugee Council of Australia (RCOA) is the national umbrella body for refugees, asylum seekers and the organisations and individuals who work with them, representing 200 organisations and 1,000 individual members. RCOA promotes the adoption of humane, lawful and constructive policies by governments and communities towards refugees, asylum seekers and humanitarian entrants both within Australia and internationally. RCOA consults regularly with its members, community leaders and people from refugee backgrounds, and this submission is informed by their views.

RCOA welcomes the opportunity to provide feedback on the Australian Law Reform Commission (ALRC) Review of Commonwealth Laws for Consistency with Traditional Rights, Freedoms and Privileges. This submission provides a response to the Traditional Rights and Freedoms – Encroachments by Commonwealth Laws Interim Report released by the ALRC in July 2015 (Interim Report). Following RCOA's initial submission[1] providing an overview of some of the most troubling of these laws and policies, this submission takes into account the content of the Interim Report and highlights laws that merit further investigation in the inquiry. Specific focus is given to laws which unreasonably restrict freedom of movement, in particular arbitrary detention and laws which unreasonably restrict freedom of speech, retrospectively change legal rights, change the burden of proof and deny procedural fairness.

1. Positive Aspects

1.1. RCOA commends the Interim Report as noting migration law as an "area of particular concern" in relation to judicial review and retrospectivity. For many years, RCOA has expressed serious concern about laws and policies which infringe upon the rights and freedoms of people seeking protection in Australia.

1.2. The Interim Report rightly emphasises a strong focus on the lack of procedural fairness afforded by the *Migration Act,* including in relation to ASIO assessments, fast track, mandatory cancellation and the use of maritime powers. RCOA would support further review of these laws. A review of mandatory cancellation in particular would be welcome given the significant increase in the number of cancellations under these provisions, resulting in potentially indefinite detention.

2. Limited Terms of Reference

2.1. We note that certain rights which would fall into the category of "traditional rights and freedoms" have not been included in this inquiry. Examples of these include: freedom from torture; freedom from arbitrary detention; right to privacy; and non-interference.

[1] Available at http://www.refugeecouncil.org.au/wp-content/uploads/2015/03/1502-Freedoms.pdf

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2.2. We note that certain rights have been excluded and not considered to be "traditional", such as freedom from discrimination, freedom from vilification and the right to health. This prevents a comprehensive analysis of the rights implications of Commonwealth laws and policies.

2.3. We understand that the terms of reference for this inquiry are limited. We would however welcome a clearer acknowledgement of the limitations and therefore the scope of this inquiry.

Recommendation 1
RCOA recommends that the inquiry include freedoms such as freedom from torture; freedom from arbitrary detention; right to privacy; and non-interference and others also falling into the category of "traditional rights and freedoms".

3. Freedom of Movement, the Right to Liberty and Freedom from Arbitrary Detention

3.1. The Interim Report adequately recognises freedom of movement as a "traditional" freedom. However, RCOA believes there is a need for a more detailed analysis of the implications of immigration detention provisions for freedom of movement. While some restrictions may be justified in the case of people who arrive unlawfully, the extent of the restrictions currently permitted in Australian law certainly exceed what is justified. For example, a short period of detention to conduct security and health checks may be permissible, yet indefinite detention without judicial review or any individualised assessment of the need to detain is entirely unjustifiable.

3.2. We note that there is no mention of the following important issues that were highlighted in our initial submission: offshore processing and detention, forcible transfer, detention at sea, forcible transfer at sea and indefinite detention on security or character grounds. Australia is clearly exercising effective control over these issues, which brings them within Australia's jurisdiction and therefore within the scope of the "traditional rights and freedoms" subject to this inquiry.[2]

3.3. We note that the right to liberty and freedom from arbitrary detention have not been independently considered by the Interim Report despite each being established on its own merits as a traditional right/freedom.

3.4. The right to liberty and freedom from arbitrary detention are a fundamental human rights. In addition to being embedded in international law, these rights are also found in classical and "traditional" rights, such as in the Magna Carta.

3.5. The Magna Carta clause 29 provides that "No Freeman shall be taken, or imprisoned, or be disseised, or outlawed, or exiled, or in any way harmed save by the lawful judgment of his peers or by the law of the land." The 1689 Bill of Rights provides that no excessive bail or "cruel and unusual" punishments may be imposed. The 1789 Declaration of the Rights of Man acknowledges the rights to "liberty, property, security and resistance to oppression." Furthermore, Article 8 provides that "the law shall provide for such punishments only as are strictly and obviously necessary." [3]

3.6. Article 9 of the Universal Declaration of Human Rights states that 'no one shall be subjected to arbitrary arrest, detention or exile'. Furthermore, Article 9(1) of the International Covenant on Civil and Political Rights states that 'everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.'[4] In addition, Article 9(4) states that 'anyone

[2] It has been well established under international law that a State's jurisdiction extends to wherever the State exercises effective control. See Lauterpacht, E and Bethlehem, D (2003), "The Scope and Content of the Principle of Non-Refoulement: Opinion" in Erika Feller, Volker Türk and Frances Nicholson (eds), Refugee protection in international law: UNHCR's global consultations on international protection, Cambridge University Press, 110.
[3] For a comprehensive analysis of immigration detention and the rule of law see the Bingham Centre for the Rule of Law, *Immigration Detention and the Rule of Law,*
http://binghamcentre.biicl.org/documents/187_immigration_detention_and_the_rule_of_law_report.pdf
[4] *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court'.[5]

3.7. It is clear that both the right to liberty and freedom from arbitrary detention fall within the scope of "traditional rights and freedoms" and are within the scope of this inquiry. We recommend that all laws with regard to detention be examined in light of these in the inquiry.

Recommendation 2

Per Recommendation 1 of our initial submission (see footnote 1) RCOA recommends that:

a) Mandatory immigration detention be abolished in favour of a discretionary system under which detention is applied as a last resort and only when strictly necessary;
b) Immigration detention is restricted to a maximum of 30 days without judicial review and six months overall

Recommendation 3

RCOA recommends that the inquiry include a comprehensive analysis of the laws relating to the issues of offshore processing and detention, forcible transfer, detention at sea, forcible transfer at sea and indefinite detention on security or character grounds.

4. Freedom of Speech

4.1. RCOA believes there is the need for a direct and detailed analysis of the laws enabling the restrictions on media coverage of Australia's immigration detention system, Operation Sovereign Borders, and the systemic abuse of rights within the detention centres in Nauru and Papua New Guinea that are funded entirely by Australia. We refer to point 2 of our initial submissions in this regard.

4.2. With regard to the potential reintroduction of the amendments to section 18C of the *Racial Discrimination Act 1975* (RDA), we express concern that the proposed amendments would provide a licence to the community to engage in racist behaviour and may lead to further acts of racially motivated violence.

4.3. We submit that the currently existing sections 18B, 18C, 18D and 18E protect people from the harm of racial vilification and discrimination, as exemplified by almost 20 years of case law. We argue that there is a lack of a clear rationale for these changes, which have only been brought about after extensive media attention regarding one case. Indeed, research shows that these laws have been considered in less than 100 finalised court cases since 1995 and RCOA argues that the courts have applied these laws reasonably and appropriately.

4.4. We have previously expressed concern regarding the potential effects of the proposed amendments on refugee communities who are often persecuted on grounds of race. People of refugee background have continuously emphasised the importance of protecting against racist hate speech, which can easily lead to racially motivated violence, physiological harm and other serious issues. Many refugee communities have fled persecution on the basis of their race, being one of the five grounds on which people are entitled to seek protection as refugees under the 1951 Refugee Convention. Refugee communities are among the minority groups who would be most affected by these changes to the law and as such it is important to consider their needs when assessing the proposed amendments.

4.5. We acknowledge the concerns expressed about the potential limitations on freedom of speech resulting from the RDA. We however note that there is no evidence that these limitations have been seen in practice. Further, concerns about the RDA seem to focus on the wording of s18C in isolation, without considering the protections provided by s18D or existing case law.

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[5] *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

Recommendation 4
RCOA recommends that the amendments to section 18C of the Racial Discrimination Act should once again be 'taken off the table'.

5. Procedural Fairness

5.1. The Interim Report adequately addresses the laws regarding indefinite detention on grounds of security assessment. Concerns relating to lack of transparency, and lack of notice and reasoning provided to asylum seekers and their legal representatives are well addressed.

5.2. We note however, that indefinite detention on grounds of character has not been addressed. Indefinite detention on grounds of both security and character equally fall within the scope of the inquiry.

Recommendation 5
RCOA recommends that the laws regarding indefinite detention on grounds of character are equally considered in the inquiry.

6. Retrospective Laws

6.1. RCOA notes that the Interim Report acknowledges our initial submissions with regards to the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* at 9.85 of the report. However it is unclear whether the Interim Report is indicating these issues as evidence of encroachment on traditional rights and freedoms, or as an example of a justification that the ALRC considers to validate such laws. We would welcome a clarification of this section. We reiterate our initial submission that these laws are unjustified.

6.2. We note that the *Migration Amendment (Protection and Other Measures) Act 2015* has not been considered in the Interim Report.

Recommendation 6
RCOA recommends that this Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 be considered in the inquiry, with regard to its potential retrospective application. We refer to points 5.4 and 5.5 of our initial submissions in this regard.

7. Burden of Proof

7.1. RCOA notes that migration law as a whole has not been considered with regard to the burden of proof other than one reference at 11.67. The *Migration Amendment (Protection and Other Measures) Act 2015* seeks to shift the burden of proof onto asylum seekers to specify the parameters of their protection claims and provide sufficient evidence to support these claims. We refer to point 6 of our initial submissions in this regard.

Recommendation 7
RCOA strongly recommends that the area of migration law be considered in more detail, with particular attention given to the *Migration Amendment (Protection and Other Measures) Act 2015* passed earlier this year.