The Legal Assault on Australian Democracy


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Thank you, it is an honour to be here today. Sir Richard had a distinguished legal career as a justice of the Supreme Court of the Northern Territory and of the ACT, before serving as Chief Justice of this jurisdiction. He was also a judge of the Federal Court of Australia. The regard with which he was held is reflected in the importance of this event.

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

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

Over the course of many decades, Australian parliamentarians have usually not sought to pass laws that undermine Australia’s democratic system. There are however notable exceptions to this, such as the attempt to ban the Australian Communist Party in the early 1950s, the banning of street marches in Queensland in the late 1970s and the denial of the vote in federal elections to Aboriginal people from 1902 for a further 60 years. The final example also reflects another theme in parliamentary engagement with human rights, a willingness to abrogate rights belonging to minorities. Indigenous peoples have in particular suffered from discrimination imposed by law. In addition to being denied the vote, laws have permitted the removal of their children, prevented them from marrying, limited their freedom of movement and permitted their wages to be confiscated.

The result is a mixed picture of rights protection by Australian parliaments. Their record of abrogating the rights of certain minorities sits alongside a generally strong history of upholding the rights, freedoms and privileges necessary for a healthy democracy.

What has changed in recent times is that concerns have been raised that parliaments have ceased to pay the same heed to these latter, democratic rights, and indeed that they have passed a number of laws that directly infringe upon them. It has been suggested that Parliament has departed from its traditional role in this regard.

Federal Attorney-General George Brandis has repeatedly argued that traditional freedoms of this kind are under attack, saying: ‘For too long we have seen freedoms of the individual diminish and become
devalued … They underpin the principles of democracy and we cannot take them for granted.’ In making such statements, he has focused particularly upon freedom of speech, and indeed his concerns and those of Prime Minister Tony Abbott led to the government’s failed attempt to repeal or amend s 18C of the Racial Discrimination Act 1975 (Cth), which proscribes offensive behaviour because of race, colour or national or ethnic origin.

Brandis has highlighted concerns about the abrogation of traditional freedoms and democratic rights through two major announcements. First, Brandis initiated a ‘Freedoms Inquiry’ by the Australian Law Reform Commission to identify federal laws that ‘encroach upon traditional rights, freedoms and privileges’. The second announcement was the appointment of Institute of Public Affairs policy analyst Tim Wilson as a ‘freedom commissioner’ at the Australian Human Rights Commission. The Attorney-General has made it clear that Wilson’s primary role is to ‘focus on the protection of the traditional liberal democratic and common law rights’, including especially freedom of speech.

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

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

The State of the Statute Book

Democracy is by its nature a broad-ranging and elusive concept. Assessing then the number and scope of the laws that might infringe upon it is difficult. My approach is not to attempt to develop a definition of Australian democracy, but instead to test for infringements of it by identifying laws that arguably compromise basic rights and freedoms that might be considered as essential preconditions for a fully functioning, healthy democratic state. With this in mind, in the following sections I survey current federal, state and territory legislation with respect to its impact upon the following rights and freedoms:

1. Freedom of speech;
2. Freedom of the press;
3. Freedom of association;
4. Freedom of movement;
5. Right to protest; and
6. Basic legal rights and the rule of law.

There is no authoritative list of what constitutes basic democratic rights, and indeed this list is underinclusive of that group. This reflects the fact that I have not sought to be exhaustive, but have selected rights and freedoms reasonably connected to Australian democracy that are most likely to be the subject of problematic laws. This explains for example the omission of a right to vote. It is indisputably a core right for any effective democracy, but has not been selected because there are
relatively few laws currently on the statute book that touch upon that subject in a way that might expose the sort of problem being searched for.

In the survey below, laws are identified as encroaching upon the listed rights and freedoms without assessing whether this can be justified, by way of a proportionality test or otherwise. Tests of justification tend to be contested and often subjective, and are in any event rarely applied by Australian courts given the presence of very few legally protected human rights. Hence, the survey identifies the laws most likely to give rise to problems of justification, without necessarily suggesting that they would fail such a test if Australia had something akin to a Bill of Rights.

All up, the survey below identifies 350 instances of current Commonwealth, state and territory laws infringing the identified democratic rights and freedoms. Many of the laws relate to more than one of the listed rights, such as to freedom of speech and the press, and so has been described only under the most appropriate heading. Of these laws, the greatest number were enacted by the federal Parliament, indeed more than double the number of any other Australian legislature. The jurisdictions next most responsible for enacting laws that encroach upon democratic freedoms are NSW and Queensland.

These laws are only the most prominent examples of such incursions. This is because the list only includes laws that could be quickly and obviously identified as giving rise to an infringement. What this means is that the problem is actually far larger than is set out below, as infringements will not always be clear on the face of the law, or will only occur through indirect means. Indeed, if a full list of laws that infringe upon democratic principles were to be developed, the number could well run into the thousands.

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

1. Freedom of speech

Laws impinging on the freedom of speech in Australia tend to fall within six categories. First, anti-vilification laws exist in every jurisdiction (except the Northern Territory) to prevent speech or conduct, that, for instance, ‘is likely to offend, insult, humiliate or intimidate’ a person, where that conduct was done because of a person’s race or ethnicity, gender identity or transsexual status, sexuality, religion, HIV/AIDS status, or disability. Second, laws exist in every jurisdiction to criminalise, and create civil causes of action for, defamation. Third, a comprehensive set of provisions in the Australian Consumer Law penalises representations that may be misleading and deceptive.

Fourth, and more problematically, swathes of new laws impinging on free speech have been introduced in recent years under the banner of anti-terrorism and security, particularly at the federal level. A number of these laws permit a person to be imprisoned merely for their speech. For example, the Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014 (Cth) created a new offence of advocating terrorism as s 80.2C of the Criminal Code 1995 (Cth). This offence, carrying a maximum term of five years imprisonment, applies wherever a person advocates the doing of a terrorist act or the commission of a range of terrorism offences. Advocacy, for the purposes of the offence, means counselling, promoting, encouraging or urging terrorism. It has the potential to criminalise a wide range of legitimate speech, such as if someone expressed general support for fighters opposing the Assad regime in Syria and encouraged further resistance by these groups. The Abbott government has since announced that it wishes to further extend the advocacy offence to capture an even broader range of speech by so-called ‘hate preachers’.

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

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

A range of offences fall within the fifth category of laws that impact on free speech: that is criminal laws more generally. There are, for instance, criminal offences relating to treachery, treason, urging violence, perjury, aiding and abetting, blasphemy, child pornography, swearing falsely, taking an oath to commit a crime, publishing false or defamatory statements in relation to a candidate in an election, or publishing a recruitment advertisement for the armed forces of a foreign country.

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

2. Freedom of the press

Many of the laws just mentioned impact also on the freedom of the press, yet there are further laws that have a particular effect on that freedom. A prominent, recent example relates to the amendment in 2014 of the Australian Security Intelligence Organisation Act 1979 (Cth) to grant immunity to ASIO officers from criminal and civil law while engaged in ‘special intelligence operations’. Section 35P of that Act now provides that ‘A person commits an offence if: (a) the person discloses information; and (b) the information relates to a special intelligence operation.’ The penalty is imprisonment for five years, increased to 10 years if, for example, ‘the disclosure of the information will endanger the health or safety of any person or prejudice the effective conduct of a special intelligence operation’.

Section 35P precludes media reporting not only of such operations, but of anything that ‘relates to’ them. The effect is to criminalise reporting that is demonstrably in the public interest, for instance because it would reveal incompetence or wrongdoing on behalf of the authorities. This is not the first provision of its kind: similar offences of recent vintage exist for other kinds of secret information, such as where a person discloses information about a controlled operation.

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

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

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

3. Freedom of association

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

Extensive laws also exist in each jurisdiction directed at breaking up troublesome organisations, or as the South Australian Attorney-General put it in the second reading speech to his government’s organised crime bill in 2012, to ‘disrupt and harass the activities of criminals of all persuasions: organised, disorganised, competent and incompetent.’ Once again, the threat of terrorism has proven to be a significant catalyst for such laws, with the introduction in 2005 of the Commonwealth offence of intentionally associating with a member of a terrorist organisation on two or more occasions, and of new powers for the Australian Federal Police to obtain control orders in respect of a person.

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

These laws can have harsh consequences, such as in the case of Sally Kuether — a librarian, mother of three, multiple sclerosis sufferer and community service award holder with no criminal history — who was arrested when she went out for a drink at the local pub with her fiancé while wearing the insignia of a bikie gang to which her fiancé and his friend belonged. The police arrested all three people, opposed bail and raided Kuether’s home. She was detained for six days at the Pine Rivers Watch House and had to pay a fine of $150, although no conviction against her was recorded.

### 4. Freedom of movement

A large number of laws empower the detention of, or at least restriction on the movement of, various people. Since the enactment of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Act, people may be imprisoned for up to 10 years merely for stepping foot in a ‘declared area’ (currently the Mosul district in Iraq and the Al-Raqqa province in Syria) without being able to make out a valid excuse. Anti-terrorism laws passed in 2003 and 2005 also gave the AFP or ASIO powers to stop and detain people within declared ‘prescribed security zones’ (regardless of whether the officer suspects that the person is involved in a terrorist act) and to obtain control orders restricting a person’s movement, PDOs allowing the secret detention of non-suspects for 48 hours (or up to 14 days by virtue of complementary state laws), questioning warrants that last up to 48 hours, and questioning and detention warrants that last up to 7 days.

Other agencies have been empowered to place people in new species of detention, including fisheries detention, environment detention, detention for the purpose of maritime safety, detention for the purpose of customs, and immigration detention — the last of which, when coinciding with an adverse security assessment by ASIO, can spell indefinite detention.

In the states and territories, detention powers exist for the management of casinos and cemeteries, for the pursuit of various public health purposes (including the quarantining of people suspected of carrying chemical, biological or radiological substances), and for mandatory admission to drug and alcohol rehabilitation facilities. One such law, the Northern Territory’s Alcohol Mandatory Treatment Act 2013 (NT), allows for the mandatory detention and treatment for 3 months of a person who is misusing alcohol and would benefit from the treatment. A person will automatically be assessed for the program if taken into custody three times in two months for being intoxicated in public.

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

Protestors, too, have their own catalogue of laws to contend with. Governments have adopted various methods to regulate the conduct of protests in Australia, ranging from giving police ‘move on’ powers, to the creation of offences for disorderly conduct, breaching the public peace, creating a disturbance, obstruction, trespass, besetting or surrounding premises, and unlawful assembly.

Many of these laws have the potential to penalise legitimate, peaceful protests, such as Queensland’s Criminal Code, which creates the offence of engaging in disorderly conduct within immediate view of the Legislative Assembly in a way that tends to either interrupt its proceedings or impair the respect due to its authority. In addition, extensive powers are given to police in Tasmania’s new Workplaces (Protection from Protesters) Act 2014 (Tas) to order that protesters vacate business premises and access areas to those premises, under threat of fines of $10,000, and for repeat offenders, 4 years’ imprisonment.

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

6. Basic legal rights and the rule of law

The five rights and freedoms identified above are not the only civil rights relevant to democracy affected by current laws in Australia. The presumption of innocence has been undermined by a number of laws, including the already mentioned Western Australian protesters bill, which would place the onus of demonstrating a lack of ‘intention to prevent lawful activity’ on the defendant. So too has that corollary to freedom of speech — the right to silence — been increasingly abrogated, with bodies like the Fair Work Commission and the Australian Sport Anti-Doping Authority being given compulsory powers to require disclosure of information. Other laws have impacted on the rights to a fair trial and procedural fairness, such as the National Security Information (Civil and Criminal Proceedings) Act 2004 (Cth), which enables a judge to exclude evidence pertaining to national security, and to prevent the defendant from knowing what that evidence might have been, even where that evidence is central to a civil cause of action, such as in an appeal against a control order. Decisions as to whether the evidence will be admitted are made in a closed hearing from which the defendant and even his or her legal representative may be excluded. When deciding whether and in what form to admit evidence, the judge or magistrate is directed by the Act to give ‘greatest weight’ to the interests of national security.

FINDINGS

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

Second, what is striking is not only the number of laws raising a potential problem, but that so many of them have been enacted over recent years. Of the 350 provisions, 209 (or around 60%) have been made since September 2001. This suggest that those terrorist attacks marked an important turning point in lawmaking in Australia. Those attacks, and the compelling need to respond forcefully to the threat of terrorism, gave greater license to our legislators to depart from long accepted conventions and understandings about the preservation of democratic rights in Australia. As a result, the abrogation of democratic rights, including stringent measures that were previously unthinkable, have become commonplace.
Third, since September 2001, enacting laws or regulations that infringe democratic freedoms has become a routine part of the legislative process. Basic values such as freedom of speech are not only being impugned in the name of national security or counter-terrorism, but for a range of mundane purposes. Speech offences now apply to a range of public places and occupations, and legislatures have greatly expanded the capacity of state agencies to detain people without charge or arrest. Such offences have become so normal and accepted that they can be turned into law without eliciting a community or media response. This demonstrates not only the willingness of parliaments to limit such rights, but that, with rare exceptions, they pay little or no political price for doing so. Indeed, many of these laws were enacted with the support of the opposition, including all of the federal laws passed in 2014 to deal with the problem of foreign fighters.

Fourth, not only has number of laws infringing democratic freedoms increased, but so has their severity. The survey shows that it is possible to identify many laws enacted prior to September 2001 that run counter to democratic rights and freedoms. However, for the most part, laws still on the books enacted prior to that time have a significantly lower impact upon those freedoms than the laws enacted after then. For example, laws on the statute book enacted prior to September 2001 contain a number of restrictions on freedom of speech, such as in anti-discrimination legislation with regard to proscribing insulting and offensive speech. The most prominent example of this is s 18C the Racial Discrimination Act, which is directed at speech and other conduct that is ‘reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people’ where this is done ‘because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group’. The section makes such conduct unlawful, but does not render it a crime. The contrast with more recent laws directed at freedom of speech is stark. Several of those carry the possibility of lengthy terms of imprisonment. For example, s 35P gives rise to the possibility of 10 years’ imprisonment for a journalist writing a story, even in the public interest, about a special intelligence operation.

Fifth, the development of a range of scrutiny measures within parliaments to head off the enactment of rights-infringing laws is not proving to be effective. One recent example of such a measure is the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth). It requires federal Bills and legislative instruments to be accompanied by a statement of their compatibility with a number of international human rights conventions, which include all of the rights used in the survey. These claims can be examined, and other human rights matters investigated, by a Parliamentary Joint Committee on Human Rights. This establishes an elaborate process of human rights vetting of legislation. It is arguable that this and other scrutiny measures have improved deliberation within legislatures. On the other hand, there is little or no evidence that they have had a significant impact in preventing or dissuading parliaments from enacting laws that infringe basic democratic rights. Such breaches have been identified on many occasions, but this has often been ignored as parliamentarians have gone on to vote in support of the infringement.

CONCLUSION

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

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

Politicians such as Attorney-General Brandis deserve credit for highlighting that Australia has a problem with regard to laws infringing upon traditional rights and freedoms. However, his position is undermined by his willingness to champion a range of new measures, such as in regard to the foreign fighter threat, that have contributed a number of laws demonstrating exactly the same problem. Whether this amounts to hypocrisy or willful blindness is not clear, but it does demonstrate how easily our politicians are able to move on from extolling the values of free speech to supporting legislation infringing that same right. Indeed, one of the remarkable features of political and legal debate in 2014 was just how quickly federal politicians moved on from heated debate over the value of free speech in the context of s 18C the Racial Discrimination Act to enacting measures with bipartisan support, such as new advocacy and disclosure offences, that impose far more significant sanctions, such as imprisonment, upon speech. This revealed a shallow adherence to freedom of speech, and an unwelcome, authoritarian streak on behalf of the government and the opposition when it came to restricting democratic freedoms.

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

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