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Safeguarding Democracy

Human Rights Law Centre

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Democracy relies on many foundations for its success including an active civil society, a free press, informed and diverse public debate, protest rights and the checks and balances provided by courts and other institutions. This report documents a clear and disturbing trend of new laws and practices that are eroding these vital foundations of Australia's democracy. Importantly, it also outlines a way forward to safeguard our democracy.

Human Rights Law Centre

Contact

Emily Howie and Hugh de Kretser
Human Rights Law Centre Ltd
Level 17, 461 Bourke Street
Melbourne VIC 3000

Telephone
+ 61 3 8636 4450

Fax
+ 61 3 8636 4455

Email
emily.howie@hrlc.org.au
hugh.dekretser@hrlc.org.au

Web
www.hrlc.org.au

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The Human Rights Law Centre protects and promotes human rights in Australia and beyond through a strategic mix of legal action, advocacy, research and capacity building.

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Executive Summary

The enduring success of Australia's democracy rests on many vital foundations including a free press, informed and diverse debate, the rule of law, free and fair elections, active civil society and the checks and balances provided by courts and other institutions. Yet, despite Australia's strong democratic history, there is a clear and disturbing trend of new laws and practices eroding many of these foundations.

Federal and state governments have stepped up efforts to avoid scrutiny, reduce transparency and limit accountability in order to expand government power, advantage political elites and advance the interests of business. Governments are using a range of funding levers to stifle advocacy by non-government organisations that represent vulnerable minorities. Environmental groups who challenge the fossil fuel industry are facing threats to their financial viability though attempts to remove their charity tax concessions. A number of states have enacted excessive and unnecessary anti-protest laws that prioritise business and political interests over protest rights.

Whistleblowers who expose even the most serious human rights abuses against children now face unprecedented risks of reprisals including prosecution and jail. Press freedom is being eroded by new laws and policies jeopardising journalists' ability to maintain the confidentiality of sources and to report on matters of public interest. All the while, in critical areas governments are undermining or sidelining the courts and institutions like the Australian Human Rights Commission, the nation's human rights watchdog, that were created to keep them in check.

The success of Australia's democracy relies on much more than the ability of adults to cast a free vote on election day. For our democracy to thrive, we need free speech, the free flow of information and a free press to hold government accountable and to inform peoples' voting decisions. We need to be able to organise and protest on issues that concern us. We need an environment in which civil society can effectively participate. We need institutions, organisations and practices to prevent and expose misconduct and abuse of power; to ensure that government and elected representatives act in the best interests of the Australian public instead of prioritising powerful business and political interests; and to ensure that the interests of vulnerable minority groups are represented in policy debates.

These are not only our human rights but they are vital preconditions to the health and prosperity of our democracy and our nation.

We must arrest this trend that is eroding many of the vital foundations of our democracy and we must strengthen these foundations. This report outlines a way forward.

Australia's democratic progress

Australia has a strong, if uneven, democratic history that has played a key role in generating the prosperity and safety many Australians enjoy today. Many of the components of Australia's democratic success have been developed over decades, even centuries. Reform has been ongoing and progress has been hard won.

In the 19th and early 20th century, Australian men were the first in the British colonies to vote without holding property. We pioneered the secret ballot; a private vote that protected voters from the undue influence of their landlords and employers. South Australia was the first place in the world where women were allowed to vote and to stand for parliament.

At Federation, the Australian Senate was the first upper house of parliament in the world to be directly elected by the people and our members of parliament were paid, opening up the opportunity for working class men to hold office. Voting rights for women across Australia followed but it took until 1965 for all Aboriginal and Torres Strait Islander adults to be able to vote across Australia.

Reform has always been driven by the hard work and courage of movements of people who believed in equality, human rights and fairness, often in the face of staunch opposition from entrenched and powerful political and business interests. Those movements remain critical to allowing our democracy to survive and thrive.

The success of Australia's modern democracy rests on many strong foundations

While periodic elections provide the fundamental accountability mechanism for government, a network of complementary checks and balances is needed not only to protect our modern democracy but to ensure that it thrives.

The exercise of our democratic rights to free speech, protest and freedom of association are a critical part of these checks and balances. Democracy flourishes when a diverse range of people can participate in political decision-making and public institutions. Free speech allows the media to hold governments to account and enables the free flow of information and views. Peaceful protest is a means of communicating ideas, increasing political power through joint action and articulating shared opinions. Freedom of association allows for a vibrant civil society that can come together to broaden political impact, particularly for minority or less powerful groups in our society.

Our independent courts and basic rule of law principles provide vital accountability, allowing citizens and organisations to ensure government complies with the law. Institutions like the Australian Human Rights Commission help to prevent and address human rights violations and ensure proper government conduct.

Civil society has been vital to our democratic success

One of Australia's greatest achievements has been the strength of the community sector and civil society more broadly to act as a counterweight to the power of government and business interests. Australian governments have generally fostered a positive environment for community organisations to operate. This has allowed a balance between the majoritarian interests of government, the economic interests of business and the more people-centred approach of community organisations who represent the voices and experiences of minority, marginalised and disadvantaged groups.

Australia's success owes much to the activism and engagement of Australia's community sector and civil society. Behind many of the rights, laws and policies we now enjoy and often take for granted, lie years and sometimes decades of hard work – campaigning, organising and advocating to raise awareness of problems and to push for reform. From the efforts of unions to secure the eight-hour day and workplace safety laws; to the work of environmental groups protecting the Franklin River and ending whaling in Australia; and the advances secured by community advocates on disability rights, family violence, consumer protection and much more - the activism of community organisations and civil society has been integral in ensuring that fairness guides Australia's progress.

Community organisations today run homeless shelters, women's refuges, childcare facilities, disability support services and much more. Through this on-the-ground work, they are expert in the lived experience of many of Australia's vulnerable social groups and well placed to share those insights with government and the public. Advocacy by community organisations creates awareness of the impact of laws and government policies on the groups they work with and in turn contributes to improved laws and policies.

The High Court has recognised that advocacy by

community organisations is a vital part of the nation's political communications that are, in turn, "an indispensable incident" of Australia's constitutional system and that contribute to public welfare.[1]

The foundations of our democracy are fragile

Although we developed the foundations of our democracy over many decades, they are fragile and vulnerable to being eroded or dismantled. Years of activism, advocacy and debate to build reforms and laws can be quickly undone by the executive arm of government and a compliant parliament.

Australia remains the only Western democracy without comprehensive constitutional or legislative protection of human rights, such as through a national Human Rights Act. This means that there are fewer constraints on governments' power to violate basic democratic rights such as the rights to free speech, peaceful protest and freedom of association. While these rights are key ingredients in our political system, the absence of enforceable legal protection of those rights means we rely heavily on governments and parliaments restraining themselves from eroding them.

There is a disturbing trend of governments eroding our democratic foundations

In many respects, Australia's democracy is strong. For example, voting is near universal, electoral fraud is rare and our judiciary is impartial and independent. However, this report highlights a disturbing trend of governments eroding many of the vital foundations of our democracy at the State and Federal level, tipping the balance away from the interests of the individuals, and in particular vulnerable and marginalised individuals, towards greater business and government power.

This report is not a comprehensive documentation of all aspects of the trend. Instead, the report uses the key examples summarised below to highlight the erosion of democratic freedoms across a range of areas in Australia.

Attacks on advocacy by non-government organisations

Direct and indirect attacks by government on civil society using a range of financial levers have undermined the ability of non-government organisations to advocate and threatened their independence.

Peak bodies and other non-government organisations that advocate for legal and policy reform have been defunded. A parliamentary inquiry threatens to remove the charity tax concessions of outspoken environmental organisations. Governments have amended funding agreements to either prohibit the use of government funding to undertake advocacy work or prohibit advocacy outright.

Ignoring strong evidence of the public value of advocacy activities, governments have created false distinctions between "frontline services" (which are deemed worthy of government funding) and "advocacy" (that, apparently, is not).

The rationale for the attacks is varied. Some attacks on environmental organisations reflect the power and influence of the fossil fuel industry. Other attacks seek to bolster the power of the executive arm of government by stifling criticism of government policy.

The attacks threaten the viability of many organisations and the spectre of further funding cuts and reprisals has generated an atmosphere of self-censorship among some government-funded organisations. Community organisations are being given a clear message: if you speak out against government you risk losing your funding.

Attacks on the right to peaceful protest

Australian people's movements have secured many of the rights and privileges that we take for granted. The suffragist movements led to women's voting rights. The Gurindji walk-out played a key role in securing Aboriginal land rights. Environmental protests saved the Franklin River and a decade-long movement to celebrate "Sorry Day" preceded the official 2008 apology to the Stolen Generations.

However, State governments have passed far-reaching and dangerous laws that undermine our right to peaceful protest. Tasmania and Western Australia have introduced or proposed laws aimed at restricting protest in order to protect commercial interests, particularly forestry or mining operations. Queensland passed

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excessive anti-protest laws in connection with the G20 summit. These laws get the balance wrong – unduly favouring the government and vested business interests at the expense of the democratic right to protest.

Attacks on whistleblowers and press freedom

New laws and practices have unjustifiably increased government secrecy, particularly in the areas of national security and immigration. The Australian Government now refuses to make available basic and timely information about immigration matters of intense public interest that it previously routinely provided. The Australian Government tightly controls journalists' access to immigration detention centres in Australia including the content of any reporting. Journalists are all but prevented from visiting the offshore detention centre on Manus Island or even entering Nauru.

The 2015 *Border Force Act* intensified this suffocating culture of secrecy. It threatens immigration workers and contractors with two years in jail for recording or disclosing information about events that they witness. The Act has inspired protest from medical staff who say they are unable to act in accordance with their ethical duties without risking prosecution.

New ASIO laws have criminalised the disclosure of information about 'special intelligence operations' regardless of the public interest in exposing any potential wrongdoing by ASIO.

Increased secrecy has meant that whistleblowing - insiders exposing misconduct and illegality - has become even more important. Yet whistleblower protections are complex, unwieldy and inadequate to protect those who wish to disclose abuses. Worse, the Australian Government has responded to whistleblowers with increasingly aggressive reprisals including referrals to the Australian Federal Police for investigation and potential prosecution. This response increases the chilling effect on others who might consider exposing wrongdoing.

Separately, new laws have mandated the stockpiling of huge rafts of metadata generated by individuals, giving law enforcement agencies the tools to expose journalists' confidential sources.

The cumulative effect of these changes has made it far harder for the Australian media to do its job informing the Australian public and holding government accountable. Numerous senior journalists and media organisations have spoken out against them with the Media, Entertainment and Arts Alliance calling the national security law reforms "the greatest assault on press freedom in peacetime."[2]

Undermining institutions and sidelining the courts

Courts and other institutions provide critical oversight of government, helping to ensure that it does not exceed its power or act outside of the law. Yet, the Australian Government has increasingly sought to undermine some of the institutions that hold it accountable and to sideline our independent court system in a number of critical areas including immigration detention and national security.

New laws remove or diminish the ability of courts to oversee government decisions that strip people of their citizenship, suspend their passports, lock them up on suspicion of future conduct, secretly turn back their asylum seeker boats and detain them on the high seas.

Senior ministers, including the attorney-general, have sought to vilify legal action by community and

environmental organisations aimed at holding government to account, accusing the organisations of engaging in "vigilante litigation", "legal sabotage" and being part of "a racket". The Government is also seeking to limit the ability of environmental groups to bring court proceedings to enforce environmental laws.

The Government has sought to undermine the capacity and independence of the Australian Human Rights Commission, our national human rights watchdog, by slashing its funding and engaging in unprecedented personal attacks on its President in response to her investigation into the human rights abuses against children in immigration detention.

The erosion of our democracy is part of global trend

The erosion of Australia's democracy is occurring within a well-documented global trend of governments stifling criticism and restricting civil society - a trend that has been called "the great challenge of our time."[3]

While the trend is pronounced in authoritarian regimes, established Western democracies are not immune. The Harper Government in Canada vilified environmental groups that opposed oil developments and restricted the legal, financial and political space within which environmental and human rights organisations operate.[4] The United Kingdom passed controversial laws limiting the ability of NGOs to speak out on political issues in the lead up to elections.[5] The United States is aggressively prosecuting whistleblowers who exposed serious human rights violations and misconduct[6] and Spain passed harsh anti-protest laws.[7]

Seizing the opportunity to renew our democracy

This report identifies a range of measures that are eroding Australia's democracy. The measures are not isolated. They are occurring across a range of policy areas and at both the state and federal level. There is a clear trend and it is corroding our democracy and human rights. This report seeks to highlight this trend in order to stop it.

Encouragingly, the work of stopping the regression has already begun in some states, with new state governments repealing excessive move on powers that threatened protest rights in Victoria and removing gag clauses from funding agreements with non-government organisations in Queensland.

However, more than simply arresting this trend, we must use this opportunity to truly strengthen our democracy.

When Malcolm Turnbull became Prime Minister, he promised to run a "thoroughly liberal government," committed to freedom, the individual and the market. He also said that "[t]he Australia of the future has to be a nation that is agile, that is innovative, that is creative."[8]

Strong democratic foundations are necessary preconditions to this vision.

Strengthening these democratic foundations is entirely consistent with views expressed by Australian Attorney-General George Brandis, who has advocated for the protection of "traditional rights, freedoms and privileges", arguing that "freedoms…underpin the principles of democracy and we cannot take them for granted."[9]

We need to protect and promote fundamental human rights from government intrusion, including the rights to free speech, freedom of association and peaceful protest. We need to respect the rule of law and encourage, rather than diminish, oversight by our independent court system. We need properly resourced and mandated institutions capable of holding government accountable. We need an environment in which civil society is resourced and empowered to speak on behalf of its constituencies.

Australia has a strong history of democratic reforms that have sought to ensure equality of participation in public life. The recommendations in this report provide a way forward to safeguard our democracy.

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Recommendations

Strengthening the community sector

To the Australian Government

Create an environment that enables advocacy by community organisations.

Strengthen the *Not-for-profit Freedom to Advocate Act 2013* (Cth) to prevent government using funding as a lever to stifle advocacy by community organisations including by:

- introducing a statement of principles into the Act which articulates, among other things, the importance of advocacy by not-for-profit organisations and its contribution to effective and informed government policy making; and
- establishing means to oblige government to adopt policies which are consistent with this statement of principles and which enable community organisations to undertake advocacy consistent with their mission.

Insert standard terms in funding agreements to clarify that organisations receiving government funding are not prevented from entering into public debate or criticising the government.

Enshrine the importance of civil society advocacy and the freedom to advocate in the public service values and codes of conduct.

Restore government funding to peak sector bodies to undertake advocacy work on behalf of their sectors, including to the Refugee Council of Australia, the National Congress of Australia's First Peoples and the peak bodies in the housing, homelessness and environment sectors.

Provide community sector organisations with adequate opportunities to contribute to government decision-making processes.

Institute or empower an independent monitoring and reporting mechanism to ensure compliance with the above.

Support and facilitate the strong contribution of the community sector to Australian society by:

- progressively widening the scope for gift deductibility to include all endorsed charitable institutions and funds, as recommended by the Productivity Commission; and
- making strong public statements in support of the contribution of civil society organisations to the health of our democracy, human rights and the rule of law.

To the House of Representatives Environment Committee

Recommend an enabling tax environment, including deductible gift recipient status, for environmental groups to ensure that they can continue their valuable work, including advocacy, for the purpose of advancing the natural environment.

To the Australian Attorney-General

Remove clauses from funding agreements with community legal centres that prohibit government funding being used in law reform, policy and advocacy work.

To State and Territory Governments

Take concrete steps to facilitate the involvement of the community sector in government decision making, policy development and public discussion by:

- removing prohibitions in funding agreements with community organisations that prevent government funding being used for law reform, policy and advocacy work;
- inserting provisions into funding agreements to clarify that organisations receiving government funding are not prevented from entering into public debate or criticising the government;
- providing community sector organisations with adequate opportunities to contribute to government decision-making processes; and
- following South Australia's lead and passing laws to prevent government funding being used as a lever by which to unreasonably directly or indirectly gag funding recipients (drawing on the *Not-for-Profit Sector Freedom to Advocate Act 2013* (Cth) with necessary amendments).

To the New South Wales Government

Remove clauses from funding agreements with community legal centres that prohibit government funding being used in law reform, policy and advocacy work.

Protest rights

To all State and Territory Governments

Ensure that all laws regulating protest activity comply with Australia's international human rights obligations to guarantee free speech, freedom of association and freedom of peaceful assembly.

To the Tasmanian Government

Repeal the *Workplaces (Protection from Protesters) Act 2014* (Tas).

To the Western Australian Government

Abandon the *Criminal Code Amendment (Prevention of unlawful activity) Bill 2015* (WA).

Press freedom and whistleblowers

To the Australian Government

Ensure greater transparency in government and ensure better protection of whistleblowers by:

- repealing the secrecy provisions in the *Australian Border Force Act 2015* (Cth);
- amending section 70 of the *Crimes Act 1914* (Cth) to ensure that disclosures are only unlawful if they harm certain essential public interests, in accordance with the recommendations of the Australian Law Reform Commission's 2009 *Secrecy Laws and Open Government Report*;
- amending other secrecy laws in accordance with the recommendations of the ALRC's 2009 *Secrecy Laws* and *Open Government Report*; and
- strengthening the *Public Interest Disclosure Act 2013* (Cth) to protect whistleblowers that reveal serious violations of human rights, or whose disclosure may expose or promote accountability for such violations.

Ensure that Australia's counter-terror laws do not unreasonably restrict free speech and hinder transparent government, including by:

- repealing section 35P of the *Australian Special Intelligence Operation Act 1979* (Cth) or at the very least amending the section to exempt disclosures made in good faith in the public interest; and
- amending the *Telecommunications (Interception and Access) Act 1997* (Cth) to require law enforcement agencies to obtain independent authorisation before accessing a person's metadata and to remove the requirement for telecommunications service providers to store metadata.

The Australian Human Rights Commission and other watchdog institutions

To the Australian Attorney-General

Ensure that the Australian Human Rights Commission functions as an effective independent human rights watchdog by:

- restoring funding to the Commission to 2013 levels; and
- developing a transparent process for appointment of Commissioners that is consultative, transparent, based on merit and in accordance with publicly available criteria.

To the Australian Government

Establish an independent review mechanism that examines and reports on the health of the nation's watchdog agencies with a particular emphasis on agency mandates, resourcing and appointment processes.

Rule of law

To the Australian Attorney-General

Abandon proposed legislation that would remove the extended standing provisions that facilitate the ability of environmental organisations to bring legal action to ensure compliance with the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth).

Introduce legislation to enhance access to justice by broadening standing rules to allow interested parties to bring public interest cases in matters in which affected parties are unable to seek redress or in which there is no other reasonable or effective way to bring the issue to court.

Introduce legislation to expand the power of the federal courts to make protective costs orders that eliminate or limit the exposure to costs for parties that bring public interest litigation.

Introduce legislation to restore proper court review of government action, especially in the immigration and national security contexts.

In accordance with Attorney-General's traditional role in a representative democracy, promote the rule of law and government respect for the judicial process, particularly when government is a party to legal proceedings.

State and Territory Attorneys-General

Introduce legislation to broaden standing rules to allow interested parties to bring public interest cases in matters in which affected parties are unable to seek redress or in which there is no other reasonable or effective way to bring the issue to court.

Introduce legislation to expand the power of state and territory courts to make protective costs orders that eliminate or limit the exposure to costs for parties that bring public interest litigation.

Human Rights Act

To the Australian Government

Adopt a national Human Rights Act that protects peoples' fundamental human rights including free speech, freedom of association and freedom of peaceful assembly.

To the State and Territory Governments

Follow the lead of Victoria and the Australian Capital Territory and adopt state or territory-based Human Rights Acts that protect fundamental human rights including free speech, freedom of association and freedom of peaceful assembly.

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1 Silencing the community sector

Chapter at a glance

The health of our democracy relies on an informed public debate with a plurality of voices reflecting the range of needs and interests of Australia's diverse community. This ensures that our elected representatives can take into account the interests of the entire community, not just powerful business or political interests.

Community organisations are a vital contributor to an informed public debate.

However, instead of seeing the community sector as a vital contributor to policy development and a critical source of information, expertise and advice, governments have sought to restrict the sector's contribution and influence.

Governments have de-funded and sidelined important peak sector bodies that provide critical expertise and advice to government on marginalised and vulnerable groups.

The spectre of further funding cuts and reprisals has generated an atmosphere of self-censorship among some government-funded organisations.

The Australian Attorney-General has changed funding agreements to prohibit community legal centres from using Commonwealth funding to undertake law reform or policy work. New South Wales has done the same.

A parliamentary inquiry is investigating whether environmental organisations should have their deductible gift recipient status removed – a move that would threaten their existence.

Community organisations have been given a clear message: if you speak out against the government, you risk losing your funding.

The vital contribution of advocacy by community organisations

Australia is a far better place thanks to the activism and engagement of Australia's community sector. Many of the rights, laws and policies we now enjoy in areas as diverse as discrimination, family violence, homelessness, consumer protection, disability and workplace safety have been secured after years and sometimes decades of advocacy by community organisations.

Community organisations run homeless shelters, women's refuges, childcare facilities, disability support services and much more. Through this on-the-ground work, they are expert in the lived experience of many of Australia's vulnerable social groups and are well placed to convey those insights with government and the public.

Laws and policies across Australia are constantly being reviewed, changed or introduced. Policy debates and representations to politicians shape the content of these laws and policies. Advocacy by community organisations ensures a voice in these policy processes for often marginalised and disadvantaged groups who are often unable to advocate effectively on their own behalf. Advocacy by environmental organisations ensures a voice for the interests of nature, which cannot speak for itself.

This advocacy improves the awareness of the impact of laws and government policies on the constituencies that community organisations work with and in turn contributes to improved laws and policies.

It also provides a vital balance to the influence of other powerful interests. Business lobbyists and industry groups advocate on behalf of business sectors in order to access politicians and secure more favourable laws and policies. Advocacy by community organisations provides important alternative perspectives.

As Antoinette Braybook, CEO of the Aboriginal Family Violence Prevention Legal Service has observed:

> "Our services are there to assist Aboriginal women victims and survivors of family violence. Through our policy work we give a voice to their experiences that is so often silenced. Without [funding for our peak body] who is sharing Aboriginal women's experiences with decision makers in government?"[10]

The vital democratic contribution of advocacy by community organisations has been well-recognised.

The Senate Legal and Constitutional Affairs Committee has recognised community organisations as "an invaluable source of information for government to make informed and balanced policy decisions."[11] The Australian Law Reform Commission (ALRC) relies on community organisations to present both the evidence base and ideas for law reform:

> "NGO contribution to the Law Reform Commission's work forms part of the evidence base and the ideas that we rely on. We rely in large part on community legal centres and NGOs to filter and consolidate on-the-ground experiences. The ALRC in that way gets the benefit and outcomes of those organisations' long and close experiences with their constituents, be they clients, patients etc."
>
> PROFESSOR ROSALIND CROUCHER – PRESIDENT, ALRC.

On the international stage, Australia recognises the critical importance of civil society organisations to the promotion of human rights, democracy and the rule of law,[12] acknowledging that NGOs "contribute to development outcomes by improving economic opportunities, making institutions more effective and accountable, enabling gender equality, building community sustainability, and delivering essential services."[13]

Advocacy by community organisations also brings important economic benefits and there are sound economic arguments in favour of government providing subsidies for advocacy by community organisations, either through tax concessions or through direct funding from government.[14] The voices of community organisations are critical to the efficient and effective delivery of government services as they provide information needed to effectively identify problems and assess the merits of alternative policy proposals. The Productivity Commission has observed that limiting consultation with the NGO sector may "impede the efficient and effective delivery" of government services and "reduce the government's ability to develop the evidence base needed to effectively identify problems and assess the relative merits of alternative policy proposals."[15]

A 2010 High Court decision removed any doubt that advocacy by charities is a legitimate activity where it is in line with their mission. The High Court recognised that advocacy by community organisations is a vital part of the political communications that are, in turn, "an indispensable incident" of Australia's constitutional system and that contribute to public welfare.[16]

Silencing community organisations

Advocacy by community organisations is sometimes welcomed and supported by government, including through funding, or, in the case of organisations with deductible gift recipient status, through tax concessions for donations. The views of community organisations are often actively sought through inquiries, meetings, policy submissions and more. However, where the interests of community organisations and government differ, advocacy by community organisations can be uncomfortable for government.

Many community organisations receive government funding. While government funding is often a vital resource for community organisations to help them achieve their mission, it creates risks around independence and censorship. Funding presents government with the means to pressure community organisations not to criticise it and it also creates related risks of organisations self-censoring for fear of losing funding.

In recent years, the Australian Government and some state governments have moved to suppress criticism from community organisations using a range of funding and other levers, creating an environment where organisations are more likely to self-censor for fear of losing funding. The impact has been so severe that in Pro Bono Australia's 2015 survey of the not-for profit sector, nine out of ten respondents saw recognition of the role of advocacy as being the most important factor in developing a thriving not-for-profit sector in 2016.[17]

Governments should welcome the contest of ideas from organisations that have proven expertise and experience. Instead, we see the disregard for that contribution.

> "The Minister sees us as a small obstacle to be navigated around, rather than a source of advice or expertise."
>
> PAUL POWER – CEO REFUGEE COUNCIL OF AUSTRALIA

Cutting funding to community organisations that advocate

One way that the Australian Government has put community organisations on notice that criticism of government is unwelcome is by defunding organisations that advocate against government policy. Peak bodies have borne the brunt of these funding cuts.

In sectors where community organisations receive government funding, peak bodies play a critical advocacy role in speaking collectively on behalf of their sector, members and client groups. Yet instead of seeing peak bodies as a source of information, expertise and advice, the Australian Government has defunded many of them and sought to delegitimise their advocacy work.

The peak bodies in the housing and homelessness sector lost all their Commonwealth funding, despite concerns from a Senate committee that it would impede their ability to advocate in processes designed to achieve the best outcomes for people experiencing homelessness.[18] As a result, Homelessness Australia will close its doors in 2016, after years as a peak body in the homelessness and housing sectors. Its CEO Glenda Stevens articulated the loss:

> "Homelessness Australia's provision of frontline services with efficient and effective capacity building programs is lost, the conduit between government and the homelessness and housing sectors is lost, community education and engagement on ending homelessness is lost and strategic and timely research and policy advice is gone."[19]

Similarly, the Australian Government cut funding to the Refugee Council, the peak body for refugee and asylum seeker support agencies in Australia, with Minister Scott Morrison stating that government should not fund advocacy.[20] The move was criticised as an attempt by the government to silence its critics in the refugee and asylum seeker sector.[21]

The Australian Government also cut all funding to the National Congress of Australia's First Peoples, the representative body and national voice of Aboriginal and Torres Strait Islander peoples. Instead of working with the representative body, the Prime Minister handpicked an Indigenous Advisory Group which includes non-Indigenous members.

> "The problem is not limited to the constraints that government is imposing on free speech through funding agreements. The impact is much broader and much more insidious. The government is creating an environment that discourages strong informed public debate and encourages self-censorship by expert organisations on issues of national importance."
>
> CASSANDRA GOLDIE – CHIEF EXECUTIVE OFFICER OF THE AUSTRALIAN COUNCIL OF SOCIAL SERVICE

Changing funding agreements to silence community organisations

The federal and some state governments have used funding agreements to stifle criticism from community organisations.

Some agreements contain outright bans on advocacy, whilst others require government approval before a community organisation issues a media release or makes public statements about the work that is being funded.

The most explicit means of stopping advocacy was the use of gag clauses by the former Queensland Government in Health Department funding agreements that expressly prohibited advocacy by the funded organisation (regardless of whether the advocacy might be funded independently).[22] Fortunately the current Queensland Government removed the gag clauses, describing them as "an outrageous attempt to control public debate by telling NGOs that if they criticised the government, it could affect their funding."[23]

Less direct methods continue to be used in other contexts. For example, in 2015 it was reported that the Department of Immigration and Border Protection sought to control the public comments made by organisations working in offshore immigration detention facilities by requiring them to pay performance bonds of up to $2 million that might be forfeited if they spoke out against government policy.[24] Save the Children, charged with caring for asylum seekers and refugees offshore, was among the organisations asked to furnish bonds.[25] Save the Children considered the bond was effectively a gag clause and refused to pay it, but they have subsequently lost their contract to work on Nauru.

Stopping advocacy by community legal centres

Until recently, community legal centres (CLCs) received Commonwealth funding specifically to engage in advocacy and law reform work in addition to other services. Around 200 CLCs across Australia provide access to justice for hundreds of thousands of disadvantaged and vulnerable clients each year including homeless people, people with disabilities, women experiencing domestic violence and people ripped-off by unscrupulous businesses.

As with advocacy by the broader community sector, there is strong evidence supporting the value of CLC advocacy and the importance of government funding it. For example in 2014, the Productivity Commission recommended that governments continue to fund CLC advocacy activities "that seek to identify and remedy systemic issues because it reduces demand for frontline services."[26] More recently, Delia Rickard, the Deputy Chair of the Australian Competition and Consumer Commission, noted that CLCs make critical contributions to the work of regulators because they are in a position to "analyse their cases, identify system conduct (such as poor practices by debt collectors...) and present the necessary information to regulators, industry and governments."[27]

Despite these recognised benefits, in 2014 the Australian Government changed CLC funding agreements to expressly prohibit funding being used to lobby government or to engage in public campaigns, with extremely narrow exceptions.[28] The Attorney-General stated that government should only fund services that are "actually helping a flesh and blood individual."[29]

The New South Wales Government imposed similar restrictions on its CLC funding.[30]

In the context of broader funding cuts and budget pressure, these restrictions at the Commonwealth and New South Wales level delivered a strong message to the CLC sector – that advocacy and law reform work is not valued and organisations that criticise government risk losing their funding. Understandably, this has a chilling effect. As Amanda Alford, Deputy Director of the National Association of Community Legal Centres noted:

> "These restrictions have a number of implications, including that CLCs feel that they are less able to undertake absolutely crucial preventative and early intervention work, or assist by addressing legal problems in a systemic way."
>
> AMANDA ALFORD – DIRECTOR POLICY AND ADVOCACY, NATIONAL ASSOCIATION OF COMMUNITY LEGAL CENTRES

Attacks on advocacy by environmental organisations

Many of the attacks on advocacy described above have been driven by a combination of an ideological opposition to advocacy by community organisations and a deliberate intent to stifle criticism of government by community organisations.

The attacks on advocacy by environmental organisations however can be closely linked to lobbying by the fossil fuel industry in what has been described as a "spectacular display of political capture."[31]

These attacks have taken the form of funding cuts, threats to the charity tax concessions of environmental organisations and efforts to vilify advocacy by environmental organisations.

Funding cuts to environmental organisations that advocate

Following lobbying by the New South Wales Minerals Council, in 2013, the Australian Government cut funding to the Environmental Defenders' Offices in all states and territories without warning, many of whom faced closure as a result.[32] Some states such as New South Wales and Western Australia also cut their funding to Environmental Defenders Offices. In 2014, the Australian Government also cut funding to state peak environment bodies; funding that had been ongoing since 1973.[33]

Threats to the charity tax concessions of environmental organisations

The Australian Government launched a parliamentary committee inquiry that threatens to strip environmental advocacy organisations of their deductible gift recipient status (DGR status).[34] DGR status is the tax classification that enables supporters to make tax deductible donations to organisations. It is critical to attracting donations and its loss would threaten the financial viability of many organisations.[35]

The commencement of the inquiry followed a motion that was unanimously endorsed by the Federal Liberal Party to strip environmental organisations of their DGR status. During one inquiry hearing, Queensland Liberal MP George Christensen tweeted about cancelling DGR status: "Time to get the donations in. I can't see it continuing longer once we report".[36]

The fact that environmental organisations engage in political advocacy is one of the key rationales advanced to strip environment groups of this status.[37] Echoing other attacks on advocacy in other areas, Government MPs are attempting to distinguish between environmental organisations that do "practical environment work" who should be entitled to tax concessions and organisations that engage in 'political activism' who should not.[38]

The distinction is a false one, as the Australian Conservation Foundation's Elizabeth McKinnon points out, "often where the environment is not yet damaged, advocacy is more widely used to protect the environment in a preventative sense. It is clearly a more efficient use of resources to prevent harm to the environment in the first place."[39]

Philanthropy Australia put it this way:

> "Where a particular environmental asset, such as a river, is threatened by certain forms of human activity, for example pollutants emitted from a factory, little is likely to be achieved by way of 'on-ground environmental works'... Instead, it may be necessary to...engage with stakeholders and decision makers such as the factory owners, regulators, policy makers and political representatives in order to reduce the level of pollutants being emitted in the first place – this engagement is what is commonly referred to as advocacy."[40]

The irony behind the calls to strip environmental advocacy organisations of their tax concession status is that the industry lobby groups behind the push are themselves the recipient of tax deductibility for advocacy activities. Industry lobby groups like the Minerals Council of Australia and the Australian Petroleum Production and Exploration Association receive substantial tax deductions for political advocacy each year, estimated to have reduced government revenue from company tax by $20 million per year for the last five years.[41]

The fossil fuel industry already has a disproportionate influence in the halls of power. The Australia Institute reports that the mining industry employs less than 2 per cent of Australia's workforce but 15 per cent of the firms on the federal lobbying register.[42]

Accessing decision makers is a real issue for environmental groups, with some stating that it is difficult to get face to face meetings with relevant ministers. Some see a "revolving door" between government and industry that gives the resources sector disproportionate access to government.[43] For example, Stephen Galillee, CEO of the Minerals Council of Australia, was previously a Howard staffer and the chief of staff to NSW Premier Mike Baird.[44]

In this environment, it is especially important that environmental organisations are able to provide a counterweight to the power of industry. As the Wentworth Group of Concerned Scientists said:

> "If it is in the public interest for corporations to claim a tax deduction for engaging in advocacy to promote their short-term economic self-interest… it surely is also in the public interest for institutions that are on the register to be provided with this same opportunity."[45]

Eco-traitors and extremists: the vilification of environmental advocacy

Government MPs are also engaged in attempts to vilify environmentalists, particularly those that challenge the interests of the fossil fuel industry, likening them to criminals, traitors and extremists. For example, Nationals MP George Christensen labelled environmental groups who sought to have the Great Barrier Reef classified as "in danger" on UNESCO's world heritage list as "eco-traitors", accusing them "holding the reef to ransom" and of being guilty of treachery.[46] Mr Christensen also described a Queensland conservation organisation as a "local extreme green group."[47] Senator Matt Canavan has said that Greenpeace's actions to protect the Great Barrier Reef "amount to a treasonous betrayal of the national interest."[48]

These attacks seek to de-legitimise environmental voices in policy debate and protect business interests which are linked to environmental harm.[49]

Creating an enabling environment for community sector advocacy

Australia has international law obligations to not only refrain from curtailing civil society, but to foster it – "a duty to create the best possible environment for the existence and operation of associations."[50] Instead of restricting advocacy by community organisations, Australian governments should create an environment that enables it.

Two actions by the Gillard Government provide examples that should be drawn on and expanded in this regard.

Firstly, the Gillard Government introduced standard clauses into Federal funding agreements (which were removed by the Abbott Government) that expressly recognised the right of community organisations to engage in public debate and criticise government.

Secondly, the Gillard Government introduced the *Not-for-Profit Sector Freedom to Advocate Act* in 2013 that prevents the Australian Government from inserting express gag clauses into community sector funding agreements such as those used in Queensland.[51] The South Australian Government introduced its own version of this legislation.[52]

The recommendations in this report outline ways to replicate and strengthen actions like these in order to enable community sector advocacy.

Further, instead of reviewing whether to strip tax concession status from certain community organisations, the Australian Government should instead progressively widen the scope of DGR status to include all endorsed charitable institutions and funds, as recommended by the Productivity Commission.[53] Current laws and regulation around accessing DGR status are complex and inconsistent, preventing many deserving charities from benefitting from the most significant tax concessions. Extending DGR status would reduce complexity and regulatory costs, improve community organisations' ability to access non-government money and foster a strong, independent and diverse sector.[54]

Finally, while it is beyond the scope of the paper to explore in detail, government must introduce reforms to reduce incentives and opportunities for business to unduly influence or, at worst, corrupt politicians. David Ipp AO QC, former Commissioner of the NSW Independent Commission against Corruption, suggests improved regulation, greater investigative powers for anti-corruption bodies, adequate resourcing of those bodies and laws to prevent cash for access.[55] Others recommend greater transparency of political donations through real time disclosure of donations and expenditure limits.[56] In Queensland and NSW, ministerial diaries are now published online in order to improve transparency and accountability around access to ministers.[57]

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21. Ibid.
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23. Ibid.

24. Adam Morton, "Buying silence? Immigration asked charities for multimillion-dollar bond," *Sydney Morning Herald,* 30 October 2015, available at http://www.smh.com.au/federal-politics/political-news/buying-silence-immigration-asked-charities-for-multimilliondollar-bond-20151030-gkmspv.html (accessed 1 February 2016).
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30. This applies to all NSW legal assistance services funded by legal aid and public purpose funding: *Principles for Funding of Legal Assistance Services NSW*, principle 3, available at http://www.naclc.org.au/cb_pages/files/Principles%20for%20Funding%20of%20Legal%20Assistance%20Services.pdf (accessed 1 February 2016).
31. Dr Helen Szoke, "Human Rights in an Age of Rapidly Rising Inequality," Speech to the Castan Centre for Human Rights Law, 24 July 2015.
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40. Philanthropy Australia, *Submission to the Inquiry into the Register of Environmental Organisations*, 21 May 2015, 2.
41. Campbell et al, *Powers of deduction: Tax deductions, environmental organisations and the mining industry*, The Australia Institute, June 2015, 3-4.
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46. "A label of 'in danger' would do enormous damage to the brand of the reef and threaten millions of tourism dollars," the Queensland MP said. "It would also threaten major investments in my region. This is outright treachery, and these eco-traitors are literally holding the reef to ransom": Shalailah Medora, "Great Barrier Reef: Nationals MP says environmentalists are guilty of treason," The Guardian, 25 March 2015 available at http://www.theguardian.com/environment/2015/mar/25/great-barrier-reef-nationals-mp-says-environmentalists-are-guilty-of-treason (accessed 1 February 2016).
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2 Limiting freedom to protest in Australia

Chapter at a glance

"In democratic societies, demonstrations and protests are key to raising awareness about human rights, political, social concerns, including regarding environmental, labour or economic issues, and of holding not just governments, but also corporations accountable."

MAINA KIAI, UN SPECIAL RAPPORTEUR ON THE RIGHTS TO FREEDOM OF PEACEFUL ASSEMBLY AND OF ASSOCIATION.[58]

Australian protest movements have helped to secure many social, environmental and political advances that we now take for granted. The eight-hour working day was won through campaigns and protest. Universal voting rights were secured through the suffragist movements and campaigns for Aboriginal citizenship. The reconciliation marches led to Kevin Rudd's apology to the Stolen Generations. A ground up environmental movement defended the Franklin River from being dammed and widespread protests against conscription in World War 1, the Vietnam War, apartheid and more brought political change.

Yet despite the critical importance of protest to our democracy, there is an alarming trend of state governments eroding protest rights through vague and unnecessary laws that grant police excessive power to prevent protest and that prioritise business interests over democratic rights.

Tasmania and Western Australia have recently introduced or proposed laws aimed, in part, at restricting protest in order to protect commercial interests, particularly forestry or mining operations. Queensland passed excessive anti-protest laws in connection with the G20 meeting.

Australian governments must ensure that all laws regulating protest activity comply with Australia's international obligations to guarantee free speech and freedom of association and freedom of peaceful assembly.

Protest is an important part of Australian democracy

> "In our view, healthy democracy requires dissent which can include street-level protest. If we stamp that out then we lose the best of our democracy."
>
> CAM WALKER, FRIENDS OF THE EARTH

Peaceful assembly or protest has long been an important part of Australian democracy and it remains so today. Through public protests, Australians have joined together to communicate their views and push for change on workplace rights, Australia's involvement in war abroad, Aboriginal rights, environmental conservation, climate change and much more. Peaceful protests are a symptom of a healthy democracy.

International law binds Australia to respect, protect and facilitate Australians' rights to assemble peacefully and associate freely.[59] This entails a positive obligation on the government to facilitate peaceful assembly[60] and a presumption in favour of unrestricted and unregulated peaceful protests.[61] Under international law, protests may only be limited to the extent "necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others."[62] Any limitations must be both necessary and proportionate.[63]

Under international law, the notion of a 'peaceful' assembly is broad. For example, a demonstration may be peaceful even though the protestors' conduct might "annoy, give offence, hinder, impede or obstruct the activities of third parties."[64] International law will almost invariably protect peaceful civil disobedience.[65]

On the international stage, Australia has played a leadership role in supporting rights to peaceful protest, co-sponsoring a 2014 UN Human Rights Council resolution recognising the positive contribution that peaceful protests can make to the development and strengthening of democracy, and urging States to facilitate peaceful protests by providing access to public space.[66]

Unfortunately, Australia's domestic laws do not adequately protect freedom of assembly and association in line with international standards. Australia does not have a national Human Rights Act. Accordingly, there are few legal limits on the ability of parliaments to pass excessive and unreasonable anti-protest laws.

Australian police already have broad powers to manage protests

Police forces across Australia have broad powers to manage protests to protect public safety, public order and other interests. These powers include powers to arrest, detain and charge people for a suite of offences like trespass, obstruction, nuisance, breach of the peace and property damage. Yet, state governments have sought to introduce new laws granting police even broader powers to restrict protest.

Tasmanian and Western Australian anti-protest laws

Tasmania and Western Australia have recently introduced or proposed excessive and unnecessary laws aimed at restricting protest rights around workplaces, forestry and mining operations.[67] Instead of facilitating peaceful assembly, the new laws discourage legitimate protest activity and prioritise business interests over democratic rights.[68]

In Tasmania, anti-protest laws have criminalised legitimate protest activity, creating new offences which, in some circumstances, can lead to serious financial penalties of up to $10,000 and four years imprisonment. The *Workplaces (Protection from Protesters) Act 2014* (Tas) criminalises all protest activity (without distinguishing between peaceful and other protests) on both public and private property, that occurs on or near certain business premises and that "hinders" access to business premises or "disrupts" business operations."[69]

The laws are disproportionate and unnecessary restrictions on peaceful assembly. When they were introduced to Parliament, three UN experts released a statement saying that the draft laws violated Australia's international obligations as they silenced legitimate and lawful speech and protests, were disproportionate and targeted particular protests.[70]

The Western Australian Government is proposing similar legislation. The *Criminal Code Amendment (Prevention of lawful activity) Bill 2015* contains extremely broad, new offences of "physically preventing a lawful activity" and "possessing a thing for the purpose of preventing a lawful activity." Both proposed offences carry serious penalties of up to one year in prison and a fine

of up to $12,000 and in some circumstances the penalties increase to two years in prison and a fine of $24,000.

Amongst the many flaws in the proposed law is the fact that a brief, trivial interruption to a lawful activity will trigger the offence. There also is an effective reversal of the onus of proof, whereby the accused must disprove that they intended to prevent a lawful activity if there are reasonable circumstances suggesting that they did.

Crackdown on protest for Brisbane's G20 summit

Ahead of the G20 Summit in November 2014, the Queensland Government passed new laws to restrict protest activity. While the objective of the laws, namely ensuring security at the G20, was legitimate, the means by which the laws achieved this objective was neither reasonable nor proportionate.

The *G20 (Safety and Security) Act 2013* (Qld) created a special security area, covering a large part of central Brisbane including thousands of homes and businesses, and allowed police to stop and search any person within the security area for any reason without the safeguard of requiring reasonable suspicion before a search.

Echoing excessive 2008 New South Wales laws which prohibited conduct causing "annoyance or inconvenience",[71] the Queensland legislation created broad new offences such as "disrupting" the G20 and also created a presumption against bail for certain offences. Police could require individuals to prove why their perfectly ordinary behaviour was lawful, such as walking through the parts of Brisbane or carrying everyday household items.

Ahead of the summit, Queensland police made extensive preparations for coercive responses to protests and refused to rule out intimidating tactics such as "kettling" or containing protesters.

Ultimately, the G20 laws deterred people from gathering to express their views on important issues like the environment, industrial relations and privatisation.[72] There were other disproportionately harsh law enforcement responses, including a police raid on the home of a 60 year-old grandmother as part of a search for anti-G20 stickers.[73]

HUMAN RIGHTS LAW CENTRE: TOM CLARKE

"These preparations had a chilling effect upon the exercise of the right to protest. Many people that might otherwise have participated in mobilisations about issues concerning the environment, industrial relations, privatisation and so on simply left town on the Summit weekend."

BRISCAN SUBMISSION TO G20 REVIEW[74]

Victoria's move-on powers

In 2014, Victoria amended existing 'move-on' powers to expand police powers to move people on from public spaces while winding back safeguards around protest rights and free speech. The laws were introduced in the context of long-standing protests against the government's proposed East West link road development and against the development of a McDonald's restaurant in suburban Melbourne.

The laws were criticised by a range of community organisations as well as a UN Special Rapporteur for unduly restricting protest rights.[75] In a positive development, the laws were repealed by the incoming Victorian Labor Government in 2015.

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60. OSCE Office for Democratic Institutions and Human Rights, *Guidelines on Freedom of Peaceful Assembly*, 2010, 2.2.
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64. See also OSCE Office for Democratic Institutions and Human Rights, *Guidelines on Freedom of Peaceful Assembly,* 2010, 1.3.
65. Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford University Press, 3rd ed, 2013) [19.05].
66. Human Rights Council, *The Promotion and Protection of Human Rights in the Context of Peaceful Protests*, A/HRC/RES/25/38, 11 April 2014.
67. *Workplaces (Protection from Protestors) Act 2014* (Tas); *Criminal Code (Prevention of Lawful Activity) Bill 2015* (WA).
68. Human Rights Council, *Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association: Addendum – Observations on Communications Transmitted to Governments and Replies Received*, 29th sess, UN Doc A/HRC/29/25/Add.3, 10 June 2015, 41-2 [211]-[212].
69. See Second Reading Speech, available at http://www.parliament.tas.gov.au/bills/Bills2014/pdf/notes/15_of_2014-SRS.pdf (accessed 1 February 2016).
70. Office of the High Commissioner for Human Rights, "UN experts urge Tasmania to drop its anti-protest bill," Statement, 9 September 2014, available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15002&LangID=E (accessed 1 February 2016).
71. See *Evans v New South Wales* (2008) 168 FCR 576.
72. BrisCAN, *Submission to Review of the G20 (Safety and Security) Act 2013 by Crime and Misconduct Commission*, 9 April 2015, available at http://www.ccc.qld.gov.au/research-and-publications/browse-by-topic-1/legislation-reviews/g20/review-of-the-g20-act (accessed 1 February 2016); See also Caxton Legal Centre, *Submission to the Review of the G20 (Safety and Security) Act 2013 by Crime and Misconduct Commission* , April 2015, available at https://caxton.org.au/pdfs/G20%20Review%20submission.pdf (accessed 1 February 2016).
73. Scott Forbes, "Big Brother, watch out! Forget about the G20 sticker blitz, another kind of revelry may be a thorny issue," *Cairns Post,* 17 September 2014, available at http://www.cairnspost.com.au/news/opinion/big-brother-watch-out-forget-about-the-g20-sticker-blitz-another-kind-of-revelry-may-be-a-thorny-issue/story-fnjpuwl3-1227057184366 (accessed 1 February 2016).
74. BrisCAN, *Submission to Review of the G20 (Safety and Security) Act 2013 by Crime and Misconduct Commission*, 9 April 2015, available at http://www.ccc.qld.gov.au/research-and-publications/browse-by-topic-1/legislation-reviews/g20/review-of-the-g20-act (accessed 1 February 2016). The review is yet to be published and separate review by the Queensland Police Commissioner is also yet to be made available.
75. Human Rights Council, *Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association: Addendum – Observations on Communications Transmitted to Governments and Replies Received*, 29th sess, UN Doc A/HRC/29/25/Add.3, 10 June 2015, 42 [213].

3 Threats to press freedom and whistleblowers

Chapter at a glance

Free speech and press freedom are vital components of a healthy democracy. They ensure the free flow of information, ideas and debate that inform the public about political matters. They ensure transparency and accountability in government. This in turn protects against the abuse of power and violations of other human rights.

Yet press freedom and free speech are being increasingly eroded in Australia.

New laws and practices have unjustifiably increased government secrecy, particularly in the areas of national security and immigration. The *Border Force Act*, which threatens immigration workers and contracters, such as doctors, with two years in jail for recording or disclosing information, is one prominent example.

Increased secrecy has meant that whistleblowing – insiders exposing misconduct and illegality by disclosing information – has become even more important. Yet, complex and unwieldy whistleblower protections are inadequate. Worse, the Australian Government has responded to whistleblowers with increasingly aggressive reprisals including referral to the Australian Federal Police for investigation and potential prosecution. This response intensifies the chilling effect on others who might be in a position to expose wrongdoing.

Separately, new national security laws have mandated the stockpiling of huge rafts of the Australian public's metadata, leaving journalists' confidential sources inadequately protected.

Numerous senior journalists and media organisations have spoken out against the changes with the MEAA describing them as "the greatest assault on press freedom in peacetime."[76]

The importance of free press and free speech to democracy

Prime Minister Malcolm Turnbull, a former journalist, recently stated that no institution is more important to our democracy than a free and courageous press.[77] Press freedom enables citizens to receive information, to make informed choices and to participate in public debates. As the Australian Press Council articulates:

> "In a truly democratic society open debate, discussion, criticism and dissent are central to the process of generating informed and considered choices…A free press is a symbol of a free people. The people of Australia have a right to freedom of information…"[78]

The right to free speech includes the right to seek, receive and impart information and ideas of all kinds.[79] A free, uncensored and unhindered press is essential to ensure free speech and other human rights.[80] Under international law, free speech may only be limited where it is reasonable, proportionate and necessary, either to protect the reputation or rights of others, or else to protect national security, public order, public morals or public health.[81]

Australia is the only Western democratic country that does not expressly protect free speech in its national laws. However, the High Court of Australia has recognised a limited implied freedom of political communication in the Australian Constitution, noting:

> "[E]ach member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia. The duty to disseminate such information is simply the correlative of the interest in receiving it. The common convenience and welfare of Australian society are advanced by discussion – the giving and receiving of information – about government and political matters."[82]

Despite the critical importance of free speech and a free press to our democracy, a range of new laws and practices are eroding it.

Intensifying government secrecy

Access to information is a critical component of free speech and press freedom. Widely accepted principles of open government and access to information[83] recognise that governments collect and hold information on behalf of the people. Citizens have a right to seek information about governmental activities. If there is no legal need to protect the information it should be open to public access.

Despite making its Open Government Declaration in 2012 to "promote greater participation in Australia's democracy",[84] the Australian Government has not carried through on its aims.

Australia has an extensive network of hundreds of secrecy laws that restrict access to government information.[85] The broadest provision is section 70 of the *Crimes Act* that threatens public servants and many Commonwealth contractors with up to two years jail if they disclose government information in breach of confidentiality obligations.[86] The offence applies regardless of the seriousness of the disclosure, its impact, the intent of the person or the public interest in the information being in the public domain.

Many of Australia's secrecy laws are not justified. In its 2009 report, the Australian Law Reform Commission recommended a range of reforms to wind back the scope of these laws so that disclosures are only unlawful if they harm certain essential public interests.[87]

Instead of acting on these recommendations to limit secrecy, the Abbott Government has moved in the opposite direction by intensifying it, particularly in the areas of immigration and national security.

In 2013, the Australian Government, under its Operation Sovereign Borders policy, commenced a new practice of withholding information about asylum seekers that previous governments had routinely released. Then Prime Minister Abbott defended the policy against criticism, likening the situation to a war with people smugglers.[89]

The Australian Government is deliberately expanding secrecy at the very same time as it adopts increasingly radical responses to the arrival of asylum seekers by boats with consequent widespread human rights violations including death, allegations of torture, arbitrary and indefinite detention of children and more.[90]

Since the current Australian Government was elected in 2013, no journalists have been permitted to visit detention centres in Australia.[91] The only time journalists have been permitted to visit the Australian-run detention centre on Manus Island, Papua New Guinea, was when the National Court of Papua New Guinea

Families detained in secret on the high seas

In June 2014, then Immigration Minister Scott Morrison refused to confirm the existence of a boat carrying people seeking asylum that had been approaching Christmas Island. When asked about the developments in a press conference, the Minister said:

> *I am not confirming any of these matters. This should come as no surprise to you. This has been our practice now for the entire period of this operation. This is another day at the office for Operation Sovereign Borders.*[99]

It was later revealed that Australian Navy and Customs vessels had in fact intercepted the boat and the 157 Sri Lankan Tamil asylum seekers on board, including 50 children, were being detained incommunicado on the high seas. It was not until a High Court case was commenced over a week later, that the Government finally admitted that the people were being detained, but still refused to say where they were or where they were being taken.[100]

ordered that journalists be given temporary access.[92] Nauru introduced a non-refundable $8,000 visa fee for foreign journalists to limit access to Australian-run immigration processing facilities in Nauru. The Nauruan government told Al Jazeera it would reject all visa applications from foreign journalists.[93] However, *The Australian*'s Chris Kenny, a former Liberal party adviser and an avowed "strong supporter" of offshore detention, was the first foreign journalist allowed to visit the island in over two years.[94] Kenny has refused to say whether or not he was required to pay the $8,000 visa fee.

Access to the Australian immigration detention facilities on PNG and Nauru has also been denied or restricted for a range of human rights groups,[95] the Australian Human Rights Commission[96] and UN experts.[97]

The Government has continued to refuse to provide basic information to the Australian public about matters of intense and legitimate public interest, including when and in what circumstances Australian officials turn back asylum seeker boats at sea, return refugees to countries from which they have fled or pay people smugglers to return asylum seekers to Indonesia.[98]

Border Force Act

In 2015, the Australian Government expanded the nation's secrecy laws when it passed the controversial *Border Force Act*.[101] The legislation makes it unlawful for a Department of Immigration and Border Protection employee or contractor, such as a doctor or welfare services provider, to disclose or record certain information obtained by them in that capacity. The penalty is up to two years jail.

The laws create significant barriers to whistleblowing on human rights abuses and misconduct in immigration detention. Further, while the offence itself is directed at Commonwealth officials and contractors, related provisions threaten journalists, human rights advocates and others who aid, abet, counsel or procure the unlawful disclosure by a Commonwealth official or contractor.[102]

The *Border Force Act* has sparked significant protests, particularly from medical staff who publicly wrote to the Prime Minister stating that "standing by and watching sub-standard and harmful care, child abuse and gross violations of human rights is not ethically justifiable."[103] Doctors are bound by professional duties to their patients and ethical rules not to countenance or participate in cruel, inhuman or degrading procedures, which may directly conflict with the secrecy restrictions imposed on them.[104] The Australian Medical Association says that medical practitioners should be able to speak out about unjust, unethical maltreatment of asylum seekers without persecution and doctors have a duty to speak out if health care services or the environment in immigration detention are inadequate or pose a threat to health.[105]

There are exemptions for disclosures that are necessary to prevent or lessen a serious threat to life or health

Hypothetical: Filming immigration detainees in the shower

An Australian doctor or guard working for the Australian Government or their contractor on Nauru observes the detention centre guards covertly filming immigration detainees while they have a shower. If the doctor or guard disclosed the information to the public, she would potentially face a jail term under both the *Crimes Act* and the *Border Force Act*. Under the *Border Force Act*, the defence of disclosing a matter that is a "serious threat to the life or health of an individual" may not apply, notwithstanding that the filming of detainees was a gross invasion of personal privacy. Similarly, protection under *Public Interest Disclosure Act* would not be assured as national security might be invoked to justify the suppression of the allegations. Further, if the matter was not an "imminent danger to health and safety," the doctor or guard would have to raise the matter internally first (which may take months to resolve), rather than disclose the matter publicly in the hope of securing a prompt end to the abuse.

of a person, or that are required by law,[106] and other limited protections provided in the *Public Interest Disclosure Act* (see below). However, the complexity of the laws, the severity of the penalty and the extremely hostile attitude of the Australian Government to whistleblowing, means many potential whistleblowers will not take the risk of disclosing.

The suffocating culture of secrecy was highlighted in September 2015, when a UN expert investigator cancelled his visit to Australia because the Australian Government refused to provide him with assurances that people who spoke with him would not risk prosecution under the *Border Force Act*.[107] The cancellation was unprecedented for a Western democracy and places Australia among the likes of The Gambia and Bahrain in having UN visits aborted due to a lack of government cooperation.

ASIO secrecy provisions

Secrecy laws were also expanded in the area of national security when the Australian Parliament passed section 35P of the *Australian Special Intelligence Operation Act*[108] which prohibits disclosure of information relating to an ASIO "special intelligence operation" – operations where ASIO agents are granted legal immunity for engaging in a range of otherwise criminal conduct. Penalties for disclosure range from a maximum of five years to up to ten years in jail in certain circumstances.

This new provision is concerning for a range of reasons. First, without confirmation from ASIO, it is extremely difficult for a journalist to know whether an ASIO operation is a special intelligence operation. Secondly, the provision will likely lead to self-censorship by the media. Given the provision criminalises both intentional and reckless disclosure, and the serious penalties that apply, journalists are likely to take a conservative approach to publication and avoid legitimate reporting of ASIO's activities for fear of falling foul of the offence.[110] Finally, the whistleblower protections in the *Public Interest Disclosure Act* are very unlikely to apply given the extensive carve-outs for intelligence agencies.

The new laws were strongly opposed by many groups including all the major news organisations.[111] While the Government claimed that the section 35P secrecy provision was necessary to protect national security,[112] the Parliamentary Joint Committee on Human Rights concluded it was not a reasonable, necessary and proportionate limitation on the right to freedom of expression and would potentially stifle public reporting and scrutiny of ASIO's activities.[113]

Under international law, national security must not be used as an excuse to prosecute journalists, researchers, environmental activists or human rights defenders who disseminate information in the public interest, if that information does not in fact harm or genuinely threaten national security.[114]

Attacks on whistleblowers

The impact of these expanded secrecy laws and practices has been compounded by a combination of inadequate whisteblower protections, an increasingly hostile government attitude to whistleblowers and new metadata laws which make it easier to identify and prosecute whistleblowers.

Effective public interest journalism and open government relies on whistleblowers – insiders who reveal wrongdoing inside government or other organisations. As Paul Murphy, Chief Executive Officer of MEAA, has stated:

> "Whistleblowers turn to journalists to help expose misconduct, illegality, fraud, threats to health and safety, and corruption. Our communities are the better for their courageous efforts to ensure the public's right to know. If the identity of whistleblowers can be revealed then that has a chilling effect on public interest journalism; sources needing anonymity cannot rely on their contact with a journalist being kept secret. When that happens, we all lose..."[115]

The more government withholds information, the more important whistleblowers become to ensuring transparency on matters of public interest.

There a numerous examples highlighting the public interest in whistleblowing. In 2003, Independent MP Andrew Wilkie, then working as an intelligence officer with the Office of National Assessment, blew the whistle on the inadequate intelligence used to support Australia's decision to go to war in Iraq. Although his warnings were not heeded, Wilkie's disclosures provided the public with the opportunity to know that decisions about going to war were being made based on false claims about Iraq's weapons of mass destruction.[116] Other whistleblowers have exposed police misconduct,[117] corruption,[118] dangerously inadequate clean-up of nuclear waste,[119] the medical malpractice of surgeons,[120] and cruel treatment of asylum seekers in immigration detention.[121]

Despite the importance of whistleblowing to Australian democracy, people who might blow the whistle on misconduct in Australia face significant risks of reprisals.

Inadequate legal protection

Whistleblowers are not adequately protected in Australian law. While the *Public Interest Disclosure Act*[122] was a step in the right direction, to receive protection under the legislation, whistleblowers are required to follow strict and complex statutory procedures that create high barriers to people making a disclosure – especially given the potentially harsh criminal consequences if the person gets it wrong.

The Act protects Commonwealth officials or contractors from prosecution for breach of secrecy laws if they disclose information about certain types of unlawful, unjust, fraudulent or unsafe conduct. However the protection only applies if:

- the information has first been disclosed internally within the relevant agency;
- an internal investigation was either not completed in 90 days, was inadequate or resulted in an inadequate response;
- the disclosure is not, on balance, contrary to the public interest;
- the disclosure is limited to that which is reasonably necessary to identify the conduct; and
- the information isn't "intelligence information" (which is defined very broadly and includes certain law enforcement information) or information about an intelligence agency such as ASIO.

Further, the laws potentially allow a minister to stymie disclosure because where a minister is "taking action" in response to an internal disclosure, the response of the internal investigation cannot be considered inadequate, meaning the would-be whistleblower could be indefinitely deprived of protection under the laws.

Reprisals against people who blow the whistle on government misconduct

The lack of legal protection for whistleblowers has been compounded by the Australian Government responding to whistleblowing with increasingly aggressive, punitive and intimidating tactics.

The Australian Government has referred a range of media outlets reporting on its asylum seeker policies to the Federal Police in an attempt to uncover their sources and to investigate and potentially prosecute the whistleblowers involved.[123] *The Guardian's* Paul Farrell commented:

> "This is a move that should alarm all citizens. It's not an attack on any particular news outlet. It's an attack on those who have reported on matters of significant public interest in the increasingly secretive area of asylum seeker policy ... These kind of attacks severely damage the confidence between reporters and their sources and pose a grave threat to effective and responsible journalism. When the federal police go knocking on the doors of a reporter's sources, sources will soon dry up. People will be scared. And that is exactly the point."[124]

HUMAN RIGHTS LAW CENTRE: DANIEL WEBB

The Australian Government also engaged in reprisals against immigration detention contractors after allegations were made of sexual assault and abuse against asylum seekers including children in the Australian-run detention centre on Nauru. Then Immigration Minister Scott Morrison responded by claiming that the allegations "may have been fabricated as part of an orchestrated campaign, involving service provider staff."[125] The Minister directed his allegations at the staff of the NGO Save the Children. Ten of its staff were ordered to leave Nauru and the story that they had coached self-harm to asylum seekers was leaked to *The Daily Telegraph*.[126] Minister Morrison added that "[m]aking false claims" and "allegedly coaching self-harm and using children in protests is completely unacceptable."[127] Subsequent inquiries commissioned by the Government later cleared the workers of any misconduct[128] but the damage had been done not only to the individuals involved but to future would-be whistleblowers.[129]

The intimidation of whistleblowers has not been limited to immigration detention. The Australian Government referred a whistleblower and a lawyer to the Federal Police over the disclosure of revelations that the Australian Government spied on the East Timorese Government during oil and gas negotiations.[130]

Exposing whistleblowers through metadata access

The risk of reprisals for whistleblowers increased further when the Australian Parliament passed new metadata retention laws in March 2015.[131] The laws compel telecommunications service providers to retain massive amounts of personal metadata for two years[132] and aim to give law enforcement agencies "an irrefutable method of tracing all telecommunications from end to end" and to "prove that two or more people communicated at a particular time."[133]

When Labor introduced similar laws, then shadow Communications Minister Malcolm Turnbull described them as a "sweeping and intrusive new power" which would have a "chilling effect on free speech."[134] He was right.

The ability of journalists to protect their confidential sources is a fundamental part of our democratic system and freedom of the press. As *The Australian's* Associate Editor, Cameron Stewart, has said, confidentiality "allows whistleblowers to come forth without fear and empowers the media to carry out their role of keeping governments and institutions accountable by exposing corruption, waste and incompetence."[135]

The retention of metadata enables governments to trace a whistleblower who has spoken to journalists and prosecute them for breaching secrecy laws.[136] Veteran journalist Laurie Oakes called the metadata threat to journalists and their sources "the great press freedom issue of the internet age", saying: "It's clear in retrospect we should have been alarmed and tried to get protection for sources much, much earlier."[137] The aggressive attitude towards whistleblowers means that governments "now hunt down those leakers with zeal and this means that metadata is their friend."[138]

Law enforcement agencies must obtain a warrant to access a journalist's metadata. However, the process for obtaining a warrant will be conducted in secret, without the journalist or their media organisation ever knowing or having a chance to respond. Instead, any public interest arguments against the granting of the warrant will be put by an advocate appointed by the government. It is also an offence with a jail term of up to two years for a person to disclose information about the existence of such a warrant or related warrant application process.

Further, in many cases it will be possible for a law enforcement agency to find a journalists' source without needing a warrant. They will simply access the suspected whistleblower's metadata, rather than accessing the metadata of the journalist they are suspected of speaking to.[139] As Bernard Keane observes:

> "The threat arises from the existence and maintenance of data. That creates the chilling effect. You don't need a warrant to investigate a journalist if the agency can access the data of the whole department that the leak came from."[140]

The whole metadata regime completely undermines the effectiveness of shield laws which are meant to prevent journalists from being forced to reveal their sources and which recognise the public interest in doing so.[141] Metadata laws give law enforcement agencies the tools to expose and potentially prosecute those sources without involving the journalist.

The Media Entertainment and Arts Alliance, the journalists' union, has described these national security law changes as "the greatest assault on press freedom in peacetime."[142]

Other issues

The issues outlined above represent some of the most concerning attacks on press freedom in Australia in recent months. There are a wide range of other issues where Australia has regressed in this area including:

- increasing reliance on "national security" and "practical refusal" exemptions to resist freedom of information applications as well as routine non-compliance with legislative deadlines for such applications;[143]
- the dismantling of the Office of the Information Privacy Commissioner, the freedom of information and privacy watchdog;[144] and
- attacks on the funding and editorial independence of the ABC.[145]

76. Media, Entertainment and Arts Alliance, *Going after Whistleblowers, Going after Journalism: The Report into the State of Press Freedom in Australia in 2015,* 14, available at https://www.alliance.org.au/documents/Press_Freedom_Report_2015_Going_after_whistleblowers_going_after_journalism.pdf (accessed 1 February 2016).
77. Malcolm Turnbull, "Tribute to war correspondents," Speech delivered at the Australian War Memorial, 23 September 2015, available at http://www.malcolmturnbull.com.au/media/tribute-to-war-correspondents (accessed 1 February 2016).
78. Australian Press Council, *Charter for a Free Press in Australia,* available at www.presscouncil.org.au/charter-of-press-freedom/ (accessed 1 February 2016).
79. *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19(2).
80. Human Rights Committee, *General Comment No 34 - Article 19: Freedoms of Opinion and Expression*, 102nd sess, CCPR/C/GC/34, 12 September 2011, [15], [16], [20].
81. *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19(3).
82. *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 571.
83. See, Office of the Australian Information Commissioner, *Principles on Open Public Sector Information*, 2011 available at https://www.oaic.gov.au/information-policy/information-policy-resources/principles-on-open-public-sector-information (accessed 1 February 2016) and Open Government Partnership, *Open Government Declaration*, available at http://www.opengovpartnership.org/about/open-government-declaration (accessed 1 February 2016).
84. Australian Government, *Declaration of Open Government*, 24 October 2013, available at http://www.finance.gov.au/policy-guides-procurement/declaration-of-open-government/ (accessed 1 February 2016).
85. In its 2009 report, the Australian Law Reform Commission identified 506 secrecy provisions in 176 pieces of legislation, with many of the provisions creating criminal offences for breaches: Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009).
86. Section 70 of the *Crimes Act 1914* (Cth).
87. Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009).
88. See Department of Immigration and Border Protection, "Operation Sovereign Borders Update", Press Conference, 18 October 2013, available at http://newsroom.border.gov.au/releases/minister-for-immigration-and-border-protection-and-commander-of-operation-sovereign-borders-joint-agency-task-force-address-press-conference-on-operation-sovereign-borders-2 (accessed 1 February 2016).
89. ABC News, "Prime Minister Tony Abbott likens campaign against people smugglers to 'war'," *ABC News Online*, 4 February 2014, available at http://www.abc.net.au/news/2014-01-10/abbott-likens-campaign-against-people-smugglers-to-war/5193546.
90. See generally Human Rights Watch, *Australia: Events of 2015*, January 2015, available at https://www.hrw.org/world-report/2016/country-chapters/australia, accessed 1 February 2016.
91. Media, Entertainment and Arts Alliance, *Going after Whistleblowers, Going after Journalism: The Report into the State of Press Freedom in Australia in 2015,* 38, available at https://www.alliance.org.au/documents/Press_Freedom_Report_2015_Going_after_whistleblowers_going_after_journalism.pdf (accessed 1 February 2016).
92. ABC, "ABC journalist to be allowed inside Manus detention centre," *Radio Australia,* 21 March 2014, available at http://www.radioaustralia.net.au/international/radio/program/pacific-beat/abc-journalist-to-be-allowed-inside-manus-detention-centre/1282928 (accessed 1 February 2016).
93. "Nauru government bans all media visits from country," Al- Jazeera, 9 October 2015, available at http://www.aljazeera.com/news/2015/10/nauru-government-refuses-media-visa-applications-151009043225083.html (accessed 1 February 2016).
94. Ben Doherty, "This is Abyan's story, and it is Australia's story," *The Guardian,* 28 October 2015, available at http://www.theguardian.com/australia-news/2015/oct/28/this-is-abyans-story-and-it-is-australias-story (accessed 1 February 2016).
95. See Human Rights Watch, Statement, "It's been two years since Manus Island Re-opened. Not a single refugee has been resettled," 20 July 2015, available at https://www.hrw.org/news/2015/07/20/its-been-two-years-manus-island-re-opened-not-single-refugee-has-been-resettled (accessed 1 February 2016).
96. Bianca Hall, "Human rights chief warned off islands visit," 5 March 2013, *Sydney Morning Herald*, available at http://www.smh.com.au/federal-politics/political-news/human-rights-chief-warned-off-islands-visit-20130304-2fgy9.html (accessed 1 February 2016).
97. Lisa Cox and Sarah Whyte, "UN investigators denied access to Nauru detention centre," 9 April 2014, available at http://www.smh.com.au/federal-politics/political-news/un-investigators-denied-access-to-nauru-detention-centre-20140409-zqspk.html (accessed 1 February 2016).
98. Adam Gartrell, "Tony Abbott comes close to admitting people smuggler payments," *Sydney Morning Herald,* 20 June 2015, available at http://www.smh.com.au/federal-politics/political-news/tony-abbott-comes-close-to-admitting-people-smuggler-payments-20150620-ght1kl.html (accessed 1 February 2016) .
99. See Annabel Crabb, "Scott Morrison interview takes on Pythonesque proportions," *Sydney Morning Herald*, 6 July 2014, available at http://www.smh.com.au/federal-politics/political-opinion/scott-morrison-interview-takes-on-pythonesque-proportions-20140704-zsw9n.html (accessed 1 February 2016).
100. Mark Dunn, "High Court documents state asylum boat carrying 157 was disabled by fire," *Herald Sun,* 22 July 2014, available at http://www.heraldsun.com.au/news/high-court-documents-state-asylum-boat-carrying-157-was-disabled-by-fire/news-story/89fe58da9a586d7031435b928fb892cb?sv=2505a472225bda5a7333d23d0ab6136c (accessed 1 February 2016).
101. *Australian Border Force Act 2015* (Cth).
102. Section 11.2 *Criminal Code Act 1995* (Cth) – there are also conspiracy, incitement and other provisions extending criminal liability to other people involved in committing an offence.
103. Jane Lee, "Detention centre doctors, workers dare government to prosecute them over new laws," *Sydney Morning Herald*, 1 July 2015, available at http://www.smh.com.au/federal-politics/political-news/detention-centre-doctors-workers-dare-government-to-prosecute-them-over-new-laws-20150701-gi24pr.html (accessed 1 February 2016).
104. See Australian Medical Association, *AMA Code of Ethics 2004. Editorially revised 2006*, available at https://ama.com.au/position-statement/ama-code-ethics-2004-editorially-revised-2006 (accessed 1 February 2016).
105. Australian Medical Association Position Statement, *Health Care of Asylum Seekers and Refugees*, 2011. Revised 2015.
106. The offence does not apply to disclosures authorised by a State or Federal law (such as the public interest disclosure legislation discussed above) or in circumstances where the person reasonably believes that the disclosure is necessary to prevent or lessen a serious threat to the life or health of an individual (for which the whistleblower bears the burden of proof) and the

disclosure is for the purposes of preventing or lessening that threat: See sections 42 and 48 of the *Australian Border Force Act 2015* (Cth).

107. Francois Crepeau, Statement, "Migrants / Human rights: Official visit to Australia postponed due to protection concerns," 25 September 2015, available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16503&LangID=E (accessed 1 February 2016).

108. The *National Security Legislation Amendment Act (No 1) 2014* (Cth), passed on 1 October 2014, introduced the two new offences.

109. Section 35K of the *Australian Special Intelligence Operation Act 1979* (Cth).

110. Parliamentary Joint Committee on Human Rights, *16th Report of the 44th Parliament,* October 2014, 56.

111. See the submissions to the Parliamentary Joint Committee on Intelligence and Security's inquiry, September 2014, available at http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/National_Security_Amendment_Bill_2014/Report1 (accessed 1 February 2016).

112. Explanatory Memorandum, *National Security Legislation Amendment Bill (No 1) 2014* (Cth), 22.

113. Parliamentary Joint Committee on Human Rights, *16th Report of the 44th Parliament,* October 2014, 56-57. The Scrutiny of Bills Committee also criticised the drafting of the provisions: Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Twelfth Report of 2014.*

114. Human Rights Committee, *General Comment No 34 - Article 19: Freedoms of Opinion and Expression*, 102nd sess, CCPR/C/GC/34, 12 September 2011, [30].

115. Media, Entertainment and Arts Alliance, *Going after Whistleblowers, Going after Journalism: The Report into the State of Press Freedom in Australia in 2015,* 2, available at https://www.alliance.org.au/documents/Press_Freedom_Report_2015_Going_after_whistleblowers_going_after_journalism.pdf (accessed 1 February 2016).

116. Brian Martin, "Bucking the System: Andrew Wilkie and the Difficult Task of the Whistleblower" (2005) 180 *Overland* 45.

117. Yu Shu Lipski was an interpreter at Dandenong Police Station who provided insight into the fatal neglect of Mr Gong Lin Tang in custody. See Liberty Victoria, Statement, "Interpreter whistleblower takes Voltaire Award 2014," 26 June 2014, available at https://libertyvictoria.org.au/VoltaireAward2014 (accessed 1 February 2016).

118. See for example, Megan Palin, "AFP whistle blower's explosive claims of mass murder, rape and corruption," *News.com.au*, 23 November 2015, available at http://www.news.com.au/national/crime/afp-whistle-blowers-explosive-claims-of-mass-murder-rape-and-corruption/news-story/0133a6b654afb765becd0b1676445f79 (accessed 1 February 2016).

119. Alan Parkinson was the mechanical and nuclear engineer that exposed the inadequate clean-up of the British nuclear test sight at Maralinga, South Australia.

120. Toni Hoffman is the nurse that exposed the medical malpractice of surgeon Jayant Patel.

121. Lexi Metherell, "Immigration detention psychiatrist Dr Peter Young says treatment of asylum seekers akin to torture," *ABC News*, 6 August 2014, available at http://www.abc.net.au/news/2014-08-05/psychiatrist-says-treatment-of-asylum-seekers-akin-to-torture/5650992 (accessed 1 February 2016).

122. *Public Interest Disclosure Act 2013* (Cth).

123. See Nicole Hasham, "Federal Government asks the Australian Federal Police to find Nauru whistleblowers," *Sydney Morning Herald*, 5 October 2015, available at http://www.smh.com.au/federal-politics/political-news/federal-government-asks-australian-federal-police-to-find-nauru-whistleblowers-20150930-gjyj0i.html (accessed 1 February 2016); Paul Farrell, "Journalists reporting on asylum seekers referred to Australian Police," *The Guardian,* 22 January 2015, available at http://www.theguardian.com/australia-news/2015/jan/22/journalists-reporting-on-asylum-seekers-referred-to-australian-police (accessed 1 February 2016).

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125. Nick Feik, "Scott Morrison's response to claims of refugees' molestation, self-harm is immoral, unjust," *Sydney Morning Herald*, 21 November 2014, available at http://www.smh.com.au/comment/scott-morrisons-response-to-claims-of-refugees-molestation-selfharm-is-immoral-unjust-20141119-11q8bo.html#ixzz3pvYZ8r2V (accessed 1 February 2016).

126. Samantha Donovan, "Save the Children denies it's orchestrating self-harm," *ABC News*, 3 October 2014, available at http://www.abc.net.au/pm/content/2014/s4100214.htm (accessed 1 February 2016).

127. Ibid.

128. Philip Moss, *Review into recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru*, 6 February 2015, 6.

129. See Adam Morton, "Save the Children staff accused and deported from Nauru demand an explanation," *Sydney Morning Herald,* 4 October 2015, available at http://www.smh.com.au/federal-politics/political-news/save-the-children-staff-accused-and-deported-from-nauru-demand-an-explanation-20151002-gk0g64.html (accessed 1 February 2016).

130. Tom Allard, "Government wants East Timor spy charged," *Sydney Morning Herald,* 31 August 2014, available at http://www.smh.com.au/federal-politics/political-news/government-wants-east-timor-spy-charged-20140831-10aoad.html (accessed 1 February 2016).

131. *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2014* (Cth).

132. Metadata is data which provides information about electronic communications. It isn't the content of phone calls, text messages or emails but rather data about those communications that allow others to determine where a person has been and who they have been communicating with, when, how and for how long.

133. Explanatory Memorandum, *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2014* (Cth), 5-6.

134. See Malcolm Turnbull, "Free at last! Or freedom lost? Liberty in the digital age," Speech delivered at the University of Melbourne, 12 October 2012, available at http://www.malcolmturnbull.com.au/media/free-at-last-or-freedom-lost-liberty-in-the-digital-age-2012-alfred-deakin (accessed 1 February 2016).

135. Cameron Stewart, "Metadata laws an uneasy compromise on press freedom," *The Australian*, 21 March 2015 available at http://www.theaustralian.com.au/opinion/metadata-laws-an-uneasy-compromise-on-press-freedom/news-story/937760417575e1344711d14b581baaac (accessed 1 February 2016).

136. Ibid.

137. Laurie Oakes, Speech delivered at the Melbourne Press Club, 27 September 2015, http://www.melbournepressclub.com/wp-content/uploads/2015/09/150925_Melbourne_Press_Freedom_Dinner_Oakes_speech.pdf (accessed 1 February 2016).

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140. Interview with Bernard Keane, 9 July 2015.

141. See for example *Evidence Amendment (Journalists' Privilege) Act 2011* (Cth).

142. Media, Entertainment and Arts Alliance, *Going after Whistleblowers, Going after Journalism: The Report into the State of Press Freedom in Australia in 2015,* 14, available at https://www.alliance.org.au/documents/Press_Freedom_Report_2015_Going_after_whistleblowers_going_after_journalism.pdf (accessed 1 February 2016).

143. See for example, Office of the Australian Information Commissioner, *Annual Report 2014-15*, Chapter 7. The UN's *Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information*, U.N. Doc. E/CN.4/1996/39 (1996) outline the limited circumstances in which national security can be relied on to justify restricting freedom of expression or information.

144. Richard Mulgan, "How the FOI watchdog was starved to death," *Canberra Times,* 3 June 2014, available at http://www.canberratimes.com.au/national/public-service/how-the-foi-watchdog-was-starved-to-death-20140601-39ckf.html (accessed 1 February 2016).

145. Quentin Dempster, "Abbott's assault on the ABC," *The Saturday Paper*, 19 April 2014, available at https://www.thesaturdaypaper.com.au/opinion/topic/2014/04/19/abbotts-assault-the-abc/1397829600 (accessed 1 February 2016); David Salter, "Forget Q&A: the ABC is likely to surrender its independence, and Media Watch is next," *Crikey,* 6 August 2015, available at http://www.crikey.com.au/2015/08/06/forget-qa-the-abc-is-likely-to-surrender-its-independence-and-media-watch-is-next/ (accessed 1 February 2016).

4 Attacks on the Australian Human Rights Commission

Chapter at a glance

Independent commissions and agencies provide important accountability mechanisms for government. To be effective, they should be properly mandated and resourced and free from political interference. Yet there is often a tension between governments and the watchdogs that hold them to account.

The Australian Human Rights Commission is the nation's human rights watchdog. It performs a vital role in identifying and reporting on significant human rights violations such as the Stolen Generations and the treatment of women in the Australian Defence Force.

In 2014, when the Commission commenced an inquiry into the politically sensitive issue of the treatment of children in immigration detention, it triggered a series of unprecedented attacks.

The Australian Government cut the Commission's funding by around 30 percent, the then Prime Minister and senior ministers personally attacked the Commission's President and the Attorney-General sought to procure her resignation.

The Government is ignoring open, merit-based selection processes in appointing Commissioners.

These attacks undermine a vital institution that provides an important check on government power and echo similar attacks on other watchdog organisations.

The Australian Human Rights Commission's role

The Australian Human Rights Commission is Australia's national human rights institution.

Federal legislation sets out the Commission's functions which include resolving human rights complaints, encouraging human rights-consistent law reform and building a shared awareness of rights and freedoms throughout Australia.[146] The Commission investigates and conciliates complaints of alleged discrimination and other human rights breaches.[147] It undertakes public education and conducts major inquiries into human rights issues of national significance, such as its Stolen Generations inquiry into previous government policies of forced removal of Aboriginal children from their families and its review of the treatment of women in the Australian Defence Force.[148]

If the Commission does its job properly, there will necessarily be times when it criticises government policy and inquires into human rights issues that are uncomfortable for government. Accordingly, a proper mandate, adequate resources and independence from government are critical to the Commission's ability to perform its role. Australia led a UN resolution last year which emphasized the importance of making sure that institutions like the Commission:

> "should not face any form of reprisal or intimidation, including political pressure, physical intimidation, harassment or unjustifiable budgetary limitations, as a result of activities undertaken in accordance with their respective mandates, including when taking up individual cases or when reporting on serious or systematic violations in their countries."[149]

Hand-picked Commissioners and funding cuts

An open, merit-based selection process for Commissioners is an important means of ensuring the independence of the Commission. Shortly after taking office in December 2013, however, the new Abbott Government appointed Tim Wilson to the vacant Human Rights Commissioner position with no open or transparent process whatsoever. The Attorney-General reportedly hand-picked Mr Wilson for the role.[150] Immediately prior to his appointment, Mr Wilson was a Liberal Party member who worked for the Institute of Public Affairs, a free market liberal think tank that had called for the abolition of the Commission.[151] There is nothing wrong with governments appointing members of political parties to the Commission, provided there is a proper process ensuring they are the best person for the job. The absence of this process undermines the independence and public confidence in the Commission.[152]

A much improved, but still flawed, process was adopted to fill the Sex Discrimination Commissioner position after the Prime Minister intervened.[153]

Funding is similarly critical to the Commission's ability to perform its role. In May 2014, however, the Australian Government announced funding cuts of $1.7 million over four years to the Commission.[154] These cuts resulted in the non-renewal of Graeme Innes's position as the full-time Disability Discrimination Commissioner. In opposition, Attorney-General George Brandis had publicly criticised Mr Innes for his advocacy on behalf of people with a disability and expressed his concern that "an ideological culture has developed within the Human Rights Commission."[155] Susan Ryan, the Age Discrimination Commissioner, has been required to perform both her original role and Disability Discrimination Commissioner, effectively reducing both roles to part-time.

Unprecedented political attacks

The Government's attacks on the Commission dramatically escalated in response to the Commission's inquiry into the politically sensitive issue of the harm being inflicted on children in immigration detention. The Commission's report, which was highly critical of the policies of successive governments, was delivered to the Government in October 2014 but was not publicly released by the Government until February 2015.

After receiving the report, the Government launched a series of unprecedented attacks on the Commission and its President.

First, in December 2014, the Government announced additional severe funding cuts to the Commission of around 30 percent over three years.[156] Then, Senior ministers personally attacked the Commission's President, Professor Gillian Triggs, publicly questioning her integrity, impartiality and judgement.[157] In January 2015, the Attorney-General sought to procure Professor Triggs' resignation by "facilitating an offer of an alternative role."[158]

Finally, when the report was made public, instead of responding to its findings and recommendations, the Government attacked the Commission with then Prime

Minister Tony Abbott condemning the report as a "blatantly partisan exercise", saying that the Commission "ought to be ashamed of itself."[159]

These attacks on the Commission and its President drew serious criticism from within Australia and abroad, including from former Prime Minister the late Malcolm Fraser.[160] United Nations bodies expressed "grave concern" that the attacks intimidate and undermine the independence of the Commission[161] and urged Australia to halt these attacks.[162] In June 2015 however, the attacks continued with the Immigration Minister labelling comments by Professor Triggs "complete disgrace" and urged her to consider resigning.[163]

Ensuring the Commission's effectiveness

In contrast to its domestic actions, on the international stage, Australia plays an important role promoting and strengthening institutions like the Australian Human Rights Commission, known internationally as National Human Rights Institutions (NHRIs). This includes leading United Nations work promoting compliance with the agreed minimum standards for NHRIs set out in the *Principles Relating to the Status and Functioning of National Institutions* (Paris Principles).[164]

The Paris Principles emphasise the need for financial and administrative independence for NHRIs and highlight the importance of a clear, transparent and participatory appointment process for NHRI members under the control of an independent, credible body to ensure independence, effectiveness and public confidence in the institution.[165]

Compliance with the Paris Principles provides the starting point for the Australian Government to ensure the Australian Human Rights Commission's independence and effectiveness as the nation's state-appointed human rights watchdog. The recent announcement that promoting NHRIs will be a key pillar in Australia's bid for a seat on the UN Human Rights Council in 2018, combined with the change in Prime Minister, provides an opportunity to recast the Government's relationship with the Commission and restore Australia's domestic and international credibility on this issue.

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Other institutions

Aspects of the treatment of the Commission have been echoed in the way the Australian Government has undermined or abolished other important institutions. In particular we note that:

- The government abolished the Climate Commission which had been established to provide reliable and authoritative information on climate change.[166]
- The government is starving the Office of the Australian Information Commissioner of funds and refusing to fill key vacant positions in this office. The office is the nation's state-appointed freedom of information and privacy watchdog. The government's actions follow its unsuccessful attempts to pass legislation abolishing the agency.[167]
- The government initially threatened abolishing the Independent National Security Legislation Monitor. While the office has received a reprieve, the government is refusing to provide it with the necessary funding to fulfil its mandate of reviewing the operation and effectiveness of Australia's national security legislation.[168]

146. See the Australian Human Rights Commission, *Annual Report 2012-13*, 2, available at https://www.humanrights.gov.au/sites/default/files/document/publication/ahrc_annual_report_2012-13.pdf (accessed 1 February 2016).

147. *Australian Human Rights Commission Act 1986* (Cth); *Age Discrimination Act 2004* (Cth); *Disability Discrimination Act 1992* (Cth); *Racial Discrimination Act 1975* (Cth); and *Sex Discrimination Act 1984* (Cth). Further information about the AHRC is available at https://www.humanrights.gov.au/about-commission-0.

148. Australian Human Rights Commission, *Bringing them home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, May 1997; Australian Human Rights Commission, Review into the Treatment of Women in the Australian Defence Force, 2014.

149. Human Rights Council, *National Institutions for the Promotion and Protection of Human Rights, A/HRC/RES/*27/18,23 September 2014, [9], available at http://daccess-dds-ny.un.org/doc/UNDOC/LTD/G14/169/05/PDF/G1416905.pdf?OpenElement (accessed 1 February 2016).

150. Ben Packham, "Tim Wilson facing clash with Human Rights Commission colleagues over 'Andrew Bolt' race provisions," *The Australian*, 18 December 2013, available at http://www.theaustralian.com.au/national-affairs/tim-wilson-facing-clash-with-human-rights-commission-colleagues-over-andrew-bolt-race-provisions/story-fn59niix-1226785787995 (accessed 1 February 2016); Adam Gartrell, "Tony Abbott's human rights man Tim Wilson racks up $77,000 in expenses," *Sydney Morning Herald*, available at http://www.smh.com.au/federal-politics/political-news/tony-abbotts-human-rights-man-tim-wilson-racks-up-77000-in-expenses-20150702-gi46m3.html (accessed 1 February 2016).

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152. See Hugh de Kretser, "Choices must be seen to be unbiased," *The Australian,* 4 February 2014, available at http://www.theaustralian.com.au/business/legal-affairs/choices-must-be-seen-to-be-unbiased/story-e6frg97x-1226814191519 (accessed 1 February 2016).

153. Judith Ireland, "Kate Jenkins named Australia's new Sex Discrimination Commissioner," *Sydney Morning Herald* 12 February 2016 available at http://www.smh.com.au/federal-politics/political-news/kate-jenkins-named-australias-new-sex-discrimination-commissioner-20160211-gmrhe1.html (accessed 12 February 2016).

154. Australian Government, *Budget: 2014-15 – Part 2: Expense Measures*, available at http://www.budget.gov.au/2014-15/content/bp2/html/bp2_expense-05.htm (accessed 1 February 2016).

155. See Brendan Nicholson, "Brandis lashes Myer 'vendetta'," *The Australian*, 2 July 2013, available at http://www.theaustralian.com.au/business/brandis-lashes-myer-vendetta/story-e6frg8zx-1226672831794 (accessed 1 February 2016).

156. See Rick Morton, "Job cuts pay for child sex funding," *The Australian*, 15 December 2014, available at http://www.theaustralian.com.au/national-affairs/in-depth/royal-commission/job-cuts-pay-for-child-sex-funding/news-story/b7bbba9962870c07aa0a36ef38a055b9?login=1, (accessed 1 February 2016).

157. Patrick Begley, "Gillian Triggs refused to resign in face of 'personal attacks' from Abbott government," *Sydney Morning Herald*, 12 June 2015, available http://www.smh.com.au/federal-politics/political-news/gillian-triggs-refuses-to-resign-in-face-of-personal-attacks-from-abbott-government-20150611-ghm56b.html (accessed 1 February 2016).

158. See Michelle Grattan, "Brandis censured by Senate over Triggs attacks," *The Conversation*, 2 March 2015, available at http://theconversation.com/brandis-censured-by-senate-over-triggs-attacks-38231 (accessed 1 February 2016); Jared Owens, "Police clear George Brandis of Gillian Triggs resign inducement," *The Australian*, 27 May 2015, available at http://www.theaustralian.com.au/national-affairs/police-clear-george-brandis-of-gillian-triggs-resign-inducement/story-fn59niix-1227370367868 (accessed 1 February 2016).

159. See Shalailah Medhora and Ben Doherty, "Tony Abbott calls report on children in detention a 'transparent stitch-up'," *The Guardian*, available at http://www.theguardian.com/australia-news/2015/feb/12/tony-abbott-rejects-report-children-detention-blatantly-political (accessed 1 February 2016).

160. See, for example, Ben Saul, "Attacks on Commission unbefitting our government," *The Drum*, 16 February 2015, available at http://www.abc.net.au/news/2015-02-16/saul-attacks-on-commission-unbefitting-our-government/6115078 (accessed 1 February 2016). See also AM, "Malcolm Fraser criticizes PM over 'bully-boy' response to Human Rights Commission report and president Gillian Triggs," *ABC*, available at http://www.abc.net.au/news/2015-02-14/malcolm-fraser-attacks-abbott-treatment-human-rights-commission/6098920 (accessed 1 February 2016).

161. Letter from Mabedle Mushwana, Chairperson of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, to Prime Minister Tony Abbott, 23 February 2015, available at http://www.ishr.ch/sites/default/files/article/files/the_prime_minister_of_australia.pdf (accessed 1 February 2016).

162. See Michael Gordon, "Revealed: How the UN told Abbott government to back off on Gillian Triggs," *Sydney Morning Herald,* 9 June 2015, available at http://www.smh.com.au/federal-politics/political-news/revealed-how-the-un-told-abbott-government-to-back-off-on-gillian-triggs-20150609-ghk224.html (accessed 1 February 2016).

163. See Daniel Hurst, "Peter Dutton says Gillian Triggs should consider resigning as human rights chief," *The Guardian,* 7 June 2015, available at http://www.theguardian.com/australia-news/2015/jun/07/peter-dutton-says-gillian-triggs-should-consider-resigning-as-human-rights-chief (accessed 1 February 2016).

164. Adopted by General Assembly resolution 48/134 20 December 1993. The principles are available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx (accessed 1 February 2016).

165. See Paris Principles section B.1 and the General Comment from the Sub-Committee on Accreditation of the International Coordinating Committee of National Institutions for the Protection and Promotion of Human Rights (ICC), which sets out the requirements for a Paris Principles compliant appointment process and suggests the criteria for appointment be legislatively based, at p 21, available through http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Pages/default.aspx.

166. Tom Arup, "Abbott shuts down Climate Commission," *Sydney Morning Herald*, 19 September 2013, available at http://www.smh.com.au/federal-politics/political-news/abbott-shuts-down-climate-commission-20130919-2u185.html (accessed 1 February 2016).

167. Richard Mulgan, "How the FOI watchdog was starved to death," *Canberra Times,* 3 June 2014, available at http://www.canberratimes.com.au/national/public-service/how-the-foi-watchdog-was-starved-to-death-20140601-39ckf.html (Accessed 1 February 2016); Richard Mulgan, "The Slow Death of the Office of the Australian Information Commissioner," *Canberra Times*, 1 September 2015, available at http://www.canberratimes.com.au/national/public-service/the-slow-death-of-the-office-of-the-australian-information-commissioner-20150826-gj81dl.html (accessed 1 February 2016).

168. Cameron Stewart, "Terror law monitor swamped but no extra cash coming," *The Australian*, available at http://www.theaustralian.com.au/national-affairs/terror-law-monitor-swamped-but-no-extra-cash-coming/news-story/c2fe8ffc019db6c716610b3664d4a14b (accessed 1 February 2016).

5 Undermining the rule of law

Chapter at a glance

The rule of law is a fundamental component of Australian democracy. The rule of law means that everybody, including the government, is subject to the law, and that people can access courts to ensure that government decisions are made lawfully. Review of government action by courts is a vital accountability mechanism particularly where fundamental rights, like the right to liberty, are at stake.

While both major parties express support for the rule of law, there has been a steady regression in key aspects of the rule of law in Australia.

The Australian Government is seeking to prevent the courts from reviewing critical decisions in the areas of immigration and national security. It is attempting to limit the ability of environmental organisations to enforce environmental laws in court. It is vilifying groups that challenge government decisions in the courts.

Common to these moves is the deliberate intent by government to remove limits on its power. Instead of limiting the ability of organisations and individuals to hold government accountable in the courts, we should be expanding it.

The rule of law

The rule of law, in its most basic form, is the principle that no one is above the law. While there are many definitions of the rule of law, there are common principles that underpin them. The World Justice Project's definition refers to a legal system where the following four universal principles are upheld:

- the government and its officials and agents as well as individuals and private entities are accountable under the law;
- the laws are clear, publicized, stable and just; are applied evenly; and protect fundamental rights including the security of persons and property;
- the process by which the laws are enacted, administered and enforced is accessible, fair and efficient; and
- justice is delivered in a timely way by competent, ethical and independent representatives who are of sufficient number, have adequate resources and reflect the make-up of the communities they serve.[169]

The rule of law prohibits arbitrary or discretionary decision-making by the executive or Parliament if that power should properly be exercised by the courts.[170] It demands the availability of court review of administrative action to safeguard the legality of that action.[171]

The rule of law is critical to the success of Australia's democracy. The High Court of Australia has described it as a bedrock principle of Australian democracy and an "assumption" on which our Constitution rests.[172]

Despite this, and despite both major political parties expressing support for the rule of law,[173] fundamental tenets of the rule of law such as access to courts, judicial review, separation of powers and equal treatment before the law are increasingly being threatened, particularly in the areas of immigration, national security and environmental protection.

Australia's regression in this regard has featured laws that seek to prevent the courts from reviewing politically sensitive executive decisions, attempts to limit the ability of environmental organisations to access the courts to review government decisions and efforts by government to vilify organisations that challenge government decisions in the courts. Common to these moves is the deliberate effort by government, with the support of an increasingly compliant parliament, to remove limits on its power.

Removing court oversight of government decisions

Governments are increasingly seeking to limit courts' powers to review the legality of government action, particularly in the areas of immigration detention and national security and with the acquiescence of parliament.[174] This is occurring at the same time as governments are intensifying their secrecy and extending their own powers to limit people's rights in these areas, making court review in these areas even more important.

Australia's migration legislation is littered with legal devices which seek to limit the ability of people to bring court action challenging government decisions that affect their fundamental rights, including rights to liberty and rights not to be returned to a place where may face persecution and torture. These devices include "privative" clauses, which seek to oust the jurisdiction of "any court" from reviewing decisions[175] and the vesting the minister with personal non-compellable discretions to exercise powers.[176]

The extent of power granted to the Immigration Minister to make critical decisions over people's lives is so extreme that in 2008, then Immigration Minister Chris Evans told a Senate Committee:

> "I have formed the view that I have too much power. I think the Migration Act is unlike any other act I have seen in terms of the power given to the minister to make decisions about individual cases. I am uncomfortable with that, not just because of concern about playing God, but also because of the lack of transparency and accountability for those decisions and the lack in some cases of any appeal rights against those decisions."[177]

Instead of moving to restrict those powers, successive Australian Governments have sought to increase them. Most recently in 2014, the Australian Parliament dramatically increased the Immigration Minister's powers in relation to matters at sea, including the power to turn back boats and detain people, whilst at the same time cutting the court oversight of those powers.[178] The rules of natural justice do not apply and courts cannot scrutinize the legality of "decisions relating to operational matters."[180]

Separately, the Australian Government is seeking to grant officers in immigration detention centres an immunity from criminal and civil liability where they exercise "reasonable force" so long as it was exercised "in good faith."[181] This undermines the rule of

law principle that requires that the courts enforce the criminal law against agents of the executive just as they would against ordinary citizens.[182] In 2014, new laws also ousted the possibility of seeking court review of administrative decisions to suspend the passports of people suspected of engaging in "conduct that might prejudice the security of Australia or a foreign country."[183]

In the counter-terrorism context, the traditional role of courts overseeing decisions to remove liberty has been usurped by laws allowing senior Australian Federal Police members to order the "preventative" detention orders of people for up to 48 hours.[184] In contrast, under Victoria's counter-terrorism laws only the Supreme Court can make preventative detention orders and the reasons for orders are publicly available.[185] In 2012, the Administrative Review Council recommended allowing judicial oversight of these preventative detention decisions.[186]

In 2015, the Australian Government's power to cancel the citizenship of dual citizens was extended without adequate safeguards under new laws.[187] Immigration officials can now revoke Australian citizenship from dual nationals suspected of involvement in terrorism, without requiring a conviction in respect of the offences. The law could effectively render people as young as 14 years old stateless, on top of losing all the other rights that flow from citizenship. When then Prime Minister Tony Abbott was asked why he was pushing for government to be able to strip a person's citizenship without a conviction in cases where the Minister thought they were involved in terrorism, he answered: "What happens if they get off? That's the problem."[188]

Blocking environmental organisation's access to the courts

The Federal *Environment Protection and Biodiversity Conversation Act* currently gives conservation groups the right to seek court review of decisions made under that Act to ensure proper environmental assessment of large development projects.[189] This right recognises the public interest in allowing environment organisations to ensure that government complies with environmental laws, particularly given the environment cannot itself bring action.

The Mackay Conservation Group recently relied on this right to successfully challenge a decision to approve the expansion of the controversial Carmichael coal mine because the Minister had failed to consider conservation advice concerning two threatened species. Instead of accepting that it had failed to comply with its own environmental laws, the Australian Attorney-General introduced a bill to remove the right arguing that it provides "a red carpet for radical activists…to sabotage important projects."[190]

In November 2015, the Senate Committee inquiring into the bill released its report. The government-dominated committee supported the legislation, despite strong opposition from farmers, lawyers, academics and environmental NGOs.[191] Parliament is due to consider the bill in 2016.

Vilifying public interest litigation: "vigilante litigation" and legal "rackets"

Using the courts is one of the most orthodox methods for challenging government decision making in a mature democracy. Yet the government is vilifying lawyers and groups who challenge it in court. Whilst the government can of course engage in robust public debate, these comments reflect a disturbing attitude towards the role of the courts and legitimate limits on the government power. Further, certain comments could be seen as attempts to intimidate or place undue pressure on judges, lawyers and people seeking to challenge government action in courts.

In August 2015, when the Mackay Conservation Group successfully challenged the approval of the Carmichael coal mine, Senior Australian Government Ministers engaged in unprecedented attacks on the group for using the courts to challenge the decision.

Trade Minister Andrew Robb described the case as "lawfare brought by activist groups."[192] Attorney-General George Brandis described the court action as "vigilante litigation" by "people who are determined to wipe out Queensland's biggest industry."[193] Former Prime Minister Tony Abbott claimed the Carmichael project was being "legally sabotaged by green activists running a strategic campaign against the coal industry and in fact, against all large developments."[194]

These statements showed contempt for the separation of powers and the rule of law. They sought to undermine the legitimacy of court action by environmental groups to enforce compliance with the law. They were also misleading as the Federal Court's orders were made with the consent of all parties, including the Minister. The public debate around the case was so misleading that the Federal Court took the extraordinary step of issuing a media statement to clarify what had happened.[195]

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Similar attacks have been made in other contexts. Immigration Minister Peter Dutton has repeatedly described a range of current asylum seeker court cases as a "racket"[196] and former Immigration Minister Scott Morrison referred to lawyers assisting asylum seekers as "boat chasers."[197]

In the national security context, former Prime Minister Tony Abbott attacked a court's decision to grant bail to a terror suspect as a "very, very questionable bit of judicial judgment" and said he understood why people would be "aghast" at the decision.[198] He also criticised legal aid funded cases which challenged government laws, saying:

> "Obviously, people are entitled to go to the law, but why they are entitled to go to the law with taxpayer funding when they are essentially attacking public policy, when they are essentially attacking the policy of the elected government, I think is something which again exasperates and sometimes infuriates the public and, frankly, it exasperates and sometimes infuriates me."[199]

In Queensland, similar issues arose in relation to the former Newman Government's extreme anti-bikie laws that enabled the Attorney-General to declare organisations unlawful without court involvement, triggering a range of adverse legal consequences for members of the organisations.[200] When lawyers raised specific concerns over the laws, then Premier Newman attacked them saying:

> "These people…take money from people who sell drugs to our teenagers and young people…they are part of the machine, part of the criminal gang machine, and they will see, say and do anything to defend their clients, and try and get them off and indeed progress … their dishonest case."[201]

Expanding access to the courts for public interest litigation: standing and costs

Instead of limiting the ability of organisations and individuals to hold government accountable in the courts, we should be expanding it. Laws are effectively rendered meaningless if they aren't enforced. Often it can be difficult to enforce laws, particularly where the affected people:

- are marginalised and disadvantaged (eg people with cognitive disabilities who are sexually abused);
- are not easily located or contactable (eg asylum seekers whose boat is turned back at sea and who are returned to the country they fled from); or
- may face reprisals for bringing court action (eg prisoners' or people in immigration detention whose daily lives are controlled by the agency they would sue).

However, currently, people or organisations whose interests are not directly affected will rarely have 'standing' to bring cases on behalf of their members or the constituencies that they work with. Standing is the right of a person to bring a dispute to court and to receive a remedy. Whilst standing rules differ depending on the remedy sought, generally to bring a case a person must either have a "special interest in the subject matter" or be a "person aggrieved."[202] This test creates a barrier to community organisations and other people bringing cases on behalf of others in the public interest.

We should learn from other jurisdictions such as Canada and India that have broadened the ability of any member of the public to bring a case challenging laws that violate human rights or create public injury.[203]

The enormous financial cost of litigation is another significant barrier to bringing public interest cases. Even if a person can obtain pro bono legal assistance for their case, they typically run the risk of being ordered to pay the other side's costs in the event that they lose. These costs can amount to hundreds of thousands of dollars. This is understandably a major disincentive to public interest litigation, especially for marginalised and disadvantaged people.[204] One way to address this issue would be to expand the availability of protective costs orders – orders that protect a party to a proceeding from an adverse costs outcome. Examples of these orders include an order that a party will not be exposed to a costs order if they lose at trial, or an order capping the amount of costs that a party will be required to pay if it loses.[205]

169. World Justice Project, *Rule of Law Index 2015*, 9. See also A V Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Fund, 8th ed, 1915) 110–15. See also the definition in United Nations, *Report of the Secretary General: The rule of law and transitional justice in conflict and post-conflict societies* (2004) S/2004/616

170. A V Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Fund, 8th ed, 1915) 110.

171. *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 513–14 [103]–[104]).

172. *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193.

173. Prime Minister Tony Abbott, "The Magna Carta Lecture," Speech delivered at Parliament House, 24 June 2015; Barrie Cassidy, Interview with Federal Opposition Leader Bill Shorten , *ABC Insiders*,21 June 2015.

174. Gillian Triggs, "Freedom, Parliament and the Courts," Speech delivered at the Human Rights Dinner, 12 June 2015.

175. Section 474 of the *Migration Act 1958* (Cth). While the High Court's decision in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, restricted the impact of the privative clause in the *Migration Act*, it remains a very real barrier to effective scrutiny of executive decisions on migration matters.

176. For example, section 46A of the *Migration Act,* which gives the minister a discretion whether or not to allow an asylum seeker to apply for a visa]

177. Mark Metherell, "I should not play god: Evans," *The Age,* 20 February 2008, available at http://www.smh.com.au/news/national/i-should-not-play-god-evans/2008/02/19/1203190824140.html (accessed 1 February 2016).

178. *Maritime Powers Act 2013 (*Cth) pt 3, as amended by *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth).

179. Section 75B of the *Maritime Powers Act 2013* (Cth), as inserted by *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth).

180. *Administrative Decisions (Judicial Review) Act 1977* (Cth) sch 1, para (pa), as inserted by *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth).

181. Sections 197BA and 197BF of the *Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015* (Cth).

182. *R v Hayden* (1984) 156 CLR 532, 595.

183. Sections 22A and 24A of the *Australian Passports Act 2005* (Cth), and sections 15A and 16A of the *Foreign Passports (Law Enforcement and Security Act 2005* (Cth), as inserted by *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth). See also *Administrative Decisions (Judicial Review) Act 1977* (Cth) sch 1, para dc, dd, as inserted by *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth).

184. Division 105 of the *Criminal Code Act 1995* (Cth).

185. Section 1 of the *Terrorism (Community Protection) Act 2003* (Vic). See also *Re Causevic* [2015] VSC 248.

186. Administrative Review Council, *Federal Judicial Review in Australia*, Report No 50 (2012) 209–11. See also Australian Law Reform Commission, *Interim Report: Traditional Rights and Freedoms — Encroachments by Commonwealth Laws*, Report No 127 (2015) 488 [18.87]–[18.89].

187. *Australian Citizenship Amendment (Allegiance to Australia) Act* 2015 (Cth)

188. Latika Bourke, "Courts might let suspected terrorists off, says Tony Abbott," *Sydney Morning Herald*, available at http://www.smh.com.au/federal-politics/political-news/courts-might-let-suspected-terrorists-off-says-tony-abbott-20150619-ghs1il.html (accessed 1 February 2016).

189. Section 487 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

190. *Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015 (*Cth); Attorney-General George Brandis, "Government acts to protect jobs from vigilante litigants," Media Release, 18 August 2015, available https://www.attorneygeneral.gov.au/Mediareleases/Pages/2015/ThirdQuarter/18-August-2015-Government-acts-to-protect-jobs-from-vigilante-litigants.aspx (accessed 1 February 2016).

191. Senate Environment and Communications Committee, *Report on Environment Protection and Biodiversity Conservation Amendment (Standing) Bill*, 18 November 2015, available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/EPBC_Standing_Bill/Report (accessed 1 February 2016).

192. Sid Maher, "Robb's 'Reptile Rage' over Coalmine Delay," *The Australian*, 13 August 2015, available at http://www.theaustralian.com.au/business/mining-energy/andrew-robbs-reptile-rage-over-carmichael-coalmine-delay/news-story/ddea0b8619e3d303163f40c989a9722b (accessed 1 February 2016).

193. *Stephanie Peatling*, "'Vigilante litigation: Adani mine decision was appalling, says Brandis," *The Sydney Morning Herald*, 17 August 2015, available at http://www.smh.com.au/federal-politics/political-news/vigilante-litigation-adani-mine-decision-was-appalling-says-brandis-20150816-gj00u3.html (accessed 1 February 2016).

194. Peta Donald, "Federal Government Moves against 'Vigilante' Environment Groups," *ABC*, 18 August 2015, available at http://www.abc.net.au/pm/content/2015/s4295734.htm (accessed 1 February 2016).

195. Federal Court of Australia, Statement, "Statement re NSD33/2015 Mackay Conservation Group v Minister for Environment," 19 August 2015.

196. Staff and wires, "Peter Dutton insists Somali refugee changed her mind about abortion," *The Guardian*, 17 October 2015, available at http://www.theguardian.com/australia-news/2015/oct/17/turnbull-is-wrong-to-claim-refugee-changed-her-mind-about-abortion-advocates-say (accessed 1 February 2016).

197. Simon Benson, "D'Day Nauru: Tamil boat people say hello to their new home after secret overnight operation," *Daily Telegraph*, 2 August 2014, available at http://www.dailytelegraph.com.au/news/nsw/gday-nauru-tamil-boat-people-say-hello-to-their-new-home-after-secret-overnight-operation/news-story/49a12bb73b1adc81db864b9cb0ec1896?= (accessed 1 February 2016).

198. Michael Gordon, "PM warned over undermining courts by attack on magistrate," *Sydney Morning Herald,* 16 January 2015, available at http://www.smh.com.au/national/pm-warned-over-undermining-courts-by-attack-on-magistrate-20150116-12rx55.html (accessed 1 February 2016).

199. Prime Minister Tony Abbott, Interview with Ray Hadley, Radio 2GB Sydney, 18 December 2014, available at https://pmtranscripts.dpmc.gov.au/release/transcript-24079 (accessed 1 February 2016).

200. *Vicious Lawless Association Disestablishment Act 2013* (Qld). See also *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld); *Criminal Organisation Act 2009* (Qld); *Criminal Code 1899* (Qld).

201. Stephen Johnson, "Qld Premier has 'sullied all lawyers'," *brisbanetimes.com.au,* 6 February 2014, available at http://www.brisbanetimes.com.au/queensland/queensland-premier-has-sullied-all-lawyers-20140206-324av.html (accessed 1 February 2016).

202. *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493. See also the different standing tests that apply to relief in the form of the prerogative writs of prohibition, certiorari and mandamus and under the *ADJR Act 1977* (Cth), sections 5,6 and 7.

203. See *Nova Scotia Board of Censors v McNeil* [1976] 2 SCR 265 and *Minister of Justice of Canada v Borowski* [1981] 2 SCR 575, 606. Also *Bandhua Mukti Morcha v Union of India* AIR 1984 SC 802, 812.

204. See Public Interest Law Clearing House, *Submission to the Commonwealth Attorney-General on Protective Costs Orders*, April 2009, available at https://www.justiceconnect.org.au/sites/default/files/PILCH%20Submission-%20Protective%20Costs%20Orders%202009%20.pdf (accessed 1 February 2016).

205. See, for example, the orders made by the Victorian Court of Appeal in *Bare v Small* [2013] VSCA 204. Only some Australian jurisdictions expressly provide for the making of protective costs: *Federal Court Rules 2011* (Cth) rule 40.51; *Federal Circuit Court Rules 2011* (Cth) rule 21.03; *Uniform Civil Procedure Rules 2005* (NSW) rule 42.4; *Local Court Rules* (NT) regulation 38.10(6)(c)(ii); *Civil Procedure Act 2010* (Vic) s 65C; *Rules of the Supreme Court 1971* (WA) rule 66.1, 1.4B(1).

GRAPHIC DESIGN
STEPHEN HORSLEY, PROPELLANT

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Emily Howie, author of *Safeguarding Democracy*, speaks to press outside the Victorian Supreme Court, June 2015

Safeguarding Democracy

Democracy relies on many foundations for its success including an active civil society, a free press, informed and diverse and the checks and balances provided by courts and other institutions. This report documents a clear and disturbing trend of new laws and practices that are eroding these vital foundations, from silencing community organisations to attacks on whistleblowers and press freedom. It considers state-based anti-protest laws and the sidelining of institutions such as the courts that are meant to protect against abuses of government power. Importantly, the report also outlines a way forward to safeguard our democracy.

Human Rights Law Centre

Human Rights Law Centre Ltd
Level 17, 461 Bourke Street
Melbourne VIC 3000

Tel: + 61 3 8636 4450
Web: www.hrlc.org.au