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THE LEGAL ASSAULT ON AUSTRALIAN DEMOCRACY

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Recent years have seen fierce public debate on whether Australia's parliaments are passing laws that undermine fundamental democratic values, such as freedom of speech and freedom of association. Such debate has tended to focus on a few contentious laws, including s 18C of the Racial Discrimination Act 1975 *(Cth), s 35P of the* Australian Security Intelligence Organisation Act 1979 *(Cth) and Queensland's anti-bikie legislation. This article conducts a survey of the federal, state and territory statute books in order to determine whether such examples are isolated, or indicative of a broader trend. It identifies 350 instances of laws that arguably encroach upon rights and freedoms essential to the maintenance of a healthy democracy. Most of these laws have entered onto the statute book since September 2001. The article finds that the terrorist attacks of that month marked a watershed moment in the making of Australian laws, and that since that time parliamentarians have been less willing to exercise self-restraint by not passing laws that undermine Australia's democratic system.*

I INTRODUCTION

Australia's democratic system of government has proved to be robust and long-standing. Its institutions and values have stood the test of time as compared to those of countries beset with cycles of political turmoil. This stability is a product of many factors, including Australia's political culture, institutional arrangements and legal system. It is also a product of the respect traditionally paid by legislators to the importance of democratic rights and freedoms, and the willingness of those people to preserve and uphold those values.

The role of legislators is particularly important in Australia. In other nations, legal rules, typically found in a Human Rights Act or Bill of Rights, constrain the power of parliaments to depart from basic democratic standards, such as in regard to freedom of speech or the right to vote. Few such constraints exist in Australia. On occasion, constitutional implications, including the freedom of political communication, the maintenance of the universal adult franchise or the separation of judicial power,[1] limit the scope for lawmaking. In most other respects, no legal checks exist upon the capacity of laws to infringe important aspects of Australian democracy.

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[1] See for example *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Roach v Electoral Commissioner* (2007) 233 CLR 162; and *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.

This is particularly true at the state level, where each jurisdiction sets out its governance arrangements in a constitution that is an Act of Parliament.[2] As a result, the constitutional arrangements of each state can be changed by way of an ordinary statute,[3] subject only to whether those arrangements require a special manner and form for their alteration[4] or are in some way preserved by the text of the *Australian Constitution*.[5] This means that democratic standards exist at the state level often only to the extent that they are not limited or abrogated by parliament. The preservation of these values thus depends upon the willingness of legislators to exercise self-restraint.

Over the course of many decades, Australian parliamentarians have generally exercised such restraint by not passing laws that undermine Australia's democratic system. There are however notable exceptions to this, such as the attempt to ban the Australian Communist Party in the early 1950s,[6] the banning of street marches in Queensland in the late 1970s[7] and the denial of the vote in federal elections to Aboriginal people from 1902 for a further 60 years.[8] The final example also reflects another theme in parliamentary engagement with human rights, a willingness to abrogate rights belonging to minorities. Indigenous peoples have in particular suffered from discrimination imposed by law. In addition to being denied the vote, laws have permitted the removal of their children, prevented them from marrying, limited their freedom of movement and permitted their wages to be confiscated.[9] Other laws targeting minority groups can also be found in the field of migration, including the law that enabled the White Australia policy by denying people from Southeast Asia entry on the basis of a dictation test.[10]

The result is a mixed picture of rights protection by Australian parliaments. Their record of abrogating the rights of certain minorities sits alongside a generally strong history of upholding the rights, freedoms and privileges necessary for a healthy democracy. What has changed in recent times is that concerns have been raised that parliaments have ceased to pay the same heed to these latter, democratic rights, and indeed that they have passed a number of laws that directly infringe upon them. It has been suggested that parliament has departed from its role of acting as a protector of democracy, and instead has become a significant part of the problem.

Federal Attorney-General George Brandis has repeatedly argued that traditional freedoms of this kind are under attack, saying: 'For too long we have seen freedoms of the individual diminish and become devalued … They underpin the principles of democracy and we cannot

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[2] For example, *Constitution Act 1902* (NSW).
[3] See *McCawley v The King* [1920] AC 691.
[4] For example, s 7A of the *Constitution Act 1902* (NSW) requires a referendum to be held to abolish the State's upper house.
[5] For example, in *Kirk v Industrial Relations Commission* (2010) 239 CLR 531, the High Court recognised that each state must possess a body fitting the description of a Supreme Court based on the mention of the 'Supreme Court of a State' in s 73 of the *Australian Constitution*.
[6] *Communist Party Dissolution Act 1950* (Cth), as struck down by the High Court in *Australian Communist Party v Commonwealth (Communist Party Case)* (1951) 83 CLR 1.
[7] See generally Frank Brennan, *Too Much Order with Too Little Law* (University of Queensland Press, 1983).
[8] *Commonwealth Franchise Act 1902* (Cth) s 4.
[9] Megan Davis and George Williams, *Everything You Need to Know about the Referendum to Recognise Indigenous Australians* (NewSouth Publishing, 2015) 2.
[10] *Immigration Restriction Act 1901* (Cth) s 3(a).

take them for granted'.[11] In making such statements, he has focused particularly upon freedom of speech, and indeed his concerns and those of former Prime Minister Tony Abbott led to the government's failed attempt to repeal or amend s 18C of the *Racial Discrimination Act 1975* (Cth), which proscribes offensive behaviour because of race, colour or national or ethnic origin.[12]

Brandis has highlighted concerns about the abrogation of traditional freedoms and democratic rights through two major announcements. First, he initiated a 'Freedoms Inquiry' by the Australian Law Reform Commission to identify federal laws that 'encroach upon traditional rights, freedoms and privileges'.[13] The inquiry's terms of reference defined 'laws that encroach upon traditional rights, freedoms and privileges' by way of a long list which included laws that interfere with freedom of speech, religion, association or movement. The Commission undertook 'a critical examination of those laws to determine whether the encroachment upon those traditional rights, freedoms and privileges is appropriately justified'.[14] The Commission's report was tabled in 2016. The report provides an extensive survey of such laws, without making concluded judgments about whether they are appropriately justified.[15] The second announcement was the appointment in December 2013 of Institute of Public Affairs policy analyst Tim Wilson as a 'freedom commissioner' at the Australian Human Rights Commission. The Attorney-General made it clear that Wilson's primary role was to 'focus on the protection of the traditional liberal democratic and common law rights', including especially freedom of speech.[16] Wilson held that role until February 2016, at which point he resigned to seek preselection as the Liberal candidate for the federal electorate of Goldstein.

The Attorney-General has not been the only person to raise questions about parliaments having enacted laws that limit important democratic freedoms. Such concerns have been raised repeatedly in response to Australian anti-terrorism legislation enacted since the September 2001 attacks, including most recently the laws passed in response to the threat of fighters returning home to Australia from the conflicts in Iraq and Syria. The impact of these laws upon basic rights, such as freedom of speech and of the press, has given rise to heated debate about whether they unduly trespass upon fundamental freedoms, and whether in doing so they do long-term damage to Australian democracy.[17]

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[11] George Brandis, 'New Australian Law Reform Inquiry to Focus on Freedoms' (Media Release, 11 December 2013) <http://www.attorneygeneral.gov.au/Mediareleases/Pages/2013/Fourth%20quarter/11December2013-NewAustralianLawReformInquiryToFocusOnFreedoms.aspx>.

[12] See, eg, the federal government's exposure draft of a Freedom of Speech (Repeal of s 18C) Bill 2014: Attorney-General's Department, *Amendments to the Racial Discrimination Act 1975* (25 March 2014) <http://www.ag.gov.au/Consultations/Pages/ConsultationsonamendmentstotheRacialDiscriminationAct1975.aspx>.

[13] Australian Government, *Terms of Reference* (19 May 2014) Australian Law Reform Commission <http://www.alrc.gov.au/inquiries/freedoms/terms-reference>.

[14] Ibid.

[15] See Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (ALRC Report 129, 2 March 2016).

[16] George Brandis, 'Appointment of Mr Timothy Wilson as Human Rights Commissioner' (Media Release, 17 December 2013) <http://www.attorneygeneral.gov.au/Mediareleases/Pages/2013/Fourth%20quarter/17December2013-AppointmentofMrTimothyWilsonasHumanRightsCommissioner.aspx>.

[17] For example, Ben Eltham, 'Abbott's "Anti-Terror" Laws Are The Real Danger To Australia', *New Matilda* (online), 23 September 2014 <https://newmatilda.com/2014/09/23/abbotts-anti-terror-laws-are-real-danger-australia>.

My object in this article is to determine whether the concerns expressed by Brandis and others are justified, that is, to ascertain the extent to which Australian democracy is under threat from the actions of our elected representatives. I do so by examining the laws currently on the federal, state and territory statute books. This enables a deeper, systematic analysis of whether public debates are responding to a few isolated examples of problematic laws, or whether such laws are examples of a more worrying trend.

II THE STATE OF THE STATUTE BOOK

A *Methodology*

Democracy is not an easy term to define, and by its nature can be broad-ranging and elusive. Nonetheless, it can be described by way of identifying its key features as they exist in Australia. These are set out in the broadest terms by the text of the Australian and state Constitutions, as complemented by a range of legislation and conventions. The latter include laws providing for the conduct of elections, and the conventions that determine which political party is entitled to form government after such a poll.

Collectively, these laws and practices establish a representative democracy, which in the words of Mason CJ in *Australian Capital Television v Commonwealth*,[18] 'signifies government by the people through their representatives. Translated into constitutional terms, it denotes that the sovereign power which resides in the people is exercised on their behalf by their representatives'. This is expressed in the text of the *Constitution*, particularly ss 7 and 24, which, respectively, provide that the members of the Senate and the House of Representatives 'shall be composed of members directly chosen by the people'. Other sections in the *Constitution* are also consistent with the creation of such a system. Sections 8 and 30 speak of the qualifications of electors for the Senate and House of Representatives, respectively, while s 41 states that 'no adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State [can be denied the right to vote at elections for the Commonwealth Parliament]'. These provisions reflect the view of Stephen J, who in *Attorney-General (Cth); Ex rel McKinlay v Commonwealth*[19] stated that a system of representative democracy predicates 'the enfranchisement of electors, the existence of an electoral system capable of giving effect to their selection of representatives and the bestowal of legislative functions upon the representatives thus selected'.

Such a system necessarily gives rise to further implications and entitlements on the part of the people. A representative democracy such as Australia's requires observance of the basic facets of the rule of law and that the people are able to communicate about political matters and associate for political purposes. Hence, the High Court has determined in a succession of cases that the Australian system as created by the text of the *Constitution* entails a capacity on the part of the voters to discuss political matters. As Brennan CJ stated in *McGinty v Western Australia*:[20]

> 'Representative democracy' has been used as a shorthand description of the form of government prescribed by the Commonwealth Constitution in order to explain how the freedom to discuss governments and political matters is implied in the Constitution. As 'the

[18] (1992) 177 CLR 106, 137.
[19] (1975) 135 CLR 1, 56.
[20] (1996) 186 CLR 140, 168.

> people' are to choose their elected representatives, it has been held that the people must be left free to discuss political and economic matters in order to perform their constitutional functions.

Most recently, the High Court has also found in the context of elaborating on the scope of this implied freedom that: 'Equality of opportunity to participate in the exercise of political sovereignty is an aspect of the representative democracy guaranteed by our Constitution'.[21]

The High Court has determined that some rights are inescapable incidents of Australia's system of representative democracy, most notably the freedom to communicate about political matters. The Court has determined this on a case-by-case basis, and an exhaustive list of those rights that might be regarded as being essential preconditions to Australia's system of representative democracy has not been reached. Beyond the work of the High Court, such rights can be further identified by referring to the leading international instrument on the subject, the *International Covenant on Civil and Political Rights*.[22] Not all of the rights listed in that instrument are relevant, as many have no obvious connection to democracy, such as the right to 'marry and to found a family' in art 23(2). Others though obviously are, including freedom of association and of movement.

For the purposes of this study I have selected five rights that have a clear connection to the maintenance of Australia's system of representative democracy. These are: freedom of speech; freedom of the press; freedom of association; freedom of movement; and the right to protest. In addition, I have identified a sixth category encompassing basic legal rights, such as the presumption of innocence. Rights of this kind, in underpinning the rule of law and concepts such as judicial independence, are also viewed as being necessary for democratic governance. The Australian Bar Association has, for example, described an independent judiciary as 'a keystone in the democratic arch'.[23]

The list of selected rights is underinclusive of the rights that may be seen as essential for democratic governance.[24] This reflects the fact that I have not sought to be exhaustive, but have selected rights and freedoms reasonably connected to Australian democracy that are most likely to be the subject of problematic laws. This explains, for example, the omission of a right to vote. It is indisputably a core right for any effective democracy, but has not been selected because there are relatively few laws currently on the statute book that touch upon that subject in a way that might expose the sort of problem being searched for.[25]

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[21] *McCloy v New South Wales* [2015] HCA 34 (7 October 2015) [45] (French CJ, Kiefel, Bell and Keane JJ).

[22] Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

[23] Australian Bar Association, 'The Independence of the Judiciary' [1991] (Winter) *Victorian Bar News* 17, 18 [2.2].

[24] For example, last year the Institute of Public Affairs surveyed federal legislation for breaches of four other civil rights or values connected with democracy (onus of proof, natural justice, right to silence and the privilege against self-incrimination), finding a total of 262 breaches. That finding is not incorporated into this survey because it relates to different rights than those identified in my methodology. However, it echoes the broader concerns this article seeks to address. See Simon Breheny and Morgan Begg, 'The State of Fundamental Legal Rights in Australia: An Audit of Federal Law' (Occasional Paper, Institute of Public Affairs, December 2014) <http://ipa.org.au/publications/2303/the-state-of-fundamental-legal-rights-in-australia>.

[25] The *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth) had denied the vote to any person serving a sentence of imprisonment and provided for the early closing of the rolls after the calling of an election. However, these measures were struck down by the High Court in *Roach v Electoral Commissioner* (2007) 233 CLR 162 and *Rowe v Electoral Commissioner* (2010) 243 CLR 1, respectively.

In the survey below, I identify laws that infringe upon the selected rights. This is sufficient to test the extent to which current laws reflect public concerns about encroachments upon Australian democracy. None of the selected rights though could be described as absolute, and so each may be subject to justifiable limitations. This possibility is made explicit in a number of international and comparative instruments. For example, s 1 of the *Canadian Charter of Rights and Freedoms*[26] guarantees the rights and freedoms set out in it 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.

I do not take the further step of determining whether the infringements identified in my survey of Australian law are justified. Tests of justification, such as those that involve the application of proportionality analysis, tend to be contested and often subjective, and are in any event rarely applied by Australian courts given the presence of few legally protected human rights. Hence, the survey identifies the laws most likely to give rise to problems of justification, without necessarily suggesting that they would fail such a test if Australia had something akin to a Bill of Rights. Of course, even if a law is found to be justified, this does not deny the fact that it infringes upon the relevant right in the first place.

The survey was undertaken by examining the federal, state and territory statute books as at May 2015. As a result, it does not capture past infringements that have since been repealed or amended, such as the ill-fated sedition laws enacted in 2005 during the time of the Howard government.[27] Those offences were replaced in 2010.[28]

Infringements were identified by using a set of generic keywords related to each of the listed rights. These keywords were applied to searches of current laws within Australia as found on the consolidated legislation databases on AustLII. For example, laws affecting freedom of the press were found using search terms such as 'journalist', 'media', 'publish', 'publication', 'must not publish', 'not be published', 'non-publication', and 'suppression'. In each case, laws were then individually assessed to determine whether they did in fact clearly give rise to an infringement. Where there was any doubt, the law was not included. Where one Act contained a number of separate provisions impacting upon the listed freedoms, these are tallied separately. Where a particular provision in an Act infringed more than one of the listed rights, it is included only once under the category most clearly giving rise to the infringement. Where an infringement is brought about by a number of connected provisions, these are counted as one instance or law, and the relevant division or part of the law is cited.

B *The Survey*

All up, the survey below identifies 350 instances of current Commonwealth, state and territory laws infringing the identified democratic rights and freedoms. Many of the laws relate to more than one of the listed rights, such as to freedom of speech and the press, and so has been described only under the most appropriate heading. Of these laws, the greatest number were enacted by the federal Parliament, indeed more than double the number of any

[26] *Canada Act 1982* (UK) c 11, sch B pt 1 ('*Canadian Charter of Rights and Freedoms*').
[27] *Criminal Code Act 1995* (Cth) ss 80.2A–80.2B ('*Criminal Code*'). These offences were first introduced as 'sedition' offences by the *Anti-Terrorism Act (No 2) 2005* (Cth) sch 7 item 12.
[28] *National Security Legislation Amendment Act 2010* (Cth) pt 2.

other Australian legislature. The jurisdictions next most responsible for enacting laws that encroach upon democratic freedoms are New South Wales and Queensland.

Certain years stand out as producing an especially large number of these laws. All of these have occurred over the last decade: 2005, 2006, 2009, 2010, 2012, 2013, 2014, and (extrapolating from the year till May) 2015. Of those years, 2005 and 2006 produced the most laws (31 and 25, respectively).

These laws are only the most prominent examples of such incursions. This is because the list only includes laws that could be clearly identified as giving rise to an infringement. What this means is that the problem is actually far larger than is set out below, as infringements will not always be clear on the face of the law, or will only occur through indirect means.

1 *Freedom of Speech*

Laws impinging on the freedom of speech in Australia[29] tend to fall within six categories. First, anti-vilification laws exist in every jurisdiction (except the Northern Territory) to prevent speech or conduct that, for instance, 'is likely to offend, insult, humiliate or intimidate' a person, where that conduct was done because of a person's race or ethnicity,[30] gender identity or transsexual status,[31] sexuality,[32] religion,[33] HIV/AIDS status,[34] or

[29] See, eg, *Racial Discrimination Act 1975* (Cth) ss 18C, 18D; *Crimes Act 1914* (Cth) ss 15HK, 15HL, 24AA, 70, 79; *Australian Border Force Bill* 2015 (Cth) cl 42; *Criminal Code* ss 11.4, 80.2, 80.2A, 80.2B, 80.2C, 91,1, 101.5, 102.1, 105.35, 105.38, 105.41, 115.1, 115.2, 115.3, 115.4, 272.19, 474.19, 474.22, 474.29A; *Australian Security Intelligence Organisation Act 1979* (Cth) ss 34L, 34ZQ, 35P; *Commonwealth Electoral Act 1918* (Cth) ss 327, 329, 330; *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 9A; *Competition and Consumer Act 2010* (Cth) sch 2, ss 18, 29, 30, 31, 33, 34, 37, 151, 152, 153, 155, 156, 159; *Defence Force Discipline Act 1982* (Cth) ss 33, 58; *Fair Work Act 2009* (Cth) s 674; *Copyright Act 1968* (Cth) s 173; *Royal Commissions Act 1902* (Cth) s 6O; *Administrative Appeals Tribunal Act 1975* (Cth) s 63; *Shipping Registration Regulations 1981* (Cth) r 21(2)(d); *Public Service Act 1999* (Cth) s 13(6), (10); *Defamation Act 2005 (NSW) s 8; Anti-Discrimination Act* 1977 (NSW) ss 20C, 20D, 38S, 49ZT, 49ZXB; *Crimes Act 1900* (NSW) ss 16, 31C, 327, 331, 333, 529, 574; *Crimes Prevention Act 1916* (NSW) ss 2, 3; *Imperial Acts Application Act 1969* (NSW) s 35; *Firearms Act 1996* (NSW) s 51C(2); *Drug Misuse and Trafficking Act 1985* (NSW) s 19(1); *Oaths Act 1900* (NSW) s 33; *Crimes (Administration of Sentences) Regulation 2014* (NSW) r 249; *Royal Botanic Gardens and Domain Trust Regulation 2013* (NSW) r 65; *Sydney Cricket Ground and Sydney Football Stadium By-Law 2014* (NSW) r 19; *Defamation Act 2005* (Vic) s 8; *Racial and Religious Tolerance Act 2001* (Vic) ss 7, 8; *Crimes Act 1958* (Vic) ss 9A, 314, 316, 321G; pt 2, div 1; *Sex Work Act 1994* (Vic) s 16(2); *Planning and Environment Act 1987* (Vic) s 169; *Summary Offences Act 1966* (Vic) s 17(1); *Defamation Act 2005 (Qld) s 8; Anti-Discrimination Act 1991* (Qld) s 124A; *Criminal Code 1899* (Qld) ss 52, 123, 270, 365; *Justices Act 1886* (Qld) s 40; *Defamation Act 2005 (Tas) s 8; Workplaces (Protection from Protesters) Act 2014* (Tas) s 7(3); *Reproductive Health (Access to Terminations) Act 2013* (Tas) s 9(4); *Anti-Discrimination Act 1998* (Tas) ss 3, 17, 19; *Criminal Code 1924* (Tas) ss 67, 196, 241; *Police Offences Act 1935* (Tas) ss 12, 20; *Passenger Transport Services Regulations 2013* (Tas) r 16(1)(g); *Defamation Act 2005* (WA) s 8; *Criminal Code Act 1913* (WA) ss 47, 48, 77, 78, 99, 345; *Jetties Regulations 1940* (WA) r 45(b); *Defamation Act 2005 (SA) s 8; Racial Vilification Act 1996* (SA) s 4; *Criminal Law Consolidation Act 1935* (SA) ss 10, 257; *Summary Offences Act 1953* (SA) s 18A(2); *Education Act 1972* (SA) s 104; *Technical and Further Education 1975* (SA) s 40A; *Real Property Act 1886* (SA) s 230; *Defamation Act 2006* (NT) s 7; *Anti-Discrimination Act 1992* (NT) s 20(1)(b); *Criminal Code* (NT) s 46, 204; *Observance of Law Act* (NT) s 3(b); *Civil Law (Wrongs) Act 2002* (ACT) s 120; *Discrimination Act 1991* (ACT) ss 66, 67; *Criminal Code 2002* (ACT) s 703; *Crimes Act 1900* (ACT) s 440;

[30] See, eg, *Racial Discrimination Act 1975* (Cth) s 18C.

[31] See, eg, *Anti-Discrimination Act 1977* (NSW) s 38S.

[32] Ibid s 49ZT.

[33] See, eg, *Racial and Religious Tolerance Act 2001* (Vic) s 8.

[34] See, eg, *Anti-Discrimination Act 1977* (NSW) s 49ZXB.

disability.[35] Second, laws exist in every jurisdiction to criminalise, and create civil causes of action for, defamation.[36] Third, a comprehensive set of provisions in the *Australian Consumer Law* penalises representations that may be misleading or deceptive.[37]

Fourth, and more problematically, swathes of new laws impinging on free speech have been introduced in recent years under the banner of anti-terrorism and security, particularly at the federal level. A number of these laws permit a person to be imprisoned merely for their speech. For example, the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) created a new offence of advocating terrorism as s 80.2C of the *Criminal Code 1995* (Cth). This offence, carrying a maximum term of five years imprisonment, applies wherever a person advocates the doing of a terrorist act or the commission of a range of terrorism offences. Advocacy, for the purposes of the offence, means counselling, promoting, encouraging or urging terrorism. It is significantly broader than the criminal offences for incitement at the state and federal levels,[38] including, for example, printing or publishing 'any writing which incites to, urges, aids, or encourages the commission of crimes'.[39] The federal incitement offence is limited by the requirement for the prosecution to prove that the defendant intended (or meant) to urge another person to commit the substantive offence.[40] The advocacy offence by contrast requires only that the defendant was reckless as to whether another person would do a terrorist act or commit a terrorism offence. It therefore has the potential to criminalise a wide range of legitimate speech, such as if someone expressed general support for fighters opposing the Assad regime in Syria and encouraged further resistance by these groups. The Abbott government also announced that it wished to further extend the advocacy offence to capture an even broader range of speech by so-called 'hate preachers'.[41]

A number of other provisions also imprison people on the basis of speech. For instance, s 102.1(1A) of the *Criminal Code 1995* (Cth) permits an organisation to be listed as a terrorist organisation because it 'advocate[s] the doing of a terrorist act', including by 'prais[ing]' a terrorist act in a way that might lead a person (regardless of any mental impairment they might suffer) to engage in one.[42] This again includes speech that involves the direct or indirect promotion or encouragement of terrorism. Once an organisation has been listed, its members face jail terms of up to 10 years, including any members who disagreed with the speech.[43] As with the advocacy offence, the jailing of members of listed organisations occurs based upon speech about a 'terrorist act'.[44] The definition of this term is broad in dealing with a wide range of conflicts, including violence undertaken as part of a struggle for liberation. The offences would, as a result, apply with regard to speech praising, for instance, Nelson Mandela in regard to his resistance to apartheid in South Africa.

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[35] See, eg, *Anti-Discrimination Act 1998* (Tas) s 19.
[36] See, eg, *Defamation Act 2005 (NSW)* s 8*; Crimes Act 1900* (NSW) s 529.
[37] *Competition and Consumer Act 2010* (Cth) sch 2, ss 18, 29, 30, 31, 33, 34, 37, 151, 152, 153, 155, 156, 159.
[38] See, eg, *Criminal Code* s 11.4.
[39] *Crimes Prevention Act 1916* (NSW) s 3.
[40] *Criminal Code* s 11.4.
[41] Tony Abbott, 'National Security Statement' (Media Release, 23 February 2015) <http://www.pm.gov.au/media/2015-02-23/national-security-statement-canberra>.
[42] *Criminal Code* s 102.1(1A).
[43] Ibid s 102.3.
[44] Section 100.1 of the *Criminal Code* defines a 'terrorist act' as an action – or threat of action – done with the intention of 'advancing a political, religious or ideological cause', and 'coercing, or influencing by intimidation' an Australian or foreign government, or 'intimidating the public or a section of the public'. The required action must also have a specified consequence, including causing physical harm or serious damage to property.

Other anti-terrorism laws contain extraordinary restrictions upon the communication rights of people held under new detention powers. Preventative detention orders ('PDOs'), for example, permit a person to be held in secret without arrest or charge for up to two weeks. During a person's period of detention under a PDO, they may only contact one family member to say that they are safe and unable to be contacted for the time being.[45] Other laws also abrogate client legal privilege (as authorities may monitor conversations with lawyers)[46] and the right to silence by removing any privilege against self-incrimination (by way of compelling a person upon pain of imprisonment to answer the questions of federal government agencies).[47]

Australia's anti-terrorism laws also contain a new censorship measure. The Classification Board must ban 'any publication, film or computer game that directly or indirectly advocates or praises the doing of a terrorist act',[48] including where it 'directly praises the doing of a terrorist act in circumstances where there is a risk that such a praise might have the effect of leading a person (regardless of his or her age or any mental impairment … that the person might suffer) to engage in a terrorist act'.[49] This means that a publication, film or computer game may be banned based not only upon the reaction of a reasonable person, but upon a person suffering from any of 'senility, intellectual disability, mental illness, brain damage and severe personality disorder'.[50]

Some anti-terrorism laws not obviously operating to curtail freedom of speech may nonetheless have that effect in a tangential way. Division 115 of the *Criminal Code Act 1995* (Cth) criminalises all conduct outside Australia that causes serious harm to an Australian citizen or resident, either intentionally or recklessly. This may operate to stifle free speech in circumstances where, for example, a whistleblower seeks refuge in a foreign country and releases national security information. Such conduct is punishable by up to 20 years' imprisonment[51] if the conduct causes serious harm, or life imprisonment if it causes death.[52]

A range of offences fall within the fifth category of laws that impact on free speech: that is criminal laws more generally. There are, for instance, criminal offences relating to treachery,[53] treason,[54] urging violence,[55] perjury,[56] aiding and abetting,[57] blasphemy,[58] child pornography,[59] swearing falsely,[60] taking an oath to commit a crime,[61] publishing false or

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[45] *Criminal Code* s 105.35.
[46] Ibid s 105.38(1); *Australian Security Intelligence Organisation Act 1979* (Cth) s 34ZQ.
[47] *Australian Security Intelligence Organisation Act 1979* (Cth) s 34L.
[48] *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 9A.
[49] Ibid s 9A(2)(c).
[50] *Criminal Code* s 7.3.
[51] Ibid ss 115.1, 115.2.
[52] Ibid ss 115.3, 115.4. See further Keiran Hardy and George Williams, 'Terrorist, Traitor or Whistleblower? Offences and Protections in Australia for Disclosing National Security Information' (2014) 37 *UNSW Law Journal* 784, 792–3.
[53] See, eg, *Crimes Act 1914* (Cth) s 24AA.
[54] See, eg, *Crimes Act 1900* (NSW) s 16.
[55] See, eg, *Criminal Code* s 80.2.
[56] See, eg, *Crimes Act 1958* (Vic) s 314.
[57] See, eg, *Crimes Act 1900* (NSW) s 31C.
[58] Ibid s 574.
[59] See, eg, *Criminal Code* s 474.19.
[60] See, eg, *Oaths Act 1900* (NSW) s 33.
[61] See, eg, *Crimes Act 1958* (Vic) s 316.

defamatory statements in relation to a candidate in an election,[62] or publishing a recruitment advertisement for the armed forces of a foreign country.[63]

A sixth, related category that has been expanded in recent times might be called summary and public order offences. In 2014, it became an offence to use indecent, obscene or insulting language at the Sydney Cricket Ground,[64] taking its cue from an offence created the year before of using offensive or insulting language at the Royal Botanic Gardens and the Domain in Sydney.[65] As a result, if a person uses language that offends or insults while giving a speech, for example, at the historic Speakers' Corner (which has been a hotbed of soapbox oratory since 1878), that person will now be guilty of an offence and liable to pay a fine. Similarly, a person commits an offence if they sing an obscene song or ballad in public in Victoria,[66] use foul language on public transport in Tasmania,[67] or utter indecent or blasphemous words on a jetty in Western Australia.[68] People must also take care as to who they insult: there are offences for insulting, or acting in an insulting manner towards, people performing their duties, including sex workers,[69] teachers,[70] TAFE employees,[71] court staff,[72] or members of a Planning Panel,[73] an administrative tribunal,[74] a Royal Commission,[75] the Copyright Tribunal,[76] or the Fair Work Commission.[77]

2 *Freedom of the Press*

Many of the laws just mentioned impact also on the freedom of the press, yet there are further laws that have a particular effect on that freedom.[78] A prominent, recent example relates to

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[62] *Criminal Code Act 1913* (WA) s 99. For other electoral laws affecting freedom of speech, see *Commonwealth Electoral Act 1918* (Cth) ss 327, 329, 330.
[63] *Criminal Code* s 119.7.
[64] *Sydney Cricket Ground and Sydney Football Stadium By-Law 2014* (NSW) r 19.
[65] *Royal Botanic Gardens and Domain Trust Regulation 2013* (NSW) r 65.
[66] *Summary Offences Act 1966* (Vic) s 17(1).
[67] *Passenger Transport Services Regulations 2013* (Tas) r 16(1)(g).
[68] *Jetties Regulations 1940* (WA) r 45(b).
[69] *Sex Work Act 1994* (Vic) s 16(2).
[70] See, eg, *Education Act 1972* (SA) s 104.
[71] See, eg, *Technical and Further Education 1975* (SA) s 40A.
[72] See, eg, *Justices Act 1886* (Qld) s 40.
[73] See, eg, *Planning and Environment Act 1987* (Vic) s 169.
[74] See, eg, *Administrative Appeals Tribunal Act 1975* (Cth) s 63.
[75] *Royal Commissions Act 1902* (Cth) s 6O.
[76] *Copyright Act 1968* (Cth) s 173.
[77] *Fair Work Act 2009* (Cth) s 674.
[78] See, eg, *Australian Security Intelligence Organisation Act 1979* (Cth) ss 18, 25A, 34ZS, 35P, 92; *Intelligence Services Act 2001* (Cth) ss 39, 39A, 40, 40A, 40B, 41; *Crimes Act 1914* (Cth) s 3ZZHA; *Criminal Code* s 119.7; *Telecommunications (Interception and Access) Act 1979* (Cth) pt 4-1, div 4C; *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth) ss 44, 63; *Fair Work (Registered Organisations) Act 2009* (Cth) s 356; *Broadcasting Services Act 1992* (Cth) s 189; *Australian Human Rights Commission Act 1986* (Cth) s 14(3); *Family Law Act 1975* (Cth) s 121; *Evidence Act 1995* (Cth) s 195; *Service and Execution of Process Act 1992* (Cth) s 96; *Witness Protection Act 1994* (Cth) s 28(2)(b); *Director of Public Prosecutions Act 1983* (Cth) s 16A; *Judiciary Act 1903* (Cth) s 77RF; *Migration Act 1958* (Cth) ss 336E, 440; *Fisheries Management Act 1991* (Cth) s 155; *Epidemiological Studies (Confidentiality) Act 1981* (Cth) s 11; *Reproductive Health (Access to Terminations) Act 2013* (Tas) s 9(4); *Court Suppression and Non-Publication Orders Act 2010* (NSW) s 7; *Court Security Act 2005* (NSW) s 9A; *Independent Commission against Corruption Act 1988* (NSW) s 112; *Police Integrity Commission Act 1996* (NSW) s 52; *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) s 15; *Crimes Act 1900* (NSW) s 578A; *Surveillance Devices Act 2007* (NSW) s 42; *Evidence Act 1995* (NSW) s 136E; *Lie Detectors Act 1983* (NSW) s 6; *Crimes (Forensic Procedures) Act 2000* (NSW) s 43; *Children (Criminal Proceedings) Act 1987* (NSW) s 15A; *Children and Young Persons (Care and Protection)*

the amendment in 2014 of the *Australian Security Intelligence Organisation Act 1979* (Cth) to grant immunity to Australian Security Intelligence Organisation ('ASIO') officers from criminal and civil law while engaged in 'special intelligence operations'. Section 35P of that Act now provides that 'A person commits an offence if: (a) the person discloses information; and (b) the information relates to a special intelligence operation'. The penalty is imprisonment for five years, increased to 10 years if, for example, 'the disclosure of the information will endanger the health or safety of any person or prejudice the effective conduct of a special intelligence operation'. Section 35P precludes media reporting not only of such operations, but of anything that 'relates to' them. The effect is to criminalise reporting that is demonstrably in the public interest, for instance because it would reveal incompetence or wrongdoing on behalf of the authorities. This is not the first provision of its kind: similar offences of recent vintage exist for other kinds of secret information, such as where a person discloses information about a controlled operation.[79] However, section 35P breaks new ground in applying to the activities of a secret intelligence organisation and by increasing the penalty for the base offence from two years to five.[80] Section 35P has raised such strong concerns in the media that immediately after its enactment it became the subject of an inquiry by the Independent National Security Legislation Monitor.[81] Submissions to that inquiry provide a long list of examples of how the provision may impact upon freedom of the press.[82]

Similar restrictions on the media exist elsewhere, such as in regard to warrants obtained by ASIO to compel the questioning and detention of non-suspects in order to gather intelligence about terrorism offences. In that case, it is an offence, while the warrant is in effect and for two years afterwards, to disclose operational information that a person has as a direct or indirect result of the issue or execution of the warrant, regardless of whether the disclosure of that information is in the public interest.[83] 'Operational information' is not limited to information the disclosure of which might pose a risk to national security. It includes 'information indicating … information that [ASIO] has or had'; a 'source of information' (other than the person subject to the warrant) or 'an operational capability, method or plan of [ASIO]'.[84] In its review of an initial draft of the legislation providing for ASIO's questioning and detention regime, the Parliamentary Joint Committee on ASIO, Australian Secret Intelligence Service ('ASIS') and Defence Signals Directorate ('DSD') stated that the Bill 'would undermine key legal rights and erode the civil liberties that make Australia a leading democracy'.[85]

Act 1998 (NSW) s 105; *Minors (Property and Contracts) Act 1970* (NSW) s 43(5); *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 45; *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) s 18; *Coroners Act 2009* (NSW) s 75; *Drug and Alcohol Treatment Act 2007* (NSW) s 41; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 51B; *Law Enforcement (Controlled Operations) Act 1997* (NSW) s 28.

[79] *Crimes Act 1914* (Cth) ss 15HK, 15HL.

[80] *Australian Security Intelligence Organisation 1979* (Cth) ss 35P(1), 35D(1)(d). See further Keiran Hardy, 'National Security Reforms and Freedom of the Press' (2015) 3 *Griffith Journal of Law & Human Dignity* 1.

[81] Australian Government, *Independent National Security Legislation Monitor* (6 May 2015) Department of Premier and Cabinet <http://www.dpmc.gov.au/pmc/about-pmc/core-priorities/independent-national-security-legislation-monitor>.

[82] Australian Government, *Submissions*, Department of Premier and Cabinet <http://www.dpmc.gov.au/pmc/about-pmc/core-priorities/independent-national-security-legislation-monitor-submissions>.

[83] *Australian Security Intelligence Organisation Act 1979* (Cth) s 34ZS(2).

[84] Ibid s 34ZS(5).

[85] Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, *An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (2002) vii.

Another controversial law enacted in 2015 was the *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* (Cth), giving the executive new powers to apply for the issue of 'journalist information warrants', which can compel the surrender of journalists' metadata from telecommunications companies in order to identify their source.[86] This law was passed despite sustained criticism by public interest groups and the media, such as the Chair of the Press Council, David Weisbrot, who said that 'the new regime will crush investigative journalism in Australia and deal a serious blow to freedom of speech and press freedom. It will dissuade whistleblowers and confidential sources from engaging with the media, and similarly it will discourage what once were "anonymous tips"'.[87] These concerns are far from fanciful. Earlier this year documents obtained under freedom of information laws revealed that eight stories on Australia's immigration policy last year were referred to the Australian Federal Police for the purpose of 'identification, and if appropriate, prosecution' of the persons responsible for leaking the information.[88]

In the immigration context, offences exist where personal identification information held by the Department of Immigration and Border Protection is disclosed except for an authorised purpose, such as to communicate with foreign governments about the identity of visa applicants.[89] This prohibition is perhaps surprisingly narrow, being directed primarily at protecting the privacy of people to whom the information relates, and indeed the Abbott Government sought to place additional restrictions on the reporting of such matters through having Parliament enact new whistleblowing offences for Australian Border Force employees who disclose any information obtained while on duty, punishable by two years' imprisonment.[90] Notwithstanding the limited nature of the law as it stands, the Government has been able to effectively muzzle journalists who report on asylum seeker issues by way of operational means, such as by stemming the flow of information provided at press briefings,[91] restricting access to offshore processing facilities,[92] deleting journalists' photographs,[93] and requiring reporters who visit offshore processing facilities to sign a Deed of Agreement prohibiting them from filming, recording, photographing or in any way communicating with detainees.[94] This led journalist Leigh Sales, after an attempted visit to Inverbrackie detention centre in 2011, to comment that 'Australian immigration detention centres are less open and transparent that Guantanamo Bay'.[95]

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[86] *Telecommunications (Interception and Access) Act 1979* (Cth) pt 4-1, div 4C.
[87] David Weisbrot, 'Proposed Surveillance Legislation a Threat to Press Freedom' (Media Release, 11 March 2015) Australian Press Council <http://www.presscouncil.org.au/media-release-11-march-2015/>.
[88] Paul Farrell, 'Journalists Reporting on Asylum Seekers Referred to Australian Police', *The Guardian* (online), 22 January 2015 <http://www.theguardian.com/australia-news/2015/jan/22/journalists-reporting-on-asylum-seekers-referred-to-australian-police>.
[89] *Migration Act 1958* (Cth) s 336E.
[90] Australian Border Force Bill 2015 (Cth) cl 42.
[91] 'Scott Morrison Says He Will Stop Holding Weekly Asylum Seeker Briefings', *ABC News* (online), 4 February 2014 <http://www.abc.net.au/news/2014-01-14/scott-morrison-says-he-will-stop-holding-weekly-asylum-seeker-b/5200158>.
[92] Ben Pynt, 'We Need to See Manus Island', *Sydney Morning Herald* (online), 24 February 2014 <http://www.smh.com.au/comment/we-need-to-see-manus-island-20140224-33bk1.html>.
[93] Rory Callinan, 'Manus Island: How Information is Kept "Under Control"', *The Age* (online), 25 February 2014 <http://www.theage.com.au/comment/manus-island-how-information-is-kept-under-control-20140225-33eob.html>.
[94] ABC TV, 'The Story of Our Times The Government Doesn't Want Told', *Media Watch*, 29 July 2013 <http://www.abc.net.au/mediawatch/transcripts/s3813718.htm>.
[95] Ibid.

There is also a suite of elaborate laws in each jurisdiction relating to the suppression or non-publication of certain categories of information. At the federal level, for example, it is an offence to publish information relating to the financial position of a company that was admitted into evidence despite a party's objection in proceedings before the Fair Work Commission or the Federal Court,[96] information relating to persons involved in an epidemiological study,[97] or certain information relating to family law proceedings.[98] There are laws giving suppression powers to parliamentary commissions,[99] courts,[100] administrative tribunals,[101] the Australian Communications and Media Authority[102] and even the Statutory Fishing Rights Allocation Review Panel.[103] Such restrictions exist at the state level too: in Tasmania it became an offence in 2013 to publish footage of a person accessing an abortion clinic without their consent, punishable by a fine of $10 500, imprisonment for 12 months, or both.[104] Meanwhile in NSW, journalists may be gagged from posting information about proceedings from within a courtroom,[105] posting information or evidence produced before the Independent Commission Against Corruption[106] or the Police Integrity Commission,[107] or posting sensitive information of a staggering variety relating to court proceedings.[108]

3 *Freedom of Association*

A large number of laws impact upon freedom of association. One recurring theme in anti-association laws is the offence of consorting.[109] For example in NSW, a person is guilty of an offence punishable by a fine of $16 500, imprisonment for 3 years, or both, if he or she, having been given one official warning, habitually consorts with convicted offenders.[110]

Extensive laws also exist in each jurisdiction directed at breaking up troublesome organisations,[111] or as the South Australian Attorney-General put it in the second reading

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[96] *Fair Work (Registered Organisations) Act 2009* (Cth) s 356.
[97] *Epidemiological Studies (Confidentiality) Act 1981* (Cth) s 11.
[98] *Family Law Act 1975* (Cth) s 121.
[99] See, eg, *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth) ss 44, 63.
[100] See, eg, *Judiciary Act 1903* (Cth) s 77RF; *Director of Public Prosecutions Act 1983* (Cth) s 16A; *Service and Execution of Process Act* 1992 (Cth) s 96.
[101] See, eg, *Migration Act 1958* (Cth) s 440.
[102] *Broadcasting Services Act 1992* (Cth) s 189.
[103] *Fisheries Management Act 1991* (Cth) s 155.
[104] *Reproductive Health (Access to Terminations) Act 2013* (Tas) s 9(4).
[105] *Court Security Act 2005* (NSW) s 9A.
[106] *Independent Commission against Corruption Act 1988* (NSW) s 112.
[107] *Police Integrity Commission Act 1996* (NSW) s 52.
[108] See, eg, *Court Suppression and Non-Publication Orders Act 2010* (NSW) s 7; *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) s 15; *Crimes Act 1900* (NSW) s 578A; *Surveillance Devices Act 2007* (NSW) s 42; *Evidence Act 1995* (NSW) s 136E; *Lie Detectors Act 1983* (NSW) s 6; *Crimes (Forensic Procedures) Act 2000* (NSW) s 43; *Children (Criminal Proceedings) Act 1987* (NSW) s 15A; *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 105; *Minors (Property and Contracts) Act 1970* (NSW) s 43(5); *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 45; *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) s 18; *Coroners Act 2009* (NSW) s 75; *Drug and Alcohol Treatment Act 2007* (NSW) s 41; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 51B; *Law Enforcement (Controlled Operations) Act 1997* (NSW) s 28.
[109] See, eg, *Crimes Act 1900* (NSW) s 93X; *Summary Offences Act 1966* (Vic) s 49F; *Health Act 1911* (WA) s 273(6); *Summary Offences Act 1953* (SA) s 13; *Summary Offences Act* (NT) s 56.
[110] *Crimes Act 1900* (NSW) s 93X. The validity of this provision was challenged unsuccessfully in the High Court in *Tajjour v New South Wales* (2014) 313 ALR 221.
[111] See, eg, *Criminal Code Act 1995* (Cth) ss 102.8, 104.5(3)(a), 105.15(4), 390.3, 390.4; *Telecommunications (Intercept and Access) Act 1979* (Cth) s 5D(9); *Terrorism (Police Powers) Act 2002* (NSW) s 26N; *Crimes Act*

speech to his government's organised crime bill in 2012, to 'disrupt and harass the activities of criminals of all persuasions: organised, disorganised, competent and incompetent'.[112] Once again, the threat of terrorism has proven to be a significant catalyst for such laws, with the introduction in 2005 of the Commonwealth offence of intentionally associating with a member of a terrorist organisation on two or more occasions,[113] and of new powers for the Australian Federal Police to obtain control orders in respect of a person (prohibiting them from a range of specified conduct, including communicating or associating with specified individuals).[114] The PDO regime also includes a power to obtain 'prohibited contact orders' that prevent contact with a specified person during the period of detention.[115]

The other legislative expansion in this area relates to laws aimed at dispersing criminal organisations. While some such laws date back decades, such as the Tasmanian offence of 'habitually consorting with reputed thieves',[116] or the power to segregate inmates in correctional facilities in NSW,[117] the overwhelming majority have been enacted in the past five years. The most notorious example is Queensland's anti-bikie laws (although most other jurisdictions now in fact have similar laws). The laws in Queensland, as elsewhere, represent an adaption of the federal anti-terrorism control order regime, thereby demonstrating the potential for such regimes to migrate across subject matters and jurisdictions.[118] The Queensland laws impose a mandatory minimum sentence of 15 years' imprisonment in addition to the expected sentence where a person is charged with a criminal offence and that person is a 'vicious lawless associate'.[119] The laws create control orders and public safety orders empowering authorities to prohibit bikies from associating with one another,[120] offences where participants in criminal organisations gather in public,[121] and penal consequences for being a member of such organisations, including a presumption against bail,[122] disqualification of liquor and tattoo parlour licences,[123] and the disqualification of 56

1900 (NSW) ss 93T, 93X; *Crimes (Criminal Organisations Control) Act 2012* (NSW) s 26; *Tattoo Parlours Act 2012* (NSW) pt 2; *Motor Dealers and Repairers Act 2013* (NSW) s 27; *Liquor Regulation 2008* (NSW) r 53K; *Crimes (Administration of Sentences) Act 1999* (NSW) s 10; *Terrorism (Community Protection) Act 2003* (Vic) s 13KA; *Criminal Organisations Control Act 2012* (Vic) s 47; *Summary Offences Act 1966* (Vic) s 49F; *Police Offences Act 1935* (Tas) s 6; *Vicious Lawless Association Disestablishment Act 2013* (Qld) s 7; *Criminal Organisation Act 2009* (Qld) ss 19, 29; *Criminal Code Act 1899* (Qld) s 60A; *Bail Act 1980* (Qld) s 16(3A); *Corrective Services Act 2006* (Qld) s 65A; *Liquor Act 1992* (Qld) s 228B; *Electrical Safety Act 1992* (Qld) ss 56–71; *Queensland Building Services Authority Act 1991* (Qld) s 49AA; *Tattoo Parlours Act 2013* (Qld) s 20; *Terrorism (Preventative Detention) Act 2005* (Qld) s 32; *Terrorism (Preventative Detention) Act 2005* (WA) ss 17–18; *Criminal Organisations Control Act 2012* (WA) ss 77, 107; *Sentencing Act 1995* (WA) 9D; *Health Act 1911* (WA) s 273(6); *Terrorism (Preventative Detention) Act 2005* (SA) s 12A; *Serious and Organised Crime (Control) Act 2008* (SA) ss 22, 34A, 35; *Criminal Law Consolidation Act 1935* (SA) pt 3B; *Summary Offences Act 1953* (SA) s 13; *Terrorism (Emergency Powers) Act* (NT) ss 21Q, 21R; *Serious Crime Control Act 2009* (NT) ss 27, 36; *Liquor Act* (NT) s 33(1); *Summary Offences Act* (NT) ss 55A, 56; *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) s 32; *Corrections Management Act 2007* (ACT) s 90.

[112] South Australia, *Parliamentary Debates*, House of Assembly, 15 February 2012, 78 (John Rau, Attorney-General).

[113] *Criminal Code* s 102.8.

[114] Ibid s 104.5(3)(a).

[115] Ibid s 105.15(4). Mirror provisions exist in every state and territory.

[116] *Police Offences Act 1935* (Tas) s 6.

[117] *Crimes (Administration of Sentences) Act 1999* (NSW) s 10.

[118] Rebecca Ananian-Welsh and George Williams, 'The New Terrorists: The Normalisation and Spread of Anti-Terror Laws in Australia' (2014) 38 *Melbourne University Law Review* 362.

[119] *Vicious Lawless Association Disestablishment Act 2013* (Qld) s 7.

[120] *Criminal Organisation Act 2009* (Qld) ss 19, 29.

[121] *Criminal Code Act 1899* (Qld) s 60A.

[122] *Bail Act 1980* (Qld) s 16(3A).

types of licences relied upon by tradespersons, including builders, plumbers, stonemasons, carpenters, painters and decorators.[124] These laws can have harsh consequences, such as in the case of Sally Kuether — a librarian, mother of three, multiple sclerosis sufferer and community service award holder with no criminal history — who was arrested when she went out for a drink at the local pub with her fiancé while wearing the insignia of a bikie gang to which her fiancé and his friend belonged. The police arrested all three people, opposed bail and raided Kuether's home.[125] She was detained for six days at the Pine Rivers Watch House and had to pay a fine of $150, although no conviction against her was recorded.[126] Similar provisions in other jurisdictions restrict the right of members of declared organisations to work as mechanics,[127] make it an offence for an occupier of licensed premises to allow those premises to be habitually used as a place of resort for members of a declared organisation,[128] and prohibit the entry of persons wearing bikie-related insignia into licensed premises in certain areas.[129]

4 *Freedom of Movement*

A large number of laws empower the detention of, or at least restriction on the movement of, various people.[130] Since the enactment of the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth), the Australian government has been granted an additional power to suspend a person's passport,[131] and people may be imprisoned for up to 10 years merely for stepping foot in a 'declared area' (currently the Mosul district in Iraq and the Al-

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[123] *Liquor Act 1992* (Qld) s 228B; *Tattoo Parlours Act 2013* (Qld) s 20.
[124] *Queensland Building Services Authority Act 1991* (Qld) s 49AA.
[125] Frank Robson, 'Crack Down', *Sydney Morning Herald* (online), 14 June 2014 <http://www.smh.com.au/lifestyle/crack-down-20140613-39rul.html>.
[126] 'Anti-Association Charges Dropped against First Woman Charged under Queensland's Anti-Bikie Laws', *ABC News* (online), 8 April 2015 <http://www.abc.net.au/news/2015-04-08/a-librarian-who-was-charged-under-queenslands-antibikie-laws-ha/6377062>.
[127] *Motor Dealers and Repairers Act 2013* (NSW) s 27.
[128] *Criminal Organisations Control Act 2012* (WA) s 107.
[129] *Liquor Regulation 2008* (NSW) r 53K.
[130] See, eg, *Australian Passports Act 2005* (Cth) ss 16A, 22A; *Crimes Act 1914* (Cth) s 3UD; *Criminal Code* s 119.2(1), divs 104, 105; *Australian Security Intelligence Organisation Act 1979* (Cth) ss 34E, 34G, 35, 37; *Migration Act 1958* (Cth) s 189; *Fisheries Management Act 1991* (Cth) sch 1A, cl 8; *Environment Protection and Biodiversity Conservation Act 1999* (Cth) sch 1, cl 8; *Defence Act 1903* (Cth) s 51SE(1)(b); *Customs Act 1901* (Cth) s 219Q; *Navigation Act 2012* (Cth) s 248; *Crimes (High Risk Offenders) Act 2006* (NSW) s 17; *Terrorism (Police Powers) Act 2002* (NSW) ss 26D, 26K; *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 197; *Intoxicated Persons (Sobering Up Centres Trial) Act 2013* (NSW) pt 2; *Casino Control Act 1992* (NSW) s 88; *Cemeteries and Crematoria Act 2013* (NSW) s 133; *Drug Court Act 1998* (NSW) s 18C; *Mental Health Act 2007* (NSW) s 18; *Public Health Act 2010* (NSW) s 62; *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) pt 3; *Severe Substance Dependence Treatment Act 2010* (Vic) s 20; *Terrorism (Community Protection) Act 2003* (Vic) ss 13E, 13G; *Summary Offences Act 1966* (Vic) s 89DE; *Summary Offences Act 1966* (Vic) s 6; *Casino Control Act 1991* (Vic) s 81; *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 13; *Public Safety Preservation Act 1986* (Qld) s 32; *Terrorism (Preventative Detention) Act 2005* (Qld) ss 8, 12; *Police Powers and Responsibilities Act 2000* (Qld) s 48(3); *Terrorism (Preventative Detention) Act 2005* (Tas) s 8; *Police Offences Act 1935* (Tas) s 15B; *Dangerous Sexual Offenders Act 2006* (WA) s 17; *Terrorism (Preventative Detention) Act 2006* (WA) s 13; *Criminal Investigation Act 2006* (WA) s 27; *Terrorism (Preventative Detention) Act 2005* (SA) ss 6, 10; *Summary Offences Act 1953* (SA) s 18; *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) s 21; *Crime Prevention Powers Act 1998* (ACT) s 4; *Casino Control Act 2006* (ACT) s 121; *Alcohol Mandatory Treatment Act 2013* (NT) pt 3; *Terrorism (Emergency Powers) Act* (NT) ss 21H, 21K; *Police Administration Act 1978* (NT) s 133AB; *Misuse of Drugs Act* (NT) s 35A; *Summary Offences Act* (NT) ss 47A, 47B.
[131] *Australian Passports Act 2005* (Cth) ss 16A, 22A.

Raqqa province in Syria)[132] without being able to make out a valid excuse.[133] Anti-terrorism laws passed in 2003 and 2005 also gave the Australian Federal Police ('AFP') or ASIO powers to stop and detain people within declared 'prescribed security zones' (regardless of whether the officer suspects that the person is involved in a terrorist act)[134] and to obtain control orders restricting a person's movement,[135] PDOs allowing the secret detention of non-suspects for 48 hours (or up to 14 days by virtue of complementary state laws),[136] questioning warrants that last up to 48 hours,[137] and questioning and detention warrants that last up to 7 days.[138] Other agencies have been empowered to place people in new species of detention, including fisheries detention,[139] environment detention,[140] detention for the purpose of maritime safety,[141] detention for the purpose of customs,[142] and immigration detention[143] – the last of which, when coinciding with an adverse security assessment by ASIO, can spell indefinite detention.[144]

In the states and territories, detention powers exist for the management of casinos[145] and cemeteries,[146] for the pursuit of various public health purposes[147] (including the quarantining of people suspected of carrying chemical, biological or radiological substances),[148] and for mandatory admission to drug and alcohol rehabilitation facilities.[149] One such law, the Northern Territory's *Alcohol Mandatory Treatment Act 2013* (NT), allows for the mandatory detention and treatment for 3 months of a person who is misusing alcohol and would benefit from the treatment. A person will automatically be assessed for the program if taken into custody three times in two months for being intoxicated in public.[150] The Act provoked a backlash, with federal Senator Nova Peris arguing that it was a 'racist act… [setting up] an institution… that tries to rehabilitate Aboriginal people', while Mark O'Reilly from the Central Aboriginal Legal Service added that 'it flies in the face of recommendations of the

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[132] Australian Government, *Declared Area Offence* (28 November 2014) Australian National Security <http://www.nationalsecurity.gov.au/WhatAustraliaisdoing/Pages/DeclaredAreaOffence.aspx>.
[133] *Criminal Code* s 119.2(1).
[134] *Crimes Act 1914* (Cth) s 3UD.
[135] *Criminal Code* div 104.
[136] Ibid div 105, as complemented by the *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) pt 2; *Terrorism (Police Powers) Act 2002* (NSW) pt 2A; *Terrorism (Emergency Powers) Act 2003* (NT) pt 2B; *Terrorism (Preventative Detention) Act 2005* (Qld); *Terrorism (Preventative Detention) Act 2005* (SA); *Terrorism (Preventative Detention) Act 2005* (Tas); *Terrorism (Community Protection) Act 2003* (Vic) pt 2A; *Terrorism (Preventative Detention) Act 2006* (WA).
[137] *Australian Security Intelligence Organisation Act 1979* (Cth) s 34E.
[138] Ibid s 34G.
[139] *Fisheries Management Act 1991* (Cth) sch 1A, cl 8.
[140] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) sch 1, cl 8.
[141] *Navigation Act 2012* (Cth) s 248.
[142] *Customs Act 1901* (Cth) s 219Q.
[143] *Migration Act 1958* (Cth) s 189.
[144] *Australian Security Intelligence Organisation Act 1979* (Cth) ss 35, 37.
[145] See, eg, *Casino Control Act 1992* (NSW) s 88.
[146] See, eg, *Cemeteries and Crematoria Act 2013* (NSW) s 133.
[147] See, eg, *Public Health Act 2010* (NSW) s 62; *Mental Health Act 2007* (NSW) s 18.
[148] See, eg, *Public Safety Preservation Act 1986* (Qld) s 32.
[149] See, eg, *Intoxicated Persons (Sobering Up Centres Trial) Act 2013* (NSW) pt 2; *Drug Court Act 1998* (NSW) s 18C; *Severe Substance Dependence Treatment Act 2010* (Vic) s 20; *Alcohol Mandatory Treatment Act 2013* (NT) pt 3.
[150] *Alcohol Mandatory Treatment Act 2013* (NT) pt 3.

Royal Commission into Deaths in Custody, [and] we shouldn't be going anywhere near criminalising alcohol dependence'.[151]

State laws also allow for the preventative detention of convicted offenders who are due for release from prison, in the name of protection of the community. For example, the *Crimes (High Risk Offenders) Act 2006* (NSW) allows for a 'high risk violent or sexual offender' to be imprisoned for a further five years after the completion of their sentence, with no limits on how many times such an order can be imposed.[152] The *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) dispenses with the need to re-apply, providing that offenders who present a serious danger to the community may be detained indefinitely.[153]

5 *Right to Protest*

Protestors, too, have their own catalogue of laws to contend with.[154] Governments have adopted various methods to regulate the conduct of protests in Australia, ranging from giving police 'move on' powers,[155] to the creation of offences for disorderly conduct,[156] breaching the public peace,[157] creating a disturbance,[158] obstruction,[159] trespass,[160] besetting or surrounding premises,[161] and unlawful assembly.[162]

Many of these laws have the potential to penalise legitimate, peaceful protests, such as Queensland's *Criminal Code*, which creates the offence of engaging in disorderly conduct within immediate view of the Legislative Assembly in a way that tends to either interrupt its

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[151] 'NT's Mandatory Alcohol Act called "Racist"', *SBS News* (online), 12 October 2014 <http://www.sbs.com.au/news/article/2014/10/12/nts-mandatory-alcohol-act-called-racist>.

[152] *Crimes (High Risk Offenders) Act 2006* (NSW) s 17.

[153] *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 13.

[154] *Public Order (Protection of Persons and Property) Act 1971* (Cth) ss 9, 11(2), 12(2); *Commonwealth Electoral Act 1918* (Cth) s 347; *Competition and Consumer Act 2010* (Cth) s 45D; *Fair Work Act 2009* (Cth) ss 418, 423; *Social Security Act 1991* (Cth) ss 596, 660XBE; *Defence Act 1903* (Cth) ss 51G, 72L; *Maritime Transport and Offshore Facilities Security Act 2003* (Cth) s 11; *Aviation Transport Security Act 2004* (Cth) s 10; *Sydney Harbour Federation Trust Regulations 2001* (Cth) r 11; *Crimes Act 1900* (NSW) s 545C; *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 197; *Parliamentary Electorates and Election Act 1912* (NSW) s 176B; *Summary Offences Act 1988* (NSW) s 6; *Unlawful Assemblies and Processions Act 1958* (Vic) s 10; *Summary Offences Act 1966* (Vic) ss 4(e), 6(1), 6A, 6D, 9(1)(g), 17(1), 17(3), 17A, 52(1A); *Vital State Projects Act 1976* (Vic) s 15; *Criminal Code 1899* (Qld) ss 56(1), (2); *Recreation Areas Management Act 2006* (Qld) s 133(1)(a); *Marine Parks Regulation 2006* (Qld) r 146(1)(a); *Nature Conservation Regulation 1994* (Qld) r 79(1)(a); *Corrective Services Act 2006* (Qld) s 122; *Workplaces (Protection from Protesters) Act 2014* (Tas) ss 6, 8, 11, 13, 17(2); *Reproductive Health (Access to Terminations) Act 2013* (Tas) s 9; *Education and Training (Tasmanian Academy) Regulations 2011* (Tas) ss 19(1), (2); *TasTAFE By-Laws Regulation 2014* (Tas) r 18; *Education and Training (Tasmanian Skills Institute) By-Laws 2010* (Tas) r 15; *Roads and Jetties Act 1935* (Tas) s 49(1)(f); *Security and Investigations Agents 2002* (Tas) s 3A; *Criminal Code Act 1913* (WA) ss 68AA(2)–(3), 68AB(1); *Summary Offences Act 1953* (SA) ss 18A, 73(1)–(2); *Forestry Regulations 2013* (SA) s 22; *Wilderness Protection Regulations 2006* (SA) r 30(1); *Botanic Gardens and State Herbarium Regulations 2007* (SA) r 23(2); *Darwin Waterfront Corporation By-Laws 2010* (NT) r 70(1)–(2); *Summary Offences Act* (NT) ss 47(a)–(b), (e); *Police Administration Act 1978* (NT) s 133AB; *Legislative Assembly (Security) Act 1998* (NT) s 9(1)–(2); *Building Act 2006* (NT) s 66.

[155] See, eg, *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 197.

[156] See, eg, *Parliamentary Electorates and Election Act 1912* (NSW) s 176B.

[157] See, eg, *Summary Offences Act 1966* (Vic) s 9(1)(g).

[158] See, eg, *Recreation Areas Management Act 2006* (Qld) s 133(1)(a).

[159] See, eg, *Public Order (Protection of Persons and Property) Act 1971* (Cth) s 9.

[160] Ibid ss 11(2), 12(2).

[161] See, eg, *Summary Offences Act 1966* (Vic) s 51(1A).

[162] See, eg, *Crimes Act 1900* (NSW) s 545C.

proceedings or impair the respect due to its authority.[163] In addition, extensive powers are given to police in Tasmania's new *Workplaces (Protection from Protesters) Act 2014* (Tas). Police may order that protesters vacate business premises and access areas to those premises, under threat of fines of $10 000, and for repeat offenders, 4 years' imprisonment.[164] At the Commonwealth level, the Fair Work Commission has the power to suspend or terminate an industrial action if satisfied that the action threatens to cause significant damage to an important part of the Australian economy[165] – which arguably is the point of many legitimate industrial actions.

In Western Australia, the 'Prevention of Lawful Activity' Bill[166] currently being debated in Parliament seeks to stop people from 'preventing lawful activity' through, for example, the creation of a physical barrier. Sixty-six interest groups released a joint statement in opposition to the bill in March 2015, stating:

> We are concerned that the punishments defined in the bill, up to $24000 or 24 months' imprisonment, will act as a deterrent to lawful and peaceful protests; inhibiting our ability and the ability of all Western Australians to stand up for the people, places and activities they love and to have their voices heard.[167]

Further, a number of these laws operate by reference to stated geographic areas like nature reserves or trust lands, which can be prohibitive when protesters wish, for example, to protest logging plans in a World Heritage-listed forest, yet are prevented from 'causing a disturbance', 'interrupt[ing] or annoy[ing] any other person' in a forestry reserve.[168] Another Tasmanian offence introduced in 2013 criminalises protesting within 150 metres of an abortion clinic.[169]

6 *Basic Legal Rights*

The five rights and freedoms identified above are not the only civil rights relevant to democracy affected by current laws in Australia. The presumption of innocence has been undermined by a number of laws,[170] including the already mentioned Western Australian protesters bill, which would place the onus of demonstrating a lack of 'intention to prevent lawful activity' on the defendant.[171] So too has that corollary to freedom of speech – the right to silence – been increasingly abrogated,[172] with bodies like the Fair Work Commission[173]

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[163] *Criminal Code 1899* (Qld) ss 56(1)–(2).
[164] *Workplaces (Protection from Protesters) Act 2014* (Tas) ss 8, 11, 17(2).
[165] *Fair Work Act 2009* (Cth) s 423.
[166] Criminal Code Amendment (Prevention of Lawful Activity) Bill 2015 (WA).
[167] Joint Statement, *Criminal Code Amendment (Prevention of Lawful Activity) Bill 2015* (12 March 2015), Conservation Council of Western Australia <http://ccwa.org.au/media/broad-community-opposes-protest-laws?page=27>.
[168] See, eg, *Forestry Regulations 2013* (SA) s 22.
[169] *Reproductive Health (Access to Terminations) Act 2013* (Tas) s 9.
[170] See, eg, *Criminal Code Act 1913* (WA) s 68AA(3); *Fair Work Act 2009* (Cth) s 361; *Classification (Publications, Films and Computer Games) Act 1995* (Cth); *Sex Discrimination Act 1984* (Cth) s 7C.
[171] *Criminal Code Act 1913* (WA) s 68AA(3).
[172] See, eg, *Broadcasting Services Act 1992* (Cth) s 202; *Fair Work Act 2009* (Cth) s 712; *Export Control Act 1982* (Cth) s 11P; *Australian Meat and Livestock Industry Act 1997* (Cth) s 47; *Navigation Act 2012* (Cth) s 263; *Australian Sports Anti-Doping Authority Act 2006* (Cth) s 13C; *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* (Cth) s 64.
[173] *Fair Work Act 2009* (Cth) s 712.

and the Australian Sport Anti-Doping Authority[174] being given compulsory powers to require disclosure of information. Other laws have impacted on the rights to a fair trial and procedural fairness, such as the *National Security Information (Civil and Criminal Proceedings) Act 2004* (Cth), which enables a judge to exclude evidence pertaining to national security, and to prevent the defendant from knowing what that evidence might have been, even where that evidence is central to a civil cause of action, such as in an appeal against a control order.[175] Decisions as to whether the evidence will be admitted are made in a closed hearing from which the defendant and even his or her legal representative may be excluded.[176] When deciding whether and in what form to admit evidence, the judge or magistrate is directed by the Act to give 'greatest weight' to the interests of national security.[177]

III FINDINGS

The survey identified 350 instances of where democratic rights and values considered essential to Australia's system of government are the subject of legislative incursion by current Commonwealth, state and territory laws. These relate to areas as diverse as crime, discrimination, anti-terrorism, consumer law, electoral law, administrative law, defence, migration, industrial relations, intellectual property, evidence, shipping, environment, education and health. The following conclusions can be drawn from the survey.

First, even though public debate has focused only on a few laws that infringe democratic standards, such as s 18C of the *Racial Discrimination Act* or s 35P of the *Australian Security Intelligence Organisation Act*, these are far from isolated instances. The survey demonstrates that the number of laws that may be easily identified as raising similar issues runs into the hundreds, and so incursions arise very frequently. The scale of the problem is much larger than might be thought.

Second, what is striking is not only the number of laws raising a potential problem, but that so many of them have been enacted over recent years. Of the 350 provisions, 209 (or around 60 per cent) have been made since September 2001. This suggests that those terrorist attacks marked an important turning point in lawmaking in Australia. Those attacks, and the compelling need to respond forcefully to the threat of terrorism, gave greater license to our legislators to depart from long accepted conventions and understandings about the preservation of democratic rights in Australia. As a result, the abrogation of democratic rights, including stringent measures that were previously unthinkable, have become commonplace.

Third, since September 2001, enacting laws or regulations that infringe democratic freedoms has become a routine part of the legislative process. Basic values such as freedom of speech are not only being impugned in the name of national security or counter-terrorism, but for a range of mundane purposes. Speech offences now apply to a range of public places and occupations, and legislatures have greatly expanded the capacity of state agencies to detain people without charge or arrest. Such offences have become so normal and accepted that they

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[174] *Australian Sports Anti-Doping Authority Act 2006* (Cth) s 13C.
[175] See *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) pt 3A; ss 29(3), 31, 38I, 38L.
[176] Ibid s 29(3).
[177] Ibid ss 31(7)(a), (8), 38L(7)(a), (8).

can be turned into law without eliciting a community or media response. This demonstrates not only the willingness of parliaments to limit such rights, but that, with rare exceptions, they pay little or no political price for doing so. Indeed, many of these laws were enacted with the support of the opposition, including all of the federal laws passed in 2014 to deal with the problem of foreign fighters.

Fourth, not only has the number of laws infringing democratic freedoms increased, but so has their severity. The survey shows that it is possible to identify many laws enacted prior to September 2001 that run counter to democratic rights and freedoms. However, for the most part, laws still on the books enacted prior to that time have a significantly lower impact upon those freedoms than the laws enacted after then. This is apparent, for example, by contrasting the impact upon freedom of association in the laws on the statute book enacted prior to September 2001 and those enacted afterwards, such as in regard to control orders or anti-bikie laws.

Freedom of speech provides another example. The laws on the statute book enacted prior to September 2001 contain a number of restrictions on freedom of speech, such as in anti-discrimination legislation with regard to proscribing insulting and offensive speech. The most prominent example of this is s 18C of the *Racial Discrimination Act*, which is directed at speech and other conduct that is 'reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people' where this is done 'because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group'. The section makes such conduct unlawful, but does not render it a crime. At most, it can give rise to court orders such as a declaration that unlawful conduct has been committed and that compensation be paid.[178] Hence, in the most well-known litigation under this section, in which it was held that s 18C had been breached by articles written by Andrew Bolt questioning the Aboriginality of a number of people, the Federal Court ordered that the Herald Sun newspaper print corrective notices, not republish the offending articles and pay the costs of the applicant.[179] The contrast with more recent laws directed at freedom of speech is stark. Several of those carry the possibility of lengthy terms of imprisonment. For example, s 35P gives rise to the possibility of 10 years' imprisonment for a journalist writing a story, even in the public interest, about a special intelligence operation.

Fifth, the development of a range of scrutiny measures within parliaments to head off the enactment of rights-infringing laws is not proving to be effective. One recent example of such a measure is the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). It requires federal Bills and legislative instruments to be accompanied by a statement of their compatibility with a number of international human rights conventions, which include all of the rights used in the survey. These claims can be examined, and other human rights matters investigated, by a Parliamentary Joint Committee on Human Rights. This establishes an elaborate process of human rights vetting of legislation.

It is arguable that this and other scrutiny measures have improved deliberation within legislatures.[180] On the other hand, there is little evidence that they have had a significant impact in preventing or dissuading parliaments from enacting laws that infringe basic

[178] *Australian Human Rights Commission Act 1986* (Cth) s 46PO(4).
[179] *Eatock v Bolt (No 2)* [2011] FCA 1180.
[180] See generally George Williams and Lisa Burton, 'Australia's Exclusive Model of Parliamentary Rights Protection' (2013) 34 *Statute Law Review* 58.

democratic rights. Such breaches have been identified on many occasions, but this has often been ignored as parliamentarians have gone on to vote in support of the infringement.

For example, a number of the measures identified in the survey relate to the tranches of legislation passed by the federal Parliament in the second half of 2014 in response to the threat of fighters returning to Australia from Syria and Iraq. The Parliamentary Joint Committee on Human Rights identified a number of concerns and problems with these measures. In one instance, it found that the new declared area offence was likely to be incompatible with the right to a fair trial, the presumption of innocence, the prohibition against arbitrary detention, rights to equality and non-discrimination and freedom of movement.[181] Nevertheless, the new offence was enacted, and these findings appear to have had no impact upon the final state of the law, despite vocal opposition from certain members of both Houses of Parliament.[182]

Another problem for scrutiny processes is that many of the most concerning rights infringing laws have been enacted in haste, thereby leaving only a short time for deliberation and analysis. For example, the Anti-Terrorism Bill (No 2) 2005 introduced a number of especially contentious measures, including control orders, preventative detention orders and new sedition offences. Despite this, the government proceeded in a way that ensured the Bill received minimal scrutiny. The Bill was introduced into Parliament on 3 November 2005, with Attorney-General Philip Ruddock stating that 'the government would like all elements of the anti-terrorism legislation package to become law before Christmas'.[183] An inquiry was conducted by the Senate Legal and Constitutional Affairs Committee, which had time only for a 6-day period of calling for submissions, 3 days of hearings and 10 more days to prepare the final report. The 137-page Bill went through each legislative stage promptly and was passed on 7 December 2005 after a little over six hours of debate.

More recently, in early 2015 the federal Parliament passed the *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* (Cth), which requires telecommunication providers to retain user's metadata for a two-year period, and enables government agencies to access that information for law enforcement and other purposes. Part of the final package was a warrant regime to govern access to metadata that could be used to identify a journalist's source. The amendments providing for this were introduced into

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[181] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Fourteenth Report of the 44th Parliament* (2014) 34–44.

[182] Most of this opposition drew from sources other than the work of the Parliamentary Joint Committee on Human Rights, such as reports produced by the Independent National Security Legislation Monitor. The notable exception was Greens Senator Penny Wright (who was and remains a member of the Parliamentary Joint Committee on Human Rights): 'It is a damning review. The human rights committee has found the new declared area zones offence to be incompatible with human rights. Other parts of the bill have caused the committee to raise concerns about the right to freedom of expression, the right to freedom of movement, the right to freedom from arbitrary detention, the right to privacy and the right to a fair trial, as well as the right to a presumption of innocence. And yet this bill—if the government, aided by Labor and some of the crossbench, have their way—will pass this place in three short hours, by 12.30pm today. In the committee stage of this debate, we can see there are still so many questions about how it will really affect people into the future and what the implications are': Commonwealth, *Parliamentary Debates*, Senate, 29 October 2014, 8062 (Penny Wright). It should be noted that several amendments introduced by the Government in light of a report of the Parliamentary Joint Committee on Intelligence and Security were passed, and these did lessen the Bill's severity, for example by shortening the sunset periods of some of the Bill's most controversial measures from 10 years to four. See, eg, Commonwealth, *Parliamentary Debates*, Senate, 28 October 2014, 8021–9.

[183] Commonwealth, *Parliamentary Debates*, House of Representatives, 3 November 2005, 102.

Parliament and then enacted so quickly that there was no capacity for scrutiny processes to operate. Less than two hours separated the introduction of the government's amendments to the Bill's passage through the House of Representatives, and it was subsequently passed through the Senate within a week. This occurred while an inquiry into metadata and its impact upon journalist's sources by the Parliamentary Joint Committee on Intelligence and Security was underway. The hasty passage of the measure meant that this process was abruptly brought to a halt and then cancelled before the date for submissions had even closed.[184]

IV CONCLUSION

Australians should be concerned about the state of their democracy. A worrying trend has emerged whereby parliaments at all levels have become increasingly willing to enact laws that impinge upon basic rights and freedoms essential to the operation of that system. This is not to state anything new. Such concerns have been well ventilated in public debate, especially in regard to freedom of speech. What this article does is demonstrate that the problem runs much deeper than might be thought, and that the few laws subject to public debate are only the tip of the iceberg. All up, this article, through a survey of the current federal, state and territory statute books, identified some 350 instances of laws that infringe upon freedom of speech, freedom of the press, freedom of association, freedom of movement, the right to protest and basic legal rights and the rule of law.

What is striking is not only the number of these laws, but the fact that most of them, some 209, have been enacted since September 2001. That event marked an important turning point. Since then the federal Parliament has enacted some 64 anti-terrorism statutes,[185] and has also demonstrated a greater willingness to encroach upon basic democratic rights. Indeed, the evidence suggests that those terrorist attacks marked a watershed moment in lawmaking in Australia. Past conventions and practices that lead parliamentarians to exercise self-restraint with regard to democratic principles were put aside in the name of responding to the threat of terrorism. Ultimately, this has come to affect not only the enactment of laws in that area, but has created a sense of permissiveness in a range of other areas as well, such as by enabling the enactment of stringent laws at the state level directed at organised crime and bikies. A dynamic has been created whereby extraordinary anti-terrorism laws have created new understandings and precedents that have made possible an even broader range of rights-infringing legislation.[186]

Politicians such as Attorney-General Brandis deserve credit for highlighting that Australia has a problem with regard to laws infringing upon traditional rights and freedoms. However, his position is undermined by his willingness to champion a range of new measures, such as in regard to the foreign fighter threat, which have contributed a number of laws demonstrating exactly the same problem. Whether this amounts to hypocrisy or willful blindness is not clear, but it does demonstrate how easily our politicians are able to move on from extolling the values of free speech to supporting legislation infringing that same right. Indeed, one of the remarkable features of political and legal debate in 2014 was just how

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[184] Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Inquiry into the Authorisation of Access to Telecommunications Data to Identify a Journalist's Source* (2015).
[185] Andrew Lynch, Nicola McGarrity and George Williams, *Inside Australia's Anti-Terror Laws and Trials* (NewSouth Press, 2015) 3.
[186] Ananian-Welsh and Williams, above n 118.

quickly federal politicians moved on from heated debate over the value of free speech in the context of s 18C the *Racial Discrimination Act* to enacting measures with bipartisan support, such as new advocacy and disclosure offences, that impose far more significant sanctions, including imprisonment, upon speech. This revealed a shallow adherence to freedom of speech, and an unwelcome, authoritarian streak on behalf of the government and the opposition when it came to restricting democratic freedoms.

It is hard to see how these developments can be turned around, and respect for and adherence to basic democratic values among Australian parliamentarians restored. Part of the difficulty stems from the fact that a number of these measures, especially in regard to national security, have been justified on the basis that they are needed to defend Australian democracy. As a result, the preservation of democracy has served as the rationale for laws that serve to undermine that same concept. So long as such reasoning prevails, further erosions of democratic principles are likely.

One reform possibility that has re-emerged in response to these measures is the idea that Australia should have a national Bill of Rights or Human Rights Act.[187] Australia has gone through a number of cycles of debate about whether to adopt such an instrument, most recently when the Rudd government rejected the call for such a reform in 2010,[188] and instead supported the enactment of the *Human Rights (Parliamentary Scrutiny) Act*. A renewed call for stronger legal protection of democratic values is not surprising given the failure of parliamentary processes and scrutiny mechanisms to head off the enactment of rights-infringing laws. Such reform is a larger question that lies beyond the scope of this article. Suffice it to say, it is a debate that needs to be reopened in light of Australia's worrying, recent experience of enacting laws that challenge what it means to live in an Australian democracy.

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[187] For example Stefanie Garber, 'Lawyer Body Slams PM, Calls for Human Rights Act', *Lawyers Weekly* (online), 14 April 2015 <http://www.lawyersweekly.com.au/news/16383-lawyer-body-slams-pm-calls-for-human-rights-act>. Such calls have also emerged in Queensland, with the Labor government of the state bringing about an inquiry into the issue: Queensland Parliament, Legal Affairs and Community Safety Committee, *Human Rights Inquiry* (due to report 30 June 2016).

[188] National Human Rights Consultation Committee, *Report* (30 September 2009) National Human Rights Consultation <http://www.ag.gov.au/RightsAndProtections/HumanRights/TreatyBodyReporting/Pages/HumanRightsconsultationreport.aspx>.