

Nationhood, National Identity & Democracy

25 October 2019

Submission to Legal and Constitutional Affairs References Committee

Committee Secretary
Senate Legal and Constitutional Affairs Committee
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The NSW Young Lawyers International Law Committee (**Committee**) makes the following submission in response to the Senate Standing Legal and Constitutional Affairs References Committee's Inquiry (**Senate Inquiry**) into Nationhood, National Identity & Democracy

NSW Young Lawyers

NSW Young Lawyers is a division of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 15 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

The International Law Committee

The International Law Committee (ILC), is committed to providing a platform to young lawyers and law students with a key interest in international law (both public and private) to discuss among peers and learn from experts in the field through selected seminars, as well as providing networking opportunities. The ILC currently has over 1,200 members and has established working relationships with the Australian Institute of International Affairs, the Australian Dispute Centre, the Australian Centre for International Commercial Arbitration and the Rule of Law Institute of Australia. As one of its primary goals, the ILC endeavours to broaden the knowledge of international law within the legal profession and the Australian legal system. In doing so, the ILC seeks to promote informed discussion amongst its members and the wider legal community on international law in Australia.

Summary of Recommendations

The Committee makes the following recommendations for the Inquiry on Nationhood, National Identity and Democracy.

On term of reference **(a) the changing notions of nationhood, citizenship and modern notions of the nation state in the twenty first century**, the Committee recommends:

1. That Australia implement the recommendations provided for in the Uluru Statement of the Heart.

On **(f) the extent to which nation states balance domestic imperatives and sovereignty and international obligations**, the Committee recommends:

1. That when legislating in respect of national security laws, Australia only implements laws consistent with its obligations under international law; and
2. That Australia strengthen its cyber security legislative framework to protect Australia, particularly from cyber threats against democracy and human rights, in a way which is balanced with its international law obligations.

This submission now turns to each term of reference and the detailed suggestions made by the Committee regarding each of them.

The changing notions of nationhood, citizenship and modern notions of the nation state in the twenty first century

On **(a) the changing notions of nationhood, citizenship and modern notions of the nation state in the twenty first century**, the Committee recommends:

1. That Australia implement the recommendations provided for in the Uluru Statement of the Heart.

Increasingly, nation states around the world are actively taking steps to recognise and empower their indigenous populations.¹ In this sense, the modern perception or notion of a nation state is that states are strongly connected with and identified by their indigenous populations, traditions and culture. Australia is no exception, with Aboriginal and Torres Strait Islander peoples and communities being increasingly advocated for and recognised by civil society as Australia's first peoples and at the forefront of Australia's identity.

The Law Council of Australia,² and the New South Wales Young Lawyers Human Rights Committee³ have offered their support for the recommendations envisaged by the Uluru Statement of the Heart. The Committee endorses this support and recommends the prompt implementation of the recommendations from the Uluru Statement of the Heart, being: "the establishment of a First Nation's voice enshrined in the constitution" and a "Makaratta Commission to supervise a process of agreements between governments and First-Nations and truth telling about our history".⁴

The extent to which nation states balance domestic imperatives and sovereignty and international obligations

On **(f) the extent to which nation states balance domestic imperatives and sovereignty and international obligations**, the Committee submits:

¹ United Nations Declaration on the Rights of Indigenous Peoples', *Department of Economic and Social Affairs* (Web Page) <<https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>>; Julian Brave Noise Cat, 'Indigenous sovereignty is on the rise. Can it shape the course of history?' *Opinion: Indigenous Peoples* (Opinion Article, 31 May 2017) <<https://www.theguardian.com/commentisfree/2017/may/30/indigenous-sovereignty-growth-history-australia>>; UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295.

² Arthur Moses, 'Walking together: the role of the Uluru Statement and a First Nations Voice in addressing Incarceration Rates' (Speech, National Legal Indigenous Conference, Darwin, 14 August 2019) <<https://www.lawcouncil.asn.au/media/speeches/walking-together-the-role-of-the-uluu-statement-and-a-first-nations-voice-in-addressing-incarceration-rates>>.

³ The NSW Young Lawyers Human Rights Committee, Submission No. 344 to the Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples (25 June 2018).

⁴ Uluru Position working group, *The Statement* <<https://www.1voiceuluru.org/the-statement>>.

1. That when legislating in respect of national security laws, Australia only implements laws consistent with their obligations under international law; and
2. That Australia strengthen its cyber security legislative framework to protect Australia, particularly from cyber threats against democracy and human rights, in a way which is balanced with its international law obligations.

Implementing national security laws consistent with Australia’s obligations under international law

Australia’s self-perception is that it has common standing as a “good international citizen” and is committed to progressing international law.⁵ This proposition is not entirely unsupported. Indeed, Australia’s engagement with international law has increased and the significance of international law for Australia has continued to grow, despite its physical remoteness from the larger global community.⁶

The Committee recognises that Australia has signed and ratified all seven key international law human rights instruments.⁷ However, the Committee submits that the key challenge for Australia is respecting and enforcing its obligations arising from these instruments, even in light of Australia’s evolving national interests. Australia’s reputation as a “good international citizen” has often come into disrepute due to its failure to implement its international obligations when enacting and amending legislation, and for its tendency to “pick and choose” which international obligations it adheres to.⁸

In the past decade, there have been a slew of legislative changes passed by the Parliament which have been said to be necessary for national security.⁹ Prime examples of such legislation are the *Telecommunications*

⁵ Emily Crawford and Donald R Rothwell, *International Law in Australia* (Thomson Reuters, 3rd ed, 2016), 22; Gareth Evans and Bruce Grant, *Australia’s Foreign Relations: In the World of the 1990s* (Melbourne University Press, 2nd ed, 1991) 33.

⁶ Donald R Rothwell and Emily Crawford, ‘International Law: Is Australia a good International Citizen?’, *Australian Outlook* (Analysis, 8 May 2017). <<http://www.internationalaffairs.org.au/australianoutlook/international-law-australia-good-citizen/>>; James Crawford and Rose Cameron, ‘International Law in Australia Revisited’ (2019) 40 *Adelaide Law Review* 200.

⁷ The Law Council of Australia, ‘Australia’s International Human Rights Obligations’, *Policy Agenda* (Web Page) <<https://www.lawcouncil.asn.au/policy-agenda/human-rights/australias-international-human-rights-obligations>>.

⁸ Emily Crawford and Donald R Rothwell, *International Law in Australia* (Thomson Reuters, 3rd ed, 2016), 22; Gareth Evans and Bruce Grant, *Australia’s Foreign Relations: In the World of the 1990s* (Melbourne University Press, 2nd ed, 1991) 33; Ben Doherty, “Unacceptable: UN committee damns Australia’s record on human rights”, *Australia News* (News Article, 19 October 2017) <<https://www.theguardian.com/australia-news/2017/oct/19/unacceptable-un-committee-damns-australias-record-on-human-rights>>.

⁹ Monica Biddington, ‘National Security and Counter Terrorism Laws’, *Parliamentary Library Briefing Book* (Web Page). <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook45p/CounterTerrorism>.

(*Interception and Access*) Amendment (*Data Retention*) Act and the implementation of 33AA, 35, 35AA and 35A of the *Australian Citizenship Act 2007*. Whilst Australia may pass legislation that is in conflict or breach of some international law obligations, such as those in the ICCPR, it may only do so, to the extent that the laws are necessary and proportionate for the legitimate purpose of protecting national security.¹⁰ A common key criticism of each of such pieces of legislation is that these laws are not necessary and proportionate, and severely breach Australian citizens' recognised human rights, such as the right to privacy.¹¹

The Committee recognises that recent parliamentary inquiries have been opened on both pieces of legislation, with Australia yet to have the opportunity to implement any recommendations. However, the Committee notes that when enacting future national security legislation that is inherently linked to encroaching on the rights of an individual, it is imperative that Australia ensures that each legislative provision is necessary and proportionate for the purpose of enhancing national security imperatives.

Legislative Framework for the protection from cyber threats to democracy

Malicious actions perpetrated in cyberspace are posing an increasing threat to democracy and human rights. This year, the Australian Signals Directorate attributed to China a sophisticated cyber attack on the emails of Australian Members of Parliament and the Australian Labor Party's computer networks.¹² This attack was a hack, a stereotypical type of cyber attack.

Additionally, revelations following the 2016 United States' election illustrate how malicious cyber actors and actions have evolved beyond the stereotype. The use and abuse of personal data by private corporations played a part in swinging that election.¹³ These new methods of interference are alarming because cyberspace has lowered the barriers to launching attacks that threaten democracy and impinge on a State's ability to uphold an individual's right to privacy. Human rights such as the right to privacy cannot be effectively protected by states where there is a lack of regulation of companies which collect and abuse personal data for illegitimate purposes.

¹⁰ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999; Australian Government Attorney General's Department 'Permissible Limitations' *Public Sector Guidance Sheets* (Web Page). <<https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Permissiblelimitations.aspx>>.

¹¹ Nicolas Suzor, Kylie Pappalardo and Natalie McIntosh, 'The passage of Australia's data retention regime: national security, human rights and media scrutiny' (2017) 6(1) *Internet Policy Review* 1.

¹² Colin Packman, 'Exclusive: Australia concluded China was behind hack on parliament, political parties – sources', *Reuters*, (16 September 2019) <<https://www.reuters.com/article/us-australia-china-cyber-exclusive/exclusive-australia-concluded-china-was-behind-hack-on-parliament-political-parties-sources-idUSKBN1W00VF>>.

¹³ Alex Hern, "Cambridge Analytica: how did it turn clicks into votes?", *The Guardian*, 6 May 2018 <<https://www.theguardian.com/news/2018/may/06/cambridge-analytica-how-turn-clicks-into-votes-christopher-wylie>>.

The Committee recommends that Australia strengthen its legislative framework to protect against the cyber threats posed to democracy and human rights in line with its obligations under international law. This should include a review into how personal data can be protected from use for illegitimate purposes, and continual cooperation with other States to establish international law norms as applicable in cyberspace.

However, as above, if these laws impinge on an Australian citizen's right to privacy or freedom of association in any way, those laws must be necessary and proportionate for the purpose of combatting cyber threats to democracy.

Concluding Comments

NSW Young Lawyers and the Committee thank you for the opportunity to make this submission. If you have any queries or require further submissions please contact the undersigned at your convenience.

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