



**Australian
Privacy
Foundation**

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

21 September 2015

Australian Law Reform Commission

By email: info@alrc.gov.au

Dear ALRC,

Re: ALRC Interim Report: 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 interim report: Traditional Rights and Freedoms – Encroachments by Commonwealth Laws ('Freedoms Inquiry').

Summary

The Australian Privacy Foundation makes the following recommendations in response to the Freedoms Inquiry's interim report:

- **Privacy should be recognised as a fundamental right listed in the Freedoms Inquiry's terms of reference and examined as part of any review of encroachments by Commonwealth legislation;**
- **That the ALRC acknowledges the weaknesses of the common law as a means of 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, including the right to Privacy;**
- **That the ALRC explicit acknowledges that the protection of Privacy can justify certain encroachments into the freedom of expression;**
- **That the ALRC also explicitly acknowledges the encroachment into Privacy that the new data retention laws present, and the lack of protection for confidential relationships.**

Our detailed comments are outlined below.

Privacy is a Traditional Right and Freedom

In our initial submission to the Freedoms Inquiry of 15th March 2015, we note that Privacy is widely recognised as a fundamental right, and that it should thus be examined as part of any review of encroachments by Commonwealth Legislation. We were perplexed and dismayed by the arbitrary exclusion of this critical right, upon which the exercise of many other rights depends, from the list of 'traditional rights and freedoms'. We are disappointed to see that the interim report has repeated the initial error and excluded the right to Privacy from the traditional rights and freedoms making up the Freedoms Inquiry's terms of reference. In our view, this oversight indicates that the Freedoms Inquiry will be incomplete and inadequate.

Privacy is recognised as a fundamental right by the English common law, notably in the landmark judgement of Lord Camden CJ in *Entick v Carrington* [1765] EWHC KB J98; 95 ER 807. 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 (and we note that the case is discussed in relation to Property Rights in the interim report), it is clear that the court recognised a common law right to Privacy against intrusion by the state.

As well as in the common law, Privacy is recognised as a fundamental right in International Human Rights Law and Bills of Rights across the world. Yet the ALRC itself has specifically acknowledged that Privacy underpins a number of traditional rights and freedoms in the Serious Invasions of Privacy in the Digital Era discussion paper (Guiding Principle 1). However, Australia remains as one of the only advanced countries with no constitutional or statutory protection of a right recognised in so many comparable such countries, and a large number of less developed countries.

The unjustified, unexplained absence of the right to Privacy from the Terms of Reference is significant in that it raises serious concerns regarding ALRC's approach to the inherent rights of the Australian people. This is particularly concerning as severe encroachments to this right currently exist under Commonwealth legislation,

and the absence of Privacy from the Terms of Reference enables this legislation to escape scrutiny from the Freedoms Inquiry.

Recommendation: Privacy should be recognised as a fundamental right listed in the Freedoms Inquiry's terms of reference and examined as part of any review of encroachments by Commonwealth legislation.

Bill of Rights / National Human Rights Act

As we argued in our previous submission, Australians' rights and freedoms are not sufficiently protected at the current time, a significant weakness of the Australian legal system and one which renders it out of step with similar jurisdictions in other parts of the world. Without an express bill of rights or national human rights legislation written into our constitution or statute, the extent to which Australian citizens can trust that their government strives to protect their rights and freedoms is uncertain, and the protections offered by the common law are an ineffective way to protect Australians' fundamental rights.

Australia is lagging behind other liberal democracies and we urge here as well as in our previous submission that introducing a comprehensive bill of rights or national human rights legislation is the best way to protect the rights and freedoms of Australian citizens.

This is of particular significance given recent legislation passed in Australia which we regard as infringing the right to Privacy. Within the current legal framework lacking a comprehensive bill of rights, including the right to Privacy, challenges to such legislation based on an infringement of these rights are not possible. This sharply contrasts with the situation in other jurisdictions to which Australia routinely compares itself.

An illustration can be provided by the recently-passed data retention legislation (Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015). This legislation is based to a large extent on the EU's Data Retention Directive and its UK implementation, both of which have been declared incompatible with the protection of fundamental rights and freedoms in European law, especially the right to Privacy. While in our view Australia's data retention laws are similarly flawed to those in the EU and UK due to their unjustified and disproportionate interference with Privacy, Australians do not have an effective means of challenging this interference before Australian courts.

In addition, other recent events raise concerns for all Australians regarding the lack of protection and significance given to Privacy in the Australian context. This can be seen by recent news that the Federal Government has failed to conduct Privacy Impact Assessments on the vast majority of national security measures passed over the last 14 years. Privacy must be taken more seriously in both law and administrative practice.

Recommendations:

That the ALRC acknowledges the weaknesses of the common law as a means of 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, including the right to Privacy.

Specific Commonwealth legislation identified in the Interim Report that unreasonably encroach upon traditional rights, freedoms and privileges

Privacy Act 1988 (Cth)

The interim report identifies the *Privacy Act 1988* as interfering with freedom of speech. The reason for this is due to the Privacy Act mandating that personal information be handled consistently with the 13 Australian Privacy Principles, with the result that disclosure of such personal information would breach Privacy.

APF recognises that the interaction of freedom of expression and Privacy can on occasions be problematic, although on many occasions they are complementary rights. However, we would like to see explicit recognition that the protection of Privacy can be a necessary and appropriate justification for encroachments into the right to free expression. We note that rights are not absolute, and to the extent they sometimes conflict, this should be acknowledged and resolved as respectfully as possible to the interests involved. Indeed, we note that the protection of private and confidential information is discussed in the Freedoms Inquiry's Issues Paper. This should also be included in the Final Report.

Many of the other rights that the ALRC does recognise in the Freedoms Inquiry, such as speech, belief and association, depend to some extent on the capacity to have Privacy, the security of personal information and the confidentiality of communications. Indeed, free speech for instance is actually sometimes dependent on (rather than conflicting with) Privacy. We view it improper to pose Privacy as simply a threat to free speech when there are ways of reconciling the interests in most occasions, and they often go together.

Recommendation: That the ALRC explicit acknowledges that the protection of Privacy can justify certain encroachments into the freedom of expression.

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

The new data retention legislation is noted in the interim report as interfering with freedom of speech and client legal privilege. The APF submits that this legislation also interferes with the right to Privacy, not only in respect to client legal privilege but as a stand-alone right. As stated in our submission to the Parliamentary Joint Committee on Intelligence and Security dated 19th January 2014; ‘the mandatory blanket retention of metadata has been rejected by every court that has reviewed such laws on the basis that it represents an invasion of Privacy that is not justified by necessity or proportionality.’

While we do note that a special mechanism has been set up to provide protection for journalists, we do not regard this as adequate and sufficient to protect their Privacy and confidentiality of communications, as well as that of their sources. Their data will still be collected under the data retention scheme, and whistleblowers are still left exposed with a lack of protective mechanism for them and their data. In addition, other interests like medical and legal confidentiality, the privilege of religious speech, counseling confidentiality and parliamentary confidentiality conventions are likewise compromised by the warrantless and suspicionless retention model.

Recommendation:

That the ALRC also explicitly acknowledges the encroachment into Privacy that the new data retention laws present, and the lack of protection for confidential relationships.

Thank you for your consideration.

Yours sincerely

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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/>