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Dear Director

'Traditional Rights and Freedoms – Encroachments by Commonwealth Laws' – Issues Paper

- [1] Australian Lawyers for Human Rights (ALHR) is pleased to provide this submission in relation to the provisions of the Issues Paper referred to above. ALHR was established in 1993 and is a national network of over 2600 Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and a secretariat at La Trobe University Law School in Melbourne. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.
- [2] In summary, ALHR's submission makes the following points.
- (a) International human rights standards are the criteria by which the Commission should determine whether any law unjustifiably encroaches on freedoms: see [12]–[18] below.
 - (b) The issue of a Charter of Rights, or similar form of national protection of these human rights standards, cannot logically be quarantined from the Commission's review: [32]–[40].
 - (c) Specific submissions, in relation to the 'freedoms' identified in Commission's Issues Paper, are contained in Part B of this submission.
- [3] This submission is provided under the following headings (with the numbering in Part B corresponding to the numbering of the Issues Paper):

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PART A: PRELIMINARY COMMENTS

1. Background

[4] In relation to each of the 'traditional rights, freedoms and privileges' ('freedoms') identified in the Issues Paper, the Australian Law Reform Commission ('ALRC' or 'the Commission') has asked for submissions on the following basic questions (subject to some minor variations):

1. what general principles or criteria should be applied to help determine the justifiability of a law encroaching on the relevant freedom;
2. (a) which Commonwealth laws unjustifiably interfere with that freedom; and
(b) why are these laws unjustified?

The first question (principles/criteria to determine whether there is justifiable encroachment) has broadly the same answer regardless of the 'freedom' concerned: and the answer is international human rights standards – which we explain below at [12]-[18]. The second question (identifying relevant laws which unjustifiably encroach) has a different answer for each 'freedom', and these are addressed in detail in part B of this submission.

- [5] It should be noted that not every right or process of Australia's common law heritage is necessarily beneficial nor should take priority over contemporary regulation by statute or constitution. A range of common law rules has been changed over time, through statutory amendment, because the rules became out-of-step with contemporary expectations. That something is traditional or long-standing does not necessarily mean that it is good or desirable. Age alone is an insufficient test by which to judge the desirability of particular laws or values. No one seeks to retain everything from the past, only the best, and to favour longstanding concepts over newer ideas is to refuse to progress.
- [6] In addition, matters listed in the Terms of Reference have been defined differently by courts over the years, their scope and even their nature changing. A right might be 'founded' in (say) mediaeval law, but it will not be interpreted in that way today. Examples of common law rules which have changed over time include rules as to government immunities, marital-rape¹, and no right of appeal from judicial decisions. It would be inconceivable that contemporary Australia would want these matters reversed and a return to the 'traditional' common law position on such issues.
- [7] While we acknowledge, as stated in paragraph 1.10 of the Issues Paper, that the desirability of the introduction of a bill of rights in Australia is not the subject of the Inquiry, we submit that the lack of a Bill or Charter of Rights or Human Rights Act in Australia is indirectly relevant under the Terms of Reference of the Inquiry. This is explained, below [32]-[40].
- [8] We submit that the Commission should bear in mind not only the safeguards provided in legislation but also what safeguards are **not** provided, and the impact of that deficiency. This lack of a Bill or Charter of Rights is also considered below, in the context of 'national security' legislation ([19]-[31]) and also its relevance to the Commission's inquiry more generally ([32]-[40]).
- [9] The scope of the Inquiry is obviously extensive and we can only touch on the issues raised. We refer in this submission primarily to those matters on which ALHR has made submissions over the past year. For ease of reading we have not footnoted the earlier submissions. Some of the relevant legislation has already been enacted and other Bills on which we have commented could be enacted before the Commission has completed its review.
- [10] We note that the pieces of legislation discussed in this paper impose, in our view, unjustified limits upon many different rights, including upon rights and freedoms not identified in the Terms of Reference either because they are not common law rights and freedoms and/or because they are 'emerging' rights (such as the 'right to be forgotten'). For example, the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* impacts upon over 13 separate human rights listed in the *International Covenant On Civil And Political Rights* (ICCPR).
- [11] This paper is not exhaustive and the fact that we have focused upon some impacts rather than others should not be taken as indicating that we find any particular legislation satisfactory in other respects.

2. What principles should apply?

(a) Generally

- [12] ALHR recommends that, in assessing whether and what 'traditional rights, freedoms and privileges' may require protection from statutory incursion, the Commission should in general terms be guided by those rights which are internationally recognised: that is, by international human rights standards. Australia uses international law to guide its development and actions in many areas, such as control of whaling, trade & investment rules, postage, aircraft flights, rules of sea, diplomatic relations and responsibilities. In all these areas, the Australian Government relies on and enforces the relevant international law in its dealings within and outside our nation. This current project should be no different: there are relevant international law standards (human rights law), and these are the

1 See for example *R v Kowalski* (1987) 86 Cr App R 379.

appropriate reference point which the Commission should use in assessing the effect of any statutory law within Australia.

- [13] International law, including human rights standards, is a legitimate and important influence on the development of the common law, particularly where the common law on an area is uncertain or unsettled. It is a principle of the common law 'that statutes should be interpreted and applied, so far as their language permits, so as not to be inconsistent with international law or conventions to which Australia is a party'.²
- [14] In addition to human rights conventions, the Court can have reference to the *United Nations Declaration on the Rights of Indigenous Peoples*. Although a declaration and not a treaty, it is equally relevant for international standards.³ The New Zealand Court of Appeal considers UNDRIP a legitimate influence on the common law.⁴ The High Court has often used the work of the treaty-monitoring committees in determining the content of international human rights standards.⁵
- [15] Limitations on some human rights standards are permitted⁶ but any limitations or restrictions must be stipulated in law,⁷ necessary in a democratic society⁸ and *non-discriminatory*.⁹ The requirement for racial equality before the law is non-derogable.¹⁰
- [16] Where legislation (such as section 75A introduced by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*) sets out that the exercise of a power will not be invalid where those actions do not consider, defectively consider, or are inconsistent with, Australia's international obligations, we submit that such a restriction imposes unjustifiable limitations, removing any possibility of redress through Australian courts for breach of international human rights, contrary to Article 2(3) of the ICCPR which provides for the right to an effective remedy for violations of ICCPR rights. The protection of 'rights and fundamental freedoms' is not limited to where there is direct congruence with an existing human right under international law. Various common law protections exist even in the absence of a corresponding international human right, with examples including the non-authorisation of a tort,¹¹ protection of reputation,¹² and the right to pass on public roads.¹³

2 *Momcilovic v The Queen* [2011] HCA 34, [18] per French CJ (referencing *Zachariassen v The Commonwealth* (1917) 24 CLR 166, 181 per Barton, Isaacs & Rich JJ; *Polites v Commonwealth* [1945] HCA 3; 70 CLR 60, 68-69 per Latham CJ, 77 per Dixon J, 80-81 per Williams J).

3 See for example *Cheedy (Yindjibarndi People) v Western Australia* [2011] FCAFC 100, [109] per North, Mansfield & Gilmour JJ; *Lin v Rail Corporation NSW* [2011] FCA 546, [19] per Buchanan J.

4 'Whilst the Declaration [United Nations Declaration on the Rights of Indigenous Peoples] is non-binding, New Zealand announced its support of the Declaration in 2010. It is also a party to the international human rights covenants on which the Declaration is based. ... We consider that a more modern approach to customary law is to try to integrate it into the common law where possible rather than relying on the strict rules of colonial times. This conclusion is reinforced by the need to develop the common law, so far as is reasonably possible, consistently with ... the importance of recognising the collective nature of the culture of indigenous peoples and the value of their diversity (as recognised in particular by the United Nations Declaration on the Rights of Indigenous Peoples) and by international human rights covenants to which New Zealand is a party': *Takamore v Clarke* [2011] NZCA 587, [250]-[254] per Glazebrook & Wild JJ.

5 See for example *Maloney v The Queen* [2013] HCA 28, [68 fn110] per Hayne J, [121] per Crennan J, [170] per Kiefel J, [288]-[289] per Gageler J; *Dietrich v R* [1992] HCA 57; 177 CLR 292, 306 per Mason CJ & McHugh.

6 Only where required for national security, public order/health/morals/safety, or protecting others' rights, eg. International Covenant on Civil and Political Rights [1980] ATS 23 ('**ICCPR**'), arts 12(3) (freedom of movement), 13 (expulsion of non-citizens), 14(1) (fair trial), 18(3) (freedom of religion/belief), art 19(3) (freedom of expression), 21 (peaceful assembly), 22(2) (freedom of association). A general collation and explanation of limitations is provided in UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights* (UN doc E/CN.4/1984/4, Annex, 28 Sep 1984).

7 See for example ICCPR, arts 18(3), 19(3) & 22(2).

8 See for example ICCPR, arts 14(1), 21, 22(2).

9 See for example ICCPR, art 4(1) (derogation of rights); *United Nations Declaration on the Rights of Indigenous Peoples* (UN doc A/RES/61/295, 13 Sep 2007), art 46(2).

10 An Australian example is the reasoning in *Maloney v The Queen* [2013] HCA 28, [37]-[38] per French CJ, [77]-[85] per Hayne J (with whom Crennan J agreed), [224]-[227] per Bell J, and [361] per Gageler J.

11 *Coco v R* [1994] HCA 15; 179 CLR 427, 436 per Mason CJ, Brennan, Gaudron & McHugh JJ.

12 *Balog v Independent Commission Against Corruption* [1990] HCA 28; 169 CLR 625, 635-636 per Mason CJ, Deane, Dawson, Toohey & Gaudron JJ.

13 *The Mayor & City of Melbourne v Barry* [1922] HCA 56; 31 CLR 174, 206 per Higgins J, see, to similar effect 197 per Isaacs J.

(b) Specifically

- [17] In the light of the above, ALHR submits that in addition to the principles of transparency and accountability, the following documents set out appropriate principles to guide the ALRC:
- (a) *Guidance Notes 1 and 2* issued by the Parliamentary Joint Committee on Human Rights, December 2014;
 - (b) *Guide to Human Rights*, Parliamentary Joint Committee on Human Rights, March 2014;
 - (c) *Rule of Law Principles*, a Policy Statement of the Law Council of Australia, March 2011.¹⁴
- [18] In summary, laws encroaching on a freedom should:
- (a) Be clear, accessible and precise so that people know the legal consequences of the limitations or the circumstances under which authorities may restrict the right or freedom;
 - (b) Be in pursuit of a legitimate objective;
 - (c) Be necessary in pursuit of that objective;
 - (d) Have a rational connection to the objective to be achieved;
 - (e) Apply to all people equally and not discriminate on arbitrary or irrational grounds;
 - (f) Be proportionate to the objective being sought (taking into consideration whether there are other less restrictive ways to achieve the aim, the impact of the legislation upon human rights, whether affected groups are particularly vulnerable, whether the merits of individual cases can be taken into account)¹⁵;
 - (g) Contain effective and transparent safeguards or controls (including as to monitoring and access to review, public trial, no limitations on judicial discretion or information available to legal representatives, notification to persons affected by the legislation);
 - (h) Not be disproportionately severe (eg not involve reverse burden offences and/or strict liability offence);
 - (i) Not be retrogressive in terms of diminishing any existing rights or accepted norms, including international human rights norms;
 - (j) Only permit proportionate subordinate legislation (in particular, not subordinate legislation that creates new offences or confers new powers on executive agencies);
 - (k) Be transparent so that decisions made under the laws are open to scrutiny; and
 - (l) Enshrine accountability by specifying to whom the decision-maker is accountable, by what process, according to what standards and involving what effects.

If any of these standards or principles is not met we submit that, to that extent, the interference or encroachment is not justified.

3. Particular concerns in relation to 'national security' issues

- [19] An increased focus in respect of 'national security' in Australia in recent decades has involved a departure from previous review and public transparency standards. In response to 9/11, Australian legislation authorised the interception of non-suspects' communication,¹⁶ allowed the Attorney General to issue warrants on the application of ASIO's Director General;¹⁷ introduced a new regime allowing the government to intercept 'stored communications' – that is, communications sent across a

¹⁴ See also "Legislative Standards", 3 Sept 2013, accessed 16 Feb 2015 at <http://www.lawcouncil.asn.au/lawcouncil/index.php/legislative-standards>.

¹⁵ In our view, adherence to international human rights law and standards is also an indicator of proportionality.

¹⁶ *Telecommunications (Interception) Amendment Act 2006* (Cth) sections 9 and 46.

¹⁷ *Ibid*, section 9(1).

telecommunications system and accessible to the intended recipient;¹⁸ and allowed the Director-General of ASIO to apply to the Attorney-General for questioning and detention warrants.¹⁹

[20] Effectively, Australia:

- (a) moved from largely relying on Australia's criminal law (with all its tested procedural safeguards) in promoting national security, to relying on a system that uses special provisions to target classes of people that may include innocent bystanders;²⁰
- (b) moved from allowing judges to authorise the interception of communications to and from a telecommunications service in specific circumstances –where there were reasonable grounds for suspecting that a particular person was likely to use the service, and the information obtained was likely to assist the investigation of an offence in which the person involved - to a system that allows elected officials to issue such warrants on the ASIO Director-General's application;
- (c) expanded the scope of communications that the Government could monitor for the purposes of national security protection; and
- (d) included non-suspects within the class of persons the government could monitor.

[21] We submit that a number of recent pieces of Federal legislation which have been presented to the Australian public as 'counter- terrorist' – as establishing a retaliatory and preventative framework in the 'war on terror' – are largely impractical, inconsistent with accepted human rights of Australian citizens and residents, and based upon amorphous and unsubstantiated foundations.

[22] Counter-terrorism legislation by its very nature enshrines "extreme measures."²¹ The initial (yet no less deeply disturbing) concern about this type of legislation is the "general willingness on the part of the public to accept greater civil liberties deprivations in the face of a specific threat."²² In a predictable sequence, the enactment of legislation which restricts human rights on the basis of 'national security' then forms a pathway whereby such infringements 'bleed' into other areas of jurisprudence.²³ Sadly, these laws "reflect major problems of process and political judgment."²⁴

[23] Given that current and proposed Federal legislation in this area is potentially so deleterious to Australia's domestic human rights environment, it is of great concern that minimal attention has been given to the introduction of any 'check and balance' mechanisms, especially in the context that Australia is the one of the few democratic nations that cannot pride itself upon having an overriding 'check and balance' apparatus in the form of a Bill or Charter of Rights or Human Rights Act.²⁵

[24] Legislation such as the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014*, the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* and the *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* are put to Federal Parliament on the basis that they will protect our country and the rights of its citizens and residents. But in responding to real fears (or, it might be argued, to a fear-based campaign), these pieces of legislation are crafted without adequate attention to rudimentary human rights concerns.

[25] We note that the manner in which Australia responds to security concerns is in itself a measure of the strength and nature of our society. As noted by the United Nations Special Rapporteur on the

18 Ibid, section 110.

19 *Australian Security Intelligence Organisation Act 1979* (Cth) Part III div III.

20 David Hume and George Williams, 'Who's Listening? Intercepting the telephone calls, emails and SMS's of innocent people' (2006) 31 *Alternative Law Journal*, 211; Kent Roach, *The 9/11 Effect: Comparative Counter-terrorism* (Cambridge University Press, 2011) 317; George Williams, 'A Decade of Australian Anti-terror Laws' (2011) 35 *Melbourne University Law Review* 1137; 1140; and George Williams, 'One year On: Australia's Legal Response to September 11' (2002) *Alternative Law Journal* 212.

21 Ananian-Welsh R and Williams G, 'The New Terrorists : The Normalisation and Spread of Anti-Terror Laws in Australia' (2014) 38(2) *Melbourne University Law Review* (Advance Copy) at 2.

22 Baldwin F & Koslosky, D, 'Mission Creep in National Security Law' (2011) 114 *West Virginia Law Review* 669, 671.

23 Ibid at 672.

24 Williams G, "A Decade of Australian Anti-Terror Laws" (2011) 35 *Melbourne University Law Review*, 1136, 1163.

25 Ibid at 1169.

Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism in their 2010 Report:

*Compliance with human rights while countering terrorism represents a best practice because not only is this a legal obligation of States, but it is also an indispensable part of a successful medium and long-term strategy to combat terrorism.*²⁶

- [26] That is to say, legislation which infringes our human rights is the very evil from which national security procedures are intended to protect us. We should not respond to terrorist threats by restricting our own human rights. To do so is to admit that in our attempt to oppose the terrorists we have given them effective control over us and our own legal system.
- [27] A fundamental concern with regard to legislation such as the *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* is 'mission-creep' which, as Ananian-Welsh & Williams have stated,²⁷ results in the migration or translation of what are singular, exceptional responses to a purported threat, into 'normalised' law and order methodology. This is a particular hazard in a jurisdiction without a Bill of Rights.
- [28] The further concern with 'mission-creep' in the legislative environment²⁸ is that laws such as the Data Retention Bill lead to concept of a surveillance state as an 'effective' law and order solution without cognizance of the collateral cost to the domestic human rights framework.²⁹ Such a state is a pathogenic environment where liberty is an expendable element, routinely expunged from consideration, and where procedural protections are substantively undermined.³⁰
- [29] This phenomenon is not localised and we receive the warning from our North American counterparts when noting Justice Sotomayer's warning that a government's "unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse".³¹
- [30] When laws such as the *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014*, created for the purported protection of the populace, metastasize into extreme infringements of liberty, the alleged cures have become a human rights poison.
- [31] Any legislation purporting to be grounded in national security concerns must submit to exacting and uncompromising oversight provisions. Those provisions must that ensure that – in the absence of a Bill or Charter of Rights – basic freedoms and the sanctity of the rule of law in our domestic jurisprudence are not compromised by an unproven solution in pursuit of terrorist threats.

4. Bill of Rights

- [32] The Commission's Issues Paper states in paragraph 1.10 that the introduction of a bill of rights in Australia "... is not the subject of this Inquiry". This is in contrast with the Terms of Reference of the Inquiry. The Terms of Reference specifically provide that:
- In considering what, if any, changes to Commonwealth law should be made, the ALRC should consider:*
- *how laws are drafted, implemented and operate in practice; and*
 - *any safeguards provided in the laws, such as rights of review or other accountability mechanisms.*

- [33] The necessary implication of the above reference is that the role and place of a Bill of Rights (BOR) in Australia – or the absence thereof - should feature in the deliberations of the Commission. A BOR

²⁶ Quoted in Australian Lawyers for Human Rights, *Submission to the Independent National Security Legislation Monitor*, 25 September 2012, par 8.

²⁷ Ananian-Welsh & Williams op cit.

²⁸ Baldwin & Koslosky, op cit.,

²⁹ McGarrity N, 'From Terrorism to Bikies: Control Orders in Australia' (2012) 37 *Alternative Law Journal* 166, 168.

³⁰ Ibid at 166.

³¹ *United States v Jones*, 132 S. Ct 945, 956 (2012)

could affect how laws are drafted, implemented and operate in practice. Moreover a BOR could in and of itself act as a safeguard mechanism against the encroachment of certain rights. The ability of a BOR to effect these objectives would depend upon its construction. The National Human Rights Consultation (NHRC) Committee, headed by Father Frank Brennan, similarly concluded as much.

- [34] In considering the role and construction of a BOR, reference should be had to the international human rights instruments to which Australia is a party. The ratification of international human rights by Australia is a “positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the [relevant] convention[s].”³²
- [35] Effective and careful drafting of a BOR will ensure that the critical oversight by Australian courts does not lead into overly wide or narrow interpretations of the Bill that were never the intention of the legislature, whilst maintaining the courts’ key role of legislative interpretation.
- [36] ALHR submits that a BOR will provide clear reference to the judiciary in interpreting all future legislation with reference to the Bill.
- [37] Rather than focusing on the protection of “traditional rights” (which ALHR submits has many inherent problems), a BOR seeks to preserve and safeguard rights via the independence of the courts. In its efforts to protect its citizens from the real or imagined threat of terrorism, the Australian government has endeavoured to enact laws that will seriously undermine our human rights rather than preserve them.
- [38] The government has done much to erode even these ‘traditional rights’, as pointed out by Professor Ben Saul in a recent speech, by over-reaching legislation that is slowly encroaching upon all Australians. A BOR will prevent the current and any future government from whittling away our ‘traditional rights’ or imposing laws upon us that in, apparently, protecting us, seriously diminish and constrict our human rights. This can be seen in the ‘Anti-terror’ laws as discussed below.
- [39] A BOR will preserve or enable the rights of the most vulnerable and disadvantaged groups of society. Social and economic rights matter as much as civil and political ones, as Professor Saul says. Participation in democracy is limited if one is homeless, hungry, illiterate, unemployed or compromised in health.³³ ALHR submits that a BOR will go far to redress this area of need in our society.
- [40] Submissions to the NHRCR Report conducted by Fr Brennan were overwhelming in support for a BOR, especially those from society’s marginalised groups such as the homeless, aged, physically and mentally disabled who stated that they felt a BOR would protect human rights in a clear document providing a framework that must be followed by all people including government agencies.

PART B: RESPONSE to ISSUES PAPER QUESTIONS

- [41] We reiterate that, in response to the Commission’s questions of what principles/criteria should be used in determining whether a law unjustifiably encroaches ‘freedoms’, the answer is international human rights standards. This is explained above at [12]-[18]. The remainder of this submission now adopts the heading numbers of the Issues Paper, and explains in relation to those parts we address, the relevant Commonwealth laws which do unjustifiably encroach according to international human rights standards.

32 *Minister for Immigration v Teoh* [1995] HCA 20; 183 CLR 273, [34] per Mason CJ & Deane J; also *Mabo v Queensland (No 2)* [1992] HCA 23, [42] per Brennan J.

33 B. Saul, *The Ideological War on Human Rights: Why Are Australian Politicians So Hostile towards Basic Freedoms?* Speech at the NSW Council for Civil Liberties Annual Dinner, 26/09/14 available at http://sydney.edu.au/law/news/docs_pdfs_images/2014/October/Prof_Ben_Saul_civil_liberties_speech.pdf accessed 26 February 2015.

2. Freedom of Speech

- [42] *The Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* unjustifiably limits effective freedom of political communication on matters covered by that Act, as described further below under item 18.
- [43] Section 313 of the *Telecommunications Act 1997* unjustifiably limits freedom of speech in that the section permits blocking of 'illegal online services' without defining this term. Given that some content which is legal when it is offline is regarded as illegal when it is online³⁴ (because classification system chosen for Internet content is the more restrictive standard used for films, rather than the publications classification), further clarity is required.
- [44] The mention in the Terms of Reference relating to section 313³⁵ of the possibility of using that section to block services that are 'potentially' illegal demonstrates clearly that the section is not appropriately limited. Only services established to be involved in serious crimes or that directly incite serious crimes should be covered by the section. Section 313 was drafted at a time when minimal information could be accessed through communications technologies and therefore did not take into account the way in which modern technologies could impact upon human rights. When used against Australian sites, blocking has resulted in the disruption of thousands of legitimate sites with completely legal content, to the commercial disadvantage and inconvenience of the owners.³⁶ We submit that the section should comply with the *International Principles on the Application of Human Rights to Communications Surveillance* so as to draw a proper balance between the potential infringement of human rights and State interests.
- [45] The only apparent process, accountability or oversight in agency use of section 313 (as described further below [74]-[75]) rests upon the policies of the requesting agencies (which are not available to the public), and the internal policies of ISPs in dealing with such requests (which are not generally available to the public either).
- [46] ALHR is of the view that this current state of affairs is unsatisfactory and the lack of transparency leaves unchecked potential infringements on the privacy rights and rights to freedom of expression and communication of individuals.³⁷
- [47] Under the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* in the case of preventative detention orders it is an offence for the detainee, his or her lawyer, an interpreter or anyone else to disclose that the detainee is in preventative detention: s105.41 Criminal Code Act 1995. The detainee is effectively held incommunicado, which has been the subject of adverse comment by the HRC because it is a circumstance in which torture can more readily take place. Such interference with communication is on the face of it a violation of the freedom from arbitrary interference with family (Article 17 ICCPR), Freedom of Speech (Article 19 ICCPR) and the right to work (Article 6 ICESCR). It could also give rise to circumstances of arbitrary detention given the secrecy involved.
- [48] The *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* unjustifiably chills free speech as Australians will not know what information about them, including information about their contacts, might be collected and shared amongst government (and perhaps even non-

34 OpenNet Initiative, "Australia and New Zealand", <<https://opennet.net/research/regions/australia-and-new-zealand>> accessed 8 August 2014, in relation to footnote 10 on that page, and see ALRC Report 118 Classification – Content Regulation and Convergent Media, ALRC 2012 [Executive Summary] <<http://www.alrc.gov.au/publications/executive-summary/background-1>>

35 House of Representatives Standing Committee on Infrastructure and Communications *Inquiry into the use of subsection 313(3) of the Telecommunications Act 1997 by government agencies to disrupt the operation of illegal online services*, Terms of Reference, 2014, accessed 26 February 2015 at <http://www.aph.gov.au/Parliamentary_Business/Committees/House/Infrastructure_and_Communications/Inquiry_into_the_use_of_section_313_of_the_Telecommunications_Act_to_disrupt_the_operation_of_illegal_online_services/Terms_of_Reference>

36 Ibid.

37 See generally the submission by Australian Lawyers for Human Rights, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/House/Infrastructure_and_Communications/Inquiry_into_the_use_of_section_313_of_the_Telecommunications_Act_to_disrupt_the_operation_of_illegal_online_services/Submissions>

government) bodies. The fact that the content of the data will not be retained is irrelevant to the Bill's impingement upon privacy rights. Users will still be able to be identified and significant information about them will be obtainable.³⁸

- [49] The Bill also unjustifiably chills freedom of political communication in that data retention and consequential surveillance chills reporting, reduces the volume and quality of political communication and hence limits the ability of the media to act as a check on governmental wrongdoing.
- [50] The *Fair Work Amendment (Bargaining Processes) Bill 2014* interferes with freedom of communications in the workplace by:
- (a) restricting the circumstances in which the Fair Work Commission (FWC) may make a 'protected action ballot order' according to whether or not the FWC is satisfied that a claim of an applicant would have 'a significant adverse impact on productivity at the workplace' (new s443(2)). We submit that this is an unjustifiable interference because:
 - (i) It imposes an unreasonable limit on employees' already very restricted collective bargaining rights and penalises workers for factors over which they have no control. Applications for higher wages are most likely to be driven by cost of living issues – like the excessively high accommodation prices in Sydney – which will remain the same irrespective of productivity within a particular company or industry.
 - (ii) It is not clear how the legislation will apply if the workers in question are already very productive. Because meeting their wage claim will impose an additional cost on the employer, can the employer argue that this will reduce the employer's overall productivity?
 - (iii) Labour productivity differs enormously between industries, not because some workers work harder than others but because different capital values are taken into account in the calculations ie 'productivity' in the economic sense is not a measure of hard work alone, as the legislation seems to imply.
 - (b) requiring the FWC to be satisfied that, during bargaining for an enterprise agreement, 'improvements to productivity at the workplace' were discussed (new s187(1A)). We submit that this is an unjustifiable interference because it is not clear what will happen if the employer refuses to discuss productivity – or imposes requirements upon the employees to concede other matters first. The employer appears to be effectively given a veto which would be an unjustifiable interference with freedom of communication. If this is not the intention, then the wording of the proposed provision should be clarified.

3. Freedom of Religion

- [51] The *Native Title Amendment Act 1998* (Cth) unjustifiably interferes with traditional (native title) rights regarding freedom of religion, in that it extinguished and encroached on these traditional rights in various parts of Australia. This occurred through the Act's confirmation and validation of other forms of title, and the primary production upgrade provisions. These aspects are explained below: [86]-[91].

4. Freedom of Association

- [52] The rights to information and to freedom of expression are integral to freedom of association as expressed in group advocacy, political organizing, vindication of rights, civil society monitoring, and many other associative activities in a normal democratic society. The impact of the *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* upon free speech thus also unjustifiably chills free association.

³⁸ To quote the European Court: 'Those data, taken as a whole, may provide very precise information on the private lives of the persons whose data are retained, such as the habits of everyday life, permanent or temporary places of residence, daily or other movements, activities carried out, social relationships and the social environments frequented.'

- [53] The *Fair Work Amendment (Bargaining Processes) Bill 2014* unjustifiably limits the right of employees to freedom of association under Article 8(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and Article 22 of the International Covenant on Civil and Political Rights (ICCPR) as discussed above under the heading '2 -Freedom of Speech'.

5. Freedom of Movement

- [54] The *Native Title Amendment Act 1998* (Cth) unjustifiably interferes with traditional (native title) rights regarding freedom of movement, in that it extinguished and encroached on these traditional rights in various parts of Australia. This occurred through the Act's confirmation and validation of other forms of title, and the primary production upgrade provisions. These aspects are explained below: [86]-[91].
- [55] The *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* imposes unjustifiable limits on Australians' freedom of movement into declared areas. There is a very limited list of permitted defences to what is effectively a blanket prohibition, which reverses the burden of proof (discussed further below). There is no element of intent. It is perfectly possible that an Australian could be in a declared area with no knowledge that it has been made illegal for Australians to be there and no with no guilty intent.
- [56] A related issue is the limitation of the 'humanitarian aid exception' in the *Criminal Code Act 1995*. The Act now makes it much harder to claim that exception, as humanitarian aid is now to be an exception only where it is the *sole* reason that the conduct in question is undertaken. It is submitted that there could be many additional reasons why the particular conduct was carried out that are not related to terrorist activities and that it is inappropriate and unjustifiable for the test to be so narrow.

6. Property Rights

- [57] ALHR notes the Commission's comments that the concept of 'vested property rights' appears to be borrowed from US discourse, and that as a result the Commission's focus has remained on 'property rights' and how they are understood within Australia's legal system. ALHR considers this a sensible way to proceed.
- [58] The Commission rightly notes that the concept of 'property' and 'property rights' has changed over time. Contemporary understandings of property acknowledge broader societal interests in controlling what a person can do with their 'property', eg in environmental controls, town planning, public health. The Commission has noted this dynamic in 6.31. We agree with the Commission's approach that, if any submissions are made asserting that certain 'Commonwealth laws interfere with property rights' then the submission must 'explain why these laws are not justified'. In ALHR's view, if the laws are implementing international human rights, that would provide adequate justification: see [12] & [15].

7. Retrospective Laws

- [59] The Commission notes the protections against being held criminally liable for something which was not a crime at the time it occurred, protections which exist under the criminal law and international human rights law (7.1-7.15 of the Issues Paper).
- [60] ALHR considers that retrospective liability is not justified in the David Hicks case but is justified in the case of marital rape. Each is addressed below.

(a) *David Hicks*

- [61] A number of laws/legal directives of the Commonwealth Government were related to imposing retrospective criminal liability on David Hicks for actions which were not a crime at the time he did

them. The Law Council of Australia has explained these comprehensively in its 2007 report³⁹. We note that, on 23 July 2012, the Commonwealth DPP dropped proceedings it had commenced against David Hicks in relation to 'proceeds from crime'⁴⁰ and on 14 July 2014 the US Court of Appeals ruled invalid a conviction on the charge identical to that for which David Hicks was convicted.⁴¹ We submit that the Commission should note concerns that have been expressed as to how the Australian Government dealt with the Hicks case and as to its support for retrospective criminality, which is now being found invalid in the US.

(b) Marital Rape and other Gross Human Rights breaches

- [62] In a number of areas law has retrospectively criminalised matters which were gross breaches of human rights at the time, but were historically protected or not prosecuted, such as marital rape. Retrospective liability has been recognised in Australia as a valid form of retrospective laws - as the Commission noted in relation to war crimes (7.11). There have also been international decisions, indicating that where an act is a criminal offence under international law, that can justify retrospective criminal liability under a country's domestic legal system.⁴² ALHR realises there is a balance of different human rights here - against retrospective liability, but also in favour of the need to protect people from being assaulted and to provide redress where that has occurred.
- [63] The problem is that the earlier laws established a situation which was contrary to human rights. ALHR has not conducted a comprehensive review of all Australian jurisdictions, but if the Commission receives any submissions requesting it to act in relation to laws imposing criminality for marital rape, we urge the Commission to consider this issue very carefully.
- [64] Given providing immunity for such acts is completely inconsistent with human rights, and given the Australian State's ability to act on this issue at least from that from 1972 (when Australia signed the ICCPR, including its non-discrimination provisions), there is significant justification for retrospective liability for such acts at a national level from 1972 onwards.
- [65] The human rights rationale here is that any sexual assault against a woman must be treated the same regardless of marital status - as is the case with sexual assault against a man.

8. Fair Trial

- [66] It is possible that amendments made by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* to the *Foreign Evidence Act* may have the unintended consequence of making it harder for a court to exclude evidence obtained by torture or duress. The concerns of the Law Council as expressed in 2013 would appear to still be applicable.⁴³ While the Explanatory Memorandum states that there is a mandatory requirement to exclude material obtained by torture or duress, it appears that this only applies where the court is 'satisfied' that the material was obtained in this way (paragraph 252 and see the terms of the proposed section 27D of the *Foreign Evidence Act 1994*). It is difficult to imagine how a court in Australia can 'satisfy' itself of such a matter in relation to events which have happened overseas. There is a further difficulty in that 'torture' is defined prescriptively. Paragraphs 1017 and 1018 of the Explanatory Memorandum say that:

The definition of 'torture' will provide that an act or omission amounting to torture must inflict severe pain or suffering, whether physical or mental. The definition of 'torture' in subsection

39 *The United States V. David Hicks*, Final Report of the Independent Observer for the Law Council of Australia, 20 June 2007, points 4.4-4.16, available at http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/Hicks_final_report.pdf

40 <http://www.cdpp.gov.au/news/statement-in-the-matter-of-david-hicks/>

41 *Bahlul v. USA*, United States Court of Appeals for the District Of Columbia Circuit, pages 46-50, available at [http://www.cadc.uscourts.gov/internet/opinions.nsf/8F42CB79020918FF85257D15_004DBDD/\\$file/11-1324-1502277.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/8F42CB79020918FF85257D15_004DBDD/$file/11-1324-1502277.pdf)

42 eg. *Baumgarten v. Germany* CCPR/C/78/D/960/2000, 31 July 2003, at [9.4] & [9.5] (indicating that retrospective liability of former officers for killing people leaving East Germany is consistent with human rights principles, even though the officer was not criminally responsible at the time).

43 Law Council of Australia (2013), *op cit*, 130 ff.

27D(3) will also list the purposes for which the relevant conduct must be engaged in to constitute torture. In summary these purposes are:

- *obtaining from the other person or from a third person information or a confession, or*
- *punishing the other person for an act that the other person or a third person has committed or is suspected of having committed, or*
- *intimidating or coercing the other person or a third person, or*
- *discrimination that is inconsistent with the Articles of the ICCPR.*

[67] That is, a court is not permitted to categorise the intentional infliction of pain for other reasons, or for no reason, as torture. Neither would merely 'cruel, inhuman or degrading treatment', or pain inflicted for 'medical' or 'scientific' experimentation appear to amount to the definition of torture, contrary to Article 7 of the ICCPR. This is unjustifiable and the definition should be made inclusive, not exclusive.

9. Burden of Proof

[68] As mentioned, the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* imposes unjustifiable limits on Australians' freedom of movement into declared areas. The Explanatory Memorandum appears to argue that there is no infringement of Article 14(2) of the ICCPR (which provides that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law)⁴⁴ because the burden 'shifts back' again to the prosecution once the defendant demonstrates that they fall within one of the exemptions, or at least that they have a 'legitimate' reason for being in the area. While paragraph 235 argues that '*The legitimate purpose defence captures common reasons for travelling*' this is not correct and the list is very limited. It is clear from paragraph 228 and the text of the amendment that the effect of the amendment is clearly to place the burden of proving their innocence upon the defendant – which indeed might not be possible given the very narrow list of permitted defences.

[69] The Act also extends both **preventative detention** and **control orders**⁴⁵ in terms of scope and lower thresholds.⁴⁶ Division 104 of the *Criminal Code* already provides for control restrictions (of a level appropriate to convicted criminals) to be placed on a person who has not been charged, tried or convicted of an offence.⁴⁷ Division 105 already allows for preventative detention intended to prevent an imminent terrorist attack occurring or to preserve evidence relating to a terrorist attack.⁴⁸ That is, the restrictions that can already be placed on a person through these orders are extremely onerous and involve a high potential for human rights violations - particularly in the light of the secrecy surrounding such orders mentioned above, and consequential limits on a fair trial as per Article 14 ICCPR⁴⁹ and judicial oversight,⁵⁰

44 Paragraph 227.

45 See Nathan Kennedy, "Are Human Rights Adequately Protected In Australia?" a paper prepared for the course in International Human Rights Law, University of NSW, 2009 and the Law Council of Australia (2013), *op cit*.

46 See for example section 104.2(2)(a).

47 Australian Lawyers for Human Rights, 'Terrorism, Counter-Terrorism and Human Rights,' *Submission to the International Commission of Jurists Eminent Jurists' Panel*, 15 March 2006, 9.

48 s105.1 *Criminal Code* 1995.

49 The *ex parte* nature of the control hearings violate the right of the person to be tried in their own presence and to be informed of the case against them contrary to Articles 14(3)(a) & (d) ICCPR.

50 The judicial review grounds available under the *Administrative Decisions (Judicial Review) Act 1977* are not available in relation to decisions made under Division 105 of the Code (Schedule 1(dac) *Administrative Decisions (Judicial Review) Act 1977*). This is despite review under that Act being considered to be the Federal Court's principal judicial review jurisdiction (Administrative Review Council, *The Scope of Judicial Review Discussion Paper*, 2003, 10). This therefore limits any review to writs of mandamus, prohibition, or injunction (The High Court's power under section 75(v) of the Constitution to issue these remedies is conferred on the Federal Court by section 39B(1) of the *Judiciary Act 1903*). Application for a writ of habeas corpus to the Federal Court may be possible for the review of the legality of the detention or on narrow procedural grounds (Australian Lawyers for Human Rights, (2006) *op cit*, 5.) It has been argued that this is 'well short' of effective 'court control of the detention' and is a breach of Article 9(4) ICCPR (Letter from Professors Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon to ACT Chief Minister, 18 October 2005, 5).

- [70] The orders should be subject to the same safeguards as for a person charged with a criminal offence. The criminal standard of proof should apply, not the balance of probabilities.
- [71] We are concerned that the burden of proof is again reversed here: the onus is on the person to prove that the order against them should be revoked⁵¹ despite the person affected being allowed to receive only minimal information as to the basis for the decision being made. The argument that the control order regime 'does not constitute a criminal penalty as [it] is neither punitive nor retributive'⁵² is not convincing

In relation to the *Stronger Futures* laws discussed below in section 19, we agree with the Senate Standing Committee for the Scrutiny of Bills⁵³ that it is undesirable that the onus of proof is placed upon the defendant in relation to a number of matters covered by the legislation relating to liquor laws. While the original explanatory memorandum stated that this was for consistency with similar existing offences, we agree with the Senate Committee that this is not appropriate in a situation where the legislation is already reliant on enshrining 'special measures'.⁵⁴

11. Client Legal Privilege

- [72] The ICCPR has been interpreted as protecting the full confidentiality of communications between client and lawyer. The *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* does not, however, permit any exemptions for lawyer/client communications. The mere fact that the relevant Internet Service Provider (if Australian) and potentially also the government acquire and retain materials about the making of such communications, even if they are never used, and even if the content of the communications is not collected, conflicts with lawyers' ethical obligations to keep that information confidential and imposes an unjustifiable incursion upon the ability of lawyers to maintain client legal privilege.⁵⁵

12. Strict and Absolute Liability

- [73] See item 5 above in relation to the impact of the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014*.

14. Procedural Fairness

- [74] From a transparency perspective, section 313 of the *Telecommunications Act* does not:
- impose any limits on the agencies that might request assistance under subsections 313(3) and 313(4), or who or what entity might suggest preventative action be taken pursuant to subsections 313(1) and 313(2);
 - provide for any reporting requirement for the number and nature of requests made under subsections 313(3) and 313(4), or reporting on how subsections 313(1) and 313(2) are used by agencies;
 - prescribe for any level of independent oversight of agency use of this section;
 - prescribe any formal procedure for agency use of this section (eg. no formal powers are conferred on agencies to compel compliance with the duties, no formal warrant or application process is outlined);

51 ss104.18 and 140.20 *Criminal Code 1995*.

52 Explanatory Memorandum, paragraph 182. The paragraph continues: 'this amendment does not further punish those who have been convicted or acquitted in accordance with the law.' While this may be so, it does punish those who have never been brought to a full trial and who have not been convicted of any offence.

53 Senate Standing Committee for the Scrutiny of Bills, *Second Report of 2012*
<http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Reports/2012/index>

54 *op cit*, p 86ff.

55 Human Rights Watch and Civil Liberties Union, *op cit*, 51, 91.

- (e) provide for detailed and transparent notice to end-users where preventative action may result in the blocking of access to internet content.⁵⁶
- [75] The lack of transparency in the section as it currently stands raises concerns as to the protection of individuals' privacy and freedom of communication, and the potential for unchecked agency pressuring of ISPs to block websites.
- [76] There are a number of provisions of particular concern in the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014*:
- (a) Amendments to the *Australian Passports Act 2005*, *Australian Security Intelligence Organisation Act 1979*, *Foreign Passports (Law Enforcement and Security Act) 2005*, and the *Administrative Decisions (Judicial Review) Act 1977* allow for temporary cancellation of Australian passports **without notification to the passport holder, and without judicial review of the decision being possible**. Again, this is inconsistent with proper process;
- (b) Amendments to the *Crimes Act* will allow police to conduct searches of a 'warrant premises' **without the occupier's knowledge and without notifying the occupier of the premises at the time the warrant is executed**. They also have the right to access those premises via adjacent premises. Notice of the search will be required to be given to the occupier of a searched premises – and to the occupier of the adjoining premises – at a later date, 'generally' within six months. Police are also given the **right to 'impersonate a person where reasonably necessary to execute the warrant'** in order, says the EM, 'to allay the suspicion of other residents of the area'.⁵⁷
- (c) The introduction of **mandatory non-parole periods** for terrorism offences under the *Crimes Act 1914* (Cth) is inconsistent with proper judicial process and contrary to the comments elsewhere in the EM that 'facilitating the exercise of judicial discretion' is evidence that the legislation is 'sufficiently mindful of human rights obligations'.⁵⁸
- [77] The *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* reduces the scope for judicial scrutiny of Government actions in detaining and transferring people and vessels at sea by removing the right to natural justice. Under the new section 22B, natural justice also does not apply to authorisations of the exercise of maritime power.
- [78] The *Fair Work Amendment (Bargaining Processes) Bill 2014* unjustifiably limits the right of employees to procedural fairness in various matters to be determined by the Fair Work Commission as discussed above under the heading '2 -Freedom of Speech'.

15. Delegating Legislative Power

- [79] The *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* unjustifiably delegates legislative power. The relevant data set to be retained (s 187A(1) although the general outlines are contained in s 187A(2)) remains to be decided by Regulation. This is bad legislative practice and likely to result in legislative 'creep' with individuals' privacy rights being increasingly attacked through expansion of the data set, as noted by a number of commentators. The data retention period can be extended by Regulation (s 187C(2)) which arouses the same concerns as to the possibility of regulatory 'creep'.

16. Authorising what would otherwise be a Tort

- [80] The *Native Title Amendment Act 1998* (Cth) unjustifiably interferes with traditional (native title) rights in its extinguishment and encroachment on these traditional rights in various parts of Australia. This occurred through the Act's confirmation and validation of other forms of title, and the primary

⁵⁶ See Craddock, op cit, p 33 re failures to notify end users.

⁵⁷ Paragraph 106.

⁵⁸ Paragraph 83.

production upgrade provisions. The priority of government-granted tenure over traditional rights in some cases authorises what would otherwise be a tort. The *Native Title Amendment Act* aspects are explained below (see [86]-[91]). The relevance of tortious aspects is explained here.

- [81] An old line of common law cases regulates the impact of mining and mineral rights, with miners needing to minimise their impacts on those who use the surface of the land. Statute can, of course, expand a miner's rights but if it does not then the common law provides the miner with an implied right to access and use land to extract the ore,⁵⁹ but only to the extent strictly necessary for that.⁶⁰ There are many cases where miners have been held liable for damaging the surface rights – often through tortious actions of trespass and nuisance.⁶¹ Mining legislation has been construed in various cases to be read as only altering the common law 'as far as is necessary to give effect to the express provisions of the Act.'⁶² Therefore, where the *Native Title Amendment Act* extinguished traditional (native title) rights as result of mineral titles, it had the effect of authorising various encroachments which may otherwise have been torts.

17. Executive Immunities

- [82] The *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* continues the existing practice of removing all terrorism-related matters from the ambit of the *Administrative Decisions (Judicial Review) Act* (AD(JR) Act). The Act adds to the already long lists in Schedules 1 and 2 of that Act of decisions which either cannot be reviewed at all under the AD(JR) Act⁶³, or for which reasons do not have to be given⁶⁴ – effectively making it impossible for the court to carry out any contextual review.⁶⁵ Thus:

- (a) amendments made under the Act which involve administrative or executive decisions under the majority of Acts amended by the Bill, including: the *ASIO Act 1979*, the *Intelligence Services Act 2001*, the *Telecommunications (Interception and Access) Act 1979*, cannot be reviewed under the AD(JR) Act,
- (b) the new provisions of the *Australian Passports Act 2005* and the *Foreign Passports (Law Enforcement and Security) Act 2005* which are added by the Act are themselves specifically excluded from review under the AD(JR) Act, and
- (c) amendments made under the Act which involve administrative or executive decisions under the *Social Security Act 1991*, the *A New Tax System (Family Assistance) Act 1999*, *A New Tax System (Family Assistance) (Administration) Act 1999*, the *Paid Parental Leave Act 2010* (involving payments of a social security nature to suspected terrorists being cancelled) can be reviewed but no reasons for the decisions need to be given.

There can be no justification for restricting full judicial review of those decisions. Without full judicial review there is no accountability and no transparency. A government that places its administrative officials above the courts is not properly or fully democratic.

59 See for example *Earl of Cardigan v Armitage* [1823] EngR 232; 107 ER 356; applied in *Barrett v Federal Commissioner of Taxation* [1968] HCA 59; (1968) 118 CLR 666, 672 per Owen J; *Payne v Dwyer* [2013] WASC 271, [79] per Pritchard J.

60 *Earl of Cardigan v Armitage* [1823] EngR 232 (107 ER 356), 362 per Bayley J for the Court; *Lord Darcy v Askwith* (1618) Hob 234; *Marshall v Borrowdale Plumbago Mines* (1892) 8 TLR 275.

61 See for example *Dixon Ltd v White* (1883) 8 App. Cas. 833, 838-839 per Lords Blackburn, Watson & Fitzgerald; *Dand v Kingscote* (1840) 6 M and W 174; 151 ER 370, 379-380 Parke B for the Court (building railway was 'trespassing to a greater extent than was necessary for exercising the reserved [mining] rights') - applied in *Payne v Dwyer* [2013] WASC 271, [79] per Pritchard J.

62 *Hocking v Western Australian Bank* [1909] HCA 68; 9 CLR 738, 746 per Griffith CJ; *Walker v White Feather Main Reef* [1909] WALawRp 52, 12 WALR 25, 29 per McMillan ACJ (Rooth J agreeing); *Curator of Intestate Estates v Graham* [1913] WALawRp 26, 15 WALR 93, 96 per McMillan ACJ.

63 See Schedule 1 of the Act. This includes all decisions under the *ASIO Acts 1956 and 1979*, *Intelligence Services Act 2001*, *Inspector-General of Intelligence and Security Act 1986*, *Telecommunications (Interception and Access) Act 1979*, and *Telephonic Communications (Interception) Act 1960*.

64 See Schedule 2 of the Act.

65 Paragraph 273.

18. Judicial Review

- [83] The *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* unjustifiably limits the right of judicial review in that it largely removes critical oversight by Australian courts. ALHR is concerned that:
- (a) this Act entrenches Australia's refugee protection regime as a matter almost entirely for executive or Ministerial discretion;
 - (b) the lack of procedural safeguards increases the risk of erroneous decisions being made with little or no regard for individual rights and principles of natural justice;
 - (c) the limiting of merits and judicial review will reduce transparency of decision-making and deny the Australian public and the individuals concerned the right to know the truth and to participate in decision-making, thereby limiting the right to freedom of political communication.
- [84] Through section 75B, the Act further reduces the scope for judicial scrutiny of Government actions in detaining and transferring people and vessels at sea by removing the right to natural justice. Natural justice ensures procedural fairness in executive decision-making, to those whose interests may be adversely affected by the exercise of the power. It includes the right to make submissions and be heard in respect of the decision, and requires the neutrality of decisions.
- [85] ALHR submits that denying natural justice to asylum seekers who are detained at sea will result in asylum seekers being unable to assert their right to human rights protections, such as the protection from *refoulement*, leading to a high risk of human rights abuses and no avenue for redress. Denying the ability of a detained person to take proceedings to court is in direct conflict with the ICCPR.

19. Others Rights, Freedoms and Privileges

(a) Native Title Rights

- [86] The *Native Title Amendment Act 1998* (Cth) unjustifiably encroaches on native title rights. The Commission's invitation of submissions under 19-1⁶⁶ has subtly, but importantly, modified one aspect of the TOR in limiting the submissions under 19 to laws encroaching upon 'other common law rights'. Such a limitation is incorrect because the TOR refers generally to 'laws that encroach upon traditional rights, freedoms and privileges' and specifically, in the last listed item, to laws that 'interfere with any other similar legal right, freedom or privilege'. The TOR thus permits the examination of Commonwealth law encroaching on native title, as we explain below. We note the Commission envisaged this possibility on page 126 of its paper.
- [87] Native title rights are the quintessential 'traditional rights', having been specifically recognised as such by Australia's High Court⁶⁷ and Parliament,⁶⁸ as well as under international law.⁶⁹ The essence of 'traditional rights' is central to native title, as the High Court explained in its 2002 *Yorta Yorta* decision:

"traditional" is a word apt to refer to a means of transmission of law or custom. A traditional law or custom is one which has been passed from generation to generation of a society, usually by word of mouth and common practice ... [and native title rights are recognised by today's courts where] the normative system under which the rights and interests are possessed (the

66 Namely 'Which Commonwealth laws unjustifiably encroach on other common law rights, freedoms and privileges, and why are these laws unjustified?'

67 *Western Australia v Ward* [2002] HCA 28, [17]-[19], [64], [82], per Gleeson CJ, Gaudron, Gummow & Hayne JJ; *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58, [33]-[34], [37], [39]-[57] per Gleeson CJ, Gummow & Hayne JJ; and McHugh J at [134].

68 *Native Title Act 1993* (Cth), s223.

69 'the land rights of indigenous peoples are unique and encompass a traditional and cultural identification of the indigenous peoples with their land': Committee on the Elimination of Racial Discrimination, *Decision 2(54) on Australia* (UN doc A/54/18, IIA, 18 Mar 1999 CERD Decision) ('**CERD 1999 Decision**'), para 4. The use of the word 'traditional' also features in the Human Rights Committee's analysis in 2000, stating that Australia was required to 'take the necessary steps in order to secure for the indigenous inhabitants a stronger role in decision-making over their traditional lands and natural resources': *Concluding observations: Australia* (UN doc A/55/40, 24 July 2000) ('**CCPR 2000 Decision**'), para 498.

*traditional laws and customs) is a system that has had a continuous existence and vitality since [the imposition of British] sovereignty*⁷⁰

- [88] The Commonwealth Government expressly and repeatedly accepts, and relies on, this understanding of traditional rights.⁷¹ The High Court has used international law to inform the common law's understanding on the existence and content of native title.⁷²
- [89] Given that the Commission was tasked to advise the Government on Commonwealth laws that 'encroach upon traditional rights...[and whether] the encroachment...is appropriately justified', we submit that the Commission must examine native title and relevant Commonwealth laws. As explained below, in our view some of the encroachment of Commonwealth laws in this area is not justifiable.
- [90] In 1998 the Commonwealth Parliament passed laws amending the 1993 *Native Title Act*,⁷³ and some of these amendments unjustifiably encroach on traditional (native title) rights. This point has been consistently and repeatedly identified by international bodies, as summarised below.
- (a) In 1999, the Committee on Racial Discrimination ruled that Australia breached its obligations under the treaty against racial discrimination in the 1998 amendments in 'the Act's "validation" provisions; the "confirmation of extinguishment" provisions; the primary production upgrade provisions; and restrictions concerning the right of indigenous title holders to negotiate non-indigenous land uses ... [which] raises concerns about the State party's compliance with articles 2 and 5 of the Convention [against Racial Discrimination]'.⁷⁴ The Committee also indicated that the 'lack of effective participation by indigenous communities in the formulation of the amendments also raises concerns with respect to the State party's compliance with its obligations under article 5(c) of the Convention [equality in political rights]'.⁷⁵
- (b) The Committee stated that Australia should 'suspend implementation of the 1998 amendments and reopen discussions with the representatives of the Aboriginal and Torres Strait Islander peoples with a view to finding solutions acceptable to the indigenous peoples and which would comply with Australia's obligations under the Convention [against Racial Discrimination]'.⁷⁶
- (c) The Committee has reaffirmed this decision in 1999,⁷⁷ 2000,⁷⁸ 2005,⁷⁹ and 2010.⁸⁰
- (d) These particular 1998 amendments also breach of Australia's obligations under the *International Covenant on Civil and Political Rights*. The body responsible for that treaty found that 'the Native Title Amendments of 1998 in some respects limit the rights of indigenous persons and communities, in particular in the field of effective participation in all matters affecting land ownership and use, and affects their interests in native title lands, particularly pastoral lands. ... The Committee recommends ... the necessary steps be taken to restore and protect the titles and interests of indigenous persons in their native lands, including by considering amending anew the Native Title Act, taking into account these concerns'.⁸¹

70 *Yorta Yorta* [2002] HCA 58, [46]-[47] per Gleeson CJ, Gummow & Hayne JJ; and McHugh J at [134].

71 See for example 'Yorta Yorta is perfectly clear on that point, and ... the logic of Yorta Yorta in it is unanswerable. ... [W]hat one has to show is ... the continuation of rights. ... [I]t is what Yorta Yorta says...what one has to show, ...is that whatever was going on in the interruption period was sustainable as traditional law': *Risk v Northern Territory* [2007] HCATrans 472, per Pettit SC for Attorney General of the Commonwealth; *Sampi (Bardi and Jawi People) v Western Australia* [2010] FCAFC 26, [43]-[48] per North & Mansfield JJ.

72 See for example *Commonwealth v Yarmirr* [2001] HCA 56; 208 CLR 1, [70] per Gleeson CJ, Gaudron, Gummow & Hayne JJ; *Mabo (No 2)* (nError! Bookmark not defined. above), 42 per Brennan J (Mason CJ & McHugh J agreeing).

73 *Native Title Amendment Act 1998* (Cth).

74 CERD 1999 Decision, para's 7-8.

75 CERD 1999 Decision, para 9.

76 CERD 1999 Decision: para 11.

77 Committee on the Elimination of Racial Discrimination, *Decision 2(55) on Australia* (UN doc A/54/18(SUPP), pp6-8, 16 Aug 1999), para 1.

78 Committee on the Elimination of Racial Discrimination, *Concluding observations: Australia* (UN doc CERD/C/304/Add.101, 19 April 2000), para's 8-9.

79 Committee on the Elimination of Racial Discrimination, *Concluding observations: Australia* (UN doc CERD/C/AUS/CO/14, 14 April 2005) ('**CERD 2005 Observations**'), para 16.

80 Committee on the Elimination of Racial Discrimination, *Concluding observations: Australia* (UN doc CERD/C/AUS/CO/15-17, 13 Sep 2010), para 9.

81 CCPR 2000 Decision, para's 499-500.

- [91] The 1998 amendments, and their encroachment on traditional (native title) rights are not justifiable. The international bodies examined the Government's justification of the 1998 amendments, with the Government emphasising its consultation process, and arguing that the amendments were passed by national parliament, and that its balancing of interests justified the amendments.⁸² The Commonwealth Parliament has also examined these justifications.⁸³ The various international bodies have rejected the Government's position that these arguments comprise adequate justifications.⁸⁴ This result leaves such aspects of the 1998 amendments as evidencing an unjustified encroachment of traditional (native title) rights.
- [92] Even if the Government chooses to ignore this issue and argue that parliamentary enactment 'overrides' any human rights breach, the international human rights situation remains and must be observed by companies. This is because companies need to respect human rights standards *regardless* of the domestic law.⁸⁵ Accordingly, the current situation means that any businesses relying on titles or permits under these impugned sections of the *Native Title Act 1993*, are acting contrary to international standards. This is a matter that the Australian Government may then need to examine, should complaints be raised under the *OECD Guidelines for Multinational Enterprises*.⁸⁶ This reinforces the lack of justification for the encroachment of the *Native Title Amendment Act 1998* on traditional (native title) rights, and the need for the Australian Government to promptly address this.

(b) Collective bargaining rights

- [93] The *Fair Work Amendment (Bargaining Processes) Bill 2014* and the legislation to which it relates, the *Fair Work Act 2009*, unjustifiably limit the right of employees to collectively bargain for terms and conditions of employment under Article 4, the *Right to Organise and Collective Bargaining Convention, 1949 (No. 98)*, the right to freedom of association under Article 8(1) of the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* and Article 22 of the *International Covenant on Civil and Political Rights (ICCPR)*; the right to strike under Article 8(1) of the *International Covenant on Economic, Social and Cultural Rights* and Article 22 of the *International Covenant on Civil and Political Rights*, the right to organise (Article 3, International Labour Organisation (ILO) *Freedom of Association and Protection of the Right to Organise Convention 1948 (No. 87)*, as discussed above under the heading '2 -Freedom of Speech' and '4- Freedom of Association'.

(c) 'personality' and related rights

- [94] This includes the rights to confidentiality, privacy, personal autonomy, identity and image, dignity, free development of personality, to take part in public affairs, to be free from arbitrary interference with privacy, family, home and correspondence.
- [95] The *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* unjustifiably limits and/or chills the following additional rights and freedoms:
- (a) the right to be treated with dignity (Article 1, Universal Declaration of Human Rights);
 - (b) the right to protection against arbitrary or unlawful interference with privacy (Article 17, ICCPR);

82 Permanent Mission of Australia to the United Nations Office, *Comments of the Government of Australia on decision 2 (54) adopted by the Committee on the Elimination of Racial Discrimination on the special report of Australia* (File No. 250/1/5; Note No. 25/99, 5 July 1999); and the Government's explanation regarding ICCPR is recorded in the Human Rights Committee's *Summary record of the 1856th meeting* UN doc CCPR/C/SR.1856, 28 July 2000), para's 6 & 31.

83 Parliamentary Joint Committee on Native Title & Aboriginal and Torres Strait Islander Land Fund, *Consistency of the Native Title Amendment Act 1998 with Australia's international obligations under the Convention on the Elimination of all Forms of Racial Discrimination*, Sixteenth Report of the Committee, June 2000. Canberra: Parliament of Australia.

84 Committee on the Elimination of Racial Discrimination, *Decision 2(55) on Australia* (UN doc A/54/18, IIC, 16 Aug 1999), para's 1 & 3; CERD 2005 Observations, par 16.

85 United Nations, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (UN doc UN doc A/HRC/17/31, Annex, 21 March 2011), principles 11 & 12. ALHR notes the Australian Government's acceptance of this situation, eg. in Australian Government, *The State Duty To Protect: Government experiences and steps take towards implementing the Guiding Principles and identifying opportunities for implementation*, Statement to First Annual United Nations Forum on Business and Human Rights, 4 December 2012.

86 Organisation for Economic Co-operation & Development, *OECD Guidelines for Multinational Enterprises*, 25 May 2011.

- (c) the right to free development of one's personality (Article 22, Universal Declaration of Human Rights);
- (d) the right to take part in the conduct of public affairs (Article 25, ICCPR)⁸⁷;
- (e) freedom from arbitrary interference with privacy, family, home **or correspondence** (Article 12, Universal Declaration of Human Rights). It should be noted that the Bill provides no safeguards in relation to the secure retention of the data to be stored, which is at risk of hacking and can perhaps be kept indefinitely once accessed.

(d) Right to be free from discrimination

[96] The right to be free from racial discrimination has been identified by Chief Justice Spigelman⁸⁸ on the basis of the decision in *Constantine v Imperial Hotels Ltd.*⁸⁹ Section 8 of the *Racial Discrimination Act* unjustifiably limits the *rights to equality and to be free from racial discrimination* by (1) permitting the imposition of criminal penalties upon a group effectively selected in terms of race for their purported benefit and (2) permitting substantial, if not formal, inequality. The 'special measures' provisions of other legislation such as Section 7D of the *Sexual Discrimination Act* (SDA) should similarly be limited to ensure that such a result is not possible.

[97] We submit that the *Stronger Futures* legislation, including the:

- (a) *Stronger Futures in the Northern Territory Act 2012*;
- (b) *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012*;
- (c) *Social Security Legislation Amendment Act 2012*;

similarly does not appear to reflect an appropriate balance of rights and responsibilities and effectively penalises the victims without providing them with assistance or resources. We are particularly concerned that the **removal of welfare payments** for children's non-attendance at school effectively imposes a penalty upon the whole family, including the children, when there may be various valid reasons for the child not attending school – including lack of adequate school facilities – which lie outside the ability of the child and their family to remedy.⁹⁰ The very concept of penalising some members of the group for the **potential 'greater good'** of the group as a whole is one that is not acceptable to anti-discrimination law or consistent with international human rights interpretation. The legislation generally does not provide benefits (but imposes restrictions) and does not directly aim to reverse existing discrimination (but arguably increases it).

[98] We submit that exemptions from anti-discrimination legislation on the basis of religion (for example, under the *SDA* and the *Anti-discrimination Act*) also unjustifiably limit the right to equality and to be free from discrimination, and – particularly in the context of employment limitations - should be drafted more narrowly. As HREOC has noted in relation to the *SDA*,

The existing permanent exemption provides little incentive for religious bodies to re-examine their beliefs about the role of women and to ensure adequate representation of women in areas that do not conflict with the doctrines, tenets and beliefs of the religion. The permanent exemption does not provide support for women of faith who are promoting gender equality

87 'Absent such a freedom of communication' said Mason CJ, 'representative government would fail to achieve its purpose, namely, government by the people through their elected representatives; government would cease to be responsive to the needs and wishes of the people and, in that sense, would cease to be truly representative... The efficacy of representative government depends also upon free communication on such matters between all persons, groups and other bodies in the community.' *Australian Capital Television Pty Ltd & New South Wales v Commonwealth* [1992] HCA 45; (1992) 177 CLR 106 (30 September 1992) [38 -39].

88 The Honourable J J Spigelman AC Chief Justice Of New South Wales, "The Common Law Bill of Rights," First Lecture In The 2008 McPherson Lectures: Statutory Interpretation & Human Rights, University Of Queensland, Brisbane 10 March 2008, p 25, accessed 25 May 2014 at p 183 at: www.supremecourt.lawlink.nsw.gov.au/agdbasev7wr/supremecourt/documents/pdf/spigelman_speeches_2008.pdf

89 [1944] 1 KB 693 at 708

90 See Helen Hughes, *Lands of Shame*, Centre for Independent Studies, 2007, 93 and following. Indeed, withdrawal of payments is likely to entrench the very problems of poverty, ill health and overcrowded housing which research shows are factors that contribute to school absence.

*within their religious body.*⁹¹

(e) Right to seek asylum and the right to family unity

[99] This includes freedom from arbitrary interference with family life.

[100] The *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* unjustifiably limits these rights in a variety of ways, as described elsewhere in these submissions. In particular, we note the denial of family reunion for Temporary Protection Visa holders and the restrictions on TPV holders leaving the country.

(f) Liberty, dignity, life and freedom from torture

[101] More fully, this includes the right not to be unreasonably deprived of liberty, the right to be treated with dignity, the right not to be arbitrarily deprived of life or subjected to cruel, inhuman or degrading treatment or punishment.

[102] The *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* unjustifiably limits these rights. It enables the transfer of asylum seekers to countries that do not offer effective human rights protections and where the person may be subjected to cruel, inhuman or degrading treatment or even torture. It requires only that a transfer be in the "national interest" which does not offer any real human rights protection for those transferred or suggest that the Minister needs even to consider human rights in his decision to transfer those on board the vessel.

[103] Under section 72(4), a maritime officer has the power to detain a person. Sections 69A and 72A set out that a vessel, aircraft or person may be detained for any reasonable period while the destination is determined or the Minister considers whether to give a direction. The Government has acknowledged that the amendments provide for a longer period of detention under the new 72(4) than is allowed under the previous provisions of the Maritime Powers Act.

(g) Rights of children

[104] Numerous rights concerning children under the *Convention on the Rights of Children*, including that, in all actions concerning children, the best interests of the child shall be a primary consideration, are unjustifiably breached by the Migration Act and Maritime Powers Act.

[105] If you would like to discuss any aspect of this submission, please email me at: president@alhr.org.au.

Yours faithfully



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Contributors: Tamsin Clarke, Keith M Francis, Glenn Geerts, Joanna Mansfield, and many other ALHR members whose work in earlier submissions has been referred to in this paper

91 Human Rights and Equal Opportunity Commission, *Submission to The Senate Legal and Constitutional Affairs Committee on the Inquiry into the Effectiveness of The Sex Discrimination Act 1984 (Cth) in Eliminating Discrimination and Promoting Gender Equality* 1 September 2008, par 475, Accessed 26 February 2015 at <https://www.humanrights.gov.au/inquiry-effectiveness-sex-discrimination-act-1984-cth-eliminating-discrimination-and-promoting#14_4>