The Sir Robert Garran Oration

Fault Lines for the Future of the Public Sector

Delivered by Emeritus Professor Gillian Triggs at the 2018 IPAA National Conference held in Melbourne on 17 October 2018.

Speaking truth to power responsibly

Thank you for the opportunity to speak to you this morning at your conference considering the 'fault lines' for the future of the public sector. Among these fault lines that I detect are challenges emerging to the ideal of the public official as the servant of the people, objective and neutral; speaking truth to power; and giving advice to governments without 'fear or favour'.

I am also concerned by the willingness of Governments — in this post-truth world of alternative facts and false news — to ignore evidence and expert reports in favour of ideology and political advantage.

Public servants have long been recognised as one of the vital checks and balances designed to facilitate a vibrant transparent democracy. A public servant is also seen as an influencer upon our parliamentary representatives in Canberra, presenting the facts and evidence to underpin development of public policy and law reform.

Today, this idealised vision of the public official is under threat in the hyper-partisan world in which we live, both globally and here in Australia.

In these times of increasing polarisation and politicisation of issues as diverse as national responses to climate change, freedom of religion, tax reform and the global movement of peoples across national boundaries, the contemporary question is: *how can the public sector continue to deliver its core functions of an impartial professional body, sometimes giving unwelcome advice to governments?*

When considering this question, we remember Sir Robert Garran as the very model of the modern Departmental Secretary. Sir Robert was Australia's First Secretary of the Attorney-General's Department, serving 16 Commonwealth Governments over 31 years of Federation;

His optimistic vision in the early years of Federation was to create 'a professional department with as little as possible administrative work'. He would be astonished by the volume of work today.

Sir Robert is best known to lawyers for his work with his co-author Sir John Quick on Australia's *Annotated Constitution*, an indispensable tool for all constitutional scholars. He observed that:

> 'We knew the constitution was not perfect; it had to be a compromise with all the faults of a compromise... But, in spite of the unforeseen [sic] strains and stresses, the constitution has worked, on the whole, much as we thought it would. I think it now needs revision, to meet the needs of a changed world.'

I would like to explore why and how our Federal Constitution has failed to meet the needs of that changed world, in particular, the need to protect our common law freedoms and human rights. One of the several reasons for this failure lies in Australia's exceptionalism and isolation from evolving legal systems in comparable nations such as Canada, the US, much of Europe, the UK and NZ. In short, Australia is the only democracy and the only common law country in the world that does not have a Charter of Rights as a benchmark against which the legislative overreach of executive government and parliaments can be assessed and checked.

Over the last few years we have been repeatedly reminded that elected majorities in parliament do not always make just laws, and that the independence of the judicial system and of public officials should be protected as part of the checks and balances on the creeping expansion of executive powers of Government and Parliament. The lack of legal tools in the constitution to moderate the power of parliament to legislate increasingly disproportionate and repressive laws is, I suggest, a growing threat to our democratic freedoms.

Compounding the legal deficit is the encroachment by recent governments upon the independence of our democratic institutions – attacks upon the independence of the judiciary especially through mandatory sentencing and the appointment and failure to make appointments to the Administrative Appeals Tribunal, calls for abolition of the Australian Human Rights Commission, even of the ABC — you might recall that a few months ago Minister Fifield introduced into Parliament the *Fair and Balance ABC Bill* that, sensibly, was rejected but along with his repeated objections to ABC news stories demonstrates interference in a public body; political concessions to radio shock jocks by countermanding decisions of the CEO and Board of the Sydney Opera House.

Under the Public Service Act 1999 (Cth) Employees of the Australian Public Service occupy a position of trust with responsibility for the highest standards of ethical behaviour. They must demonstrate impartiality providing the Government with advice that is apolitical, frank, honest, timely and based on the best available evidence; a commitment to public service, accountability to government and the community, respect, leadership and integrity.

In my experience public servants take these standards seriously and do all in their power to act in the best interests of Australia, but their capacity to do so is threatened by:

- interference by Cabinet ministers with appointments to public office, bypassing recommendations of selection panels,
- making senior departmental appointments without proper process of those willing to promote a political rather than evidence-based policy agenda
- manipulation of core departmental work by reducing budgets.
- the prosecution of public servants who expose government illegal or corrupt practices including those who are 'whistle blowers' calling attention to corruption or disagreeing with government policy: a most egregious example is the recent prosecution of Witness K and his lawyer for passing on information about Australia's spying on our closest neighbour, Timor L'Este, to give Australia a better negotiating position on sovereignty rights over the Timor Gap oil and gas resources.

This is all very heavy stuff for this early in the morning!

I thought I might lighten my message by giving you some idea of my own experiences as a statutory officer of the Commonwealth and President of the Australian Human Rights Commission and perhaps relevantly, a woman in the public arena. Depending on your point of view, and that of the editors of our major newspapers, I am variously: a saint walking on water, a statue of liberty or a radical left-wing activist with decidedly green and socialist tendencies. I assure you, none of these descriptors is true.

During my tenure I was the subject of about 40 cartoons, and numerous op eds and editorials calling for my resignation over not just month but years, the most recent cartoon being a weekend or so ago. Let us look at some examples of the cartoons [these were *Ms Triggs*, *Motor Cycle gangs*, *S18C* and *James Bond*].

While humour can take the sting out of such political and media abuse, the fact remains that many Australians do not understand the statutory underpinnings of public institutions and are all too ready to see public officials as a drain on the public purse.

These threats to Australia's democratic institutions and to the independence of public officials beg the question: what can we do about it?

I have concluded that we need to revisit the idea of a legislated — but not constitutionally entrenched — Charter of Rights, along the lines of the so-called 'dialogue' model in Victoria and New Zealand. A Bill of Rights could provide a means for an independent determination of whether a law breaches an agreed right and protect public officials from the vagaries of improper interference with their independence in the public interest.

We need a federal charter of rights to set a benchmark for rights, to protect public servants and to ensure that they can do their jobs according to the rule of law and best evidence.

What practical difference would a charter of rights make?

I would like to illustrate what I mean by reference to two cases dealing with the rights of asylum seekers and refugees in offshore detention. Government treatment and detention of refugees escaping persecution, torture or even execution for political or other reasons, is hardly humane or consistent with commonly held views about human dignity.

The two cases are:

- the **PNG decision** Supreme Court: 1975 Constitution provides that every person has the right to liberty
- the **M 68 Case**: I suggest a serious ethical failure in drafting laws that breach international human rights treaties to which Australia is a willing party.

How has it come to this? Inadequate protection of human rights in Australia

The roots of our current problem lie many decades ago in the drafting of the Australian Constitution. The framers did not seek to establish the Constitution as a catalyst for the protection of civil liberties. Instead, they adopted the idea of responsible government but did so in a way that would enable some fundamental rights to be undermined by a parliament even where they might have been recognised by the common law. In short, parliament is sovereign, and legislation passed by our representatives can oust ancient and basic freedoms.

The Constitution does protect the right to freedom of religion and to judicial review of administrative decisions, to the separation of powers and the independence of the judiciary.

The Constitution barely mentions indigenous peoples, and then only negatively. Section 51(xxvi), the races power, enabled the federal parliament to make laws with respect to '*The people of any race,* Long-standing government policy of forcibly removing indigenous children from their families and communities, was held by the High Court in the *Stolen Generation case* in 1997 that there was nothing in the Constitution that prohibited such conduct.

The Constitution does not protect the rights to vote, to freedom of speech, association, privacy, protest, or equality before the law, no prohibition of arbitrary detention without charge or trial or slavery.

Australia has been dependent in practice upon the High Court to imply powers such as the right to political communication and legislation and the right to procedural fairness.

There have been developments in Canada in 1982, New Zealand in 1990 and even the United Kingdom (from which our own system is derived) in 1998. We have been left behind; our legal system quarantined from human rights developments in other nations with which we had shared a common legal framework.

Conclusions

Sir Robert Garran would, I suggest, be much troubled by the erosion of respect for public life in its various forms and for the independence of public officials.

I suggest that a Bill of Rights would make a positive contribution to modern Australia. It would enhance Australian democracy by expressing the core rights of the Australian people and provide a benchmark against which government and parliament could be held accountable. A Bill of Rights would give public officials the legislated standard for their frank and fearless advice.