CREATING A HUMAN RIGHTS CULTURE

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I acknowledge the traditional owners of the land and to pay respect to their Elders past and present.

I am pleased to be able to talk to you about a subject which I think is becoming increasingly important. And that is the need to create – or re-create – a human rights culture.

We have had an almost unprecedented debate in the past few months and last couple of years, broadly termed the 'Freedom wars', in which the idea of a human rights culture for Australia has become a very important one. Especially, I would suggest to you, as the human rights culture is a declining one in Australia, our citizens are ill informed about their rights, our political leaders denigrate those who claim their rights, and we have a growing culture of apathy in the face of ministerial executive exercise of discretion which is neither compellable nor reviewable, where we have a veil of secrecy drawn across crucial matters on the purported ground of national security but a ground not subject to review.

In short, I believe that the rule of law – and particularly human rights law in Australia – is significantly under threat.

Well that is a fairly powerful way to begin. Now I had better explain to you why I am so concerned about this and why Professor Goh's proposal for this symposium is such a pertinent and important one and hopefully will generate change.

And I would like to explore with you the 'exceptionalist', if not unique, nature of the way in which Australia goes about protecting its human rights. But I would like to give you some examples of why I have taken such a strong view on these questions.

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Obviously, of course, is the question of mandatory detention of about 4,500 asylum seekers in Australia, in closed mandatory detention for many years.[1] It seems we currently have about 153 floating around on an Australian Patrol boat somewhere in the high seas, with no access to trials or legal advice or any assistance whatsoever.

We also have increased use of the right of arbitrary and administrative detention in order to deal with the risk of terrorism – anti-terrorism laws that allow detention for 14 days without charge.[2] Certainly, of course, the state has a right of national security defence, but there is strong advice from lawyers in Australia – Bret Walker QC in particular – that we now have a legacy of old anti-terrorism laws that are far disproportionate to any real risk.

We have legislation that imposes mandatory detention and reduces the principle of an independent judiciary.

We have children under 18 being detained in adult prisons, typically including a disproportionate number of indigenous youths.[3]

We have a threat to the right to freedom of association, with the new Queensland government's laws aimed at controlling criminal conduct by so-called 'bikie' gangs, a matter over which the Australian Human Rights Commission is intervening in the High Court.[4]

We have a willingness of governments to suspend the *Racial Discrimination Act 1975* (Cth) for practices to deal with Aboriginal and Torres Strait Islander communities without consultation with those communities.[5]

And, we have the *cause celebre*, the *Andrew Bolt Case*,[6] where the right to freedom of expression is said to be at risk in situations where we bring civil action against racial abuse in public.

Some people argue that Australia has become a nanny state that unnecessarily restricts individual autonomy. They reject treaties setting out universal norms of human rights. They reject the findings of the United Nation's Human Rights monitoring committees and ignore the concerns of the United Nations High

1 See generally, <https://www humanrights.gov.au/our-work/asylum-seekers-and-refugees>.
2 See generally, <https://www humanrights.gov.au/human-rights-guide-australias-counter-terrorism-laws>.
3 See generally, <http://www.aic.gov.au/crime_types/in_focus/indigenousjustice.html>.
4 See *Vicious Lawless Association Disestablishment Act 2013* (Qld), the *Tattoo Parlours Act 2013* (Qld) and the *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld).
5 And see *Maloney v The Queen* [2013] HCA 28 (19 June 2013).
6 *Eatock v Bolt* [2011] FCA 1103 (28 September 2011).

Commissioner for Refugees and the United Nations High Commissioner for Human Rights. Rather, these people look to the traditional common law of Australia and to Parliament to safeguard our Australian freedoms.

Others recognise the international human rights law and the adoption of the *Universal Declaration of Human Rights* in 1948.[7] They stress the rights of the individual to protection from unlimited – or almost unlimited – executive power. However, the abstract nature of these debates does not make for a good one-liner for the media.

In the last few days we have seen yet another Tampa-like standoff with asylum seekers on the high seas. One boat of 41 Sinhalese from Sri Lanka has been intercepted – arguably illegally – by Australian patrol officials.[8] Another boat left Londicherry in Southern India with 153 Tamils aboard also seeking asylum. They have also been intercepted, if not on the high seas, in the contiguous zone, where they have attempted to take their chances, as many others have done, by placing themselves in the hands of people smugglers.

We don't know what is going to happen to these people and one of the reasons we don't know is that our Government won't tell us what is happening in relation to them. But we have a curious situation this time, in which neither the Sri Lankan Government, nor the Indian Government, will take the boat back and interestingly, we have a High Court injunction which has brought some facts to light that would otherwise not be available to us.[9]

In the meantime, the UN High Commissioner for Refugees and the Human Rights Council, have yet again expressed their concerns about our turning back boats, off-shore detention and the risks of returning asylum seekers to the state of persecution in violation of absolutely fundamental principles of international law developed in the years after the Second World War.[10] And I remember that marvellous movie mentioned by the Chancellor, *Exodus*, where the Jewish refugees were brought into Palestine – a film and a memory that doesn't go away. And I quite take the Chancellor's point that we do need

7 *Universal Declaration of Human Rights*, GA Res 217A, GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

8 See generally, Andrew Knott, 'Asylum seekers screened at sea returned to Sri Lanka', *Sydney Morning Herald*, 7 July 2014, <http://www.smh.com.au/federal-politics/political-news/asylum-seekers-screened-at-sea-returned-to-sri-lanka-20140706-3bh3x html>.

9 See generally, Leo Shanahan, 'High Court blocks return of 153 asylum-seekers to Sri Lanka military', *The Australian*, 7 July 2014, <http://www.theaustralian.com.au/national-affairs/high-court-blocks-return-of-153-asylumseekers-to-sri-lanka-military/story-fn59niix-1226980884195>.

10 See generally, 'UN High Commissioner criticises Australia's 'strange' obsession with boats', Refugee Council of Australia, 18 June 2014, <http://www.refugeecouncil.org.au/n/mr/140618_UNHCRNGO.pdf>.

these visual images when it is so easy to put the image of a boat on the high seas with a 153 people on it out of our minds.

The question that I really want to look at today is how it is that Australian law permits the mandatory detention of asylum seekers, the turning back of boats and the refusal to abide by the principles of refugee law. There are gaps in the law, and I will address some of them.

The question 'why is Australia so exceptional and even unique', is the key question we need to answer. For relative to comparable legal systems, we have very few constitutional or legislative protections for fundamental freedoms in Australia. We have, as you know, a constitutional right to vote. And we have a constitutional right of freedom of religion, adopted by the Founding Fathers in order to prevent a religion being established, rather than necessarily a right of individual freedom of religion. However it was expressed in that way, and we have that protection.

We also have a High Court implied right of political communication.[11] But that is all. We have no Bill of Rights, we have no Charter of Rights, unlike all of our comparable jurisdictions in Europe, Canada, the United States, and even our cousins across the Tasman, in New Zealand.

In the absence of constitutional protections, a Bill of Rights or other guiding Charter, we do have some legislation prohibiting discrimination, protecting privacy, employment rights and criminal trial procedures, and ensuring that administrative powers are exercised fairly. It is for that reason then, that we have a tendency in Australia to emphasise anti-discrimination laws rather than the fundamental principles that are core.

But let us start at the beginning, back to the Magna Carta. We are going to be celebrating the Magna Carta's 800th anniversary next year. It really is interesting if you take the time to go back and look at the Magna Carta you will find buried in all the laws about the rights to own pigs or what your feudal dues were. King John was forced by his feudal barons to agree that fundamentally, no man may be detained arbitrarily without charge and trial by his peers. Buried in the middle of the Magna Carta is a principle that has been absolutely core to the English common law system, to our common law system, and to the principles of virtually any legal system – civil or common – that has developed in the world.

11 See *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, and *Australian Capital Television v Commonwealth* (1992) 177 CLR 106.

Those principles were, of course, picked up in the *Universal Declaration of Human Rights* and led to the creation of the body of international human rights law that we are so familiar with now:

- *International Convention on Civil and Political Rights* ('the ICCPR')[12]
- *International Convention on Economic, Social and Cultural Rights* ('the ICESCR')[13]
- *Convention on the Rights of the Child* ('CROC')[14]
- *Convention on the Elimination of Discrimination against Women* ('CEDAW')[15]
- *Convention on the Rights of Persons with Disabilities* ('DisCo')[16]
- *Convention against Torture* ('CAT'),[17] and
- *International Convention on Elimination of Racial Discrimination* ('the ICERD').[18]

But the critical point in trying to understand the culture and now declining culture of human rights in Australia, is that despite Australia playing a dominant role in the negotiation and creation of those treaties – led in part by Doc Evatt, and picked up by every government on a bi-partisan basis since that time – we have ratified those treaties but generally speaking never introduced them into Australian law. This is the curiosity of the Australian legal system.

Of course, we know why you must have treaties implemented in domestic law. Our diplomats cannot go off to an international conference and agree on terms of a treaty and sign the final Act with cameras and flowers and red carpets and come back with that treaty and say that is now part of Australian law. The democratic system is one in which the Parliament must give effect to that treaty in domestic law.

But the curiosity in Australia has been that, for the most part, these major conventions have never been introduced into Australian law. We do have laws

12 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

13 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

14 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

15 *Convention on the Elimination of all Forms of Discrimination against Women*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981).

16 *International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, opened for signature 30 March 2007, 189 UNTS 137(entered into force 3 May 2008).

17 *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

18 *International Convention on the Elimination of all Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969).

that prevent discrimination on the grounds of race, sex, age and disability. But all the other treaties – and the key ones, the ICCPR, ICESCR, CROC, and the CAT – are not directly part of Australian law. There is therefore a resulting disconnect between our international obligations and our national laws that reflects the ambivalent approach that Australia has taken to human rights.

But in light of the failure to make human rights directly part of Australian law, how is it that in practice we should accept and recognise that Australia has generally met a high standard of human rights compliance and that we have a well-deserved reputation as good international citizens?

The answer lies in a more sophisticated or nuanced understanding of the way Australian law works. To the extent that we have respected human rights, it has reflected the culture and demands of fundamental freedoms. It is a bit of a cliché to talk about the insistence on the 'fair go', but most Australians get that and they'll interpret what they mean by a 'fair go' in their own ways. They insist on tolerance and equality of opportunity. But we have also relied on building the culture in Australia on a mix of judicially developed common law principles of legality, particularly through the High Court and I might say particularly by the current Chief Justice Robert French. We have a system of parliamentary scrutiny of Bills, we have principles of administrative law of due process and natural justice, and we have the monitoring and complaints functions of the Australian Human Rights Commission. In short, Australia implements human rights in a multifaceted way, using the institutions of modern democracy – Parliament, the courts, administrative law and the Commission – to ensure a normative culture in which human rights are, for the most part, respected.

But my thesis today is that the exceptionalism of Australia, among comparable legal nations, to protect human rights has been effective in creating an environment in which Australians will cheerfully assert the right to freedom of speech, freedom of assembly, the right to a fair trial and the right to property, without ever being able to point to a specific constitutional or legislative provision. It is however, I believe, a current situation in which that normative culture is fading. It is fracturing, because many groups are not adequately protected and worrying trends are appearing.

I am most concerned in relation to asylum seekers. But I think you will appreciate that laws which allow non-compellable and non-reviewable Ministerial powers in relation to migration under the *Migration Act 1958* (Cth) are equally at play in relation to discretions on a range of things. We have been discovering at the Human Rights Commission in the past few months,

hundreds of people detained administratively where they have mental illness and have not been fit to plead. And we are discovering instances in which people have been held for 10, 15, 20 years without ever having their matter before a court and where it is simply assumed that they can be incarcerated.

So, I would like to speak very briefly about the role of our common law courts, because they do protect our fundamental principles through the notion of legality. And by that they adopt certain presumptions, including that Parliament does not intend to interfere with fundamental rights regarding criminal trial procedures, freedom of association, and a main presumption – very important – that Parliament does not intend to violate international law.[19]

Indeed, the High Court of Australia has stated:

> Everybody is free to do anything, subject only to the provisions of the law.[20]

Senior judges have acknowledged the power of the courts. Chief Justice Allsop, of the NSW Supreme Court, points to the power of the courts to 'speak in a way that resonates with the norms, values, and indeed [the] soul,' of the Australian community.[21]

The great challenge however – and this is perhaps not always understood by the Australian community as lawyers will understand it – is that unless the statute or law is ambiguous or unclear, those presumptions of legality or presumptions of compliance with international law have no relevance. In other words, wherever there is a statute, that statute will always trump the common law and a sense that we can look to the international legal standards to which Australia is a party. This has been the core problem in relation to the *Migration Act*.

In the Malaysian case, for example, the High Court found that, under the s 98A of the *Migration Act*, the Minister could not send asylum seekers to Malaysia

19 See generally, Hilary Charlesworth, 'Globalisation, the Law and Australian Sovereignty: Dangerous Liaisons', Papers on Parliament No 33, Parliament of Australia, May 1999, <http://www.aph.gov.au/senate/~/~/link.aspx?_id=94FB41D43B114658A3663A242DBA3C49&_z=z>.

20 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 564 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) quoting *AG v Guardian Newspapers (No 2)* [1990] 1 AC 109, 283.

21 The Hon Justice James Allsop, 'Some Reflections on the Sources of Our Law', Paper presented at the Judges' Conference, Supreme Court of Western Australia, Perth, 18 August 2012, [9] (available at <http://nswca.jc nsw.gov.au/courtofappeal/Speeches/allsop180812.pdf>). He argues that this power is 'all the more important in a society that recognizes diversity in its racial, religious and social composition, but strives for coherence and harmony through co-existence and shared ideals': Ibid [17]. The role of the courts has been vital in building incrementally through judicial analysis laws that reflect 'society's needs and the policy formulation that inheres in a role of adaptation and development of law to a contemporary society': Ibid [30].

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. And the High Court is very profoundly constrained by what it can do for the reasons that I have just outlined. Now you would say that is all consistent with a democracy in which Parliament is sovereign and represents the people. If Parliament says that this is the law in the statute, then it is appropriate that our judges apply it where it is done unambiguously. But we are in an era now where we have hung Parliaments, we have governments that are not that dissimilar from each other, or in the case of asylum seekers law, governments competing with each other to produce the most inappropriate laws contrary to international laws.

So what do you do in a modern democracy when you have bi-partisan laws going through Parliament, particularly in the area of migration law, and where the only bastion for the rule of law becomes the Court[22] or – as is the topic of today's seminar – the community that has a core belief in fundamental human rights? And to the extent, as the Chancellor has said, our leaders denigrate, diminish those principles by using the word 'illegal' – you say 'black is white' often enough and people start to believe you. Asylum seekers are not illegal, but when you have senior politicians saying that they are it becomes very difficult.

So this is the weakness and let me illustrate what that weakness is in the context of a case that I am sure you will be familiar with – the case of *Al Kateb v Godwin & Ors*.[23]

Ahmed Al-Kateb was a young Palestinian asylum-seeker who was born in Kuwait – but he was technically without nationality and therefore stateless. He was rejected in his claim for refugee status in Australia, so the Minister

22 While our judges are not legislators nor are they law reform agencies; our former Chief Justice of the High Court, Justice Gleeson, has observed, 'many of the settled principles of [judge-made] law in their application to changing circumstances and social conditions, require judgment about what is wise and expedient': *Attorney-General (Cth) v Alinta Ltd* [2008] HCA 2 (31 January 2008), [5]; 233 CLR 542.

23 [2004] HCA 37; (2004) 219 CLR 562; 208 ALR 124 (6 August 2004).

detained him indefinitely – for more than four years initially – on the grounds that under the *Migration Act*, the Minister can detain someone who is an asylum seeker but who is not judged to be a refugee. So this young man was held for many years and attempted to gain his release. Finally the challenge to mandatory detention in these circumstances was brought to the High Court in 2004. In a four to three decision the Court had virtually no option but to say that the *Migration Act* is clear and unambiguous – if the Minister wanted to detain an asylum seeker indefinitely in closed detention, the Minister has the power to do so.

I believe that this case was the low point in the history of human rights law in Australia. It demonstrated an absolutely fundamental point, that the Courts are powerless if Parliament passes legislation that breaches fundamental freedoms.

One of the judges in the majority, Justice McHugh, did recognise the vital point that I want to make: in the absence of a constitutionally entrenched Bill of Rights or of clear legislation, it is not possible for the Court to determine whether the course taken by Parliament is unjust or contrary to human rights.[24] Justice Gummow, in the minority, captured the key idea when he said freedom from indefinite detention at the will of the Executive is 'at the very core of liberty secured by our Anglo-Saxon system of law'[25] – hence taking us back to that remarkable document, the Magna Carta.

Now I should – in fairness – point out that after the High Court decision, the Minister decided that he would release Ahmed Al-Kateb and he was released on a humanitarian visa some months later. And I understand that Mr Al-Kateb is now living well in the Australian community, having had the chance to gain an education, he is working and has a family life. But the key point is that the law itself remains unchanged and the High Court has not yet had an opportunity to overturn that power to hold indefinitely without charge, without trial, and now without access to any legal advice. So the situation gets worse.

I have been trying to describe to you the nuanced way in which we do try to achieve human rights in Australia. I talked a little bit about the common law, but I also want to say a few words about the Australian Human Rights Commission.

24 Ibid [73].

25 Ibid [137], quoting Scalia J (with the concurrence of Stevens J) in *Hamdi v Rumsfeld* 72 USLW 4607, at 4621 (2004).

The Commission was established almost 30 years ago in 1986, and since then it has been supported by all federal governments on a bipartisan basis. We have about a 130 employees. In my role as President, I am the person primarily responsible for the powers of the Commission, and we have now six commissioners with portfolios in particular areas: Ms Elizabeth Broderick, Sex Discrimination Commissioner; Mr Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner; Ms Megan Mitchell, Children's Commissioner; Dr Tim Soutphommasane, Race Discrimination Commissioner; The Hon Susan Ryan AO, Age and Disability Discrimination Commissioner; and Mr Tim Wilson, Human Rights Commissioner.[26]

We are a rather strange body because we are an independent statutory body. We are appointed by the Attorney General (that is, the President and the six commissioners), and we are paid for by the Australian tax payer. But we are protected by legislation so that we can speak truth to power. Almost all of our work at the Commission is done and accepted on a bipartisan level. Governments of all persuasions respect and accept our work. But in relation to asylum seekers and in relation to the *Racial Discrimination Act* amendments, you find that you are standing up against policy. And that is fine – that is something that a mature democracy is able to achieve.

We have the capacity to be genuinely independent of government and are protected by statute. In fact, I have been in China recently at the invitation of the Ministry of Justice to talk to them about China establishing a national human rights body like ours – there are 110 of them in the world and it would be wonderful to see China there. But after a day of me talking to them about this, they said 'We don't really understand how you can be appointed by the Attorney General and the government, paid for by the taxpayer and you are independent – how can you be?' Well the truth is that we are. But it works because of convention. And, again to come back to the point, it works because that's our culture. At the Commission our job is to monitor Commonwealth compliance with international human rights. We also have a complaint handling function. We receive about 18,000 to 20,000 inquiries and complaints each year. It is a completely free system. Nobody pays to come to us, and we deal as thoroughly as we can as lawyers with those complaints in an attempt to conciliate them.[27] None of the parties pays any fees, although sometimes they do bring lawyers along in major cases. This is one of the most powerful forms of access to social justice that Australia has because you do not, and

26 See generally, <https://www humanrights.gov.au/about/president-commissioners>.

27 We do succeed in conciliating about 65 per cent of complaints, and frequently these cases have a broader impact, bringing about systemic change. We also intervene in Federal and High Court cases, hold inquiries and make submissions to parliamentary inquiries. Eg, see the Commission's Conciliation Register at <https://www humanrights.gov.au/complaints/conciliation-register>.

you cannot, go to the Federal Court or the High Court without coming first to the Human Rights Commission. So for practical purposes, most human rights compliance is achieved through the processes of the Human Rights Commission. That is something that I am very proud of.

We do however, have a very strange problem, and that is that our mandate is determined by a definition of human rights which is in all seven major human rights treaties that I have outlined to you.

So that is where we have ships passing in the night. We have a structure to deal with human rights based on those treaties, but they are not arguments that we can do any more than go to the Court as an intervener or as an *amicus* to the Court to persuade or try to persuade the Court that they need to take cognisance of the international standards. But where the Act is clear, there is nothing we can do about it.

Before I talk to the two specific things that I wanted to discuss with you, I will mention one of the things that I think is the biggest advance in developing the culture of human rights law in Australia. That is the creation a couple of years ago of a Parliamentary Joint Committee on Human Rights, the so-called Scrutiny Committee.[28] This Committee has the same mandate as the Australian Human Rights Commission, but it adds the *International Covenant on Economic and Social Rights*. Every new Bill must come with a compliance statement – that questions whether the proposed legislation complies with international human rights law. So we have a connection between the Commission and the work of the Parliamentary Scrutiny Committee – of course, it suits Parliament and it is consistent with our parliamentary system of democracy because it is Parliament that is constantly adjusting itself by reference to core human rights standards. We have had two years of this Committee, under the Chairmanship of Harry Jenkins who is the Speaker of the House. He has achieved absolute unanimity in those reports – we have not had one dissenting view in those Parliamentary Committees so far. That is the good news. The bad news is that the views of that Parliamentary Committee are almost invariably ignored when it comes to the key human rights principles. However, the Committee is not something to be ignored, it is important and I think it will be more important in the future.

I would like now to discuss two aspects of our freedoms in more detail: the first is asylum seekers and our culture. We do have an extraordinary position in which undeniably clear rules of refugee law are being breached or at risk of breach in the current position.

28 See generally, Parliamentary Joint Committee on Human Rights, Parliament House, undated, <http://www.aph.gov.au/joint_humanrights/>.

And let me just go through with you some rather disturbing facts.

At the moment we have about 4,500 asylum seekers – men, women, children, and unaccompanied minors in closed, locked, mandatory detention in Australia, Christmas Island and Nauru, including nearly a thousand children. There are 304 children on Christmas Island as at March 31 2014, 54 unaccompanied children throughout Australia, and 128 babies have been born in immigration detention in Australia over the last 15 months.

As some of you will know, using my Presidential powers, I have called an inquiry into the detention of children, and I have been to all of the detention centres holding children throughout Australia and in Christmas Island. One of the very few rays of light in these grim visits is that families bring up to me their six-week old babies, their 10-week old babies – there are children everywhere – both arriving as asylum seekers or who have subsequently been born, thankfully in safe and generally healthy environments, though not, of course, including Christmas Island.

We have 38 children who have been held for more than a year. We have 320 children who have been held for more than 10 months, and most children are now being held for close to a year. There are another 1,325 adults being detained on Manus Island, where there are no children.

The greatest concern that I have is not only the conditions in which the children and their families and adults are being held, but the violation of core principles. It took me a while after I had taken this job to really understand what the impact was of the failure to allow asylum seeker's claims to refugee status to be assessed. I think you will be aware that there is something like 25,000 asylum seekers in mainland Australia whose claims to refugee status have not been assessed. About 4,500 of those are in closed detention. The rest are in either community detention or on bridging visas with no work rights.

The powerful concern that I started to understand is that if your claim to refugee status has never been assessed, you haven't got anything to complain about, you haven't got anything to go to the Refugee Appeals Tribunal about. You haven't got anything to go to the High Court about, because there has been no breach of the law or breach of your rights to due process under the migration provisions or administrative law. Certainly, you would think going back to the Magna Carta that you had a right to go back to the court on the grounds of habeas corpus. Now I think a first year lawyer would probably come up with that as an answer. But the High Court will not allow appeals on the habeas corpus ground on the basis that the Minister has a discretion – non-

reviewable – to hold people in closed detention without charge or trial. So the High Court can do nothing about the fact that these people are held in a legal twilight zone for a very long period of time.

We hear so much of other cases, the floating ships on the high seas at the moment, the return of asylum seekers contrary to the principle of *non refoulement*[29] to Sri Lanka, and we know of the conditions at Manus Island and Nauru, and Christmas Island. But we do have a very significant problem right on our doorstep with people who either remain in closed detention or who have no right of access to any determination of their refugee rights. Indeed, it is a rather curious irony that the 41 asylum seekers on the Sri Lankan boat that has just been returned to Sri Lanka, did have an assessment – albeit a brisk one, three or four questions by video conference[30] – they are at least a step ahead of the others, but they did not of course have a right as they do under refugee law, to an impartial tribunal to determine whether that first assessment is made in accordance with the rule of law. Those are the elements.

This is our system of law and I make the point again that the *Australian Constitution* and laws do not protect these fundamental rights against arbitrary detention. I believe that the legal position will continue until we have a community demand that the government abide by the normative rules of human rights law – which brings us back to the points that have been made in relation to a culture of human rights in Australia. Because we have a declining culture of human rights, the government is able to bring in this legislation across different governments and to avoid what would be otherwise principles that any other country in the world would abide by.

I do believe that education is one of those key elements as the Chancellor has said. Every American child knows that they have a *Constitution*. And every American child knows about the First Amendment or the Fifth Amendment or the Second Amendment. In England, every facet of law – even banal issues of property rights or tax or corporate law – every facet of law is viewed through the prism of a Human Rights Act. You can't look at any aspect of European law, North American law or New Zealand law without understanding that law and its impact on human rights through their own Charters or Constitutional provisions. But in Australia we do not have that opportunity.

29 See generally, 'Refoulement', UNESCO, 2009-2014, <http://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/refoulement/>.

30 See generally, Sarah Whyte, 'Immigration department officials screen asylum seekers at sea 'via teleconference', *The Sydney Morning Herald*, 2 July 2014, <http://www.smh.com.au/federal-politics/political-news/immigration-department-officials-screen-asylum-seekers-at-sea-via-teleconference-20140702-3b837 html>.

Now in the remaining time we have left let's move on to the last issue that I wanted to raise with you which is the amendments proposed by the Exposure Draft[31] to the *Racial Discrimination Act*, s 18C. I might just remind you what s 18C does. What it does is to make it unlawful – but not criminal – to do an act in public that is reasonably likely to 'offend, insult, humiliate or intimidate' a person because of their race, colour or national or ethnic origin. An important exception to that provision is by s 18D, which is rarely discussed, which is that if the persons charged with this civil offence acted 'reasonably and in good faith' in respect of an artistic work, or in the public interest, or makes a comment that is 'fair and accurate', then it is not unlawful – it is lawful.

And then we come to the successful prosecution of Andrew Bolt under this provision.[32] As you will remember, he made comments that fair skinned Aborigines take unfair advantage of their race to seek various welfare or other benefits and grants. The Federal Court judge, when this prosecution took place, found that his comments were made in bad faith, that they were inaccurate as a matter of objective fact, and that they were not protected by the free speech requirement because they could not under any circumstances be seen as reasonable or in good faith or fair.

But that case created a furore. What it did was to raise the argument that the Attorney General now makes, and that is that the notion of merely offending or insulting someone on the grounds of race in the public arena is putting the offence at too low a level – that it is part of our culture to take a little bit of cut and thrust in our public life, we do say things to each other that we expect can be taken either lightly or as a joke, we can manage a certain level of offence and insult, and that this provision, particularly as it applied in the *Bolt Case*, was a violation of our fundamental right to freedom of speech.

Now we might remind ourselves for the moment that there is no right to freedom of speech in the *Constitution*. There is a right to freedom of political communication.[33] Maybe a journalist could be said to be involved in the process of political communication – I will leave you to think about that. But we are grasping in order to understand this on this notion of the 'fair go', of what is acceptable, what we find appropriate, within the culture of human rights in Australia.

31 See generally, <http://www.attorneygeneral.gov.au/Mediareleases/Pages/2014/First%20Quarter/25March2014-RacialDiscriminationAct.aspx>.

32 *Eatock v Bolt* [2011] FCA 1103 (28 September 2011).

33 See above n 11.

The Attorney thinks that this law has gone too far, and needs to be revised, and needs to be done in a way that protects the right to freedom of speech. I have no difficulty with that at all. But one of the problems is something that you will all learn at law school, which is that 'hard cases make bad law'. To the extent that the *Bolt Case* was 'hard law', it has led to 'bad law' because of another law school maxim, which is that good law reform should identify the mischief to be prevented on the basis of evidence, and should adopt a proportionate remedy to address the problem. So you should identify the evil and come up with a proportionate response to deal with it – that's good law reform.

Freedom of speech and of the press is the litmus test for any healthy liberal democracy. It is not an absolute right but must be accommodated with other freedoms.[34] In finding this accommodation it is helpful to ask why democracies protect freedom of speech. An important reason is that this freedom ensures an informed participation in representative democracy. It is therefore hard to see how racial abuse in public can possibly advance democracy or ensure inclusion of vulnerable minorities within the Australian community. Racial abuse is an attack on minorities that diminishes their dignity and has a chilling effect on their participation in social life. In short, freedom of speech can also be an abuse of that freedom.

What has actually happened here is that the Exposure Draft introduced by the Attorney General for public discussion – it is a perfectly proper proposal – has really failed in my view to achieve the appropriate level of reform. It might be that there is a case for taking the words 'offend and insult' out of the legislation. But in my view *only* to strengthen the core provisions and that is essentially to prevent racial vilification in the public arena.

34 The Courts do sometimes struggle to find the line between conflicting rights. In the *Monis Case* a prosecution was brought under a law, similar to s 18C, that prohibited the use of the postal services in a way that is 'harassing or offensive'. Man {Haron Monis} wrote letters to the families of Australian soldiers killed in Afghanistan that the Court found were 'denigrating and derogatory'. In the High Court, lawyers for Monis argued that he merely expressed political opposition to the war in Afghanistan, and should be protected by freedom of speech. The High Court agreed that the postal law would be valid if it was a proportionate law in response to a legitimate aim. But in applying this principle to the facts the judges split 3:3. The result was that the conviction was upheld. See Generally, 'Casenote: *Monis v The Queen* [2013] HCA 4', AHRC, 2013, <https://www humanrights.gov.au/our-work/legal/publications/casenote-monis-v-queen-2013-hca-4-0>.

Instead of this, the Exposure Draft does two major things:[35] one it takes out the words 'offend, insult and humiliate', but leaves in 'intimidation' – but only to the extent that leads to physical harm.[36] Now very rarely does racial abuse in the public arena result in physical harm.[37] Sometimes it does, but that is covered by the criminal code anyway. You don't need it. The other is that to leave in the word 'vilification' will only apply,[38] and has been narrowly interpreted to apply, where the vilification has caused a third person to hate the victim. Now again, most Australians don't see it that way, they wouldn't hate the victim. It would rarely occur, but I also think it would be almost impossible to prove in a court of law.

But the other – and the major thing – that the Attorney has proposed is that the good faith free speech defence is to be amended. So in other words, as long as what you said is in the public arena, part of public discussion, on economics, politics, law, race, culture – all of which would have allowed Bolt to avoid his civil prosecution were it to be the law today.[39] I have two major points to make. One is that our courts have interpreted s 18C with great common sense. They have applied the provision at the higher end of the spectrum. So that we

35 Two additional reforms were proposed. The third reform was that the test of what is 'reasonably likely' to vilify or intimidate should be based on the views of the 'ordinary reasonable member of the Australian community', rather than those of the group that is allegedly being vilified or intimidated. The problem with this is that most Australians – those of Anglo-Saxon background, anyway – have not been abused on the basis of their race, and therefore could barely conceive of the profound impact of such behaviour. The fourth proposed reform is that, for practical purposes, the ability of people to access justice, in a cost-free and efficient way, through the investigation and complaints process of the Human Rights Commission would be abolished. Those aggrieved by racial abuse will be limited to litigation under defamation laws, or rely on the criminal law; neither is a realistic option in most cases.

36 'Intimidate' is a problematic word, because it is defined to relate only to fear of physical harm. This is a limited definition that, if adopted, means the law can apply only to the rare situations in which racial abuse spills over into violence.

37 At the Human Rights Commission we are in a unique position to we know that most complaints of racial abuse, many of them involving material published on the internet, do not lead to physical violence. If psychological and social impacts are excluded from the prohibition, very few cases will be caught. But such incidents can still have a devastating impact, and anyone who doubts that needs only recall the testimony of the ABC presenter Jeremy Fernandez, the AFL footballer and Australian of the year Adam Goodes, and a French woman who sang the French National anthem, each of whom were subjected to racial abuse on the bus or the football field. These are but a few well known examples of the hundreds of complaints we receive about racial abuse in public.

38 The Exposure Draft adopts the word 'vilify'. While on its face a powerful term, it is limited to inciting hatred by a third party. That's a very narrow definition, and in practice incitement will be difficult to prove. It would be better, I suggest, to revert to the more generally accepted definition of 'vilify', which is to denigrate the person or group spoken about.

39 Section 18D currently protects speech that is fair and in good faith. The Exposure Draft proposes to amend this so that a defendant need demonstrate only that the words were used in 'the public discussion of any political, social, cultural, religious, artistic, academic or scientific matter'. To adopt such a wide exemption would be a truly radical change, ironically sweeping away free speech exemptions that have been applied by the courts in a measured way to dismiss the vast majority of prosecutions.

have the very few successes, under the case law – we have the *Bolt Case* of course, but the other one is *Jones v Toben*, which I am sure you are all aware of that – the holocaust denier.[40] But we have had a lot of other cases that have failed.

One was dealt with by our current Chief Justice when he was in the Federal Court. The case dealt with offensive cartoons about Aborigines, about the return of a head of a very respected tribal leader that had been held in Liverpool in a museum, which was brought back to Australia. There were cartoons published in the *West Australian* in 1997 and entitled 'Alas poor Yagan' which made fun of it. Our current Chief Justice, when he was in the Federal Court, said that is protected by the right to freedom of speech.[41] It was hurtful, it was rather cruel, but it made a point, and that was that the Aboriginal head did not want to come back to a squabbling tribal group in one part of Western Australia. Offensive yes, but protected by the human right of freedom of speech.

It is fair to say that of the 20 or so of cases that have come up on s 18C, they've almost all failed with the exception of two or three cases.

It is an area of law that the Courts have been abided by and a high standard has been applied.

I do have one important and final point. I mentioned to you that we receive about 20,000 complaints a year at the Australian Human Rights Commission.

We have had a huge spike in racial hatred complaints in the past 18 months – a 59 per cent increase in complaints about racial abuse in the public arena. In that same period of time, we have had one or two complaints that somebody's right to freedom of speech has been infringed. In other words, if you are going to expend your political capital, why would you spend it on trying to change an important piece of legislation that reflects the concern of the public in order to deal with the principle of freedom of speech which is really not under threat in modern Australia? There may be instances where it comes up and it does very occasionally at the Commission, but very rarely. In short, freedom of speech is not at risk for most Australians. Rather, the risk of abuse on racial grounds in public is all too frequent an occurrence.

40 In *Jones v Toben* [2000] HREOCA 39 (5 October 2000), Frederick Toben was found to have breached s 18C by publishing on the internet anti-Semitic material denying the Holocaust. This was the first occasion on which the law was applied in relation to the internet, and we are likely to see more such cases, given that many of the racial abuse complaints we receive relate to social media and other online fora.

41 *Bropho v Human Rights and Equal Opportunity Commission* [2004] FCAFC 16 (6 February 2004).

To conclude, we do have a successful human rights record in Australia and we do have a good international reputation. For the most part, human rights are respected in Australia and we have had a culture to respect human rights. But I think that culture is under significant threat because of the community apathy in the face of what are pretty clear breaches of well recognised and accepted principles of human rights law in so far as they affect refugees and asylum seekers. That is a very serious problem for Australia – we are being questioned in international tribunals and international bodies. There is growing concern about Australia's detention of asylum seekers in the international community and calls on Australia to reconsider its offshore processing policy. The UN Human Rights Committee has found that the continued detention for years of 43 refugees on the basis of a secret ASIO assessment is arbitrary detention and cruel punishment contrary to international law. This then is my point. The *Australian Constitution* and laws do not protect the fundamental freedom from arbitrary detention by government. For the libertarian there can be no more powerful example of the need to protect the individual from executive power than our current asylum seeker detention policy. Sadly, those who speak loudest about fundamental freedoms remain silent on this issue.

We have to take stock of our policies to accept that we have perhaps taken the wrong road and to move forward in compliance with the rule of law.

What is most worrying is that apparently about 80 per cent of Australians think asylum seeker policy is acceptable in the higher interests of border security and stopping the boats. That is where we have to work harder on building that community culture in Australia to make sure that we understand what human rights are – even if we recognise that we achieve human rights in this multi-faceted way that is not entirely the same as other countries.

Personally, and certainly the Human Rights Commission is on record as saying, that we believe that we should have a Bill of Rights. I think that this asylum seeker issue has exposed the cracks in the system – as have the numbers of incarcerated for mental illness, extreme laws in relation to criminal bikie gang issue, extreme laws in relation to terrorism are among others, areas that could be covered and adequately dealt with if we had some form of legislative Charter of Rights. If we get it wrong in the Charter of Rights you simply repeal it. It is not entrenched. But we need that as the benchmark for human rights for the future partly. I believe that legislation provides the basis or the framework upon which a culture of human rights can adequately be established. It is very difficult to build that culture in Australia where we don't have laws to hang the ideas from. And that is the great exceptionalism of Australia.

But I do believe – and I am eternally optimistic – that Australian opinion is turning on these key questions, so that we are starting to ask for how long can the government, or governments, abuse their executive powers, their ministerial powers, and avoid the rule of law before our Courts.

Thank you all very much.