



*Australian Council
for Civil Liberties*

CCLS Submission to the Inquiry on Traditional Rights and Freedoms: Encroachments by Commonwealth Laws

18TH October 2015

*A combined submission from:
NSW Council for Civil Liberties
Liberty Victoria
Queensland Council for Civil Liberties
South Australian Council for Civil Liberties
Australian Council for Civil Liberties*

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1. INTRODUCTION

The Councils for Civil Liberties across Australia (CCLs)¹ are grateful for the opportunity to provide a submission to the Australian Law Reform Commission (ALRC) on its Interim Report 127 on Traditional Rights and Freedoms – Encroachment by Commonwealth Laws (**Interim Report**).

Given the ever-increasing body of Commonwealth legislation that infringes civil rights and liberties; we consider that this Inquiry is an important start to a national conversation about how to better protect freedoms and human rights in Australia.

While we hope for positive outcomes from such a major exercise, we consider the cumulative work done already by the ALRC in its Issues Paper and this Interim Report and by the many individuals and groups who made submissions to the Issues Paper and are responding to this Report have already generated a very valuable resource.

1.1. Terms of Reference

We share the concerns expressed by the Castan Centre for Human Rights and the Human Rights Law Centre and others in their submissions to this Inquiry as to the limited terms of reference, namely that:

- the express focus on an incomplete, arbitrarily selected set of common law rights is unduly narrow and ignores the full suite of human rights contained in international treaties that Australia has ratified and explicitly made reference to in Australian law;²
- even within the common law framework we agree with Professor Saul that the omission of the right to personal liberty including freedom from unlawful detention is inappropriate; a separate chapter should be included distinct from the existing freedom of movement chapter,³
- the scope of the inquiry is restricted to identifying and critiquing individual Commonwealth provisions that encroach on traditional rights on an ad hoc basis.

¹ Liberty Victoria, New South Wales Council for Civil Liberties, Queensland Council for Civil Liberties, South Australian Council for Civil Liberties and Australian Council for Civil Liberties.

² Australia has signed and ratified a number of international human rights treaties including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC), the Convention against Torture (CAT), the Convention on the Elimination of All forms of Racial Discrimination (CERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of Persons with Disabilities (CRPD), as well as a number of optional protocols to these treaties. These human rights treaties have also been referenced in Australian Commonwealth law including the *Australian Human Rights Commission Act 1986* and the *Human Rights (Parliamentary Scrutiny) Act 2011*. The CCS endorses the submissions of the Castan Centre for Human Rights Law February 2015.

³ Submission 85

Recommendation 1

- i) The CCLS recommend that the ALRC includes in its final report a separate review of the right to personal liberty including the freedom from unlawful detention; and***
- ii) A discussion on broadening the definition of human rights and freedoms to include the suite of human rights contained in international treaties that Australia has ratified and explicitly made reference to into Australian law in any flow-on work from this review.⁴***

1.2. Scope of submission

This submission does not attempt to comment on all of the areas of law and process considered in the Interim Report. We offer some relatively detailed comments on several chapters and briefer generalized comments in relation to others.

- Chapter 2 Scrutiny Mechanisms
- Chapter 3 Freedom of Speech
- Chapter 5 Freedom of Association
- Chapter 9 Retrospective Laws
- Chapter 12 Privilege against self-incrimination
- Chapter 14 Strict and absolute liability
- Chapter 15 Procedural fairness

In summary, this submission:

- Endorses and adopts a human rights framework for determining whether encroachment of Commonwealth law on rights is appropriately justified;
- Recommends that the ALRC includes in its final report a separate review of the right to personal liberty and from unlawful detention; and a discussion of the need to broaden the definition of human rights and freedoms to include the suite of human rights contained in international treaties that Australia has ratified and explicitly made reference to in Australian law in any flow-on work on this agenda;
- Recommends that a number of laws that unjustifiably encroach on human rights be subject to further review with a view to amendment or repeal;
- Argues that existing scrutiny mechanisms inside and outside parliament do not currently provide an effective protection against progressive statutory encroachments on fundamental freedoms and rights;
- Recommends that effective protection of fundamental freedoms and rights against unjustifiable encroachment by Commonwealth laws requires the enactment of an Australian Charter or Bill of Rights.

⁴ Australia has signed and ratified a number of international human rights treaties including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC), the Convention against Torture (CAT), the Convention on the Elimination of All forms of Racial Discrimination (CERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of Persons with Disabilities (CRPD), as well as a number of optional protocols to these treaties. These human rights treaties have also been referenced in Australian Commonwealth law including the *Australian Human Rights Commission Act 986* and the *Human Rights (Parliamentary Scrutiny) Act 2011*. The CCS endorses the submissions of the Castan Centre for Human Rights Law February 2015.

2. HUMAN RIGHTS FRAMEWORK FOR DETERMINING ENCROACHMENT

We endorse the test of proportionality as developed and applied in common law, international and domestic state- based human rights jurisprudence as the appropriate framework to determine whether an encroachment of a right is justified.⁵

This test involves asking whether any limitation of rights is reasonable and demonstrably justified in a free and democratic society. As set out in the Canadian case *R v Oakes*,⁶ this requires asking the following critical questions in order to determine if a limitation of a right is justified:

- a) What is the purpose of the limitation of the right?
- b) Is this purpose justified in a free and democratic society?
- c) Are the means of the limitation reasonable in that:
 - i. The measures adopted are rationally connected to the objective;
 - ii. The means impair the right in question as little as possible; and
 - iii. The effects of the measures are proportionate to the objective.⁷

The CCLs considers that adopting this framework will ensure that there is a consistent, logical and transparent way of protecting and balancing the fundamental rights and freedoms of individuals with the community interests, such as national security, public order, safety and health.

3. SCRUTINY MECHANISMS

In Chapter 2 the ALRC has provided a comprehensive description of the multiple points for scrutiny of legislation to protect rights and liberties from unjustified statutory encroachment - from policy inception to parliamentary consideration and post enactment review of a law's implementation. The number and variety of scrutiny mechanisms looks impressive and reassuring.

It is a standard Government response to dismiss responsible and well-informed concerns about the serious encroachment of proposed legislation on rights and freedoms with reference to these multiple oversighting and review mechanisms. The strong implication is that the multiple

⁵ See also Human Rights Law Centre, *Submission 39*; UNSW Law Society, *Submission 19*; Law Council of Australia, *Submission 75*.

⁶ *R v Oakes* [1986] 1 SCR 103 as cited with approval in *Kracke v Mental Health Review Board* [2009] VCAT 646 [145] and in *R v Momcilovic* [2010] VSCA 50.

⁷ Similarly, s 7 of the Charter of Human Rights and Responsibility requires that all relevant factors are taken into account, including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose and any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

scrutiny mechanisms provide the community with ample grounds for confidence that liberties and rights will be effectively and appropriately protected.

The CCLs consider this to be an unjustified assertion.

The CCLs have a long history⁸ of engagement with the Australian Parliament advocating for or against a wide range of laws that impinge on civil liberties and human rights. We have extensive, collective experience with the bureaucratic and parliamentary scrutiny bodies/mechanisms which are meant to protect these rights and liberties from unjustified statutory encroachments.⁹

We appreciate that many of the parliamentary committees and independent review bodies do excellent work and that the mandated and de facto consideration of the impact of legislation on human rights has been greatly expanded in recent years. Nonetheless, over the last decade or so – and especially in the current Parliament – there have been multiple laws enacted which seriously undermine fundamental rights and liberties essential to a free and robust democracy¹⁰. Observably, the safeguard scrutiny mechanisms have not protected us from this deeply disturbing trend. The improvements that they have been able to effect have been very much at the margins.

The ALRC does acknowledge process and other weaknesses in the scrutiny mechanisms in the Interim Report and floats some sensible and modest suggestions for improvement.¹¹ The CCLs support the need for these largely administrative improvements- but our concern is on a larger scale.

There is no evidence from recent history for any expectation that improving the functioning and/or scope of the existing public service, parliamentary and statutory scrutiny mechanisms will provide effective protection from further statutory encroachment on freedoms and rights - or any remedy for the significant recent erosion of these freedoms and rights. Electoral politics will continue to be the over-riding driver –especially in the areas of counter-terrorism, national security and border protection.

Without some stronger constraint, all existing evidence suggests the Australian Parliament will continue to pass laws which encroach on fundamental rights and freedoms.

⁸ Eg Liberty Victoria over 60 years; NSWCCCL over 50 years; Qld CCL 49 years.

⁹ Note the academic research being undertaken by Adam Fletcher Castan Centre for Human Rights Law p3

¹⁰ See the Table of Legislation for a list of relevant statutes. Interim Report Appendix 1pp 491-515. Also the recent paper by George Williams which lists 350 relevant state/territory and commonwealth statute : *'The Legal Assault on Australian Democracy*, Sir Richard Blackburn Lecture, ACT Law Society, 12 May 2015. Submission No 76 to this Review. Of course not all cited legislation will constitute an unjustified encroachment on freedoms and rights.

¹¹ Interim report: pars 2.45-2.2.7, pp 48- 54 ;par 2.51, p54 .

3.1. The Public Service

The importance of the early testing of policy options underpinning proposed legislation by many players including the public service is noted in the Interim Report. This is a large issue well beyond the parameters of this inquiry –but it is relevant to the safeguards issue.

While there are exceptions, and of course much occurs which is not publicly visible, the traditional and important role of the public service in providing impartial advice on the implications of policy options appears to be less than robust in some contexts. This trend is discernible in background papers, explanatory memorandums and in evidence to parliamentary committees.

A clear example was the very significant 2012 discussion paper on ‘proposals for telecommunications interception reform, telecommunications sector security reform and Australian intelligence community legislation reform’ from the Attorney-General’s Department¹². This discussion paper raised many areas for potential ‘reform’ of national security legislation- including the hugely contentious proposal for mandatory retention of telecommunications data.

The publication of a discussion paper to assist the community and was strongly welcomed as a constructive way of helping community bodies make informed submissions to the PJCIS inquiry on such a complex and important package of potential reforms in the intelligence and security area.

However, the material provided in relation to the mandatory data retention was so lacking in detail as to what the Government or the agencies might have in mind, that the NSWCCCL, like others, was unable to make any meaningful comment¹³. As became clear over time, this omission was not because the Department had no detail¹⁴. The ongoing failure to provide clarity on this matter remained a highly contentious issue up to and including the passage of the Bill in 2014.

A central issue for the discussion around the data retention proposal was, of course, the proportionate balance between a citizen’s right to privacy and national security. The coverage of this core rights issue in the paper was tokenistic.¹⁵ Comparison of the agency submissions to the related PJCIS inquiry could allow one to surmise that the discussion paper reflected the views of

¹² Attorney-General’s Department: Equipping Australia Against Emerging and Evolving Threat July 2012

¹³ NSWCCCL Submission to PJCIS Inquiry into Potential Reforms of the National Security Legislation, 21st August 2012. The paper’s inadequacies were discussed on p 5.

¹⁴ It was later revealed that the Department had a paper on the issue and had conducted consultations with industry around it. I

¹⁵ ‘The rhetoric is there but the substance necessary for a real and principled analysis of these important competing priorities is not. The willingness to cite administrative convenience as a sufficient reason for ‘reforms’ which extend intelligence agency powers, reduce rights and liberties and weaken accountability frameworks is one depressing manifestation of this’. ¹⁵ ibid p6.

the security agencies with little meaningful input from those parts of an Attorney-General's Department with a broader and impartial brief to balance security and citizens' rights.¹⁶

3.2. Explanatory Memorandum and Statement of Compatibility

The explanatory memorandum and statement of compatibility with human rights in relation to proposed legislation are important points for public service/government agency input into the scrutiny process.

These are important documents. They are widely relied on as the main source of information as to the contents and implications of the proposed legislation-especially when a bill is lengthy and complex. It is noticeable that members of the parliamentary committees often appear to be relying heavily on the explanatory memorandum rather than the actual bill for their understanding of the proposed legislation.

It is a major problem that some explanatory memorandum has been of poor quality because of incomplete, inaccurate or misleading descriptions of what the bill says and what its implications are. From an external perspective it is not clear whether this results from a lack of competence, time pressures or even the occasional deliberate intention to obscure implications. But clearly it weakens the scrutiny process at a critical point.

A very public example was the disconnect between the explanatory memorandum description of the content and implications of the controversial provision for ASIO Special Intelligence Operations immunity and the related s35P introduction of new criminal offences for disclosure by any person of any information in relation to these operations and the actual words and obvious implications in The National Security Legislation Amendment Bill (No 1) 2014.¹⁷

From our experience, many of the statements of compatibility are closer to rhetorical gestures than serious analysis. The ALRC notes that the Human Rights Committee itself has identified over 80 of these statements since January 2013 as being inadequate.¹⁸ It also references the complaints of both the Scrutiny of Bills and the Human Rights Committees about problems created for their work by deficient explanatory memorandums.¹⁹

Remedying this problem will not be easy. The ALRC does make some suggestions:

¹⁶ This is not to suggest the Security agencies views should not have been expressed in the paper.

¹⁷ For example the immediate controversy arising from the unexpected new offences criminalizing the unauthorised disclosure of information about an SIO by 'any person' was, not surprisingly, about the effect on journalists. The explanatory memorandum did not reference the capture of journalists under this provision and for some time the Government response was to assert that the provisions were not aimed at journalists. The non-reference to journalists in the EM led to initial confusion and debate as to whether they were or were not captured by the provision – though they clearly were. The EM had- at best -obscured a major effect of the provision. Explanatory Memorandum: National Security Legislation Amendment Bill (No. 1) 2014 pp111ff.

¹⁸ IR 2.53 p50

¹⁹ Ibid 2.55-2.57 p51

2.58 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. The object of such procedures would be to ensure that statements of compatibility and explanatory memoranda provide sufficiently detailed and evidence-based rationales for encroachments on fundamental rights, freedoms and privileges to allow the parliamentary scrutiny committees to complete their review.²⁰

While this is a sensible and obvious suggestion, in practice it is not likely in itself to drive any significant improvement in the quality of these checks. There are issues of resources and time frame. The effort put into producing statements of compatibility will always reflect the status these have within the public service.

3.3. The Committee System

Parliament is the decisive point for scrutiny of bills and the parliamentary committee reviews are a major contributor to the overall effectiveness of the parliamentary process.

Committees should provide parliament with well-informed analysis of the content and implications of proposed law. This is important for any complex legislative proposal. It is hugely important when the legislation could have serious impact on core democratic freedoms and rights. The Interim Report provides a useful summary of the committees which have a requirement – or a practical necessity - to consider either technical or policy merits of draft legislation in relation to the impact on human rights and freedoms. This submission comments on two of those: the Joint committee on Human Rights and the Parliamentary Joint Committee on Intelligence and Security.

Clearly much valuable work happens around and within the committees. When a public review process is established, it provides a focused –and much needed- point for community engagement and input. Since 9/11 civil society has put enormous work into responding to the many committee reviews relating to national security/counter-terrorism and border control legislation. This has been particularly intense in the last two years.

While the opportunity for this input is appreciated, there is considerable frustration and scepticism in relation to the impact of this process on the resulting legislation. Mostly the core provisions which are seen as serious, unjustified encroachments on rights and freedoms go ahead and become law. Therefore, we have significant concerns about the current effectiveness of the committee system as a safeguard in this context.

There are some obvious problems experienced by the committees and most of these have been identified by the ALRC. It is recognized that inadequate time is the common factor seriously

²⁰ Ibid p 51

inhibiting most committee processes. This results in superficial reviews and the rather farcical outcome of reports being completed and issued after parliament has passed the relevant bill into law.²¹

The Joint Committee on Human Rights established in 2011 has a specific brief which includes reference to international human rights instruments. It should obviously have an important role in the Parliamentary scrutiny of the impact of bills on fundamental rights and freedoms. It has produced some well researched and argued reports which have included significant recommendations for changes to bills to reduce unjustified encroachment on freedoms and rights – albeit sometimes with a dissenting minority report²². In recent times at least these have not had any impact on the legislative outcome.²³ It is difficult to avoid the impression that neither the Government nor the Opposition is particularly influenced by the recommendations of this committee.

The Parliamentary Joint Committee on Intelligence and Security has no particular mandate to consider the impact of bills on rights and freedoms. In practice it does address this issue quite extensively. It would be difficult for it to do otherwise, given the number of counter-terrorism and national security bills it has had to review since 9/11. The unavoidable tension between national security needs and protection of citizens' rights and freedoms is usually the issue of greatest contention in consideration of bills in these areas.

The PJCIS clearly has high status and its findings and recommendations are taken seriously by Government and the Opposition and are regularly reported in the general media. In recent times its recommendations have largely been adopted by Government and the Parliament.

In other sections of this submission we identify particular statutes in the counter-terrorism/security and border protection areas which must be further reviewed because of their unwarranted encroachment on rights and freedoms. In this context, we raise concerns as to the way the PJCIS appears to be working in recent times.

It has been immensely productive committee and has generated many solid reports on a series of very important, often complex and usually contentious bills in recent years.

As close observers of the PJCIS, it is clear that it regularly works within unreasonable time frames – which affect both the Committee's review capacity and the capacity of the community to properly inform itself about the contents and implications of bills and develop considered submissions. In the life of this Parliament the pressure on this front has been extreme. It is also apparent that the PJCIS is under resourced for the volume of its work.

²¹ Since its inception in 2011 over 50 bills have been passed before the Human Rights Committee has completed its review of them. Ibid 2.69 p52

²² Examples ..

²³ This impression is given substance by an analysis by Adam Fletcher of all Ministerial responses to the JCHR recommendations in the 44th Parliament showing that not a single recommendation has been taken up by Government. Caston Centre for Human Rights Law: Submission to this Review September 2015. P7

Recommendation 2

The CCLs recommend that the PJCIS resources are reviewed to ensure they are adequate to its expanding roles.

Our major concern about the PJCIS is on another dimension.

PJCIS reviews generate useful recommendations to improve draft legislation. The acceptance by Government and Opposition of the majority of PJCIS recommendations in recent times has allowed them both to argue that the scrutiny process is working well and that the many encroachments on liberties and rights that remain in the bills have therefore been established as justified and reasonable.

The CCLs dispute this account.

With recent counter-terrorism /national security bills, most PJCIS recommendations have addressed disputed issues at the margins leaving the core policy proposals, which seriously encroach on rights and freedoms, more or less intact. This has been so - notwithstanding the considerable weight of sound argument and evidence from credible academic, legal and civil society groups and individuals as to serious and unjustified encroachments on freedoms and rights of many of the proposals.

The PJCIS reviews in recent times have generated consensus reports. This of course is not a problem in itself. However, the combination of the broad political context and a public commitment by the Opposition to a bipartisan position on counter-terrorism/security policy has, in practice, left little opportunity for substantial amendments to the Government's proposals within the Committee or in the subsequent parliamentary consideration of bills.

The PJCIS membership is currently confined to the Coalition (6 members) and the Labor Opposition (5 members). There are no Greens or other crossbench members. For such an important Committee it is desirable that the membership is more fully representative of the Parliament. With the current Parliamentary composition, it would be reasonable to include a Greens representative even if this meant increasing the membership.

This is not likely to significantly change outcomes but it might generate some alternative minority recommendations which might have some wider impact on media coverage and community views.

Recommendation 3

The CCLs recommend that the number of PJCIS members is increased to allow its composition to be more fully representative of the Parliament. With the current Parliamentary composition, it would be reasonable to include a Greens representative.

The CCLS note that the most recent PJCS report on the contentious Citizenship Bill ²⁴ diverges from this recent pattern and does include recommendations which go beyond the margins. Most significantly, it recommends that loss of citizenship under the proposed new s33AA not apply to dual citizens within Australia.²⁵ This would very significantly limit the number of persons who will be adversely affected by this Bill if passed –many of whom would have ended up in indefinite detention.

Hopefully, this might indicate a more robust willingness within the PJCS – and therefore Parliament- to challenge and constrain future national security proposals to encroach unwarrantedly on liberties and rights. It might also reflect the intensity of unease around this bill from sections of the community - and especially from Muslims who saw citizenship stripping aimed squarely at their community - and broadly consistent legal and academic advice that key provisions in the bill would likely be struck down as unconstitutional.

3.4. Broader Parliamentary Process

The crunch issue is that since 9/11 the Australian Parliament has increasingly failed to protect our fundamental liberties and rights. This has accelerated in the life of the current Parliament. We have argued the specifics of this in numerous submissions.

Professor George Williams has over recent years warned of the drift from short term ‘exceptional’ laws that encroach on valued liberties to an acceptance of such encroachments as common place and normal. In 2012 he argued that new powers given to ASIO in the counter-terrorism context constituted the ‘greatest assault on civil liberties in Australia since world War II’. ²⁶ His most recent contribution is a survey of current laws encroaching on rights and liberties ‘reasonably connected to Australian democracy’. ²⁷ His general analysis aligns with the CCLS assessment that existing scrutiny mechanisms do not deter Parliaments from passing laws that ‘infringe basic democratic rights’.

Professor Williams’ conclusions are deeply pessimistic: ‘*Australian’s should be concerned about state of their democracy*’. He considers further erosion of democratic principles is likely. ²⁸

The President of the Australian Human Rights Commission has repeatedly documented her concerns about Parliament’s approval of multiple laws that breach fundamental liberties and undermine the rule of law. These concerns have led her argue that the question as to the proper

²⁴ PJCS: Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, Sept 2015.

²⁵ Recommendation 1 proposes to limit the operation of s33AA to individuals who have engaged in relevant conduct overseas OR in Australia but have left Australia before being charged and brought to trial. There are other recommendations that will significantly lessen the adverse impacts of this Bill on persons’ rights and liberties, (e.g.3, 5, 20, 21) Ibid

²⁶ Launch of the National ASIO Campaign 31st October 2012.

²⁷ George Williams: *The Legal Assault on Australian Democracy* Sir Richard Blackburn Lecture, ACT Law Society, 12 May 2015 p9. Submission No 76 to this Inquiry. This generated a list of some 350 state, territory and Commonwealth laws which’ were most likely to give rise to a problems of justification’. P3.

²⁸ Ibid p10

limits on the power of Parliament is a live issue for contemporary Australian democracy. Contemplating Australia's recent legislative history, Professor Triggs asks:

'What then are the safeguards of democratic liberties if Parliament itself is compliant and complicit in expanding executive power to the detriment of the judiciary and ultimately of all Australian citizens?

*What are the options for democracy when both major parties, in government and opposition, agree upon laws that explicitly violate fundamental freedoms under the common law and breach Australia's obligations under international treaties?'*²⁹

It is our deep concern that there is no available remedy in the current broad political context.

We note the existence of important independent bodies outside parliament with relevant oversight and scrutiny roles –most notably the Independent National Security Legislation Monitor, the Australian Human Rights Commission and the ALRC. These bodies do significant work but in recent times have not had any discernible influence in deterring Governments from passing numerous laws undermining important rights and freedoms.

The CCLS support the very general proposals put forward by the ALRC³⁰ as possible areas for further review 'to enhance the ability of committees to perform a constructive role in the scrutiny of legislation'. They are sensible suggestions albeit somewhat vague. If seriously implemented, they could possibly lead to a better quality review process.

However, we do not think such tinkering at the administrative edges will have any impact in restraining Government's and Parliament's willingness to pass laws which are seriously encroach on liberties and rights and which are dangerous to our democratic system.

It appears obvious that there are two –probably interrelated- developments necessary to cut across the post 9/11 trend. One is the Australian community gains a better understanding of the individual and cumulative effects of these rights-encroaching laws, becomes concerned for our democratic way of life and calls a halt to the seeming tsunami of national security laws and also determines there are more economically sensible and decent ways of dealing with the huge global issue of asylum seekers.

The CCLS will continue to be a part of the growing campaigns across Australia to achieve this community understanding.

Secondly, like many others responding to this review, we consider it difficult, if not impossible, to have long term effective protection of our rights and freedoms without a stronger overarching benchmark. Notwithstanding the bitter disappointment of prior efforts, it is difficult to see a viable way forward without achieving a strong Australian Charter of Rights.

²⁹ Speech to the NSW Council for Civil Liberties Dinner, 31/72015

³⁰ Interim Report p55

Recommendation 4

The CCLs urge the ALRC to recommend that the Government accepts the need for an Australian Charter or Bill of Rights as necessary for the effective prevention of the accelerating passage of laws which unjustifiably encroach on our fundamental freedoms and rights.

4. FREEDOM OF SPEECH

Along with the right to personal liberty, freedom of speech is at the heart of a democratic society. It has always been a key area of advocacy for civil liberties bodies though the contexts have varied – literary censorship is, for example, no longer a major driver for encroachment of free speech in Australia. The significant threats to freedom of speech now arise in the context of the proliferating counter-terrorist, national security and border security laws and the general trend to greater secrecy within government and commercial and corporate contexts - driven in part by national security concerns.

The ALRC provides a useful overview of the common law protection for freedom of speech ('a common law freedom') and the limitations of the Constitution's implied freedom of political communication. The available protections for freedom of speech in Australia are very limited in comparison with the international law provisions and with countries with protections flowing from a bill of rights or rights statute³¹.

It is not surprising therefore that there are a great many statutory encroachments on freedom of speech and that a considerable number of these are unjustified.

4.1. Statutory Encroachment on Freedom Of Speech

The CCLS largely agree with the categories and statutory provisions that are identified as encroaching on freedom of speech in Chapter 3 of the Interim Report. The description of identified legislation and brief analysis of the justification provided and the counter arguments from committees and from submissions made to the Issues Paper provide a largely accurate and clear overview of the issues.

While we do not want to duplicate analyses that have been made in the responses to the Issues Paper and recognised in the Interim Report we do want to put our views on some of the most disturbing and dangerous legislation impinging on freedom of speech into the record for this Inquiry³². We also identify legislation which has not been considered in Chapter 3.

³¹ Interim Report pars 3.1-3.29, pp 57-63.

³² The CCLS did not make a submission to the **Issues Paper**

4.2. Counter-Terrorism Statutes

Within the broad areas of law the CCLS are deeply concerned about the cumulative impact of the post 9/11 counter-terrorism and national security legislation on rights and freedoms-including freedom of speech. We offer brief comment on laws that are disproportionate in their encroachment on freedom of speech and unnecessary for national security.

4.2.1. Advocating terrorism Section 80.2C of the Criminal Code.

The CCLS opposed this provision when the Foreign Fighters' Bill came before Parliament.³³ It is an unnecessary - in that adequate criminal law exists for those parts of it which are justified - and an unjustified encroachment on freedom of speech.

The section creates an offence if a person advocates the doing of a terrorist act, or the commission of a terrorism offence, and is reckless as to whether another person will engage in that conduct as a consequence. A person 'advocates' the doing of a terrorist act or the commission of a terrorism offence if the person 'counsels, promotes, encourages or urges' the doing of it.

A defence is provided covering, for example, pointing out 'in good faith any matters that are producing, or have a tendency to produce, feelings of ill-will or hostility between different groups, in order to bring about the removal of those matters'. (s 80.3(1)(d), Criminal Code.

The CCLS consider the provision disproportionately burdens free speech beyond what is necessary to protect national security because:

- The broad wording of the offence may capture conduct which is a legitimate exercise of free speech and expression. Broad words of particular concern in the legislation are 'advocates' and 'reckless'.
- A person exercising free speech and arguing publicly in support of 'oppressive and non-democratic' regimes may be person who, within the provisions of section 80.2C, is a person who 'advocates' (which is defined to include 'encourages') the doing of a terrorist act merely because that regime has engaged in terrorist activity in the past.³⁴
- That person need only have been 'reckless' as to whether another person would engage in the terrorist conduct, and they will have committed an offence. The recklessness test is too broad and too vague. A speaker can never be certain as to whether he/she is acting recklessly in making a statement. The adoption of such a test may, therefore, discourage public speech, in particular robust speech concerning contentious national and international political and military matters.
- Notwithstanding there are defence provisions, the broad scope of the offence may also mean that journalists, for example, will be reluctant to report on certain matters

³³ Joint CCLS Submission to the PJCS Inquiry into The Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill, 3rd October 2014

³⁴ Quoted Interim Report, p66.

because of the uncertainty inherent in the application of the recklessness element. The section should be confined to speech that is intended to encourage another person to engage in the relevant conduct.

- Further, existing offences within the Criminal Code appear to be satisfactory to capture the kind of conduct to which section 80.2C is directed.

Recommendation 5

The CCLS consider Section 80.2C of the Criminal Code encroaches unjustifiably on freedom of speech and will have a potential chilling effect on open debate and journalism. We recommend it for further review with the view to repeal.

4.2.2. Prescribed terrorist organisations Division 102 of the Criminal Code.

Division 102 provides that an organisation may be prescribed as a terrorist organisation under regulations where it 'is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act' or 'advocates the doing of a terrorist act' (Section 102.1(2)). A number of offences flow from an organisation being prescribed as a terrorist organisation. These include offences relating to: membership of a terrorist organisation (Section 102.3), recruiting for a terrorist organisation (Section 102.4) and getting funds to, from or for a terrorist organisation (Section 102.6).

The CCLS concerns in relation to these provisions include:

- The definition of what constitutes a terrorist organisation is broad and has the potential to capture organisations which are legitimate religious or other organisations. An organisation can be prescribed as a terrorist organisation under the legislation, for instance, where it is 'indirectly...fostering the doing of a terrorist act' (Section 102.1(2)). This criterion is too broad and too vague. What 'fostering' means is quite unclear. It could result in legitimate religious or other organisations being brought within the operation of the legislation. This has serious consequences for all members of that organisation, and those affiliated with it, even though extreme views might be propagated only by a small minority of its members.
- By reason of the broad nature of terrorist organisation, the group of persons potentially covered by the range of 'terrorist organisation' offences increases proportionately. In turn, those offences may capture conduct which is a legitimate exercise of free speech and expression merely because it is carried out by members of a 'terrorist organisation'.

So, for instance, if a legitimate religious organisation is found to be a 'terrorist organisation' under the provisions its members may come within the associated criminal offence provisions in carrying out day to day activities such as worship, welcoming new followers, making donations and fundraising.

Recommendation 6

The CCLs consider the prescribed terrorist organisations provisions in Division 102 of the Criminal Code disproportionately burden free speech, in a way which goes beyond what is necessary to protect national security. We recommend these provisions to the ALRC for further review with a view to repeal or amendment.

4.3. Secrecy Laws

4.3.1. ASIO Act Secrecy Provisions - Section 35P of the ASIO Act 1979

Section 35P(1) provides that a person commits an offence if the person discloses information and the information relates to a special intelligence operation (SIO). Recklessness is the fault element.

Section 35P(2) provides that a person commits an offence if the person discloses information and the information relates to a SIO and the person intends to endanger the health or safety of any person or prejudice the effective conduct of a SIO; or the disclosure of the information will endanger the health or safety of any person or prejudice the effective conduct of a SIO.

The CCLS oppose the immunity provisions provided for SIOs as dangerously inappropriate in a democracy. This danger is exacerbated by the provocative creation of the related Section 35P offences protecting these operations from any public scrutiny.

Section 35P(1) is the more concerning of the two ASIO offences. It applies where a person discloses information and that information relates to a SIO. It is exceptionally broad both in its application to 'any person' and the very wide scope of ASIO activities that are captured.

In addition to preventing publication of information which is harmful to Australia's national security interests, the new offences could be used to prevent or deter publication or disclosure of important information regarding the use and misuse of official power that is essential to the proper functioning of a democratic state. No agency of the state should be shielded from public scrutiny in this way. The accountability principle applies to intelligence organizations no less than to any other entity in the machinery of government. S.35P is a concerted attempt to undermine it.

Journalists and whistle-blowers work in tandem to obtain and expose information about governmental corruption and malfeasance. This activity is clearly in the public interest. Journalists cultivate knowledgeable and expert sources all the time. They promise sources that their identity will not be revealed. They receive and evaluate confidential information. For the most part, they are careful when publishing information concerning surveillance operations, particularly when they relate to the protection of national security.

S.35P, however, is likely to chill these crucial investigative activities. Journalists, lawyers and others who come into possession of specialist intelligence information may be prosecuted not only when they intend to disclose that information but also if they are reckless as to the possibility of its disclosure.³⁵

The s 35P offences will have, and appear intended to have, a major deterrent effect on legitimate whistle-blowers, on the freedom of the media to report on abuses of power by ASIO and on debate relating to intelligence and counter terrorism issues- even when these pose no threat to national security.

However, concerns about the impact of s 35P cannot be confined to journalists or whistle-blowers. Academics, members of civil society and religious groups, community advocates and ordinary members of the community may well be caught up by s 35P.³⁶

Recommendation 7

- i) As a matter of principle, the CCLs consider that S.35P should be repealed in its entirety.***
- ii) Failing this: s 35P(1) should be repealed.***
- iii) Failing this: protection for legitimate disclosure should be provided by strong general public interest protection provisions being incorporated into s 35P(1).³⁷***

4.3.2. The broader trend

The special intelligence operations (SIO) provision and the related s 35P offences are recent additions to the disturbing trend in the extension of secrecy provisions and inhibitions on the reasonable disclosure of information in the public interest and weakening of reasonable public scrutiny of executive government and intelligence agencies.

The cumulative impact of these laws (and others outside the specific counter-terrorism/national security legislative framework) on the work of journalists and the viability of a free and effective media in Australia is considerable.

For example, the hugely important protection afforded to journalists and their sources within the (Cth) Evidence Act 1995 is effectively by-passed and undermined by the cumulative impact of the s35P offences and recent mandatory data retention laws. Although a warrant is now required for access to a journalists meta-data – and a public interest

³⁵ In response to the community and media opposition to s35P the Attorney-General decided to use his powers to require the Commonwealth Director of Public Prosecutions to gain the consent of the Attorney-General to prosecute a journalist for a s 35P offence. Media statement 30/10/14. This provides protection only on the basis of ministerial discretion and while it was sufficient to allow the legislation to gain Parliamentary passage, it provides no certain and is therefore not an effective protection.

³⁶ We note for example the correspondence on this matter between National Tertiary Education Union and the Attorney-General. Letter from Jeannie Rea, National President NTEU to Senator George Brandis, 14/1/14 .

³⁷ The CCLs only recommended repeal of s 35P in their submission to the INSLM but indicated our preference for a strong public interest protection for s35P(1) added when giving evidence to the public hearings for this review. Rec 1 p8. Joint CCLs Submission to INSLM Review of Impact on Journalists of The Operation of Section 35P of THE ASIO Act 1979 22nd April 2015. Public hearings were held on 27/4/15.

advocate can intervene on behalf of the public interest- access is very likely to be granted to this data which can readily reveal the identity of a source – when the justification for seeking a warrant is the suspected breach of S35P (disclosure of information relating to a special intelligence operation). This is a serious crime.

Further, as the issuing of a warrant is secret, the journalist will have no way of knowing when and if his meta-data has been released to ASIO or any other law enforcement authority. The uncertainty and the resulting chilling effect are obvious.

It is clearly important that the cumulative impact of such provisions on the work of journalists and the viability of a free and effective media is subject to review.³⁸

The CCLs have previously recommended to the INSLM that he undertake a review of all the provisions within counter-terrorism/national security suite of legislation which erode legitimate journalistic freedom and weaken protections for legitimate whistle-blowers with the intention of developing a comprehensive set of effective shield laws for journalists and comprehensive and effective whistle-blower legislation which protects all citizens. We consider this would be a useful and manageable next step from this review process. This is consistent with the ALRC option proposed in its conclusions to the discussion on freedom of speech.³⁹

Recommendation 8

The CCLs recommend that the INSLM conducts a review of all the provisions within counter-terrorism/national security suite of legislation which erode legitimate journalistic freedom and weaken protections for legitimate whistle-blowers with the intention of developing a comprehensive set of effective shield laws for journalists and comprehensive and effective whistle-blower legislation which protects all citizens.⁴⁰

4.3.3. Sections 70 and 79 Crimes Act 1914

Section 70 (Disclosure of information by Commonwealth officers) makes it an offence for a Commonwealth officer, past or present, to communicate information which they have a duty not to disclose. It is the general offence provision used against Commonwealth officers who communicate information.

Section 79 (Official Secrets) contains offence provisions for the communication of official secrets in various forms. A preliminary enquiry is whether the relevant information is

³⁸ See comments by the previous INSLM “The very serious policy which isn’t addressed by this law is whether, as a society, we want effective shield laws for journalists and comprehensive whistleblower legislation. They are really big issues which are really not addressed at all by this law or current laws.” Walker was speaking on the impact of the new mandatory data retention laws. ABC Media Watch 20th March 2015.

³⁹ Interim Report par 3.190 p95. The ALRC option also references freedom of association laws.

⁴⁰ See Rec 3, Joint CCLs Submission to INSLM Review Of Impact On Journalists Of The Operation Of Section 35P OF THE ASIO Act 1979. P20. Such a review would be an extension of his current review of the specific s35P provisions in relation to their impact on journalists.

‘prescribed’ under section 79(1). Information is ‘prescribed’ depending on how and in what circumstances it was obtained. The offences themselves relate to how information is treated (apart from communication of the information, the provisions regulate retention, failure to comply with directions, failing to take reasonable care).

Sections 70 and 79 have the potential to capture a wide range of government information that poses no risk to national security but that the broader public may want to access. They are disproportionate in their impact and should be replaced with provisions which better balance the public’s right to know in a democracy with security and other government interests which favour non-disclosure.

Any such reform must also necessarily include the enactment of effective and accessible whistle-blower legislation

The CCLS note that the ALRC reaffirms its previous recommendation to repeal these laws and replace them with more constrained offences in the Criminal Code.⁴¹

Recommendation 9

The CCLS support the ALRC proposal that sections 70 and 79 of the Crimes Act 1914 be repealed and replaced with provisions which require the disclosure to be likely to damage the security, defence or international relations of the Commonwealth; prejudice the prevention, detection, investigation, prosecution or punishment of criminal offences; endanger the life or physical safety of any person; prejudice the protection of public safety.

4.4. Border Security - Section 24 Part 6 Australian Border Force Act 2015

Section 24 sets out a process for the Australian Border Force Commissioner to require persons to make and subscribe to an oath or affirmation. A person who has done this must not engage in conduct inconsistent with the oath or affirmation. Under Part 6 it is an offence for an entrusted person (defined to include Immigration and Border Protection Department workers which, by written determination, may include consultants, contractors or service providers, eg doctors or welfare workers) to disclose information obtained by a person in the person’s capacity as entrusted person.

The terms of Part 6 are cast far too broadly. These sections operate to preclude – under the section 42 secrecy offence provision - disclosure of information generally, subject to exceptions. Disclosure may be precluded notwithstanding disclosure in a particular case has no implications for security or other legitimate government interests favouring secrecy.

Further, the prohibitions extend to consultants, contractors or service providers engaged with the and by the Australian Border Force. So, for example, the Victorian Foundation for the Victims of Torture, may be caught by the legislation solely on the ground that the Foundation provides

⁴¹ Interim Report, par 3.193, p96.

counselling services for refugee clients of the Immigration Department. Once caught, not only counselling staff but all members of the Foundation's staff may be prohibited from disclosing relevant information. The contracted and non-governmental agencies to which the legislation applies should be specifically defined and properly limited.

The provisions are likely to result in entrusted persons, broadly defined, being reluctant to speak out for fear they will commit an offence under the provisions, whether or not in fact the provisions preclude

Australian citizens, residents or body corporates engaging in the offence outside of Australia,⁴² including Australia's regional processing centres on Nauru and PNG, may be captured by the provision.

Part 6 of the ABF Act details certain, limited, exemptions,⁴³ but this does not include disclosure in the public interest. Unauthorised disclosure is only permissible if the entrusted person 'reasonably believes that the disclosure is necessary to prevent or lessen a serious threat to the life or health of an individual' and 'the disclosure is for the purposes of preventing or lessening that threat'.⁴⁴

All Australian states and territories have mandatory reporting legislation requiring compulsory disclosure of suspected child abuse by relevant professionals.⁴⁵ There are also two other types of duties to report suspected child abuse and neglect, which can co-exist with a legislative duty, or which can exist in the absence of a legislative duty. These include: the duty of care and duties under professional or industry policy.

The Department of Immigration and Border Protection and the Minister for Immigration and Border Protection, the Hon Peter Dutton MP, clarified that mandatory reporting requirements would not be affected, and that whistleblowers would be protected under the *Public Interest*

⁴² Section 42(3) stipulates that s 15.2 of the *Criminal Code 1995* (Cth) concerning extended geographical jurisdiction, applies to an offence against subsection (1)

⁴³ Subsection 42(2) provides that the offence does not apply if: (a) the making of the record or disclosure is authorised by section 43, 44, 45, 47, 48 or 49; or (b) the making of the record or disclosure is in the course of the person's employment or service as an entrusted person; or (c) the making of the record or disclosure is required or authorised by or under a law of the Commonwealth, a State or a Territory; or (d) the making of the record or disclosure is required by an order or direction of a court or tribunal. A defendant bears an evidential burden in relation to a matter listed above, in accordance with subsection 13.3(3) of the *Criminal Code Act 1995* (Cth). Sections 43, 44, 45, 47, 48 and 49 set out circumstances in which use and disclosure of protected information is permitted, in particular where: the recording or disclosure is for the purposes of the *ABF Act* or the *Law Enforcement Integrity Commissioner Act 2006* (Cth) (s 43); the person has written authorisation from the Secretary of the Department to disclose information, or a class of information, to certain bodies and persons in Australia, including government agencies and police, for certain purposes (s 44); the person has written authorisation from the Secretary of the Department to disclose information, or a class of information, to a foreign country, agency or authority of a foreign country, or public international organisation, that has entered into an agreement with the Commonwealth or one of its agencies, for certain purposes (s 45); the disclosure is in accordance with consent given by the person or body to whom the information relates (s 47); an entrusted person reasonably believes it is necessary to prevent or lessen a serious threat to the life or health of an individual (s 48) or the information has already been lawfully made available to the public (s 49).

⁴⁴ Section 48.

⁴⁵ *Children and Young People Act 2008* (ACT) ss 356, 357; *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 23, 27, 27A; *Public Health Act 2005* (QLD) ss 158, 191; *Child Protection Act 1999* (QLD) ss 22, 186; *Children's Protection Act 1993* (SA) ss 6, 10, 11; *Children, Young Persons and Their Families Act 1997* (Tas) ss 3, 4, 14; *Children, Youth and Families Act 2005* (Vic) ss 162, 182, 184; *Children and Community Services Act 2004* (WA) ss 124A-H; *Family Law Act 1975* (Cth) ss4, 67ZA.

Disclosure Act 2013 (Cth) (PID Act). However, the Law Council has previously observed that the legislative mandatory reporting requirement protections may not apply to Australia's regional processing centres in Nauru and Papua New Guinea. This is concerning as it will discourage whistle-blowers from disclosing information about conditions in the offshore detention centres of Nauru and Manus Island in PNG.

Furthermore, there is a question over the protection offered by the *Public Interest Disclosure Act* – it does not permit public disclosures of information that consists of, or includes, 'sensitive law enforcement information', which is undefined in the Act.

In these circumstances, the Part 6 of the Act constitutes a disproportionate infringement on freedom of speech. The ABF Act may warrant further review with a particular focus on such infringement.

The Law Council has suggested that Part 6 should be amended to include: a general exception allowing for disclosure when made in the public interest; a requirement that for the secrecy offence (section 42) to have been committed 'the unauthorised disclosure caused, or was likely or intended to cause, harm to an identified essential public interest.'⁴⁶

Recommendation 10

The CCLS consider that Section 24 Part 6 of The Australian Border Force Act 2015 unjustifiably encroaches on freedom of speech and strongly recommend it be further reviewed with a view to including a public interest disclosure exception and requiring that an unauthorised disclosure must have caused or was likely to intend to cause harm to an identified public interest to be an offence.

4.5. Anti-Discrimination Law – Section 18C of the Racial Discrimination Act 1975 (Cth)

The ALRC references the considerable controversy relating to s 18C of the Racial Discrimination Act 1975 (Cth) (RDA). None of the CCLS supported the Attorney -General's proposed amendment to this section as set out in the *Freedom of Speech (Repeal of s.18C) Bill 2014*. If the existing legislation is to be reviewed in this process, the parameters recommended by CERD for legislation to combat racist hate speech would serve as an appropriate framework:

.... the Committee recommends that States parties declare and effectively sanction as offences punishable by law:

(a) All dissemination of ideas based on racial or ethnic superiority or hatred, by whatever means;

(b) incitement to hatred, contempt or discrimination against members of a group on the basis of their race, colour, descent, or national or ethnic origin;

(c) Threats or incitement to violence against persons or groups on the grounds in (b) above;

⁴⁶ Interim Report, Para 3.74, p73

- (d) Expressions of insults, ridicule or slander of persons or groups and justification of hatred, contempt or discrimination on the grounds in (b) above – when it clearly amounts to hatred, contempt or discrimination;
- (e) Participation in organizations and activities which promote and incite racial discrimination.⁴⁷

5. PROCEDURAL FAIRNESS

5.1. Doctrinal basis

We refer to the general discussion of the doctrinal basis for procedural fairness set out in Chapter 15 of the Interim Report. The CCLs generally concur with the identified principles.

Procedural fairness plays a critical role in ensuring good decision-making, fairness to individuals, public confidence in the justice system, transparency and accountability. Accordingly, excluding natural justice should occur only in limited and clearly defined circumstances that can satisfy the test of proportionality.

We would like, however, for the purposes of this submission, to emphasise the following aspects of procedural fairness.

It should be acknowledged that in an adversarial procedural system, procedural fairness is a pre-condition for the enforcement of substantive rights. Therefore procedural fairness underpins the system of substantive rights enjoyed by individuals within Australia. Any limitations on procedural fairness put at risk the ability of individuals to enjoy and enforce substantive rights.⁴⁸

Procedural fairness not only requires objectively fair procedural rules, it seeks to achieve substantive fairness. As was said by the plurality of the High Court in *Assistant Commissioner Condon v Pompano Pty Ltd*:⁴⁹

Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice.

We submit that ‘practical justice’ in this context can be read as ‘substantive fairness’. These principles were recently applied by the Full Federal Court in *Shrestha v Migration Review Tribunal*⁵⁰ where the Court stated at [53]:

The pressure of high volume decision making, such as that undertaken by the FCC in the migration jurisdiction, should be recognised. Essential tools in managing high volumes of cases include the show cause process in Part 44 of the FCC Rules, and the power outside that

⁴⁷ UN Committee on the Elimination of Racial Discrimination: General recommendation No. 35 : Combating racist hate speech 26th September 2013 <http://www.refworld.org/docid/53f457db4.html>

⁴⁸ *Poyser v Minors* (1881) LR 7 QBD 329 at 333 per Lush J.

⁴⁹ [2013] HCA7 at [156].

⁵⁰ [2015] FCAFC 87 (19 June 2015).

process, in s 17A of the FCC Act, summarily to dismiss a judicial review application. The existence and utilisation of those processes do not obviate the need to consider the material before the Tribunal (rather than simply its reasons), nor to explain in plain terms to unrepresented applicants that they must identify to the Court why the Tribunal's decision was not made lawfully and by a fair process. Insisting to an unrepresented applicant that she or he identify a "jurisdictional error" is a pointless, and unfair, exercise.⁵¹

In paragraph 1.19 of the Interim Report it is suggested that the High Court have 'somewhat moved towards entrenching procedural fairness as a constitutional right'. It is submitted that recent developments have given impetus to the recognition of procedural fairness as a constitutional right. In *Pompano*, Gageler J placed procedural fairness at the center of the judicial function and the exercise of judicial power. At [194] his Honour said:

There should be no doubt and no room for misunderstanding. Procedural fairness is an immutable characteristic of a court. No court in Australia can be required by state to adopt an unfair procedure. If a procedure cannot be adopted without unfairness, then it cannot be required of a court. "[A]brogation of natural justice", to adopt the language of the explanatory notes to the Bill for the COA, is anathema to Ch III of the *Constitution*.

Referring to these observations by Gageler J, the Full Federal Court in *Shrestha*⁵² held at [48] that "there is no doubt whatsoever that a court constituted in accordance with Ch III of the *Constitution*, such as the Federal Circuit Court, is not empowered to exercise its powers, or perform its judicial functions unfairly." These statements, we say, clearly point to the recognition of procedural fairness as a constitutional right in Australia, at least as far as courts exercising federal jurisdiction is concerned.

Recommendation 11

The CCLs submit that the Commonwealth ought to be extremely restrained in making laws which exclude procedural fairness and should only do so in exceptional circumstances after careful and considered analysis as to whether it is reasonable and justifiable to do so.

5.2. Statutory encroachment on procedural fairness

The ALRC acknowledges that a 'wide range of Commonwealth laws may be seen to deny the duty to afford procedural fairness'.⁵³ The CCLS agree with this and argue that many of these laws do so without justification.

⁵¹ [2013] HCA 7, (2003) 252 CLR 38

⁵² At [47]-[48].

⁵³ Interim Report 15.37, p419

The CCLS are deeply concerned with the trend within Government to continuously expand the scope of executive decision making, without affording procedural fairness to those affected by such decisions.

Despite the many parliamentary scrutiny processes that most of these laws have been through, and the many submissions highlighting the problematic nature of such amendments, including from members of the CCL, the Government has continued to pass legislation, particularly relating to migration and national security, which unjustifiably exclude procedural fairness. Current measures of parliamentary scrutiny have proven ineffective in ensuring laws that exclude natural justice satisfies the proportionality test.

In this section we offer detailed comment on major encroachments on this right to procedural fairness in relation to selected statutes of particular concern to the CCLS.

5.3. National Security Legislation

5.3.1. National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) (NSI Act)

The NSI Act establishes a scheme to protect information from disclosure during federal proceedings where the disclosure is likely to prejudice Australia's national security. The provisions apply to criminal and civil proceedings.⁵⁴

The scheme requires parties to notify the Attorney-General at any stage of a proceeding where a party expects to introduce information or call a witness that may disclose information that relates to, or the disclosure of which may affect, national security. On receiving advice that the Attorney-General has been so notified, the court must order that the proceedings be adjourned until the Attorney-General decides whether to issue a non-disclosure or witness exclusion certificate.⁵⁵

Any certificates that have been issued under these provisions must be considered at a closed hearing which will determine whether and how the information will be admitted into evidence. Under s 29(3) a party to the proceeding or that party's legal representative may be excluded from such a closed hearing. Depending on the outcome of the hearing, the information may be either excluded from the proceedings altogether, or admitted in redacted or summary form.⁵⁶ The NSI Act also includes a system for requiring legal practitioners to undergo security clearances before being permitted access to national security information. The effect of these provisions are that they may curtail the right of a party to be represented by counsel of his or her choice, it may also impose restrictions on

⁵⁴ 'federal criminal proceedings' is defined in s 13 and 'civil proceedings' is defined in s 15A.

⁵⁵ Law Council of Australia submission to the Independent Monitor on National Security Legislation into the *National Security Information (Criminal and Civil Proceedings) Act 2004* 19 July 2013, 3-4.

⁵⁶ NSI Act ss 31, 38L.

the ability of a party to adduce evidence relevant to his or her case, or to challenge the case of the federal prosecution or federal party to the dispute.⁵⁷

Although in *Lodhi v R*⁵⁸ the NSI Act survived a constitutional challenge on the basis that it infringed the right to procedural fairness, in the course of his judgment Whealy J described a number of its provisions as ‘novel’, ‘startling’ and ‘intrusive’. For example, under the NSI Act, legal counsel are rendered liable to criminal prosecution (and imprisonment for up to two years) if he or she fails to give notice to the Attorney-General of knowledge or a belief that they would disclose in a federal proceeding information that related to national security.⁵⁹

Also of particular concern are two further aspects of the NSI Act. First, s 31 unduly restricts a court’s discretion to determine what orders should be made in relation to matters covered by a certificate issued under the legislation. Pursuant to s 31(8) a court in balancing the considerations of procedural fairness and national security, must give greatest weight to the latter. This tilts the balance too far in favour of protecting the interest of national security at the expense of the rights of individual litigants.⁶⁰ In contrast, the balancing exercise prescribed under s 130 of the uniform Evidence Acts strikes an appropriate balance between these opposing interests. It states:

If the public interest in admitting into evidence information or a document that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information or document, the court may direct that the information or document not be adduced as evidence

The test in s 130 of the uniform Evidence Acts has proven to be an effective tool for Governments to protect national security information⁶¹ and there is no reason why the same test should not apply under the NSI Act.

Second, the provisions of the NSI Act that require security clearances for lawyers are unnecessary and threaten the independence of the legal profession by potentially allowing government bureaucrats to ‘vet’ lawyers and limit the class of lawyers who are able to act in matters to which the NSI Act applies. Justice Whealy, writing extra judicially, observed that:⁶²

The [NSI] Act impose highly unusual obligations on lawyers engaged in Federal proceedings. In particular, lawyers must obtain security clearance to have access to information

⁵⁷ Law Council of Australia submission to the Independent Monitor on National Security Legislation into the *National Security Information (Criminal and Civil Proceedings) Act 2004* 19 July 2013, [130].

⁵⁸ [2006] NSWSC 571 (7 February 2006).

⁵⁹ *Ibid* at [94]-[96].

⁶⁰ Law Council of Australia submission to the Independent Monitor on National Security Legislation into the *National Security Information (Criminal and Civil Proceedings) Act 2004* 19 July 2013, [147]; Centre of Public Law, *Submission 22* at 11.

⁶¹ Law Council of Australia submission to the Independent Monitor on National Security Legislation into the *National Security Information (Criminal and Civil Proceedings) Act 2004* 19 July 2013, [149].

⁶² The Hon Justice Whealy QC ‘Terrorism and the Right to a Fair Trial Can the Law Stop Terrorism? A Comparative Analysis’ (Paper presented to the British Institute of International and Comparative Law- April 2010) at 23.

concerning national security. The processes for obtaining these clearances are intrusive and, in some instances, upsetting. Not only must the individual be scrutinized but so also their spouses and partners. Details of their financial and personal lives are examined.

As observed by the Law Council of Australia, these provisions in the NSI Act:⁶³

[P]otentially restricts a person's right to a legal representative of his or her choosing by limiting the pool of lawyers who are permitted to act in cases involving national security information. Such a risk may be particularly acute in jurisdictions where access to senior counsel with experience in federal criminal matters involving national security information may already be very limited.

We concur with the view expressed by the Law Council of Australia and the Independent National Security Legislation Monitor that the NSI Act threatens the right to a fair trial without providing any benefit or advantage over and beyond the principles developed by the common law for the protection of public interest immunity.⁶⁴

Recommendation 12

The CCLS recommend that the NSI Act be amended to remove its most problematic features and that the legislation be reviewed as to the appropriate balance to be achieved between national security concerns and fair trial values, including procedural fairness.

5.3.2. Questioning and Detention Warrants under the ASIO Act 1979 [ASIO Act]

Under s 34G of the ASIO Act a person may be taken into custody by ASIO for questioning and detained for up to 7 days without being charged.⁶⁵ Reasonable and necessary force may be used to take the person into custody.⁶⁶ The person may be questioned in the absence of his or her lawyer.⁶⁷ The person does not have the right to remain silent.⁶⁸ The person and his or her lawyer are only entitled to view the warrant, but not any of the supporting evidence.⁶⁹ We concur with the submission made by the Human Rights Law Centre that the ASIO's questioning and detention warrants are some of the most intrusive and worrying aspects of Australia's counter-terrorism legislation.⁷⁰

⁶³ Law Council of Australia submission to the Independent Monitor on National Security Legislation into the *National Security Information (Criminal and Civil Proceedings) Act 2004* 19 July 2013, [158].

⁶⁴ Ibid [225]; National Security Legislation Monitor, *Annual Report 16 December 2011*, 63.

⁶⁵ *Australian Security Intelligence Organisation Act 1979* s 34G(3) and (4).

⁶⁶ Ibid s 34V(1)(a)(i).

⁶⁷ Ibid s 34ZP.

⁶⁸ Ibid s 34L.

⁶⁹ Ibid s 34ZQ(4)(b).

⁷⁰ Human Rights Law Centre, Submission 39 [28].

These provisions have the effect that a person may be detained without being informed as to the basis of the detention. It is fundamental to procedural fairness, particularly where a person's liberty is concerned, that the person be entitled to know the reasons for their detention and the case against them. Without knowing the reasons for detention it is impossible for an individual to challenge the lawfulness of their detention. No civilised constitutional democracy should allow the exercise of executive power, least of all when depriving subjects of their liberty, in breach of these principles.

Necessity, even in the context of national security or fighting terrorism, is no justification for withholding information against individuals detained. Once a person is detained, any alleged security risk they may pose has been eliminated due to the fact of detention. Disclosing the evidence upon which the detention is supported does not change this. The Independent National Security Legislation Monitor has recommended the repeal of questioning and detention warrants on the basis that they are an unjustifiable intrusion on individual rights.⁷¹ We agree.

Recommendation 13

The CCLS reaffirm their view that the questioning and detention warrants powers s34G of the ASIO Act should be repealed. We recommend this section for further review by the ALRC on the basis of unjustified denial of procedural fairness.

5.4. Migration Act 1958 (Cth)

The Interim Report identified a number of provisions in the Migration Act that expressly deny people in Australia the rights to procedural fairness and natural justice. These provisions broadly relate to:

- The Minister's discretion to cancel or revoke visas;
- Mandatory cancellation of visas
- The fast track assessment process for UMAs;
- Maritime powers; and
- ASIO security assessments for non-citizens.

5.4.1. Minister's discretion to cancel or refuse visas

The Migration Act confers a wide discretionary power on the Minister to cancel or refuse visas in a broad range of circumstances, which are exempt from any procedural fairness requirements.

Pursuant to section 133A(4), natural justice does not apply to s109, which provides that a Minister may cancel a visa if information provided to the Department for the purpose of

⁷¹ Independent National Security Legislation Monitor, *Declassified Annual Report 20th December 2012*, 106.

obtaining that visa was incorrect and the Minister is satisfied it is in the “public interest”. The grounds for which a Minister can cancel a visa under s109 are non-compliance with ss 101 – 105; these grounds range from the trivial inadvertence of failing to answer a question on a visa application or passenger card to the more serious act of intentionally giving authorities a “bogus” document. Section 133A(5) makes clear that the Minister can cancel a visa regardless of whether the visa holder was given notice, or the relevant tribunal found that such a ground did not exist. Further, there is no requirement for the Minister to take into account in his discretion the seriousness of the non-compliance. Section 110 makes clear that the Minister can cancel regardless of whether the non-compliance was inadvertent or deliberate.

Similarly, pursuant to section 133C(4), natural justice does not apply to s116, which gives the Minister the power to refuse or cancel a visa on a range of grounds if the Minister is satisfied it is in the “public interest” to do so. These grounds include being satisfied that a circumstance or fact upon which a decision to grant a visa was based has changed, that incorrect information was given by or on behalf of the visa holder during the application process and that a visa holder is a risk to the “health and safety or good order” of the Australian Community.

It is unclear what purpose excluding natural justice serves in these circumstances, where the grounds for cancelling the visa are very broad, could be relatively trivial and do not seem to involve any security risk to the community. The term “public interest” is an incredibly broad concept and there is no legislative criteria defining the term, which makes it difficult to contend that the Minister’s wide discretion to exclude natural justice in making a decision under s109 or s116 is properly justified or reasonable.

If the purpose of excluding natural justice is simply to reduce administrative delay, then such a rationale cannot constitute a “pressing and substantial” objective which can properly justify excluding natural justice. Nor could such a rationale be considered proportionate in light of the seriousness of the consequences for the visa holder, which could include indefinite detention or deportation. The only ground which may justify excluding natural justice is where a visa holder would be a risk to the “health safety or good order” of the community (s116(e)) or the person is assessed by ASIO to be a security risk (Reg 2.43), however, it is still questionable as to whether excluding natural justice is reasonable where the risk is not serious or imminent and where the information relied upon by ASIO or the Minister could simply be wrong.

Moreover, excluding natural justice in these circumstances is a recipe for bad, mistaken and arbitrary decision-making. For example, the Minister could cancel a person’s visa on the grounds that incorrect information was given, where if the visa holder had an opportunity to respond, she or he could provide additional information as to why the information provided is indeed correct. Further, the fact that the Minister can overturn a Tribunal or delegate decision to not cancel or refuse a visa - a decision where natural justice must be

afforded (s133A(5) and s133C(5)) - undermines the rule of law and means that there is no mechanism for oversight or accountability for the Minister's decision.

Similar problems are raised with excluding the rules of natural justice from discretionary decisions made by the Minister to refuse to grant, or to cancel, a person's temporary safe haven visa (s500A(11)) or a person's visa if the Minister "reasonably suspects" that a person does not satisfy the "character test" and the decision is in the national interest (s501A(4) and s501(5)). The CCS submits that where the Minister is entitled to refuse to grant or cancel a person's visa on the grounds of reasonable suspicion, it is even more important that procedural fairness is afforded so that the visa holder has an opportunity to respond to the grounds, and provide any additional information which could displace such suspicions. The seriousness of the consequences of visa refusal or revocation, not only on the visa holder, but also on the temporary safe haven visa holder's family - which would automatically be refused or cancelled where such a decision is made pursuant to ss500A(12) and (13)) - demands that such decisions are made based on all relevant information and subject to scrutiny.

Recommendation 14

The CCLs considers that these provisions fail the test of proportionality and accordingly unjustifiably exclude procedural fairness. These provisions are contrary to the rule of law and ought be subject to further review, as members of the CCLS have previously highlighted in submissions to various inquiries.⁷²

5.4.2. Mandatory cancellation of visas

Pursuant to s501(3A), the Minister is compelled to cancel a person's visa if the Minister is satisfied that the person does not pass the character test because the person has a substantial criminal record (meaning the person has been sentenced to imprisonment for 12 months or more), or has been convicted or found guilty of one or more sexually based offences involving a child, and the person is serving a custodial sentence at the time of cancellation. Section 501(5) excludes natural justice from applying to such a decision.

As highlighted in the ALRC Interim Report, the Explanatory Memorandum to the Migration Amendment (Character and General Visa Cancellation) Bill 2014 does not provide specific justifications for the removal of this discretion, and appears to counter the rationale for mandatory cancellation by emphasising the importance of the Minister having the power to make decisions in the public interest.⁷³ Accordingly, the exclusion of natural justice in these circumstances does not appear to serve any legitimate purpose. The CCS agrees with other

⁷² NSWCCCL submission to the Legal and Constitutional Affairs Committee of the Australian Senate concerning the Migration Amendment (Character and Visa Cancellation Bill) 2014, Submission 8, 28 October 2014; Liberty Victoria submission to the Legal and Constitutional Affairs Committee of the Australian Senate concerning the Migration Amendment (Character and Visa Cancellation Bill) 2014, Submission 9, 27 October 2014:

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Character_and_Visa_Cancellation_Bill_2014/Submissions.

⁷³ Interim Report, paragraph 15.55.

stakeholders that the mandatory cancellation of visas has serious consequences, particularly for refugees or stateless persons who may face indefinite detention. The tragic case of Ali Jafarri, an Afghani refugee who committed suicide in Yongah Hill immigration detention, after having his visa cancelled on character grounds, and who faced indefinite detention, underscores these potentially fatal consequences.⁷⁴ In our submission, s501(3A) should be repealed altogether.

Pursuant to section 134A, natural justice does not apply to s134B which provides that the Minister must cancel a person's visa if advised by ASIO that that person is outside Australia, is suspected of posing, directly or indirectly, a security risk and ASIO recommends cancelling the person's visa.

The Explanatory Memorandum to the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* explains that this measure would assist where ASIO receives intelligence that raises the possibility that a permanent or temporary visa holder outside Australia, is a security risk but that intelligence alone is not sufficient to enable ASIO to furnish an adverse security assessment. The emergency cancellation would be revoked after 28 days unless ASIO furnishes a subsequent security assessment that recommends against revocation on the basis that the person *is* a security risk, in which case the visa holder, if a former permanent visa holder, would then be able to seek merits review of the adverse security assessment by ASIO at the Administrative Appeals Tribunal. If the visa is cancelled and the cancellation not revoked, the Minister then has discretion to cancel any other person's visa, including children, who depend on that person's visa.

The purpose of excluding natural justice in this case is clearly to protect national security and public safety and order, which is a justifiable purpose in a free and democratic society. Whether excluding natural justice in all circumstances is reasonable and proportionate to the stated purpose given the seriousness of the consequences of cancellation of a visa, particularly where it may mean that children are detained or deported, is debatable.

The CCLS considers that excluding natural justice in these circumstances could be considered reasonable and proportionate, if:

- a) Any final adverse decision by ASIO is subject to procedural fairness requirements;
- b) All visa holders (not just former permanent visa holders) could seek merits review of any final adverse decision by ASIO at AAT and
- c) any decision made by the Minister to cancel a visa dependent on another person's visa is made to consider family unity principles, the best interests of the child and possible legal consequences, and is reviewable on the merits.

⁷⁴ See <http://www.abc.net.au/news/2015-09-17/man-who-set-self-on-fire-in-immigration-detention-dies/6782268>.

Recommendation 15

The CCLS consider the provisions referenced above relating to the Minister’s discretion to cancel or refuse visas and mandatory cancellation of visas in the Migration Act unjustifiably deny procedural fairness and recommend them to the ALRC for further review.

5.4.3. Fast Track Assessment Process For Unauthorised Maritime Arrivals

Part 7AA of the Migration Act, which prescribes the Fast Track Assessment Process, applies only to asylum seekers who arrived in Australia by boat between 13 August 2012, but before 1 January 2014 and have not been transferred offshore. Under this process, where a decision has been made to refuse a protection visa to affected asylum seekers (**fast track reviewable decision**), the Minister must refer the decision to the Immigration Assessment Authority (**IAA**), a body within the Refugee Review Tribunal, which will conduct a limited merits review and decide to either affirm or remit the fast track reviewable decision. If the Minister believes that it would be contrary to the national interest to change the decision or for the decision to be reviewed, then the Minister can issue a conclusive certificate, which excludes the decision from being reviewed (s473BD).

This Fast Track Assessment Process limits procedural fairness in the following ways:

- a) Affected asylum seekers cannot appeal decisions to refuse protection visas to the Refugee Review Tribunal which allows a full merits review and affords procedural fairness;
- b) The Minister’s decision to issue a conclusive certificate is not reviewable;
- c) The IAA will not generally hold hearings and must review decisions on the papers (s473DB);
- d) Affected asylum seekers do not have the right to know or respond to or comment on the material that is provided to the IAA, including the reasons for the preliminary decision and any material in the Secretary’s possession that is considered to be “relevant” to the review (s473CB, s473DB and s473DE);
- e) The IAA is not allowed to consider any new information unless it is satisfied that there are “exceptional circumstances” and the affected applicant has satisfied the IAA that the new information:
 - i. could not have been provided to the Minister before the refusal decision was made; or
 - ii. is credible personal information which was not previously known and, had it been known, may have affected the applicant’s claims (s473DD).
- d) The IAA is only obliged to give the affected applicant an opportunity to comment on new information in writing or in an interview if it specifically is about the affected applicant and is disclosable. Otherwise, if the new information relates to the class of persons of which the applicant is a member or is non-disclosable, the affected applicant does not have an opportunity to know about or comment on the information (s473DE); and
- e) The IAA has no power to vary or revoke a decision once a written statement has been made and there is no further ability to review IAA’s decision (s473EA).

The purpose of these limitations appears to be to “protect” the “safety and security” of the Australian community⁷⁵ and “make it clear that there will not be permanent protection for those who travel to Australia illegally”.⁷⁶ Further, the Migration Act states that the IAA’s main objective is to provide limited review that is efficient, quick, free of bias and consistent (s473FA)

While protecting the Australian community from threats posed to their safety and security is a laudable objective that is justified in a free and democratic society, the Fast Track Assessment Process has nothing to do with making Australians safer. The Fast Track Assessment Process applies in a completely arbitrary fashion to asylum seekers who have arrived in a certain time period via a particular method of arrival (that does not, in of itself, present a higher security risk to Australians). The process does not discriminate between those who pose a security risk or those who do not. Indeed, if the Minister believes that it would be contrary to the national interest for a protection visa refusal decision to be reviewed, the Minister has a wide, unfettered discretion to exclude the fast track assessment from applying at all (see s473BD). The real purpose of the Fast Track Assessment Process appears more clearly targeted at ensuring that those who have come to Australia by boat and remain in Australian detention centers are not granted protection by being processed quickly with limited access to review. Further, it is part of a broader aim to deter others from coming to Australia by boat. Given Australia’s international obligations under the Refugee Convention to protect the rights of asylum seekers and refugees, regardless of how or where they arrive or whether they arrive with or without a visa, the CCS submits that this purpose is not justified and should have no place in a free and democratic society such as Australia.

It is notable that the IAA’s objectives fail to mention fairness or just decision-making and privilege instead efficient, quick and consistent decision-making. Although individual IAA members must be free of bias, the Fast Track Assessment Process is infected, by its very design, with structural bias. By removing fundamental safeguards to ensure fair and just decision making in the way that Part 7AA does, the Fast Track Assessment Process will inevitably lead to errors and miscarriages of justice. Such a process is entirely unnecessary when the Refugee Review Tribunal already exists to review such decisions according to fundamental principals of procedural fairness. The potentially serious consequences of this process are that people in genuine need of our protection are denied a visa, detained indefinitely or sent back to a country where they fear persecution thereby contravening Australia’s non-refoulment obligations.

Accordingly, the CCLS join the chorus of other stakeholders in condemning the Fast Track Assessment Process for arbitrarily and unjustifiably denying procedural fairness.⁷⁷ As previously recommended with respect to these provisions, the Fast Track Assessment Process should be

⁷⁵ Commonwealth, *Parliamentary Debates* Senate, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 second Reading Speech, 4 December (Michaelia Cash).

⁷⁶ Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth).

⁷⁷ Law Council of Australia, Submission 75, Law Society of NSW Young Lawyers, Submission 69, ANU Migration Law Program, Submission 59, Refugee Council of Australia, Submission 41, Refugee Advice and Casework Service, Submission 30.

repealed so that affected asylum seekers can have any negative decisions fairly reviewed in the Refugee Review Tribunal.⁷⁸

Recommendation 16

The CCLS reaffirm their view that the Fast Track Assessment Process (Part 7AA of the Migration Act) unjustifiably denies procedural fairness and recommends this provision to the ALRC for review with the view to repeal.

5.5. Maritime Powers Act

Section 22B(1) of the *Maritime Powers Act* provides that the rules of natural justice do not apply to the exercise of maritime powers, which include powers to board and enter, information gather, search, seize and retain things, detain vessels and aircraft, and detain and arrest persons.⁷⁹ This power effectively allows maritime officials to implement the government's "turn back the boats" policy without any accountability or transparency of its decision-making.

The maritime powers are extremely broad, invasive and can entail serious consequences for those subject to their powers, including arbitrary detention and breach of Australia's non-refoulement obligations. As such, the government must meet a very high burden to justify the exclusion of natural justice. We agree with the Human Rights Law Centre and the Senate Committee that government's justification – that it would be impracticable to afford natural justice in a maritime environment – is entirely inadequate for such a broad exclusion.⁸⁰ Further, "impracticability" is not a legitimate purpose in a just and democratic society to exclude natural justice. There should be a real public interest served by departing from a fundamental safeguard of the common law, rather than mere convenience. There are many, far less rights restrictive measures available to the government to practically afford natural justice to those subject to the different maritime powers.

As has previously been argued by NSWCCCL,⁸¹ we consider that the provision excluding these maritime powers from the laws of natural justice should be repealed.

⁷⁸ The CCS adopts the recommendations contained in the NSWCCCL submission to the Legal and Constitutional Affairs Committee of the Australian Senate concerning the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, Submission 178, 28 October 2014.

⁷⁹ Part 2, Division 2 of the *Maritime Powers Act* set outs how the maritime powers may be exercised while Part 3, Division 1 of the *Maritime Powers Act*, sets out the maritime powers themselves.

⁸⁰ Human Rights Law Centre, Submission 39; Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, Fourteenth Report of 2014 (October 2014) 909.

⁸¹ The CCLS adopts the recommendations contained in the NSWCCCL submission to the Legal and Constitutional Affairs Committee of the Australian Senate concerning the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, Submission 178, 28 October 2014.

Recommendation 17

The CCLS reaffirm their view that the exclusion provisions in Section 22B(1) of the Maritime Powers Act unjustifiably deny procedural fairness and recommend they ALRV further review them with a view to repeal.

5.6. ASIO Security Assessments For Non-Citizens

Section 36 of the ASIO Act provides that any adverse security assessment made in respect of a non-citizen is not subject to the hearing requirements under Part IV of the Act. This effectively means that non-citizens or their representatives do not receive notice of an adverse security assessment, or reasons for the assessment and have limited legal avenues to contest a negative assessment.

There is no clear, justifiable purpose for excluding a person's right to a fair hearing in these circumstances. There is no compelling national security argument for the absence of a right to effective merits review. The right of a refugee to test an adverse security assessment in a court or tribunal does not threaten Australia's security. This is a right currently available to an Australian citizen in respect of whom an ASIO adverse security assessment is issued.

The consequences of issuing a non-citizen an adverse security assessment are significant. It means that they are ineligible for a protection visa (s36(1B) of the Migration Act), and, in the case of refugees or stateless people, remain in indefinite detention as a result of the *Al-Kateb* decision. There are currently at least 32 people who in indefinite detention due to adverse security assessments.⁸²

The CCLS have repeatedly argued for the amendment of this provision to provide non-citizens with a statutory right to a merit review of an adverse security assessment before the Administrative Appeals Tribunal and access to adequate information as to the reason for their adverse assessment to be able to defend themselves.⁸³

This is a widely supported position.⁸⁴ The Gillard Government acknowledged the inherent injustice and undue secrecy of the process with the creation in December 2012 of an office of Independent Reviewer of Adverse Security Assessments (the Independent Reviewer).

This was an improvement and the Independent Reviewer's work has led to the reversal of a number of adverse assessments and the release of some detainees. However, it is generally

⁸² Refugee Council of Australia, Submission 41.

⁸³ See for example open letter to Prime Minister Gillard 21st May 2013 signed by all CCLS in the context of a campaign to amend or repeal some counter-terrorism laws: "*One immediate goal of the Campaign is to persuade the Government to act on the widespread call for a statutory right for refugees subject to adverse security assessments to effective merits review before the Administrative Appeals Tribunal*"

⁸⁴ For example see Joint Select Committee Report on Australia's Immigration Detention Network, Community Detention and Bridging Visas March 2012. Recommendation 28. Senate Legal and Constitutional Affairs Committee Report on the *Migration and Security Legislation Amendment (Review of Security Assessment) Bill 2012*, May 2013 Recommendation 2

recognised that this non-statutory review process is inadequate as a remedy for denial of fair process. It generates only limited access to information about the reasons for the adverse assessment and the most that the Independent Reviewer can do is to make recommendations to the Director General of ASIO.

Given there are far less restrictive measures that could be adopted which afford procedural fairness to applicants while addressing national security issues, the CCLs submit that the current ASIO security assessment process for non-citizens unjustifiably denies procedural fairness and should be repealed or amended to provide access to a merits review before the Administrative Appeals Tribunal .

Recommendation 18

The CCLs consider the current provisions relating to ASIO adverse security assessments for non-citizens in section 36 of the ASIO Act deny procedural fairness with extremely serious consequences for persons affected. The CCLs recommend that the ALRC further review this provision with a view to establishing a statutory right of merit review for non-citizens before the Administrative Appeals Tribunal.

6. PRIVILEGE AGAINST SELF-INCRIMINATION

6.1. Introduction

The section is limited to comment with respect to the privilege against self-incrimination in relation to criminal justice and national security laws.

The CCLs support the need for further review of use and derivative use immunities. A benefit of conducting a review is that the effectiveness, or otherwise, of immunity protections can be properly assessed in terms of the use of statements made or records produced in subsequent criminal or civil penalty proceedings.

A further benefit of any review would be that data would be available whereby the effect of Australian national laws, that exclude the right to the privilege against self-incrimination, could be compared against standards of international law. This is important because of the influence of article 14 of the International Covenant on Civil and Political Rights (ICCPR) on common law rights.⁸⁵

At same time however, the CCLs believe that any review of immunities should be part of a broader review of the privilege against self-incrimination more generally.

⁸⁵ *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 499 (Mason CJ and Toohey J).

Use immunity and derivative use immunity provisions are protections afforded to persons for whom the privilege against self-incrimination is not available because they are required to make statements or produce records under law. Removal of the privilege against self-incrimination represents a significant loss of personal liberty for persons who are forced to answer questions they otherwise would not be required to do. They are, in effect, a safeguard against the removal of a common law right which has been described as: a fundamental bulwark of liberty;⁸⁶ and a protection against practices whose methods to extract evidence are objectionable and generally incompatible with the presumption of innocence.⁸⁷

A protection against the subsequent use of self-incriminating statements and/or records in court proceedings is different from a justification to abrogate the privilege on grounds of public interest and/or proportionality. A review of use and derivative use immunities that does not consider the broader question of the justification for abrogation of the privilege against self-incrimination risks, among other things, characterising immunity protections as a justification for abrogation that is not contemplated by the courts.

6.2. The contemporary relevance of privilege against self-incrimination- s 34L of the Australian Security Intelligence Organisation Act 1979

The importance and continuing relevance of the privilege against self-incrimination has been the subject of much legislative and judicial attention in recent years.

As noted in the Inquiry, a number of Commonwealth laws exclude the right to claim privilege against self-incrimination. An example is s 34L of the *Australian Security Intelligence Organisation Act 1979* (Cth) (“ASIO Act”). Under this provision a person cannot fail to provide information to ASIO officers on the grounds that it may incriminate them.

As identified by Lisa Burton, Nicola McGarrity and George Williams, a problem with the justification for the abrogation of the privilege of self-incrimination, in this case on grounds of public interest, is that the basis for issuing a questioning warrant does not require any proof of imminent danger or that the intelligence sought is capable of preventing a terrorism offence before coercive questioning is permitted.⁸⁸

Absence of such proof invariably raises the prospect of over reach on the part of law enforcement agencies in the pursuit of questioning warrants. Use and derivative use immunities are not a safeguard against such activities.

⁸⁶ *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 92, [55].

⁸⁷ *Cornwell v The Queen* (2007) 231 CLR 260 [176] (Kirby J).

⁸⁸ Australian Law Reform Freedoms Inquiry, (2015) 351.

6.3. CCLs opposition to abrogation of the privilege against self-incrimination

The CCLs have previously voiced their concerns about statutory encroachments of the privilege against self-incrimination. We share the view of the courts that the privilege protects the personal freedom, liberty, privacy and dignity of individuals.⁸⁹ We are also of the view that the privilege, rather than inhibiting investigation, encourages individuals to cooperate with investigators and prosecutors, protects individuals from coercion and reduces the risk of false confessions or the provision of untruthful evidence.

The CCLs are of the view that a statute should only abrogate the privilege where a pressing public interest clearly outweighs the harm to individual to whom the privilege is lost. As the New South Wales Council for Civil Liberties (NSWCCL) stated in 2005, “the mere fact that self-incriminating information is likely to assist authorities with their investigations is not a public interest sufficiently compelling to warrant the abrogation.”⁹⁰

The CCLs have previously raised concerns regarding the absence of directive use immunities in statutes where there is an abrogation of the privilege against self-incrimination. The CCLs are of the view that the provision to law enforcement bodies of information obtained in breach of the privilege amounts to an unwarranted departure from the common law rights of the accused.

Where the privilege is statutorily abrogated, the CCLs are in favour of the imposition of both use and derivative use immunities that would both prevent the use of privileged information in subsequent proceedings and prevent the use of evidence derived from information obtained in breach of the privilege.

6.4. A substantive common law right

The privilege against self-incrimination has been widely recognised as a basic and substantive common law right. Recent High Court of Australia judgements have affirmed its importance.

In *Lee v NSW Crime Commission* the privilege against self-incrimination was described as reflecting ‘*the long-standing antipathy of the common law to the compulsory interrogations of criminal conduct*’.⁹¹

In *X7 v Australian Crime Commission* it was held that requiring a person to answer questions on the subject matter of a crime for which they were waiting trial fundamentally altered the system of adversarial and accusatorial criminal justice.⁹² While in *Lee v the Queen* the Court stated that:

⁸⁹ *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 346 per Murphy J; *X7 v Australian Crime Commission* (2013) 248 CLR 92 at [104]-[105].

⁹⁰ NSWCCL, Parliament of NSW Legislation Review Committee’s Discussion Paper, ‘The Right to Silence’, 29 November 2005.

⁹¹ (2013) 251 CLR 196, [1] (French CJ)

⁹² 131 [85], 140 [118] (Hayne and Bell JJ), 152-3 [157] (Kiefel J).

It is a breach of the principle of the common law, and a departure in a fundamental respect from a criminal trial which the system of criminal justice requires an accused person to have, for the prosecution to be armed with the evidence of an accused person obtained under compulsion concerning matters the subject of charges.⁹³

The particular concerns shown by the High Court of Australia as to the fundamental importance of the privilege against self-incrimination supports our view that a review of use and derivative use immunities should consider questions concerned more generally about abrogation of this privilege altogether.

Recommendation 19

The CCLs support the further review of use and derivative immunities with respect to the privilege against self-incrimination. The terms of reference should go beyond those of review of protections alone.

7. STRICT AND ABSOLUTE LIABILITY

7.1. Introduction

Unlike the vast majority of remedies available under the law, punishment and denunciation are considerations when a court sentences an offender for a criminal offence. The unique and serious sanctions available under criminal law are justified by reference to the moral culpability of the offender, which is assessed by both the harm done by the offender's actions and their intention to inflict that harm (or recklessness as to that result). This is reflected in the common law presumption that every criminal offence includes both a physical element and mental element.

Strict and absolute liability offences, which do not require proof of mental elements, raise the possibility of criminal liability being imposed on persons even where moral culpability is absent. CCLS consider that strict and absolute liability may be justified and proportionate, primarily to ensure the integrity of regulatory regimes (such as public health, workplace safety and the environment), where imprisonment is not a sanction and other options have been explored.

CCLS agree that the statutory provisions identified in the ALRC's interim report ought to be reviewed to ensure that they do not unjustifiably encroach upon the presumption that intent or knowledge must be proved before imposing criminal liability.

⁹³ [2014] HCA 20 [46] (French CJ, Crennan, Kiefel, Bell and Keane JJ).

7.2. National security legislation

Of the statutory provisions identified in the interim report, the imposition of strict liability in counter-terrorism and national security offences is particularly concerning to the CCLS.

7.2.1. Section 102.5(2) of the Criminal Code

Section 102.5(2) of the Criminal Code prohibits training with or providing training to an organization that is proscribed by regulations as a terrorist organization. The prosecution do not need to prove that the person knew that the organization was a terrorist organization. Strict liability applies to whether the organization is proscribed, but the provision also states that the offence does not apply unless the person is reckless as to whether the organization is proscribed. This is confusing and raises the question of how these provisions operate.

7.2.2. Section 102.8(1) of the Criminal Code

Section 102.8(1) of the Criminal Code prohibits association with a person who is a member of, or who promotes or directs the activities of an organization, that is proscribed by regulations as a terrorist organization.

CCLS consider that it is neither justifiable nor proportionate to apply strict liability to these offences for the following reasons:

- i) The potential penalties are extremely serious, namely 25 years imprisonment for s 102.5(2) and 3 years imprisonment for s 102.8(2). Such sanctions should be reserved for offenders who have a high level of moral culpability, and as such the prosecution ought to be required to prove the offender's state of mind. It is not legitimate to impose strict liability for these offences to make them easier to prosecute.
- ii) The conduct caught by s102.5(2) may have no relationship with supporting terrorist activities, but for their connection with a proscribed organization. For example, a person could provide training of a purely humanitarian nature.
- iii) Section 102.5(2) covers conduct where the person has no knowledge about its connection to a proscribed organization, for example where the person receives training but does not know that the persons providing the training are from the organization.

7.2.3. Section s 119.2 of the Criminal Code

CCLS share the concerns raised in the Interim Report regarding s 119.2, which criminalizes entry or presence a foreign country in an area that is proscribed by the Foreign Affairs Minister. Even though the offence carries a maximum of 10 years imprisonment, the prosecution does not have to establish that the accused was in that area for a purpose connected to terrorism. CCLS consider that both the offence and available sentences are disproportionate to the conduct in question. It is highly questionable whether the mere

presence of a person in a proscribed area, without anything more, should be criminalized let alone carry a possible term of imprisonment.

The CCLS agree with the provisions identified by the ALRC for further review.

Recommendation 20

The CCLS recommend that:

- i) That s 102.5 and s 102.8 of the criminal Code be redrafted without making the offence or any element of it strict liability.***
- ii) That s 102.5 and s 102.8 be redrafted to make it an element of the offence that the training or association with the organization is connected with a terrorist act, or preparation for a terrorist act.***
- iii) That s 119.2 be redrafted to make it an element of the offence that the entry or presence in the area is connected with a terrorist act, or preparation for a terrorist act.***

8. FREEDOM OF ASSOCIATION

This section constitutes brief general comment on the important right to freedom of association.

“Freedom of association is closely related to other fundamental freedoms recognised by the common law, particularly freedom of speech. It has been said to serve the same values as freedom of speech: ‘the self-fulfilment of those participating in the meeting or other form of protest, and the dissemination of ideas and opinions essential to the working of an active democracy’.” 7

However, in the Australian constitutional context, it seems this right to free association is only a corollary of the right to political communication. The High Court said in *Wainohu v New South Wales*:

The CCLS agree with the issues identified by the ALRC for review.

There are numbers of anti-terrorism and anti-consorting offences under the *Criminal Code* (Cth) that are not proportionate to the legitimate aim of public safety and national security and are an encroachment on freedom of association. We agree with the submissions of the Law Council of Australia and the UNSW Law Society in regard to ss 120.8 and 119.2 and divs 104 and 105 of the *Criminal Code*. These laws shift the focus away from the criminal liability of a person’s conduct to his or her membership or association with an organisation. The CCLS support a review of these anti-terrorism and anti-consorting offences by the INSLM.

Section 501(6)(b) of the *Migration Act* fails the proportionality test and cannot be justified on the basis of legitimate objectives, for example preventing criminal activity. The section is a clear encroachment on freedom of association and violates Article 22 of the ICCPR. The CCLS agree with

Submission 19 of the UNSW Law Society and Submission 30 of the Refugee Advice and Casework Service (RACS) to the extent that this provision is not a proportionate encroachment on the right to freedom of association. The decision of the Full Federal Court in *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414 provides a possible basis for reform in terms of narrowing the scope of the concept of ‘association’.⁹⁴ This reform could make it clear within the legislation that association or membership requires that “the person was sympathetic with or supportive of the criminal conduct”.⁹⁵ Reform of this kind may ensure that s501 does not unduly encroach upon freedom of association.

Recommendation 21

The CCLs recommend that s 501(6)(b) of the Migration Act should be repealed and replaced with a section where the judgment of a person’s character is based on more than membership or association.

9. RETROSPECTIVE LAWS

9.1. The Migration Act 1958

The CCLs agree with the issues identified by the ALRC for review. In addition, the CCLs believe that the ALRC should consider the operation of 91WA of the *Migration Act* in Chapter 9.

Insofar as the submissions relate to ss 45AA, 500A(3)(d) and 501(6)(aa) of the Migration Act, the CCL supports the Refugee Council of Australia (Submission 41), ANU Migration Law Program (Submission 59), Human Rights Law Centre (Submission 39), RACS (Submission 30) and the Law Council of Australia (Submission 75).

Sections 45AA, 500A(3)(d) and 501(6)(aa) cannot be justified as laws which retrospectively change legal rights and obligations. Firstly, s 45AA does not honour the justified expectations of those asylum seekers who came to Australia with the belief that they would be granted permanent protection visas. Secondly, to the extent that these sections are retrospective, they can have no deterrent effect. These sections are therefore unjust as they lack certainty and predictability.

The CCLs reiterates its submission made in relation to the Inquiry into the *Deterring People Smuggling Bill 2011*. People are entitled to certainty and predictability in the law. Section 228B removes this entitlement. Retroactively applied criminal liability is unjust and offends fundamental notions of justice and fairness.⁹⁶ This retrospective law also violates Article 15 of the International Covenant of Civil and Political Rights and other international human rights instruments.⁹⁷

Section 91WA of the *Migration Act* provides that Minister must refuse to grant a protection visa to an applicant for a protection visa if that applicant has provided bogus documents or destroyed

⁹⁴ Submission 59 of the ANU Migration Law Program and p 149 of the ALRC Interim Report.

⁹⁵ The proposal of Submission 59 of the ANU Migration Law Program.

⁹⁶ *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 608 (Toohey J).

⁹⁷ For a list of these instruments, refer to the NSWCLL submission to the Senate Legal and Constitutional Affairs Committee on the Deterring People Smuggling Bill 2011.

identity documents. This provision applies retrospectively to applicants who have already been granted refugee status by the Department of Immigration and Border Protection and are awaiting their final health and security checks prior to being issued with a protection visa. It is therefore almost guaranteed that these applicants will be issued a protection visa. Many applicants would be in the final stages of an application process that had been years in the making. However, the scope of s91WA is so wide that it fails to take in to consideration legitimate reasons for why an applicant may have provided bogus documents or destroyed identity documents. For example, people smugglers often tell people to throw passports in to the sea or stateless people for whom it is impossible to obtain national identity documents. Article 31 of the Refugee Convention clearly states that penalties should not be imposed on an asylum seeker by reason of his or her illegal entry or presence in a country, for example by arriving without valid travel documents. This situation is therefore clearly not one that justifies the use of retrospective laws. The CCLs is of the view that s91WA merits further review and should be included in Chapter 9 for further consideration.

Recommendation 22

The CCLs recommend that the retrospective operation of ss 45AA, 500A(3)(d), 501(6)(aa) and 91WA is not necessary to achieve the objectives of the Migration Act. To the extent that these sections are retroactive, we recommend that they be repealed.

9.2. POST-SCRIPT Proposed s 35A: The Australian Citizenship Amendment (Allegiance to Australia) Bill 2015

The Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 is currently before the Australian Parliament. It is the latest in the long list of increasingly alarming legislative responses by the Government to the threat of terrorism. The CCLs opposed this Bill.⁹⁸ The PJCIS has reviewed and reported on the Bill.⁹⁹ As indicated earlier in this submission, the PJCIS does recommend significant changes to the Bill which will greatly diminish its overreach, scope and pervasive contempt for natural justice and the rule of law. Overall the PJCIS recommendations certainly make the Bill a considerably less dangerous set of proposals. The Government has not yet indicated its response to the PJCIS recommendations and the Bill has not yet returned to the House of Representatives.

Proposed s.35A would see a person who was convicted of a relevant offence stripped of his or her citizenship regardless of when they engaged in the conduct. Any legislation that so fundamentally affects the rights and freedoms of persons should only apply to conduct occurring after enactment.

This was and remains an intensely controversial Bill. The retrospectivity proposal in s 35A was widely opposed. It is disappointing that the PJCIS has not rejected the retrospectivity element. Instead, it has significantly limited the ambit of the retrospectivity proposal by recommending it be applied

⁹⁸ Joint CCLs submission to PJCIS Review of The Australian Citizenship Amendment (Allegiance To Australia) Bill 2015, 20/7/15.

⁹⁹ Parliamentary Joint Committee on Intelligence and Security: Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, September 2015.

only where sentences of 10 years or more have been imposed by a court no more than 10 years before the Bill's assent .

The Committee recommends that proposed section 35A of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 be applied retrospectively to convictions for relevant offences where sentences of ten years or more have been handed down by a court. The Ministerial discretion to revoke citizenship must not apply to convictions that have been handed down more than ten years before the Bill receives Royal Assent. Rec 10¹⁰⁰

If implemented, this will restrict application to a **very** small number of persons. Nonetheless, the CCLs oppose this recommendation by the PJCIS. Every time a statute includes a retrospectivity provision it strengthens the perception that retrospectivity as acceptable and normal. It is contrary to natural justice and the rule of law. It should be resisted as a matter of important principle. In this Bill the consequence of retrospectivity for the affected persons is very significant- the loss of Australian citizenship.

Recommendation 23

- i) The CCLs oppose the proposed inclusion of the s 35A retrospectivity provision in the Australian Citizenship Amendment (Allegiance To Australia) Bill 2015 – including the proposed amended provision recommended by the PJCIS - as opposed to natural justice and the rule of law.***

- ii) If the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 is approved by Parliament and becomes law the ALRC should include it in its list of Australian statutes which encroach on fundamental liberties and rights and include it in the next stage of the review process.***

10. CONCLUSION

The nominated CCLs across Australia collaborated on this submission because we recognise the Inquiry to be an important national project. Defending liberties and rights is the bread and butter of our organisations and we have been very alert for some time to the cumulative impact on rights and freedoms of the post 9/11 counter-terrorism and national security (and more lately border protection) flood of legislation.

We welcomed and continue to support the worth of the inquiry. It has provided an opportunity for a national focus on the rapidly increasing numbers of statutes which undermine our rights and freedoms – all too often with lack of justification.

It has been difficult to maintain optimism about the project over the term of the current Government given the veritable flood of new rights/freedoms offending statutes. Nonetheless we

¹⁰⁰ Ibid, pxviii

are hopeful that the Government will make constructive use of the powerful body of evidence that is emerging from the work of this review.

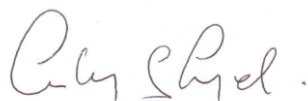
We will be urging the Government to develop a clear strategy for acting on the recommendations that will emerge from the final stage of the review. We would urge the ALRC to provide the Government with recommendations that prioritise areas of legislation for planned rollback of unjustified encroachments. The CCLs consider the counter-terrorism/national security and border protection statutes to be high on any such priority list.

The CCLs regret that we have not been able to respond more fully to the range of legislation covered in the Interim Report. Time and resources precluded that. We are hopeful that this partial response is of use to the review process. We look forward to the final report with great interest.

The CCLs would welcome an opportunity to discuss these issues further with the ALRC.

This submission was written on behalf of the nominated Councils for Civil Liberties across Australia by Professor Spencer Zifcak, Evelyn Tadros, Hugo de Kock, Andrew Vincent and Angie Wong from Liberty Victoria; Dr Lesley Lynch, Anna Lochhead and Sarah Swartz from NSWCCCL. Significant comment was provided by George Georgio SC, President of Liberty Victoria. Overall coordination was managed by Dr Lesley Lynch.

With Regards,



Dr Lesley Lynch
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