Traditional Rights and Freedoms: Encroachments by Commonwealth Laws

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Introduction

The Castan Centre for Human Rights Law (Castan Centre) thanks the Australian Law Reform Commission for the opportunity to comment on its Issues Paper 46 (IP46) on Traditional Rights and Freedoms (TRFs).

We do not intend to address each section of IP46 in detail; rather we wish to express our general concern about the Government's focus on TRFs rather than international human rights law, which we believe to be a more appropriate framework for the assessment of the rights-compatibility of Australian legislation.

To be clear, the Castan Centre strongly supports the evaluation of Australian legislation for rights-compatibility, but we believe this should be done more systematically based on Australia's relevant international obligations. The Terms of Reference for the present inquiry appear to prescribe an arbitrarily incomplete list of rights and freedoms. For example, perhaps due to the ongoing political sensitivity surrounding Australia's immigration detention regime, the Terms of Reference for the present inquiry do not expressly include the traditional protection against deprivation of liberty found in doctrines such as *habeas corpus*. This exemplifies the apparently selective approach taken by the Attorney-General in drafting the terms.

In addition, the TRFs listed appear to be a limited, outmoded 'subset' of rights.[1] For example, laws which interfere with freedom of religion are included, but laws which interfere with other cultural practices (as protected under the *International Convention on the Elimination of All Forms of Racial Discrimination* and *Covenant on Economic, Social and Cultural Rights (ICESCR))* are not. We should be verifying whether Australian law unduly encroaches on human rights and freedoms as they are understood and accepted globally in the 21st Century, rather than centuries past.

By ratifying the seven core human rights treaties (not to mention incorporating reference to them in the *Australian Human Rights Commission Act 1986* and the *Human Rights (Parliamentary Scrutiny) Act 2011*), the Australian Government has already accepted an international obligation to legislate in conformity with them. As such, it makes little sense to base the present inquiry on a selection of rights and freedoms which are already protected at common law in Australia; surely those which are not (adequately) protected ought to be of equal or greater concern.

In addition, the inquiry sends an ambivalent message about Australia's commitment to its international obligations, in contrast to the message maintained by the Government in its

[1] See Carne, 'Charting Opposition to Human Rights Charters: New Arguments or Recycled Objections?' (2009) 28(1) *UTasLR* 81, 113.

dealings in multilateral (eg the UN Security Council, Human Rights Council and Human Rights Treaty Bodies) and bilateral (eg Human Rights Dialogues with China, Vietnam and Laos) fora.

In principle, an evaluation of federal laws in comparison to the listed TRFs may seem benign. However, combined with the occasional rhetoric of the Attorney General, as well as the Human Rights Commissioner Tim Wilson, we are concerned that such studies are a stalking horse for a plan to somehow change the meaning of "human rights" in Australian legislation, by divorcing it from international law and substituting this questionable notion of TRFs.

In our submission, the present inquiry represents a case of the Government prescribing its own benchmarks by which its laws should be judged, which clearly involves a conflict of interest. For the reasons set out below, the more apposite benchmark would be the widely accepted international human rights standards contained in multilateral treaties to which Australia is party. Furthermore, as will be seen below, we recommend the adoption of comprehensive human rights legislation at the federal level, which would make this sort of inquiry less necessary.

1. Common Law Protection of Rights

It is unarguable that the common law has traditionally protected many important rights of British subjects. From the earliest writs such as *habeas corpus* (which we reiterate is not explicitly included in the Terms of Reference[2]), the courts of common law (and of equity) have developed means of restraining executive overreach in defence of the individual. As IP46 notes, many of these protections predate international human rights law (in its modern form) by decades or even centuries.[3]

However, we question two of the implications behind calling them 'traditional' rights and freedoms. First, some common law protections are not steeped in antiquity. Second, human rights law has its own tradition, much of which is in fact shared with the common law. We address both issues below.

A. The Principle of Legality

The principle of legality, which apparently provides a sort of framework for the Terms of Reference,[4] is not as entrenched as it may seem from the references to Blackstone and Bentham cited in IP46.[5] Recent scholarly examinations of its origins have found that it does

[2] The power to issue *habeas corpus* is included only under *Other Rights, Freedoms and Privileges* – see IP46, 124.
[3] IP46, 10.
[4] IP46, 123.
[5] IP46, 15.

not have a continuous historical pedigree as is commonly assumed, and that the 'legitimate underpinnings' of the principle have shifted over the course of the 20th Century.[6]

It is true that the High Court in the early case of *Potter v Minihan,*[7] referring to the authority *Maxwell on Statutes,*[8] found in the common law a principle of statutory construction that Parliament should not be assumed to be trampling on rights or fundamental principles of law unless its intention is expressed with 'irresistable clearness.'[9] Indeed, such a principle can be traced back much further, as James Spigelman has observed.[10]

However, as the articles cited in footnote 16 of IP46 attest, curial engagement with the principle of legality has been patchy. For a broad swath of the 20th Century (between 1908 and 1987), it appears to have fallen into disuse.

In addition, the requirement to find sufficient ambiguity in the legislation being interpreted means that IP46's characterisation of the principle as providing only 'limited protection' is accurate and should be emphasised.

A good example of the limitations to its protection is found in the (somewhat infamous) High Court case of *Al-Kateb v Godwin*.[11] A stateless asylum-seeker was being detained under the *Migration Act 1958* (Cth). The relevant provision specified that a person in his position could only be detained for the purposes of immigration processing or removal. Al-Kateb's asylum claim claim had been processed and he was refused a protection visa, but there was no apparent prospect of removing him due to his statelessness. Nevertheless, a bare majority in the High Court found that neither established principles of statutory interpretation nor the Australian Constitution precluded his detention, effectively at the Executive's pleasure.[12] This was despite the Full Court of the Federal Court previously relying on 'fundamental values lying at the heart of our legal system, not least of which is the law's traditional protection against the deprivation of liberty' to hold that a temporal limit should be implied into the relevant detention provision.[13] With the High Court's decision in *Al-Kateb,* this 'fundamental value' was effectively disregarded as the lesser of two principles of statutory interpretation (the greater being that such provisions ought 'to be given effect according to their natural and ordinary meaning.'[14]) Neither the principle of legality, nor the

[6] See Lim, 'The Normativity of the Principle of Legality' (2013) 37 *Melbourne University Law Review* 372, 373.
[7] (1908) 7 CLR 277.
[8] Maxwell and Theobald, *On the Interpretation of Statutes* (Sweet & Maxwell, 4th ed, 1905).
[9] Ibid, 122.
[10] James Spigelman, 'The Principle of Legality and the Clear Statement Principle' (2005) 79 *Australian Law Journal* 769, 775 (as cited in IP46 at 15).
[11] (2004) 219 CLR 562.
[12] See eg Zagor 'Uncertainty and Exclusion: Detention of Aliens and the High Court,' (2006) 34 *Federal Law Review* 127.
[13] Ibid, 128 (referring to the appeal in the related case of *Al-Masri v MIMIA* (2003) 126 FCR 54).
[14] See eg *Al-Kateb* per McHugh J at [65].

rule that statutes ought to be read consistently with Australia's relevant international obligations, availed the appellant due to a lack of ambiguity in the relevant provision.[15]

If the common law does not allow for intervention by the courts in a case of (potentially) indefinite administrative detention, its protection of 'fundamental values lying at the heart of our legal system' is weak. In comparable circumstances (where detainees have been processed and denied a visa, but cannot be removed), the UN Human Rights Committee has found a clear breach of Australia's international obligations under article 9 of the *International Covenant on Civil and Political Rights* (ICCPR).[16]

B. Inadequacy of Common Law as a Protector of Rights

It must not be overlooked that even the home of the common law saw fit to pass the *Human Rights Act 1998* (UK), partly in recognition of the fact that common law protections did not match up to those required under the European Convention on Human Rights. Of course Australia does not have a *Human Rights Act*, which is out of step with other common law countries (and liberal democracies in general). As such, the inadequacy of the common law in protecting certain rights continues to be demonstrated in this country.

There is even considerable doubt about the 'traditional' nature of some of the protections listed in the Terms of Reference. The following are illustrative examples:

(i). A Case Study - Freedom of Speech

In the 1993 case of *Derbyshire County Council v Times Newspapers Ltd*,[17] the House of Lords determined that the Council could not sue in libel for articles which had questioned the propriety of investments made for its superannuation fund. It found that the common law effectively protects freedom of political speech, just as article 10 of the European Convention on Human Rights (ECHR) does.[18] Indeed, the unanimous judgment stated that the 'Convention, though not part of domestic law, enshrines the common law.'[19] However, this case was arguably the first time the courts had 'found' such a robust protection for freedom of speech in the common law, and it arose 40 years after the ECHR came into force for the UK. Numerous cases, decided in years not far removed from the *Derbyshire* decision, attested to the weakness of freedom of speech principles in British law, such as the

[15] Ibid, 132-133.
[16] See eg *FKAG et al v Australia*, UN Doc CCPR/C/108/D/2094/2011, Views of 20 August 2013. NB the Human Rights Committee has made findings of arbitrariness in several cases involving Australia's mandatory detention regime beginning with *A v Australia*, UN Doc CCPR/C/59/D/560/1993, Views of 3 April 1997. Article 9 prohibits unlawful and arbitrary detention.
[17] [1993] AC 534.
[18] Ibid, 539-540.
[19] Ibid, 540.

decisions in the *Spycatcher* cases[20] as well as in *R v Secretary of State for the Home Department, ex parte Brind*.[21]

Similarly in Australia, the protection of free speech at the Commonwealth level essentially dates back to 1992,[22] and is very limited compared with the equivalent protection under international law.[23]

(ii) A Case Study - The British Miners' Strikes and the Freedoms of Assembly and Association

The miners' strike of the mid-1980s was the longest industrial dispute in the history of the United Kingdom (UK).[24] It has been said that the Government of the day used the law 'to an extent unprecedented in controlling industrial disputes in the United Kingdom.'[25] Over the course of the strike, a total of 9808 arrests were made, of which 8788 were miners and which led to 10,372 criminal charges.[26] Commentators noted the 'willingness of the courts to view and process the strikers from the perspective of the government,' despite freedom of association theoretically being guaranteed in the UK since 1950 under article 11 of the ECHR.[27]

(iii) A Case Study – Privacy

In the age of the Internet and mass surveillance, privacy is an increasingly prominent right. Yet the common law in Australia does not recognise a cause of action for even the most serious invasions of privacy, despite a lack of statutory protection, and despite an international obligation to protect it since 1980 (when article 17 of the ICCPR entered into force for Australia).[28] Reflecting the current state of the law, the Terms of Reference refer to 'protection of personal reputation,' which is also covered by article 17, but not to privacy.

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[20] *Attorney-General v Guardian Newspapers Ltd and Others* [1988] 2 WLR 805; *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109.
[21] [1991] AC 696.
[22] See *ACTV v Cth* (1992) 177 CLR 106 and *Nationwide News v Wills* (1992) 177 CLR 1. A case could perhaps be made that significant inroads for free speech protection arose in *Davis v Commonwealth* (1988) 166 CLR 79.
[23] See ICCPR, article 19.
[24] See eg Thomas, Power and East, 'The British Miners' Strike' (1985) 5 *Windsor Yearbook of Access to Justice* 181. See also 'Labour Law: The Miners' Strike 1984/85 in Britain' (1985) 13 *International Business Lawyer* 474, 479.
[25] Thomas, Power and East, as above, 181.
[26] Figures quoted in a Report on the miners' strike by Gordon Brown and Merlyn Rees, Labour Party M.P.'s, House of Commons, May 1985, p 4, 6. Over 60% of the charges were brought under s 51, *Police Act 1964* and s 5, *Public Order Act 1963*.
[27] Thomas, Power and East, above n 24, 183. See also Ewing, 'The Strike, the Courts and the Rule-Books' (1985) 14 *Industrial Law Journal* (UK) 160, 174-5. See also Keith Ewing and Conor Gearty, *Freedom Under Thatcher: Civil Liberties in Modern Britain* (Clarendon Press, Oxford, 1990), 103-112.
[28] As a consequence of this gap in protection, the Australian Government issued a discussion paper canvassing a statutory cause of action in September 2011: <http://www.ag.gov.au/consultations/pages/Righttosueforseriousinvasionofpersonalprivacyissuespaper.aspx>

As noted in the ALRC's recent Discussion Paper *Serious Invasions of Privacy in the Digital Era*,[29] a common law right of privacy has only been recognised in two lower courts in Australia to date; no appellate court has confirmed its existence.[30] In the 2013 case of *SZSKF v Minister for Immigration and Anor*,[31] the Federal Circuit Court, in discussing an alleged case mix-up by the Refugee Review Tribunal, potentially resulting in the release of sensitive personal information relating to a refugee application, was notably dismissive of actionable right to privacy in Australian law.[32]

Other recent cases involving serious breaches of privacy (for example, CCTV surveillance images of an employee being posted on Facebook) have essentially stalled due to superior courts' reluctance to recognise a right to privacy.[33] As a result of this reticence, an important (and increasingly prominent) human right is excluded from the present inquiry's Terms of Reference.

2. Human Rights Law is also 'Traditional'

Although some of the TRFs identified in the Terms of Reference predate International Human Rights Law as we know it today, others do not. As outlined above, international law has actually stolen a march on the common law when it comes to protection of rights such as privacy.

Many of these two systems' origins are also shared. For example, The *Magna Carta* of 1215 and associated Acts passed by the British Parliament (the 1628 *Petition of Right*, the *Habeas Corpus Act* of 1679, the *Bill of Rights Act* of 1689, and others such as the *Toleration Act* of 1689 and the *Act of Settlement* of 1701) protected rights including:

- the right to personal security (including the right to life, safety, health and reputation);
- the right to personal liberty (including a prohibition on arbitrary detention, freedom of movement and *habeas corpus*);
- the right to hold and dispose of one's property free from interference (save by operation of law, and then only with adequate indemnity), and

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Neither the *Privacy Act 1988* (Cth) nor the equitable action for breach of confidence provide comprehensive protection for privacy in Australian law.

[29] ALRC Discussion Paper 80, 31 March 2014: <http://www.alrc.gov.au/publications/serious-invasions-privacy-dp-80>.

[30] Ibid, [3.52].

[31] [2013] FCCA 846.

[32] Ibid, [72]. Indeed, the court seemed to be dismissive of the very notion of a right to privacy, let alone an actionable right.

[33] See *Saad v Chubb Security Australia Pty Ltd* [2012] NSWSC 1183; also eg *Doe v Yahoo!7 Pty Ltd* [2013] QDC 181.

- the right to apply to the courts for redress of injuries (or, failing that, to petition the Sovereign or Parliament, or in extreme cases of oppression to take up arms in self-defence).[34]

These statutes gave rise to the idea that the power of the Sovereign should be limited for the sake of individual citizens – an idea at the root of human rights law.[35] They were imported into Australian law upon settlement in the 18th Century,[36] although by the late 19th Century they ceased to have effect,[37] and many of their provisions have not since been replicated in Australian law (at least at the Commonwealth level).

In a speech on the present inquiry at the AHRC's Free Speech Conference in 2014, the President of the ALRC, Professor Rosalind Croucher, cited John Locke on freedom – specifically his *Two Treatises of Government.*[38] Professor Croucher emphasises Locke's comments on the limits of freedom in a society governed by law, but she might also have cited his advocacy of natural rights – for example 'man was born with a title to perfect freedom, and an uncontrolled enjoyment of all the rights and privileges of the law of nature, equally with any other man…'.[39] Locke's ideas on freedom were a major influence on the common law, but also on human rights law, as is evident in the preamble to the Universal Declaration of Human Rights of 1948 (UDHR).[40]

The American *Declaration of Independence* of 1776 also began with a reference to equality and 'unalienable rights,' as did the French *Declaration of the Rights of Man and of the Citizen* of 1789.[41] Shortly afterwards, Thomas Paine was among the first to use the term 'human rights' in *The Rights of Man* (1791/2).[42] Subsequently, Bills of Rights began to flourish around the world – first in France and in amendments to the US Constitution, followed by most of Europe and many other nations.[43]

Of course these laws did not instantly achieve perfect equality and freedom for all, which generated trenchant critiques by, for example, Jeremy Bentham, Mary Wollstonecraft and (later) Karl Marx.[44] Achieving effective protection for the rights of minorities, or politically weak groups, was of particular concern. After WWI, 14 countries were required to improve

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[34] See Blackstone, *Commentaries on the Laws of England* (Callaghan and Cockcroft, 1871), Vol I, 83-93.
[35] See Bates, 'History' in Moeckli, Shah and Sivakumaran (Eds), *International Human Rights Law* (2nd Ed, OUP 2014), 17.
[36] Blackstone, above n 34, 67-68.
[37] English law (save for that drafted specifically to apply to the colony) ceased to have effect due to the operation of the *Australian Courts Act 1828* (in NSW) and the *Colonial Laws Validity Act 1865* (in the other colonies).
[38] Croucher, Presentation to Free Speech Conference 2014, 7 August 2014: <http://www.alrc.gov.au/news-media/%5Btermpath-raw%5D/ahrc-free-speech-conference-2014>.
[39] Locke, *Two Treatises of Government,* as cited in Bates, above n 35, 17.
[40] Ibid, 17-18.
[41] Ibid, 19.
[42] Ibid, 20.
[43] Ibid, 21-22.
[44] Ibid.

their protections for minorities by the League of Nations; the first time that sovereign nations had been required to treat their inhabitants in certain ways.[45] Of course, these obligations did not prevent the horrors of WWII, which became the catalyst for the modern human rights movement and the UDHR. Australia played a leading role in the drafting of this historic instrument, then reinforced its support for international human rights law through ratification of the treaties which followed (including the ICCPR and the ICESCR).

From this necessarily brief history, it is evident that human rights law has a claim to be termed 'traditional', just like common law protection of rights and freedoms – indeed, much of their story is shared. However, as mentioned above, the common law protections listed in the Terms of Reference represent only a subset of even the rights traditionally protected under English law. International human rights law, on the other hand, now represents an international consensus on the standards to which all nations should be held. It would therefore form a more contemporary and legitimate basis for the proposed evaluation of the Australian statute book.

Potential for Inquiry if Properly Founded

We recognise that that the desirability of a Bill or Charter of Rights is not the subject of this inquiry. However, we must say that it seems far more practical to adopt a Bill or Charter than to amend (potentially) hundreds of existing rights-encroaching Commonwealth laws.

In any event, it is admirable that the Government is interested in identifying rights-encroaching legislation, since amending such legislation would help to ensure the courts are not put in the invidious position of having to uphold laws abrogating fundamental freedoms, as was the case in *Al-Kateb*.

However, the reality is that there are many more rights and freedoms owed to Australians than are listed in the Terms of Reference. This is recognised in Section 19 of IP46, which acknowledges that 'other important rights, such as the right to work, social security, housing and privacy, many of which are set out in the *International Covenant on Economic, Social and Cultural Rights*'[46] will not be canvassed, simply because the courts have not previously recognised them in the context of the principle of legality.

Even if the inquiry were to be limited to civil and political rights, the list of TRFs in the Terms of Reference overlooks several important protections. Understandably, the common law (originating as it does with judges) protects rights such as the right to a fair trial and the right of access to justice well, but its protection for other civil and political rights is inconsistent. Some important examples included in the ICCPR but missing from the Terms of Reference are:

[45] Ibid, 26-27. It may be noted however that these obligations were essentially imposed on the nations defeated in WWI.
[46] IP46, 123.

- Right of self determination (article 1)
- Freedom from discrimination generally and before the law (articles 2 and 26);
- The prohibition on cruel, inhuman and degrading treatment or punishment (article 7);
- The prohibition on slavery (article 8);
- The right to liberty and security of person (article 9 - as distinct from freedom of movement);
- The right to be treated humanely and with dignity in detention (article 10(1));
- The right to a prison system focussed on rehabilitation and social reformation, and which segregates children from adults (article 10(3));
- The right to enter one's own country (article 12(4));
- The right of aliens not to be expelled without due process of law (article 13);
- The right to recognition as a person before the law (article 16);
- The right to privacy (article 17);
- The right of peaceful assembly (article 21);
- The right to protection of family life (article 23);
- The right of minors to special measures of protection (article 24);
- Rights to take part in public affairs, to vote and to access public services (article 25), and
- Rights of minorities (article 27).

Admittedly some of these rights are protected, or partially protected, under legislation such as the Commonwealth Criminal Code, the *Privacy Act 1988* and the various anti-discrimination Acts. On the other hand, we can (and have, in other submissions to Government) identify many instances in which Australian law fails to protect rights on the above list. In any case, all of them unequivocally deserve to be included in any list of rights and freedoms against which Commonwealth laws should be tested.

We believe the present inquiry, properly conceived, would constitute an excellent complement to the work of the Parliamentary Joint Committee on Human Rights (JCHR), which has been scrutinising new legislation for rights-compatibility since 2012. Although the JCHR has the power to scrutinise existing Acts, its capacity to do so is limited. The ALRC is in a better position to identify older laws which encroach unjustifiably on human rights. Judging by the JCHR's findings to date (not to mention our own experience), the Castan Centre expects that the ALRC would in fact be able to identify many such laws.

The National Human Rights Consultation led by Father Frank Brennan reported in 2009 that that a large majority of the thousands of Australians consulted thought that the rights of 'minorities and other marginalised people'[47] were inadequately protected by existing laws. Although many of the TRFs identified in IP46 coincide with the concerns of such vulnerable

[47] *National Human Rights Consultation Committee Report*, September 2009, xxiv.

groups, there are several important group rights (such as freedom from racial discrimination or the right to self-determination) which are omitted from the Terms of Reference.

The Human Rights Framework, presented by the previous Government in response to the Consultation, was originally intended to include an audit of Commonwealth laws for compatibility with Australia's international human rights obligations (as per the Committee's Recommendation 4,[48] adopted in light of 133 expert submissions supporting such an audit). The Consultation highlighted that comparable audits had already been performed in the UK and Victoria.[49] The present inquiry represents a good opportunity to revive this important project, since the Commonwealth audit appears to be in indefinite abeyance. However, limiting it to identifying only those laws which conflict with the TRFs listed in the Terms of Reference (plus perhaps the ones listed in Section 19 of IP46), fails to respond adequately to the Consultation Committee's recommendation.

In fact, the limitations inherent in the Terms of Reference even conflict with Senator Brandis' own submission to the Consultation, which stated that the (then) Opposition favoured 'a *comprehensive* audit of existing legislation, to identify and repair gaps in *human rights* protection under the existing law.'[50]

Conclusion

The present inquiry into the compatibility of Commonwealth legislation with TRFs is misconceived for the following reasons:

- The basis for the list of TRFs in the Terms of Reference (and exclusions from that list) is unclear;
- The TRFs identified in IP46 represent only a limited subset of the rights protected under international human rights law. International human rights law would form a sounder, more up-to-date basis for an assessment of Australian legislation;
- International human rights law also draws on centuries of legal tradition, and has the added legitimacy of international endorsement;
- The limited scope of the inquiry is inconsistent with Recommendation 4 of the National Human Rights Consultation Committee Report of 2009, and the (present) Attorney-General's own submission to that Consultation.

To be considered comprehensive, the inquiry should be reframed to take into account Australia's international human rights obligations. Any common law rights, freedoms or privileges that are not considered to be covered by Australia's relevant treaty obligations could also be included as additional bases for such a compatibility assessment.

[48] Ibid, 163.
[49] Ibid, 155-156.
[50] G Brandis, submission to National Human Rights Consultation, cited in *Consultation Committee Report*, above n 47, 156 (emphasis added).