**Victorian Anti-discrimination and Human Rights Oration 2014**

**The overreach of executive discretion: anti-terrorism laws, asylum seekers and the mentally disabled.**

Thank you Kate for your invitation and introduction. It is a great pleasure for me to be back in Melbourne to give this oration. Indeed, I have recently read your 2013 Report on the Operation of the Charter of Human Rights and believe that Victoria is the national leader in integrating rights and freedoms in our laws and practices.

I would like to acknowledge that we meet on the land of the Kulin people, and pay my respects to their elders, past and present.

As Australia emerges from the surprises of the G20 meetings, I had the opportunity to listen to Chancellor Angela Merkel giving the annual Levy Lecture. She anchored her speech in the importance of the international rule of law, democracy and human rights. In contrast, last week, when giving evidence to the Joint Parliamentary Committee on Legal and Constitutional affairs, the Chairman said: “Australians do not care about treaties and international law” and, he continued, the aim of amendments to the *Migration* and *Maritime Powers Acts* is to stop the High Court interfering with government asylum seeker policy.

The contrast in approaches to international human rights law was stark and distrurbing.

It has become a matter of profound concern to me that several Bills recently introduced to Parliament in this last session propose an unprecedented increase in executive discretion by the Federal Government, often ousting the jurisdiction of the judiciary, and excluding international law and human rights. The threat posed by the overreach of executive discretion was well understood by Chief Justice Dixon as early as 1952 who observed that democracy was at risk of being taken over by the executive following the *Communist Party case* that had been decided the previous year.

Today I would like to explore the admittedly lofty idea of limits on executive discretion in the context of three important human rights issues; the long term imprisonment of those who are mentally unfit to plead to criminal charges, the indefinite mandatory detention of asylum seekers and the new and proposed counter-terrorism laws.

Let me begin with one of the foundational ideas of the common law. As you will know, next year we celebrate the 800th anniversary of the- reluctant- signing of the Magna Carta by King John on the fields on Runnimede in 1215. Buried in the middle of this constitutional document that set the volume of a glass of ale, or the property rights of a widow on the death of her husband is the following clause;

 *No freeman is to be taken or imprisoned or disseissed …of his liberties…or in anyway ruined…save by the lawful judgment of his peers or by the law of the land. To no-one will we sell or deny or delay right or justice.*

These words ring through the centuries and the right not to be detained arbitrarily is reflected in every common law and civil law system in the world.

The idea that the Executive Government of a state may not detain a person without judicial process is not the recent invention of new country members of the United Nations. Rather, it is a guarantee of ancient lineage that virtually every democratic legal regime in the world, recognizes as the *sine qua non* of a civilized nation.

Yet today in Australia we detain people under the broad right of the Executive to detain for administrative purposes.

**Imprisonment of those with mental disabilities**

One seldom discussed example is the detention of those with a mental disability. Let me show you a particularly egregious example of Merlin who was held for over 10 years without trial in WA in circumstances in which the evidence of a criminal offence was virtually non-existent.

Merlin found unfit to plead in response to a sexual assault and not eligible for full psychiatric support but also not to be released into the community, was held for 10 years in criminal detention.

See video

More recently the AHRC has considered complaints against the Commonwealth for failing to ensure that 4 Aboriginal men with intellectual disabilities were accommodated in facilities other than maximum security prisons or that they received appropriate medical and other support. In one case a man was held for over 6 years, when the maximum sentence, if convicted, would have been a year. There are scores of similar cases we are discovering around Australia, especially in Queensland, NT and WA. I have recently made a finding that the failure to act is arbitrary detention and inconsistent with the ICCOR and CRDP. Sadly, the response by the Commonwealth is that this is the responsibility of the NT government.

**Indefinite Immigration Detention**

2. A second and well-known if not understood example of administrative detention is the mandatory detention of those asylum seekers who arrive by boat without a visa. Australia currently detains about 5,500 asylum seekers on the mainland, Christmas Island, Manus Island and Nauru, including about 730 children. We are the only nation in the world that mandates the detention of children and their families on their arrival and we do so indefinitely and on average for over a year and three months; in many cases for several years. (cf the United Kingdom, where asylum seekers must be released after 72 hours).

Since 2010 Australia has detained literally thousands of children and their families in substandard prisons in remote and inaccessible places with little or no education, without access to legal advice, without criminal charge and without a trial before a court or tribunal. Asylum seekers have been held in legal black holes with no idea when they might be released into the community and the courts can find few opportunities to intervene.

Recently passed amendments to the *Migration Act* and the *Maritime Powers Act* achieve two important reforms: some children will be released from detention camps into the community and work rights will be available to their parents on bridging visas.

These welcome legislative changes bring with them some very worrying little understood amendments which give unprecedented powers to the Minister of Immigration.

Of particular concern are the following provisions :

* The failure by a Government official to abide by Australia’s obligations under International law or to ensure due process or natural justice are not reasons for invalidity of authorized acts under the *Maritime Powers Act*, which is intended to ensure that officials are permitted act on the high seas in ways that breach international law.
* Mandating that Australia’s obligation not to return a refugee to the country of persecution is “irrelevant” to the power to remove compulsorily a person who does not have a visa. Aims to avoid the 157 Tamil case before the High Court, refoulement is legal, no injunctions to prevent return to place of persecution.
* Minister has power to overturn decisions of the Administrative Appeals Tribunal
* Fast track processes to assess refugee status are created but are expected to clog up the courts with legal errors
* More limited merits review and are confined to the documents with no personal appearances.
* Narrow definition of a ‘refugee’ so that the international definition no longer applies, rather the government’s view of its obligations to refugees replaces the internationally recognized standards. This reminds me of Humpty Dumpty who said to Alice, “words mean what I choose them to mean”.
* TPVs to be introduced that depend on Ministerial discretion and may not be granted at all.
* Children born in Australia are to be treated like their parents, so that they can be transferred for off shore processing in Nauru and Manus Island and are barred from applying for a protection visa

In one fell swoop, decades of Australian administrative law and international law are deleted from the Acts. The Minister can of course ensure these standards are met, but the exercise of his discretion is not compellable.

**Counter Terrorism laws**

3. The third example of the expansion of executive discretion lies in the recent amendments and proposed amendments to the counter-terrorism legislation. In short, the concerns of the AHRC are that any reforms should be evidence based, and necessary and proportionate to achieve a legitimate aim; echoing of course both the long-held views of the High Court and international law. Our concerns are that a sledge hammer has been used to crack a nut. The reforms are often an overreach that invades privacy and impedes freedom of speech, without appropriate judicial or external oversight.

Two tranches of legislation have now been passed that bring our anti-terrorism laws up to date. But as usual the devil lies in the detail.

The new laws:

* The AG can grant ASIO questioning warrants if he is satisfied that it would be reasonable to do so. The earlier law was that he had to be satisfied that other methods would be ineffective.
* Preventive Detention Orders, Control orders and stop, search and seizure powers have all been extended, despite recommendations by the Monitor that they are not used in practice and should be abolished.
* A new offence of traveling to a ‘declared area’, the first of which has just been announced, where the burden of proof is on the accused to show their visit was solely for a listed purpose. While the Commission argued for a wider justification of ‘legitimate reason’, this was rejected because the Government did not want the courts to play any role in determining what legitimate means.
* The Government can also cancel visas and welfare payments regardless of the family of children
* 10year penalties for disclosure of information under s35P where the disclosure prejudices the effective conduct of an SIO, regardless of any intention to do so. (We suggest the test should be likely to prejudice)
* ASIO may share the confidential information with both Australian and overseas government agencies: too wide.

Proposed amendments to:

* Allow Minister to issue computer access warrant wide definition of computer to any combination of networks, all computers associated with a particular person, and authorizes material interference with a computer if necessary to carry out the warrant.
* Require telecommunications companies to store all meta data for two years with wide rights of access and use without scrutiny by external independent overseers such as a judge.
* Special intelligence operations can be agreed to by the Director General of ASIO for a year and extended for another year without any external oversight.
* Immunity is given to ASIO agents without showing that the otherwise illegal act is necessary and that there are no alternative means available.

These are but three examples of human rights that are increasingly subject to Ministerial discretion and beyond the scrutiny of the courts.

**How has it come to this in Australia’s relatively mature and successful democracy?**

**Why is it not possible to gain a writ of *habeas corpus* to examine the legality of detention?**

**Why does the Magna Carta not apply?**

There are at least two explanations.

* One is that Australia is unique, or exceptional, in its approach to international law and human rights.
* The other is that the Constitution and the High Court have long recognized the right of the Federal Government to exercise its discretion to detain people for administrative purposes, for example, those with mental illness or to deal with aliens.

**Firstly, what do I mean by Australian exceptionalism and human rights?**

Australia’s exceptional approach:

* Human rights treaties (such as the ICCPR ICCESCR, CRC, CAT) are not legislated as part of Australian law, They form the benchmarks for the human rights work of the Australian Human Rights Commission, but are not directly applicable law.
* There are few constitutional protections other than the right to vote, the right to freedom of religion and the implied right to political communication.
* Unlike every common law country in the world, Australia has no bill of rights. As a consequence, unlike NZ, UK, Europe, Canada and the United States, we do not view any legal situation through the prism of human rights.
* Victoria and the ACT are exceptions in having charters of human rights and an evolving jurisprudence.
* I am told that when a survey was conducted in which Australians were asked – “do we have a constitution?, to which 90% answered “no”. When asked if we have a Bill of Rights 60% of Australians said ‘yes’. It seems that we learn more about the law from American TV programs. I was informed by a NSW police commissioner that a man who was recently convicted of murdering his wife in Sydney, asked the police on his arrest if he could take the fifth amendment.
* Not only do we have few constitutional provisions but also, there is little human rights legislation other than anti-discrimination laws, for example, in relation to sex, disability, age and race.
* Finally, unlike other regions of the world, there is no overarching regional human rights framework in the Asia Pacific - there is no treaty, no body or monitoring mechanism and no regional court.

In summary, in Australia, we have but an incomplete and fragile culture of human rights.

How do we get it right most of the time? We rely on :

* the important principle of a ‘fair go’: perhaps a cliché but an import cultural expectation that fundamental rights and freedoms will be respected.
* Common law rules of statutory interpretation and legality, including that parliament intends to comply with Australia’s international obligations, and that common law freedoms should be upheld. (Note resignation of Grieve QC, UK Att-Gen saying the common law principles have an ‘almost mythic restraint on governments”).
* The Commonwealth’s Joint Parliamentary Committee on Human Rights, the so-called Scrutiny Committee- one of the most important advances in human rights in Australia for many years.
* The work of the Australian Human Rights Commission through its advocacy, monitoring and complaints processes.

But the fatal flaw in Australia’s mixed and usually successful regime is that the common law principle of legality will be trumped by the clear words of the statute. This reflects, of course, the principle of parliamentary sovereignty. The Courts are bound to apply the unambiguous words of legislation that has been agreed to by the elected parliament. On the face of it, this makes sense. Parliamentarians are elected says the Government; judges are appointed. But, I fear it is not understood that an independent judiciary is an integral part of democracy. To dismiss our judges as unelected misses the point. They are one of the vital institutions of democracy and are there to ensure that the executive and Parliament act within the Constitution and the rule of law.

The consequence of the *ad hoc* and mixed means of achieving human rights outcomes in Australia is illustrated by recent events.

In the months leading up to the election we were told by the now Prime Minister and Attorney-General that the important principle of freedom of speech was at risk because journalists like Andrew Bolt could be prosecuted under the civil law prohibition in 18C of the *Racial Discrimination Act*, that no one may ‘offend, insult, humiliate or intimidate’ a person in public because of his race or national origin.

On gaining Government, an Exposure Bill was introduced that in effect would eliminate s18C. Unexpectedly, a few months ago the Government announced that the reform proposals for s18C would not go ahead and that, instead, new laws would be introduced to make it criminal to advocate terrorism without the current requirement for evidence that advocacy has had an effect in practice and also to impose an up to 10 year prison sentence to anyone disclosing information about an ASIO special operation, if this will prejudice that operation.

It seems that the right to freedom of speech is now to be balanced negatively against the need to protect national security.

It is not my purpose to comment on the substantive merits of either of these legislative policies. Rather, it is to make the point that we have few benchmarks of legal jurisprudence for fundamental freedoms by which to judge whether the government has got the balance right. How can a 180degree swing in the importance of the right to freedom of speech be justified?

I suggest that **Australia has become like a compass that has lost its due north.** We do not know what core freedoms we should be standing up for. We do not understand the balancing process between competing rights, nor the commitments Australia has made to international law.

**Executive discretion to detain**

The second suggested explanation for our current policies in respect of administrative detention is that the High Court has recognized the aliens power under s 51(19) of the Constitution. This provision gives the Executive the power to detain an asylum seeker for certain purposes without judicial scrutiny.

The decision of the High Court in *Lim’s case* in 1992 sets out the law. This case concerned several Cambodians fleeing the civil war in their country during which 25% of the population was killed. They had arrived in Australia by boat without a visa. The Court confirmed that the Executive may detain an alien in order to remove him from Australia or to determine his eligibility for a protection visa and that this executive discretion does not usurp the Chapter 111 exclusivity of the judicial powers of the courts.

Justice McHugh in the majority referred to legal history. In the 16th and 17th centuries and especially during the American Revolution in the 18th century, it was common, he points out, for the English Parliament to pass what are called Bills of Attainder and Bills of Pains and Penalties. These bills gave the Executive power to inflict punishment, execution and imprisonment, without a judicial trial. By the 19th century, it was accepted that such bills are not valid because the doctrine of separation of powers among the executive, legislative and judicial arms of government, means that punishment may be imposed only after a trial with the usual procedural protections in a judicial proceeding. If detention is for a legitimate non-punitive, essentially administrative purpose, it will be valid. So detention of those unfit to plead because of mental illness, of accused persons before their trial, or of aliens prior to deportation or the grant of a visa, can be valid so long as the aim is not penal or punitive.

The validity of detention under executive discretion has been adopted in Australia, with distressing results. The most notorious example, and a low point for human rights law, is the *Al Katab* decision by four judges of the High Court in 2004. The majority held that, under the unambiguous terms of the *Migration Act*, the Minister could hold Al Katab indefinitely. That is, for over four and half years with no end in sight. As Al Katab was stateless, no country would take him and the Minister had refused to release him or grant him a visa.

The dissenting judges took different points. Justice Kirby considered the law a violation of liberty and the CJ Gleeson and J Gummow preferred to read down the *Migration Act* in the interests of practicality. The *Al Kateb* decision has remained the law over the following 10 years - **that is until about a month ago.**

In *Plaintiff S4* (2014), the Plaintiff was also stateless; he met the definition of a ‘refugee’ and had been held in closed indefinite detention for about two and a half years.

This time however, the High Court made a unanimous decision that the executive discretion of the Immigration Minister to detain was limited to two purposes, viz: deportation or a decision whether to allow the Plaintiff to apply for a visa. For the first time the Court articulated a condition on the power. The Court said that the *Migration Act* does not authorize the detention of an asylum seeker ‘at the unconstrained discretion’ of the Minister. An alien is not an ‘outlaw’ and can be detained only strictly in accordance with the law. The Court further said that the Minister must make a decision one way or the other “as soon as is practicable”. The Court also observed sternly, that if the Minister does not make a decision reasonably promptly, it will use the constitutional writ of mandamus to make him comply with the Act.

It remains to be seen how future courts will define the acceptable time for detention. It seems that the years of detention in which no decision is made at all, will be invalid in the future. Indeed, the deliberate failure to make a decision, and to detain children as leverage to gain temporary protection visas from the Senate is, I suggest, an egregious abuse of power and, being essentially punitive, usurps the judicial power of the courts.

In my view, detention of the current 3,500 asylum seekers on Christmas Island and in centers on the mainland, without a decision within a reasonable time as to whether they can apply for a visa, has become penal and is not protected by the executive power of administrative detention.

**Secrecy of government activities.**

In addition to concerns about the new Bills, are wider practices by Governments that compound the risks to human rights and democracy.

We are seeing greater levels of secrecy justified as being in the national interest.

* You will know that the 5,500 public submissions to Government in the S. 18C reforms were not made public as is usual.
* There is a lack of information in relation to Operation Sovereign Borders and the policy of turning back asylum seeker boats.
* Moreover, a Bill has just been introduced to eliminate the office of the Information Commissioner.
* Appointments to Tribunals and commissions are made without open processes or are not made at all.
* Reform bills are introduced into Parliament with unseemly haste, giving parliamentary committees such as the Intelligence Committee and the Legal and Constitutional Committee minimal time to understand or comment on the Bills.

Members of the public are largely oblivious to the magnitude of these practices or of the consequences for their private lives.

**International approbrium:**

The wide gulf between Australia’s immigration detention policies and offshore processing on Nauru and Manus Island and its international obligations has attracted the attention of the United Nations and its human rights monitoring committees.

The Human Rights Committee has found that the indefinite detention of those 46 refugees assessed to be a security risk is cruel and inhuman punishment, contrary to the Convention against Torture.

Last week the Committee Against Torture reported that it was:

“…*concerned that detention continues to be mandatory for all unauthorized arrivals, including children” despite the legal principle that detention should be a last resort for children.*

The Committee was also concernedthat *‘harsh conditions’* prevailed in regional processing centers where conditions for children included *“overcrowding, inadequate health care; and even allegations of sexual abuse and ill-treatment’.*

Unusually, the Committee commented on the Bill to amend the *Migration and Maritime Powers Act,* The Committee noted its concern that the Bill would require an government official to remove a ‘non-citizen’ regardless of whether to do so would be in violation of Australia’s non-refoulement obligations.

Australia has traditionally been a good international citizen and, in recognition of this, is currently the President of the UN Security Council. The Foreign Minister hopes Australia will be elected to the UN Human Rights Council for 2018. Australia has never been on the Human Rights Council and it deserves to be a member. It will not, however, be lost on the international community that Australia’s detention policies are out of line with international treaty obligations and with accepted practices of other States.

Recently, the Monash Mapping Social Cohesion Report shows that political parties and parliament are ranked at the bottom of scores for institutional trust. The Biennial Constitutional Values Survey found more than 25% of Australians are convinced that democracy does not work effectively. They want to see governments abide by core principles of consistency, transparency and accountability. I suggest that the failure to abide by the rule of law, the lack of respect for, and understanding of the role of, our judges and the failure to implement human rights in our domestic laws, compound the decline in faith in our democratic institutions.

**Conclusions**

For the most part, Australia gets it right. We have a high standard of human rights in this largely cohesive country. But we have some blind spots; Indigenous policy, immigration detention, the detention juveniles in adult prisons and the prolonged detention of those with mental illness.

What is to be done about the failure to recognize international human rights or our ancient and fundamental common law freedoms?

**A powerful tool lies in strong leadership**.

Imagine for a moment if our senior politicians insisted on fundamental freedoms for all, and on human rights all those we detain, as required by the international treaties Australia has ratified…. then we would have a different landscape than exists today.

But to the extent that we do not have that leadership, I believe we have to start at the beginning with including more comprehensive education at schools and universities; even of our parliamentarians, so they can better protect our freedoms.

I believe that the increasing power of the modern state to intrude into people’s lives requires a statute to protect citizens. We need to reopen the public debate about a national legislated form of human rights Charter to ensure that neglected freedoms are better protected and that, where the freedom is necessarily limited, we are in agreement upon principles by which to determine if the limit is fair, proportionate and reasonable.

I believe Australia is out of step with comparable countries in its failure adequately to protect fundamental freedoms and in its failure to meet its international human rights obligations. We need to do much better if we are to sustain our successful multicultural, and generally harmonious community. We must not remain silent in the face of a serious challenge of executive power to democracy.

Thank you.