Ethnic Communities' Council of Victoria
Walter Lippman Memorial Oration

Professor Gillian Triggs
President of the Australian Human Rights Commission

Melbourne Town Hall, 10 May 2017

Professor Gillian Triggs
Speech:

I acknowledge the traditional custodians of the land on which we meet, the Wurundjeri peoples and respect their elders, especially any who might be here today.

I am honoured to deliver the Walter Lippman Memorial Oration here at the Melbourne Town Hall and to follow my colleague, Dr Tim Soutphamasan

Walter Lippmann was one of the founders of the Ethnic Communities Council of Victoria and an architect of Australia's multiculturalism. In 1974 he chaired the Committee on Community Relations that attempted to articulate a philosophical basis for multiculturalism. The Report by the Committee had a vision that remains vital today; it called for greater cultural sensitivity to cultural diversity and noted that:

A harmonious understanding and national cohesion among Australian citizens can be achieved only through "accepting newcomers in a spirit of understanding and recognition of their right to equality of treatment and opportunity".

The leadership demonstrated by Walter Lippman laid the ground work for our contemporary multiculturalism, a social policy that underpins Australian law and policy… multiculturalism is today endorsed overwhelmingly by most Australians (86% say multiculturalism works). Indeed, our political leaders insist we are the most successful multicultural society in the world.

Whatever the truth of such a statement, our globalised world is one of growing tensions and unpredictability among powerful nations, threats to free trade and growing economic volatility, the rise of populist nationalism and anti-immigration sentiment reflected in the electoral success of far-right political parties in parts of Europe, (eg: the 35% vote for Le Pen in France) in North America and in Australia; each of these elements contributes to a toxic mix, fuelled by the media and by some of our political leaders.

Over my professional life I can think of no more important time than now to speak up for the ideas that inform Australia's commitment to multiculturalism: non-discrimination on the basis of race, equality before the law and cultural, racial and religious inclusion. We need to push back against political spin, alternative truths and the cynical view that the truth is anything you can get away with. We need to be vigilant in rejecting finely tuned and artfully camouflaged whistling to extreme right wing groups.

Walter Lippmann was prescient in 1976 when he observed that:

…at times of social and economic uncertainty, insecurity creates fear in the hearts of many men. Fear makes people susceptible to prejudice and prejudice distorts values.

He well understood that it is fear that fertilizes the ground for racism that now threatens Australia's agreed values of a liberal democracy under the law, founded in the principles of equality and respect and dignity for all cultures.

It is no accident that the year following the Lippmann Report, the Federal Government enacted the *Racial Discrimination Act* 1975, giving legislative effect to the Convention on the Elimination of Racial Discrimination, negotiated 10 years earlier in 1965. The Convention prohibits:

… discrimination, exclusion or preference based on race, colour, descent, nationality or ethnic origin if it nullifies the enjoyment on an equal footing of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. Art.1

The Racial Discrimination Act then provides the national architectural or skeletal frame upon which the principles of multiculturalism have evolved. Before this time no law prohibited racial discrimination and no remedy could be provided by the courts for an injury suffered. 2015 was the 40th anniversary of the RDA. With benefit of reflection it has become apparent that the Act is the closest Australia has to Bill or Charter of Rights and, perhaps for that reason, it has attracted the most political and media commentary.

Tonight, I would like to focus on the role that the rule of law and the substantive laws themselves have played- or failed to play- in protecting multiculturalism in the context of:

- S18C and the right to freedom of expression

- The disproportionate impact of Australia's migration and asylum seeker and refugee policies on vulnerable racial, religious and ethnic groups.

- The PM's proposal that Australian citizenship should be confined to those who can demonstrate that they accept Australian values.

Limits of the law.

Over my 5 years as President of the AHRC, I have come to understand both the power and the frailties of the law. It is axiomatic that it is one thing for Parliament to pass laws and quite another to give those laws practical effect. I have learned that legislation can be effective only with genuine community and cultural support.

It is true that the law cannot prevent racist acts or words, but the law can set the benchmarks against which social behaviour can be measured. Then law can promote cultural norms that racist behaviour is unacceptable within the community.

In considering the role of law in underpinning multicultural policies it needs to be understood that Australia is exceptional and, I believe, profoundly isolated in its failure to provide the legal tools to protect human rights.

- It is notable that Australia is the only common law country in the world that does not have a Bill or Charter of rights.
- Major international HR treaties have not been implemented in Australian law, ICCPR, ICESCR, CRC, Refugee Convention.
- There are three exceptions: Race, Sex and Disability.
- The failure to implement Australia's Treaty obligations by legislation means that the courts do not have a power to refer to and apply these obligations.
- The failure to legislate treaty-based freedoms and rights is compounded by the fact that the Commonwealth Constitution protects very few basic rights; we have a right to vote, to a fair trial, and to compensation for property that has been confiscated; we have constitutionally protected freedom of religions expression, but no right to freedom of speech as such.
- Rather, the High Court has implied a right to freedom of political communication.
- Moreover, the common law has not provided effective strong protection for fundamental rights because of the supremacy of parliament. If laws passed by parliament are unambiguous in their intent to breach a human right-for example the *Migration Act* or counter-terrorism laws- there is virtually no role for the application of the common law presumption that Parliament intends to comply with international law including human rights. This is why legal action before the High Court challenging laws that violate the right to freedom of association, and the prohibitions on arbitrary detention and offshore processing laws have largely been unsuccessful. In short, common law principles dating from the time of the Magna Carta, have been trumped by the clear and unambiguous words of Parliament.
- Sadly, our Federal parliamentarians-both government and opposition- have voted all too often to displace freedom from arbitrary detention, freedom of speech and association, and the right to privacy and have imposed national security laws that have a significantly disproportionate impact on vulnerable minorities.

In summary, the protection of human rights through the law has become increasingly difficult, in part because courts do not have the legislative means with which to strike down laws that breach our fundamental freedoms.

The right to freedom of speech and the vulnerability of ethnic minorities to verbal abuse.

The AHRC has the statutory obligation to attempt to investigate and conciliate complaints under the *Racial Discrimination Act*. The most controversial provision in this Act is s 18c. S 18c prohibits acts that "offend, insult, humiliate and intimidate" a person because of their race, national or ethnic origin in a public place.

This section is vital to the protection of all ethnic minorities in the community, against racial abuse and hate speech.

Efforts have been made by both the Abbot and Turnbull Governments to amend s18C by deleting the words "offend and insult" and replacing them with other words. They have objected to s 18C on the ground that it has a chilling effect on freedom of speech. This, despite the consistent jurisprudence of the Federal and Circuit Courts that the prohibition does not apply to a "mere insult", but rather is confined to profound levels of abuse.

The position of the AHRC has been and is that S18C should not be amended, as it has applied for the last 20 years in a fair and balanced way, it is a proportionate measure to achieve a legitimate aim and sends the vital message to the community that racially abusive language will not be tolerated.

The defeat of the two Bills to amend S18 C owes much to the multicultural community. All Australia's ethnic and religious communities, Chinese, Vietnamese, Muslims, Jews, Christians, Buddhist, Italian and Greeks, worked collaboratively, united by the sure knowledge that this provision is a foundation stone of multiculturalism in this country.

The national debate, by the government and media commentators over the last 4 years has been essentially ideological. It is "much ado about nothing" when you realise that only a handful of 18C cases has ever been successful before the Federal Courts. As John Alexander pointed out, s18C is not on the top 100 issues of his electorate.

Most 18C cases fail, partly because they do not meet the high threshold imposed by the courts and partly because of the free speech protection provided by s18D.

Where an act or speech is prohibited by section 18C, it may nonetheless be protected by s 18D if the act or speech is in good faith, or in the public interest or a work of artistic or scientific purpose. Indeed, it might be noted that s18D provides the strongest legislative protection for free speech in Australia given that there is no constitutional protection beyond the implied right to freedom of political communication.

One instance in which Sections 18C and D have been used successfully is the challenge holocaust deniers brought by the Jewish community. The Bolt case has also been exceptional for, despite the high threshold for such a civil action based on s 18C, the Federal Court found that the right to freedom of speech does not apply where the journalist got his facts wrong and acted in bad faith.

Last year, the Parliamentary Joint Committee on Human Rights was asked by the Government to report on reform proposals to s 18C. In its Report last month, the Committee proved unable to make a recommendation. Instead it listed 6 possible options for reform, without expressing a view for a way forward.

The Report did make some recommendations about the complaints processes of the Commission, many of which had been proposed by the Commission itself. In the aftermath of the Report the

Government introduced a Bill to amend s18C and to reform aspects of the complaint handling processes of the AHRC. The Bill failed to pass the Senate with respect to s18C, but Parliament did pass provisions giving the President expanded powers to terminate matters where appropriate. The Commission is largely happy with the amendments that we had requested.

And so… we return to the status quo, that is: the right to freedom of speech continues to be sensibly balanced by the prohibition on public abuse on racial grounds.

But it should be acknowledged that it is not an easy balance to achieve, as the High Court of Australia discovered in the Monis case of the Muslim cleric who was ultimately responsible for the subsequent Lint Café tragedy.

Monis had been earlier charged with the criminal offence (among many others) of using the Commonwealth Postal Service to send abusive letters to the parents of Australians killed in Afghanistan. These letters were alleged to fall foul of the prohibition on offensive language, thus the prohibition is similar to s 8C. The High Court split 3:3 on whether the conviction of Monis should be upheld. 3 judges said the law was a breach of the right to freedom of political communication as an expression of opposition to Australia's role in the conflict.

The other three judges- all women- concluded that the prohibitions reflected a reasonable and proportionate balance with the right not to be subject to racial abuse.

Returning to efforts to reform s 18C, you will be aware that the second government Bill, introduced a few weeks ago, also failed to gain the support of the Senate. It is clear that yet again Australia's multicultural community rose as one to defend the right not to be abused in the public arena on the ground of race.

But remain alert and alarmed. The embers of the reform fire are still smouldering. Last night the Senate Legal and Constitutional Affairs Committee tabled its report on yet another bill to reform s18C by removing the words "offend and insult". The majority Report was a half-page and it recommended the Bill be passed, despite the minority objections of both the Labour Party and the Greens. While this and similar Bills are unlikely to pass the Senate in the near future, the ideological objections to s18C within the Government remain alive.

Disproportionate effect of migration and national security laws on racial and ethnic minorities, especially those of the Muslim faith.

Over the last 5 years of my Presidency, I have learned about the damage done to social cohesion by ill-informed stereotypes. To generalise about the human rights breaches that concern most Australians most of the time -they are not indefinite offshore detention of refugees and asylum seeker or indigenous incarceration rates or even domestic violence. In fact, Australians complain to the AHR Commission that they have not been treated as individuals, but rather as representatives of a group whether as an older persons or persons with a disability. Australians complain about their treatment on the basis of preconceived ideas about gender and sexual orientation, race, ethnicity and religious beliefs. Indigenous Australians continue to be concerned about disproportionate and discriminatory incarceration rates, domestic violence and ill health.

Stereotypical thinking has been especially damaging for Muslims in Australia and reflects a combination of factors over the last 16 years, arguably since that momentous year in 2001:

- In August that year the Norwegian freighter the "Tampa" sailed into Melbourne with 433 asylum seekers, mainly Shia Muslims -Hazaras from Afghanistan - who had been rescued on the high seas.
- The "Tampa" incident was followed in October by allegations from the Howard government that asylum seekers arriving in Australian waters without a visa were throwing their children overboard to ensure they were rescued and taken to Australia; allegations that were proven to be false by a subsequent Senate Inquiry.
- And some weeks later, on 9th September, attacks were made on the Twin Towers and Pentagon in the US, with a tragic loss of life, sparking the continuing conflicts in Afghanistan Iraq, and Syria with even greater loss of civilian life.

The following year in 2002, we saw the Bali bombings that exacerbated anti-Muslim feelings along with some criminal trials in Sydney that year.

A common feature of all these events and their aftermath has been the links made between all those of the Muslim faith and the people smuggling trade, global security and terrorism, and religious fundamentalism; links that have been promoted explicitly, sometimes with more subtlety, by political and community leaders.

A recent example of the growing tolerance for demonising Muslims generally has been the controversy over a face book comment on ANZAC day by Abdel-Magied a hijab wearing Muslim woman. She drew attention to the plight of detainees on Manus Island and Nauru, and of the refugees from Syria and Palestine. Despite a speedy apology for what she conceded was a disrespectful comment on this day of remembrance, this relatively minor incident has been used to demand the removal of Abdel-Magied from the Council of Australian-Arab Relations, to constrain her right to freedom of speech and to demand that, as an Australian resident since she was a young child, she should return to Sudan, her country of origin. It is encouraging that the Foreign Minister has not succumbed to these demands.

This single incident clearly touched some raw nerves: indeed, the head scarf has become a lightning rod for attacking Muslim women. The incident also prompted further ritual attacks on the independence of the ABC, and popular nationalist language that we should always "put Australia first".

How can and should Australians respond to such a damaging mix of racism, misogyny, national populism and legal isolation from our international obligations? One response is to present the facts and evidence, to inform public debate with balanced scholarship and to ensure that we have the laws in place to protect fundamental freedoms.

Some facts. There are 460,000 Muslims living in Australia, being 2.2% of the population, most live in Sydney and Melbourne, though some live throughout regional and rural Australia. Muslims have visited Australia and traded with Aboriginal Australians since the 18th century and came as migrants in the mid to late 19th century.

Despite this long history of Muslim engagement with Australia there is consistent evidence that Muslims are subject to higher rates of racism than pertains for all other racial and religious groups within the Australian community. Of course, racism often overlaps with religious and cultural hostility and it can be difficult to separate them. The research is clear however. The Muslim community is disproportionately subject to "hate speech" and discrimination in employment and the delivery of goods and services.

A study by the University of Western Sydney found racial prejudice against Muslims to be three times that of all other Australians. The Scanlon Foundation found in 2015 high rates of reported discrimination for faith groups generally, but that there were significantly more negative attitudes towards Muslims than Christians, Buddhist or Jews. Strong negative attitudes exist in respect of all immigrants from the Middle East compared with all other migrant groups.

Role of the Australian Human Rights Commission

The Commission has a special insight into the level of racial discrimination and abuse in Australia through our complaints processes. Last year we received about 19,000 enquiries and complaints for conciliation. 21% of complaints arose under the RDA numbering 429. Overwhelmingly the complaints concerned discrimination in employment and delivery of goods and services on the grounds of race and national origin. 77 complaints arose from racial hatred laws, being only 3.8% of the complaints total for the Commission.

Attacks on religious freedoms are of serious concern. All Australians have the right to enjoy basic freedoms whatever their religion, race or ethnicity. They have the right to be free of fear, to be safe and to be treated fairly and as equals. They have the right to practice their faith without harassment or humiliation. It might be recalled that the right to freedom of religious expression is one of the few human rights protections in the Constitution, a right that has been widely interpreted by the High Court.

Not only are Muslims disproportionately subject to racism in Australia but also our Migration laws with respect to asylum seekers and refugees have a disproportionate impact on ethnic minorities, especially the Hazara of Afghanistan and the Rohinga of Burma/ Myanmar.

It is a sad reality that overwhelmingly, asylum seekers and refugees detained in immigration detention centres in Australia and Christmas Island, and offshore in Nauru and Manus Island, are Muslims. So too are those in the Australian community whose claims to refugee status have yet to be assessed or those who are on bridging visas or temporary visas with no hope of permanent settlement.

I will not belabour the breaches of human rights imposed by indefinite detention in the current harsh conditions. The egregious violations of international law created by our *Migration Act* have been amply demonstrated by many UN rapporteurs reports and by the UN's Office of the High Commissioner for Human Rights, by several Federal parliamentary reports, by reports from civil society and finally by the Commission in its report, *The Forgotten Children* 2014.

My concern tonight is the disproportionate impact of Australia's immigration policies on Muslims. Accurate statistics are hard to find. As at February this year, there were 1,383 people in immigration detention in Australia, 378 detainees, including 45 children on Nauru and 837 adult men on Manus. The average length of time in detention is about 500 days, though many have been detained for years.

The countries of origin of <u>most</u> asylum seekers and refugees are predominantly Muslim nations: Iraq, Syria, Afghanistan, Iran. (Exceptions are Myanmar with a 4.3% Muslim population; the DR of Congo with 10% Muslims; Ethiopia with 34% Muslims). Precise figures of religious groups are not available, it is probable that the largest group in immigration detention, and in the community awaiting assessment of their refugee status, are Muslims.

The evidence is that, while religious persecution is one of the five grounds on which a person can seek protection under the Refugee Convention, when Muslim seek protection against religious persecution they are subject to yet further discrimination in Australia on the basis of their faith.

In addition to the long term human rights abuses of immigration detention of refugees is the more recent problem of S501 of the *Migration Act. This provision* allows visa cancellations on character grounds at the discretion of the Minister, cancellations that are, for practical purposes not subject to judicial review or supervision. The numbers of those subject to s501 visa cancellations in immigration detention is rising and they now outnumber asylum seekers, most of whom are in the community awaiting refugee assessment.

The irony is that this category of visa cancellations leading to immigration detention has a disproportionate impact on New Zealanders, especially Pacific Islanders, who have been in Australia for many years, often since they were children, but who do not have citizenship. It has been the impact of this law on our New Zealand cousins that has raised public awareness as to the fairness of the Migration law.

Let me conclude with the question of Australian values and the principles that unite us.

The PM has recently announced that his government plans to put Australian values at the heart of new citizenship requirements: these values are, he says, respect, the rule of law, and a commitment to freedom and to liberal democratic representative government. Who could possibly disagree with these so called values? They are obvious and they are already founded in our legal system.

The cautious sceptic is bound to ask: what motivates this recent effort to rethink citizenship? The proposal might usefully be viewed in the context of restricting s457 visas to overseas workers; to visa cancellations on character grounds, to echoes of "Trumpism" with "putting Australia first" and the labour party's advertisement, "employing Australian workers first" where overwhelmingly those represented were of Anglo Saxon origin.

One element of a strong national identity is a clear articulation of national values. The US has been very successful in articulating its values through the American Constitution and the Bill of Rights. So too for Australia it may well be perfectly reasonable to require a few years residency in Australia as a prerequisite for citizenship. The requirement that a citizen should speak English, while reasonable on its face, is problematic because it is open to official abuse and to a discriminatory impact.

The critical need is to move past statements of the obvious to define Australian values with precision. I suggest that one way to strengthen our understanding and commitment to core Australian values is to set them out in a document that provides a benchmark for all that we stand for.

Let us agree upon the principles that underpin multiculturalism: respect for all cultures, religions and ethnicity, equality before the law and non-discriminatory treatment, freedom form arbitrary detention, freedom of speech and association. To recall the words of the national anthem, we should "Advance Australia fair"… with the operative word being "fair" or in the vernacular give all a fair go.

In conclusion, I think it is time we set out Australian values by drafting a legislated Bill of Rights, Freedoms and Responsibilities to which we can agree and around which we can unite. We can then join the rest of the world in benchmark provisions that speak for Australia's aspirations and commitments to social justice and freedom.