



**Australian
Privacy
Foundation**

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<http://www.privacy.org.au/About/Contacts.html>

13 March 2015

Australian Law Reform Commission

By email: freedoms@alrc.gov.au

Dear ALRC,

Re: ALRC Issues Paper: Traditional Rights and Freedoms – Encroachments by Commonwealth Laws

The Australian Privacy Foundation (APF) is the country's leading privacy advocacy organisation. A brief backgrounder is attached.

This submission by the Australian Privacy Foundation responds to the Issues Paper: Traditional Rights and Freedoms - Encroachments by Commonwealth Laws.

General comments

It is noted that the purpose of this Issues Paper is to identify encroachments by Commonwealth Laws on traditional rights and freedoms, having regard to the rights, freedoms and privileges recognised by the common law. The Australian Privacy Foundation supports an audit of existing laws to ensure the laws are consistent with the human rights of the individuals in Australia. However, any audit of encroachments on human rights by Commonwealth legislation needs to be comprehensive and systematic. We contend that the entire approach to this matter is fundamentally flawed and will not achieve the desired outcomes in an efficient way without a change in approach.

This submission will not be identifying a list of Commonwealth Laws that encroach on traditional rights and freedoms. We do not have the resources to undertake this task. We would also argue that many other organisations would have the same problem. We will include case studies only. We contend that the identification of laws should be the subject of a separate process with consultation.

Our detailed comments are outlined below.

Bill of Rights/National Human Rights Act

Australia is exceptional in that it is the only developed liberal democracy that does not have an express bill of rights or national human rights legislation in the form of either constitutional protection or a statute. Accordingly, the ability of courts to review legislation to determine whether or not it presents a disproportionate interference with human rights is severely constrained, especially when compared with jurisdictions we would like to compare ourselves with. Given that legislation can always override the common law, relying on the common law to protect traditional rights and freedoms is an ineffective way to protect the fundamental rights of Australian citizens. In this respect, we refer to a recent article by Professor George Williams, a patron of the Foundation, which concluded that if a national bill of rights was enacted "*the High Court will have a broader canvas upon which to determine human rights matters, and may even ultimately come to play a similar role to like courts in other nations.*"¹

Accordingly, the Privacy Foundation submits that the only effective way of ensuring the protection of the fundamental rights of Australians is to introduce a bill of rights or national human rights legislation which provides for appropriate judicial review of legislation passed by the Parliament. The Foundation further submits that the inadequate protection of the rights of Australians under the common law is a fundamental weakness of the Australian legal system, which throws doubt on the extent to which the Australian legal system complies with the rule of law.

Recommendations:

That the ALRC acknowledges the weaknesses of the common law as a means for protecting fundamental rights, including traditional rights and freedoms.

That the ALRC recognises the desirability of introducing a bill of rights, incorporating appropriate judicial review of legislation, as a preferred means of protecting the fundamental rights of Australians.

Limitations of the Terms of Reference

The Terms of Reference for this inquiry appears to only cover a limited range of rights and freedoms. It is unclear why the list would be limited. Australia has human rights obligations

¹ Williams, George, *The High Court, the Constitution and Human Rights*, paper presented to the Castan Centre for Human Rights Law Conference, Melbourne, 25 July 2014.

through international agreements. As a minimum, it would make sense to audit Australian legislation for encroachments in relation to all international commitments and existing common law rights. The Terms of Reference is not meeting even this minimum requirement.

Instead, the Government has chosen a very limited number of rights and freedoms to review. This choice undermines the importance of other rights and freedoms. It is arguable that an artificial audit of encroachments on rights and freedoms (as identified only) constitutes maladministration. There is also, arguably, a fundamental conflict of interest with the Government conducting a limited audit based on freedoms the Government determines as important (at the exclusion of other freedoms).

A further problem also arises with determining freedoms based on the common law. The common law decisions are subject to significant interpretation arguments on the meaning and scope of existing decisions. This is yet another argument why a national human rights act is required so that encroachments can be identified against set legislative human rights.

Efficiency of process

The proposed process appears to be an inefficient way to repair gaps in human rights protection under the existing Commonwealth laws. As already stated above, the most practical and efficient way to repair gaps and keep those gaps repaired is to enact human rights legislation. This would enshrine principles that all laws must be consistent with.

The proposed process will require ongoing audits of laws to ensure that there are no encroachments of rights and freedoms. There is no identified process to audit new laws. The audit process will need to be independent to avoid conflicts of interest. The independent process may prove expensive. It is likely with ongoing budgetary constraints that any process may be abandoned on change of government.

Privacy as a traditional right and freedom

The Foundation submits that the right to privacy is a traditional right and freedom recognised by the English common law. It is therefore disappointing that the right to privacy is not specifically referenced in the terms of reference for the inquiry. In this respect, we specifically refer to the landmark judgment of Lord Camden CJ in *Entick v Carrington* [1765] EWHC KB J98; 95 ER 807. In that seminal case on the rule of law, which effectively set limits on executive power under English law, Carrington and others had forcibly broken into the home of the writer, John Entick, and engaged in a search of the premises. In holding that Lord Halifax, under whose orders

Carrington and the others engaged in the trespass were acting, had no authority to authorise their activities, Lord Camden specifically held that the common law recognised a right against search and seizure by agents of the state, unless such activities are conducted pursuant to lawful authority. While the language used by Lord Camden expressly refers to property rights, it is clear that the court recognised a common law right to privacy against intrusions by the state.

Apart from its recognition as an integral part of the common law, the right to privacy is recognised as a fundamental right under international human rights law² and bills of rights across the world.

We contend that the freedom and the right of privacy is integral to freedom of movement and property rights. A failure to include the right to privacy in a discussion of these freedoms would mean that any assessment of encroachments from Commonwealth Laws would be incomplete.

As a starting point we contend that the appropriate principles that should be applied are that all Australians have a right to privacy with limited exceptions. The exceptions would be: targeted national security and criminal law enforcement powers subject to effective accountability and specific justification measures, and protection of the rights and freedoms of others. The exceptions must only be exercised in a necessary and proportionate way; assessing these accepted criteria depends on transparency and comprehensive reporting of practices with systemic evidence about effectiveness, and costs and unwanted consequences. The appropriate balance of proportionality would need to be developed through case law, including the conduct of public interest test cases where necessary due to absence of such judicial guidance.

We note that the ALRC Discussion Paper: Serious Invasions of Privacy in the Digital Era discussed a number of guiding principles about privacy. In particular, guiding principle 1 specifically acknowledged that privacy underpins a number of traditional rights and freedoms.

Recommendation: privacy should be recognised as a fundamental right/freedom and examined as part of any review of encroachments by Commonwealth legislation

Identifying encroachments

We contend that the ALRC would be well placed to identify encroachments of Commonwealth Laws on rights and freedoms. The ALRC should undertake this analysis, however, the rights and freedoms list needs to be significantly expanded to include all of the fundamental human rights including a right to privacy.

² Article 17 of the International Covenant on Civil and Political Rights

Proposed laws

We contend that there are currently a number of laws under consideration in parliament that are not necessary and proportionate and are likely to impinge on traditional rights and freedoms. The proposed data retention laws are an example of a proposed law that impinges on freedom of movement and property rights with very poor evidence that it will assist with national security or prevention of crime. See our submission dated 19/1/15 and supplementary submissions on the Inquiry into Telecommunications (interception and Access) Amendment (Data Retention) Bill 2014 available at www.privacy.org.au.

The problems faced in Australia are illustrated by the current debate concerning the introduction of blanket data retention. In jurisdictions with adequate and appropriate legal protection of human rights, such laws are subject to judicial review to determine whether or not there is an infringement of fundamental rights and, if so, whether the infringement is legally justified. In Australia, however, there is no possibility of such independent review, meaning the fate of legislation that may unacceptably interfere with human rights depends entirely upon the political process.

We also note that the Prime Minister has just announced further anti-terrorism laws. We would stress again that the rights and freedoms of individuals have to be balanced against national security needs. There has to be clear evidence that these encroachments are justified based on sound evidence before the rights and freedoms of individuals are eroded.

Recommendation: there must be an independent process in place to ensure there is sound evidence to support encroachments on rights and freedoms

Thank you for your consideration.

Yours sincerely

Australian Privacy Foundation

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Background Information

The Australian Privacy Foundation (APF) is the primary national association dedicated to protecting the privacy rights of Australians. The Foundation aims to focus public attention on emerging issues that pose a threat to the freedom and privacy of Australians. The Foundation has led the fight to defend the right of individuals to control their personal information and to be free of excessive intrusions.

The APF's primary activity is analysis of the privacy impact of systems and proposals for new systems. It makes frequent submissions to parliamentary committees and government agencies. It publishes information on privacy laws and privacy issues. It provides continual background briefings to the media on privacy-related matters.

Where possible, the APF cooperates with and supports privacy oversight agencies, but it is entirely independent of the agencies that administer privacy legislation, and regrettably often finds it necessary to be critical of their performance.

When necessary, the APF conducts campaigns for or against specific proposals. It works with civil liberties councils, consumer organisations, professional associations and other community groups as appropriate to the circumstances. The Privacy Foundation is also an active participant in Privacy International, the world-wide privacy protection network.

The APF is open to membership by individuals and organisations who support the APF's Objects. Funding that is provided by members and donors is used to run the Foundation and to support its activities including research, campaigns and awards events.

The APF does not claim any right to formally represent the public as a whole, nor to formally represent any particular population segment, and it accordingly makes no public declarations about its membership-base. The APF's contributions to policy are based on the expertise of the members of its Board, SubCommittees and Reference Groups, and its impact reflects the quality of the evidence, analysis and arguments that its contributions contain.

The APF's Board, SubCommittees and Reference Groups comprise professionals who bring to their work deep experience in privacy, information technology and the law.

The Board is supported by Patrons The Hon Michael Kirby AC CMG and The Hon Elizabeth Evatt AC, and an Advisory Panel of eminent citizens, including former judges, former Ministers of the Crown, and a former Prime Minister.

The following pages provide access to information about the APF:

- Policies <http://www.privacy.org.au/Papers/>
- Resources <http://www.privacy.org.au/Resources/>
- Media <http://www.privacy.org.au/Media/>
- Current Board Members <http://www.privacy.org.au/About/Contacts.html>
- Patron and Advisory Panel <http://www.privacy.org.au/About/AdvisoryPanel.html>

The following pages provide outlines of several campaigns the APF has conducted:

- The Australia Card (1985-87) <http://www.privacy.org.au/About/Formation.html>
- Credit Reporting (1988-90) <http://www.privacy.org.au/Campaigns/CreditRpting/>
- The Access Card (2006-07) http://www.privacy.org.au/Campaigns/ID_cards/HSAC.html
- The Media (2007-) <http://www.privacy.org.au/Campaigns/Media/>