KEYNOTE ADDRESS BY PROFESSOR GILLIAN TRIGGS PRESIDENT OF THE AHRC TO THE NSWCCL ANNUAL DINNER

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I was pleased to have been invited to speak to the NSW Council for Civil Liberties at this your annual fund raising dinner for you are, above all, best placed to understand the phenomenon of the last few years that is of concern to the Australian Human Rights Commission; that is, the encroachment of executive discretion on fundamental rights and freedoms. Senator Cory Bernardi calls this a "Power creep"… I don't often quote the Senator, but on this occasion he is right.

I have long admired the work of the Council since its beginnings in the 60s. It is gratifying that some of you here tonight are foundational members and other are younger members. On checking your website, I notice that some of your priorities match those of the AHRC, including the lack of government transparency, custodial or administrative detention and the death penalty in the Asian region. You have also raised awareness of the Trans-Pacific Partnership and Trade in Services Agreements that pose concerns for human rights and civil liberties. As these international trade agreements are technical, opaque and secret until they are presented as a *fait a complet* to Parliament, we should be vigilant in monitoring their implications for human rights. I congratulate you on your work and encourage donors to support your vital role within our democracy.

I have been asked to speak to you tonight about the role of the AHRC in what has undoubtedly been a 'year of living dangerously'. Life is likely to be, and has long been, perilous for human rights lawyers globally; I was in China a few days ago where 60 human rights lawyers were recently arrested on charges of disturbing social harmony; in Mauritius the human rights commissioners have been charged with treason and sedition. It has also been a perilous year in Australia, where the Federal Executive Government has embarked upon an unprecedented erosion of fundamental liberties and diminution of the checks and balances that preserve our democracy...all in the year in which, ironically, we also celebrate the 800th anniversary of the Magna Carta.

This evening I would like to discuss the overreach of executive discretion in the dozens of new federal laws introduced by recent Governments and passed by compliant parliaments, with the effect of diminishing the powers of our judiciary and threatening core democratic principles of the separation of powers and independence of the courts.

Over the last 14 years or so, the major political parties have agreed with each other to pass laws that threaten some of the most fundamental rights and freedoms that we have inherited from our common law tradition.

Indeed, respective governments have been remarkably successful in persuading Parliaments to pass laws that are contrary, even explicitly contrary, to common law rights and to the international human rights regime to which Australia is a party.

Particularly since the conflation in the public mind of the events of 2001- the Tampa Crisis 26 August, the "children overboard" "misstatements", 6 October and the 9/11 terrorist attacks on the United States - Australian parliaments have passed scores of laws that infringe our common law freedoms of speech, association and movement, the right to a fair trial and the prohibition on arbitrary detention. These new laws undermine a healthy, robust democracy, especially when they grant discretionary powers to executive governments in the absence of meaningful scrutiny by our courts.

While I will focus on the proposed laws to strip citizenship from Australians with dual nationality and the extensive use of administrative detention, some recent examples illustrate the risks to democracy:

Restrictions on freedom of speech

Constitute a180degree turn for a Government that proposed abolishing or amending 18C of the RDA on the ground that it restricts freedom of speech; a proposal that the community soundly rejected.

- The *Australian Border Force Act 2015* (Cth) provides that medical officers, teachers and other professionals employed by the Dept. of Immigration and Border Protection are subject to 2 year prison sentences for speaking out about conditions in immigration detention, if to do so will affect the operations of the Department. While the Act is thought not to prevent reporting of acts that threaten the life or health of a detainee, it is likely to have a serious chilling effect on the willingness to speak out to the detriment of

the public's right to know what is happening in these camps, especially in Manus and Nauru. {Role of *Public Interest Disclosure Act… whistleblowers laws)*

- New crimes of "advocating terrorism" that are vague and ill-defined
- The *Data Retention* laws 2015, potentially applicable to 24 million Australians, are so extreme as to be "sledge hammer to crack a nut".
- Government may apply for a "journalist information warrant" to compel the surrender of a journalist's metadata to identify their sources, but such a warrant is not necessary in respect of anyone else. Lawyers, for example, do not have the special privileges that are extended to journalists. [Compare the new US *Patriot Act* that restricts, for the first time, the powers of its intelligence and security agencies.]

Independence of the judiciary

Diminution of the discretion of the Courts to consider individual circumstances:

- Mandatory sentencing laws at the Federal level; once rare and now accepted practice
- Reversals of the evidential burden of proof in criminal trials
- Restrictions on freedom of association in laws such as the 'bikie laws'
- Australians may not enter "Declared areas" such as the Mosel district of Iraq and Al-Raqqa province of Syria. A criminal prosecution for violations will attract a 10 year prison sentence and place the evidential burden on the accused to show a legitimate reason for being there.
- Any disclosure of information in respect of 'special intelligence operations" will attract a mandatory 5 or 10-year penalty, but ASIO officers have total immunity from civil and criminal prosecution while engaged in these operations

Good governance principles of transparency and process

- Senior appointments or 'captain's picks' made by Cabinet, without the usual public advertisement and competitive selection
- Secrecy and lack of transparency re on water operational matters to stop asylum seekers

- Non-compellable ministerial discretions of Ministers, particularly under the *Migration Act*

Failure to give effect to the human rights treaties to which Australia is a party.

- The 2014 *Maritime Powers Act* removed references to the Refugee Convention from s 36 of the *Migration Act*, which sets out the criteria for grant of a protection visa. "Refugee" is now defined in s 5H (and relevant connected concepts such as 'well-founded fear of persecution' are defined in ss 5J to 5M). S197C of the *Migration Act re* Australia's *non-refoulement* obligations are now irrelevant to removal of unlawful non-citizens under section 198.
- An officer's duty to remove as soon as reasonably practicable an unlawful non-citizen under section 198 arises irrespective of whether there has been an assessment, according to law, of Australia's *non-refoulement* obligations in respect of the non-citizen.

In each case, the laws have been passed by parliaments; an obvious but vital point.

I believe that the question:

"what are the proper limits on the power of Parliament?"

-remains a live one for contemporary Australian democracy.

- What then are the safeguards of democratic liberties if Parliament itself is compliant and complicit in expanding executive power to the detriment of the judiciary and ultimately of all Australian citizens?

- What are the options for democracy when both major parties, in government and opposition, agree upon laws that explicitly violate fundamental freedoms under the common law and breach Australia's obligations under international treaties?

I suggest that Australia has become isolationist and exceptional in its approach to the protection of human rights.

Australian Exceptionalism

It is true to say that, in the past, Australia has been a good international citizen, playing an active role in negotiating the human rights treaties that form the international monitoring regime. However, these treaties have typically not been introduced into Australian law by Parliament, so that key instruments such as the ICCPR and CROC are not directly applicable by our courts.

Our Constitution protects the freedom of religion, the right to compensation for the acquisition of property and the right to vote, and implies a right of political communication…but very little more. It was drafted as a practical solution to the need to establish a federal structure that respected the rights of the state. It was not inspirational in the way that for example the United States Constitution was intended to be. As is well known, unlike every other common law country in the world, Australia has no Charter or Bill of Rights.

Compounding our isolation from international human rights jurisprudence, the Asia Pacific has no regional human rights treaty and no regional court to develop human rights law or to build a regional consensus.

It might be thought that we can rely on our courts to protect common law liberties. Laws passed by Parliament are not to be construed as abrogating fundamental common law rights, privileges and immunities in the absence of clear words. Our courts have employed the principle of 'legality' to adopt a restrictive interpretation of legislation to protect common law freedoms. That is, it is presumed that Parliament intends to act in conformity with international law and the treaties to which it is party. But in practice this has not proved to be as effective a protection as one might have hoped. The presumption of legality applies only if there is an ambiguity in the words of the legislation. The rationale being, of course, that parliament is the law-maker and the task of the courts is to interpret and to implement such laws. But, as our laws today are drafted with such precision, or are so constantly amended, that ambiguities are increasingly hard for the courts to find.

In the *Malaysian case*, for example, the High Court found that, under the s 98 A of the *Migration Act*, the Minister could not send asylum seekers to Malaysia as that nation had not ratified the Refugee Convention and they would be at risk of return to the country of persecution and discrimination. The Government immediately returned to Parliament to delete the offending clause, leaving open the possibility of further

offshore processing arrangements with the Asian region where so many states are not party to the relevant human rights treaties.

Time and again the High Court has limited executive discretion by reference to statutory principles of interpretation and the principle of legality. Time and again the Government has been successful in asking Parliament to tighten up legislation to permit what was hitherto illegal.

The *Malaysia Solution Case* illustrates how, respective Parliaments over the last few years have failed to exercise their traditional self-restraint in protecting democratic rights. Historically, Parliament has been the bulwark against sovereign or executive power. Sadly, Professor George Williams estimates that there are currently over 350 Australian laws that infringe fundamental freedoms. He suggests that prioritizing governmental power has become a "routine part of the legislative process", stimulating little community or media responses.

Underpinning my concerns about executive overreach is the doctrine of separation of powers that is vital to our democratic system of governance. It is a concept that lawyers learn about at law school but which is hardly ever part of public commentary, and infrequently taught in schools. In brief, we have three arms of government; Executive power vests in the Queen and is exercised by the Governor General; Parliament has the power to pass legislation and the courts are required to interpret the laws and determining whether it has been complied with.

As the High Court has acknowledged, the Chapter III powers of the judiciary are intended to protect against an excess of Commonwealth executive power and to advance individual liberty.

The rationale for the separation of the three arms of government is that sovereigns or executive governments -from King John of Magna Carta, to Charles the 1st of England, to the present day- will almost always seek to augment their autonomy. This is a given. It is the function of Parliament and judges to provide checks and balances against the inevitability of executive overreach. It has been the institutional failure of Parliament over the last decade or so that poses the creates risks to our individual liberties.

With these general comments about Australian exceptionalism, I would now like to look at the growing incidence of overreaching executive power. There are scores of recent examples.

In considering them, the legal test of validity is whether the legislation is necessary and proportionate to the meet a legitimate aim. Individual laws may well pass this test, and perhaps should be accepted until we see how they have worked in practice. But my concern is that, as each new piece of legislation is passed, they accumulate and become more than the sum of their parts, demonstrating a systemic and disproportionate intrusion on individual liberties.

I would like to focus on two examples:

The first example of executive overreach are the:

Counter Terrorism and loss of citizenship laws

Counter-terrorism laws have been significantly extended over recent years to modernize our outdated laws and to recognize that terrorism is highly individual and not state-based.

The strength of the rule of law is, however, more truly tested when security is threatened than in times of peace. When Australia is threatened by terrorism, the need to protect our traditional liberties assumes an even greater urgency. Many counter-terrorism laws, introduced with unseemly haste before Christmas, go well beyond what might be deemed to proportionate, creating a chilling effect on freedom of speech and the press and breaching the right to privacy.

The *Australian Citizenship (Allegiance to Australia) Bill* 2015 has just been introduced to ensure that Australian citizen accused of fighting for or in the service of a declared terrorist organization, or acting inconsistently with their allegiance to Australia, will be stripped of their citizenship automatically, including that of their children, if they are dual nationals. The wording of the Bill is ill-defined, but does explicitly include the ground of damaging Commonwealth property. The loss of citizenship for dual nationals, including those who have spend most if not all their lives in Australia strikes at the heart of Australia's successful migrant and multi-cultural nation and threatens social cohesion.

Under current law, the power of the Minister to revoke citizenship arises if a conviction for specified offences had been made and if the offence was in connection with making an application for citizenship of Australia.

It is now proposed that the revocation should arise by operation of law rather than the initially proposed subjective Ministerial discretion. In short, no decision is required by the Minister, though it is implicit that an official somewhere will make the decision. But it is also proposed that the Minister be granted a non-compellable discretion to exempt the citizen from the automaticity of the loss of citizenship '*if the Minister considers it appropriate to do so'*. The Minister cannot be required to think about whether he will exercise this discretion and if he makes any mistakes is not bound by the rules of natural justice.

- Magna Carta has something to say about this.
- It provided that no man is to be 'outlawed or exiled' except by the law of the land. This ancient principle raises the question whether it is consistent with the rule of law for Parliament to pass legislation to withdraw citizenship automatically, subject to the discretion of the Minister. I suggest it is contrary to the spirit of the rule of law, contrary to the ICCCPR Art 12 (4) protecting the right to enter and remain in ones own country and to the principle of the separation of powers for Parliament to revoke citizenship automatically under the legislation and then to grant discretion to the Executive to provide an exemption from the Act. The effect of the Bill is to allow the Executive not only to pass laws through Parliament but also to determine when those laws will apply.

- The Government argues that the right to a fair trial is not threatened by the Bill because there is judicial review of any decision made by the Minister not to exempt a person from the automatic loss of citizenship. This is true. A court could review whether the power under the *Citizenship Act* has been exercised according to the law. But all the law requires is that the Minister can exercise his discretion as he considers appropriate. In short, the courts have nothing to review thus the exercise will be futile. In this way the courts are excluded from the process, other than the theoretical power to review the unreviewable.

- The Bill, I suggest, diminishes the judicial power to make determinations, and will be if passed an arbitrary overreach of executive discretion facilitated by a compliant Parliament.

- The debate over citizenship has become one between the subjective satisfaction of a minister, versus an evidence-based determination by a judge according to established rules of evidence and law.

The second example of the overreach of executive discretion and power lies in:

Arbitrary and indefinite detention

- The enduring words of Magna Carta are:

- *" no freeman is to be imprisoned except by the lawful judgment of his equals or by the law of the land".*

- Over recent years, respective Parliaments have granted governments the power to detain indefinitely various classes of persons, including most notably refugees and asylum seekers, along with those less well known who have infectious diseases, or who are mentally ill and unfit to plead to criminal charges, or who are subject to mandatory admission to drug and alcohol rehabilitation facilities. Few of those detained under such laws have meaningful access to legal advice or regular independent judicial or administrative review.

- The AHRC is particularly concerned by the growing instances of detention in prisons of those with cognitive disabilities for lengthy periods without releasing them into more appropriate facilities and in the absence of regular review by an independent tribunal.

- In a recent complaint the AHRC found that four Aboriginal men with intellectual and cognitive disabilities had been held for many years in a maximum-security prison in the Northern Territory. Each complainant had been found unfit to stand trial or found not guilty by reason of insanity. In respect to two of these men, they would have received a maximum sentence of 12 months had they been duly convicted. Instead, they were imprisoned for four and a half years and six years respectively. The Commission found that the failure by the Commonwealth was a violation of the right not to be detained arbitrarily under Article 9 of the ICCPR, a provision in the spirit of the Magna Carta.

- Sadly, such detention disproportionately impacts Aboriginal and Torres Strait Islanders; a problem exacerbated by the Northern

Territory's 'paperless arrest' powers introduced late last year permitting detention for 4 hours without being brought to a court for offences that do not in some cases, attract the sanction of imprisonment. Such detentions have increased the rate of detention of Aboriginal Australians and deaths in custody continue, as recently as a few weeks ago, 24 years after the Royal Commission Report into Deaths in Custody of 1991.

- Detention powers of the Executive have also been expanded to detain asylum seekers and refugees indefinitely, powers that were found to be valid by the High Court in *Al Kateb* in 2007. Most egregiously, those with ASIO adverse security assessments are detained indefinitely, many, including children, for some years without meaningful access to legal advice or independent review. About 2026, people, including 138 children, remain in closed detention in Australia and 943 males remain on Manus and 448 refugees on Nauru, including 81 children. Most have been held for well over a year in conditions that have been criticized by the UN as breaching the Torture Convention.

- Some recent cases shine rays of legal light on the unconstrained right of Parliaments to give the Executive the power to detain. The High Court has for example said that Parliament cannot confer delegated legislative power on the Minister to exercise an open-ended discretion with respect to aliens. The High Court has also unanimously confirmed a writ of mandamus against the Minister for Immigration to require him to make a decision to grant a visa or deport, one or the other, within a reasonable period of time.

- As punitive detention is for the courts alone, I suggest that their prolonged and indefinite detention by the Executive risks becoming punitive. If so, it violates the principle of separation of powers.

Conclusions

One of many lessons I have learned over my three years as President of the AHRC is that one of the most effective safeguards of human rights is the cultural expectation of Australians that our freedoms will be protected. While most Australians are unlikely to be able to describe the doctrine of the separation of powers, they are quick to assert their liberties under the rubric of a 'fair go'- a phrase that is as close to a bill of rights in this country as we are likely to get. This cultural expectation is

what keeps our freedoms alive today, as was illustrated by the overwhelming community response to preserve s18C of the RDA.

The scores of laws passed recently that infringe our rights has confirmed in my view that Australia needs a legislated Charter of Rights. If the law fails and needs to be repealed or amended that is easy to achieve.

A national priority is to promote the education of young Australians, so they better understand and value the Constitutional protections for democracy and the rule of law.

In conclusion, I hope that, despite challenging the power of the executive, I, as an English migrant and as a dual citizen, I can keep my Australian passport secure and escape statelessness, and eventually retire to smell the roses in peace.

Thank you