



Commonwealth counter terror and migration laws:
a disturbing trend of unjustifiable interference
with rights and freedoms

Submission to the Australian Law Reform Commission's Issues
Paper

27 February 2014

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Freedom. Respect. Equality. Dignity. **Action.**

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Contents

1.	SUMMARY AND RECOMMENDATIONS	2
1.1	Summary	2
1.2	Recommendations	3
2.	DETERMINING IF AN ENCROACHMENT IS JUSTIFIED	4
2.1	The proportionality test	5
3.	NATIONAL SECURITY AND COUNTER-TERRORISM LAWS	6
3.1	Special intelligence operations (<i>freedom of speech</i>)	6
3.2	Control orders (<i>freedom of association, freedom of movement, fair trial</i>)	7
3.3	Travel bans (<i>freedom of movement, burden of proof</i>)	9
3.4	ASIO's questioning and detention warrants (<i>right to a fair trial, procedural fairness, judicial review</i>)	10
4.	MIGRATION LAWS	11
4.1	Mandatory detention of asylum seekers (<i>freedom of movement</i>)	11
4.2	Retrospective invalidation of permanent visa application (<i>retrospective laws</i>)	13
4.3	Maritime powers (<i>right to a fair trial, procedural fairness, judicial review</i>)	14
4.4	Refugees and adverse security assessments by ASIO (<i>right to a fair trial, procedural fairness, judicial review</i>)	15
5.	A FRAMEWORK FOR PROTECTING FROM ENCROACHMENT	17
5.1	Other fundamental rights and freedoms that ought to be addressed	17
5.2	Using law to protect human rights	18

1. Summary and recommendations

1.1 Summary

1. The Human Rights Law Centre (**HRLC**) welcomes this opportunity to provide a submission to the Australian Law Reform Commission (**ALRC**) on its issues paper, “Traditional Rights and Freedoms – Encroachments by Commonwealth Laws” (**Issues Paper**). The Attorney-General has asked the ALRC to review “Commonwealth laws that encroach upon traditional rights, freedoms and privileges recognised by the common law”.¹
2. The review provides an important opportunity to highlight and reform some Commonwealth laws that impermissibly encroach on rights and freedoms. This submission is mostly confined to discussing Australian counter-terrorism and migration laws that unjustifiably interfere with fundamental human rights, freedoms and privileges to an extraordinary degree.
3. In terms of Australia’s national security and counter-terrorism laws, we highlight:
 - (a) the suppression of free speech through new laws that threaten prison terms for disclosing information relating to **ASIO’s special intelligence operations**;
 - (b) the disproportionate impact of the **control orders regime**, which can unnecessarily and disproportionately limit freedom of association and freedom of movement;
 - (c) the effective **travel bans** created by the new offence of entering or remaining in a declared foreign area, which can infringe freedom of movement and effectively reverses the burden of proof; and
 - (d) the unjustifiable denial of procedural fairness through **ASIO’s questioning and detention warrant regime**.
4. In terms of Australia’s migration laws, we highlight:
 - (a) a **law with retrospective application** that converts applications for permanent visas into applications for temporary visas;
 - (b) the **complete exclusion of procedural fairness from the exercise of maritime powers** under the *Maritime Powers Act 2013 (Cth)*; and
 - (c) the denial of due process to applicants for protection visas who receive an **adverse ASIO security assessment** process.

¹ Australian Law Reform Commission, *Terms of Reference*, Review of Commonwealth Laws for Consistency with Traditional Rights, Freedoms and Privileges <<http://www.alrc.gov.au/inquiries/freedoms/terms-reference>>.

5. Finally, the HRLC submission addresses two key limitations in the terms of reference provided to the ALRC, namely:
 - (a) the scope of the terms of reference is limited only to a narrow set of common law rights and does not reflect the complete range of the Australian government's constitutional law or international law obligations to protect other human rights; and
 - (b) the review is limited to identifying and critiquing laws that encroach on rights, without considering the need for laws that would actively protect against such encroachment, such as a national Human Rights Act.

6. This submission:
 - (a) sets out the human rights framework for determining whether an encroachment on rights is appropriately justified;
 - (b) discusses the unjustified infringement of rights occasioned by counter-terrorism and migration laws; and
 - (c) argues that the best protection from encroachment on these rights and freedoms, as well as other important human rights, would be national laws that comprehensively protect human rights such as a Human Rights Act.

1.2 Recommendations

Recommendation 1: The Australian Government should repeal the two new offences in s 35P of the ASIO Act for disclosing information relating to ASIO's special intelligence operations.

Recommendation 2: The control orders regime unjustifiably interferes with freedom of association and movement. The Australian Government should repeal the control orders regime or substantial amend it to ensure it does not disproportionately limit rights.

Recommendation 3: The new offence of entering a declared area effectively reverses the onus of proof and places an unreasonable obligation on a defendant to lead evidence that their travel to the area was for a sole legitimate purpose. The Australian Government should repeal the new offence.

Recommendation 4: The questioning and detention warrant regime in subdivision C in division 3 of Part III of the ASIO Act unjustifiably denies procedural fairness. The Australian Government should adopt the recommendation of the INSLM and repeal the subdivision.

Recommendation 5: The Australian Government should immediately cease its policy of mandatory detention of unlawful non-citizens. The Australian Government should ensure that detention is used as a measure of last resort, only when strictly necessary and proportionate in an individual case.

Recommendation 6: The Australian Government should repeal the retrospective application of amendments to the Migration Act 1958 (Cth) that enable a valid visa application to be taken to be an application for another type of visa.

Recommendation 7: The Australian Government should repeal the exclusion of natural justice in the Maritime Powers Act 2013 (Cth).

Recommendation 8: The ASIO security assessment process unjustifiably denies applicants for protection visas and protection visa holders procedural fairness and unjustifiably restricts access to judicial and merits review. Applicants for protection visas, and protection visa holders, should be afforded procedural fairness and given the same legal right as citizens and permanent residents to seek merits review of adverse ASIO security assessments in the AAT.

2. Determining if an encroachment is justified

7. The Issues Paper asks for submissions to identify laws that encroach on rights as well as for the “general principles and criteria that should be applied” to determine whether the restriction on the right is justified.
8. The HRLC submits that the test for determining whether a restriction is appropriate should be one of proportionality as used in international and comparative human rights jurisprudence

and under the *Charter of Human Rights and Responsibilities Act 2006* (Vic). It is also an expression of the ‘appropriate and adapted’ test used in assessing constitutional rights.

2.1 The proportionality test

9. Put broadly, general provisions setting out a proportionality analysis require that any limitation of rights be reasonable and demonstrably justified in a free and democratic society.² The proportionality test is a two stage process.
10. First, the purpose of the limitation on the right must be of sufficient importance to a free and democratic society to justify limiting the right.³ This might also be described as requiring a “pressing and substantial” objective,⁴ reflecting a need to balance the interests of society with those of individuals and groups. Examples of purposes for limitations that might accord with a free and democratic society include protection of public security, public order, public safety or public health.⁵
11. Second, the means used by the State to limit rights must be proportionate to the purpose of the limitation. The most widely accepted test of proportionality is derived from the Canadian case *R v Oakes*.⁶ In that case the Supreme Court of Canada set out the three important components of a proportionality test:

First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair “as little as possible” the right or freedom in question ... Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of “sufficient importance”.⁷

² Words to this effect are used in section 7 of the *Victorian Charter of Human Rights and Responsibilities Act* (Vic), section 1 of the Canadian Charter of Human Rights and Freedoms, section 5 of the *New Zealand Bill of Rights Act (NZ)* and section 36 of the South African Constitution.

³ *R v Oakes* [1986] 1 SCR 103 [69]-[71] (Dickson CJ).

⁴ *The Supreme Court in Canada (Attorney-General) v Hislop* [2007] 1 SCR 429 [44]. See also *R v Oakes* [1986] 1 SCR 103, cited with approval in *Kracke v Mental Health Review Board* [2009] VCAT 646 [145] and in *R v Momcilovic* [2010] VSCA 50.

⁵ The Hon Rob Hulls MP, Victoria, Parliamentary Debates, *Legislative Assembly*, 4 May 2006, 1291 (Rob Hulls).

⁶ [1986] 1 SCR [103].

⁷ *Ibid* [43].

12. The onus of establishing that a limitation is reasonable and demonstrably justified rests on the party seeking to rely on the limitation, which will usually be the government.⁸ The standard of proof is generally the balance of probabilities, although it may change in given circumstances, requiring “a degree of probability which is commensurate with the occasion”.⁹ That is, the more serious the infringement of rights, the more important the objective of the limitation of those rights must be to a free and democratic society, and the higher the standard of proof will be for the State.¹⁰ This approach has been approved in the Victorian Court of Appeal decision of *R v Momcilovic*,¹¹ in which the Court endorsed the *R v Oakes* requirement for clear, cogent and persuasive evidence in order to demonstrably justify a human rights infringement.¹²
13. The “appropriate and adapted” requirement in Commonwealth constitutional implied freedom jurisprudence is generally consistent with the proportionality approach just described.¹³
14. A proportionality test is appropriate as it preserves rights, provides a framework for balancing competing rights and enables other important public concerns, such as national security and public order, to be duly taken into account.

3. National security and counter-terrorism laws

3.1 Special intelligence operations (*freedom of speech*)

15. Amendments introduced into the *ASIO Act 1979* (Cth) in 2014 prohibit disclosure of information relating to a “special intelligence operation” (**SIO**) of the Australian Security Intelligence Organisation (**ASIO**).¹⁴ Under new section 35P of the *ASIO Act* a person can be imprisoned for up to 10 years if they disclose information relating to an SIO.

⁸ *Ibid* [66]; *Kracke v Mental Health Review Board* [2009] VCAT 646 [108].

⁹ See Warren CJ in *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381 [147] citing *Bater v Bater* [1950] 2 All ER 458, 459 (Lord Denning).

¹⁰ See Warren CJ in *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381 [150].

¹¹ [2010] VSCA 50.

¹² *R v Momcilovic* [2010] VSCA 50 [143] (Maxwell P and Ashley and Neave JJA).

¹³ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. As the majority said in *Roach v Electoral Commissioner* [2007] HCA 43 [85]: ‘When used here the phrase “reasonably appropriate and adapted” does not mean “essential” or “unavoidable”. Rather, as remarked in *Lange*, in this context there is little difference between what is conveyed by that phrase and the notion of “proportionality.”

¹⁴ The *National Security Legislation Amendment Act (No 1) 2014* (Cth), passed on 1 October 2014, introduced the two new offences.

16. The Government states that the legitimate purpose of the provisions is protection of national security.¹⁵ However, the Parliamentary Joint Committee on Human Rights noted that a journalist could be found guilty of an offence even though they did not intentionally disclose information about an SIO. The Committee notes that the potential “chilling effect” of the new offences could undermine public reporting and scrutiny of ASIO’s activities.¹⁶ The Committee stated that it will be difficult to know if the activities being reported on were the subject of an SIO.¹⁷ It concluded that the defence provisions are “very narrow” and “do not offer adequate protection of the public interest in respect of public reporting”.¹⁸
17. The new laws were strongly opposed by many groups including all the major news organisations.¹⁹ They disproportionately and unjustifiably limit freedom of speech and expression and should be repealed.²⁰

Recommendation 1: The Australian Government should repeal the two new offences in s 35P of the ASIO Act for disclosing information relating to ASIO’s special intelligence operations.

3.2 Control orders (*freedom of association, freedom of movement, fair trial*)

18. Control orders are an unnecessary, unreasonable and disproportionate limitation on freedom of association, freedom of movement and procedural fairness.

¹⁵ Explanatory Memorandum, National Security Legislation Amendment Bill (No 1) 2014 (Cth) 22.

¹⁶ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Sixteenth Report of the 44th Parliament* (2014) 57.

¹⁷ *Ibid* 56.

¹⁸ *Ibid* 57.

¹⁹ See the submissions to the Parliamentary Joint Committee on Intelligence and Security’s inquiry, September 2014, available at http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/National_Security_Amendment_Bill_2014/Report1.

²⁰ The statement of compatibility accompanying the amendments these offences limit the right to freedom of expression. Explanatory Memorandum, National Security Legislation Amendment Bill (No 1) 2014 (Cth), p 22.

19. Control orders can be made if, among other things, the order would substantially assist in preventing a terrorist act.²¹ The terms of a control order can limit freedom of association and freedom of movement by:²²
- (a) prohibiting or restricting the person being at specified areas or places;
 - (b) prohibiting or restricting the person's communications or associations with specified individuals;
 - (c) prohibiting or restricting the person accessing or using specified forms of telecommunication or other technology (including the internet);
 - (d) prohibiting or restricting the person leaving Australia;
 - (e) requiring the person to remain at specified premises between specified times each day, or on specified days;²³
 - (f) requiring a person to wear a tracking device;
 - (g) prohibiting or restricting specified activities (including in respect of the person's work or occupation); and
 - (h) requiring a person to report to specified persons at specified times and places.
20. Control orders can be made even in circumstances where a person has not been charged and may never be tried. They can also be made irrespective of a person's ongoing dangerousness.
21. Australia's Independent National Security Legislation Monitor (**INSLM**) has said that control orders are not necessary in their current form.²⁴ The INSLM recommended that the control orders provisions be repealed, and consideration instead be given to authorising such orders only against people convicted of an offence who are shown to have failed to rehabilitate or who continue to present a security risk.²⁵
22. Control orders are also made *ex parte* – that is, the person against whom the control order is made is not present in court. Because they are not protected by the established safeguards of the criminal process, it is crucial that the control orders regime contains appropriate checks and balances. The regime in its current form does not.

²¹ *Criminal Code Act 1995* (Cth) s 104.4(1)(c)(i).

²² *Ibid* s 104.5(3).

²³ Though for no more than 12 hours within any 24 hours: *Criminal Code Act 1995* (Cth) s 104.5(3)(c).

²⁴ Independent National Security Legislation Monitor, *Declassified Annual Report 20th December 2012* (2013) Commonwealth of Australia, <www.dpmc.gov.au/INSLM/docs/INSLM_Annual_Report_20121220.pdf>.

²⁵ *Ibid* 40.

23. The Parliamentary Joint Committee on Human Rights has said that the control orders regime involves “very significant limitations on human rights”, including right to security of the person and the right to be free from arbitrary detention; the right to a fair trial; the right to freedom of expression; the right to freedom of movement; the right to privacy; the right to protection of the family; the rights to equality and non-discrimination; and the right to work.²⁶ The Committee considered that “the control orders regime may not satisfy the requirement of being reasonable, necessary and proportionate in pursuit of their legitimate objective”.²⁷

Recommendation 2: The control orders regime unjustifiably interferes with freedom of association and movement. The Australian Government should repeal the control orders regime or substantial amend it to ensure it does not disproportionately limit rights.

3.3 Travel bans (*freedom of movement, burden of proof*)

24. New provisions introduced in 2014 make it an offence to enter or remain in an area in a foreign country the subject of a declaration by the Foreign Affairs Minister.²⁸ The Foreign Affairs Minister may make a declaration if satisfied that a listed terrorist organisation is engaging in a hostile activity in that area.²⁹ The offence carries a penalty of 10 years imprisonment. A limited exception applies if the person enters, or remains in, the area *solely* for a legitimate purpose, such as providing humanitarian aid, a bona fide visit to a family member or performing an official duty for the Commonwealth.³⁰ A defendant bears the evidential burden of proving the exception.³¹
25. This is an extraordinary offence, both because it substantially interferes with a person’s freedom of movement, and because the operation of the provisions will effectively, although not technically, reverse the onus of proof.

²⁶ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Fourteenth Report of the 44th Parliament* (2014) 17.

²⁷ *Ibid* 15-17.

²⁸ *Criminal Code Act 1995* (Cth) s 119.2(1).

²⁹ *Ibid* s 119.3.

³⁰ *Ibid* s 119.2(3).

³¹ *Ibid* s 13.3(3).

26. The Australian Government has not provided adequate justification for limiting freedom of movement, beyond broad statements such as the need to “deter Australians from travelling to areas where listed terrorist organisations are engaged in a hostile activity”.³²
27. In addition to bearing the onus of providing evidence of a legitimate purpose for entering or remaining in the area, a defendant may also be faced with the difficult task of showing that their travel was *solely* for that purpose. This may require a defendant to prove a negative – that they did not travel to the declared area for a purpose or purposes other than the sole legitimate purpose on which they wish to rely. This limits the presumption of innocence and unjustifiably reverses the burden of proof in substance if not in form.

Recommendation 3: The new offence of entering a declared area effectively reverses the onus of proof and places an unreasonable obligation on a defendant to lead evidence that their travel to the area was for a sole legitimate purpose. The Australian Government should repeal the new offence.

3.4 ASIO’s questioning and detention warrants (*right to a fair trial, procedural fairness, judicial review*)

28. ASIO’s questioning and detention warrants are some of the most intrusive and worrying aspects of Australia’s counter-terrorism regime. The former High Court Chief Justice, Sir Gerard Brennan, described the powers and procedures as follows:

In summary, a person may be detained in custody, virtually incommunicado, without ever being accused of involvement in terrorist activity, on grounds which are kept secret and without effective opportunity to challenge the basis of his or her detention.³³

29. The warrant authorises a specified person to be immediately taken into custody for questioning and detained for up to 7 days with limited external communications.³⁴ Reasonable and necessary force may be used to take the person into custody.³⁵
30. A fundamental component of procedural fairness is that a decision-maker must inform a person of the case against them and provide them with an opportunity to be heard. However, questioning and detention warrants are made *ex parte*. The person the subject of the warrant

³² Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) 47.

³³ The Hon Sir Gerard Brennan AC KBE, ‘The Law and Justice Address’ (Speech delivered at the Justice Awards, Parliament House, 31 October 2007).

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

³⁵ *Ibid* s 34V(1)(a)(i).

is not informed of the reasons put forward for the issue of the warrant. And if a person wanted to challenge the issue of a warrant, their legal advisor would not be entitled to see any document except the warrant.³⁶

31. This denial of procedural fairness far beyond what is necessary.³⁷ The INSLM has recommended the repeal of questioning and detention warrants, finding they are an unjustifiable intrusion on personal liberty and either violate, or are dangerously close to violating, the right to freedom from arbitrary detention under article 9(1) of the ICCPR.³⁸

Recommendation 4: The questioning and detention warrant regime in subdivision C in division 3 of Part III of the ASIO Act unjustifiably denies procedural fairness. The Australian Government should adopt the recommendation of the INSLM and repeal the subdivision.

4. Migration laws

4.1 Mandatory detention of asylum seekers (*freedom of movement*)

32. Unlawful non-citizens in Australia (including children) are subject to mandatory, indefinite and non-reviewable detention.³⁹ The *Migration Act 1958* (Cth) requires that they remain in detention until they are granted a visa or removed from the country.⁴⁰ The possibility of release by a court is expressly excluded.⁴¹
33. Australia's mandatory, indefinite and non-reviewable detention provisions are not replicated elsewhere and defy a host of internationally accepted rights norms. Article 31(2) of the *Refugees Convention* provides that States must not restrict the movement of unauthorised arrivals except where such restrictions are necessary. The United Nations High Commission

³⁶ Ibid s 34ZQ(4)b).

³⁷ The INSLM did not discover a scenario, hypothetical or real, that would require the use of ASIO's questioning and detention warrants where no other alternatives existed that would achieve the same purpose: Independent National Security Legislation Monitor, *Declassified Annual Report 20th December 2012* (2013) Commonwealth of Australia, <www.dpmc.gov.au/INSLM/docs/INSLM_Annual_Report_20121220.pdf> p 105.

³⁸ Independent National Security Legislation Monitor, *Declassified Annual Report 20th December 2012* (2013) Commonwealth of Australia, <www.dpmc.gov.au/INSLM/docs/INSLM_Annual_Report_20121220.pdf> p 106.

³⁹ *Migration Act 1958* (Cth) s 189.

⁴⁰ Ibid s 196.

⁴¹ Ibid s 196(3).

for Refugees (**UNHCR**) has published guidelines on the detention of asylum seekers, confirming that asylum seekers should have the right to freedom of movement⁴² and that detention should be a measure of last resort, “with liberty being the default position”.⁴³ The guidelines state that:

detention for the sole reason that the person is seeking asylum is not lawful under international law.⁴⁴ Illegal entry or stay of asylum-seekers does not give the State an automatic power to detain or to otherwise restrict freedom of movement. Detention that is imposed in order to deter future asylum-seekers, or to dissuade those who have commenced their claims from pursuing them, is inconsistent with international norms.⁴⁵

34. Australia’s mandatory and indefinite detention provisions were also recently condemned by the United Nations Committee against Torture (**UNCAT**), which recommended that Australia:

... adopt the necessary measures with a view to considering: (a) repealing the provisions establishing the mandatory detention of persons entering its territory irregularly; (b) ensuring that detention should be only applied as a last resort, when determined to be strictly necessary and proportionate in each individual case, and for as short a period as possible; and (c) establishing, in case it is necessary and proportionate that a person should be detained, statutory time limits for detention and access to an effective judicial remedy to review the necessity of the detention. It should also ensure that persons in need of international protection, children and families with children are not detained or, if at all, only as a measure of last resort, after alternatives to detention have been duly examined and exhausted, when determined to be necessary and proportionate in each individual case, and for as short a period as possible. The State party should also continue and redouble its efforts with a view to expanding the use of alternatives to closed immigration detention. It should also adopt all necessary measures to ensure that stateless persons whose asylum claims were refused and refugees with adverse security or character assessments are not held in detention indefinitely, including by resorting to non-custodial measures and alternatives to closed immigration detention.⁴⁶

35. Serious concerns were also raised about Australia’s offshore processing of asylum claims, with the UNCAT stating that Australia’s international obligations extend to protecting those

⁴² UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, available at <<http://www.unhcr.org/505b10ee9.html>>.

⁴³ Ibid 13.

⁴⁴ Article 31, 1951 Convention; Article 18(1), *European Union Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status*, available at: <<http://www.unhcr.org/refworld/docid/4394203c4.html>>.

⁴⁵ UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, available at <<http://www.unhcr.org/505b10ee9.html>>

⁴⁶ United Nations Committee against Torture, *Concluding observations on the combined fourth and fifth periodic reports of Australia*, UN Doc CAT/C/AU/CO/4-5 (23 December 2014) [16].

under its effective control. Like asylum seekers on the mainland, asylum seekers under the effective control of Australia on Nauru and Manus Island should not be subject to mandatory, indefinite and non-reviewable immigration detention.

Recommendation 5: The Australian Government should immediately cease its policy of mandatory detention of unlawful non-citizens. The Australian Government should ensure that detention is used as a measure of last resort, only when strictly necessary and proportionate in an individual case.

4.2 Retrospective invalidation of permanent visa application (*retrospective laws*)

36. The *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) (**MMPA**) was passed in December last year. Schedule 2 of the MMPA expanded the meaning of protection visa to include a number of types of temporary protection visas (**TPVs**) for refugees whose arrival in Australia was unauthorised.⁴⁷
37. These changes apply to visa applications that have been made but not yet finally determined.⁴⁸ The changes also include provision for a valid visa application to be deemed not to have been made and to be deemed instead to be a valid application for a visa of a different class.⁴⁹ The upshot is that applications for permanent protection visas made whilst an applicant is on a bridging visa can be retrospectively deemed to be an application for a temporary protection visa only.⁵⁰
38. The amendments expressly oust the prohibition against certain retrospective measures in the *Acts Interpretation Act 1913* (Cth).⁵¹ The justification offered by the Government, namely to

⁴⁷ *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) sch 2, part 1, items 5 and 30.

⁴⁸ *Ibid* sch 2, part 1, item 19.

⁴⁹ *Ibid* sch 2, part 1, item 20.

⁵⁰ See the Law Council of Australia's submission to the Senate Legal and Constitutional Affairs Legislation Committee at [66], available at <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2800-2899/2898_-_Migration_and_Maritime_Powers_Legislation_Amendment_Resolving_the_Asylum_Legacy_Caseload_Bill_2014.pdf>.

⁵¹ *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) sch 2, part 1, item 20.

deter asylum seekers from coming, does not justify retrospectively offering an inferior form of protection to those already here.

Recommendation 6: The Australian Government should repeal the retrospective application of amendments to the Migration Act 1958 (Cth) that enable a valid visa application to be taken to be an application for another type of visa.

4.3 Maritime powers (*right to a fair trial, procedural fairness, judicial review*)

39. The MMPA also removed any requirement for maritime powers to be exercised in accordance with the rules of natural justice.⁵²
40. The rules of natural justice are deeply rooted in Australian law and underpin ‘important societal values applicable to any form of official decision-making which can affect individual interests’.⁵³ They are ‘indispensable to justice’.⁵⁴ Yet they have been expressly dispensed with as they apply to the exercise of maritime powers.
41. The Government justifies this exclusion on the basis that fairness at sea can be “impracticable”.⁵⁵ However the courts have recognised that the rules of natural justice and procedural fairness are, at least to some extent, flexible – while there may be an overarching duty to act fairly, the content of that duty is adaptable to circumstance.⁵⁶
42. As such, ‘impracticability’ does not justify completely excluding the duty to act fairly. It is a factor relevant to what fairness practically requires in the particular circumstances. More fundamentally, to the extent that acting fairly at sea could carry practical challenges, administrative inconvenience is a necessary and reasonable price to pay to ensure important decisions affecting people’s rights and liberties are properly made.
43. The obligation at the core of the *Refugees Convention* and other international human rights treaties to which Australia is a party is to not return people to real risks of serious harm.

⁵² *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) sch 1, item 6, inserting section 22B in the *Maritime Powers Act 2013* (Cth).

⁵³ Chief Justice Robert French, ‘Procedural Fairness – Indispensable to Justice?’ (Speech delivered at the Sir Anthony Mason Lecture, The University of Melbourne, 7 October 2010) 1, 22.

⁵⁴ *Ibid* 22-23.

⁵⁵ Explanatory Memorandum, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* (Cth) [25].

⁵⁶ *Kioa v West* (1985) 159 CLR 550, 585 (Mason J).

Compliance with that obligation requires a fair and thorough assessment of individual protection claims – something these amendments seek to absolve the Government of needing to do when using maritime powers to intercept, detain and return asylum seekers.

Recommendation 7: The Australian Government should repeal the exclusion of natural justice in the Maritime Powers Act 2013 (Cth).

4.4 Refugees and adverse security assessments by ASIO (*right to a fair trial, procedural fairness, judicial review*)

44. An amendment to the *Migration Act 1958* (Cth) in May 2014 inserted a new criterion for a protection visa: that the applicant is not assessed by the Australian Security Intelligence Organisation to be a risk to security.⁵⁷
45. This followed a successful High Court challenge to the Australian Government's attempt to insert the same criterion as a public interest criterion in Schedule 4 of the *Migration Regulations 1994* (Cth).⁵⁸
46. Serious consequences can flow from an adverse ASIO security assessment: the applicant will be refused a protection visa and, as acknowledged in the Explanatory Memorandum to the Bill, the applicant is at risk of indefinite detention if they cannot be returned to their country of origin and cannot be sent to a third country.⁵⁹ The Committee against Torture has raised concerns about the indefinite detention of refugees with an adverse security assessment.⁶⁰ The UN Human Rights Committee has found it to be in clear breach of the *International Covenant on Civil and Political Rights*.⁶¹
47. Given the seriousness of the consequences flowing from an adverse ASIO security assessments, it is crucial that they be made through a process that is fair, transparent and

⁵⁷ *Migration Amendment Act 2014* (Cth) sch 3, item 1, inserting subsection 36(1A) and (1B) into the *Migration Act 1958* (Cth).

⁵⁸ *Plaintiff M47/2012 v Director General of Security & Ors* (2012) 292 ALR 243.

⁵⁹ Statement of Compatibility with Human Rights, Attachment A to the Explanatory Memorandum, *Migration Amendment Bill 2013* (Cth), p 9.

⁶⁰ United Nations Committee against Torture, *Concluding observations on the combined fourth and fifth periodic reports of Australia*, UN Doc CAT/C/AU/CO/4-5 (23 December 2014) [16].

⁶¹ *FKAG et al v Australia*, UN Doc CCPR/R/108/D/2094/2011 (23 August 2013).

reviewable.⁶² The HRLC is particularly concerned that, although judicial review of an adverse ASIO security assessment or of a decision not to grant a protection visa based on such an assessment is technically available, it has no practical utility because there is no requirement to give the individual the subject of the assessment a copy of it or disclose the information or reasons underpinning it.⁶³ Essentially, procedural fairness is 'reduced to nothingness'.⁶⁴

48. The amendments also expressly exclude the possibility of review by the Refugee Review Tribunal (**RRT**) of a decision to cancel or refuse to grant a protection visa made because of an adverse security assessment by ASIO.⁶⁵ While Australian citizens and permanent and special purpose visa holders can seek merits review of an adverse or qualified ASIO security assessment,⁶⁶ protection visa applicants cannot.⁶⁷ While the non-legislative, non-binding 'Stone review' process is an important step towards some level of scrutiny and accountability for this important category of decision, it is no substitute for binding merits review.
49. In 2007, the Inspector-General of Intelligence and Security, Ian Carnell, called for refugees to be given the same right to appeal ASIO assessments to the Administrative Appeals Tribunal (AAT) as everyone else. In his 2006-2007 annual report, Mr Carnell wrote:

My predecessor had recommended that the legislation be changed to provide for AAT review for refugee applicants... This was not taken up at the time but I think it would be worthwhile revisiting the proposal. The number would be very small (hence cost should not be a barrier) and there would be greater public assurance that a sensitive group of cases have been carefully examined.⁶⁸

⁶² See further the HRLC's submission to the Legal and Constitutional Affairs Legislation Committee on the Migration Amendment Bill 2013 (Cth), available at <http://www.hrlc.org.au/wp-content/uploads/2014/01/HRLC_submission_Migration_Amendment_Bill_2013_ASIO_Security_assessment_criterion.pdf>.

⁶³ *Parkin v O'Sullivan* (2006) 162 FCR 444; *Australian Security Intelligence Organisation Act 1979* (Cth) s 36, which provides that section 37 does not apply to non-citizens who do not hold permanent or special purpose visas; see also reference to this point made by Professor Ben Saul, quoted in Joint Select Committee on Australia's Immigration Detention Network, Final Report, April 2012 at para 6.109(iv).

⁶⁴ Ben Saul, 'Dark Justice: Australia's indefinite detention of refugees on security grounds under international human rights law' (2012) 13(2) *Melbourne Journal of International Law* 685.

⁶⁵ Section 411(1)(c)(i) and 411(1)(d)(ii), inserted by sch 3, items 3 and 4 of the *Migration Amendment Act 2014* (Cth).

⁶⁶ *Australian Security Intelligence Organisation Act 1979* (Cth) ss 37 and 54.

⁶⁷ *Ibid* s 36.

⁶⁸ See Inspector General of Intelligence and Security, *Annual Report 2006-2007: Reflections on First Term* <http://www.igis.gov.au/annual_report/06-07/reflections.cfm>.

50. This remains the only context under Australian law in which a person can be indefinitely deprived of their liberty on the basis of a secretive decision which they cannot meaningfully challenge. It is a clear inequality before the law producing equally clear injustice. The need for reform is urgent.

Recommendation 8: The ASIO security assessment process unjustifiably denies applicants for protection visas and protection visa holders procedural fairness and unjustifiably restricts access to judicial and merits review. Applicants for protection visas, and protection visa holders, should be afforded procedural fairness and given the same legal right as citizens and permanent residents to seek merits review of adverse ASIO security assessments in the AAT.

5. A framework for protecting from encroachment

51. Whilst we welcome the ALRC's consultation insofar as it looks at laws that encroach on certain human rights, the HRLC notes that the inquiry is limited in two key ways:
- (a) the scope of the terms of reference is limited only to a narrow group of common law rights and does not reflect the true range of the Australian government's constitutional law or international law obligations to protect other human rights; and
 - (b) the review is limited to identifying and critiquing laws that encroach on rights, without considering the need for laws that would actively protect against such encroachment, such as a national Human Rights Act.

5.1 Other fundamental rights and freedoms that ought to be addressed

52. The HRLC is concerned that the Attorney-General's terms of reference limit the focus of the review to a small number of traditional rights, freedoms and privileges found in common law.
53. There is no clear reason why certain rights have been selected for the review while others have been rejected. However, the limited terms of the inquiry means that some of the most egregious encroachments on rights are not within the ALRC's terms of reference.
54. For example, Australia's violation of the human rights of asylum seekers was condemned by the new United Nations High Commissioner for Human Rights in his maiden speech to the UN

Human Rights Council in September 2014.⁶⁹ The UNHCR has reported that Australia's detention of asylum seekers in offshore locations on Manus Island, Papua New Guinea and on Nauru constitute arbitrary detention under international law.⁷⁰ The UN Human Rights Committee has repeatedly found Australia's onshore immigration detention practices to be in breach of its international obligation to ensure that no one is subjected to arbitrary detention.⁷¹ Given the clarity and severity of these rights violations, the scope of this review should be broadened to ensure these violations fall squarely within it.

5.2 Using law to protect human rights

55. The terms of reference focus on how Commonwealth laws encroach upon traditional rights, freedoms and privileges and whether the encroachment is appropriately justified. However, they do not ask for a consideration of how laws could be used to protect from these encroachments.
56. International human rights law imposes three types of obligations on states – to respect, protect and fulfil human rights.⁷² These obligations have been described as follows:
- (a) the obligation to 'respect' requires states to abstain from violating a right;
 - (b) the obligation to 'protect' requires states to prevent third parties from violating that right; and
 - (c) the obligation to 'fulfill' requires the state to take measures to ensure that the right is enjoyed by those within the state's jurisdiction.⁷³
57. The Issues Paper looks only at the extent to which Australia violates its first duty, to respect human rights. Whilst that is an important inquiry, the Attorney should also consider how to use law to ensure that the human rights of all Australians are protected.

⁶⁹ Opening Statement by Mr Zeid Ra'ad Al Hussein, United Nations Commissioner for Human Rights, Geneva, 8 September 2014, available at http://hrlc.org.au/wp-content/uploads/2014/09/AdvancedCopy_HRCOpeningStatement_Sep2014.pdf.

⁷⁰ UNHCR, *UNHCR monitoring visit to Manus Island, Papua New Guinea 23 to 25 October 2013*, November 2013; UNHCR, *UNHCR monitoring visit to the Republic of Nauru 7 to 9 October 2013*, November 2013.

⁷¹ See the Human Rights Committee's comments in *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997) [9.4]; *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002) [8.2]; *Shams et al v Australia*, Communication Nos. 1255,1256,1259,1260,1266,1268,1270,1288/2004, UN Doc CCPR/C/90/D/1255,1256,1259,1260,1266,1268,1270&1288/2004 (2007) [7.2].

⁷² Henry Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy* (Princeton Foreign University Press, 2nd ed, 1996) 52.

⁷³ Asbjørn Eide, UN Special Rapporteur for the Right to Food, *The Right to Adequate Food as a Human Right: Final Report submitted by Asbjørn Eide*, UN Doc E/CN.4/Sub.2/1987/23 (1987) [67]–[69].

58. The best way for rights and freedoms to be protected, and to ensure that there is an appropriate balance between individual rights and the interests of the community, is to enact a comprehensive Human Rights Act.⁷⁴

⁷⁴ The HRLC made a comprehensive submission on a Human Rights Act to the National Human Rights Consultation in May 2009, available at <http://hrlc.org.au/a-human-rights-act-for-all-australians/>.