RE-ORIENTATING HUMAN RIGHTS MEANINGS AND UNDERSTANDINGS?: REVIVING AND REVISITING AUSTRALIAN HUMAN RIGHTS EXCEPTIONALISM THROUGH A LIBERAL DEMOCRATIC RIGHTS AGENDA

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I INTRODUCTION

The announcement by the Attorney-General, Senator George Brandis and the Australian Human Rights Commissioner, Mr Tim Wilson, of two separate, but related, inquiries into aspects of human rights, provides significant insights into the likely re-orientation of the meaning and application of human rights in the laws, policies and practices of the Coalition government. The subject matter of the two reviews may loosely be described as relating to traditional liberal democratic rights and freedoms within the Australian legal system and polity.

These developments are also properly seen as located within a continuing Australian paradigm of exceptionalism in human rights. In particular, that exceptionalism is now evolving to include philosophical foundations grounded in liberal democratic principles, providing an illusory protection of human rights that is prominently rhetorical whilst substantively at odds with contemporary, common

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understandings of what constitutes human rights, based on obligations arising under international conventions.

On 11 December 2013, the Attorney-General asked the Australian Law Reform Commission (ALRC) 'to review Commonwealth legislation to identify provisions that unreasonably encroach upon traditional rights, freedoms and privileges' and 'whether the encroachment upon those traditional rights, freedoms and privileges is appropriately justified'.[1] The rights, freedoms and privileges are then identified in an extensive list of common law derived categories, particularly highlighted by the subject categories of whether, for example, there is an interference with speech, religion, property rights, association and movement, and with an overall particular focus upon commercial and corporate regulation, environmental regulation and workplace relations.[2] In considering if any changes should be made to these laws, the ALRC was to examine 'how laws are drafted, implemented and operate in practice'[3] and 'any safeguards provided in the laws, such as rights of review or other scrutiny mechanisms'.[4]

The appointment of the new Australian Human Rights Commissioner, Mr Tim Wilson, was announced by Attorney-General Brandis in similar terms, as providing a 'focus on the protection of traditional liberal democratic and common law rights'[5] and a

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1 George Brandis, 'New Australian law reform inquiry to focus on freedoms' (Attorney-General Media Release, 11 December 2013) <http://www.attorneygeneral.gov.au/Mediareleases/Pages/2013/Fourth%20quarter/11December2013_NewAustralianLawReformInquiryToFocusOnFreedoms.aspx>. In December 2014, the Australian Law Reform Commission produced an Issues Paper on this topic: see Australian Law Reform Commission, *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws*, Issues Paper No 46 (2014).

2 George Brandis, above n 1.

3 Ibid.

4 Ibid.

5 George Brandis, 'Appointment of Mr Timothy Wilson as Human Rights Commissioner' (Attorney-General Media Release, 17 December 2013) <http://www.attorneygeneral.gov.au/Mediareleases/Pages/2013/Fourth%20quar

concentration 'on the civil liberty and traditional rights and freedoms such as freedom of speech, freedom of the press, religious freedom and freedom of association'.[6] On 13 May 2014, Mr Wilson announced that in the second half of 2014, a national consultation conducted by the Australian Human Rights Commission (AHRC) on human rights issues in Australia would commence,[7] with a particular focus upon the 'forgotten' freedoms — identified as the foundational human rights of freedom of association, religion, expression and property.[8] A particular emphasis was placed in conducting the consultation in the suburbs and in rural and regional communities, as well as in the advancement of human rights by Australians through non-legislative means.[9] The AHRC consultation process, titled as *Rights and Responsibilities 2014*, commenced with the first consultation in Adelaide on 2 September 2014. Consistent with earlier indications, the consultations sought to focus discussions on the four identified 'rights and freedoms that have traditionally underpinned our liberal democracy in Australia'[10] and be conducted with a distinctive community focus.[11]

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ter/17December2013_AppointmentofMrTimothyWilsonasHumanRightsCommissioner.aspx>.

6 George Brandis, 'Human Rights Commissioner' (Attorney-General Media Release, 17 February 2014) <http://www.attorneygeneral.gov.au/Mediareleases/Pages/2014/First%20Quarter/17February2014_HumanRightsCommissioner.aspx>. Prior to appointment as Human Rights Commissioner, Mr Wilson was Policy Director of the Institute of Public Affairs, a Melbourne based public policy think tank in favour of free market economic policies such as privatisation and deregulation. The Institute of Public Affairs has also taken a strong interest in free speech issues: see Richard Ackland, 'Silence says a lot on free-speech stance', *Sydney Morning Herald* (Sydney), 12 April 2013. A book on the topic has also been authored by the Institute of Public Affairs Research Fellow, Chris Berg: see Chris Berg, *In Defence of Freedom of Speech From Ancient Greece to Andrew Bolt* (Institute of Public Affairs, 2013).

7 Timothy Wilson, 'The Forgotten Freedoms' (Speech delivered at the Sydney Institute, Sydney, 13 May 2014), 12.

8 Ibid 3, 12.

9 Ibid 12.

10 Tim Wilson, 'Rights and Responsibilities 2014' (Discussion Paper, Australian Human Rights Commission, 2014).

11 'A particular focus of the consultation will be on building a culture of respect for rights and responsibilities among the Australian community. The consultation is interested in learning about initiatives at the local and community level that advance rights and freedoms, and the responsible exercise

Both inquiries ultimately derive from the claims of Attorney-General Brandis of an imbalance in Australian human rights discourse[12] and the pre-eminence of individual freedoms as critical to the understanding and reclamation of what is asserted to be the 'proper' meaning of human rights. The common terms and circumstances announced in the two inquiries and the appointment of the Australian Human Rights Commissioner with an identified 'freedoms' agenda, itself points to the larger themes of a renewed and deliberate distinctiveness and differentiation in Australian human rights policy and practice.

Some guidance of the potential influence and impact of the liberal democratic rights agenda may be obtained by distinguishing clearly between some of its characteristics and keeping in mind these characteristics as differentially operative in the debate.

First, the selection of the rights has been narrowly confined by both major proponents to expression, association, religion and property, with the substantive content of such rights identified as liberal democratic left largely unarticulated. Similarly, citations of philosophical sources underpinning these rights by the two major proponents are minimal.[13] In a loose sense these selections of rights

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of these … There will be a specific focus on everyday Australians – people in Australia from all walks of life, whether they live in our cities, the suburbs, or regional, rural or remote Australia': Ibid 3-4. The Australian Human Rights Commission produced a report in late March 2015 outlining the details of their consultations: see Australian Human Rights Commission, 'Rights and Responsibilities Consultation Report 2015' (Consultation Report, Australian Human Rights Commission, 2015).

12 'This is a major instalment towards the commitment I made to restore balance around the issue of human rights in Australia': see George Brandis, above n 1; 'The appointment of Mr Wilson to this important position will help restore balance to the Australian Human Rights Commission which … had become increasingly narrow and selective in its view of human rights': see George Brandis, above n 5.

13 Senator Brandis refers to the formative influence of John Stuart Mill's *On Liberty* on his liberal democratic beliefs: see George Brandis, 'In Defence of Freedom of Speech', *Quadrant,* October 2012, 21, 22, 25; George Brandis, 'The art of compromise', *Sydney Morning Herald* (Sydney), 6 July 2013; one of Sir Robert Menzies *Forgotten People* broadcasts which quoted with

and unarticulated content can be described as ideological, in that choice in defining the right and attributing its content is preserved for the advocate, including the advocate's capacity to factor in political consequences in those processes.

Second, the mode of promulgation of the rights advocated is distinctive. Personal initiative and individual responsibility are at the forefront of advocating and defending these rights where those rights are engaged or threatened. Complementary to this is a preference for non-law related approaches, consistent with a liberal democratic rights outlook that favours a contraction in laws and in the role of government.

Third, the rhetorical invocation of, and appeal to, the rights by office holders and politicians in present political and human rights policy discourse is consistent with a freedom of whether to publicly express, and the timing of such expression, being incumbent in the individual.

Clearly in relation to the first manifestation with its specific identification of four rights and providing for inclusion of the content of those rights at the discretion of the advocate, and in relation to the second and third manifestations, similarly allowing a large measure of discretion though both a reliance on personal responsibility and initiative in promulgating the rights and in the capacity to identify occasions where rights related matters emerge, the liberal democratic rights agenda is open to selective invocation and application, which is loosely ideological in character.

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approval an excerpt of John Stuart Mill; Mr Wilson briefly cites Daniel Hannan, *How We Invented Freedom and Why It Matters* (Zeus Publishers, 2013) in Timothy Wilson, above n 7, 2; an indirect reference to John Stuart Mill in Sir Robert Menzies *Forgotten People* speeches: see Timothy Wilson, above n 7, 2, 5; and an excerpt from Manfred Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary* (N P Engel, 2nd ed, 2005) on the liberal version of rights: see Timothy Wilson, above n 7, 3.

This rise in liberal democratic rights advocacy therefore has a number of different strands worthy of consideration and critique. The successful promotion of liberal democratic rights as a human rights standard will have significant consequences for government policy development and law making in Australia, potentially leading to legislative reforms (including repeals of existing human rights protections due to claimed inconsistencies with liberal democratic rights, as well as fewer laws being justified as reflecting a smaller government preference) and shifts in policy settings and resource allocation away from consensual current human rights approaches. In 2014, assumptions about the application and protective capacity of liberal democratic rights were particularly tested at the contemporary and controversial intersection with terrorism legislation reform,[14] which exposed various shortcomings and contradictions in the freedoms agenda.

This article commences with a discussion of earlier and now evolving forms of Australian human rights exceptionalism, and the present revival of that exceptionalism through the discourse about liberal democratic freedoms, principally through the activities of Attorney-General Brandis and Human Rights Commissioner Wilson. In identifying the emphases of this discourse, a brief identification is made of claimed ideological supporters and opponents — party political and institutional — of the liberal democratic rights agenda. Further distinctive legal and practical features of that agenda are then identified and elaborated. Consequences and complications around the practice and realisation of human rights flowing from the liberal democratic rights agenda are subsequently discussed.

The legal and political rhetoric of the liberal democratic rights agenda is then examined against the legislative reality of significant Commonwealth terrorism law reform in 2014. It is argued that this intersection and legislative experience has produced various

[14] Principally in relation to the major reforms in the National Security Legislation Amendment Bill (No 1) 2014 (Cth); the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth); the Counter-Terrorism Legislation Amendment Bill (No 1) 2014 (Cth).

inconsistencies and deficiencies in the protection of rights. Several explanations are then offered as to the legal and practical disjuncture between liberal democratic rights advocacy and 2014 terrorism law reform. This disjuncture is further considered in the context of liberal democratic rights advocates such as Attorney-General Brandis offering a rationalisation and accommodation in the form of the need of government to ensure security as consistent with such rights advocacy, which itself is an evolution of earlier security rights principles by Attorney-General Ruddock in the Howard government. Further comprehensions are then explored and raised to explain the apparent contradictions at the intersection of liberal democratic rights and terrorism law reforms in 2014.

It is concluded that the present liberal democratic rights discourse has proven grossly ineffectual in moderating the 2014 terrorism law reforms, and that within a legislative paradigm of exceptional urgency, scrutiny, critique and mature public debate have been significantly disabled to a degree that reforms are at odds with conventional and internationally endorsed human rights standards, let alone even achieving the much narrower compass of liberal democratic rights.

II EVOLUTION AND MATURATION OF AUSTRALIAN HUMAN RIGHTS EXCEPTIONALISM

On one level, the terms and focus of the two inquiries indicate a continuity of exceptionalism in Australian human rights, as well as a revival of that exceptionalism, in a new and perhaps more sophisticated iteration. Exceptionalism in human rights matters has previously been recognised as a phenomenon in Australian human rights discourse.[15]

[15] See Elizabeth Evatt, 'How Australia 'Supports' the United Nations Human Rights Treaty System' (2001) 12 *Public Law Review* 3; Dianne Otto, 'From 'Reluctance' to 'Exceptionalism': the Australian Approach to the Domestic Implementation of Human Rights' (2001) 26 *Alternative Law Journal* 219;

In relatively recent times that exceptionalism has been characterised by the absence of a constitutional or statutory charter of rights, and entrenched opposition to the introduction of a charter,[16] a position at odds with other comparable common law democracies.[17] Related aspects of that exceptionalism also emerged during the Howard government, in which the present Attorney-General, Senator Brandis, was both a backbencher and a briefly a Minister. A repeated refrain from the Howard government era was that Australia should not slavishly copy or mimic other common law jurisdictions with bills of rights and that in Australia, human rights are delivered through different means.[18]

According to this methodology, human rights are protected through such matters as representative and responsible government, an independent judiciary, a free media, the common law, a comprehensive suite of Commonwealth anti-discrimination laws and through the good will and tolerance of the Australian people themselves.[19] Another strand of differentiation in relation to the

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David Kinley and Penelope Martin, 'International Human Rights at home: Addressing the Politics of Denial' (2002) 26 *Melbourne University Law Review* 466; Devika Hovell, 'The Sovereignty Strategem: Australia's Response to UN Human Rights Treaty Bodies' (2003) 28 *Alternative Law Journal* 29; Brian Galligan and F L Morton, 'Australian Exceptionalism: Rights Protection Without a Bill of Rights' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights Without a Bill of Rights Institutional Performance and Reform in Australia* (Ashgate, 2005); Nicholas Niachos, 'Human Rights in Australia: A Retreat from Treaties' (2004) 26 *Law Society Bulletin* 23; Spencer Zifcak, *Mr Ruddock Goes To Geneva* (UNSW Press, 2003).

16 See Greg Carne, 'Charting Opposition to Human Rights Charters; New Arguments or Recycled Objections?' (2009) 28 *University of Tasmania Law Review* 81.

17 Such as the United Kingdom, New Zealand, Canada, South Africa, the United States, Ireland and India.

18 See, eg, Daryl Williams, 'Against constitutional cringe: the protection of human rights in Australia' (2003) 9 *Australian Journal of Human Rights* 1.

19 The influence which this rhetorical differentiation affected was significant, in that it was adopted by the Rudd government in rejecting a Commonwealth statutory rights charter, against the recommendations of the *National Human Rights Consultation Committee Report* ('Brennan Committee'): see Commonwealth Attorney-General's Department, *National Human Rights Consultation Committee Report* (Commonwealth Attorney-General's

international human rights framework informing opposition to bills of rights emerged through the Howard government's interactions with the United Nations Human Rights Treaty Committee system, animated initially by adverse findings about Australia by the Committee for the *Convention on the Elimination of Racial Discrimination* (*CERD*).[20] It was subsequently reflected in the treaty Committee reform agenda pursued by Australia and its "robust and strategic approach" with such UN Committees.[21].

This present focus on these liberal democratic freedoms by Senator Brandis and Mr Wilson represents both a revival and evolution of this human rights exceptionalism. Context and history are important in understanding these current developments. It is therefore not surprising that Senator Brandis, within that earlier phase of exceptionalism, was a strong opponent of the introduction of an Australian Bill of Rights.[22] The present Attorney-General even

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Department, 2009), xxix-xxxviii (Recommendations); See also Robert McClelland, "The Protection and Promotion of Human Rights in Australia' (Attachment to Media Release, Attorney-General Media Release, 8 October 2009). Additional features mentioned are the rule of law, separation of powers, universal suffrage and administrative law.

[20] See *Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia 19 April 2000*, CERD/C/56/Misc.42/rev.3; Darryl Williams, 'Article on the United Nations Committee on the Elimination of all forms of Racial Discrimination', *The Australian* (Sydney), 29 March 2000.

[21] See attachment to Alexander Downer and Philip Ruddock, 'Progress Made to Reform UN Treaty Bodies' – 'Reform of the United Nations Human Rights Treaty Body System: Australian Initiatives' (Joint media release of Minister for Foreign Affairs and Attorney-General, 9 March 2006); See also Alexander Downer, Daryl Williams and Philip Ruddock, 'Improving the Effectiveness of United Nations Committees' (Joint media release of Minister for Foreign Affairs, Attorney-General and Minister for Immigration and Multicultural Affairs, 29 August 2000).

[22] See George Brandis, 'The Debate We Didn't Have to Have: The Proposal For An Australian Bill Of Rights' (2008) 15 *James Cook University Law Review* 22 reprinted in Julian Lesser and Ryan Haddrick (eds), *Don't Leave Us With the Bill: The Case Against an Australian Bill of Rights* (Menzies Research Centre, 2009) 17; George Brandis, 'National debate welcomed' (2008) 82 *Law Institute Journal* 29; 'Brandis makes case against bill of rights', *Lawyers Weekly*, 22 August 2008; 'Bill of Rights to create star chamber', *The Courier Mail* (Brisbane), 15 August 2008; 'Opposition flags bill of rights fight', *The Age* (Melbourne), 11 December 2008.

cited at that time that the legal status quo was a self-evident proof that Australia did not need a Bill of Rights,[23] opining that 'the very strength of our liberal democratic culture is the strongest reason why such an instrument is redundant'.[24] This historical opposition to bills of rights, contributing in part to a rejection by the Rudd government of a major recommendation of the *National Human Rights Consultation Report* that the Commonwealth enact a statutory bill of rights,[25]and the forestalling of the introduction of two additional state human rights charters after reports recommending their introduction,[26] now informs the present focus on liberal democratic freedoms and the project to dramatically re-shape the meaning and content of human rights in Australia.

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[23] George Brandis as cited in 'Libs aim to wedge Labor on rights bill', *The Australian* (Sydney), 11 August 2008.

[24] 'Brandis makes case against bill of rights', above n 22.

[25] See *National Human Rights Consultation Committee Report*, above n 19, xxxiv, Recommendation 18. In rejecting the recommendation of a Commonwealth Human Rights Act, the Rudd government launched Australia's Human Rights Framework, implementing selected, limited aspects of the report: see Robert McClelland, 'Australia's Human Rights Framework' (Attorney-General Media Release, 21 April 2010); Robert McClelland and Stephen Smith, 'Reaffirming Our Commitment To International Human Rights Obligations' (Joint Media Release, Attorney-General and Minister for Foreign Affairs, 21 April 2010); Robert McClelland, 'Enhancing parliamentary scrutiny of human rights' (Attorney-General Media Release, 2 June 2010) announcing legislation establishing a Joint Parliamentary Committee on Human Rights to examine and report on legislative compatibility with Australia's international human rights obligations, as well as a requirement that each Bill introduced into Parliament is accompanied by a Statement of Compatibility with Australia's international human rights obligations.

[26] Tasmania Law Reform Institute, *A Charter of Rights for Tasmania*, Final Report No 10 (Tasmania Law Reform Institute, 2006). The Tasmanian Charter ultimately did not proceed because of the Tasmanian budgetary position: see 'Budgetary constraints stall human rights charter proposal', *The Examiner* (Launceston), 3 February 2012; Western Australia *A WA Human Rights Act Report of the Consultative Committee For A Proposed WA Human Rights Act* (2007). The Western Australian Charter did not proceed as the then Western Australian Attorney-General, Hon Jim McGinty, deferred consideration and progress on a state charter until such time as the National Human Rights Consultation Committee was to report, by which time the Western Australian Liberal party, firmly opposed to the introduction of rights charters at both State and Federal levels, had been elected to government in Western Australia.

First, the articulation and promotion of the freedoms agenda provides the foundation for an alternative vision or necessary ideological rationale for human rights — within the Attorney-General's portfolio it is simply not politically feasible to neglect the topic of human rights. Indeed, the refrain of opponents of human rights charters has been one of consensus that human rights are important,[27] the issue then being reduced to a simple question of how human rights can best be protected in a system whilst defending parliamentary sovereignty and constricting judicial activism and policy making.

Second, the liberal democratic freedoms agenda, now occupying that political space where further charter developments appear stalled, can be utilised to add a reformative *social and legal* dimension to the extensive liberal based *economic* reforms of the last two decades. It can also be simultaneously articulated as ideologically consistent with Liberal Party of Australia values and claims about individual rights, such that the Liberal Party of Australia assumes the mantle of a rights based institution:

> My approach to the human rights debate starts with the proposition that human rights and individual rights are synonymous … I represent the only political party in the Australian Parliament which was brought into being for advancing and protecting the rights of the individual … Only the Liberal Party was created to protect and defend individual rights — a point made time and again by our founder, Robert Menzies. So the Liberal Party enters this debate as the only party for whom rights are core business.[28]

This opportunity to leverage reform from a liberal perspective within a human rights framework is evident in examples merging economic

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[27] See Robert McClelland, above n 19: 'The debate is not about whether we protect human rights – it is about *how* we protect and promote human rights. The report shows that there are many views on how human rights and responsibilities should be protected, promoted and realised'.

[28] George Brandis, *Reclaiming human rights from the fury of ideologues* (3 September 2013) Human Rights Law Centre website columns 'If I were Attorney-General' <http://hrlc.org.au/reclaiming-human-rights-from-the-fury-of-ideologues/>.

and social-legal aspects of the philosophy. The Attorney-General's terms of reference for the Australian Law Reform Commission Inquiry for example, requires the identification of encroachments upon traditional rights, freedoms and privileges to have a particular focus upon the *economic and commercial topics* of 'commercial and corporate regulation, environmental regulation and workplace relations'.[29] The Australian Human Rights Commission national consultation *Rights and Responsibilities 2014* sought, inter alia, to focus discussions on two rights and freedoms with a particular workplace and economic dimension, namely the 'right to freedom of association' and 'property rights'. The content of these rights and freedoms in the Discussion Paper[30] of the Australian Human Rights Commission not surprisingly includes references to workplace membership of associations, trade union activity, discrimination in employment, acquisition of property, and regulation of the use of land, including restrictions on land usage and the refusal of development consent permits.[31] Clearly, it is important to consider these emphases in the present liberal democratic freedoms debate and these additional dimensions in the practical realisation of liberal democratic philosophy.

Furthermore, the background to this rights and freedoms agenda discloses a strong ideological contest, presented in both personal and political terms, such that it has been labelled as the 'freedom wars'.[32] The debate has previously been framed by the Human Rights

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29 George Brandis, above n 1.

30 Tim Wilson, above n 10. The same issues are canvassed in the *Rights and Responsibilities Consultation Report:* Australian Human Rights Commission above n 11, 29-46.

31 See Tim Wilson, above n 10, 7, 8 under the headings 'Right to freedom of association' and 'Right to property'.

32 George Brandis, 'The Freedom Wars' (Speech delivered at the Sydney Institute, Sydney, 7 May 2013); Margo Kingston, 'The Liberal Party's war on freedoms: reply to George Brandis', *No Fibs Citizen Journalism*, 10 May 2013 <http://nofibs.com.au/2013/05/10/the-liberal-partys-war-on-freedoms-my-reply-to-brandis/>; Jonathan Holmes, 'Correcting the record on 'The Freedom Wars', *The Drum* (15 May 2013) <http:// www.abc.net.au/news/2013-05-15/holmes-open-letter-to-george-brandis/ 4688 454>; Timothy Wilson, above n 7: 'To the extent that we are having 'Freedom Wars', it is merely the 21st Century incarnation of the philosophical, political and legal contest of ideas'.

Commissioner Tim Wilson as a contest of philosophical traditions in the relationship of the citizen to the state[33] and in the universalisation of market based principles in that relationship, emphasising negative rights and reflecting a freedom from government regulation and interference.[34] Indeed, these philosophical underpinnings as desirable qualities in the appointment of the Human Rights Commissioner have been highlighted and defended by Attorney-General Brandis, as reflecting a proper understanding of the meaning of human rights.[35]

Attorney-General Brandis has more fully articulated and prosecuted the ideological and political dimensions of the liberal democratic freedoms debate, by asserting the primacy of a limited number of freedoms as legitimate subjects of human rights nomenclature and concern.[36] These are the freedoms of expression, association, religion and rights to property. For the Attorney-General, the commitment to liberal democratic principles[37] derives from the

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[33] Timothy Wilson, above n 7, 2-3; 'New Human Rights Commissioner', *Lateline*, 17 February 2014 <http://www.abc.net.au/lateline/content/2013/s3946783.htm> :'by their nature human rights are a political construct … From a classic liberal perspective I believe very strongly that the role of human rights is to protect individuals from the encroachment and abuse of power by government'.

[34] In the former role of the present Human Rights Commissioner as policy director of the Institute of Public Affairs: see Sarah Joseph, 'Tim Wilson and the balancing act of human rights', *The Drum* (19 December 2013) <http://www.abc.net.au/news/2013-12-19/joseph-tim-wilson-human-rights-commission/5166506>: 'Wilson and the IPA believe that human activity is best 'regulated' by the free market rather than by governments, which they seem to believe are inherently oppressive, inefficient or at the very least expensive'.

[35] George Brandis, 'Tim Wilson Understands Meaning of Human Rights', *The Australian* (Sydney), 30 December 2012; George Brandis, above n 5. For contrasting views see Christian Kerr, 'Culture Wars flare as Brandis rewrites the rights agenda', *The Australian* (Sydney), 8 February 2014, 18; Deborah Snow, 'George Brandis' inside job on human rights draws fire', *Sydney Morning Herald* (Sydney), 21 December 2013.

[36] This aspect is ultimately reflected in both the Attorney-General's reference to the Australian Law Reform Commission and in the 2014 Human Rights Commissioner's rights and responsibilities national consultation.

[37] Described as 'my lifelong commitment to liberalism': see George Brandis, 'In Defence of Freedom of Speech', *Quadrant*, October 2012, 21, 25.

reading of John Stuart Mill's *On Liberty*[38] as a Year 11 secondary school student[39] and Mill is invoked as citing the rationale for and in defence of freedom of speech.[40]

The contribution of the Attorney-General to the debate is distinctive for its confrontational tone, a rigorous pursuit of a philosophical argument equally political and personal and garnished with a feint overlay of intellectual superiority. This was illustrated most clearly from Opposition in 2012 and 2013 in response to four matters raised in public debate about the policies of the Labor government — namely s 18C of the *Racial Discrimination Act 1975* (Cth) in the wake of the Andrew Bolt speech case;[41] media reform legislation which would have established a Public Interest Media Advocate;[42] the Human Rights and Anti-Discrimination Bill and the Australia Council Bill, the last mentioned defining the functions of the Australia Council.[43] In pressing the case for a new liberal democratic rights agenda, several characteristics have animated the debate and the castigatory approach to both individuals and groups seen to be at odds with it.

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38 John Stuart Mill, *On Liberty* (Cambridge University Press, 1989).

39 Brandis, 'The art of compromise', above n 13.

40 George Brandis, 'In Defence of Freedom of Speech', *Quadrant,* October 2012, 21, 22, 25.

41 See *Eatock v Bolt* (2011) 197 FCR 261; *Eatock v Bolt* (No 2) [2011] FCA 1180.

42 See Public Interest Media Advocate Bill 2013 (Cth) which would have created the independent statutory office of the Public Interest Media Advocate. The Bill was discharged from the House of Representatives Notice paper on 21 March 2013. See also the News Media (Self-regulation) Bill 2013 (Cth). This Bill was similarly discharged from the House of Representatives notice paper on 21 March 2013.

43 See George Brandis above n 32; George Brandis above n 28; 'Brandis applauds defeat of media regulation', *Lateline,* 7 May 2013 <https://www.youtube.com/watch?v=ho2Z_ZKqHrU>.

III PROSELYTISING A LIBERAL DEMOCRATIC RIGHTS AGENDA AS HUMAN RIGHTS OR FREEDOMS: PARTY POLITICAL AND INSTUTUTIONAL ELEMENTS

First, there is a need to identify claimed ideological opponents to a liberal democratic rights agenda and their practices. That opposition has, by necessity and response, spurred the liberal rights agenda as a matter of urgency, remediation and transition. This process of identification includes both party political and institutional elements.

The party political element focuses upon the predecessor Labor governments, and particularly, the claim that the Gillard government asserted an anti-liberal, new left style of agenda, consistently intervening in individual lives in a way that imposed and micromanaged social policy. Three pieces of Labor legislation were seen as particularly attacking liberal democratic freedoms: media regulation legislation, creating the Public Interest Media Advocate; reform of Commonwealth anti-discrimination legislation, in the form of the Human Rights and Anti-Discrimination Bill; and s 18C of the *Racial Discrimination Act 1975* (Cth), creating a civil offence of offending, insulting, intimidating or humiliating a person because of their race.[44] These modern developments are posited in sharp contradistinction to the values and practices of the old left, which it is argued, took the protection of civil liberties seriously and shared many values with the political right in the protection and advancement of civil and political rights.[45]

A major difficulty with this party political analysis is that it overstates its case almost to the point of caricature. In fact, the predecessor Labor governments highlighted and implemented several human rights related policies with which Attorney-General Brandis would presumably agree — such as initiating a review of the

[44] George Brandis, above n 28; George Brandis, above n 32.
[45] George Brandis, above n 32, 5.

legislation and powers of Australia's intelligence agencies,[46] leading to their current and prospective significant expansion of powers;[47] in rejecting the recommendation of the National Human Rights Consultation Committee that the Commonwealth Parliament enact a statutory human rights charter;[48] in the shelving of the consolidation and reform of Commonwealth anti-discrimination laws;[49] and in not proceeding with the media law reforms.

Institutional elements are also identified as constituting an ideological opposition to a liberal rights agenda. The Australian Human Rights Commission is criticised on two levels — for failure to engage in the freedom of the press debate from a perspective advancing that freedom[50] and a more general claim that the Commission is too narrowly focused in its conception of human rights and with too great a focus on anti-discrimination issues.[51]

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46 Commonwealth Attorney-General's Department, *Equipping Australia Against Emerging and Evolving Threats* (Discussion Paper, Commonwealth Attorney-General's Department, 2012).

47 *National Security Legislation Amendment Act (No 1) 2014* (Cth); *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth); and *Counter-Terrorism Legislation Amendment Act (No 1) 2014* (Cth).

48 Robert McClelland, 'Australia's Human Rights Framework', above n 25.

49 'Dreyfus scuttles proposed anti-discrimination law', *ABC News* (online), 20 March 2013 <http://www.abc.net.au/news/2013-03-20/dreyfus-scuttles-proposed-anti-discrimination-laws/4584962>.

50 'At a time, when, stimulated by the Bolt case, provoked by the Finkelstein Report, freedom of speech and of the press has been the subject of discussion to an unprecedented degree, the immediate response of the Government's own human rights watchdog was to emphasise its limits': see George Brandis, above n 32, 5.

51 George Brandis, above n 28, 2: 'We will ensure that the Australian Human Rights Commission is observant of its statutory mandate to uphold all human rights, not merely some'; George Brandis above n 32, 4; 'Federal Government planning change to law governing Human Rights Commission,' *ABC News* (online), February 2014 <http://www.abc.net.au/news/2014-02-09/government-plans-legislation-to-change-human-rights-commission/5248006>. The President of the Australian Human Rights Commission, Professor Gillian Triggs, was subsequently subject to extended criticism by Senator Brandis relating to her performance in the role: see George Brandis, 'Human Rights Commission and Triggs Not Above Reproach', Opinion Editorial, *The Australian* (Sydney), 27 February 2015; George Brandis, 'Human Rights Commission and Triggs Not Above Reproach' (Attorney-General Media

There are major difficulties with at least the latter part of this analysis, as the Commission is obliged as a matter of law to act within the distinctive functions and powers conferred by the *Australian Human Rights Commission Act 1986* (Cth).

In fact, the *Australian Human Rights Commission Act 1986* (Cth) is a framework document for the lodging, investigation and conciliation of complaints of unlawful discrimination[52] under the *Age Discrimination Act 2004* (Cth), the *Disability Discrimination Act 1992* (Cth), the *Racial Discrimination Act 1975* (Cth) and the *Sex Discrimination Act 1984* (Cth). Second, its legislated functions give priority to the investigatory and conciliatory function under these the four pieces of discrimination legislation, as captured by the legal definition of unlawful discrimination,[53]whilst according some other functions, but only of general application,[54] insufficient to legally substantiate Attorney-General Brandis's criticism of a lack of attention to 'freedoms'. Third, the powers and responsibilities of the Commission are referenced to the Act's meaning of 'human rights',[55] which neither immediately nor directly incorporates or replicates the non-international sourced freedoms — liberal democratic rights, such

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Release, 27 February 2015) <http://www.attorneygeneral.gov.au/Mediareleases/Pages/2015/FirstQuarter/27-February-2015-Human-Rights-Commission-And-Triggs-Not-Above-Reproach.aspx>.

52 *Australian Human Rights Commission Act 1986* (Cth) s 3.

53 See especially the *Australian Human Rights Commission Act 1986* (Cth) ss 11 (1)(a), (aa), (ab).

54 See, eg, the *Australian Human Rights Commission Act 1986* (Cth) s 11(1)(e) concerning the function to examine enactments, or proposed enactments for the purpose of ascertaining whether the enactments or proposed enactments, as the case may be, are, or would be, inconsistent with or contrary to any human right; s 11(1)(f) the power to inquire into any act or practice that may be inconsistent with or contrary to any human right; s 11(1)(g) to promote an understanding and acceptance, and public discussion, of human rights in Australia; s 11(1)(h) to undertake research and educational programs and other programs, on behalf of the Commonwealth, for the purpose of promoting human rights, and to co-ordinate any such programs undertaken by any other person or authorities on behalf of the Commonwealth

55 See definition of human rights in the *Australian Human Rights Commission Act 1986* (Cth) s 3: 'human rights means the rights and freedoms recognised in the Covenant, declared by the Declarations or recognised or declared by any relevant international instrument'.

as 'the traditional liberal conception of freedom of speech'[56] — which Attorney-General Brandis insists properly represents human rights.[57] A literal interpretation of and application of the criticisms of Senator Brandis would have the Australian Human Rights Commission acting outside of its legislated mandate as to the definition of human rights, that is acting *ultra vires*.

The asserted failure of the Australian Human Rights Commission in institutional terms to advance and defend freedom of speech is then emphasised by a reliance on a handful of individuals and groups of conservative disposition to take up that cause.[58] It is no coincidence that the championing of such liberal democratic freedoms by the Attorney-General in the form of a reclamation of language and bases of rights as being liberal democratic in nature — in contradistinction to being reflected in international human rights conventions of which Australia is a party — occurred around the 70th anniversary of the foundation of the Liberal Party and its return to government. The Liberal Party of Australia is positioned as a national human rights institution within Australia, in contradistinction to the Australian Human Rights Commission, which is viewed as not properly advancing liberal democratic freedoms.[59] This self-positioning of an Australian political party as a de facto national human rights institution is calculated both to provide credibility to the liberal-democratic rights agenda and to

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56 George Brandis, above n 32, 1.

57 Senator Brandis has elsewhere highlighted the individually sourced nature of rights: see George Brandis, above n 28, 1.

58 Those mentioned are Andrew Bolt, Janet Albrechtsen, the Sydney Institute and the Institute of Public Affairs and the Liberal Party itself: see George Brandis, above n 32, 4. Elsewhere Senator Brandis has argued that the Liberal party 'is the only political party in the Australian Parliament which was brought into being for the very purpose of advancing and protecting the rights of the individual … Only the Liberal Party was created to protect and defend individual rights … the Liberal Party enters this debate as the only party for whom rights are core business': see George Brandis, above n 28, 1.

59 Attorney-General Brandis has contemplated changes to the Australian Human Rights Commission Act to 'ensure that the commissioners who operate within the Commission deal with a range of human rights, not just anti-discrimination issues': see 'Federal Government planning change to law governing Human Rights Commission', above n 51.

reinforce the complementary principle that political parties exercising governance within a sovereign parliament provides the proper framework for the protection of human rights.

IV ESTABLISHING FURTHER DISTINCTIVE CHARACTERISTICS IN THE LIBERAL DEMOCRATIC RIGHTS AGENDA

Some further features of the liberal democratic rights agenda promulgated by the Attorney-General highlight its distinctiveness and exceptionalism in Australian human rights terms. A careful consideration of these features shows their mutually reinforcing and complementary nature in driving an ideological reformation of the conception of human rights in Australia, in concentrating executive power under the claimed but illusory advocacy and promotion of human rights and in re-calibrating the relationship between the citizen and the state, in authoritative and sovereignty based terms.

Consistent with a market based philosophy of small government and the winding back of government regulation,[60] the Human Rights

[60] One example of this present program was the initial abolition of the Independent National Security Legislation Monitor, as part of the Government war on red tape: see the Independent National Security Legislation Monitor Repeal Bill 2014 (Cth) and Explanatory Memorandum to the Independent National Security Legislation Monitor Repeal Bill 2014 (Cth). That decision to abolish the National Security Legislation Monitor was later reversed by the Prime Minister and the Attorney-General, though the position remained unfilled for months following the expiration of the initial three year term of the first Monitor, Brett Walker SC. The continuing vacancy in the INSLM role was commented upon by the Parliamentary Joint Committee on Intelligence and Security: see Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory report on Counter-Terrorism Legislation Amendment Bill (No 1) 2014* ix, Recommendation 1. Eventually on 7 December 2014, Prime Minister Abbott announced the appointment of the Hon Roger Gyles AO QC to the position of Independent National Security Legislation Monitor: see Tony Abbott, 'Appointment of Independent National Security Legislation Monitor' (Prime Minister Media Release, 7 December 2014)

Commissioner Tim Wilson, a non-lawyer, has made the eschewal of new laws for human rights, a standard for success of his term of office.[61] Consistent with market based principles of small government, reducing laws would appear to be consistent with this prohibition.[62] Similar observations consistent with a market perspective, non-law based approach to rights by Mr Wilson are also evident and assert a preference for an active citizenry instead to protect those rights,[63] whilst articulating non law methods for encouraging human rights.[64]

In the lead up to and in introducing the *Rights and Responsibilities 2014* national consultation, Mr Wilson likewise disconnected what he considers the four forgotten freedoms — expression, association, religion and property rights — from their modern international human rights law manifestation and sought to re-connect them to 'their principled origins' of a classic liberal approach, by differentiating between rights and freedoms.[65] Mr Wilson set out his personal taxonomy of human rights and freedoms,[66] claiming that the two concepts are not synonymous:

> Human rights are the foundational building blocks of our liberal democracy. Human rights are protection against government encroachment. Freedoms are the exercise of those rights. To that end there are four foundational human rights that need to be strongly

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<https://www.pm.gov.au/media/2014-12-07/appointment-independent-national-security-legislation-monitor>.

61 'In my role as the Human Rights Commissioner I intend to a culture of rights, freedoms and responsibilities … from the outset I have set one goal — that no new piece of law will be introduced as a result of my work as Commissioner. Old laws may be reformed, but I do not want a new human rights law during my term of office. I do not want a new human rights law to hang the hat of my term of office on': see Timothy Wilson, above n 7, 11.

62 Ibid.

63 'New Human Rights Commissioner', above n 33.

64 Tim Wilson, above n 10.

65 'I will be taking discussion about human rights back to their origins and will be spending the next five years reconnecting them back to their foundations and their universal applicability': see Timothy Wilson, above n 7, 3.

66 'Human rights are not the same as freedoms. Human rights are the protection against government encroachment. Freedoms are the exercise of those rights': Ibid 3.

> asserted – freedom of association, religion, expression and property. They are the forgotten freedoms[67]

These measures are strikingly presumptuous and sufficiently idiosyncratic as to be entirely at odds with conventional human rights discourse. Most particular is the asserted identification of human rights as passive and negative in protective character against government action, with a limited set of four rights described as foundational. Similarly, the idea that the exercise of such rights, from the passive to the active, warrants a separate nomenclature as 'freedoms' highlights a conceptual premise that these limited sets of rights are defined by the absence of government interference, forming a principle on occasions which then has to be actively asserted. It is a claimed lack of assertion that has produced the result that freedoms 'are being taken for granted and are consequently compromised',[68] a situation that Mr Wilson intends to respond to as Australia's Human Rights Commissioner.[69] Mr Wilson's narrowing of the compass of rights and the disconnection of these rights from conventionally derived international law sources is also reflected in his belief that foreign rulings on international human rights instruments should be given little weight in Australian human rights matters,[70] also linked to his opposition to the identification of new rights, a feature claimed of those jurisdictions with a formal rights document.[71]

In addition, Mr Wilson delineated a series of things that human rights were not: not the same as civil rights, social justice, anti-

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67 Ibid 3.

68 Ibid 4.

69 'As Human Rights Commissioner I will be reasserting the primacy of these forgotten freedoms': Ibid.

70 'Give foreign rulings little weight: Wilson', *The Australian* (Sydney), 11 July 2014.

71 Ibid. This opposition to the identification of new rights is a corollary to the opposition to the system of international human rights, in which rights are not static but evolutionary: see Charles Beitz, *The Idea of Human Rights*, (Oxford University Press, 2009) 31.

discrimination, nor are they about protecting groups of people.[72] Accordingly, within that classic liberal approach, human rights are conceived narrowly, and as birth rights.[73] The *Rights and Responsibilities 2014* national consultation announcements enlarged these views by articulating a particular law-free approach in the consultations about advancing rights with the community:

> In Australia, human rights are advanced through culture and by ensuring the values and aspirations of rights live in the attitudes of everyone.[74]

> A particular focus of the consultation will be on building a culture of respect for rights and responsibilities among the Australian community. The consultation is interested in learning about initiatives at the local and community level that advance rights and freedoms, and the responsible exercise of these. This might be through developing voluntary codes of conduct and practice, service provision, sporting events or other community based education activities.[75]

A likely consequence to this eschewal of law as a method of advancing human rights is a practical diminution in access to, and fulfilment of, human rights as they are conventionally and contemporarily understood in the Australian community and legal system. First, the content of Mr Wilson's comments acknowledges that liberal democratic philosophy traditionally conceives of human rights quite narrowly. Second, the same philosophy baulks at enacting further laws for the protection and promotion of such rights, and most particularly, their enforceability, by restricting the scope of substantive and procedural legal protections. Third, the preferred techniques of rights protection — cultural and community based measures instead of laws, might foster and be complementary to, legislated based rights protection, but they cannot be substitutes for legislated rights.[76] Legislated rights provide a set of identifiable

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[72] Timothy Wilson, above n 7, 2.

[73] Tim Wilson, 'Why I'll take the classical liberal approach to human rights', *The Australian*, 18 February 2014.

[74] Timothy Wilson, above n 7, 11.

[75] Tim Wilson, above n 10, 4.

[76] A similar emphasis on non-charter based rights initiatives (albeit with the introduction of compatibility statements and a Joint Parliamentary Committee on Human Rights) was pursued by the Labor government in rejecting the National Human Rights Consultation recommendation for enactment of a

educative principles to the community and in policy making and program delivery by the bureaucracy, aside from providing the formal basis for ultimate resort to administrative and legal forums. Instead, in the liberal democratic model advanced by Mr Wilson, *primary* reliance is placed upon public awareness, as well as the societal and cultural characteristics of articulateness, capacity and willingness of the public to become freedoms advocates to protect encroached rights. A call is further made to exercise of considerable individual altruism and initiative:

> And I think the only thing that's really going to make sure that human rights are at the centre of public life and at the foundations of our society is if we have an active citizenry that stands up — understands what their human rights are, stands up for them and defends them against government when they come and try to attack them.[77]

V SOME HUMAN RIGHTS CONSEQUENCES AND COMPLICATIONS FLOWING FROM THE LIBERAL DEMOCRATIC RIGHTS AGENDA

The consequences for the protection and realisation of human rights in the views promoted by the Commonwealth Human Rights Commissioner have several political dimensions. Consistent with a theorised role of smaller government and a contracted number of items considered as rights, the individual has an enhanced and more personalised responsibility to defend those rights or interests (and not necessarily with a legislated rights framework as assistance) where such rights are infringed, or are not otherwise observed or respected. Such an emphasis upon individual responsibility reflects both the primacy of the individual in liberal democratic theory and a non-

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statutory charter of rights: see Robert McClelland, above n 25; Robert McClelland, 'Enhancing Human Rights Education' (Attorney-General Media Release, 21 April 2010) <http://pandora.nla.gov.au/pan/21248/20100723-1500/www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2010_SecondQuarter_21April2010_EnhancingHumanRightsEducation.html>.

77 'New Human Rights Commissioner', above n 33.

lawyer's theorised perspective about how such rights are best practically defended on a daily basis.

This is a confronting matter given the real imbalances in political power between the individual so affected, and governments, organisations and corporations allegedly infringing those rights. A movement away from legal frameworks — both in the quantum of rights recognised, and in the legal avenues available to protect and enforce such rights — is instinctively at odds with enlarging and making more effective human rights protection, within conventional and contemporary meanings of human rights. Consistent with market principles, the views of the Human Rights Commissioner increase the likelihood that individual disputes about the observance or infringement of rights will become more of a political contest or competition, meaning the chances of success will turn upon a quasi-political contestation of ideas, In the present sense, the freedom of the market as part of liberal democratic ideology will manifest itself as a competition of interests in the assertion and attainment of human rights, in which articulateness, access to media and communications, the availability of hired professional advocates and access to financial resources become critical to success in that market place competition relating to the configuration and application of the liberal democratic rights.

A corollary of the emphasis on foundational freedoms — association, religion, expression and property — being a de-emphasis upon formal legal structures in the form of legislation and institutions assisting their protection, whilst not necessarily reducing the formal number of legal rights (recognised either in statute or in common law principles), does convey a message about the relative and inferior status of those rights not perceived as foundational liberal democratic rights. Such a conceptual retreat from what constitutes rights that matter may over time discourage reformation and modernisation of existing legislated rights.

This increased inactivity may be presented in the language of executive power and discretion and in maintaining parliamentary

sovereignty. Indeed, parliamentary sovereignty has been so presented in opposition to statutory charters of rights by several commentators of a liberal democratic rights disposition.[78] Such opposition to statutory charters of rights is at one level, consistent with a liberal democratic rights agenda that eschews government regulation through further legislation and legislative intervention regulating the relationship between citizen and citizen in a variety of spheres. The contradiction of these liberal democratic rights proponents however in relation to parliamentary sovereignty is that statutory charters of rights — through statements of legislative compatibility with listed human rights, judicial interpretive clauses to interpret laws consistent with Parliament's intention, the non-binding nature of judicial determinations made in relation to listed human rights and the political review process activated by a judicial finding of incompatibility or inconsistent interpretation — are themselves instruments expressing and reinforcing parliamentary sovereignty by their explicit or consequential referencing of steps to parliamentary processes.

In addition, the reduction in the number of rights and a de-emphasis upon formal legal structures in the liberal democratic rights agenda encourages and facilitates a disengagement from international jurisprudence, conventions and institutions as contributing legally and substantively to an enjoyment and realisation of rights.[79] Apart from claims of maintaining parliamentary sovereignty by the exclusion of these international influences (and coincidentally insisting on a strict transformative doctrine in relation to international human rights) this also affords opportunities for liberal-democratic rights advocates to label their conception of the protection of human rights as distinctively Australian in character[80] and as not derivative from or subservient to legislated rights based models.

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[78] Such as James Allan, Janet Albrechtsen, Chris Kenny and John Hatzistergos. See Greg Carne, 'Charting Opposition to Human Rights Charters: New Arguments or Recycled Objections?' (2009) 28 *University of Tasmania Law Review* 81, 90-1.

[79] See 'Give foreign rulings little weight: Wilson', above n 70.

[80] See, eg, Daryl Williams, 'Against constitutional cringe: the protection of human rights in Australia' (2003) 9 *Australian Journal of Human Rights* 1.

The chronology of the Senator Brandis and Mr Wilson theses regarding human rights as being properly sourced in liberal democratic theory and as deriving legitimately from that theory creates a further complication — that of the relationship with the liberal democratic rights so recognised — speech, association, religion and property — with their later and subsequent recognition and inclusion in international instruments, such as the *International Covenant on Civil and Political Rights* (*ICCPR*), which includes specific articles providing for such rights.[81] In recognising that such rights are not absolute, the *ICCPR* also provides for limitation mechanisms of those rights,[82] identifying principles such as

[81] See especially the civil and political rights in the *International Covenant of Civil and Political Rights*, opened for signature 19 December 1966, 999 *UNTS* 171 (entered into force 23 March 1976) art 1, 6-27. For freedom of expression see art 19(2) which states: 'Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice'; For freedom of association see art 22: 'Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests'; For freedom of religion see art 18*:* 'Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching'.

[82] Art 4(1) of the *ICCPR* prescribes a public emergency derogation provision applying standards to the derogation of certain *ICCPR* rights; art 4(2) of the *ICCPR* creates a range of non-derogable rights, being the rights in art 6, 7, 8(1),(2), 11, 15, 16, 18. Some *ICCPR* rights also have an internal restriction or qualification upon those rights, for example each of the art 18 (freedom of religion), art 19 (freedom of expression) and art 22 (freedom of association) have an internal restriction or qualification imposed upon such rights – respectively; art 18(2): 'Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others'; art 19(3): 'The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order or of public health or morals'; art 22(2): 'No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or

necessity, proportionality and legality, as standards impinging upon the unfettered exercise of such rights.

On the one hand, the inclusion of a right to freedom of expression in art 19 of the *ICCPR* has provided the platform for Senator Brandis to criticise the Australian Human Rights Commission, from the premise of its governing legislation, the *Australian Human Rights Commission Act 1986* (Cth) (which incorporates *ICCPR* rights in sch 2 of the Act) — for failing to adequately articulate media freedom of expression in the circumstances of Labor's media reform legislation.[83] On the other hand, this example of the Commonwealth Attorney-General's invocation of the more broadly developed art 19 of the *ICCPR*, with its existing jurisprudence in the form of individual communications to the Human Rights Committee under the First Optional Protocol, and its General Comment issued by the Human Rights Committee,[84] and its internal rights limitation clause[85] is somewhat contradictory, when the philosophical basis for freedom of expression — as being a foundational liberal democratic right — has been construed in contradistinction to the significantly more elaborate United Nations expressed and sourced article in the *ICCPR* on freedom of expression.

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public safety, public order, the protection of public health or morals or the prosecution of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right'.

83 George Brandis, above n 32. See also 'Brandis applauds defeat of media regulation', above n 43.

84 Human Rights Committee, *General Comment No 34: Article 19 Freedoms of opinion and expression*, UN Doc CCPR /C?GC/34 (12 September 2011).

85 Art 19(3) of the *ICCPR* states that 'the exercise of rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as provided by law and are necessary: (a) for the respect of the rights and reputations of others; (b) for the protection of national security or of public order or of public health or morals'.

Similarly, the *foundational human rights*[86] language used by Mr Wilson in the liberal democratic rights agenda has also failed to acknowledge or address the distinctive foundational characteristics of human rights in the United Nations human rights system — namely the characteristics of such human rights as being universal, indivisible and inalienable.[87] Perhaps a more pressing difficulty for this liberal democratic rights discourse is that its narrow iteration of rights — expression, association, religion and property — is itself at odds with some of the broader common law recognised rights in key historical documents such as *Magna Carta*,[88] the *Bill of Rights Act 1689*,[89] the *Habeas Corpus Acts*[90] and the *Act of Settlement 1701*.[91]

The omission by both Senator Brandis and Mr Wilson to coherently address how the identified liberal democratic rights have to exist both contemporaneously and historically alongside the broader suite of rights in international instruments, as well as in the common law derived rights in legislation, is not merely a significant conceptual issue. It is a frank demonstration of the artificiality and narrowness of the promulgated liberal democratic rights agenda. It is

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86 As identified by the Human Rights Commissioner, Mr Wilson: see Timothy Wilson, above n 7, 3.

87 See, eg, the *Preamble to the Charter of the United Nations*; *Charter of the United Nations* (Economic and Social Council) art 55, 62; *Preamble to the Universal Declaration of Human Rights*; *Universal Declaration of Human Rights* art 1, 2. See also *Vienna Declaration and Programme of Action* (Adopted by the World Conference on Human Rights in Vienna on 25 June 1993).

88 In the idea that the monarch was subject to law, that due process of law should prevail, and in measures against arbitrary arrest and imprisonment, dispossession of property, outlawry and exile, the provision for judgment by peers and the provision of habeas corpus.

89 In the form of denunciation of the divine right of monarchs, freedom of parliamentary debate, taxation only by parliamentary authority, the right of citizens to petition parliament and the king, making executive suspension of laws without parliamentary authority illegal, and the prohibitions against excessive bail, excessive fines and cruel and unusual punishment.

90 Providing for persons detained or imprisoned by sovereign authority a right of habeas corpus to allow the person to be brought before a court without delay.

91 Through the conferral of judicial independence principally through security of tenure for judges and removal only by parliamentary address on grounds of proven misconduct or incapacity.

this lack of context and historical breadth in assessing where the liberal democratic iteration of the rights sits beside, is integrated with, or relates to, international human rights or common law rights that is one of the most striking features of this debate. It is evidence suggestive of the strong ideological approach by its proponents.

The liberal democratic rights agenda advanced by Senator Brandis and Mr Wilson may be understood largely in contradistinction to the iterations of modern human rights with its international emphases, by highlighting some basic and common reference points, even though, as mentioned, minimal reference is made by either proponent to philosophical and other sources and literature in support of their assertions.[92] Such an exercise therefore must be necessarily partly speculative, but does account for the strong dissonance and distinguishing of views of Senator Brandis and Mr Wilson with the modern human rights versions of the same named rights they advocate. The sharp contradistinction of the said liberal democratic rights agenda and its selectivity in contrast to international human rights is further underlined where the two spheres conjoin — for example, in John Rawls' conception of the sort of human rights which would be envisaged 'for an international society of liberal-democratic and 'decent' peoples organised politically as states'.[93] The rights seen by Rawls essential for such an international society premised on liberal values are both different to and broader than the iterations of Senator Brandis and Mr Wilson:

> Human rights are 'a special class of urgent rights … they include rights to life (importantly including the means of subsistence), personal liberty, though not equal liberty, of conscience), personal property and equal treatment under law …' "Human rights proper" do not include the full complement of the rights found in the international law of human rights … Rawls's list does not include rights to freedom of expression and association (though it does include 'freedom of thought' and its 'obvious implications' or the rights of democratic political participation. In addition, rights against discrimination are limited; for example,

[92] See the discussion under 'Introduction' in this article and the citations at above n 13.

[93] See Charles Beitz, *The Idea of Human Rights* (Oxford University Press, 2009) 96 commenting upon John Rawls, *The Law of Peoples* (Harvard University Press, 1999).

> human rights are compatible with religious and (perhaps) gender qualifications for higher public office.[94]

In general identifications of the support of liberalism as a doctrine, a broad commitment to freedom in a range of areas ordinarily is seen absolutely central, embracing aspects in both politics[95] and in personal life.[96] The concentrated iteration of four prioritised rights — expression, association religion and property — under a liberal democratic rights umbrella by Senator Brandis and Mr Wilson is therefore of a narrow conception of the range of liberal democratic rights, perhaps explained by a desire to exert discretion over the status and priority of other liberal democratic rights. Further, these rights are interestingly advocated in a way neither confirmatory of a generalised commitment to liberty and individual rights, nor one unambiguously reflecting origins from John Locke and John Stuart Mill,[97] nor in a way which unambiguously acknowledges individual sovereignty[98] and in the utility of the rights reposed in the

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94 Beitz, above n 93, 97.

95 See Jeremy Waldron, *Liberal Rights Collected Papers 1981-1991* (Cambridge University Press, 1993) 38: 'In politics, liberals are committed to intellectual freedom, freedom of speech, association and civil liberties generally'.

96 Ibid: 'In the realm of personal life, they raise their banners for freedom of religious belief and practice, freedom of life-style and freedom (provided again that it is a genuine freedom for everyone involved)'.

97 In the sense of emphasising the primacy of the individual in rights configuration and that the validity of a transfer of protective obligations over life, liberty and property to an established government is contingent upon the proper conduct of government towards those ends: see Charles Beitz, 'What Human Rights Mean' (2003) 132(1) *Daedalus* 41; Jerome Shestack, 'The Philosophical Foundations of Human Rights' in Janusz Symonds (ed), *Human Rights Concepts and Standards* (Ashgate Dartmouth UNESCO publishing, 2000) 37; Waldron, above n 95, 45: 'as a basis for political legitimacy'; Waldron, above n 95, 39: 'Liberty is a concept which captures what is distinctive and important in human agency as such and in the untrammelled exercise of powers of individual deliberation, choice and intentional initiation of action'.

98 In Lockean rights of life, liberty and property in the individual which underpin a social contract in which government derives its legitimacy by facilitating and respecting these rights; 'it imagines that individuals establish institutions in a pre-institutional situation already constrained by certain moral requirements. Because persons have no power to abrogate these requirements, any institutions they establish must respect them': see Beitz, above n 93, 55.

individual.[99] That tonal resonance is missing in the two Australian advocates, and does suggest something less than a comprehensive commitment to libertarian principles or to liberalism.

Second, liberal democratic rights are ordinarily cast as negative rights, that is, in providing a philosophical claim for the individual to be immunised from the reach of state power, typically exercised through the enactment of legislation. The negative character of such rights ordinarily means their realisation is through an absence of legislative interventions and controls, in contrast to the creation of international human rights documents and treaties, which carry an expectation and obligation of domestic implementation. As Beitz observes:

> … the nature of the human rights of the Declaration [UDHR], which describes 'a common standard of achievement for all peoples and all nations'. If natural rights are about guaranteeing individual liberty against infringement by the state, human rights are about this and more; to put it extravagantly, though I think not wrongly, international human rights, taken as a package, are about establishing social conditions conducive to the living of dignified human lives. These rights represent an assumption of moral responsibility for the public sphere that was missing in classic natural rights theories.[100]

In addition, this negative character of the rights ordinarily means there is a much greater focus on the technical existence of the right, and not upon the practical capacity of the individual — through education and access to basic living standards, information and resources — to exercise the right,[101] as the capacity issue would

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[99] As in the observation that 'Mill holds that popular institutions are desirable because they are more likely than others to protect people's present interests and because the activity of political participation encourages the development of a vigorous responsible character among citizens': Ibid 175.

[100] See Beitz, above n 97, 41. See also Beitz, above n 93, 29-30: 'International human rights seek not only to protect against threats to personal security and liberty and to guarantee some recourse against the arbitrary use of state power, but also to protect against various social and economic dangers and to guarantee some degree of participation in political and cultural life'.

[101] See Thomas Pogge, *World Poverty and Human Rights* (Polity Press, 2nd ed, 2000) 51: 'Though legal rights are effectively enforced, poor and uneducated

generate positive legal obligations to enable realisation of the rights.[102] These positive obligations are commonly expressed in international human rights documents[103]and are at odds with the liberal democratic rights preferences of Senator Brandis and Mr Wilson. In addition, such positive obligations would, amongst other things, generate market interventions in the form of legislation, contrary to a core liberal democratic characteristic of market mechanisms to resolve competing interests. A further aspect is a common idea that 'civil and political rights are linked with the liberal tradition, whereas social and economic rights are usually associated with socialist ideology',[104] reinforcing from an ideological perspective a narrow construction of the type of rights that liberal democratic rights encompass.

It follows from both being an historical antecedent of the emergence of international human rights in the wake of the Second World War and through the establishment of United Nations charter based and treaty based human rights institutions and documents, as well as these state party human rights obligations (including some domestic enactment of international human rights treaty provisions,

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persons are nonetheless incapable of insisting on their rights, because they do not know what their legal rights are or lack the knowledge or minimum economic independence necessary to pursue enforcement of their rights through proper legal channels'.

[102] Ibid 54: 'This freedom must include various other liberties, such as freedom of access to informational media (such as books and broadcasts) and the freedom to associate with persons holding similar or different ethical views'.

[103] For example, in the progressive realisation within the capacity of a state's resources, of the range of rights in the *International Covenant of Economic Social and Cultural Rights*, opened for signature 19 December 1966, 993 *UNTS* 3 (entered into force 3 January 1976). See especially art 2(1): 'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of rights recognised in the Covenant by all appropriate means, including particularly the adoption of legislative measures'. See also *General Comment 3 The nature of States parties' obligations* (art 2 [1] of the Covenant) of the Economic Social and Cultural Rights Committee, UN Doc E/1991/23 Fifth Session (1990).

[104] Micheline Ishay, *The History of Human Rights From Ancient Times To The Globalisation Era* (University of California Press, 2008) 135.

periodic states parties reporting and individual human rights communication mechanisms under relevant human rights conventions, Universal Periodic Review and the role of thematic and country specific Special Rapporteurs) creating various interventions in the domestic sovereignty of the state, the liberal democratic rights agenda is unconcerned with a holistic or integrated manner of conceiving contemporary human rights. In fact, to do so would contravene central liberal democratic rights tenets of negative rights, institutional choice, individual interests, domestic sovereignty and the marketplace as the mechanism for resolution of competing interests.

The present articulation of the freedoms agenda therefore asserts the rights properly recognised, without more, as liberal democratic in source and in nature. So this strikingly ethereal and purist view of rights, to be consistent with the present articulations by Senator Brandis and Mr Wilson, should be properly disconnected from subsequent historical and legal developments of an international nature so absorbing those liberal democratic rights into the evolution of international human rights law and jurisprudence. In consequence, the Brandis and Wilson iteration of the liberal democratic rights eschew the developmental growth and application achieved in the rights through international human rights law.[105] The liberal democratic freedoms consequently assume a quite unique and artificial character — partly frozen in time prior to the rise of international human rights law, open to significant, subjective differences in philosophical content and scope of application, and wedded to a notion that realisation and observation of those rights is best achieved by limiting or reducing legislative realisation and preferentially relying upon means other than laws and lawmaking as

[105] It is in this sense that the liberal democratic rights agenda so promulgated runs contrary to conventional views about the evolutionary enlargement of human rights and is regressive. Speaking of the various United Nations human rights conventions which emerged after the 1948 *Universal Declaration of Human Rights* (UDHR), Beitz observes: '[t]hese provisions show both the substantive expansion of human rights doctrine and the extension of its reach from a society's constitution and basic laws to its public policies and customs': see Beitz above n 93, 31.

the primary, and not an incidental or supplementary, method of realisation.

It is not an unreasonable prediction that such an approach might well diminish the actual attainment and enjoyment of human rights for not just the politically and economically weak and marginalised, but also for the average citizen.[106] Even though such outcomes are undesirable, what seems more important in application of the liberal democratic rights agenda is an attainment of market principles and minimal government, such that the interests of the economically and socially advantaged — in rights such as association and property, for example as employers or landholders — are able to be further advanced.

VI MATCHING THE RHETORIC OF LIBERAL DEMOCRATIC RIGHTS TO HARD LEGISLATIVE REALITIES — THE EXERIENCE OF COMMONWEALTH TERRORISM LAW REFORM IN 2014

In particular, this rhetoric and insistence of liberal democratic rights colliding with contemporary human rights issues produces some striking inconsistencies. The consequences and complications identified above relating to the liberal democratic rights agenda are such as to create a disconnection between the rights claimed and their realisation in a legislative process. It could be said that the features

[106] Some examples might be in potential legislative consistent with a liberal democratic rights agenda: Freedom of religion (allowing religious schools to discriminate against entry and enrolment of students who are not co-religionists); Freedom of association (prohibiting the entry as of right for trade union officials for workplace health and safety inspections); Freedom of speech (removing restrictions on racially based speech that offends or insults on the basis of race); Property rights (removing environmental restrictions on land clearing on privately owned land, despite environmental concerns including soil erosion, loss of native habitat and biodiversity and loss of natural carbon capture capacity).

identified of the liberal democratic rights agenda are not amenable to the practicalities of the legislative process. It might be that within the operations of Parliament, liberal democratic rights are nice debating claims, discretionary and rhetorical in nature, but ultimately subordinate to the demands of political interests. In such circumstances, it might be that the liberal democratic rights agenda is quietly marginalised or put aside when it is politically inconvenient to the introduction and passage of legislation in which the government has a clear electoral and political advantage to be prosecuted. In the latter situation, liberal democratic rights feature a discretionary and rhetorical quality that is peripheral to debate and largely irrelevant to how legislation is drafted and enacted.

This is no more so than in the significant expansion in 2014 relation to Australia's terrorism laws and the powers of Australian intelligence agencies. For example, the articulated content for liberal democratic rights has proven strikingly inadequate in the legislative processes relating to the *National Security Legislation Amendment Act (No 1) 2014* (Cth), the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) and the Counter-Terrorism Legislation Amendment Bill (No 1) 2014 (Cth).

Displayed against the liberal democratic standard of freedom of expression were various overreach deficiencies in legislative drafting, debate and enactment that will significantly curtail freedom of expression. The comments of Senator Brandis and Mr Wilson regarding freedom of expression — as a primary liberal democratic right — have not impacted upon the Office of Parliamentary Counsel and the Attorney-General's Department in setting the relationship between expression and national security in the drafting of the three 2014 pieces of terrorism legislation. In addition, the legislative process was subject to the usual political exigencies, such as urgency in the passage of the legislation, under the stewardship of the Attorney-General. Very significant impacts upon freedom of expression — from the likelihood of the chilling of that expression and in the imposition of significant penalties — are the probable consequences of the legislative reforms.

For example, in the *National Security Legislation Amendment Act 2014* (Cth) in relation to the enhanced computer access warrants allowing access to third party computers as a means of accessing the target computer,[107] the definition of computer is so extraordinarily broad as to potentially encompass the internet,[108] a last resort threshold does not exist[109] and controls on the scope of the warrant rest solely within the largely discretionary language of the Ministerial warrant procedures. The potential chilling effect upon freedom of expression by access to third party computers (so broadly defined) is compounded by the lack of a proper periodic auditing and destruction process of third party information that is not relevant to security.[110]

The other major impact of the *National Security Legislation Amendment Act 2014* (Cth) upon freedom of expression is in the unauthorised disclosure of information offences in relation to ASIO special intelligence operations,[111] creating an offence of universal application for the disclosure — at a minimum on a standard of

[107] See *ASIO Act 1979* (Cth) s 25A.

[108] See *ASIO Act 1979* (Cth) s 22: *computer* means all or part of (a) one or more computers; or (b) one or more computer systems; or (c) one or more computer networks; or (d) any combination of the above.

[109] See the new s 25A(4)(ab) of the *ASIO Act 1979* (Cth): 'If, having regard to other methods (if any) of obtaining access to the relevant data which are likely to be as effective, it is reasonable in all the circumstances to do so — using any other computer or a communication in transit to access the relevant data and, if necessary to achieve that purpose, adding, copying, deleting or altering other data in the computer or the communication in transit'.

[110] See recommendation 4 of the Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the National Security Legislation Amendment Bill (No 1) 2014*; *Government Response to Parliamentary Joint Committee On Intelligence and Security Advisory Report on National Security Legislation Amendment Bill (No 1) 2014 – Response to Recommendation 4*: 'The Government will request ASIO and the Attorney-General's Department to undertake a review of the Attorney-General's Guidelines issues under s.8A of the ASIO Act, including examining requirements to govern ASIO's management and destruction of information obtained on persons who are not relevant, or are no longer relevant, to security matters'.

[111] See *ASIO Act 1979* (Cth) s 35P(1): A person commits an offence if (a) the person discloses information and (b) the information relates to a special intelligence operation. Penalty: imprisonment for 5 years.

recklessness[112] — for information relating to a special intelligence operation. Accordingly, this means that the journalist or private citizen who discloses information that relates to a special intelligence operation need not know definitively of the actual existence of the special intelligence operation, but need only be aware (a) 'of a substantial risk that the result will occur; and (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk'.[113] There is no public interest defence in relation to such disclosures on the basis that the information disclosed relates to an illegality or an impropriety in the conduct of a special intelligence operation. Indeed, attempts by crossbench Senators Leyonhjelm[114] and Xenophon[115] to have the bill amended to this effect were rejected by the government. The likely impact of this provision will be to deter public discussion and media publication about national security matters if there is the chance, however slight, that the information in that discussion or publication might relate to a special intelligence operation, particularly as the s 35P *ASIO Act 1979* (Cth) offence which the legislation creates, has no time limit relating to the disclosure. This approach of the Attorney-General to the *National Security Legislation Amendment Act 2014* (Cth) is a demonstrable example of how the principles espoused in the liberal democratic rights debate are rhetorical matters expendable to political

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[112] See *Criminal Code Act 1995* (Cth) s 5.4 for definition of recklessness.

[113] See *Criminal Code Act 1995* (Cth) s 5.4 for definition of recklessness; s 5.6(2) of the *Criminal Code Act 1995* (Cth) states: 'If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for the physical element'.

[114] The Leyonhjelm amendment would have prevented the application of the offence provisions of s 35P(1), (2) of the *ASIO Act 1979* (Cth) where under (3A)(a) the person informed the Organisation about the proposed disclosure at least 24 hours before making the disclosure; and (b) the disclosure did not include information on the identities of participants of a special intelligence operation, or on a current special intelligence operation; and (c) the information concerns corruption or misconduct in relation to a special intelligence operation.

[115] The Xenophon amendment would have permitted the circumstances of the disclosure to be taken into account in sentencing see s 35P(1A): 'A court must, in determining a sentence to be passed or an order to be made in respect of a person for an offence against subsection (1), take account of whether or not, to the knowledge of the court, the disclosure was in the public interest'.

imperatives. In particular, even those exercising a freedom of expression in Parliament were unable to obtain support for amendments to the legislation that would have allowed it to more closely approximate the widely proselytised liberal democratic expression principles, while accommodating national security concerns about the secrecy of special intelligence operations.

Other examples exist in the 2014 terrorism legislation[116] then exhibiting a marked departure from principles consistent with and conducive of the liberal democratic rights so advanced. One example is the *discretionary latitude* given in the structuring of intelligence gathering warrant powers through the two tier system of general conditional authorisation by the Minister in relation to identified person warrants, followed by an authorisation able to be made by the Minister or the Director-General in relation to search of premises, computer access, surveillance devices, inspection of postal articles and inspection of delivery articles.[117] That discretionary latitude is emphasised at the second tier stage by the Director-General (this authority not being confined to the Minister) being able to authorise a range of things under the different intelligence gathering mechanisms. A further example appears to be in a general practice or principle of deliberately vague and expansive legislative drafting in the 2014 terrorism legislation,[118] where a greater specificity would help to preserve the identified liberal democratic rights.

[116] Specifically the *National Security Legislation Amendment Act (No 1) 2014* (Cth) and the *Counter Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth).

[117] See *ASIO Act 1979* (Cth) s 27C Identified Person Warrants and 27D-27H. These amendments were made by the *National Security Legislation Amendment Act (No 1) 2014* (Cth).

[118] The technique of deliberately vague and expansive legislative drafting increases the scope of executive discretion and flexibility, no doubt considered desirable characteristics from the standpoint of intelligence agencies. The vagueness and lack of precision in terms was commented upon, for example, in submissions to the Parliamentary Joint Committee on Intelligence and Security inquiry into the Counter Terrorism Legislation Amendment Bill (No 1) 2014: See Parliamentary Joint Committee on Intelligence and Security, above n 60, 35-6, 43-4.

VII EXPLAINING THE DISJUNCTURE BETWEEN THE ADVOCACY OF LIBERAL DEMOCRATIC RIGHTS AND THE HUMAN RIGHTS IMPACTS OF 2014 COMMONWEALTH TERRORISM LAW REFORMS

How then might these inconsistencies be explained? Why have such inconsistencies emerged? It is certainly important that they are explained, because the debate instigated by Attorney-General Brandis and Mr Wilson about traditional liberal democratic rights is pursued both as a philosophical preference and also to re-balance human rights discourse and practice in Australia.

One plausible perspective is that the liberal democratic rights discourse has yet to produce any concrete effects upon tempering the ambit legislative claims by the government in relation to the drafting of national security legislation. It has not permeated Parliamentary or public service culture to affect a reformative and restraining influence upon either the national security legislative agenda, identified as hyper-legislation,[119] nor in the actual content of the legislation itself. In this respect, the rejection of plausible amendments entirely consistent with liberal democratic values, as proposed by the Liberal Democratic Party Senator for NSW, Senator Leyonhjelm, to the National Security Legislation Amendment Bill (No 1) 2014 (Cth) is particularly telling.[120] Instead, what has been witnessed is a rhetorical, cultural discourse, at times indulgent, and applied for political purposes.

Whether anything more substantial comes from this discourse following the Australian Law Reform Commission Inquiry or the Human Rights Commissioner national consultation on *Rights and*

[119] A term coined by the Canadian constitutional law scholar Professor Kent Roach: see Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, 2011) 309-10.

[120] See reference to these amendments in above n 114.

Responsibilities 2014 will be an open question, particularly as the substance of what constitutes liberal democratic rights has been narrowly drawn and methods other than laws to give expression to the liberal democratic freedoms agenda have been expressly preferred.

A second plausible perspective may emerge from actual experience of the operation of the Statement of Compatibility requirements under pt 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). The Explanatory Memoranda of the National Security Legislation Amendment Bill (No 1) 2014 (Cth) and the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) contained the requisite statements of compatibility for the respective bills. At the commencement of the statements of compatibility,[121] a perfunctory assertion is made that 'The Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*'.[122]

These claims are obviously contestable, particularly as the subsequent sectional analysis in the Statements of Compatibility consistently asserts compliance with Australia's major international treaty obligations.[123] It is not readily apparent that where a

[121] See Explanatory Memoranda Statements of Compatibility with Human Rights: National Security Legislation Amendment Bill (No 1) 2014 (Cth) and Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth).

[122] See Statements of Compatibility with Human Rights: National Security Legislation Amendment Bill (No 1) 2014 (Cth) and Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth).

[123] See the definition of 'human rights' in the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 3: 'human rights means the rights and freedoms recognised or declared by the following international instruments …', being the *International Convention on the Elimination of all forms of Racial Discrimination*, the *International Covenant on Economic, Social and Cultural Rights*, the *International Covenant on Civil and Political Rights*, the *Convention on the Elimination of All Forms of Discrimination Against Women*, the *Convention Against Torture and Other Cruel, Inhuman or Degrading*

derogation is permitted under international human rights law from the relevant human rights treaty obligations applying to Australia, that the means always chosen are necessary, proportionate or reasonable in the circumstances, or manifest the requisite textual specificity to be properly considered as prescribed by law. It is significant that in the case of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth), the Parliamentary Joint Committee on Human Rights produced a 50 page report on the Bill,[124] which on multiple occasions raised the question of whether the limitations on various international human rights obligations to which Australia is a party[125] are reasonable, necessary and proportionate to the achievement of a legitimate objective.[126] These

Treatment or Punishment, and the *Convention on the Rights of Persons with Disabilities*.

[124] Through s 7(a) of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), the Parliamentary Joint Committee on Human Rights has the function of examining bills that come before either House of Parliament for compatibility with human rights and to report to both Houses of Parliament on that issue. Compatibility of the bill is assessed against the seven core human rights treaties to which Australia is a party: *International Covenant of Civil and Political Rights*, opened for signature 19 December 1966, 999 *UNTS* 171 (entered into force 23 March 1976)*; International Covenant of Economic Social and Cultural Rights*, opened for signature 19 December 1966, 993 *UNTS* 3 (entered into force 3 January 1976); *Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 *UNTS* 195 (entered into force 4 January 1969); *Convention on the Elimination of Discrimination Against Women*, opened for signature 1 March 1980, 1249 *UNTS* 13 (entered into force 4 January 1969); *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 *UNTS* 85 (entered into force 26 June 1987)*; Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 *UNTS* 3 (entered into force 2 September 1990); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 *UNTS* 3 (entered into force 3 May 2008).

[125] Being the seven major international human rights conventions to which Australia is a party: see *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 3 definition of human rights.

[126] See Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Report on Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, 5: 'This is the analytical framework the committee applies when exercising its statutory function of examining bills for compatibility with human rights. The committee expects proponents of legislation, who bear the onus of justifying proposed limitations on human rights, to apply this framework in the statement of compatibility required for bills'.

questions and recommendations of the Joint Parliamentary Committee on Human Rights were ignored in the rushed passage of the Bill.[127] Similarly, the National Security Legislation Amendment Bill (No 1) 2014 (Cth) was reported on by the Parliamentary Joint Committee on Human Rights on 1 October 2014. However, the government had already responded to the Parliamentary Joint Committee on Intelligence and Security Inquiry into the Bill on 19 September 2014, accepting all of the 17 recommendations contained in that Parliamentary Joint Committee on Intelligence and Security report which was tabled on 17 September 2014.[128] The Bill passed the Senate on 25 September 2014, and then passed the House of Representatives on 1 October 2014, the same day that the Parliamentary Joint Committee on Human Rights reported on the Bill. The Parliamentary Joint Committee on Human Rights had commented in relation to its report[129] that:

> The statement of compatibility prepared by the Attorney General's Department identifies a number of human rights engaged by the bill. However, the statement of compatibility does not provide sufficient information on each proposed measure for the committee to presently

[127] The Parliamentary Joint Committee on Human Rights tabled its report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 on 28 October 2014. The Bill passed the Senate on 29 October 2014 and then passed the House of Representatives the following day. The Committee noted that 'the apparent urgency with which the national security legislation is being passed through the Parliament is inimical to legislative scrutiny processes, through which the committee's assessments and dialogue with legislation proponents is intended to inform the deliberations of Senators and Members of the Parliament in relation to specific legislative proposals': Ibid.

[128] *Advisory Report on the National Security Legislation Amendment Bill (No 1) 2014*, above n 110; George Brandis, 'Government response to committee report on National Security Legislation Amendment Bill (no 1) 2014' (Attorney-General Media Release, 19 September 2014) with the attachment 'Government response: Parliamentary Joint Committee on Intelligence and Security Advisory Report on the National Security Legislation Amendment Bill (No 1)' <http://www.attorneygeneral.gov.au/Mediareleases/Pages/2014/ThirdQuarter/19September_2014GovernmentResponseToCommitteeReportOnNationalSecurityLegislationAmenmentBillno-12014.aspx >.

[129] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth)* (*Thirteenth Report of 44th Parliament Bills introduced 22-25 September 2014*).

> and fully assess the compatibility of the bill with Australia's human rights obligations
>
> In the absence of detailed information in relation to the proposed measures it will be difficult for the committee to conclude that the proposed measures are compatible with human rights.[130]

This is the instant experience derived from assessing recent and important national security legislation against clearly identified human rights treaty articles prescribing rights. In one sense, by ignoring the reports of the Parliamentary Joint Committee on Human Rights (and the assessment for compatibility of the two 2014 terrorism bills with Australia's international human rights obligations under the seven core treaties) the government was keeping faith with the principles of its own liberal democratic rights agenda – in particular by eschewing internationally sourced human rights law as a legitimate basis for assessing rights, in minimising the actual content (in pages of legislation and legislative structure, which would be increased by responding to the requirements of necessity, legality and proportionality) of legislation enacted, in disengaging from the process of compatibility statements which are ordinarily linked in other jurisdictions to actual operation of a legislated charter of rights[131] and in practically asserting parliamentary sovereignty.

However, in relation to the 2014 terrorism legislation, the task (if it had been properly embarked on) of assessing compatibility of legislation with liberal democratic rights would be much more legally problematic and demanding. There is no textual document to refer to; there is not a formal legislated mechanism to make that assessment, and indeed, legislated frameworks have been objected to on liberal democratic ideological grounds as involving unwarranted government intervention; there is no consistency or proximity of agreement as to the exact content of the liberal democratic rights (in the sense there is no consensus on which rights are truly liberal democratic rights), or the legislative circumstances in which they

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[130] Ibid. Chair's Tabling Statement Wednesday 1 October 2014, 2-3.

[131] See *Human Rights Act 1998* (UK); *Bill of Rights Act 1990* (NZ); *Human Rights Act 2004* (ACT); *Human Rights and Responsibilities Act 2006* (Vic).

might yield to other competing claims; further, there is no set of legally accessible criteria, such as proportionality, reasonableness, necessity or lawfulness by which an assessment of laws for consistency with liberal democratic principles can readily and consistently be made.

Instead, the controls for consistency with such rights are personalised and largely subjective. Excessive reliance is placed upon the disposition and attention of executive office holders, such as the Attorney-General and the Director-General of Security, and upon those engaged in the legislative processes, as possessing the philosophical literacy to ensure that liberal democratic rights are invoked; whilst deliberative constraints on critique and scrutiny within a time pressured legislative agenda, or indeed, party political opportunism trumping mature assessment of such rights, operate as unseen factors influencing the status of these rights and whether they are reflected in the enacted legislation.

VIII APPROPRIATING HISTORY: ASSERTING THE CLAIM OF SECURITY AS CONSISTENT WITH LIBERAL DEMOCRATIC RIGHTS AND PROVIDING CONTINUITY WITH PREVIOUS TERRORISM LAW REFORM

These difficulties are acutely confronted at the intersection of liberal democratic rights with the 2014 terrorism law reform bills identified, explaining the re-emphasis and re-emergence of the need to ensure security — contemporaneous with, and claimed to be consistent with, the liberal democratic rights discourse. Combined with the factors identifying disjuncture between liberal democratic rights advocacy and 2014 terrorism law reform (considered under the immediately preceding heading)[132] and the appropriation of the conception of

[132] Under the heading 'Explaining the disjuncture between the advocacy of liberal democratic rights and the human rights impacts of the 2014 Commonwealth terrorism law reforms.

security as consistent with liberal democratic rights (considered below), there appears no positive impact or discernible linkage of this agenda in a way that tempers the scope of the 2014 terrorism law reforms or meaningfully introduces formal or informal steps to contest the legislative provisions against the foundational liberal democratic rights.

Indeed, the contrary might well be the case. The need to ensure security and the responsibility of government for the realisation of that security is argued to be consistent with liberal democratic rights, and indeed a right in itself.[133] It provides a possible, if not convenient, resolution of the contradictions in a significant detraction of rights evident in the two 2014 examples of terrorism law reform.

This is in the sense that the realisation of liberal democratic freedoms and the minimisation of government interference with those freedoms (if necessary, through 'streamlining' legislation, the removal of 'red tape' and 'green tape' or through legislative repeals) through small government requires a physically secure environment for this to occur. Consequently, the preservation of state security — even though this might cause considerable detriment to what is conventionally and commonly understood in the twenty first century to be human rights — might be argued as consistent with creating an environment under which liberal democratic rights — expression, association, religion and property, may flourish. So rather than seeing state intervention and state power as inimical to liberal democratic rights, the role of the state is re-calibrated in its primary legitimacy or reason for existence as providing a security umbrella for the enjoyment and assertion of these liberal democratic rights.

[133] George Brandis, 'Securing our Freedoms' (Speech delivered at the Centre for Strategic and International Studies, Washington, 8 April 2014): 'The Australian Government is strongly committed to ensuring that Australian national security agencies have the resources they need to achieve the significant outcomes we have experienced in protecting our most fundamental human rights – the right of our people to life, liberty and security of person' <http://www.attorneygeneral.gov.au/Speeches/Pages/2014/Second%20Quarter%202014/8April2014SecuringourFreedoms.aspx>.

It is no small coincidence that this approach provides a perfect medium to accommodate significant real subtractions occasioned to liberal democratic rights such as expression and association (overlapping with their contemporary human rights configuration), in counter-terrorism laws, and to portray this development as entirely consistent with a liberal democratic rights agenda. In advocating the first of the 2014 reforms of terrorism laws, Attorney-General Brandis pursued this very argument by responding to the Liberal Democratic Party Senator from NSW:

> Senator Leyonhjelm … I understand and respect the fact that the power of government should be used sparingly, if at all, in a free society. If I may presume to paraphrase your political philosophy in a sentence that, I think, is it. But may I remind you … that freedom is not a given. A free society is not the usual experience of mankind. Freedom must be secured and particularly at a time when those who would destroy our freedoms are active, blatant and among us. It is all the more important that our freedoms are secured by those with the capacity and the necessary powers to keep us safe.[134]

> The Australian Government is committed to fulfilling its most important responsibility — to protect Australia, its people and its interests — and will do so while instilling confidence that our national security and counter-terrorism laws will be exercised in a just and accountable way.[135]

> The Australian Government is strongly committed to ensuring that Australian national security agencies have the resources they need to achieve the significant outcomes we have experienced in protecting our most fundamental human rights — the right of our people to life, liberty and security of person.[136]

The argument has similarly manifested itself in the asserted first priority of keeping Australians safe.[137] Yet this is a lazy argument in

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[134] Commonwealth, *Parliamentary Debates*, Senate, 24 September 2014, 6918 (Senator Brandis).

[135] Commonwealth, *Parliamentary Debates*, Senate, 24 September 2014, 68 (Senator Brandis).

[136] George Brandis, above n 133.

[137] Commonwealth, *Parliamentary Debates*, Senate, 16 July 2014, 5158 (Senator Brandis); George Brandis, 'National Security Legislation Amendment Bill (No 1) 2014' (Attorney-General Media Release, 1 October 2014)

that legislatively quite repressive measures can be characterised as necessary to create an environment for those privileged in economically, educationally and politically terms to be able to exercise a limited number of liberal democratic rights. That acceptance is elevated in the urgent and opaque circumstances of the 2014 national security legislative reforms, which significantly reduced the opportunity for scrutiny and testing of legislative reforms against liberal democratic rights, let alone against human rights as such rights are commonly, contemporarily and legally understood, deriving from international foundations.

There is nothing necessarily new about this phenomenon. Instead, this approach is more properly seen as within a continuing historical context of coalition governments using national security concepts in an attempt to redefine human rights — simply the difference on this occasion, is that the opportunity presented for such redefinition coincides with the concerted articulation of liberal democratic rights.

That continuing historical context may be traced to the significant and substantial counter terrorism legislative activity of the Howard government, including measures introduced by that government such as control orders, preventative detention, stop, search and seizure powers and ASIO questioning and detention warrants — which happened to be substantially re-visited in the subject matter of the Counter-Terrorism Legislation (Foreign Fighters) Bill 2014 (Cth).[138] Attorney-General Ruddock of the Howard government presented the expansion of executive discretionary power in several examples of significant terrorism legislation as not only consistent with international human rights law, but that international human rights law following the September 11 attacks had afforded a new

<http://www.attorneygeneral.gov.au/Mediareleases/Pages/2014/FourthQuarter/1October2014-NationalSecurityLegislationAmendmentBillNo12014.aspx>.

[138] See, eg, Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* ch 2 sch 1; Counter Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) sch 1; amendments to the *Criminal Code Act 1995* (Cth) and the *Crimes Act 1914* (Cth).

importance to art 3 of the *Universal Declaration of Human Rights* (*UDHR*), the right to life.[139] This argument was cast in the appropriated and inverted language of human security.[140] This distinctive and unique interpretation of art 3 of the *UDHR* was also pursued by the then head of the Attorney-General's Department, Robert Cornall,[141] by re-configuring an understanding of human rights and aligning what was considered necessary and desirable counter-terrorism legislative change.[142]

Accordingly, traditional conceptions of *UDHR* rights as protecting the individual against the concentration and exercise of state power, that is, of limiting government as a foundational characteristic of the liberal democratic state – were inverted to the claim of a new right of security, conceived as a human and indeed a community based right. Within the Ruddock-Cornall iterations, the notion of the state as the anticipated principal source of infringement of rights was contested in the post September 11 environment. Of course, such a re-conceptualisation provides for a legitimisation of the expansion of Commonwealth executive and discretionary power under terrorism legislation, while claiming consistency with human rights and indeed individuals ordinarily associated with human rights.[143] Closer

[139] See Greg Carne, 'Neither Principled nor Pragmatic?: International Law, International Terrorism and the Howard Government' (2008) 27 *Australian Year Book of International Law* 11; Greg Carne, 'Reconstituting 'Human Security' in a New Security Environment: One Australian, Two Canadians and Article 3 of the Universal Declaration of Human Rights' (2006) 25 *Australian Year Book of International Law* 1.

[140] The human security label was used in a series of Attorney-General's speeches, articles and media releases; see Carne, 'Neither Principled Nor Pragmatic?', above n 139, 20-1, footnote 49.

[141] Robert Cornall, 'Keeping Our Balance in Troubled Times: Legal Measures, Freedoms and Terrorist Challenges' (2005) *Defender* 28, 30-1; Robert Cornall, 'Global Security in the New Millenium: The View from the Attorney-General's Department' (2003) *Canberra Bulletin of Public Administration* 66, 68-9.

[142] See Greg Carne, 'Prevent, Detain, Control and Order?: Legislative Process and Executive Outcomes in Enacting The Anti-Terrorism Act (No 2) 2005 (Cth)' (2007) 10 *Flinders Journal of Law Reform* 17, 79.

[143] Such as Louise Arbour, former UN High Commissioner for Human Rights and former Canadian Supreme Court Judge and Irwin Cotler, then Canadian Attorney-General, a former Dean of McGill University Law Faculty and a noted civil liberties lawyer, who acted for Nelson Mandela.

examination of the writings of these individuals cited by Attorney-General Ruddock and Mr Cornall demonstrates that the claims made were neither accurate nor justifiable.[144]

These interpretations from the Howard government counter terrorism law portfolio can be seen as the strongly related lineal ancestor of the current focus upon securing the state simultaneous with a liberal democratic rights discourse. Within that internally framed logic, Attorney-General Brandis has been able to introduce new 2014 pieces of legislation[145] therefore producing significant incursions upon conventionally identified civil and political rights. This emphasis by Attorney-General Brandis within a liberal democratic rights discourse of the precedential and facilitative relationship of security to such liberal democratic rights strongly echoes previous Howard government actions which contentiously adapted and appropriated the language of international human rights law to justify its terrorism laws:

> Attorney General Ruddock elided from Article 3 of the *UDHR* (in its security of the person aspect) to a claimed human right to safety and security, which took precedence over other rights and created a government obligation for the realisation of that right.[146]

> This meant that the referent focus of threat to be protected against the right had shifted from the state to non-state actors. In fulfilling this obligation to create a physically secure environment, the possibility that state-enacted counter-terrorism measures themselves may constitute a threat to the safety and security of the individual is oddly removed from the debate.[147]

To borrow from the above language, what is oddly removed from the recent debate is a rigorous critique grounded in liberal democratic foundational principles of the impacts — which would include

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[144] Carne, 'Neither Principled Nor Pragmatic?', above n 139, 22-3.

[145] *National Security Legislation Amendment Act (No 1) 2014* (Cth); *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth); Counter Terrorism Legislation Amendment Bill (No 1) 2014 (Cth).

[146] Carne, 'Neither Principled Nor Pragmatic?', above n 139, 23.

[147] Ibid.

unintended consequences — of the 2014 counter terrorism laws upon such cardinal principles as freedom of expression and association. The invocation of a technique of securitising rights practically neutralises the contradictions arising from the pursuit of a liberal democratic rights agenda with significant and constantly incremental incursions upon such rights through sequential terrorism laws.

IX FURTHER COMPREHENDING THE INTERSECTION OF LIBERAL DEMOCRATIC RIGHTS AND THE 2014 COMMONWEALTH TERRORISM LAW REFORMS

There are further contradictions inherent in the present disposition of the Attorney-General's role. First, as purported champion of liberal democratic freedoms, but also as a practising politician attuned to both the security responsibilities of the Attorney-General's portfolio, as well as the advantageous national security agenda for the Coalition. Second, for the proper conduct of that liberal democratic critique, the legislative process did not provide the necessary deliberative space and time, instead involving a rushed passage of the 2014 terrorism legislation, making an authentic application of such liberal democratic principles impossible. It is just as important that the public policy and legislative process and framework which constructs the imagined conditions of security itself, be a product of, and significantly reflect those freedoms, but the speed[148] and complexity of the 2014 legislative experience suggests otherwise. Instead, the assertion of a strictly minimalist approach to the

[148] Again, speed and urgency in the passage of legislation were identifiable characteristics of much of the earlier era Howard government terrorism law enactment practices: see Andrew Lynch, 'Legislating with urgency: the enactment of the Anti-Terrorism Act (No 1) 2005 (Cth)' (2007) 30 *Melbourne University Law Review* 747; Anthony Reilly 'The processes and consequences of counter-terrorism law reform in Australia: 2001-2005' (2007) 10 *Flinders Journal of Law Reform* 81, 91; Martin Krygier, 'War on Terror' in Robert Manne (ed), *Dear Mr Rudd Ideas for a Better Australia* (Black Inc, 2008) 137; Greg Carne, 'Hasten Slowly: Urgency, Discretion and Review – A Counter Terrorism Legislative Agenda and Legacy' (2008) 13 *Deakin Law Review* 51.

incursion of rights consistent with the Attorney-General's personal, self-expressed liberal democratic rights world view has become something of a default response in public discussion:

> As a lawyer, I have a bred in the bone respect for due process and the rule of law. As a liberal, I have an instinctive reluctance to expanding the power of the state by diminishing the freedom of the individual. But as the Minister within the government and responsibility for protecting our national security, I am determined to do what the community expects to protect it from a real and present threat. [149]

> … I do approach these issues as a Liberal. I do approach these issues with a philosophical commitment to keeping the power of the state as small as reasonably necessary and keeping the freedom of the individual as large as we possibly can, and everything that I have done and there are many people from the Department here who work with me in devising this legislation will remember the long conversations we've had and which I've said to them … we need to give the agencies the powers they need, but we must make sure that we don't overreach.[150]

> I think that we should approach these difficult choices with a strong presumption against expanding the power of the state, except where we

[149] George Brandis, 'Address to the National Press Club' (Speech delivered at the National Press Club Canberra, 1 October 2014) <http://www.attorneygeneral.gov.au/Speeches/Pages/2014/FourthQuarter2014/1October2014-AddressToTheNationalPressClubCanberra.aspx >.

[150] George Brandis, 'Questions and answers at the National Press Club Address' (Questions and Answers following speech delivered at National Press Club Canberra 1 October 2014) <http://www.attorneygeneral.gov.au/Speeches/Pages/2014/FourthQuarter2014/1October2014_AddressToTheNationalPressClubCanberra.aspx>. See also similar comments in transcripts of media interviews with the Attorney-General, Senator Brandis: 'Attorney-General with Chris Uhlmann, AM Program, ABC', 22 September 2014 <http://www.attorneygeneral.gov.au/transcripts/Pages/2014/ThirdQuarter2014/22September2014_AttorneyGeneralWithChrisUhlmann_AMProgrammeABC.aspx>; 'Press Conference with the Director-General of Security', 22 September 2014 <http://www.attorneygeneral.gov.au/transcripts/Pages/2014/ThirdQuarter2014/22September2014_PressConferenceWithTheDirectorGeneralOfSecurity.aspx; 'interview with Louise Yaxley, ABC the World Today', 17 October 2014 <http://www.attorneygeneral.gov.au/transcripts/Pages/2014/FourthQuarter2014/17October2014_InterviewWithLouiseYaxleABCTheWorldToday.aspx>.

> are absolutely convinced that it's necessary to do so in order to protect public safety.[151]

However, there has been significant evidence of a less than minimalist legislative approach in the scope and language of the 2014 terrorism laws and significant inconsistency with the principle of minimising state power — evidenced by both the various submissions to the Parliamentary Joint Committee on Intelligence and Security inquiries[152] and in the recommendations for changes to the bills in the three reports of the Parliamentary Joint Committee on Intelligence and Security.[153]

Four important observations can be made in relation to the issue of legislative alignment with liberal democratic rights, and in particular rights of expression and association. First, surrounded by the rhetoric of the freedoms agenda and debate, there has been no consistent and coherent alignment in the drafting of these 2014 laws with the stated liberal democratic values.

Second, the quite limited nature of the articulated liberal democratic rights in contrast to contemporarily recognised human rights means that much less of substance is available in critiquing and scrutinising the new terrorism laws from the freedoms agenda, both in substance and in process, than is perhaps first appreciated.

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[151] George Brandis, 'Interview with Marius Benson', *ABC News Radio*, 31 July 2014 <http://www.attorneygeneral.gov.au/transcripts/Pages/2014/ThirdQuarter2014/31July2014-InterviewwithMariusBensonABCNewsRadio.aspx>.

[152] See *Advisory Report on the National Security Legislation Amendment Bill (No 1) 2014,* above n 110 Appendix A List of Submissions; Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* Appendix A List of Submissions.

[153] *Advisory Report on the National Security Legislation Amendment Bill (No 1) 2014* , above n 110, List of Recommendations ix; *Advisory report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, above n 138, List of Recommendations xii; *Advisory report on the Counter-Terrorism Legislation Amendment Bill (No 1) 2014,* above n 60, List of Recommendations ix.

Indeed, this limited content of liberal democratic rights does not even have the textual identity and reference points that a statutory charter or constitutional bill of rights provides.

This deficiency means that the ability to argue a re-conceptualisation of security measures as providing a structure for the realisation of liberal democratic rights, as discussed above, becomes important. This provides the means by which significant impacts upon expression and association — frequently by chilling and deterrence of expression and association activities — can be rationalised, albeit in a misleading or erroneous manner — as consistent with a liberal democratic rights agenda.

Third, the alignment of national security legislation with liberal democratic values in the above quoted and repeated circumstances relies upon a personal set of beliefs or philosophical grounds of a member of the executive set against potential or real legislative excesses. This simply does not provide a credible reassurance or bulwark, given the momentum of the national security claim, of constituting liberal democratic principles again as another example of executive discretion.

Fourth, these circumstances are compounded when, as in the present, the government considers that counter-terrorism legislation is under constant review — such constant review does not produce the optimal calm and measured circumstances to test prospective legislative changes against liberal democratic rights, absent a legal framework or formal recognition of such rights, or a consensus as to the content of such rights, that these arguments assume.

A further perspective providing understanding on how the relationship of the 2014 terrorism laws might be accommodated within a liberal democratic rights agenda is provided by various claims made prior to, and immediately after, the coming to government of the Coalition parties — by Senator Brandis first as

shadow Attorney-General and subsequently as Attorney-General, including claiming to be Australia's minister for national security.[154] This claim accompanied the belief that the Gillard government had neglected the national security agenda and measures against terrorism.[155] The elevation of and the priority given to the national security agenda in this claim was further underlined by the appointment of the former Director-General of Security, Paul Sullivan, as the Attorney-General's Chief of Staff.[156] This clear political assertion was intended to elevate the status of national security as a priority and set an agenda where the government is seen as having a natural political advantage over the Opposition. It significantly pre-dates the rise of Islamic State,[157] which was the spur to the accelerated introduction of some aspects of the 2014 terrorism legislative reforms. These circumstances indicate it was always more probable than not that the political imperative would take priority over the niceties of liberal democratic rights such as expression and

[154] See 'Terror fight returns as A-G's focus', *The Australian* (Sydney), 18 November 2013, 3; Andrew Lynch, 'The Brandis Agenda', *Inside Story*, 4 December 2013 <http://insidestory.org.au/the-brandis-agenda>.

[155] Anthony Bergin and Kristy Bryden, 'National security is being compromised', *The Australian* (Sydney), 29 November 2013; Daniel Baldino, 'Not so smart: The Coalition intelligence review repeats old mistakes', *The Conversation*, 25 June 2013 <http://theconversation.com/not-so-smart-the-coalition-intelligence-review-repeats-old-mistakes-15466>. This aspect primarily related to the claim of then Prime Minister Gillard that the 9/11 decade had come to an end.

[156] See 'Brandis staffing coup points to national security focus', *Crikey*, 18 October 2013: 'Brandis said [the] appointment 'will underline the strong national security focus which I intend to bring to the Attorney-General's portfolio" <http://www.crikey.com.au/2013/10/18/brandis-staffing-coup-points-to-national-security-focus/b>; 'Terror fight returns as A-G's focus', *The Australian* (Sydney), 18 November 2013: "I find that I spend more of my time dealing with national security issues than with anything else – by a very wide margin in fact', Senator Brandis said'; George Brandis, 'Mr Paul O'Sullivan AO' (Attorney-General Media Release, 17 October 2013): 'The appointment will underline the strong national security focus I intend to bring to Attorney-General's portfolio' <http://www.attorneygeneral.gov.au/Mediareleases/Pages/2013/Fourth%20quarter/17-October-2013---Mr-Paul-O%27Sullivan-AO.aspx>.

[157] An Islamic Sunni fundamentalist terrorist organisation aspiring to the criteria of statehood in international law, by military conquest occupying various geographical areas of Iraq and Syria and operating under a variety of names: see <http://www.nationalsecurity.gov.au/Listedterroristorganisations/Pages/IslamicState.aspx>.

association. Such rights were likely to be speedily accommodated and subordinated to the political imperative.

Prior to, and in the early months of government, Senator Brandis sought to repatriate national security and counter-terrorism law activity back to the political status it attained in the years of the Howard government. Given that objective, the actual attainment, rather than rhetorical advocacy, of liberal democratic rights must yield in an environment where the Howard era terrorism laws are not for change,[158] are under ongoing review[159] and where the newly emergent and real threat of Islamic State is driving much of the rapidly expansive counter-terrorism legislative agenda. This reclamation of the mantle of national security carries the imperative of executive and legislative action over the niceties of discourse about liberal democratic rights. There is a casual and perfunctory character in the jettisoning of such rights in new and challenging circumstances. This is no more clearly conveyed than in Prime Minister's 2014 Statement to Parliament on National Security, prioritising national security over liberty:

> … regrettably and for some time to come, Australians will have to endure more security than we're used to, and more inconvenience than we'd like. Regrettably, for some time to come, the delicate balance between freedom and security may have to shift. There may be more restrictions on some so that there can be more protections for others … So today I pledge that our security agencies will have all the resources and authority that they reasonably need … Madam Speaker, if the police and security agencies can make a case for more resources and for more powers, the government's strong disposition is to provide them because it's rightly expected of us in this place that we will do whatever we possibly can to keep people safe.[160]

[158] Baldino, above n 155, 4

[159] Lynch, above n 154, 4.

[160] Tony Abbott, 'Prime Minister of Australia Statement to Parliament on National Security 22 September 2014' (Prime Minister Media Release, 22 September 2014) <https://www.pm.gov.au/media/2014-09-22/statement-parliament-national-security>.

This prioritisation of executive interests (as represented in the police and security agencies reference here) over liberal democratic freedoms, as well as human rights more conventionally recognised, is not unexpected in the situation of heightened terrorism. However, it can equally be characterised as a retreat from freedoms into the politics of expediency and party and government advancement in its legislative and social agenda, as much as a retreat from the indulgent criticism in transition from Opposition politics to the practicalities of government. This is a broad phenomenon, not confined to the subject matters of national security and terrorism and their intersection with the liberal democratic freedoms agenda,[161] but simply more boldly embraced.

Executive interests are in fact being prioritised and the absence of, or marginalisation of, the influence and impact of liberal democratic rights upon these reforms cannot be merely explained away as a resolution of conflicting interests in security and human rights. This is evidenced by the number and seriousness of illustrative examples arising from the 2014 counter terrorism legislative reforms and usually impacting directly or tangentially on practices of expression and association.

The first of these examples has been to confine each of the reviews of the National Security Legislation Amendment Bill (No 1) 2014 (Cth), the Counter-Terrorism Legislation Amendment Bill (No 1) 2014 (Cth) and the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) to the Parliamentary Joint

[161] Cf the defence and advocacy of liberal democratic freedoms by then Opposition Leader Tony Abbott: see Tony Abbott, 'Freedom Wars' (Address at the Institute of Public Affairs, Sydney, 6 August 2012) <http://resources.news.com.au/files/2012/08/06/1226443/820701-aus-na-file-abbott-speech.pdf>. For several examples provided of retreating from those freedom principles after being elected to government in 2013 see David Marr, 'Freedom Rider The brief life and quiet death of Tony Abbott's love of liberty', *The Monthly*, September 2014, 20-9. See also David Marr, 'Abbott running from the law', *The Saturday Paper*, 28 February 2015, 7.

Committee on Intelligence and Security, whose membership[162] is drawn exclusively from the Coalition Government and the Labor Opposition. Accordingly, a more executive-centric view of national security matters is brought to these reviews, by the exclusion of cross bench and minor party members from the committee (and with membership comprising former ministerial office holders[163]), and in contrast to the traditionally more broadly based and legally qualified membership of the Senate Legal and Constitutional Affairs Committee, which conducted a number of reviews of national security legislation during the years of the Howard government.[164]

The executive interests more favoured by a narrower membership of this specialist committee were reinforced by two other factors. The Opposition repeatedly emphasised its commitment to bipartisanship and consensus on national security legislative issues, to the extent of eviscerating any sustained and deep scrutiny from an applied human rights perspective of the proposed laws, exacerbated by a largely agreed expedited process.[165] The tight deadlines set by the Executive

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[162] See the membership of the Parliamentary Joint Committee on Human Rights at <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/Committee_Membership>.

[163] Including two former Attorneys-General, Hon Mark Dreyfus and Hon Philip Ruddock.

[164] Amongst the major reviews conducted by the Senate Legal and Constitutional References Committee or the Senate Legal and Constitutional Legislation Committee into terrorism law matters were Senate Legal and Constitutional Committee, Commonwealth Parliament, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005); Senate Legal and Constitutional Legislation Committee, Commonwealth Parliament, *Provisions of the Anti-Terrorism Bill (No 2) 2004* (2004); Senate Legal and Constitutional Legislation Committee, Commonwealth Parliament, *Provisions of the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (2002); Senate Legal and Constitutional Reference Committee, Commonwealth Parliament, *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters* (2002).

[165] See 'New antiterrorism laws: Shadow AG Mark Dreyfus', *ABC Radio National RN Breakfast*, 22 September 2014 <http://www.abc.net.au/radionational/programs/breakfast/new-antiterrorism-laws-shadow-ag-mark-dreyfus/5759376>; 'Radio Interview -3AW- National Security' interview with Opposition Leader Mr Bill Shorten, 23 September 2014 <http://billshorten.com.au/radio-interview-3aw-national-security>; 'Our disconcerting certainty in battling

for public submissions[166] reduced the contributions, including those from a human rights perspective, which key expert civil society organisations and individuals could make to the review process.[167]

terrorism', *ABC The Drum*, 25 September 2014 <http://www.abc.net.au/news/2014-09-25/green-our-disconcerting-certainty-in-battling-terrorism/5767916>; 'Lateline – Iraq: National Security Legislation', *ABC Lateline* interview with Opposition Leader Mr Bill Shorten, 1 October 2014 <http://billshorten.com.au/lateline-iraq-national-security-legislation>; 'ABC Radio National – Tony Abbott's broken promise on the Petrol Tax: National security legislation', *ABC Radio National* interview with Opposition Leader Mr Bill Shorten, 29 October 2014 <http://billshorten.com.au/abc-radio-national-tony-abbotts-broken-promise-on-the-petrol-tax-national-security-legislation>; 'Press Conference Melbourne – National Security Legislation: Ebola' (transcript of Press Conference with Mr Bill Shorten, Opposition Leader and Mr Mark Dreyfus Shadow Attorney-General, Melbourne, 17 October 2014) <http://billshorten.com.au/press-conference-melbourne-national-security-legislation-ebola>; George Brandis, 'Parliament Passes Counter-Terrorism Legislation' (Attorney-General's Media Release, 2 December 2014) <http://www.attorneygeneral.gov.au/Mediareleases/Pages/2014/FourthQuarter/2December2014-ParliamentPassesCounter-TerrorismLegislation.aspx>; 'Prime Minister Tony Abbott to simplify terror warnings and appoint counter-terrorism coordinator as part of a new anti-extremism strategy', *ABC News* (online), 23 February 2015 <http://www.abc.net.au/news/2015-02-23/tony-abbott-to-announce-new-government-anti-extremism-strategy/6200042>.

166 See *Advisory Report on the National Security Legislation Amendment Bill (No 1) 2014*, above n 110, 3: 'The inquiry was referred to the Committee by the Attorney-General on 16 July 2014. The Chair of the Committee, Mr Dam Tehan MP, announced the inquiry by media release on 18 July and invited submissions from interested members of the public. Following an extension, submissions were requested to be provided to the Committee by 6 August 2014' (with the Attorney-General, Senator Brandis, having set a Committee reporting date of 8 September 2014); see *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, above n 138, 2: 'The inquiry was referred to the Committee by the Attorney-General on 24 September 2014. The Chair of the Committee, Mr Dan Tehan MP, announced the inquiry by media release on 25 September 2014 and invited submissions from interested members of the public. Submissions were requested by 3 October 2014'; *Advisory Report on the Counter Terrorism Legislation Amendment Bill* (No 1) 2014, above n 60, 2: 'The inquiry was referred to the Committee by the Attorney-General on 29 October 2014. The Chair of the Committee, Mr Dan Tehan MP, announced the inquiry by media release on 30 October 2014 and invited submissions from interested members of the public. Submissions were requested by 10 November 2014'.

167 See, eg, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, above n 138, 3: 'Nearly every submission to the inquiry commented on the short timeframes. The intensive nature of the inquiry

Furthermore, the Prime Minister and the Attorney-General applied further pressure to the review process by ongoing public commentary, calling for the swift passage of the legislation.

The manifestation of executive interests being advanced in the three examples of 2014 terrorism legislation through the inefficacy of the liberal democratic rights agency is also evidenced by some further points. Legislation was drafted, reviewed and then proceeded to enactment without proper consideration of and addressing the significant reviews of aspects of terrorism laws conducted by the Council of Australian Governments Review (Whealy Committee)[168] and the Independent National Security Legislation Monitor.[169]

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and the short timeframes placed significant demands on the Committee. While the Committee recognises and understands that this resulted from exceptional circumstances, it would have been preferable if more time had been available for that inquiry'. The last two sentences of the preceding quote are repeated in the separate and subsequent report: *Advisory Report on the Counter-Terrorism Legislation Amendment Bill (No 1) 2014*, above n 60, 3.

[168] *Council of Australian Governments Review of Counter Terrorism Legislation* (Commonwealth Attorney-General's Department, 2013) (Anthony Whealy QC, a retired judge of the New South Wales Supreme Court, was chair of the Committee). This report was of particular relevance to the *Criminal Code Act 1995* (Cth) control order amendments affected in 2014, which were significantly expanded by the *Counter Terrorism Legislation Amendment Act (No 1) 2014* (Cth), without incorporating the additional Whealy Committee report safeguards.

[169] The inaugural Independent National Security Legislation Monitor (INSLM), Mr Brett Walker SC, produced four annual reports from 2011 on a variety of terrorism related topics. Two of the three Parliamentary Joint Committee on Intelligence and Security reports (the recommendations from which were largely accepted as government amendments to the 2014 terrorism legislation) – namely the *Advisory Report on the National Security Legislation Amendment Bill (No 1) 2014* (Cth), above n 110 and the *Advisory Report on the Counter-Terrorism Legislation Amendment Bill (No 1) 2014* (Cth), above n 60 made relatively little reference to the INSLM reviews. In the *Advisory Report on Counter Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, above n 138 reference to the four INSLM reports and INSLM evidence before the Committee is consistently used to assess, in a supportive manner, an variety of government claims for expanded national security powers in the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth).

In installing a range of discretions in the exercise of substantial new powers for intelligence agencies, a repeated method has been to include review in the form of an *ex post facto* procedural review by Inspector General of Intelligence and Security (IGIS),[170] adding significant workload to that office but without introducing a legislative formula to ensure ongoing adequate resourcing of the role in a way commensurate with the ever expanding suite of national security laws.[171] A further example of the rise of executive interests in 2014 terrorism law reform is found in the initial proposals to remove the existing legislatively scheduled review of laws,[172] and to

[170] See the Government Responses to the many additional functions potentially added to the IGIS portfolio from the recommendations of the three 2014 Parliamentary Joint Committee on Intelligence and Security Reports: George Brandis, 'Government Response to Committee Report On National Security Legislation Amendment Bill (No 1) 2014' (Attorney-General Media Release, 19 September 2014, with attachment) recommendations 6, 7, 8, 10, 15 impact on the work of IGIS <http://www.attorneygeneral.gov.au/Mediareleases/Pages/2014/ThirdQuarter/19September_2014GovernmentResponseToCommitteeReportOnNationalSecurityLegislationAmendmentBillno-12014.aspx>; George Brandis, 'Government response to committee report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014' (Attorney-General Media Release, 22 October 2014, with Schedule One – Main counter-terrorism amendments) recommendations 13, 21 impact on the work of IGIS <http://www.attorneygeneral.gov.au/Mediareleases/Pages/2014/FourthQuarter/22October2014_GovernmentresponsetocommitteereportontheCounterTerrorismLegislationAmendmentForeignFightersBill.aspx>; George Brandis, 'Government response to committee report on the Counter-Terrorism Legislation Amendment Bill (No 1) 2014' (Attorney-General Media Release, 25 November 2014) recommendations 8, 9, 10, 11, 13, 14 impact on work of IGIS <http://www.attorneygeneral.gov.au/Mediareleases/Pages/2014/FourthQuarter/25November2014_GovernmentResponseToCommitteeReportOnTheCounter-TerrorismLegislationAmendmentBillNo1-2014.aspx>.

[171] See the proposal in a submission quoted in *Advisory Report on the National Security Legislation Amendment Bill (No 1) 2014*, above n 60, 70 to fix in legislation a minimum budgetary allocation for supervisory and monitoring roles of the IGIS representing a mathematical proportion of the overall budgetary appropriation to the members of Australia's intelligence community.

[172] These laws comprised the control order regime in div 104 of the *Criminal Code Act 1995* (Cth); preventative detention orders in div 105 of the *Criminal Code Act 1995* (Cth); stop, search and seizure powers relating to terrorism offences in the *Crimes Act 1914* (Cth); and the questioning and detention warrant regime in the *Australian Security Intelligence Organisation Act 1979* (Cth).

defer review for a further 10 years[173] which, subsequent to review by the Parliamentary Joint Committee on Intelligence and Security of the bill, was eventually changed to remove the existing scheduled legislated reviews (envisaged originally as a significant safeguard) and to defer review until 2017.[174]

The conferral of and reliance upon executive discretion to ensure propriety in the administration of these laws and decision making processes within them arises more acutely in consequential terms in several recently legislated areas. These areas are the secrecy provisions instituted in s 35P of the *ASIO Act 1979* (Cth) relating to prohibitions on disclosure of information relating to special intelligence operations, which attract immunities from prosecution for most criminal offences; a broadening of control order criteria in div 104 of the *Criminal Code Act 1995* (Cth) to reach more remote and tenuous involvement with foreign fighter activity; declared areas provisions (with limited exemptions and reverse onus provisions) relating to foreign fighter activity, inserted into the *Criminal Code Act 1995* (Cth); and the substantial increase in both the circumstances and penalties for the disclosure of national security information (and in the absence of a public interest disclosure defence), also amending the *Criminal Code Act 1995* (Cth). These areas intersect significantly with two of the nominated liberal democratic rights, namely freedom of expression and freedom of association. In the expedited review and enactment of these laws, any influence suggestive of liberal democratic rights over those processes

[173] See *Advisory Report on Counter Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, above n 138, 74-7 ('Delay of Review').

[174] In relation to the control order regime, preventative detention and stop, search and seizure powers relating to terrorism offences, the bill was amended to provide that these provisions would sunset on 7 September 2018 and that review of these three legislative schemes would be completed by the PJCIS by 7 March 2018. The ASIO questioning and detention powers would now sunset on 7 September 2018 and review by the PJCIS of div 3 of pt III of the *ASIO Act 1979* (Cth) would be completed by 7 March 2018. In addition, the government response to the PJCIS indicated that under s 7 of the *Independent National Security Legislation Monitor Act 2010*, the government would request the INSLM to review the above four matters by 7 September 2017.

is invisible or illusory, other than the default assertions of the Attorney-General noted above.[175]

Indeed, these developments reveal a discernible trend towards the preferred model of laws of the former head of ASIO, David Irvine, for a broad and flexible legal umbrella in the form of general legislation under which intelligence agencies operate with a system of enhanced discretions open to interpretative and priority shifts determined by the agency.[176] Within this executive centric model there is little or no space for human rights considerations,[177] of either a conventional or liberal democratic disposition, of influencing legislative formation and legislatively authorised actions.

Further, the practice and experience of 2014 and the absence and failure of influence and purchase of the liberal democratic rights agenda on terrorism law reform provides a template or precedent for future and ongoing swift introduction and enactment of laws embodying these executive favoured practices. This will extend to the crafting of future domestically applied inter agency co-ordination and co-operation upon the successfully externally applied Operation Sovereign Borders,[178] with a domestic adaptation of the innately executive based and splendidly opaque discretion of 'operational matters'[179] as suppressing public discussion and public disclosure.

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[175] See the quotations noted in the body of this article at footnotes 150, 151, 152 above, under the heading 'Further comprehending the intersection of liberal democratic rights and the 2014 Commonwealth terrorism law reforms'.

[176] See Michelle Grattan, 'Grattan on Friday: In Conversation with ASIO chief David Irvine', *The Conversation,* 15 August 2014; David Irvine, 'Diligence in the Shadows' (Address of Director-General of ASIO to National Press Club, Canberra, 27 August 2014).

[177] Indeed, the model contests the need for further checks and balances on a vastly expanded range of intelligence powers.

[178] See Tony Abbott, 'National Security Statement' (Prime Minister Media Release, 23 February 2015) <http://www.pm.gov.au/media/2015-02-23/national-security-statement-canberra>; Commonwealth of Australia, Department of Prime Minister and Cabinet, *Review of Australia's Counter-Terrorism Machinery* (2015) 22, 27 (Chapter Four: Leadership and coordination) *(Review of Australia's Counter Terrorism Machinery).*

[179] Alternatively described as an 'on water incident'.

That marginalisation is also neatly reflected in the intersecting principles of a decision overlapping with non-terrorism community relations matters, raising both a broader freedom of expression issue and a liberal democratic rights issue — s 18C of the *Racial Discrimination Act 1975* (Cth),[180] and the Abbott government's retention of this provision, justified on the basis of maintaining unity and community relations with Muslim communities at a time of increased terrorism activity and legislative and policy responses to that terrorist threat.[181] The difficulties in navigating those intersecting principles — freedom of expression in a liberal democratic sense and legislative and policy responses to terrorism — prompted a direct practical intervention and justification from the Prime Minister, again indicating the highly contingent and subjective nature[182] of the liberal democratic rights claim:

> When it comes to counter-terrorism everyone needs to be part of Team Australia and I have to say that the Government's proposals to change 18C of the Racial Discrimination Act have become a complication in that respect. I don't want to do anything that puts our national unity at risk at this time and so those proposals are now off the table. This is a call that I have made. It is, if you like, a leadership call that I have made after discussion with the Cabinet today. In the end leadership is about preserving national unity on the essentials and that is why I have taken this decision. [183]

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[180] S 18C of the *Racial Discrimination Act 1975* (Cth) states: '(1) It is unlawful for a person to do an act, otherwise than in private, if (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and (b) the act 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'.

[181] Tony Abbott, Julie Bishop and George Brandis, 'Prime Minister of Australia Joint Press Conference with Foreign Minister and Attorney-General' (Canberra, 5 August 2014) <https://www.pm.gov.au/media/2014-08-05/joint-press-conference-canberra-0>; Tony Abbott and George Brandis, 'New Counter-Terrorism Measures for a Safer Australia' (Prime Minister and Attorney-General Joint Media Release, 5 August 2014) <https://www.pm.gov.au/media/2014-08-05/new-counter-terrorism-measures-safer-australia-0>.

[182] Especially contingent in that Prime Minister Abbott had previously and personally strongly advocated liberal democratic principles as a defining aspect of his political persona: see Abbott, above n 161; Marr, above n 161.

[183] 'Prime Minister of Australia Joint Press Conference with Foreign Minister and Attorney-General', above n 181.

Furthermore, the speed with which the counter-terrorism legislative agenda was pursued in 2014, with dramatically abbreviated Parliamentary reviews conducted on a bi partisan basis by the Parliamentary Joint Committee on Intelligence and Security[184] has meant that scrutiny over the liberal democratic rights agenda has been mainly subsumed into the urgency of the process and the prospects of a catastrophic Australian domestic based terrorism event if such legislation is not speedily enacted.

[184] The Parliamentary Joint Committee on Intelligence and Security has no minor party or cross bench membership. In 2014, it conducted the three reviews of prospective legislation, each within expedited time frames, causing those making submissions to the reviews to comment that the process prevented adequate consideration of the prospective legislation. See *Advisory Report on the National Security Legislation Amendment Bill (No 1) 2014*, above n 110; *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, above n 138; *Advisory Report on the Counter-Terrorism Legislation Amendment Bill (No 1) 2014*, above n 60. A further inquiry was conducted by the Parliamentary Joint Committee On Intelligence and Security into the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014: see George Brandis and Malcolm Turnbull, 'Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014' (Attorney-General and Minister for Communications Joint Media Release, 30 October 2014) <http://www.attorneygeneral.gov.au/Mediareleases/Pages/2014/FourthQuarter/30October2014_TelecommunicationsInterceptionAndAccessAmendmentDataRetentionBill2014.aspx>. The Parliamentary Joint Committee on Intelligence and Security handed down its report on the bill on 27 February 2015: Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014;* See George Brandis, 'PJCIS Report into the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014' (Attorney-General's Media Release, 27 February 2015) <http://www.attorneygeneral.gov.au/Mediareleases/Pages/2015/FirstQuarter/27-February-2015-PJCIS-Report-into-the-Telecommunications-(Interception-and-Access)-Amendment-(Data-Retention)-Bill-2014.aspx>; the bill was enacted on 26 March 2015: see George Brandis and Malcolm Turnbull, 'Data Retention Bill passed by Parliament' (Attorney-General and Minister for Communications Joint Media Release, 26 March 2015) <http://www.attorneygeneral.gov.au/Mediareleases/Pages/2015/FirstQuarter/26-March-2015-Data-Retention-Bill-passed-by-Parliament.aspx>.

X CONCLUSION

The methodology of enacting terrorism laws in 2014 starkly reveals the weaknesses in Human Rights Commissioner Wilson preferences for how liberal democratic rights should be promoted and enforced, as well as in the advocacy of Attorney-General Brandis as encompassing the proper meaning of human rights. The deficiencies of the reliance upon public advocacy by those across the issues, a reductionist approach to legislative protection of rights and a narrow prescription of recognised rights, converged in a legislative environment of urgency, such as the significant and far ranging counter-terrorism reforms of 2014.

The present liberal democratic rights discourse has proven grossly ineffectual in offering substantive review and critique of far reaching 2014 terrorism law reform provisions. This might be unremarkable if the major proponents of that discourse, Senator Brandis and Mr Wilson, were simply engaging in a public philosophical and political debate of only theoretical and hypothetical dimensions. Instead, the proselytisation of a liberal democratic rights agenda has been such as to advance what is claimed as its core rights — expression, association, religion and property — as so diminished by present conventional human rights practices, that is a matter in need of significant redress by new and invigorated practice, policy and law reform responses.

Yet the ambitious and far reaching claims of this liberal democratic rights agenda, claiming the desirability of a reformative re-alignment and prioritisation of major rights by different, and largely, non-legislative means in Australia, has coincided with significant expansions of state executive power and discretion corrosive of a range of rights and responding to an assessment of an increased, real and potentially frightening terrorism threat manifesting itself in new ways. At its most basic level, that experience has been instructive in highlighting the lack of practical utility and purchase in human rights protection offered by a simplistic and largely subjective liberal democratic rights agenda

within the Commonwealth Parliament legislative processes, where responses are made to a heightened terrorism threat assessment.

Contemporary notions of human rights, informed by international human rights treaties and jurisprudence, are especially vulnerable to such incremental erosion where Australia's vast body of counter-terrorism legislation[185] is subjected to the practices of constant review[186] sponsored within a consensual bi-partisan political model crafted between the Coalition government and the Opposition Labor Party. Examining proposed legislative changes in an exceptionally urgent paradigm, forestalling scrutiny, critique and a mature public debate, and where the liberal democratic freedoms agenda has previously been promulgated as part of a cultural war, is not amenable to integrating such reform with human rights standards, or to even achieving with integrity the more narrow compass of liberal democratic rights identified by their proponents.

The experiences of the intersection in 2013 and 2014 of liberal democratic rights advocacy and significant terrorism legislative reforms have thrown into stark relief the many inherent limitations of the liberal democratic rights agenda, as interpreted by Attorney-General Brandis and Human Rights Commissioner Wilson. With some circumspection, it can be argued that the liberal democratic

[185] See George Williams, 'A Decade of Australian Anti-Terror Laws' (2011) 35 *Melbourne University Law Review* 1136, especially under the sub-headings 'Number of Federal Ant-Terror Laws' and 'How Many Anti-Terror Laws?'; *Chronology of Legislative and other Legal Developments since September 11 2001* (Parliamentary Library) <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Browse_by_Topic/TerrorismLaw/legislativedev#43>.

[186] The form of that review being a review of Australia's counter-terrorism coordinating machinery to ensure the arrangements 'are well organised, targeted and effective as possible to meet current and emerging threats, drawing where appropriate on international best practice': see George Brandis, 'New counter-terrorism measures for a safer Australia' (Attorney-General's Media Release, 5 August 2014) <http://www.attorneygeneral.gov.au/Mediareleases/Pages/2014/ThirdQuarter/5August2014Newcounterterrorismmeasuresforasafer Australia.aspx>; see *Review of Australia's Counter Terrorism Machinery*, above n 178.

rights agenda has actually obfuscated critique and analysis of laws potentially creating far reaching, and perhaps unintended consequences, for civil and political rights in Australia, whilst needing to respond in a measured way to a demonstrated threat. These effects have extended to an undermining of the political process itself — by using the Parliamentary Committee system, as evidenced in the Parliamentary Joint Committee on Intelligence and Security and the Parliamentary Joint Committee on Human Rights, instrumentally in a manner where time pressured reviews detract from intended scrutiny and recommendatory functions and exclude the capacity of civil society to fully contribute to that review process. This deficiency extends to the weaknesses in the implementation of review recommendations, in the form of legislative amendments, following the tabling of Parliamentary Committee review reports.

Likewise, little or no consideration has been provided as to how liberal democratic rights interrelate with common law protections of a broader and more substantial nature. It is in this respect that liberal democratic rights advocacy of the weakening of human rights laws, an emphasis upon individualised initiative and responsibility for the protection of human rights, strong opposition to legislated charters of human rights, and the emphasis on other than law based rights initiatives are entirely consistent with the narrow, economically orientated nature of the rights identified in this recent and prominent liberal democratic rights advocacy.