



New South Wales
Council for Civil Liberties

**NSW Council for Civil
Liberties**

**Federal Election 2019
Priorities for the incoming
Government**

May 2019

About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts; attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

Contact NSW Council for Civil Liberties

<http://www.nswccl.org.au>

office@nswccl.org.au

Street address: level 15 175 Liverpool Street Sydney

Correspondence to: PO Box A1386, Sydney South, NSW 1235

Phone: 02 8090 2952

CONTENTS

1. A Human Rights Charter for Australia
2. A National Integrity and Anti-Corruption Commission
3. National Security and Counter-Terrorism
4. Free and Independent Media
5. Aboriginal and Torres Strait Islander Issues
6. Rights for People Seeking Asylum
7. Merit Appointments to the Administrative Appeals Tribunal
8. The Witness K and Bernard Collaery Conspiracy Case
9. Robust and Effective Privacy Practices

The Federal Elections will be held on the 18th May 2019. In recent years civil liberties and human rights have come under unprecedented attack from federal governments in Australia. The NSW Council for Civil Liberties considers the following matters should be given urgent priority by the incoming Government.

These are the priority matters which we will continue to advocate to the incoming Government and the Parliament over the next three years.

1. HUMAN RIGHTS CHARTER FOR AUSTRALIA

The NSW Council for Civil Liberties considers the long overdue enactment of a National Human Rights Charter to be one of the highest priorities for the incoming Government.

The recurrent resistance of Australia's politicians to a number of widely supported attempts to introduce a national human rights bill/charter over the last 46 years has left Australia as the only liberal democracy without either constitutional or statutory broad protection for fundamental human rights.

This has been a significant factor in allowing the proliferation of national laws which seriously and unwarrantedly breach human rights and liberties. The extreme manifestations of this trend in the areas of counter-terrorism and refugee law and policy in recent years necessitates a renewed community effort.

NSWCCL welcome indications that our national politicians are more open to legislating a National Human Rights Charter.

The NSWCCL urges the incoming Government to move quickly and consultatively to enact a strong and comprehensive National Human Rights Charter for Australia in its first term of office.

2. A NATIONAL INTEGRITY AND ANTI-CORRUPTION COMMISSION

The NSW Council for Civil Liberties is inherently cautious about government agencies outside the established justice system wielding extraordinary coercive and covert powers. We have in recent years supported the role of the NSW ICAC and argued for the creation of an equally effective national anti-corruption body. We have taken this stance because of the corrosive threat that corruption poses to democracy and the public good in Australia.

Current levels of corruption are damaging the integrity of our political system, distorting the policy making process, diverting resources from public good objectives and dangerously undermining public trust in our political class, governing institutions and public administration.

The current 'multi-agency' approach to corruption at the national level is demonstrably ineffective and a strong anti-corruption and integrity body is an urgent and long-overdue priority for the

incoming government. There is strong public support for such a body as evidenced by the 80% of supportive respondents to an Australian Institute survey in 2017.

Parliamentary support for a national body strengthened last year. In November it appeared possible that Parliament would act on the ***National Integrity Commission*** and the ***National Integrity (Parliamentary Standards) Bills*** introduced by the independent MP Cathy McGowan. Instead the Government released its proposed alternative model for a Commonwealth Integrity Commission and invited public submissions.

While the Coalition's acceptance that an Integrity Commission is needed is welcome, their proposed model is seriously flawed. It has inadequate powers, scope or resources to be effective and has been widely criticised.

The incoming Government must act quickly to establish an effective broad-based national integrity and anti-corruption body.

Key elements

The NSWCCCL considers the following elements are essential for an effective national integrity commission.

i) Scope

- Jurisdiction across all areas of public administration - including all public service agencies, public sector entities outside the public service, Federal Parliament (including ministers and their staff and members of Parliament) and the federal electoral and funding systems.
- Including jurisdiction to investigate contractors and lobbyists who engage with government and its agencies.

ii) Definition of corruption

- The NIC should have the power to investigate serious and/or systemic corruption.
- Including serious and/or systemic corrupt conduct by a person not a public official when the corrupt conduct will have an adverse effect on public administration. It should not be a requirement that the conduct affects the propriety or probity of a public official in the exercise of an official function.

iii) Powers

- The coercive powers of a royal commission
- The power to initiate investigations on its own motion.

iv) Transparency and public hearings

The power to hold public hearings is of central importance to the effectiveness of the NIC and to public support and trust. The commission should have:

- the discretionary power to hold public hearings as part of its investigations. The decision to exercise this power in individual investigations should be decided on the basis of public interest and fairness criteria similar to those in section 31 of the ICAC Act (1988) NSW.
- The discretionary power to hold public hearings should not be constrained by specification of either public or private hearings as the default position.

v) Constraints and safeguards

- It is essential that there be strong constraints and safeguards to ensure an optimal balance between individual rights and the effectiveness of the Commission in exposing and preventing corruption for the public good.

vi) Resources and independence

- The NIC must be adequately resourced for effective operation.

vii) Oversight and accountability

- The NIC should be subject to strong and effective oversight including Parliamentary oversight and non-merit judicial review.
- Accountability and oversight mechanisms should not compromise the independence of the NIC from inappropriate Government interference in its operations.

The NSW Council for Civil Liberties urges the incoming Government to legislate in the first term of office for a broad-based National Integrity and Anti-Corruption Commission which incorporates all the 7 key elements listed above.

3. NATIONAL SECURITY AND COUNTER TERRORISM

The body of Australian counter terrorism and national security law

Australia has an exceptionally large body of counter-terrorism and national security law developed since 9/11. Protection of public safety is a core Government responsibility and few would dispute that new laws and offences were necessary to address the expansion of global terrorism and the proliferation of real threats to Australia's national security – including from home-grown terrorists. It is obviously important that intelligence and security agencies have the powers and resources needed from them to effectively fulfil their roles.

However, this vitally important policy area has too often been manipulated and exploited by governments and oppositions for partisan political reasons - often in hyper-politicized contexts around terrorist incidents and/or parliamentary elections. Too often we have seen extremely significant legislation hurriedly and badly drafted and then rushed through Parliament without serious and considered parliamentary debate.

The last-minute passage of the *Access and Assistance Bill* in December 2018, at the end of a chaotic parliamentary day dominated by party politics and fear-mongering, was the most recent disturbing example of the failure of Parliament to give responsible consideration to an extremely significant and highly controversial new law. The political play was such that the Opposition took the extraordinary step of waving the Bill through without even moving its own amendments. This new law is widely considered to be deeply flawed and reckless.

This trend has resulted in a disturbing number of counter-terrorism/national security laws which are unnecessary and/or excessive and which seriously undermine Australians' rights and liberties and long-standing principles of our justice and legal system. Extraordinary provisions, which are initially

approved exclusively for terrorist related contexts, are increasingly spilling over into other contexts and becoming 'normal' criminal law provisions.

Civil Society organisations are swamped with the volume of new legislation and struggle to develop full responses to the usually rushed Parliamentary reviews. The Australian community is largely ignorant of the content or the significance of this consistently expanding body of extraordinary legislation.

NSWCCL has repeatedly argued that that this is a dangerous trend for a democracy – all the more so because we lack the underpinning protection afforded by a National Human Rights Act.

National security is centrally important and Government's highest responsibility is to protect the safety of the people. In the current environment, political parties and our political leaders are right to give very high priority to this area. But it is not acceptable if our Parliament continues to approve counter-terrorism/national security legislation which is not compatible with a robust Australian democracy.

We urgently need to pause our 'hyper-legislating' response and reflect on the body of counter-terrorism/national security legislation and its cumulative implications.

NSWCCL calls on the incoming Government to:

- take a deliberate pause from the generation of additional national security and counter-terrorism laws and
- initiate a broad review of the existing large body of such legislation to provide a consolidated compendium of these laws and to identify the cumulative impact on Australians rights and liberties and our legal system
- refer this review to an independent entity such as the Australian Law Reform Commission with the requirement that it seeks public input by submissions and public hearings
- ensure the reviewing body is adequately resourced to conduct a professional and comprehensive review

This review should build on the existing work of the Independent National Security Legislation Monitors, the Australian Human Rights Commission, civil liberties and human rights organisations and relevant academics – as well as the many PJCS reviews of the individual laws and the extensive body of individual submissions associated with those reviews.

The 'encryption busting' law

There are many provisions in existing counter-terrorism/national security laws that should be repealed or amended. One that the incoming Government should address immediately is the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018 (Cth)* which was passed in the last minutes of the Parliamentary sitting on the 6 December 2018.

The Opposition allowed it to pass without its amendments being considered because the Prime Minister warned they would be responsible for any terrorist attack that might occur over the Christmas break if the legislation was not passed. The Government promised it would be revisited in the February sitting of Parliament. That did not occur.

The NSWCCCL and many other experts and organisations across the industry providers, media, civil society and academia oppose this legislation and consider it should be repealed. At this stage neither the Opposition nor the Government are likely to do so.

The PJCS has held two rushed reviews of the Bill and has a current review underway on the new law which will report in April 2020. The INSLM will also review this legislation on a referral from the PJCS.

Given the recommendations of these reviews will not be available until April 2020, the legislation will have been operational for 17 months. As many key players in the industry and civil society consider there are real systemic dangers to data security inherent in the operation of the legislation, the incoming Government should move quickly to act on the ameliorating Opposition amendments that were before Parliament in December 2018.

The NSW Council for Civil Liberties calls on the incoming Government to:

- repeal or failing that, amend the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018 (Cth)* passed in December 2018 consistent with Opposition amendments that were before Parliament on the 6th December 2018.

4. A FREE AND INDEPENDENT MEDIA

i) General protections

A media sector that is free and independent is fundamental to a liberal democracy such as Australia, enabling public oversight of the exercise of power by the three arms of government, judicial, executive and legislative. Media freedom in Australia has been eroded as a result of legal sanctions against journalists and whistle-blowers, and the placement of procedural hurdles acts as a barrier to the free flow of information to the public about executive decision-making.

The importance of protecting the confidentiality of journalists and their sources as well as their data is vital to journalistic independence. Disclosure of information by whistle-blowers in the public interest should be protected. The threat of crippling defamation awards also serves as an anchor on the disclosure of stories that may be in the public interest. A public interest defence should be available to journalists and others exposing information in the interests of democracy in defamation claims.

The actions of journalists in shining a light on abuses of executive power, corruption or other behaviour that is contrary to the public interest should not be criminalised. It is vital that a balance should be struck between enabling proper public scrutiny of government actions and decisions and the protection of national security.

The NSW Council for Civil Liberties urges the incoming Government to give high priority to:

- strengthening protections for whistle-blowers, journalists and their sources acting in the public interest
- providing a public interest defence for journalists and others in defamation cases
- reviewing the operation of 'open government' provisions with the aim of greatly improve public access to a wider range of government information

ii) **Protecting the independence of the ABC**

Concerns have arisen in recent years about actual and perceived attacks by government on the independence of the ABC. The ABC is Australia's public service broadcaster - not the Government's media outlet. Editorial independence of the public broadcaster from Government interference is pivotal to its effectiveness in that role.

A well-resourced, independent ABC capable of robust investigative journalism is important for a healthy Australian democracy and must be statutorily protected from improper government interference. This is particularly so given the recent growth in unchecked executive power and proliferation of secrecy provisions across an extraordinary range of government activities.

This independence has been seriously compromised by the recent actions of Government and the Chair of the ABC Board. Political interference is not a new experience for the ABC, but the events of 2018 emphatically demonstrate that the protections built into the ABC legislation and policy framework do not adequately protect the broadcaster's independence.

This has been substantially confirmed by the scathing findings of the recent Senate Environment and Communications Committee's [inquiry](#) into these events.

The Committee found significant weaknesses across the nomination, selection, consultation and appointment processes which failed expected transparency and accountability criteria, opened the processes to politicisation or perception thereof, led to a Board which lacked sufficient knowledge or experience and undermined public trust in the ABC. Politicisation was endemic:

The committee considers that the problem of politicisation of appointments runs deep and wide, which is why it is important to bring transparency and accountability, including to NP [Nomination Panel] processes.

Effective independence also requires surety of adequate public funding as the Government of the day can exercise significant influence over the ABC - including editorial policy and decisions – by withdrawing or increasing funding. The Committee acknowledged this as a real issue in the recent events:

“the Coalition Government has been complicit in the events of 2018 and beyond, by using funding as a lever to exert political influence in the ABC”.

The ABC's role is also threatened by pressure for its total or partial privatisation from private media corporations, some think tanks and some politicians.

Clearly, stronger protections against political interference must be enacted to better protect the independence of the ABC – especially in the areas of editorial independence, merit-based selection of Board members and adequate and stable funding.

The Senate Committee's recommendations are positive and would inject some much-needed clarity, transparency and accountability into the overall Board selection process and might provide some constraint on Governments using their budgetary power to bring editorial pressure to bear on the ABC.

However, some of the recommendations are need to be stronger – and NSWCCCL proposes some additional recommendations to protect the ABC against inappropriate, and increasingly habitual, Government interference with its independence.

Key elements

i) Selection criteria:

NSWCCL recommends selection criteria be strengthened to ensure members are appointed on merit with skills, knowledge and experience relevant to the role and operation of the ABC. These should include:

- A demonstrable understanding of the role of the fourth estate and independent media in democracy must be an essential criterion
- Commitment to the ABC's role as an independent public broadcaster must be an essential criterion
- Substantial experience in the media industry should be a requirement for a majority of the Board members

ii) Diversity of Board membership

NSWCCL recommends:

- An independent nomination panel should be required to include equal -or close to equal - women and men in their nominated merit-based list of qualified candidates
- In making appointments to the Board the Minister must ensure that membership includes close to equal numbers of women and men
- ABC staff representation on the Board should be increased from the current one to two members to improve the connectivity between Board and staff

iii) Nomination Panel

An independent and qualified Nomination Panel is a critical element in achieving a genuine 'arms-length' separation from Government nomination process. Serious doubt exists as to the independence of the most recent Nomination Panel - and its appointment by the Department of Prime Minister and Cabinet is not optimal for the perception (or achievement) of independence.

The Committee has recommended stronger, genuine consultation with the opposition leader on the nomination process and range of nominees before an appointment is made. This is sensible but not adequate. The Nomination Panel itself has to be credibly independent.

NSWCCL recommends:

- the Nomination Panel be jointly chosen and agreed by the Government and the Opposition.

Currently the Minister can ignore the Nomination Panel and select a person they have not recommended or even interviewed. This provision was flagrantly abused by Minister Fifield in multiple appointments to the current Board. As the ABC's independence is critical to a robust free media, this loophole is dangerous and must be closed.

NSWCCL recommends:

- that all candidates considered by the Minister must be recommended by the Nomination Panel. (As noted by the Committee, the Minister/PM is able to request a candidate they consider well qualified to apply through the Panel.)

iv) Transparency

Transparency is a powerful check against misuse of power and influence.

NSWCCL recommends:

- that Parliament should receive a clear and informative briefing from the Minister as to the Nomination Panel's process and nominations, his own consultation with the Opposition Leader and its outcome and his specific reasons for the appointments made - as recommended by the Senate Committee

v) Stable and adequate Budget

The ABC is vulnerable to Government manipulation of its budget. The ideal solution would be an adequate, indexed flow of funds quite separate from Government. Advertising is not a suitable funding source for the ABC – and it is not likely that it will be allocated long-term hypothecated funding from a tax levy or other budget source.

NSWCCL recommends

- that the incoming Government commit to re-instatement over the life of this Parliament of the \$393 million cut from the ABC budget since 2014
- that the ABC budget be restored to a level adequate for it to successfully fulfil its role in the digital era of broadcasting
- that the ABC funding cycle is increased from the current three to at least a five-yearly funding cycle to strengthen its budgetary and operating stability. (NSWCCL notes that the most recent Efficiency Review of the ABC – not yet released- is reported as recommending a 10 year cycle which would be preferable - The Guardian 19/4/2019)

The NSW Council for Civil Liberties urges the incoming Government to:

- **amend the ABC legislation to provide stronger and more effective statutory protections for the public broadcaster's independence from inappropriate political interference in the nomination, selection and appointment of ABC Board members consistent with recommendations i) to iv) above and**
- **amend the budgetary policy framework for the ABC to minimise the capacity of Government to exert partisan political pressure on editorial decisions and to ensure the broadcaster has adequate and stable funding to effectively fulfil its role consistent with recommendation v) above.**

5. ABORIGINAL AND TORRES STRAIT ISLANDER ISSUES

Recognition - Uluru Statement from the Heart

The NSWCCL strongly supports the Uluru Statement from the Heart and the key reforms and changes which are proposed in the statement: Voice, Treaty and Truth.

The Voice is essential for Aboriginal and Torres Strait Islander peoples' self-determination in relation to laws that impact their lives and the lives of their families and communities. The right to such an expression of self-determination is recognised in Article 3 of the United Nations Declaration on the Rights of Indigenous Peoples.

There is strong public support for the Voice to be enshrined in the Australian Constitution. Recent ABC Vote Compass data indicates that 64% support this, 22% disagree and 13% are neutral (based on 368,097 respondents as at 28/4/2019)

NSWCCL also supports the establishment of a Makarrata Commission to oversee agreement-making and to appropriately and respectfully recognise, through a process of truth-telling, the injustices Aboriginal and Torres Strait Islander peoples have suffered.

We welcome the policy statements of the ALP, the Australian Greens and other candidates endorsing both these aspects of the Uluru Statement and committing to begin implementation if elected.

We condemn the hasty rejection of the Voice proposal by the former Prime Minister Turnbull and are hopeful the incoming Government will have a more positive response to the Uluru Statement.

The NSWCCL calls on the incoming Government to:

- give high priority to achieving the enshrinement of a Voice for Aboriginal and Torres Strait Islander people in the Australian Constitution to ensure they have real influence in determining policy and legal reform in matters affecting them for the long term – consistent with the Uluru Statement from the Heart. This should be set as a priority for the first term of the Government.
- give high priority to the establishment of a Makarrata Commission to oversee a process of truth telling to enable recognition of the injustices suffered by Aboriginal and Torres Strait Islander people and treaty making. This should be set as a priority for the first term of the Government

Justice Issues - pathways to justice

The gross over representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system is a national disgrace. The magnitude of this over-representation has recently been documented in the Australian Law Reform Commission's Pathways to Justice report and the Royal Commission into the Protection and Detention of Children in the Northern Territory.

Australia's shame is exacerbated by the failure of Governments to respond effectively to the 1991 Royal Commission into Aboriginal Deaths in Custody which documented the huge over-representation of Aboriginal people in custody and of Aboriginal deaths in custody 28 years ago. Instead over-representation has worsened.

The incarceration statistics relating to Aboriginal and Torres Strait Islander peoples are stark:

- Aboriginal and Torres Strait Islander adults make up around 2% of the Australian population but constitute 27% of the prison population and
- Aboriginal and Torres Strait Islander women constitute 34% of the female prison population
- Aboriginal and Torres Strait Islander incarceration rates increased 41% between 2006 and 2016

- In the NT, Aboriginal and Torres Strait Islander young people aged 10-17 constituted 59% of young people in detention on an average night in the June quarter 2018 though they constituted only 5% of the general population aged 10–17 and
- in June 2018 it was reported that 100% of the young people in detention at that time (38) were Indigenous.

Reducing this incarceration rate is urgent and must be among the highest priorities for action by the incoming Government. The ALRC’s Pathways to Justice report proposes practical, achievable policy and legal reforms for addressing this ongoing justice crisis.

The Coalition Government’s response to the ALRC report was a disappointing and inadequate commitment ‘to consider’ the report’s recommendations and respond in due course.

NSWCCL notes the recent commitment by the Labor Party to invest \$107 million to address the ‘disadvantage experienced by First Nation peoples in the Justice system’. This commitment addresses numbers of the key issues and recommendations in the ALRC report.

The incoming Australian Government must take ownership of the ALRC’s recommendations and work with the states and territories to ensure their effective implementation.

The NSWCCL calls on the incoming Government to:

- Commit to the full implementation of the recommendations of the ALRC ‘s *Pathways to Justice* report and the *Royal Commission into the Protection and Detention of Children in the Northern Territory* as a matter of high priority in the first term of government and to work constructively with the states and territories to achieve this

Key elements

There are core elements which are central to achieving real progress in the Pathways to Justice.

i) Justice reinvestment initiatives

There is significant evidence that justice reinvestment strategies are more effective than the more traditional strategies of the justice system. It is essential that the incoming government gives strong support to strengthen these initiatives.

The ALRC recommended an independent justice reinvestment body to promote *“the reinvestment of resources from the criminal justice system to community-led, place-based initiatives that address the drivers of crime and incarceration, and to provide expertise on the implementation of justice reinvestment”*

The establishment of such a body properly funded and independent would greatly strengthen existing justice reinvestment projects and allow the much-needed expansion of such projects.

Additional federal funding to properly support and extend justice reinvestment projects is essential.

NSWCCL calls on the incoming Government to

- establish an adequately funded independent justice reinvestment body to promote *the reinvestment of resources from the criminal justice system to community-led, place-based initiatives that address the drivers of crime and incarceration, and to provide expertise on the implementation of justice reinvestment”*

- provide additional federal funding to properly support and extend justice reinvestment projects

ii) **Stand - alone ATSI Legal Assistance Program**

Maintaining funding through the Indigenous Legal Assistance Program is key to ATSI peoples maintaining control of decisions on the delivery of legal services to their communities.

The Coalition Government budget abolished specific funding provision for legal services for Indigenous Australians from July 2020. This is deeply concerning, particularly in light of an independent review recommending that the current separate funding arrangements be retained. Separate funding is critical both to ensure the funds are not diverted to other areas and to provide ATSI legal assistance which is culturally informed and appropriately linked to the community.

NSWCCL calls on the incoming Government to:

- Maintain organisational and funding arrangements for ATSI Legal Services through an ongoing separate ATSI Legal Services Program
- Increase federal funding for ATSI Legal Services
- Support and fund an ATSI Legal Services advocacy role

iii) **Annual Justice targets**

Annual Justice Targets properly constructed with the states and territories and adequately resourced to enable accurate implementation data and expert analysis would provide a powerful incentive as well as evaluation and public accountability mechanism for the Closing the Gap process.

NSWCCL calls on the incoming Government to:

- work with the states and territories to develop annual justice targets as part of the Closing the Gap framework and
- ensure that there are adequate resources to support properly expert development and monitoring of these targets.

iv) **Closing Don Dale Youth Detention Centre**

The 2017 Royal Commission into the Protection and Detention of Children in the Northern Territory recommended the closure of the Don Dale Youth Detention Centre and its urgent replacement by a new purpose-built facility. There has been disappointing progress in implementing these and other recommendations to protect vulnerable children from the appalling treatment and conditions that were revealed in Report. This delay is unacceptable.

The incoming national Government must take a leadership role in protecting these vulnerable children of the NT by using its influence to get rapid action on the closure of Don Dale and ensuring that the past abuse and mistreatment of children do not continue.

NSWCCL calls on the incoming Government to:

- accept it has a national responsibility to provide leadership in encouraging implementation of the key recommendations of the Royal Commission into the Protection and Detention of Children in the Northern Territory through its influence and funding powers.
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6. RIGHTS FOR PEOPLE SEEKING ASYLUM

i) Offshore detention

NSWCCL maintains its longstanding view that that all asylum seekers found to be genuine refugees should be settled in Australia.

NSWCCL urges the incoming Government to:

- review Australia’s current policy settings in relation to asylum seekers and end Australia’s current blanket refusal to accept asylum seekers arriving by boat.
- Pending such a decision, allow all refugees currently detained on Manus and Nauru to settle in Australia.

ii) Medevac legislation

In the context of current policy, NSWCCL strongly supported the medical evacuation legislation passed through Parliament in February – notwithstanding last-minute amendments which weakened the provisions.

Immediately thereafter the Coalition Government moved to thwart the intent of this legislation by determining to send medical evacuees to Christmas Island rather than the Australian mainland. Subsequently the Government [announced](#) the facility would close by 1 July and that, if re-elected, it would repeal the medevac legislation. This would be a harsh and unwarranted decision.

NSWCCL urges the incoming Government to:

- fully implement the provisions of the medevac legislation and ensure that refugees/asylum seekers needing urgent medical treatment that cannot be delivered offshore are treated on the Australian mainland – in the spirit of the legislation.

iii) New Zealand offer of settlement

New Zealand has offered to settle up to 150 refugees a year currently held by Australia in offshore detention. Australia has refused this offer on the grounds it will reactivate ‘the boat traffickers’.

As long as Australia fails to act on its international obligations to settle refugees seeking asylum here, it should accept the NZ offer. The transfer of refugees for settlement in the USA was acceptable to the Government. It is a profoundly unjust and cruel stance to refuse to allow refugees detained for years on Manus and Nauru to settle in a country willing to accept them.

NSWCCL urges the incoming Government to:

- reverse its decision and accept the NZ Prime Minister’s offer to allow them to take up residence in NZ.

iv) Onshore detention - unreasonable visitor restrictions

Villawood and other onshore immigration detention centres have seen a sharp escalation in restrictive rules in recent years. These have made it increasingly hard for people to visit detainees. These restrictions are unreasonable and should be lifted.

NSWCCL urges the incoming Government to:

- The incoming Government should remove unreasonable restrictions so that people can visit detainees in immigration detention subject to reasonable security checks.

v) Support services

By reducing access to the Status Resolution Support Service (SRSS) in the second half of 2018, the Coalition Government left many refugees without essential support. This has seriously affected their ability to access such basic needs as housing and food. Settling into a foreign country is difficult enough under any circumstances. It is cruel and wrong to force poverty onto people who have committed no crime.

NSWCCL urges the incoming Government to:

- restore refugees' access to the Status Resolution Support Service and
- commit to providing adequate economic and cultural support to asylum seekers and refugees, to ensure that they are able to successfully integrate into Australia.

7. MERIT APPOINTMENTS TO THE ADMINISTRATIVE APPEALS TRIBUNAL

The Administrative Appeals Tribunal (AAT) has the important task of conducting independent merit reviews of administrative decisions made by ministers, departments and agencies under Commonwealth laws. The effectiveness of this merit review process as a check to executive power is dependent on both the independence of the Tribunal Members and on them having appropriate skills and expertise.

[Recent appointments to the AAT](#) - and the timing of appointments and re-appointments close upon a Federal election - have renewed concerns about the extent to which the appointment process appears to be driven by partisan politics.

Politically driven appointments undermine the all-important independence of the Tribunal and are unlikely to ensure members have the necessary qualifications. The perception of undue politicisation of appointments inevitably damages the public credibility of the AAT and its decisions.

NSWCCL considers that the extent of apparent politicisation of appointments is such that the process must be strengthened to ensure its integrity. A more robust and independent process for the selection and appointment of Tribunal Members is needed. It could be similar to that introduced in 2007 for the appointment of justices but with some additional transparency elements.

Key elements

To be effective and avoid loopholes, the process should include the following key elements.

i) Merit criteria and open advertisement

NSWCCL recommends:

- Explicit merit criteria encompassing qualifications, skills and experience should be developed and agreed by both the Attorney-General and the shadow Attorney-General
- Expressions of interest from candidates should be called for by public advertisement

ii) Nomination process

NSWCCL recommends:

- An independent and qualified nomination panel should be formed to select a short list of recommended qualified candidates.
- The membership of the panel should be agreed by both the Attorney-General and the shadow Attorney-General.
- Appointments should only be made from within this list of recommended candidates.

iii) Consultation with Opposition and Parliament on appointments

NSWCCL recommends:

- The Attorney-General should have a genuine consultation with the Shadow Attorney-General as to the merit process and the grounds for the proposed appointments before they are made.
- In the interests of greater transparency and accountability the Parliament should receive a clear and informative briefing from the Attorney-General as to the process and grounds for making the appointments

iv) The Refugee Review Tribunal

The AAT's ambit was extended in 2015 by the amalgamation within it of 3 specialist tribunals: the Migration Review Tribunal, Refugee Review Tribunal and Social Security Appeals Tribunal.

The NSWCCL opposed the amalgamation of the specialist tribunals and especially the Refugee Review Tribunal. It was the appropriate body to bring to bear proper specialised knowledge in relation to the complex assessment of the issues relating to asylum seekers and refugees.

NSWCCL recommends:

- **The incoming Government re-establish the Refugee Review Tribunal as a separate tribunal with appropriate powers to consider and review decisions made in relation to asylum seekers and refugees.**

8. THE WITNESS K AND BERNARD COLLAERY CONSPIRACY CASE

In June 2018 Andrew Wilkie MP revealed from the floor of Parliament that the Commonwealth DPP had charged Witness K (a publicly unidentified former ASIS agent who had revealed the ASIS bugging of Timor-Leste Cabinet discussions in 2004) and his lawyer Bernard Collaery with conspiracy to breach s39 of the Intelligence Services Act 2001(Cth).

This came as a surprise to the Australian public. In 2013 ASIO had raided the home of Witness K and, even more controversially, the office of his lawyer Bernard Collaery seizing documents. A subsequent AFP investigation was undertaken and a report provided to the CDPP in February 2015. No action was taken for three years on the AFP report. The conflict between Timor-Leste and

Australia over oil and gas rights had been resolved. There was no threat to national security requiring action.

The case has progressed slowly. A preliminary hearing is scheduled for August to discuss a non-disclosure certificate issued by the Attorney-General. This preliminary hearing is closed to the public – and possibly to Witness K and Collaery - on national security grounds. How much of the later hearings will be closed or open is still under discussion.

The NSWCCCL considers this case against a legitimate whistle-blower and his lawyer to be a gratuitous step in a sequence of events which has not at any stage been necessitated by national security nor in the public interest. Rather it has brought shame to Australia's reputation for fairness and justice.

The initial bugging by ASIS of the Timor-Leste Cabinet discussions to advantage Australia in negotiations over oil and gas rights was arguably the only illegal act in this saga. It was certainly an unworthy action and, in so far as it endangered Australian Aid workers, it was a reckless action. There was no genuine 'National Security' justification and the actual interest served appears to have been that of the Woodside corporation rather than Australia's.

Worrying questions remain as to the role of the then Attorney General and the head of Foreign Affairs both of whom on leaving office took up paid roles with Woodside. The head of ASIO who ordered the highly controversial raids on Collaery and Witness K had been head of ASIS at the time of the bugging operation in 2004 - thus raising a legitimate question as to motivation.

No explanation has been given as to why the new CDDP in 2018 took a different view from that of her predecessor in 2015 in deciding that a prosecution was warranted.

On the basis of what is known, there is no public interest benefit nor national security justification for this prosecution of a legitimate whistleblower and his lawyer. On the contrary there is considerable potential harm being done to the public interest.

The prosecution of a legitimate whistleblower for revealing an ASIS act he considered to be unlawful- and which many Australians would consider to be wrong - will undermine the confidence of future whistle-blowers as to the effectiveness of the limited protections that are available for disclosing wrongful actions within the intelligence agencies.

The raid on Bernard Collaery's office and his current prosecution erode the longstanding recognition of lawyer-client privilege in Australia.

Given the absence of serious threats to national security in this case, the closure of the court for some or all of the hearings is a worrying and unjustified imposition of secrecy when transparency and accountability of the justice system is a much stronger public good in this context.

Most significantly, the lack of any perceivable public good justification for this prosecution leaves it open to the public to see it as vengeful. The case should be discontinued.

NSWCCCL recommends:

- The incoming Attorney General should exercise the power available to him and discontinue the case against Witness K and Bernard Collaery in the interest of fairness, justice and the

public interest

- If contrary to this recommendation the case continues, the court should be open at all stages to the media and the wider public in the interests of transparency and accountability of the justice system and the Government of the day.

9. ROBUST AND EFFECTIVE PRIVACY PRACTICES

NSWCCL supports stronger privacy policies particularly when dealing with sensitive information in areas like criminal justice, healthcare and facial recognition technology. Though NSWCCL supports proposed increased penalties for privacy breaches, recent times have seen the introduction in Australia of legislation and practices that pay scant regard to fundamental privacy principles.

NSWCCL condemns the broad powers and expansion of capability embedded in a range of recent legislation and supporting regulations, notably the *Identity Matching Services Bill 2018*, *Telecommunications and Other Legislation Amendment (Assistance and Access) Bill* and the *My Health Records Act 2012*. Communications surveillance and information collection needs to be both necessary and proportionate; backed up by entrenched privacy rights and policies of protection, collection and retention of data that are not just tokenistic.

Robust and effective privacy practices and policies are essential to protect the Australian community in this digital age and regulation of the internet is a key component of this. Global sentiment is moving towards making internet providers more accountable for the content displayed on their platforms.

It is an appropriate time, therefore, to introduce an independent, well-resourced regulatory body to lead in the promotion of responsible social media and Artificial Intelligence (AI). Such a regulatory body could have powers to act quickly and have effective monitoring capability.

However, without a commitment to also reform privacy legislation and practices, government cannot be prepared for the challenges of dealing with IT security, open and big data and AI. AI models, in particular, have the potential for discrimination which is replicated and potentially reinforced - as exemplified by the personal mining of data from Facebook by Cambridge Analytica, as well as homegrown data sharing scandals, NSWCCL also emphasises that our political institutions should follow the same principles of transparency as expected of the rest of the community. These breaches of trust illustrate the requirement for robust consumer protections, including, online consent agreements that explain the data process simply so that individuals can give informed consent.

Key elements

i) Strengthen, Update and Enforce Privacy Legislation

NSWCCL recommends the incoming Government should give priority to:

- A review of the Privacy Act 1988 (Act) to more tightly regulate privacy in the digital era.
- Further removal of exemptions from compliance with the Act, particularly for political parties, and provision for periodic review where exemptions are deemed justified.

- Introduction of effective enforcement of privacy legislation, including increased penalties, for non-compliance and adequate resources to support enforcement.
- Assurance that third parties, such as contractors, local government and research groups, are not permitted to access the private data of an individual, wherever it is stored, without complying with direct and explicit consent procedures.
- Implementation and enforcement of model provisions, similar to the EU General Data Protection Regulations, for adequate safeguards such as data minimisation and purpose limitation.
- Entrenchment of independent judicial oversight and review mechanisms, in any legislation that purports to infringe an individual's privacy.

ii) The right to sue for invasion of privacy

NSWCCL recommends the incoming Government should give priority to:

- the introduction, in accordance with ALRC recommendations, of a limited statutory cause of action to sue for a serious breach of privacy where there is a reasonable expectation of privacy.

iii) Internet Regulatory Body

NSWCCL recommends the establishment of an independent, well-resourced regulatory body to lead in the promotion of responsible social media and AI with:

- effective monitoring capability;
- ability for an individual to oppose a decision, appeal to the relevant organisation or regulatory body and have human intervention.
- a legal obligation for a service provider or content host to immediately take down material deemed inappropriate, with a right to appeal that decision.

Contacts in relation to these issues

Pauline Wright: President NSWCCL
 Email pauline.wright@nswccl.org.au

Dr Lesley Lynch: Vice President NSWCCL
 Email Lesley.lynch@nswccl.org.au