



AUSTRALIAN
LAWYERS
FOR
HUMAN RIGHTS

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Dear Director

***Australian Law Reform Commission (ALRC)
'Traditional Rights and Freedoms – Encroachments by Commonwealth Laws' – Interim Report***

Australian Lawyers for Human Rights (ALHR) is pleased to provide this further submission in relation to the *Interim Report of the Australian Law Reform Commission on Traditional Rights and Freedoms*, and to respond to the invitation (par 1.89) to identify which Commonwealth laws that infringe on traditional rights (and freedoms) deserve further review.

Background

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.

Limitations of Submission

Please note that this Submission is not exhaustive and that there may be additional issues which are of concern from a human rights point of view.

First Submission

In our previous submission of February 2015 (First Submission) we explained our approach to the Inquiry (section 1) and, in section 2, recommended 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. We have followed the same approach here.

Summary

In summary, ALHR's submission makes the following points in addition to our First Submission:

- (a) We support the calls for the ALRC to consider the impact of Commonwealth legislation upon the *right to personal liberty* and in this context submit that the *Mutual Assistance in Criminal Matters Act 1987* (Cth) and the *Australian Federal Police Act 1979* (Cth) should be further reviewed;
- (b) We do not support the 'watering down' of the *Racial Discrimination Act*. The right to free speech is not absolute and racial vilification must be appropriately regulated;
- (c) We submit that the following deserve further review for the reasons explained below:
 - s 35P of the *ASIO Act*;
 - the *Public Interest Disclosure Act 2013*;
 - those parts of the *Telecommunications (Interception and Access) Act 1979* which were amended by the *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015*;
 - the *Parliamentary Privileges Act 1987*.

We have suggested amendments which in our view would diminish the impact of some of the legislation upon traditional rights and freedoms / international human rights and would render that legislation more proportionate.

- (d) We endorse the ALRC's 2009 recommendations in relation to the reform of Commonwealth secrecy provisions (par 3.65ff) and note that the *Australian Border Force Act 2015* also deserves further review in terms of its impact on freedom of speech, as described in other parties' submissions to the ALRC.

1 The Inquiry in Context

1.1 The right to personal liberty

ALHR supports Professor Ben Saul's submission, echoed by that of the Kaldor Centre for International Refugee Law, that the ALRC final report should "squarely address Australian laws entailing the deprivation of liberty, not mere or lesser restrictions upon freedom of movement," on the basis that the right to personal liberty, including freedom from unlawful detention (and its procedural dimension, the right of habeas corpus) "is one of the oldest and most fundamental of all common law rights."

The right to personal liberty can validly be considered in the final Report because the Terms of Reference states that "laws that encroach upon traditional rights, freedoms and privileges' are to be understood as laws that: interfere with any other similar legal right, freedom or privilege" to those specifically listed. Although not specifically listed in the Terms of Reference as one of the 'traditional rights, freedoms and privileges', the right to personal liberty is clearly of a similar nature to those specifically listed.

1.2 The right not to be executed

We submit that the ALRC final Report should also address the right to personal liberty in the context of preventing Australian citizens being deprived of their lives. This issue has arisen in relation to the execution of Australian citizens in Bali as a result of information provided to the Indonesian authorities by the Australian Federal Police.¹

ALHR submits that the *Mutual Assistance in Criminal Matters Act 1987* (Cth) and the *Australian Federal*

¹ The material in this section draws largely on a 2006 speech by the then President of the Australian Human Rights and Equal Opportunity Commission, The Hon. John von Doussa QC, "The Death Penalty – A matter of Principle" given 22 October 2006 in Adelaide, to the United Nations Association of Australia, available at: <https://www.humanrights.gov.au/news/speeches/death-penalty-matter-principle> accessed 18 September 2015

Police Act 1979 (Cth) should be further reviewed with a view to their amendment (as set out in more detail in the *2012 Human Rights and Equal Opportunity Commission Submission to the Attorney-General's Department Mutual Assistance Review*²):

- to provide for the mandatory refusal of a request for mutual assistance in relation to an investigation which may expose a person to the risk of the death penalty; and
- to prohibit police sharing information which could lead to the death penalty for Australian citizens or persons otherwise under Australian jurisdiction.

1.3 Freedom of movement

ALHR agrees with the Kaldor Centre for International Refugee Law submission's concerns as to the comment in the ALRC's interim report (para 6.126) suggesting that any curtailment of the right to freedom of movement for non-citizens under the *Migration Act* is consistent with international law. We agree with the Kaldor Centre that this comment is not correct and that provisions in Commonwealth Law that authorize the detention of recognized refugees violate article 26 of the Refugee Convention.

2 Freedom of Speech

*If the individual does not have the right to freely seek, receive and impart her ideas and opinions, she will also not be able to benefit from her other human rights. This also has consequences for the right to freedom of thought, conscience and religion as laid down in Article 18, for without freedom of expression, as a fundamental principle, this right cannot be practiced.*³

2.1 Racial Discrimination Act (RDA)

The comments of Lord Steyne in relation to the power of free speech in the marketplace (as quoted at paragraph 3.6 of the Interim Report) are not unanimously accepted. It is imperative that ideas such as 'free speech' be analysed rather than uncritically accepted as universal values with agreed content. Such deconstruction must be followed by reconstruction, in which law has a primary role to play. As Human Rights Commissioner Tim Soutphommasane has noted,

*"the marketplace of ideas can be distorted; it is not an arena of perfect competition, as economists might put it. We cannot realistically expect that the speech of the strong can be countered by the speech of the weak."*⁴

Even if theoretically 'more speech' could, if received by the same audience, cancel out or 'cure' the effect of the original public hate speech, there are practical reasons why this cannot occur. "Ordinary" people still have unequal access to mass media outlets such as national newspapers and national television and radio, limiting their actual influence. A letter to the editor or online comment on an article will not have the same prominence and audience as the original speech.

The mass media presents complex situations in terms of stereotypes⁵ and appeals to prejudices rather than reason. It has acquired an enormous potential for harm⁶ which has not been taken into account in

² <<https://www.humanrights.gov.au/mutual-assistance-review>> accessed 18 September 2015

³ M. Schmidt, 'Limits to the restrictions to freedom of expression- Criteria and Application', paper presented to UNESCO, 3 October 2008, viewed 7 September 2015, <http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Seminar2008/PaperSchmidt.doc>.

⁴ Tim Soutphommasane, "Two freedoms: Freedom of expression and freedom from racial vilification" *Alice Tay Lecture in Law and Human Rights 2014*, Australian National University, 3 March 2014 accessed 20 September 2015, <https://www.humanrights.gov.au/news/speeches/two-freedoms-freedom-expression-and-freedom-racial-vilification>

⁵ Puplick in his Forward to Anti-Discrimination Board of NSW (principal author, Ruth McCausland), *Race for the Headlines*, 2003, 6, citing Murray Edelman, *The Symbolic Uses of Politics*, University of Illinois Press, Urbana, 1967, 31. See also Peter Manning, *Dog Whistle Politics and Journalism: Reporting Arabic and Muslim people in Sydney newspapers*, Australian Centre

philosophically-based arguments for free speech. Proponents of free speech such as John Stuart Mill assumed that the speech to be protected would be rational debate amongst a relatively small, educated elite. They did not envisage how speech, music and imagery would be transmitted across continents in a “systematic avalanche of falsehoods”⁷ to manipulate the emotions and opinions of millions.⁸

Modern analysis of communication understands that racist speech can still have an effect even if its message is rejected. At some level racism is planted in our minds as an idea that may hold some truth.⁹ Racism works “by socializing, by establishing the expected and the permissible.”¹⁰

If Australian legislation is to give primacy to redressing and preventing harm, and if the Australian legal system is to be perceived as a viable system which does not condone racism or racial vilification, we must look outside the First Amendment paradigm which is based on abstract arguments, and seek a contextual involvement with the realities of racist harm. American First Amendment jurisprudence is inadequate in the Australian context. It is heavily dependent upon economic metaphors, individualistic notions of identity and outdated theories of communication. It assumes that ‘free speech’ in terms of lack of government intervention against racist speech is essential to ‘democracy’ whereas it would appear from any minimal examination of racist harms that the opposite is the case. It ignores the content, context and effect of harmful speech, except in extreme cases, with the result that socially harmful speech is protected in the name of ‘free speech’.

Justification for limiting racist speech is founded on the acknowledged realities of that harm as a social injustice against which the State should take action. Failure to legislate undermines democracy, justice and equality. While it has been argued that the law itself is not the “solution to all of society’s ills,”¹¹ to quote Bhikhu Parekh:

*Because the law throws the society’s collective moral and legal weight behind a particular set of norms of good behavior, it does have some influence on attitudes; its role is limited but nonetheless important.*¹²

As the ALRC notes (at paragraph 1.54 and following), few rights can said to be absolute (eg the right to be free from torture and the right not to be deprived of life) and most rights must be balanced against others (see also pars 3.100 and 3.159 and ff). ALHR submits that the right to be free from racist abuse and hate speech is an important right which deserves protection even at the expense of some relatively minor and proportionate limits upon ‘free speech’. That is, in our view Commonwealth legislation which appropriately limits racial vilification would place justifiable limits on free speech.

ALHR submits that s 18C should not be weakened and that restrictions on racist speech should not be ‘rolled back’ in the manner suggested in 2014 by the Attorney General George Brandis. The evidence is that encouraging, accepting and tolerating racism causes it to increase and causes the forms that racism

for Independent Journalism, University of Technology, Sydney, 2004, discussed on Mike O’Regan’s “Media Report”, Radio National, 4 March 2004.

⁶ See David Reisman, “Democracy and Defamation: Control of Group Libel” (1942) 42 *Colum L. Rev* 727 at 728 (1942a) and David Riesman, “Democracy and Defamation: Fair Game and Fair Comment I” (1942) 42 *Colum. L. Rev.* 1085 at 1089 ff, discussing the role that vilification and personal defamation played in the rise of the Nazis.

⁷ Reisman (1942a).

⁸ Canadian Cohen Committee Report, 1969, quoted in Richard Moon, “Drawing lines in a culture of prejudice: *R. v. Keegstra* and the Restriction of Hate Propaganda” (1992) *U.B.C. Law Review* 99 at 117.

⁹ Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado and Kimberlè Williams Crenshaw, *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment*, Westview Press, Boulder, 1993, 25.

¹⁰ See Kathleen E. Mahoney, “*R v. Keegstra*: A rationale for regulating pornography?” (1992) 37 *Mc Gill Law Journal* 242 at 251, discussing the socialisation of pornography.

¹¹ ABC radio interview with Tim Wilson, Human Rights Commissioner, “Law is not the solution to all of society’s ills” 25 March 2014, <http://www.abc.net.au/pm/content/2014/s3971254.htm>, accessed 15 April 2014.

¹² Bhikhu Parekh, “Is there a case for banning hate speech?” *The Content and Context of Hate Speech: rethinking regulation and responses*, Michael Herz and Peter Molnar (eds), Cambridge University Press, Cambridge, 2012, 51.

takes to become more harmful and more violent.¹³ In many countries, particularly European countries which enshrine the concept of human dignity, specific legislation against racist speech is not essential because of judicial understanding that racist speech attacks a person's human dignity and democratic values and therefore is not a protected form of speech. Both international law and other nations recognise that it is not possible to have real freedom without equality and human dignity, both of which are undermined by racial vilification. However given that Australia lacks such concepts as part of its constitutional or common law, regulation is essential in order to protect both targeted groups and the wider society.

In relation to the *Freedom of Speech (Repeal of s. 18C) Bill 2014*, ALHR submitted that either no change should be made to Part IIA of the RDA (especially as no deficiency in the operation of s 18D had been identified which would justify its repeal) and that changes should be made to the RDA incorporating the following principles, in order to ensure that the RDA is both an effective and a proportionate response to the harm of racial vilification:

1. Vilification should not only include the 'incitement of hatred', and 'intimidation' but also 'abuse', 'harassment' 'humiliation', 'serious contempt' and 'severe ridicule', as well as the matters covered in the European Union Framework Decision for Combating Racism and Xenophobia (2007)¹⁴ and acts that encourage racial discrimination.¹⁵
2. Intimidation on the basis of race should not be limited to a fear of physical harm to the person, group of persons or property but also cover psychological intimidation. The definition of 'intimidate' should be expanded to cover acts reasonably likely to cause a person to (1) *hold serious fears concerning the life, health or welfare of; or (2) fear injury, violence, damage or harm occurring to: themselves, any dependants or family members or the property of any of them, including a reasonable apprehension of such results occurring if the targeted person responds to the act or acts of intimidation or if the targeted person seeks any public participation or involvement.*
3. Race is not a biological reality and racists are often incorrect in their categorisations, referring to persons by reference to their supposed 'race' (colour, ethnicity, religion etc) and then claiming that such people have negative characteristics (and therefore by implication should be treated badly). The RDA should still apply in such situations because it is not the correctness or otherwise of the perpetrator's classification which is relevant, but (1) the perpetrator's negative intention, and (2) the effect of the act/speech (which can still hurt the victims and can still encourage racism in others even if the basis for the vilification is incorrect).
4. ALHR submits that 'Racist grounds' should be defined to mean *'the supposed, alleged or perceived race, colour, national, ethno-religious, ethnic or cultural background of the targeted person or their family or dependants, and categorisations which use religion as a pretext or cover for targeting on a*

¹³ '...sections 18C and 18D were introduced in response to recommendations of major inquiries including the *National Inquiry into Racist Violence* and the *Royal Commission into Aboriginal Deaths in Custody*. These inquiries found that racial hatred and vilification can cause emotional and psychological harm to their targets, and reinforce other forms of discrimination and exclusion. They found that seemingly low-level behaviour can soften the environment for more severe acts of harassment, intimidation or violence by impliedly condoning such acts': Australian Human Rights Commission, "At a glance: Racial vilification under sections 18C and 18D of the Racial Discrimination Act 1975 (Cth)", <https://www.humanrights.gov.au/glance-racial-vilification-under-sections-18c-and-18d-racial-discrimination-act-1975-cth>, accessed 28 April 2014.

¹⁴ By expanding 'vilification' to also cover acts that *deny, grossly belittle, trivialise or play down, approve of, attempt to justify or make excuses for the occurrence of, genocide or crimes against humanity.*

¹⁵ This would apply to the extent that the matters dealt with in section 9 of the RDA are not already covered in Part IIA: that is, in addition to the matters in the existing section 18C we would recommend also covering acts that *discourage the recognition, enjoyment, exercise or participation, on an equal footing, by targeted persons, of any legal or human right or fundamental freedom, whether in the political, economic, social, cultural or any other field.*

racist ground' and that the connection should be that the act is 'by reference to' the racist grounds,¹⁶ not 'because of' the racist grounds.

5. The Exposure Draft Bill effectively limits the scope of the proscribed speech to where the victim perceives a 'clear and present danger' - a concept more appropriate to public 'village hall' discussions of previous centuries than to the effect of receiving media communications in our own homes and on our own screens. The Bill failed to address the way in which racist speech is communicated through modern media and can cause harm indirectly.
6. Indirect harm should be captured, including Holocaust Denial.¹⁷ While Holocaust Denial is clearly antisemitic, it ingeniously pretends to be a reasoned debate about history and it is doubtful whether it could be said to 'incite hatred' against Jewish people. That does not lessen its hurtfulness to Jews, nor the dangers of the messages it communicates.
7. In civil law jurisdictions, false speech is not protected to the same extent as truthful speech, on the basis (inter alia) that false statements hinder the quality of public discourse. Racist speech is generally inaccurate and involves a number of false classifications and claims, as mentioned above. It is therefore less worthy of protection. While exemptions and defences should include elements of reasonableness, truth, fairness and good faith, at the same time belief in the truth of the false statements should not of itself be a defence. On the question of 'good faith', French J held that s 18D:

*requires a recognition that the law condemns racial vilification of the defined kind but protects freedom of speech and expression in the areas defined in pars (a), (b) and (c) of the section. The good faith exercise of that freedom will, so far as practicable, seek to be faithful to the norms implicit in its protection and to the negative obligations implied by s 18C. It will honestly and conscientiously endeavour to have regard to and minimise the harm it will, by definition, inflict. It will not use those freedoms as a 'cover' to offend, insult, humiliate or intimidate people by reason of their race or colour or ethnic or national origin.*¹⁸

8. The standard of reasonableness should be determined from the perspective of a hypothetical reasonable representative of the victim group.

ALHR submitted that the Exposure Draft Bill did not address the issue of direct hurt to victims unless the speech is so extreme as to amount to direct and immediate intimidation. It did not address the issue of how racist speech encourages others to mistreat the target group until the point at which the speech is so extreme as to incite actual hatred against the target group. It dealt only with an extremely narrow band of violent speech which is likely to be caught already by ordinary criminal law.

This restriction was not appropriate. Extremist speech is not necessarily the most harmful, because its very extremism makes it less socially acceptable. The most harmful racist speech is that expressed by public figures,¹⁹ because people have a tendency to conform to the social mores they express. Similarly, the width of subclause (4) of the draft Bill was inappropriate to the nature of the harm. Racial vilification in 'public' discussions, media stereotyping and racist reporting still causes harm.

¹⁶ As used in the European Union *Framework Decision for Combating Racism and Xenophobia* (2007).

¹⁷ This would be the effect of adopting the changes referred to above in relation to the matters covered in the European Union *Framework Decision for Combating Racism and Xenophobia* (2007).

¹⁸ *Bropho v Human Rights and Equal Opportunity Commission* 135 FCR 105 131-132 [95]-[96].

¹⁹ When reputable politicians make inflammatory racist statements, said a source at Scotland Yard, racist attacks increase: *Guardian Weekly* Editorial, "What was all that about?" 2-9 May 2001, 11. See also Human Rights and Equal Opportunity Commission, *Racist Violence: Report of National Inquiry into Racist Violence*, AGPS, Canberra, 1991, 506 to 513 and Amanda Holpuch, 'Almost 100 hate-crime murders linked to a single website, report finds', *The Guardian*, 18 April 2014, <http://www.theguardian.com/world/2014/apr/18/hate-crime-murders-website-stormfront-report>, accessed on 23 April 2014.

2.2 Criminal Code

ALHR agrees with other submissions made to the ALRC that the scope of the 'advocating terrorism' offences in 80.2C of the Criminal Code is unjustifiably broad (par 3.39ff).

2.3 ASIO Act and Public Interest Disclosure Act

In relation to section 35P of the *ASIO Act*, ALHR submitted to the Acting Independent National Security Legislation Monitor in April 2015 that:

- the concept of 'recklessness' should be more fully spelt out in relation to the offence identified by Section 35P;
- the offence should not apply to events which are no longer of major security relevance, for example by virtue of lapse of time;
- further exceptions should be considered, including disclosure to parliamentarians;
- a strong 'public interest' defence should be available in relation to Section 35P. This will strengthen our democratic system through enabling a check upon government action which is not in the public interest.

The concept of recklessness in Section 35P is, according to a note to the version of the *ASIO Act* which appears on the Australian Legal Information Institute website, 'the fault element for the circumstance described in paragraph (2)(b)--see section 5.6 of the *Criminal Code*'. However there is no equivalent note in the version of the *ASIO Act* which appears on the ComLaw website. Section 5.6 of the *Criminal Code* provides as follows:

5.6 Offences

Offences that do not specify fault elements

- (1) *If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.*
- (2) *If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element.*

Given that 'disclosure' could be either an act or a result, it is submitted that at the very least clarification of the requisite element of intent would be of assistance. We note that a similar clarification is provided in Section 35M in relation to other provisions of the Act. Using similar language, we recommend at the very least adding an additional paragraph to section 35P reading along the following lines:

For the purposes of this section, a person is reckless about:

- (a) *the existence of a special intelligence operation; or*
- (b) *whether information relates to a special intelligence operation and is capable of identifying to the general public that a special intelligence operation exists or existed within the past [xx] years;*

if:

- (i) *the person is aware of a substantial risk that the information disclosed by them relates to a special intelligence operation which exists or did exist within the past [xx] years; and*
- (ii) *having regard to the circumstances known to the person, including the likely extent of the harm or risk of harm created by the disclosure,²⁰ it is unjustifiable to take the risk that the information disclosed by them does not relate to a special intelligence operation.*

²⁰ Again, this is relevant to the time which has elapsed since a past operation.

The time which has elapsed since the special intelligence operation

In its current form, Section 35P criminalises disclosure about any Australian special intelligence operation without any time limit. This is disproportionate and unnecessary. If the operation is long past, there may well be no current security reason for its continued secrecy. This will be a matter which depends upon the nature of each particular security operation. If a public interest defence is to be allowed, the length of time since the operation would be one of the matters that could be considered in the context of the extent of the harm or risk of harm created by the disclosure.

However if there is no public interest defence (as is currently the case), we submit that the issue of the time which has elapsed since the operation was carried out should be taken into account, particularly where the passing of time is relevant to the extent of the harm or risk of harm created by the disclosure.

We have therefore suggested the black wording in bold in the draft subsection included above. We would also recommend a consequential exception be included in Section 35P (3).

The degree of connection with the special intelligence operation

Section 35P is extremely widely drafted, so that the disclosure need only 'relate to' a special intelligence operation for the discloser to be convicted. This is an additional reason for the concept of recklessness to be clarified in relation to section 35P. If the discloser had no means of knowing that the information they disclosed would signal to – for example – the intelligence agencies of a foreign power that Australia had conducted a special intelligence operation, then the discloser should not be liable.

It is submitted that the wording 'relate to' is far too wide. As George Williams says in his own submission to ALRC²¹:

The effect is to criminalise reporting that is demonstrably in the public interest, for instance because it would reveal incompetence or wrongdoing on behalf of the authorities.

Numerous types of disclosures can be imagined that 'relate to' a special intelligence operation but which do not disclose to the man in the street either that the operation existed or that it was a special intelligence operation (that is, which do not cause any general harm or risk by their disclosure).

This point overlaps somewhat with the previous one, and to an extent this issue would not arise if the clause recommended above were adopted. The wording marked in blue in the clause relates to this issue.

Are the exceptions in subsection (3) wide enough?

As mentioned, the question of whether so much time has elapsed that disclosure of the operation no longer poses any security threat, and whether the nature of the information disclosed is capable of revealing the existence of a security intelligence operation could be included as an exception under Section 35P(3). We recommend that the exception should address all the points marked in bold and in blue in our draft clause above.

In addition, we recommend that:

- a) disclosure to a member of State or Federal Parliament should be protected under subsection (3), irrespective of any other legislation, where a citizen has concerns as to the legality or appropriateness of the security operation. It is an appropriate democratic check and balance that citizens, including government employees, be able to confide in their MPs in relation to valid concerns about the operations of government bodies. This is particularly so in light of the fact that the Commonwealth *Public Interest Disclosure Act 2013* does not protect federal government whistleblowers in relation to intelligence matters; and

²¹ George Williams, *The Legal Assault on Australian Democracy: Sir Richard Blackburn Lecture*, ACT Law Society, 12 May 2015, accessed 20 September 2015 at: <http://www.alrc.gov.au/inquiries/freedoms/submissions>

- b) subsection (3)(e) should also cover legal advice in relation to the matter the subject of the offence, that is, the disclosure.

Disproportionality of penalties

As George Williams notes, “not only has number of laws infringing democratic freedoms increased, but so has their severity”, and “s 35P gives rise to the possibility of 10 years’ imprisonment for a journalist writing a story, even in the public interest, about a special intelligence operation”. ALHR submits that such penalties are disproportionate given the breadth of the legislation.

Public Interest defence

Finally, we strongly submit that a public interest defence should be included. This would apply to journalists (and whistleblowers) because of the media’s vital ‘public watchdog’ role, but should not be limited to them. Discussion of topics of public concern is essential in a democracy.

Disclosure to the media and parliament, say Latimer and Brown, should be one of the foundations of a democratic society, and should be encouraged and protected.²² Indeed, they say, disclosure to journalists and the media is so important that it is the truest example of ‘whistleblowing’ behaviour.²³ We note that Australia does not have a central agency such as a Public Interest Disclosure Agency, which would otherwise be an appropriate body to which whistleblowers could resort before taking matters to a more public forum. In that absence, we do not think that it is appropriate to require disclosure to be made first to other government departments.

While the suggested wording does borrow from existing legislation in Australia (such as the *Public Interest Disclosure Act 2013*²⁴) and other countries, it also departs from that legislation in several areas. For example, we do not think it is appropriate for the defence to have to prove that the matter disclosed would have amounted to a serious offence under Australian law, only that the discloser had a reasonable belief that the matter disclosed involved serious malfeasance or had serious public interest implications. In these areas we suggest that the *Public Interest Disclosure Act 2013* could also be improved.

We suggest the inclusion of an additional section in the Act along the following lines:

- 35PA (1)** *No person is guilty of an offence under section 35P if the person establishes that he or she acted in the public interest.*
- (2) *Subject to subsection (3), a person acts in the public interest if:*
- (a) *the person acts for the purpose of disclosing an offence under an Act of Parliament, or similar substantial or serious misfeasance, whether or not amounting to an offence²⁵, that he or she reasonably believes has been, is being, or is about to be, committed by another person in the purported performance of that person’s duties and functions for or on behalf of the Government of Australia; and/or*
- (b) *the public interest in the disclosure on balance outweighs the public interest in non-disclosure.*
- (3) *In deciding whether the public interest in the disclosure outweighs the public interest in non-disclosure, a judge or court must consider:*
- (a) *the seriousness of the alleged offence;*
- (b) *whether the person had reasonable grounds to believe that the disclosure would be*

²² Paul Latimer and AJ Brown, ‘Whistleblower Laws: International Best Practice’ (2008) 31 (3) *UNSWLJ* 766, 781 citing Elletta Callahan, Terry Dworkin and David Lewis, ‘Whistleblowing: Australian, UK and US Approaches to Disclosure in the Public Interest’ (2004) 44(3) *Virginia Journal of International Law* 879, 905.

²³ Latimer and Brown, op cit, citing Damian Grace and Stephen Cohen, *Business Ethics: Australian Problems and Cases* (1998) 150.

²⁴ Note that this legislation specifically excludes conduct and information relating to intelligence agencies and intelligence information – see Section 26.

²⁵ A person should not lose the protection of this defence because the misfeasance turns out not to include all the elements of an offence; the fact that the conduct appears to be harmful should be enough.

- in the public interest;*
- (c) *the nature of the public interest intended to be served by the disclosure;*
 - (d) *the person's reasonable belief as to the extent of the harm or risk of harm created by the disclosure;*
 - (e) *the person's reasonable belief as to the extent of the harm or risk of harm created by non-disclosure of the information;*
 - (f) *whether the person tried other reasonably accessible alternatives before making the disclosure in the way that they made it;*
 - (g) *whether no more information was publicly disclosed than the person believed was reasonably necessary in the light of their perception of the extent or risk of harm involved; and*
 - (h) *the existence of exigent circumstances justifying the disclosure (including, but not limited to, whether the communication of the information was necessary to avoid grievous bodily harm or death).*

2.4 Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015 (Cth)

The General Counsel for the United States National Security Agency has stated that 'metadata absolutely tells you everything about somebody's life. If you have enough metadata, you don't really need content'.²⁶ As Ross Coulthart noted:

'if you know who I'm calling as a journalist and if you know who's calling me, and you can put together who that person is and where they're calling from, who I'm emailing, who I'm getting emails from, you almost don't need the content of the information, if what you're doing is investigating a journalist who's being leaked information'.²⁷

In June 2015, the US Senate passed the *USA Freedom Act* which has been regarded as the most extensive reform of the powers of surveillance agencies in the US since the 1970s.²⁸ Although it does not abolish all the invasive actions by these government agencies, the legislation stops the more gross violations of privacy, such as the indiscriminate collection of phone records of American citizens.²⁹ We submit that the precedent set by this legislation should be considered in the Australian context.

In addition to our various comments in relation to earlier versions of this legislation in our First Submission, we note as follows:

Impact on Legal Professional Privilege

The Act does not permit any exemptions for lawyer/client communications. The mere fact that the government acquires and retains materials about such communications, even if they are never used, conflicts with lawyers' ethical obligations to keep that information confidential.³⁰

Impact on Parliamentary Privilege

MPs have only limited Parliamentary Privilege and that is only in relation to matters which come within the definition of 'Parliamentary Proceedings' in subsection 16(2) of the *Parliamentary Privileges Act*

²⁶ Johns Hopkins, 2014, *'The Johns Hopkins Foreign Affairs Symposium Presents: The Price of Privacy: Re-Evaluating the NSA'* [video online]. Available from <https://www.youtube.com/watch?v=kV2HDM86XgI>, accessed 5 September 2015.

²⁷ Media Report, 2015, radio, ABC Radio National, 12 February 2015.

²⁸ Sabrina Siddiqui, "Congress Passes NSA surveillance reform in vindication for Snowden", *The Guardian*, accessed 20 September 2015 at <<http://www.theguardian.com/us-news/2015/jun/02/congress-surveillance-reform-edward-snowden>>.

²⁹ "Freedom Act to limit domestic surveillance signed into US law by President Barack Obama" accessed 20 September 2015 at <<http://www.abc.net.au/news/2015-06-03/us-congress-passes-bill-to-limit-domestic-surveillance/6516826>>.

³⁰ Human Rights Watch and Civil Liberties Union, *With Liberty to Monitor All*, 2014, accessed 20 September 2015 at http://www.hrw.org/sites/default/files/reports/usnsa0714_ForUpload_0.pdf, 51, 91.

1987 (the 'Act'). There is no precedent as to how the data retention legislation will apply in relation to Parliamentary Privilege. It is submitted that the definition of 'Parliamentary Proceedings' is too narrow and does not cover discussions with constituents or whistleblowers. It is submitted that comprehensive protection for MPs, including severe penalties for breach of exemptions relating to MPs, is required.

There are no exemptions in the legislation that relate specifically to MPs nor to whistleblowers or constituents confiding in MPs. There is no protection for the relationship of trust that MPs need to have with their constituents and no exemption to protect their business as MPs. Electronic data of MPs collected under the proposed legislation which relates to activities **not** connected with Parliamentary Proceedings will have no protection and can be used in civil actions or by government bodies having access powers under the legislation. Even electronic data of MPs collected under the proposed legislation which relates to activities connected with Parliamentary Proceedings will still be able to be used in court for factual matters such as:

- * to prove that a person was at a particular place at a particular time,
- * to test the fairness and accuracy of a press report of parliamentary proceedings, or
- * to prosecute certain offences against Parliament.³¹

That is, if an MP's metadata proves, on examination, to relate to Parliamentary Proceedings as defined by the Act, then the MP will not be able to be sued or prosecuted in relation to the matters revealed by that data. However:

1. the data could apparently still be used in a court to establish factual matters even when it relates directly to Parliamentary Proceedings;
2. it may be difficult to establish before a court that the relevant activities to which the data relates are directly, or directly and solely, related to Parliamentary Proceedings;
3. the definition of Parliamentary Proceedings in the Act is too narrow to protect all an MP's parliamentary activities. Discussions with whistleblowers might not be protected, and whistleblowers themselves are clearly not covered by Parliamentary Privilege.

Lack of safeguards for data after access

The Act contains no safeguards about what happens to the data once it is accessed.

The data might only be kept by the service provider for two years, but once it is accessed by an authority it would appear that – unless Australian Privacy Principles apply – it can be kept forever.

Lack of effective exemptions for whistleblowers and journalists

While under last-minute amendments to the Act security agencies will need to obtain a warrant before accessing the metadata of any journalist in relation to the journalist's source:

- the warrant may be obtained from the Minister (s 180L), or in an emergency may be issued by the Director-General of Security (s 180M) as well as from an 'issuing authority' (a judge, magistrate or person who has been a legal practitioner for 5 years and is appointed as such: s 6DC of the *Telecommunications (Interception and Access) Act 1979*;
- the reasons for which the warrant may be sought through a court are too wide (s 180T)
- the Act does not appear to require a warrant if the purpose of seeking the metadata is not in relation to a journalist's sources (s 180G and 180H);
- when an inquiry is made by the government to obtain the journalist's metadata, neither the journalist or source are notified;
- a public interest advocate appointed by the prime minister will argue, in a submission, against

³¹ "Parliamentary Privilege" last par under the heading "Immunities of the Houses" accessed on 20 September 2015 at: http://www.aph.gov.au/About_Parliament/Work_of_the_Parliament/Parliament_at_Work/Parliamentary_Privilege.

access to journalists' metadata;³²

- the advocate will do so without consulting the journalist and media organisation in question.³³

However the information of an individual's data trail can be accessed without a warrant, therefore, security agencies could reveal a source by reverse targeting the retained data of others – without needing any warrant - to see if they have been in contact with known journalists.³⁴

With whistleblower protections slowly withering away, it is not difficult to imagine that whistleblowers will cease to report corruption, contributing to a breakdown of the rule of law and democracy.

The government must continue to question and continually evaluate whether legislation and policies reflected in the recent 'Data Retention' Act is absolutely necessary to strengthen national security, given the manner in which fundamental freedoms are rapidly being repressed.

As Pearson and Polden have noted, in the wake of the September 11 attacks, the potential for journalists and whistleblowers to effectively perform their responsibilities and duties in Australian society has been severely affected with the introduction of at least 39 new counter-terrorism Acts.³⁵ These new laws impacted upon the abilities of the press and whistleblowers. Some of those consequences included:

- *Leaving reporters exposed to new detention and questioning regimes;*
- *Exposing journalists to new surveillance techniques;*
- *Seizure of journalists' notes and computer archives;*
- *Exposing journalists' confidential sources to identification;*
- *Closing certain court proceedings, thus leaving matters unreportable;*
- *Suppressing certain details related to terrorism matters and exposing journalists to fines and jail if they report them;*
- *Restricting journalists' movement in certain areas where news might be happening;*
- *Exposing journalists to new risks by merely associating or communicating with some sources;*
- *Exposing journalists to criminal charges if they publish some statements deemed to be inciting or encouraging terrorism; and*
- *Narrowing the range of material which can be accessed under Freedom of Information laws.*³⁶

With these significant impairments on the ability of the press and whistleblowers to hold representative government to account, new legislation and policies which control the press are seriously impacting on the freedom of expression and upon privacy.

If legislators continue to push these boundaries, the entire system of democracy, fundamental freedoms and human rights will be totally undermined. While there is no question that maintaining national security is crucial, it may be time for legislators to research other techniques of doing so without infringing upon the rights of Australians.

³² Section 180X.

³³ Ewa Staszewska, "Journalism may suffer despite new laws" *Upstart*, 24 March 2015, accessed on 20 September 2015 at <<http://www.upstart.net.au/2015/03/24/journalism-may-suffer-despite-new-laws/>>

³⁴ *ibid*

³⁵ M Pearson and M, Polden, 2011, *'The Journalist's Guide to Media Law'*, 4th edn, Allen & Unwin, Crows Nest, NSW, pp. 323-324. See too submission from George Williams, *op cit*.

³⁶ *Ibid*.

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

Yours faithfully

A handwritten signature in black ink that reads "N. Kennedy". The signature is written in a cursive style with a large, sweeping initial "N".

Nathan Kennedy
President
Australian Lawyers for Human Rights

Contributors: Mila Dragicevic, Socrates Aronis and the many ALHR members whose work in earlier submissions has been referred to in this paper