Remarks of the Hon. Marilyn Warren AC
Chief Justice of the Supreme Court of Victoria

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Executive Accountability in the 21st Century

Introduction
The scope of executive power has expanded considerably since Federation, as has the Executive’s role in public decision-making. Parliament’s role in such decisions has reduced.

This phenomenon is not new.1 It has occurred steadily over time.2 It has occurred at both the Commonwealth and State level.

At a time where academic surveys reveal a declining confidence in, and engagement with, many public institutions,3 the shift deserves attention.

The gradual shift of responsibility in the Executive’s favour also has implications for our key constitutional tenets – federalism, separation of powers, representative and responsible government.4 Chief Justice French has described the relationship between the Parliament, the Executive and the Judiciary in a representative democracy with responsible government as ‘beguilingly simple’.5 The Executive is accountable to Parliament, which in turn represents the people – the Parliament keeps the Executive in check and provides the ‘critical link’ between the government and the public.6 Of course, it is not so simple. If it were, as the Chief Justice said, ‘there would be a good deal less work for constitutional lawyers to do.’7

In a speech at the Convention Debates in March 1891, Sir Samuel Griffith said responsible government was ‘the best that [had] yet been invented in the history of the world for carrying out good government of the people’.8 I ask the question: If Parliament is to play a lesser role in public decisions what mechanisms will hold the Executive accountable? Judicial review will be central, as will common law rights and human rights.

4 Saunders, The Scope of Executive Power, above n 2.
6 Cheryl Saunders, ‘The Marginalisation of Parliaments’ (Lecture delivered as part of The Wednesday Lectures, Melbourne University Law School, 3 September 2014).
7 French, above n 5, 820.
The expanding scope of executive power

Executive power authorises governments and public administrators to take certain actions without parliamentary approval. The federal executive power is set out in section 61 of the Constitution; is vested in the Queen and is exercisable by the Governor-General. Professor Anne Twomey has observed that the outer boundaries of the executive power have remained uncertain and Governments have come to rely heavily on the use of executive power to achieve policy outcomes. The incentives are many – efficiency, flexibility, informality and discretion. However, the public pays a price in terms of transparency, participation, parliamentary scrutiny, consistency and accountability. These difficulties are most pronounced in the case of non-statutory executive power, in which Parliament plays no role at all.

Emeritus Professor Laureate Cheryl Saunders has recently focussed on two growing areas of executive power: intergovernmental relations and ‘executive schemes’. Both processes are dominated by the Executive. While such arrangements and schemes may ultimately take the form of legislation, Parliament’s role is often limited, for example, to the adoption of ‘template legislation’ under which significant powers are granted to the Executive and its ministers.

Lawyers, academics and citizens speak about the lack of parliamentary and public scrutiny. Aggrieved litigants are calling governments to account. A couple of examples:

- The Williams decisions concerned an executive scheme – the National School Chaplaincy Program. An aggrieved parent successfully argued in the High Court (on two separate occasions) that the program was unconstitutional.
- In Victoria, there has been ongoing litigation concerning the East-West Link proposal. Local councils and residents have made several attempts to block it. Part of the complaint with the proposal has been the alleged lack of transparency. For example, councils and residents wanted the opportunity to scrutinise the business case.

The outsourcing by governments to private organisations of infrastructure projects like East-West Link and management of programs such as public housing poses new questions for administrative law. One is whether the private organisations are subject to the same restraints as the government would be if it were performing such functions itself.

The increasing numbers of challenges to executive action in the areas of immigration law and environmental law are also noteworthy. Public lawyers continue to find innovative ways to challenge executive action in the refugee space, especially where judicial review is

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10 Likewise State executive power is vested in the Governor of each State, who acts on ministerial advice. For example see Constitution Act 1975 (Vic) s 87E.
12 Saunders, The Scope of Executive Power, above n 2; Saunders, The Marginalisation of Parliaments, above n 6.
15 Judicial review of tenancy and public housing decisions is also an emerging area. For a recent example see Burgess v Director of Housing [2014] VSC 648 (17 December 2014).
16 These issues were discussed in the UK case R v Panel on Take-overs & Mergers; Ex parte Datafin plc [1987] 1 QB 815.
We have seen a number of constitutional challenges as well as tortious claims. In one case currently in the Supreme Court of Victoria, the plaintiff is seeking compensation from the Commonwealth for injuries sustained during the unrest in Manus Island early last year. Likewise, there is more environmental litigation against government departments. Environmental groups have called for greater scrutiny of government decision-making: the coal seam gas cases in NSW; and the forest cases in Victoria trying to protect the leadbeater and pygmy possums. Groups advocate their concerns about the asserted lack of transparency in the exercise of non-statutory executive power.

The *Williams* decisions went some way to redrawing the boundaries of Commonwealth executive power in this area. The Executive’s power to spend is not unconstrained, major spending schemes require legislation (ie Parliamentary approval) and such legislation must in turn be supported by a Commonwealth head of power.

**A ‘catalyst for change’?**

Professor Saunders says she hopes these cases will be a catalyst for change. The issues raised are certainly gaining greater attention in the courts. Recently, the Victorian Court of Appeal in the course of one of the East-West Link proceedings made some relevant comments. By way of context: at trial the State had denied the citizen plaintiff discovery of certain documents on the basis of public interest immunity and unacceptable cost and delay. The trial judge had ordered a number of questions be tried separately prior to discovery and determination of the immunity point. The trial judge also held that the plaintiff should be tied to the few instances of conduct of which he was able to give particulars without discovery. In other words a shutting down and narrowing of litigation processes. The Court of Appeal had to determine whether this was fair. Justices Nettle, Santamaria and Beach held that it was not. Their Honours said that foreclosure of the plaintiff’s discovery would ‘subvert the justice process’. They were concerned that the State might use the tactic to ‘effectively eliminate the scrutiny of executive action’.

The Victorian Court of Appeal has also been critical of the State’s conduct in private commercial dealings. Note the recent *Tatts* and *Tabcorp* appeals. They arose following

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18 See for example attempts by environmental organisations to resist coal seam gas exploration in NSW *(Barrington — Gloucester — Stroud Preservation Alliance Inc v Minister for Planning and Infrastructure* (2012) 194 LGERA 113; *Fullerton Cove Residents Action Group Inc v Dart Energy Ltd (No 2)* (2013) 195 LGERA 229; *Lester v NSW Minister for Planning and Ashton Coal Operations Pty Ltd* (2013) 193 LGERA 97) and Victorian cases which question the State controls over forestry such as *MyEnvironment Inc v Vic Forests* (2013) 198 LGERA 396; *Gippsland Inc v VicForests* [2010] VSC 335.
19 There were two High Court challenges. Following the first, the High Court held that legislation was required for the scheme. The Federal Government then rushed through an Act retrospectively authorising hundreds of executive schemes (including the Chaplaincy Program). The second challenge concerned whether the legislation for the Chaplaincy Program was supported by a Commonwealth head of power. The High Court held it was not.
26 Ibid.
28 *Tabcorp Holdings Ltd v Victoria* [2014] VSCA 312 (4 December 2014).
29 Both matters are subject to special leave applications which have not been heard by the High Court.
the former Brumby Government’s significant reforms to the Victorian gambling industry, which effectively stripped Tabcorp and Tatts of their long-standing duopoly over poker-machines. Both companies sought compensation around $1 billion, only the Tatts Group was successful. Justices Nettle, Osborn and Whelan said that the Government’s conduct in relation to the gambling reforms had ‘done little to enhance the State’s reputation for reliability and commercial morality in its dealings.’

Last year in South Australia plaintiffs sought judicial review of a decision by the Urban Renewal Authority to enter into a contract granting a third party options to purchase land in South Australia. The Chief Executive entered into the contact on the Authority’s behalf. Justice Blue described the decision as ‘irrational’ saying that it was made in ‘disregard of prudent commercial principles’, contrary to the requirements of the relevant legislation.

Just this week, the High Court in Plaintiff S297 unanimously ordered the Minister for Immigration to grant a permanent protection visa to a refugee overturning the Minister’s executive refusal to do so on the twofold basis that the refugee was an ‘unauthorised maritime arrival’ and that it was not in the national interest to grant such persons permanent protection. The High Court held that was not enough. Last month, in another immigration decision CPFC, discussed this morning by Associate Professor Kristen Walker SC, the High Court, by majority dismissed a claim for damages for false imprisonment arising out of the plaintiff’s detention at sea on a Commonwealth vessel. One issue raised was whether the Commonwealth’s actions could have been authorised by a non-statutory executive power to expel aliens. The majority considered it unnecessary to decide this point. However Justices Hayne and Bell in their joint dissenting judgment held that the Commonwealth’s actions were not authorised. Their Honours said the conduct must be justified by valid statutory provision.

Concluding remarks

If Parliament is to play a lesser role, consider what else may keep the Executive and administrative action in check.

Administrative law remains central. It ensures the lawful exercise of executive power and affords citizens the right to challenge decisions. Both Federal and State courts play a

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30 Victoria v Tatts Group Ltd [2014] VSCA 311 (4 December 2014) [65]; Tabcorp Holdings Ltd v Victoria [2014] VSCA 312 (4 December 2014) [94].
31 In the case of Acquista Investments Pty Ltd v The Urban Renewal Authority [2014] SASC 206 (24 December 2014).
32 Ibid [552]. Justice Blue found that the Chief Executive had failed to take into account relevant considerations, such as marketing the land to the competitive market.
33 Another issue raised in the case was whether the Premier had the prerogative power to sell the land or grant options outside legislation. Justice Blue held that the relevant legislative provisions were inconsistent with the Premier exercising such a power. See Acquista Investments Pty Ltd v The Urban Renewal Authority [2014] SASC 206 (24 December 2014) [363] – [644].
37 Ibid [259] ( Kiefel J).
38 Chu Kheng Lim v Minister for Immigration (1992) 176 CLR 1, 19 (Brennan, Deane & Dawson JJ).
crucial role in defining and enforcing the limits of executive power and have preserved and safeguarded their institutional integrity against attempts to limit judicial review of executive decisions. Common law rights also play a role. The principle of legality operates to ensure citizens’ fundamental common law rights are not interfered with. As Justice Heydon has put it, ‘except by clear and unequivocal language for which parliaments may be accountable to the electorate’.  

Human rights jurisprudence may also have an increasing role. Former Federal Court Judge and Human Rights Commission President the Hon Catherine Branson observed administrative law and human rights are both concerned with the relationship between individuals and the State, and administrative decision-making plays an important role in the protection of human rights. Professor George Williams has pointed to the importance of formal human rights protection wherever governments exercise significant power. As executive power expands in scope, so too may the consideration of human rights in executive action.

The 21st Century has seen a number of steps taken to elevate the role of Human Rights in Australia. At the federal level, the Human Rights (Parliamentary Scrutiny) Act established the Parliamentary Joint Committee on Human Rights which examines new bills for compatibility with human rights. In Victoria, the Charter of Human Rights and Responsibilities Act serves a similar function. It requires that statutory provisions be interpreted consistently with human rights. These kind of provisions are important in educating public administrators to turn their mind to human rights in drafting and making decisions pursuant to legislation. Section 38 of the Charter makes it unlawful for public authorities to act incompatibly with human rights or to fail to consider human rights when making decisions. Such a provision has greater potential to affect non-statutory executive power and, as the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) has observed, is ‘fundamental to fostering a human rights culture’.

Anecdotally it seems these provisions are having an effect in Victoria. As part of their obligation to act compatibly, government departments and agencies must review their internal policies and procedures for compliance with human rights. VEOHRC has observed

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40 Momcilovic v R (2011) 245 CLR 1, 46 [43] (emphasis added).
that public authorities are now taking steps to address human rights issues before they arise\textsuperscript{46} and that adhering to the Charter has become ‘business as usual’.\textsuperscript{47}

Also, anecdotally, there seems to be general acceptance in the public sector that the human rights obligations have led to greater transparency and accountability in government. In this sense human rights can influence the exercise of executive power. The Victorian experience may therefore offer some valuable lessons for the national debate about how the issues of executive accountability in the 21\textsuperscript{st} century may be approached. However, I hasten to add the Victorian experience reveals little litigation in that regard.

Given Victoria is the second most populous state with a commensurately large public sector and substantial court and tribunal system, it will be informative in the constitutional context to see whether Victoria’s human rights requirements will influence administrative and judicial decision-making in other states. Successful practices in one state will be adopted by another. The Victorian experience may play a key role also in the drafting of a possible Bill of Rights in Queensland.\textsuperscript{48} Victorian legislation and decisions may be viewed with particular legitimacy, having been through a rigorous consideration of human rights compatibility.

Justice Basten, this morning, discussed the broadening of the concept of constitutional law.\textsuperscript{49} His Honour discussed whether principles of statutory interpretation form part of constitutional law. Consideration was further given in the morning's discussion to whether administrative law is a species of constitutional law. To complete the discussion I raise the inclusion of human rights law as a species of constitutional law. In Victoria there is a statutory requirement to interpret statutes through the prism of the Charter. This will be influential.

Coming back to the start: for the lawyers a growth jurisdiction awaits you; for the academics the articles, dissertations and theses will abound with administrative law and human rights developments; for the commentariat, more is to come.

Congratulations to the University, the Dean, the Gilbert & Tobin Centre and the organisers. The Conference has been excellent and features as a significant event on the legal calendar.