SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
ATTORNEY-GENERAL'S PORTFOLIO

Program: Australian Human Rights Commission

Question No. SBE16/034

Senator Reynolds asked the following question at the hearing on 18 October 2016:

Senator REYNOLDS: I just wanted to give Professor Triggs the courtesy of a copy of the article I am quoting from. This article was in Lawyers Weekly.

…

Senator REYNOLDS: Okay. The article said you called for the country to have a 'serious conversation' about a bill of rights, which, as we have discussed, is a live issue and something that is important of the nation. The article then quotes you as saying that 'lawyers and the courts have continually failed to protect fundamental freedoms'. The article continues:

Australian lawyers seem to have lost their focus as protectors of the most vulnerable, according to Professor Gillian Triggs.

… … …

"There seems to be some kind of fatigue among the profession, and we're walking and sleepwalking into accepting the unprecedented rise outside wartime of executive power and governmental discretions that are not fully subject to judicial scrutiny or the rule of law."

I am not sure if this is a rhetorical question or whether you are asking this of the lawyers who were in attendance, but you are then quoted as saying:

"What kind of a lawyer would work with the government to remove the illegality through context, in the way of a retrospective provision, to arguably make legal something which is probably illegal?"

… … …

"I do not believe that it's acceptable for our courts to ignore the legal regime …"

I will just stop there, because those were obviously clear references to a large cohort of people in your own profession. Could you explain the reasoning behind this speech?

Prof. Triggs: Firstly, again, I have to point out that this is a report by somebody who was listening to my speech. It is disjointed and it is out of context. It is not in the context of the cases. I went into a great deal of detail discussing some of the major decisions of the High Court of Australia and made some observations accordingly. So this is a very short-hand, and on occasion inaccurate, statement of what I said at that lecture. If it is of any interest to you, I am the patron of the New South Wales Young Lawyers Association, and they want to be a little edgier than perhaps the profession is—they wanted something that was going to cause them to think, and that was my task for that day. And I took that challenge. I have a full text of that speech if you would like it.

Senator REYNOLDS: That would be helpful.

The answer to the honourable senator's question is as follows:

Speaker notes: Check against delivery

NSW Young Lawyers Association, State of the Profession Oration: Young Lawyers and Human Rights. 22 September 2016

I was invited to be the patron of the NSW Young Lawyers Association for 2016 with the specific request that I bring a more "edgy", reformist approach to thinking about the changing roles of lawyers.

I hope what I have to say tonight gives you food for thought about the failure of parliaments, judges and the legal profession adequately to protect our fundamental common law freedoms.

Many years ago when I was a law student in the United States, I read a book called the "*Enemies of the Poor*" written in 1970 by James J Graeme. This work has had a lasting impact on me. Graeme's thesis was that traditional protectors of the poor- the churches, lawyers and labor unions -have let down the poor and, indeed, have become their enemies.

While I would not go so far, I have become concerned that lawyers in Australia, whether as solicitors, barristers, parliamentarians, judges, in-house counsel, or working in the media or with civil society, have failed to recognize and stand up for the rights and freedoms that have underpinned our multicultural democracy. There seems to be some kind of fatigue among the profession so that we are sleep walking into accepting the unprecedented rise (outside wartime) of executive powers and ministerial discretions that are not subject to full judicial scrutiny.

Australian parliaments have willingly granted the executive powers that override common law freedoms of speech, movement, association, and privacy and the right not to be detained arbitrarily or to be subject to cruel and inhumane treatment. Governments have been in lockstep with opposition parties over issues such as the stripping of citizenship from dual citizens who are suspected of having associated with a terrorist and cancelation of s501 visas on character grounds, access by security agencies to meta data without a judicial warrant, offshore processing of refugees and expansive counter-terrorism laws.

Where has the profession been in resisting these developments?

I would like illustrate my point by discussing two issues of contemporary importance:

- The treatment in detention of indigenous juveniles in the Northern Territory in the context of the High Court decision in the so called '4 hour paperless arrest' laws

- The removal of asylum seekers to indefinite detention offshore and the High Court decision in the M68 case.

Before considering these two examples, I would like to explain why Australia, historically a good international citizen, has become isolated over the last 15 years from international human rights jurisprudence and practice.

- Parliament has not implemented the human rights treaties to which Australia is a party in national laws, with the exception of the conventions on race, sex and disability

- The Commonwealth Constitution protects few common law freedoms other than the right to vote, to a fair trial, right to compensation for taking property and freedom of religion.
- Australia is the only common law country in the world that does not have a bill of rights,
- Australia is in a region where there is no convention on human rights or regional court to develop an accepted jurisprudence on fundamental freedoms.
- Finally, common law rights and freedoms are typically overridden by unambiguous statutes to the contrary.

Australia remains accountable at international law for breaches of treaty obligations under the UN monitoring system, including peer-to-peer review by the Human Rights Council, and the findings and recommendations of the Human Rights Committee through individual complaints. However, the human rights treaties to which Australia is a party are not usually considered by our judges to be available as a benchmark against which to decide whether Australian laws conform to the treaty obligation.

In short, Australia has relied on Parliament and the Parliamentary committee system to ensure compliance with treaty obligations; processes that have failed in practice to protect fundamental freedoms.

In particular, the creation of the Joint Parliamentary Committee on Human Rights, the so-called "Scrutiny Committee", has been disappointing. After a few years of consensus reports, often ignored on the floor of Parliament, the Committee reports now break down along party political lines. On occasion, the Committee has reported after the challenged Bill has passed through Parliament into law.

It is in this exceptionalist environment that the AHRC provides a useful role. The Commission has a statutory mandate to hold the government and private sector to account for compliance with national and international human rights laws. "Human rights" are defined by agreements such as the ICCPR and CROC; the very treaty obligations that have not been implemented by Parliament as directly applicable principles of national law.

This explains why the Commission and Parliament and the courts seem at odds with each other on some issues, especially migration and executive detention of asylum seekers and counter-terrorism laws.

The gulf between the international and national systems of law is illustrated by the contrast between the M68 decision of the High Court of Australia re detention of asylum seekers on Nauru and PNG Constitution: one country has constitutional protection of liberty and the other does not.

The gulf is also illustrated by the concerns expressed by the UN's Human Rights Council in the November 2015 UPR examination of Australia's human rights record and by the concerns of UNHCHR and UNHCR and specialist Rapporteurs. Each body has expressed its concerns that offshore detention of asylum seekers, incarceration rates of aboriginal Australians and high levels of domestic violence breach international obligations.

The response by the Australian government has been:

"*we will not be lectured to by the UN".*

I had imagined that, over time, the separate spheres of law would harmonize and inform each other by osmosis. While this is certainly happening in comparable legal systems, it has not been the case in Australia (cf Mason court years and the *Teoh case*).

Northern territory indigenous juveniles

At the Australian Human Rights Commission we have long reported to Parliament our concerns about the growing use of executive or administrative detention of various classes of persons:

- Those who are unfit to plead with cognitive disabilities held in maximum security prisons, (invariably indigenous Australians)
- Those held in immigration detention, including the s501 visa cancellations on character grounds,
- Mandatory detention of asylum seekers,
- Detention after sentence has been served of sex offenders and dangerous criminals eg *Basik Basik*. Just passed legislation re detention of those convicted of terrorist offenses once their sentence has ended.
- The numbers of those in immigration detention are rising especially those whose visas have been cancelled under the s 501 of the *Migration Act*.

The AHRC receives about 18-22,000 inquiries and complaints a year alleging breaches of human rights and anti-discrimination laws. Our task is to investigate and conciliate if possible, doing so successfully in about 76% of complaints that we attempt to conciliate.

In response to many complaints detainees of various kinds, I have reported to Parliament that indefinite detention breaches Article 9 of the ICCPR prohibiting arbitrary detention. The primary ground for such a finding has been that the Executive has not considered other less restrictive forms of detention that would more proportionately meet legitimate government objectives.

These reports are typically ignored by Parliament, including a Report two years ago on the use of restraint chairs authorized by the Northern Territory to restrain youths held in juvenile detention.

Let me turn to the shocking but unsurprising CCTV footage on *Four Corners* a few weeks ago, that has unleashed a firestorm of political and legal debate.

Incontrovertible evidence of Aboriginal children subject to demeaning, debilitating and dehumanizing behavior has galvanized the Australian community and prompted the creation of a Royal Commission with unprecedented powers of investigation that include consideration of whether the acts violate the Convention on the Rights of the Child (CRC).

The Convention requires at minimum that:

Children should be protected from all forms of physical or mental violence, injury or abuse while in the care of … any … person … they should be treated with humanity and respect and should not suffer torture or cruel, inhuman or degrading treatment or punishment.

The virtually universally accepted Convention has also been ratified by Australia, but Parliament has not legislated to make it available to Australian courts.

The unpalatable fact is that over 95% of juveniles held in the NT system are Aboriginal. The national figure is about 55%. Moreover, most adults imprisoned on criminal charges in the NT are Indigenous.

Most of the over 300 recommendations of the Royal Commission into Aboriginal Deaths in Custody 1995 have not been adopted, over 25 years after they were made. Fundamental to the recommendations was the observation that indigenous Australians are detained more often and for longer periods than others, contributing to their disproportionate deaths in custody. Today, the numbers of indigenous people in detention has more than doubled from the time of the Royal Commission

The adoption by the Territory Administration of laws to permit the use of chair restraints and to give police the power to hold people on 4hour paperless arrests has added to a culture of punishment and cruelty of indigenous people.

The paperless arrest laws empower the NT police to hold in custody for up to 4 hours anyone arrested without warrant in relation to an offence for which an "infringement notice" could be issued. The aim is to give the police time to decide whether to release unconditionally or on bail, or issue a notice.

Tragically, on 21 May 2015, a Warlpiri man, Mr Kumanjayi Langdon, died in custody of heart failure, about three hours after being detained under the NT's paperless arrest powers.

He had been arrested after being seen drinking from a plastic bottle in a public park in the Darwin CBD.

The Coroner Greg Canovan was highly critical of the paperless arrest powers, stating that they have a disproportionate impact on Aboriginal and Torres Strait Islander peoples and recommended the Northern Territory Government repeal section 133AB of the Act

Some months later, the High Court had the opportunity to consider the validity of the paperless arrest laws in a challenge brought by the *North Australia Aboriginal Justice Agency Ltd v Northern territory* [2015] HCA 41.

The High Court was constrained by the language of the *Police Administration Act (*NT), s 133AB from invalidating the "paperless arrest laws". In essence, the argument of the plaintiff before the High Court was that the law was invalid because it conferred a power on the Territory executive (and hence the police), which is penal and punitive and is thus *ultra vires* the separation of powers doctrine.

The six-member majority rejected this argument, on the ground that the police discretion was fettered in that, while a person could be held for "up" to 4 hours, this could only be for the purposes of the statute, The majority denied that the power was penal, as the outer limit of 4 hours – a cap on detention - was without prejudice to the obligation to take a person to a court or justice as soon as practicable. Any detention for a longer period would be actionable for damages for false imprisonment.

Justice Gageler, as the sole dissentient, considered that the law was punitive and 'results from the officer acting not as an accuser but as a judge".

The Court repeated the principle that construction of a law that avoids or minimizes the encroachment by the statute on fundamental rights and freedoms at common law.

The Court also accepted that, absent the NT statute, the common law would require a person arrested to be brought before a court as soon as practicable. The Court found however that the NT act modifies the common law to allow post arrest custody to be extended for a reasonable period for questioning or further investigations (para 24). The paperless arrest law, the High Court found, was not punitive and thus the question of the common law rights did not arise.

My concern is that a narrow interpretation of the terms "punitive" and "penal" has permitted the executive to arrest without warrant and to detain for up to 4 hours. Maybe a well-intentioned police officer will bring a detainee before a court as soon as practicable before the 4 hours are up. But, much more likely, the words "up to 4 hours" will be interpreted in practice to mean a person will be held for 4 hours before any attempt is made to bring them before a judge.

Even more importantly, the laws have the effect of increasing the arrest rate of indigenous Australians and creating a risk of death in custody and of further injury to their physical and mental health.

All too easily these common law principles will be "trumped" by statutory provisions that limit our fundamental freedoms.

No attempt was made by any of the judges to consider international human rights law or the practice of international tribunals relating to custody.

The second issue that illustrates my argument that the judiciary has been no friend to the most vulnerable in society is the:

M68 decision of the High Court, 3 February 2016

Bangladeshi asylum seeker was intercepted 3 years ago at sea and detained on Christmas Island on 19 October 2013 as an unlawful non-citizen for the purposes of the *Migration Act*. Transferred to Nauru 22 Jan 2014, gave birth to a daughter in Brisbane 16 December 2014, application to transfer her back to Nauru prompted her proceeding in the High Court for a writ of prohibition to prevent her return on ground that the detention in Nauru caused by the Commonwealth was without lawful authority; She has claimed refugee status, but this claim had not yet been determined by the time of the court's decision nearly 2 and a half years after her arrival.

In anticipation of the High Court challenge, the Cth. government passed s198 AHA (2) *Migration Act*: that retrospectively requires an officer to take an "unauthorized maritime arrival" to a regional processing country. The Plaintiff claimed that this section was constitutionally invalid as not supported by a head of power.

One of many questions this case raises, quite apart from the subsequent findings of the Court is:

- *What kind of lawyer would suggest to the government that the illegality of removals offshore of asylum seekers could be cured by retrospective legislation to authorize what was otherwise probably illegal?*

- *Did any lawyer from PM and C or the Att. General's Department, or DFAT raise the principles of international law, or even the ethics of such a retrospective law?*

Note also that Nauru, in anticipation of the High Court decision announced that all detainees were free to move out of the closed detention facility to roam around the island as they pleased.

Returning to the findings of the High Court in the M68 Case, the 6-member majority concluded that:

- Section 198AHA is a valid law of the Commonwealth and was supported by relevant constitutional powers, being the aliens power and the external affairs power
- There was, therefore, no need to discuss the nature of executive power of the Commonwealth to detain or to send offshore for processing

Dissenting judgment of Justice Gordon

- S 198AHA is invalid because it contravenes Chapter 111 vesting judicial power in the courts;
- The detention power is essentially judicial in character. S 198 attempts to vest that power in the executive and that is not permitted.
- No right of the Commonwealth to detain the Plaintiff in a foreign state.
- The aliens power does not extend to detention after removal from Australia is complete.
- S198 could be justified by the external affairs power but AHA is invalid because it impermissibly restricts or infringes Chapter 111 of the Constitution: ie penal power is exclusive to the courts.

Justice Gageler

I would like to focus upon Justice Gageler's separate decision that provides a scholarly and valuable discussion of the nature and limits of the administrative power of the executive to detain without trial.

Justice Gageler considered whether the detention of the Plaintiff by the Commonwealth or the Minister was in excess of the non-statutory executive power of the Commonwealth.

He begins by observing that executive power is vested in the Monarch and exercisable by the GG who is in turn advised by the Federal Executive Council, but controlled by the legislative power of Parliament.

In short, executive power is always subject to control by parliamentary legislation.

Justice Gageler confirmed that the executive power conferred by s 61 of the Constitution is to be understood by reference to common law principles relating to responsible government.

He cited with approval Justice Dean in *Re Bolton* 1987:

> *The common law of Australia know no* lettre de cachet *or executive warrant pursuant to which an alien can be deprived of his freedom by mere administrative decision.*

Detention by an officer of the Commonwealth executive can be justified only by a clear statutory mandate.

In *Lim's case*, an alien is not an outlaw…he cannot be detained except by some positive authority conferred by law.

Justice Gageler repeated the words of Justice Isaacs that certain fundamental principles not expressed in the written constitution, nonetheless 'form one united conception including the:

'inherent individual right to life, liberty, property and citizenship, subject to the general welfare at the will of the state'.

Justice Gageler affirmed that the inability of the executive government to enforce the deprivation of liberty is a 'consequence of an inherent constitutional incapacity" reflected in the power of a judge under a writ of *habeas corpus* to compel the release from any executive detention that is not affirmatively authorized by statute. Or in short, there is "no crown immunity from *habeas corpus".* This writ is available against both Ministers and crown servants". (Hogg, Monahan and wright)

Returning to the facts of the case, Justice Gageler found that the Australian government procured the services of Transfield, and through it those of Wilson Security Staff, physically to detain the Plaintiff, a Bangladeshi asylum seeker, within the regional processing center on Nauru. This, he concluded, was beyond the non-statutory executive power of the Commonwealth as there was no law of federal parliament to permit this.

But, on 30 June 2015, Federal Parliament passed a law with retrospective effect to 18 August 2012 to provide the necessary legislative authority; an authority that nicely covered the period of the Plaintiff's detention on Nauru. On this basis, Justice Gaegler declared that the impediment had been repaired; the retrospective law now meant that the 'procurement of the Plaintiff's detention on Nauru by the Executive Government of the Commonwealth under the Transfield contract was within the scope of the statutory authority retrospectively conferred on the Government by a 198AHA (2).

Justice Gageler gave scant attention to the argument that the impuned retrospective legislation was not supported by a head of constitutional power. He simply said, without analysis, that s 198AHA was pursuant to an MOU with Nauru and supported by both the External affairs power and the aliens power (s 51 (19) and s 51 (29)).

The issue also arose as to whether s198AHA inconsistent with Chapter 111? That is, is the offshore detention penal and thus an exclusive judicial power? *Lim's* case recognizes that authority to detain an alien is a valid incident of executive power.

The Plaintiff argued that the mandate for executive detention should be no longer than is necessary for the administrative processes required to carry the purpose into effect.

Justice Gageler accepted the premise of the Plaintiff's argument. Executive detention will become punitive and "transgress on the inherently judicial" power unless the:

- Duration is reasonably necessary to meet the purpose and capable of objective determination by a court from time to time.

- The purpose is capable of fulfillment

These conditions, Justice Gageler concluded, without reference to the facts, had been met. The consequence was, in his view, s198AHA did not contravene the doctrine of separation of powers.

How then does the M68 decision and Justice Gageler's judgment contribute to our understanding of the executive power to detain?

- It is notable that no judge refers a to international legal obligations under the Universal Declaration of Human Rights, the ICCPR, the Rights of the Child, the Refugee Convention or the Torture Convention. I do not believe that it is acceptable for our courts to ignore the legal regime of obligations under international law.

- Justice Gageler's analysis of the executive power confirmed that Parliament can confer on the Executive a statutory power to detain, so long as it does not violate the doctrine of separation of powers and exclusive judicial power to impose a punitive penalty. There was no discussion of whether the detention of the plaintiff was a penalty. Presumably it is not if the detention is for the statutory purpose of assessing the claim to refugee status.

- The claim to refugee status had not been determined by either Australia or Nauru. What is a reasonable period of time before the legislative purpose has not been met, and when the detention become penal? What if the detention is in practical effect indefinite as is the fact for hundreds of people?

Conclusions

That the clear will of Parliament expressed in a statute can override common law freedoms is, of course, consistent with the idea of the supremacy of an elected and representative parliament.

- But what are the options when Parliament fails to exercise its traditional restraint when enacting news laws?
- What can we do when a majority government, in collaboration with the opposition parties, passes laws that explicitly and without ambiguity, breach fundamental common law freedoms in the interests of national security, public order, border control and law and order, or even to save police having to fill out the paper work?

As respective Federal Parliaments become increasingly fractured and dysfunctional, with the result that governments cannot achieve their legislative objectives, the risks of government by executive fiat, by regulation and by the exercise of non-compellable and non-reviewable ministerial discretion pose ever-increasing threats to our democracy.

I suggest we should be alert and alarmed by the failure of our legal system to protect fundamental rights; especially by the failure of Parliament and the courts to protect the rights and freedoms that have evolved over millennia. Serious consideration should yet again be given to the need for a federal legislated Bill of Rights.

The legal profession has historically seen the protection of fundamental rights and freedoms as a core professional responsibility. I would like to see a refreshed commitment to protecting our freedoms so that lawyers are champions of the vulnerable and disadvantaged and that we have the courage to speak out against injustice.