**Traditional Rights and Freedoms –**

**Encroachments by Commonwealth Laws**

**Interim Report**

Submission by Civil Liberties Australia ***CLA***

Thank you for the invitation to make submissions on your Interim Report.

As a national organisation that stands for people’s rights and advocates for civil liberties, Civil Liberties Australia (CLA) strongly supports the reference by the federal Attorney-General of this “critical examination” to the ALRC. CLA appreciates the work that the ALRC has undertaken to date and the thoroughness of the interim report.

We provide the following specific comments with a view to improving the quality, accuracy and usefulness of the report.

**Please note:**

While CLA takes an interest in most/all elements of the report, our comments are directed toward those issues that are a particular focus for CLA. In addition, we have not made comments on individual matters where we consider our views have already been adequately canvassed in the Interim Report – including by reference to the submissions made by other organisations.

Lack of comments should therefore not be taken to indicate CLA’s support for (or opposition to) the particular content of the report or related laws and government policies. Should the ALRC require confirmation of our views on any particular subject not addressed in the comments below, we would be happy to prepare supplementary submissions.

**Coverage of the enquiry**

For the most part, CLA agrees with the list of “traditional rights, freedoms and privileges” set out in the terms of reference of this inquiry.

However, we note that the terms of reference allow the ALRC to report into laws that interfere with “any other similar legal right, freedom or privilege”. In this context, we consider there are some glaring omissions from the interim report, most notably:

(1) the right to privacy;

(2) the right to liberty and freedom from arbitrary arrest or detention (as per article 9(1) of the ICCPR); and

(3) the freedom of the press.

In our view, these rights and freedoms are of long standing and occupy a central place in all developed societies and in their legal traditions. While we note that these rights and freedoms are touched upon under other chapters of the Interim Report (for example, some encroachments on the right to liberty, or the freedom from arbitrary detention, are referred to in chapter 15 of the Interim Report), we consider they are of such importance that they should be highlighted and considered in detail within separate chapters of the report.

In relation to privacy, we note that the Interim Report itself appears to acknowledge a “right to privacy” on multiple occasions and the *Privacy Act 1988 (Cth)* refers explicitly to a right to privacy in its preamble (“the right of persons not to be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence”). In this context, CLA acknowledges the work of the ALRC on privacy in previous reports and submissions. The ALRC may wish to incorporate the findings and recommendations of those earlier reports by reference, updated where required.

In relation to the right to liberty, CLA has a long-standing interest in and concerns about bail laws around Australia and “paperless arrest” laws in the Northern Territory. In relation to Commonwealth laws, we have written, for example, about situations where jail sentences have been imposed on fine defaulters by courts despite the Commonwealth law not providing for jail sentences (see, for example, our article at: <http://www.cla.asn.au/News/do-same-crime-serve-same-time-lbr-g-but-not-if-living-in-queensland/>). We also acknowledge the ALRC’s 2006 report “Same Crime, Same Time: Sentencing of Federal Offenders”.

CLA also has an interest in and grave concerns about laws relating to immigration that impose mandatory detention on asylum seekers and others.

In relation to the freedom of the press, the ALRC will be aware of the long history of this freedom in developed countries and around the world. Suffice it to say here that, although the British Monarch historically restricted the activities of the press, the development of the traditional concept of a free press can be traced from the English Civil Wars and the works of the celebrated English author John Milton, especially his 1644 work Areopagitica, through the 1688 British Bill of Rights, the abolition of the Star Chamber and removal of ecclesiastical courts’ jurisdiction over morality offences.

This traditional freedom was formalized in the First Amendment to the US Constitution and, in the 20th century, globalized in the ICCPR.

**Recommendation 1:**

The final report should include separate chapters on “the right to privacy”, “the right to liberty” and “the freedom of the press”.

**Chapter 2: Scrutiny Mechanisms**

CLA welcomes the chapter on Scrutiny Mechanisms. It is an excellent overview of the current state of affairs.

CLA considers there are a number of weaknesses in the current system of Scrutiny Mechanisms. Perhaps the most significant is that, in successive governments, the Cabinet minister who would be expected to advocate in favour of the human rights-compatibility of bills, namely the Attorney General, also has within his/her portfolio wide responsibility for national security and law enforcement – areas where (as is clear from the Interim Report) implications for human rights frequently arise.

As a result, we believe, the interests of human rights have been poorly served – for example, in the areas of surveillance and strengthened data retention laws. We are not confident that successive Attorney-Generals have been able to represent effectively the interests of the human rights of Australians when to do so would mean arguing contrary to his/her own proposed legislation.

For this same reason, we do not consider the Attorney-General’s Department has been effective stewards of the process for preparing “Statements of Compatibility”. In fact, we consider many of these statements display a cavalier and unhelpful approach to human rights. It is no surprise then that the quality of the Statements of Compatibility have often been found “deficient” by Parliamentary Committees (paragraph 2.55 of the Interim Report).

We offer as a recent example the Statement of Compatibility for the Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015. This Bill would allow private security officers to use physical force against detainees and any other person in immigration detention centres. Such force may result in the death of the recipient of such force (it may ‘engage the right to life’ of that person – in the Orwellian language of the explanatory memorandum). Under the Bill, the security officer would be exempt from any judicial action. Yet in the Statement of Compatibility, the minister offers the circular argument that since the force would be exerted consistent with (the extremely loose provisions of) the Bill itself, killing the person (or other exercises of physical force) would be lawful and not arbitrary and, on this basis, the minister declares that the Bill is compatible with human rights. This is clearly not good enough as an interpretation of fundamental human rights as is clear from the report of the Parliamentary Joint Committee on Human Rights, numerous public submissions (including our own) to the Parliamentary consideration of the Bill and media commentary by NGOs and others.

We do not consider that these problems can be overcome simply by putting in place “additional procedures … to improve the rigour of statements of compatibility and explanatory memoranda” (2.58). In the absence of a minister being appointed to Cabinet specifically to advocate for human rights compatibility, we consider a possible improvement may be for the Statements of Compatibility to be prepared by an independent person or agency rather than by the minister responsible for the Bill. The Australian Human Rights Commission may be an appropriate body to conduct such scrutiny, provided it were properly resourced to undertake this function. Also, the Joint Committee on Human Rights could be given the power to conduct own-motion inquiries or on reference from a House of Parliament.

**Recommendation 2:**

The final report should reconsider paragraph 2.58 to suggest independent preparation of Statements of Compatibility rather than simply suggesting additional procedures.

With regard to the efficacy of scrutiny by parliamentary committees, we share the view of Professor George Williams that ‘there is little or no evidence that [the reports of the Committee] have had a significant impact in preventing or dissuading parliaments from enacting laws that infringe basic democratic rights’ (2.62).

We support the conclusion that changes to these mechanisms need to be made to improve parliamentary processes. The ideas briefly noted in 2.68 and 2.69 are deserving of serious consideration.

**Chapter 3: Freedom of Speech**

**Public Interest Disclosure**

CLA strongly supports the coverage of secrecy laws in the Interim Report and agrees with the statement in the Interim Report that “secrecy laws may need to be reconsidered in light of principles of open government and accountability—and modern conceptions of the right to freedom of speech” (3.63). In CLA’s views, such laws are having a chilling effect on public communication and the expression of critical views and have a regrettable tendency to be used against critics of the government of the day. In this context, CLA supports the recommendation in the ALRC’s 2009 report “that the general secrecy offences in ss 70 and 79 of the Crimes Act should be repealed and replaced by new offences that require that the disclosure of Commonwealth information did, or was reasonably likely to, or intended to, cause harm”.

In this context, CLA considers that the *Public Interest Disclosure Act 2013 (Cth)* (PID Act) warrants more detailed consideration in the ALRC’s final report than is included in the Interim Report (3.91). The protections in the PID Act are being cited by governments to suggest that public concerns about secrecy laws are over-stated – for example, see comments by Immigration Minister Peter Dutton in response to concerns raised by health workers and others about the effect of secrecy provisions in the *Australian Border Force Act 2015*.

In CLA’s view, the processes set out in the PID Act for public interest disclosures are extremely restrictive to the extent that they almost appear to be designed to limit, rather than free up, public disclosures. The ALRC’s final report would benefit greatly by some consideration of the effectiveness of the PID Act in the two years since it came into effect.

For example, statistics could be included on:

(a) The number of times the PID process has been initiated since the PID Act came into force,

(b) The number of times such cases have led to investigations by (i) the agency concerned and (ii) by a prescribed investigation agency, and

(c) The number of times such cases have eventually led to a public release of information.

**Recommendation 3:**

The final report should include more detailed consideration of the extent to which the *Public Interest Disclosure Act 2013 (Cth)* serves as a meaningful balance to the secrecy provisions contained in various Commonwealth Acts identified in the Interim Report.

**Classification**

In CLA’s view, the Australian classification scheme requires more detailed treatment than is provided in the Interim Report. For example, despite the fact that the first principle of Australia’s National Classification Code reads “adults should be able to read, hear, see and play what they want”, the Classification Guidelines agreed to by the Commonwealth and states and territories effectively place restrictions on the access by adults to certain material. This includes access to material relating to euthanasia (e.g. the *Peaceful Pill* handbook) and non-violent erotica and access to certain computer games. These restrictions go beyond those described in the Interim Report (particularly, in 3.128).

**Recommendation 4:**

The final report should consider in more depth the extent to which the national classification scheme for films, literature and computer games restricts the ability of adults in Australia to “read, hear, see and play what they want”.

**Interception and Surveillance**

In CLA’s view, the treatment in the report of the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2015 (Cth) should be expanded. In fact, as noted above, we consider that the report would benefit from the inclusion of separate chapters on the ‘right to privacy’ and ‘freedom of the press’. This particular proposed legislation is a prime example of how these traditional rights and freedoms have been increasingly encroached upon by Commonwealth legislation in recent years and to an extent not justifiable by the purported national security objectives.

As noted in chapter 13, such data retention and access laws may have a “chilling effect” on communication between lawyers and their clients. We believe the chilling effect is not limited to communications with lawyers.

In CLA’s view, the inability to carry on speech and other forms of communication in private is a severe encroachment on a person’s freedom of speech. The ability to choose the audience for your communication is an integral part of one’s freedom of speech.

**Recommendation 5:**

The final report should include more detailed treatment of the ‘right to privacy’ and the ‘freedom of the press’, including treatment of how these rights and freedoms are encroached upon by the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2015 (Cth) and other Commonwealth legislation.

**Euthanasia**

The Interim Report does not consider s474.29A of the Criminal Code Act 1995. This section makes it an offence to use a carriage service to access, transmit or publish material that counsels or incites committing or attempting to commit suicide. While there may be justifications for these laws, CLA notes that they have in the past been used to restrict access to materials relating to euthanasia. CLA considers these laws should be described in this report as, regardless of the justification, they clearly restrict freedom of speech, especially noting that it is a rare (and perhaps the only instance) where it is an offence to counsel the commission of an act that is not in itself an offence.

**Recommendation 6:**

The final report should include in this chapter consideration of laws that restrict freedom of speech in relation to suicide and euthanasia.

**Chapter 4: Freedom of Religion**

As set out in the following paragraphs, in CLA’s view, the section spanning paragraphs 4.38 to 4.88 of the Interim Report reflects a fundamental error in the understanding of what ‘freedom of religion’ has traditionally meant. This error leads to a false opposition being drawn between the freedom of religion and other rights and freedoms – such as freedom from discrimination.

In CLA’s view, the quote at paragraphs 4.9 of the Interim Report encapsulate an accurate view of what “freedom of religion” has traditionally meant, i.e., (i) an ability to believe in the God or Gods of one’s own choice or in no God whatsoever without interference or risk of persecution and (ii) an ability to practise the core tenets of that religion.

Accordingly, CLA considers that the Interim Report is in error in ascribing beliefs to organisations (e.g. 4.44). We do not consider that organisations can be said to have religious beliefs in any meaningful sense. The people who have created that organisation may have beliefs, they may share the same beliefs and they may have formed the organisation in order to pursue objectives related to those beliefs. However, the beliefs remain those of the individual, not of the organisation and restrictions on the operations of the organisation do not necessarily imply encroachments on the freedom of religion of the individuals concerned. CLA acknowledges that this concept of an organisation having beliefs is being increasingly asserted in recent times, but we do not consider this to be the “traditional” concept as per the terms of reference of this enquiry.

Thus, it is not clear that legislation and regulation, including those referred to in the Interim Report, governing such matters as workplace relations and equal employment opportunity, can be described as encroaching on a person’s freedom of religion (for example, see reference to anti-discrimination provisions in the Fair Work Act 2009 at paragraph 4.45).

A person who feels that they cannot run a business or employ people in conformity with their religious beliefs because of equal employment opportunity laws, for example, has a clear option open to them: not to start a business the lawful operation of which will force them to compromise their religious beliefs. To our knowledge, running aged care facilities, for example, is not a core element of the practice of any religion and, therefore, it is not clear that regulation of such a business encroaches upon freedom of religion as traditionally understood. (Note: this point of view is somewhat analogous to that set out in paragraphs 12.85 – 12.87 where it is asserted that infringements on the privilege against self-incrimination are justified where a person voluntarily decides to engage in a regulated business activity.)

This more narrow interpretation of what traditionally has been meant by freedom of religion is supported by the quote from Mason ACJ and Brennan J in the Interim Report: “… though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion”. And again, it appears to be supported by the quote in *Krygger v Williams (4.23): “t*o require a man to do a thing which has nothing at all to do with religion is not prohibiting him from a free exercise of religion.”

Looked at from this perspective, the exemptions for religious beliefs such as those referred to in 4.48 take on a different aspect. It becomes arguable that such exemptions encroach on rights that should be considered traditional, namely the right not to be discriminated against based upon one’s religious belief, sex, sexual orientation, gender identity, marital status etc, without necessarily safeguarding religious freedom as traditionally understood. That is not to say that such exemptions may not be justified, but the discussion, including in this report, takes on a different hue.

The more expansive view of the concept of freedom of religion – that it should permit a person with religious beliefs to run businesses including aged care facilities, schools, etc consistent with religious doctrines – is not, in CLA’s view, the traditional view, at least in developed, secular countries. It is more commonly found in theocratic (and generally repressive) states and it would be regrettable if it gained currency in Australia.

**Recommendation 7:**

The final report should include a more in-depth look at what the traditional concept of freedom of religion has meant and make a distinction between laws that encroach upon this traditional concept as opposed to those that encroach upon more recent and more expansive notions of what freedom of religion involves.

**Chapter 5: Freedom of Association**

In CLA’s view, some of the most severe encroachments on the right to freedom of association and assembly have occurred in relation to international summits, such as APEC and the G20, and other special events, where police are typically granted “extraordinary powers”. The interim report makes only a passing reference to this at 5.120.

It may be the ALRC’s position that, since no such laws are in operation at the time of preparing this report, they do not require in-depth consideration. CLA believes this is the wrong approach to take. Such event-related laws have now been implemented on several occasions – enough times to indicate that similar laws will be enacted in relation to future such events. On this basis, CLA considers that previous event-related Commonwealth laws should be carefully examined in this report.

**Recommendation 8:**

Previous event-related laws (for example, those related to APEC and the G20 summits) that encroach upon the freedom of association should be examined in this report as it is likely that similar laws will be enacted in relation to future such events.

**Chapter 6: Freedom of Movement**

No comment

**Chapter 7: Property Rights**

**Trade agreements**

CLA considers that the section beginning at 7.49 would benefit from consideration of international law embodied in international trade agreements. Provisions on expropriation in such agreements have been the subject of considerable dispute settlement. Australia is party to trade agreements that enshrine such protections (see for example, Article 11.7 of the Australia-United States Free Trade Agreement). While such provisions typically offer protections only to the investors of the other party to the agreement, arguably such provisions reflect the approach countries party to such agreements would take towards their own domestic investors.

These trade agreements of course also contain provisions on the protection of intellectual property rights.

In signing up to Investor State Dispute Settlement provisions in trade agreements, the Australian Government is effectively limiting the right of Australia – by vehicle of the High Court of Australia – to be free to decide the final form of laws that will govern how Australian society operates.

**Recommendation 9:**

In considering the sources of protection for property rights found in international law, the final report should take into consideration the rights and obligations established in the emerging body of international trade agreements (bilateral, regional and multilateral).

**Proceeds of crime – literary proceeds**

CLA considers that the Interim Report gives insufficient treatment to the targeting of ‘literary proceeds’ under the *Proceeds of Crime Act*. CLA believes this aspect requires particularly careful consideration in the context of this report as proceeds of literary works are not the direct proceeds of the commission of a crime but rather “are benefits a person derives from the commercial exploitation of their notoriety from committing a criminal offence” (7.100).

In CLA’s view, such targeting is an encroachment on freedom of speech (regardless of the justification) and therefore should also be considered in chapter 3 of the report (this view is supported, for example, in the following article: <http://www.abc.net.au/news/2011-08-10/berg---hicks-should-keep-his-memoir-profits/2831862>). CLA considers there is uncertainty about the scope for targeting of literary proceeds under the Act and, again in CLA’s view, such cases have been pursued on an inconsistent basis, particularly in relation to high-profile cases. The case pursued by the Commonwealth Director of Public Prosecutions (before being dropped in 2012) against Mr David Hicks in relation to his book *“Guantanamo, My Journey”* is an illustrative example.

CLA believes that, in considering the extent to which this aspect of the *Proceeds of Crime Act* encroaches upon traditional rights and freedoms, the ALRC should at least describe its relevance to freedom of speech as well as to property rights and should (as the Interim Report does in other sections such as 14.70) describe how Commonwealth laws compare with practice in other jurisdictions.

**Recommendation 10:**

The final report should consider in more depth the targeting of ‘literary proceeds’ under the Proceeds of Crime Act including by (1) considering its relevance to freedom of speech in Chapter 3 and (2) comparing the practice in Australia to the practice in other jurisdictions.

**Chapter 8: Property Rights – Real Property**

No comment

**Chapter 9: Retrospective Laws**

CLA considers that the section on Laws with Retrospective Operation beginning at 9.26 should describe the situation which allows regulations to be deemed to have been in force from a time prior to their adoption. This situation was seen most starkly in 2003 when a decision to excise Melville Island from the Australian Migration Zone was taken after the arrival there of a group of asylum seekers but was retrospectively deemed to have applied from a time before their arrival.

The following article refers to this “high farce”: <http://www.smh.com.au/articles/2003/11/07/1068013402221.html>

**Recommendation 11:**

The final report should address the scope that exists for regulations to be deemed to be operational prior to their actual adoption and the implications of this for the rights and freedoms considered in this chapter.

**Chapter 10: Fair trial**

CLA submits that this chapter of the report should also consider instances where Commonwealth laws (1) encroach upon the right to seek justice through the legal system and (2) confer on the executive the ability effectively to punish individuals – powers that under traditional rights and freedoms would only be exercised following a fair trial.

See also 17.55 and 17.77.

The Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015, which is currently before Parliament, is an example of the first category of encroachment above. This Bill would confer on security contractors the power to use force against anyone in order to “maintain the good order, peace or security of an immigration detention facility”. The only restriction that applies to the use of this force (which, as the explanatory memorandum points out, could result in the death of people subjected to such force) is that the security officer “reasonably believes” it is necessary.

Of most relevance to this report, the Bill includes provision at 197BF that “No proceedings may be instituted or continued in any court against the Commonwealth in relation to an exercise of power under section 197BA if the power was exercised in good faith.” This section of the Bill goes on to say “This section has effect despite anything else in this Act or any other law.”

**Recommendation 12:**

The final report should consider current and proposed Commonwealth laws that restrict the scope for people to pursue grievances through a fair trial, as for example under the proposed Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015. (Note: this issue could also be covered in Chapter 17 - paragraph 17.55 presents a similar issue.)

The Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, which is currently before Parliament, is an example of the second category of encroachment above. In the proposed section 33A, the relevant Minister would have power to make a decision that would strip a person of their Australian citizenship. Under the Bill, the Minister making this decision only has to “become aware” of certain categories of conduct – no fair trial is necessary to establish the facts of the alleged conduct. The proposed section goes on to say, “the rules of natural justice do not apply in relation to the powers of the Minister under this section”. No Australian Government should be able to legislate away the rules of natural justice or the Rule of Law, CLA believes.

**Recommendation 13:**

The final report should consider in this chapter current and proposed Commonwealth laws that potentially undermine the separation of powers by conferring upon the executive power effectively to punish individuals.

**Right to Appeal**

CLA believes that the right to appeal against conviction should be considered integral to the right to a fair trial and therefore should be analysed as part of this chapter.

Of Australian jurisdictions, only South Australia has made explicit provision to allow second and further appeals against conviction and sentence in instances where ‘fresh’ and ‘compelling’ evidence indicates there may have been a ‘substantial miscarriage of justice’ ([Statutes Amendment (Appeals) Bill 2012](http://www.legislation.sa.gov.au/LZ/B/CURRENT/STATUTES%20AMENDMENT%20%28APPEALS%29%20BILL%202013/E_AS%20PASSED%20LC/STATUTES%20AMENDMENT%20APPEALS%20BILL%202012.UN.PDF) to enact Part 11 of the *Criminal Law Consolidation Act 1935* (SA)).

The Australian Human Rights Commission has stated that the system of criminal appeals throughout Australia fails to comply with international human rights obligations in that: (1) it fails to respect the right to a fair trial: and (2) it fails to respect the right to an appeal where persons had been wrongly convicted, and the error was not revealed until after an unsuccessful appeal.

**Recommendation 14:**

The final report should consider in this chapter restrictions that apply to the right of post-conviction appeals where new evidence emerges, or old evidence is able to be differently interpreted in light of later developments.

**Chapter 11: Burden of Proof**

CLA wishes to add its voice to those of others who have pointed out that the reversal of the presumption of bail is an encroachment upon the burden of proof and the right to a presumption of innocence as well as on the right to liberty (section beginning at 11.70).

**Chapter 12: Privilege against self-incrimination**

No comment

**Chapter 13: Client legal privilege**

CLA believes the Interim Report is in error in concluding (at 13.99, and also at 13.68), in relation to s34ZQ(2) of the *ASIO Act*, that “without a clear and unambiguous intention to abrogate client legal privilege, this law arguably does not abrogate legal privilege. The law does not require disclosure of information despite a claim for privilege. Rather, it allows law enforcement to access and monitor communications between a lawyer and their client, with the knowledge of the client and their lawyer.”

The lack of a clearly stated intention to encroach upon client legal privilege does not mean that such a privilege has not been encroached upon by a law that requires communications between a person and their lawyer to be monitored at all times. The centrality of confidentiality to client legal privilege is supported by a number of references in the Interim Report, including by the UN Human Rights Committee (see 13.91). CLA believes the statement at 13.60 in relation to telecommunications data retention laws is similarly an error.

**Recommendation 15:**

The statements in 13.60, 13.68 and 13.99 should be revised in the final report to reflect that laws and regulations can and do encroach upon client legal privilege (and other traditional rights and freedoms) regardless of the lack of any stated intention to do so.

**Chapter 14: Strict and absolute liability**

No comment.

**Chapter 15: Procedural fairness**

No comment.

**Chapter 16: Delegating legislative Power**

No comment

**Chapter 17: Immunity from Civil Liability**

No comment.

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