

Human Rights Committee and Environment & Planning Law Committee

Submission to the Australian Law Reform Commission on the Traditional Rights and Freedoms – Encroachments by Commonwealth Laws Issues Paper (IP 46)

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New South Wales Young Lawyers

NSW Young Lawyers is a division of the Law Society of NSW and is made up of legal practitioners who are under the age of 36 or in their first five years of practice, and law students. It is the largest body of newly practising lawyers and law students in Australia, with a membership comprising some 15,000 members. NSW Young Lawyers supports practitioners in their early career development in numerous ways, including by encouraging involvement in its 16 separate committees, each dedicated to a particular area of practice.

Human Rights Committee

The Human Rights Committee (**HRC**) is responsible for development and support of members of NSW Young Lawyers who practice in, or are interested in, human rights law and comprises over 700 members. The HRC takes a keen interest in providing comment and feedback on legal and policy issues that relate to human rights law and the development and support of it, and considers the provision of submissions to be an important contribution to the community.

The HRC is drawn from lawyers working in academia, for government, private and the NGO sectors and other areas of practice that intersect with human rights law. The combined knowledge base of the HRC is therefore diverse and substantial. The objectives of the HRC are to raise awareness about human rights issues and provide education to the legal profession and wider community about human rights. Members of the HRC share a commitment to effectively promoting and protecting human rights.

The issues addressed by the HRC are found in items 1 to 7 of this submission.

Environment and Planning Law Committee

The Environment and Planning Law Committee (**EPLC**) brings together a network of the State's young practitioners to discuss a shared interest in our environment. It focuses on environmental and planning law issues, raising awareness in the profession and the community about developments in legislation, case law, and policy. The EPLC also concentrates on international environment and climate change laws and their impact within Australia.

The issue addressed by the EPLC is found in item 8 of this submission.

Both the Human Rights Committee and the Environment and Planning Law Committee are grateful for the opportunity to make this submission.

Australian Law Reform Commission's review of the Commonwealth laws for consistency with traditional rights, freedoms and privileges

Introduction

The HRC and EPLC have prepared this submission in response to the Australian Law Reform Commission's (**ALRC**) invitation for submissions on the review of Commonwealth laws for consistency with traditional rights, freedoms and privileges, as published in the *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws Issues Paper* (IP 46). In this submission, the Committees address issues that arise in relation to laws that:

- interfere with freedom of speech;
- interfere with freedom of religion;
- alter criminal law practices based on the principles of a fair trial;
- reverse or shift the burden of proof;
- deny procedural fairness to persons affected by the exercise of public power;
- authorise the commission of a tort;
- restrict access to the Courts, in particular with regard to judicial review; and
- apply strict or absolute liability to all physical elements of a criminal offence.

1. Freedom of Speech

The HRC recognises that the right to freedom of speech is strongly guaranteed by Article 19 of the *International Covenant on Civil and Political Rights (ICCPR)* and a wealth of common law authority developed by Australian Courts. The HRC acknowledge the importance of freedom of speech as a fundamental right, however, this right is not absolute and may be subject to limits where necessary to protect competing rights. The HRC reiterates its support for the protections against racial vilification in the *Racial Discrimination Act 1975 (Cth) (RDA)*, and submits that the RDA, while limiting freedom of speech, is justified as it strikes an appropriate balance between freedom of speech and the right to be free from racial vilification.

The prohibition of racial hatred in the Australian community is integral to the interests of our multicultural society. In 2012-13, the Australian Human Rights Commission addressed over 2,000 complaints, 23% of which were lodged under the RDA¹. This statistic demonstrates the acute need for strong protections against hate speech based on race. Furthermore, Australia is obliged under Articles 1 and 4 of the International Convention for the Elimination of Racial Discrimination and Article 20(2) of the ICCPR to ensure that any advocacy of '*national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law*'.

¹ Australian Human Rights Commission, Annual Report 2012-2013, available at: https://www.humanrights.gov.au/sites/default/files/document/publication/ahrc_annual_report_2012-13.pdf [accessed 10 February 2014]

Section 18C of the RDA, as it currently stands, finely balances fair and accurate reporting and fair comment with discrimination protections. The 'reasonably likely' test provided for in section 18C allows for an objective assessment to be made, and ensures that the threshold for racial vilification is appropriate. Section 18D of the RDA provides adequate safeguards to protect freedom of speech by imposing a list of exemptions for '*anything said or done reasonably and in good faith*'. The Australian Courts have historically interpreted sections 18C and 18D in a fair and reasonable manner, and with the public interest in mind. For example, in *Eatock v Bolt*² Justice Bromberg stated:

*"section [18C(1)] is at least primarily directed to serve public and not private purposes... That suggests that the section is concerned with consequences it regards as more serious than mere personal hurt, harm or fear. It seems to me that s18C is concerned with mischief that extends to the public dimension. A mischief that is not merely injurious to the individual, but is injurious to the public interest and relevantly, the public's interest in a socially cohesive society... Conformably with what I regard as the intent of Part IIA, a consequence which threatens the protection of the public interest sought to be protected by Part IIA, is a necessary element of the conduct s18C is directed against. For the reasons that I have sought to explain, conduct which invades or harms the dignity of an individual or group, involves a public mischief in the context of an Act which seeks to promote social cohesion."*³

Effective protections against racial vilification are justified, and the protections as currently enshrined in law only limit freedom of speech to the extent required to ensure that communities are protected from racial vilification. Racial vilification can have a silencing effect on those who are vilified. In the absence of a federal bill of rights and constitutional guarantees of human rights, the need to strike a clear and equitable balance between the right to free speech and the right to be free from vilification is obviously all the more pressing. Protection from racial vilification is key to the protection that underpins our vibrant and free democracy, and therefore its abolition cannot be seen as a reasonable or proportionate response to 'restrictions' on freedom of speech. Just like threats to kill, sexual harassment and defamation, it is often necessary for the law to curtail the speech of individuals or groups whose acts constitute a threat to the enjoyment of another's rights. The deterrent effect of section 18C on those who may engage in racial vilification should not be undervalued.

2. Freedom of Religion

The HRC recognises that right to freedom of religion is a fundamental right, but that right is not absolute, and needs to be finely balanced against competing rights, such as the right to be free from discrimination.

Existing religious exemptions under anti-discrimination law severely limit the effectiveness of protections against discrimination. In particular, religious exemptions in the *Sex Discrimination Act 1984* (Cth) (**SDA**) have the effect of curtailing the ability of people with attributes such as sexual orientation, gender identity and intersex status from accessing education and training, as well as employment and contract work by religious organisations such as schools. The SDA exempts educational institutions established for religious purposes that are conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed from the requirement to not discriminate against

² *Eatock v Bolt* [2011] FCA 1103

³ At [263] and [267].

a person on the basis of their sex, sexual orientation, gender identity, marital or relationship status or pregnancy, if this is done in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.⁴

This exemption effectively limits the right to be free of discrimination for the Lesbian, Gay, Bisexual, Transgender, Queer and Intersex population. The HRC submits that this permanent exemption is not justified, as it is broad, involves no consideration of balancing competing rights, and institutes a hierarchy of rights, where freedom of religion takes precedence over the right to be free from discrimination.

The HRC acknowledges that there may be religious exemptions in employment but only when it is necessary to fulfil the inherent requirements of a position requiring adherence to the tenets of the religion, for example the appointment of ministers of religion. The HRC expresses no view on such exemptions.

On the other hand, the HRC notes that protection against religious discrimination is limited at the federal level, for example, there is no protection against religious discrimination, except in the area of employment at the federal level.⁵ Additionally, there is no clear protection against religious vilification at the federal level, unless the complainant can link the religious vilification to their race for example, if the complainant is from an ethno-religious group they may be able to bring a vilification complaint under the racial vilification provisions of the RDA, but if the complainant is not from a recognised ethno-religious group, they would face difficulty doing so. For instance where vilified on the basis of religion, a Jewish person, being from an identified ethno-religious group may be able to bring a claim of racial vilification under the RDA, while a Hindu person, not being from a recognised ethno-religious group, may not.

The HRC recommends that religion should be a protected attribute under federal anti-discrimination law, and that religious vilification be made unlawful.

3. Fair Trial

The right to a fair trial in the context of anti-terrorism legislation is a live and debated issue. As recently as 12 February 2015, Australia's Prime Minister publicly relayed information obtained from a police interview with two men alleged of plotting an imminent terrorist attack. President of the New South Wales Bar Association, Jane Needham SC, said public commentary about the case could have serious consequences for the legal process and the constitution of a fair-minded jury.⁶

The HRC considers that the principle of a fair trial is further jeopardised when federal criminal laws which are outlined in this submission, *inter alia*, unduly deprive individuals of the right to be heard, the right to information adverse to their case, the right to reasons, and the right to adequate legal representation and time to mount a defence. This section addresses how many of these fundamental rights are affected by the federal government's counter-terrorism regime which has been progressively expanded since 2000.⁷

⁴ s38 *Sex Discrimination Act 1984* (Cth)

⁵ s351 *Fair Work Act 2009* (Cth)

⁶ Anna Henderson, Naomi Woodley and Andrew Green, "Sydney terror raids: Legal Community warns Tony Abbott's comments could prejudice future trial" *ABC News* (13 February 2015) at <http://www.abc.net.au/news/2015-02-13/pms-comments-could-still-prejudice-trial-says-legal-community/6090058>.

⁷ Spencer Zifcak, "Counter-terrorism Laws and Human Rights" in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (2013, Law Book Co) p 417.

The right to a fair trial

The right to a fair trial is most comprehensively defined in Articles 14 and 15 of the ICCPR to which Australia has been a party since 1980.

In 1962, Lord Denning helpfully captured the essence of the right. He said:⁸

“If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him ... and then he must be given a fair opportunity to correct or contradict [that case]”.

The HRC submits that the criteria identified at pages 63 to 64 of the ALRC Issues Paper (IP 46) appropriately capture the essence of the ICCPR and should be used as the starting point for assessing the compatibility of federal laws with the right to a fair trial.

Despite the applicability of the right to a fair trial to a range of circumstances governed by federal law, the following focuses on counter-terrorism legislation, because as Professor Spencer Zifcak has observed in his contribution on human rights in the counter-terrorism domain, anti-terror debates tend to proceed in “*terms of trade-offs*” whereby “[t]he trade-off approach proposes that in order to enhance national security we are obliged to accept a corresponding reduction in human rights”.⁹

The HRC acknowledges the need for appropriately adapted anti-terrorism laws, rather, the following highlights where current Australian federal laws favour broad and unclear notions of ‘national security’ at the expense of granting individuals the fairest trial possible.

Detention orders

Australian counter-terrorism legislation provides for three types of ‘preventative’ detention. These are all “*burdens on liberty imposed without findings of criminal liability*”¹⁰ and include:

- detention for questioning by Australian Security Intelligence Organisation (**ASIO**);¹¹
- detention on a control order;¹² and
- preventative detention.¹³

While the United Nations has recognised that preventative detention may be justifiable in some circumstances “*it must not be arbitrary*”.¹⁴ Instead, it must be “*based on grounds and procedures established by law; information as to the reasons for the detention must be given, legal representation must be allowed; and the detention must always be subject to judicial review and control.*”¹⁵

There are numerous ‘fair trial’ concerns raised by the control order regime:

⁸ *Kanda v Government of Malaya* [1962] AC 322, 337 cited in Luke Beck, “Fair Enough? The National Security Information (Criminal and Civil Proceedings) Act 2004” (2011) 16(2) *Deakin Law Review* 405, 411.

⁹ Zifcak, “Counter-terrorism Laws and Human Rights” p 421. See also Simon Bronitt, “Constitutional Rhetoric v Criminal Justice Realities: Unbalanced Response to Terrorism” (2003) 14 *Public Law Review* 69, 76.

¹⁰ *Ibid* p 425.

¹¹ This law was introduced into the *Australian Security Intelligence Organisation Act 1979* (Cth), Div 3 by the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth).

¹² Control orders were introduced into the Commonwealth *Criminal Code* by the *Anti-Terrorism Act (No 2) 2005* (Cth).

¹³ *Criminal Code Act 1995* (Cth), Div 105.

¹⁴ Zifcak, “Counter-terrorism Laws and Human Rights” p 426 citing Human Rights Committee, *General Comment No 8: Right to Liberty and Security of Persons*, 16th Sess (30 June 1982) para 4.

¹⁵ *Ibid*.

- these powers are available to be exercised on a broad definition of ‘terrorist act’ and ‘terrorist organisation’;
- interim control orders are made at an *ex parte* hearing attended by neither the accused nor their legal representative. This prevents the accused from making submissions before an interim order is granted;
- once an interim order is granted the accused is not entitled to the full reasons for the imposition of a control order;
- the subject of the order only has two days between the interim and confirmation hearing in which to prepare a case that the order ought not to be imposed, or that some of its conditions are unjustified; and
- the Court’s satisfaction as to the deemed risk to members of the public need only be made out ‘on the balance of probabilities’ and not the criminal standard of proof.

The HRC is also concerned by the extent to which the control order regime can subject an accused to ‘double jeopardy’. As stated by Professor Zifcak, “a person may complete their sentence for a terrorism crime only then to be placed on a further, restrictive control order related to the commission of the same offence”.¹⁶ So, a person may be acquitted of all terrorism-related charges and then be the subject of a further control order on the same set of circumstances.¹⁷ The HRC is not aware of the extent of use of control orders but submits that such statistics should be publically available.

Similar issues arise with preventative detention orders and ASIO interrogation orders. The issuing body only ever has before it the evidence of the Australian Federal Police (AFP) and the recommended conditions of detention. Without access to opposing evidence or submissions, the HRC concurs that on this basis it is “next to impossible for the authority to reach a conclusion in relation to the making of an order that differs from that recommended”.¹⁸

Non-disclosure orders

In 2004, the Commonwealth government introduced the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (**NSI Act**) with the intention of ensuring that information obtained before or during the course of legal proceedings that may be prejudicial to national security not be disclosed to the accused person or their legal representatives. Consideration needs to be given as to whether this legislation is currently reasonably adapted to ensuring that fair trial rights are not abrogated in favour of unduly broad ministerial discretion and notions of ‘national security’.¹⁹ The HRC is not aware of the extent of use of non-disclosure orders but submits that such statistics should be publically available.

These reasons include, but are not limited to, the following:

- national security is defined to include anything which can fall within the ambit of “defence, security, international relations and law enforcement interests”;²⁰
- in affirming or denying the Attorney-General’s decision to issue a non-disclosure certificate the Court must give the greatest weight to any likelihood of prejudice to national security (as broadly defined above);²¹

¹⁶ Zifcak, “Counter-terrorism Laws and Human Rights” p 433.

¹⁷ See, for example, *Thomas v Mowbray* (2007) 233 CLR 327.

¹⁸ Zifcak, “Counter-terrorism Laws and Human Rights” p 436.

¹⁹ See, for example, *Thomas v Mowbray* (2007) 233 CLR 327.

²⁰ Mark Rix, “Counter-Terrorism and Information: The NSI Act, fair trials and open, accountable government” (2011) *Continuum: Journal of Media and Cultural Studies* (in press).

- it is at the Court's discretion whether court officials, the defendant, the defendant's legal representative and witnesses can be present at the closed hearing to assess the necessity of the material remaining confidential; and
- where information is held to be prejudicial to national security, this may preclude an accused or an accused's legal representative from the information it requires to mount a defence.

This final consequence has been framed by Ian Barker QC as “*repugnant to long accepted notions of fairness and propriety*”²². The HRC shares Mr Barker QC's concern that:²³

“The idea that Information might be used by the prosecution without the accused seeing the information need only be stated for its offensiveness to basic notions of fairness and justice to be apparent. Yet this is a conscious aim of the legislation. Apparently it is not in the public interest that processes of criminal justice be distorted to prevent an accused from presenting a proper defence.”

Whilst the HRC accepts that exceptional circumstances may require the maintenance of confidentiality, such a measure should not be taken without adequate protections. Under the current law, the broad definition of ‘national security’ does not offer such protections and increases the risk that an accused person will be tried without sufficient access to the (deemed?) condemning information. As such the HRC believes that it is even more important that the tenants of procedural fairness be adhered to.

The above matters have now been the subject of criticism for over a decade. The HRC welcomes the ALRC review and any recommendations on ways to improve the presently unjustifiable limitations on the right to a fair trial under Australia's counter-terrorism regime.

4. Burden of Proof

The HRC recognises that laws that shift or reverse the burden of proof are only justified where the evidence is peculiarly within the knowledge of one party and a power imbalance exists.

The HRC submits that the reverse burden of proof in the *Fair Work Act 2009* (Cth) (**FWA**) is justified, as it addresses the imbalance of power in the employee-employer relationship and does not place an onerous burden on the employer. Under the FWA, once an employee or prospective employee alleges that they were subject to adverse action, it is presumed that the adverse action was taken for a prohibited reason unless the employer proves otherwise.²⁴ The burden is on the employer respondent to rebut this assumption by bringing evidence that the reason behind the adverse action is not one of the prohibited grounds. This strikes a fair balance, as evidence as to the state of mind of the employer when they engaged in the alleged action will not easily be accessible to the employee.

The HRC note that the reverse burden does not pose an unfair advantage for employees as employees are required to clearly allege and particularise the motivation for the

²¹ NSI Act s 31(8).

²² Ian Barker, “Human Rights in an Age of Counter Terrorism” (2005) 26 *Australian Bar Review* 267.

²³ *Ibid.*

²⁴ Section 361 *Fair Work Act 2009* (Cth)

adverse action,²⁵ and simply providing evidence of an alternative reason for the adverse action alleged may discharge the evidentiary burden placed on employers²⁶.

The burden of proof and appropriateness of strict/absolute liability for environmental offences are dealt with at Part 8 of this submission.

5. Procedural Fairness

It is the HRC's submission that, as acknowledged by Finn J in *SA v Honourable Peter Slipper MP* [2004] FCAFC 164,²⁷ the '*relative seriousness of the consequences occasioned to a person*' affected by the exercise of the power must be a key consideration in determining whether a law that denies procedural fairness is justified. While, as suggested in *Issues Paper 46*, considerations such as urgency (or, as discussed below, national security) may justify reducing the content of the duty to afford procedural fairness, perhaps in extreme cases '*almost to nothingness*',²⁸ these considerations must always be balanced against the severity of the consequences to the individual.

In the HRC's view, the following Commonwealth laws impact on an individual's fundamental right to procedural fairness.

Maritime Powers Act 2013 (Cth)

The *Maritime Powers Act 2013 (Cth)* (MPA) was introduced in 2013 to provide a framework for the exercise of maritime powers such as the powers to board, search, and detain vessels, and to detain and move persons. The Explanatory Memorandum to the MPA indicates that it is the Legislature's intention that an authorising officer's decision to exercise a maritime power not be subject to the requirements of natural justice.²⁹ New provisions such as section 75B (inserted by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth)*) reaffirm this intention by explicitly providing that:

- (1) The rules of natural justice do not apply to the exercise of powers under section 69, 69A, 71, 72, 72A, 74, 75D, 75F, 75G or 75H.
- (2) Subsection (1) is not to be taken to imply that the rules of natural justice do apply in relation to the exercise of powers under any other provision of this Act.

This non-application of procedural fairness is purportedly justified by the '*unique circumstances facing law enforcement in a maritime environment*'³⁰. As recently noted by the High Court in *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1 (28 January 2015), arguably considerations such as urgency and the safety of maritime personnel may create hurdles in providing an opportunity for individuals to be heard in relation to decisions such as a decision under section 72(4) to detain a person and take the person to a place outside the migration zone (or, similarly, a minister's decision to make a direction under the newly inserted section 75F specifying the place as to where the person is to be taken).³¹

²⁵ *Fox v Stowe Australia Pty Ltd* (2012) 271 FLR 372 at [27].

²⁶ See *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 290 ALR 647.

²⁷ At [113]

²⁸ See *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 290 ALR 647;

²⁹ Explanatory Memorandum, *Maritime Powers Bill 2012 (Cth)* at [25]

³⁰ *Ibid*

³¹ [2015] HCA 1 at [306] (Kiefel J), [368] (Gageler J).

However, on the assumption that the individual's only 'legitimate interest' with respect to a decision to take a person to a place outside the migration zone is limited to his or her personal safety,³² this exclusion of the rules of procedural fairness cannot be justified in light of the seriousness of the potential consequences that may be occasioned, for example the relocation of affected individuals to a place where they face a real risk of persecution. While, as noted by Hayne and Bell JJ, it may in some cases be impossible to be satisfied on reasonable grounds that a location would be safe for the purposes of section 74 without seeking information from the relevant individual first,³³ it is submitted that this safeguard is insufficient in light of the aforementioned serious consequences that may be occasioned.

Moreover, while expedient decisions under section 72(4) are desirable to avoid detaining individuals for long periods of time at sea, exclusion of the duty to afford procedural fairness does not appropriately balance considerations of urgency against the serious consequences of such decisions. A better approach, as noted by the Human Rights Law Centre, would be to retain a duty to provide procedural fairness, the content of which can be attenuated where the factual circumstances³⁴ demand that the right to a hearing be limited.

Migration Act 1958 (Cth)

The *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth)* amends the *Migration Act 1958 (Cth) (MA)* by removing access to the Refugee Review Tribunal (RRT) for 'fast track' applicants (certain persons who arrived on or after 13 August 2012 but before 1 January 2014 and who have been refused protection visas) and instead establishing a new Immigration Assessment Authority (IAA). According to the second reading speech, the amendments are required to ensure 'efficient processing' of a 'backlog' of asylum claims.³⁵

Unlike the RRT, the IAA will not be required to provide a mechanism of review that is 'fair' and 'just', but simply 'efficient, quick and free of bias'.³⁶ Moreover, the 'exhaustive statement' of the natural justice hearing rule provided by the amendments allows only for review 'on the papers' unless there are exceptional circumstances and either the new information was not and could not have been provided to the Minister or new credible personal information which was not previously known has emerged that may have affected the decision.³⁷ As noted by the Law Council of Australia in their submission to the Senate Legal and Constitutional Committee in their review of the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload) Bill 2014 (Cth)*, these limitations severely restrict the applicant's ability to correct factual errors or incorrect assumptions underlying the decision to refuse a protection visa. This is particularly concerning in light of data that indicates 65% of decisions relating to unauthorised maritime arrivals were set aside in 2012-2013 by the RRT and MRT.³⁸

³² Ibid at [117] (Hayne and Bell JJ)

³³ Ibid at [119]

³⁴ Human Rights Law Centre, Submission No 166 to Senate Legal and Constitutional Affairs Legislation Committee, *Review of the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload) Bill 2014 (Cth)*, 31 October 2014 at [18]

³⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 25 September 2014, 10545(Scott Morrison)

³⁶ *Migration Act 1958 (Cth)* s 420(1); *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload) Act 2014 (Cth)* Sch 4 amending *Migration Act 1958 (Cth)* by inserting s 473DA

³⁷ *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload) Act 2014 (Cth)* Sch 4 amending *Migration Act 1958 (Cth)* by inserting s 473FA

³⁸ Law Council of Australia, Submission No 1296 to Senate Legal and Constitutional Affairs Legislation Committee, *Review of the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload) Bill 2014 (Cth)*, 5 November 2014 at footnote 108

Thus, in light of the severe implications of a refusal for the applicant and the frequency of error in primary decisions, the applicant's limited rights to address the IAA do not appear to be justified by considerations of efficiency.

The HRC notes that the MA provides several '*exhaustive statements*' of the requirements of the natural justice hearing rule in relation to visa application decisions, cancellation decisions and review by the Migration Review Tribunal (**MRT**) and RRT.³⁹ These provisions limit the duty to afford procedural fairness in a less drastic matter than the aforementioned recently inserted provisions that exclude the duty in its entirety. The Honourable Chief Justice French has indicated that such statements are generally undesirable as they preclude the common law from assessing what fairness requires in the circumstances.⁴⁰ Given the serious consequences for the individual occasioned by such decisions, the HRC suggests that these provisions cannot be justified.

Criminal Code Act 1995 (Cth)

Section 104 of the *Criminal Code Act 1995* (Cth) (**Criminal Code**) provides for the making of interim and final control orders to protect the public from terrorist attacks and prevent provision of support for, or facilitation of, terrorist attacks and hostile activity in foreign countries.⁴¹ While interim orders are often (although are not required to be) *ex parte*,⁴² the controlee is entitled to make submissions at a confirmation hearing.⁴³ The senior AFP member is required to serve certain documents on the controlee to enable the individual to respond to the matters that allegedly form the basis for the confirmation of the order. However, that senior AFP member is not required to disclose information if its disclosure may prejudice national security, be protected by public interest immunity, put at risk ongoing operations by law enforcement agencies or intelligence agencies, or put at risk the safety of the community, law enforcement officers or intelligence officers.⁴⁴ This provides the senior AFP member with an '*unfettered discretion*', as there is no provision for review of the decision as to what information may be withheld.⁴⁵

The HRC acknowledges that the aforementioned considerations such as national security do require that the content of the duty to afford procedural fairness be curtailed, in these circumstances the HRC submits that without any avenues for the Court to review the decision, as to which information ought not to be disclosed (and perhaps also a special advocate scheme such as in the United Kingdom),⁴⁶ this legislation clearly denies the controlee procedural fairness.

6. Authorising what would otherwise be a tort

Division 105 of the Criminal Code provides for the issuing of Preventative Detention Orders (**PDOs**), which authorise the detention of individuals for a period of time.

An Initial Preventative Detention Order (**IPDO**) providing for detention of up to 24 hours can be sought, via application by an AFP member.⁴⁷ This application is made within the

³⁹ *Migration Act 1958* (Cth) ss 51A, 97A, 118A, 127A, 357A, 422B

⁴⁰ R French, 'Administrative law in Australia: Themes and values' in Matthew Grove and H Lee (eds), *Australian Administrative Law* (Cambridge University Press, 2007) 15-35 at footnote 51

⁴¹ *Criminal Code* (Cth) s 104.1

⁴² *Jabbour v Hicks* (2007) 183 A Crim R 297, 298 at [3]

⁴³ *Criminal Code* (Cth) s 104.14

⁴⁴ *Criminal Code* (Cth) s 104.12A(3)

⁴⁵ Megan Caristo, 'Secretary of State for the Home Department v AF: a lesson for Australia' (2010) 32 *Sydney Law Review* 693 at 703

⁴⁶ *Ibid* at 704

⁴⁷ Section 105.1 *Criminal Code Act 1995* (Cth)

AFP, to an 'issuing authority', but an issuing authority for this purpose is a 'senior AFP member', which refers to a member at or above the rank of Superintendent.⁴⁸ A subsequent Continued Preventative Detention Order (CPDO) providing for total detention of no more than 48 hours may also be made, but can only be made by an 'issuing authority' who has judicial or quasi-judicial experience or qualifications described under section 105.2 of the Criminal Code. The impartiality of such a person is clearly stronger than that of a senior AFP member, in that they are appointed by the Minister. However, the HRC is concerned that there is a lack of transparency concerning the selection process of such persons and of their current or former relationships with the AFP or other relevant bodies.

A PDO can only be made if an issuing authority is reasonable satisfied that a 'terrorist act' has occurred within the preceding 28 days. However, a terrorist act is defined to include the threat of action,⁴⁹ and the HRC queries whether the evidence required to establish a reasonable satisfaction of a terrorist threat is substantial.

The HRC submits that the provisions authorising PDOs may have the effect of authorising the tort of false imprisonment and create a tool that allows for potential human rights abuse. The HRC supports the argument made by the Australian Human Rights Commission that a PDO should only be made in extraordinary circumstances, and that any issuing authority should only make the order on the basis that it is proportionate to the ends being sought.⁵⁰ The test in section 105.4 of the Criminal Code requires that the detention be 'reasonably necessary' in order to substantially assist in preventing a terrorist act occurring. Although the language implies proportionality, it does so only in reference to the need to prevent a terrorist act. The HRC submits that a PDO should only be made after consideration of both the likelihood and significance of the perceived or threatened terrorist act (that is purportedly being prevented) in proportionality with the serious infringement of the subject's right to liberty.

The subject of an IPDO is only entitled to see the order itself, and not the reasons or information causing it to be made. There is no mechanism available for them to challenge an IPDO. Whilst the HRC understands that some information must be kept confidential in the interests of national security, it submits that where decisions made in respect of IPDOs are not challengeable in any way, even after the fact, serious breaches of a subject's right to liberty may occur. Noting the potential to restrict an individual's movement, the HRC submits that this lack of procedural fairness, remedy or right to review may enable an unauthorised breach of civil liberties. The HRC proposes that 'specially licensed lawyers' whose obligations of client disclosure are specially limited, who are thoroughly vetted and have no previous ties to the subject, and who are placed under very strict confidentiality obligations, should be employed by the government to represent subjects of PDOs to ensure that procedural fairness is achieved.

Section 105.6 of the Criminal Code contains restriction on the making of multiple PDOs, in relation to a person on the basis of assisting in preventing the same terrorist act occurring within the relevant 14 day period. This is sensible however, a new IPDO could be made where information of a different terrorist act potentially occurring became available to be put before an issuing authority only after the original IPDO was made.⁵¹

⁴⁸ Section 100.1 *Criminal Code Act 1995* (Cth)

⁴⁹ *Ibid*

⁵⁰ *Review of Counter-Terrorism and National Security Legislation*; AUSTRALIAN HUMAN RIGHTS COMMISSION SUBMISSION TO THE INDEPENDENT NATIONAL SECURITY LEGISLATION MONITOR, 14 September 2012, Part 4.1(b)

⁵¹ Section 105.6(2) *Criminal Code Act 1995* (Cth)

The list of different acts which may constitute a terrorist act are extensive⁵² and as noted a terrorist act can include a threat of action. There is a lack of clarity as to what constitutes a new terrorist act. Theoretically this means an IPDO can be sought on the basis of information showing that a threat of action will be made in the future. In fact, individuals have been charged with 'Conspiracy, to commit an Act, in preparation or planning for a terrorist Act'. There is potential that multiple concurrent IPDOs could be sought for the prevention of actions or threats of actions which are related but distinct from one another.

Whilst the HRC is not aware of this occurring, it submits that it is unduly onerous that Commonwealth legislation authorises such an infringement of liberty in circumstances where no right to review is available, and decisions are made via a system that is essentially opaque to the subject of the order and the public.

7. Judicial Review

The HRC believes consideration should be given to the context of an Act in which a privative clause is found as well as the powers given to the executive officers by an Act. If the powers are invasive or infringe upon rights and freedoms, there should be a proportionate availability of judicial review.

Which laws?

The HRC is concerned by Commonwealth laws which provide for conclusive certificates in relation to executive actions which directly affect an individual's rights and freedom, such as search warrants which restrict access to judicial review. Such laws oust judicial review and the individual simply has to take these kinds of certificates at face value. These laws include but are not limited to section 15GZ of the *Crimes Act 1914* (Cth) and section 18 of the *Telecommunications (Intercept and Access) Act 1979* (Cth).

These laws are of concern given the changing nature of society in the twenty-first century and the increase in counter-terrorism legislation. The powers and technologies which the executive use to investigate alleged criminal activity are extensive and have the potential to grow more extensive with time. With this increase in power, both legislative and practical, there must be a commensurate way in which individuals can ensure the lawfulness of the actions of the executive when such fundamental rights and freedoms are in question. As the power and capacity of the executive to take away the rights and freedoms of individual's increases, so too, must the power to ensure the lawfulness of such actions increase.

With regard to the production of documents to challenge such certificates, the test should not be error on the face of the instrument, ie the certificate, as the basis for challenge, but whether jurisdictional error has occurred in fully informed judicial review proceedings. That is to say, individuals should be able to gain access to investigatory evidence which confirms whether jurisdictional error has occurred or not. Some policy considerations should be taken into account, such as the protection of the identities of undercover operatives and such identifying material may be redacted. However, as time passes, it is arguable that there may be less justification for the blanket style certificates.

⁵² Section 100.1(2) *Criminal Code Act 1995* (Cth)

8. Strict and Absolute Liability

It is the view of the EPLC that strict liability for environmental offences, especially under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**), should be maintained to ensure that breaches of environmental law are able to be enforced and that Australia is able to meet its obligations under international environmental law.

Strict liability applies to selected offences under the EPBC Act, as well as other Commonwealth legislation. The relevant provisions of the EPBC Act where strict liability applies have been outlined in the table below.

The EPLC considers this an important opportunity to re-iterate the significance of these provisions in aiding prosecutions for breaches of the EPBC Act and other Commonwealth environmental legislation. Environmental offences may be difficult to prosecute without the application of strict liability. One reason for the difficulty is that, in many cases where strict liability does not apply, it can be difficult for prosecutions to obtain sufficient evidence to demonstrate that a defendant knew, or was reckless to the fact that they were, for example, harming a listed species, or doing a particular act within a Commonwealth area. To this end, the EPLC notes that there have been relatively few criminal prosecutions under the EPBC Act.

In addition, the defence of honest and reasonable mistake is available to defendants with respect to strict liability offences. This defence means that defendants will not be held liable where they held an honest and reasonable belief that they were acting in compliance with their obligations under the EPBC Act and other Commonwealth environmental laws.

On balance, removing strict liability for offences under Commonwealth environmental legislation would, in the EPLC's view, significantly reduce the efficacy of the EPBC Act and other Commonwealth environmental legislation in deterring environmental crime. This has implications for Australia's ability to meet its obligations under international environmental law.

Legislation	Description of how the law encroaches unjustifiably on the relevant right, freedom or privilege
<i>Environment Protection and Biodiversity Conservation Act 1999</i> (Cth) s 15A, 15C, 17B, 18A, 20A, 24A, 24C, 27A, 27C, 142A, 142B, 196, 196A, 196C, 196E, 207B, 211, 211A, 211B, 211C, 211D, 211E, 229, 229A, 229B, 229C, 236, 254, 254A, 254B, 254C, 254D, 254E	Reverses the onus of proof by attaching strict liability to various environmental offences under the EPBC Act.

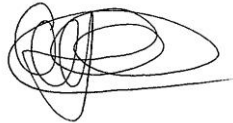
In conclusion, the EPLC believes strict liability for environmental offences, especially under the EPBC Act, should be maintained to ensure that breaches of environmental law are able to be enforced and that Australia is able to meet its obligations under international environmental law.

Conclusion

The NSW Young Lawyers Human Rights Committee and Environment and Planning Law Committee thank the Australian Law Reform Commission for the opportunity to be heard in this submission.

The Committees would be pleased to provide further information or comment in this review. To this end, Elias Yamine, President of New South Wales Young Lawyers, Nicole D'Souza, Chair of the NSW Young Lawyers Human Rights Committee and Emily Ryan, Chair of the NSW Young Lawyers Environment and Planning Law Committee; can be contacted via the details below and are interested and willing to appear at any hearings being conducted as part of this review.

Sincerely,



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