

**‘Rights-mindedness’ — making human rights real in public service and
community understanding 70 years after the adoption of the Universal
Declaration of Human Rights**

Alice Tay Lecture in Law and Human Rights 2018

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Abstract

A key function of the Australian Human Rights Commission is to promote an understanding of and acceptance, and the public discussion, of human rights in Australia. This presentation explores the embedding of human rights understanding in thinking about policy across the public service and the community. It considers institutional mechanisms, such as the parliamentary scrutiny mechanisms, and initiatives grounded in community education led by the Commission. The presentation uses the 70th anniversary of the Universal Declaration of Human Rights as an opportunity for reflection on understandings of human rights in Australia today.

Acknowledgment

Thank you very much to the Freilich Foundation for giving me the honour of presenting the Alice Tay Lecture for 2018.

I would like to begin my presentation by acknowledging the traditional custodians of this land, and to pay my respects to the elders, past and present, of the elders, past and present, and to acknowledge emerging community leaders of the Ngunnawal peoples and acknowledge Indigenous guests attending today.

Introduction

I thought I would begin this memorial lecture by speaking about Alice. And about her approach to rights. I am her ‘successor in title’ at the Australian Human Rights Commission.¹ But I was also her student; and her Dean. In the curious way of things, our lives crossed paths and echoed each other in a number of ways.

* I acknowledge the excellent input of Darren Dick, Senior Policy Executive—Human Rights and Strategy, to the middle parts of this presentation. The conclusions in this paper are my own as President of the Australian Human Rights Commission.

¹ A coinage that Michael Kirby used of me with respect to him at the Australian Law Reform Commission. He was the foundation Chairman from 1975–1986; I was President from 2009–2017.

There is surprisingly little biographical information about Alice.² But putting the pieces together, hers is a powerful tale. In this lecture I will weave her story into my theme—about rights-mindedness, about public service, and, in almost a footnoted way, about powerful women.

About Alice

I first met Alice Tay when I was a student in her Jurisprudence class. It was in the late 1970s, three years after her appointment as Challis Professor of Jurisprudence in 1975. It was the period when, according to Wikipedia, ‘fashion became more baggy’. But for Professor Alice Erh-Soon Tay, this was never the case. Stylish, with her distinctive chignon hairdo and essential elegance, she was a force of nature. Born in Singapore on 2 February 1934, of Chinese parents, her English had the ‘clip’ that we are most familiar with from Lee Lin Chin, of SBS newsreader fame. I remember Alice’s very distinctive way of saying ‘principle’ with a passing ‘m’ in the second syllable: ‘princimle’. She also loved to use examples focused around an ‘escritoire’. I still embrace the idea that a mark of style is possessing an *escritoire*! ‘Gemeinschaft’ and ‘gesellschaft’ also peppered her jurisprudential teachings.³

She encouraged me to pursue her interest in possession, as she had done, at doctoral level. This didn’t eventuate. I was too involved in other things, especially music, but I did go into academe in 1982, after the birth of my first child, and ended up undertaking my doctorate at the University of New South Wales in legal history on other aspects of property law.

Alice had very little formal school education. Singapore fell to the Japanese in February 1942, just after her 8th birthday and, because of her father’s anti-Japanese policy, she did not attend school because this would have required her to speak Japanese.⁴ It provided an impetus, as Julia Horne, University of Sydney Historian, suggests, to ‘independent learning’.⁵ The children learned English from a family Bible, Chinese from tutors, and music from a piano teacher. ‘According to her father, English was important for worldly success and Chinese for a

² For example, she is not in the Australian Dictionary of Biography—except as the wife of Professor Eugene Kamenka.

³ Drawing upon the typology of social organisations developed by Ferdinand Tonnies and published in 1887.

⁴ Julia Horne, ‘Alice Erh-Soon Tay, the Making of an Intellectual’ in *Alice Erh-Soon Tay: Lawyer, Scholar, civil servant* (Franz Steiner Verlag, 2004) 13, 17.

⁵ Ibid.

continued relationship with their “real” country of origin, but Japanese was a sign of surrender.’⁶

In the early 1950s, Alice’s parents supported her to study law at the Inns of Court.⁷ While attracted to the ‘romantic image of courtroom drama’, it proved not for her. It was ‘fun’, Alice said, but not ‘lasting fun’; and she wanted to do ‘more serious law’.⁸ In 1958, after two years of being a barrister, she applied for an assistant lectureship in the new law department of the University of Malaya.⁹ She was 24. The Irish Dean also appointed the 30-year-old political philosopher, Dr Eugene Kamenka, who moved to Singapore with his wife and children.¹⁰ This was a turning point in both their lives.

Fast forwarding: within two years Alice and Eugene were a couple.¹¹ There was a scandal. Alice told Julia Horne: ‘the university was old-fashioned—didn’t like the thought that one of their virginal young ladies had been led down the garden path’.¹² The Vice-Chancellor called them to task and they decided to resign from their secure jobs at the university and depart for London. Alice saw her departure as permanent: ‘I couldn’t go back to Singapore because of the people. I am *still* their scarlet woman’.¹³

In the early 1960s they returned to Australia. After completing her doctoral studies at the Australian National University in 1965 and then building an outstanding reputation as a legal theorist, Alice was appointed Challis Professor of Jurisprudence at the University of Sydney in 1975, as successor to Professor Julius Stone, who had retired in 1972.

From 1982 to 1987, Alice also served as a part-time Commissioner at the Australian Law Reform Commission (ALRC). During this time she contributed to several major inquiries—including an inquiry into Aboriginal Customary Laws. James Crawford, now on the International Court of Justice, led the inquiry.

In 2015, in celebration of the 40th anniversary of the ALRC, of which I was then President, I arranged short podcasts from all previous surviving Commissioners. James provided a gorgeous cameo of Alice:

⁶ Julia Horne, ‘The Cosmopolitan Life of Alice Erh-Soon Tay’ (2010) 21(3) *Journal of World History* 419, 431.

⁷ Ibid 432.

⁸ Horne, above n 5, 24.

⁹ Ibid. As Horn notes, the University of Malaya had started in 1949, and the Faculty of Law in 1957.

¹⁰ Ibid 24–25.

¹¹ Ibid 25.

¹² Horne, above n 7, 434.

¹³ Ibid.

Soigné was an understatement when it came to Alice. She was extremely well-groomed, and she came with me to conduct the women's meetings in a remote part of the Northern Territory with a group of Pintabee under the roughest conditions imaginable. ... At the end of the day Alice, having conducted her meeting and gone lizard hunting with the women, was immaculate as ever, a remarkable achievement. I was dishevelled at the beginning of the day and must have looked unspeakable at the end of it.¹⁴

My path crossed directly with Alice's again when I joined the academic staff of the University of Sydney in the Department of Law in 1990. In 1996 I served as Head of that Department, and, in 1997 as Interim Dean of the Faculty until March 1998. So for about a year and a half I was her Dean.

On 1 April 1998, two months after her 64th birthday, Alice commenced her appointment as President of what was then the Human Rights and Equal Opportunity Commission, known generally as HREOC, a position she held for five years, until 30 May 2003. The end of 2002 also marked Alice's formal retirement from the University of Sydney. Already very unwell, she passed away in April 2004.

What was Alice's vision of rights

Speaking in 1998, the 50th anniversary year of the Universal Declaration of Human Rights (UDHR), Alice reminded her audience at the International Symposium on World Human Rights, that the UDHR

... remains the most important international statement of aspirations and principles regarding the rights to which all human beings are inherently entitled. The Declaration and the International Covenants which together constitute the International Bill of Rights, and a succession of conventions of particular rights, have identified fundamental human rights and pressed states to recognise them, respect them, and ensure them.¹⁵

The struggle for human rights and for human dignity, she said, is 'the struggle for humanity itself' and that 'the most divisive conflicts are between our actions and our ideals, and perhaps within and between our ideals themselves'.¹⁶

'Humankind had come a long way to arrive at this Declaration', she affirmed.

¹⁴ Australian Law Reform Commission, *1975–2015: Celebrating 40 Years of Law Reform* (2015) Podcast by James Crawford <<https://www.alrc.gov.au/page/40>>.

¹⁵ Alice Tay, 'Toward the 21st Century: Challenges and Opportunities' (Speech Delivered at the International Symposium on World Human Rights, People's Republic of China, October 1998).

¹⁶ Ibid. This was a theme she also expressed in other writing: eg, Alice Tay, 'The Role of Law in the Twentieth Century: From Law to Laws to Social Science?' in Colin Phelan and Patricia Loughlan (eds), *The Sydney Centenary Essays in Law* (Faculty of Law, University of Sydney, 2000) 4.

Respect for human rights has become part of our thinking. This thinking is based on the awareness of human dignity, on a feeling of responsibility and solidarity, and on the conviction that all people are of equal value.¹⁷

But, she said ‘we need more than international instruments and national laws’:

We need trust, education, honesty and collective will. We need to uncover in ourselves the human strengths of benevolence, tolerance and justice.¹⁸

She concluded this speech in recalling a saying taught to Chinese children when they are very young:

‘All people within the four seas are brothers and sisters’. Whether this meant the Middle Kingdom or the whole Kingdom of Humankind in my own childhood, there is no doubt that today, it means only one thing—the whole of our Earth. This should be the starting point of our human rights education at the dawn of the twenty first century. From this will flow the benevolence, tolerance and justice’.¹⁹

Distilled in this speech are crucial ideas about the importance of education to enhance awareness of human dignity and also a collective responsibility that is inherent in the proposition that all people are of equal value. International instruments, like the UDHR, embody aspirations, but they are not enough by themselves—which brings me to my theme of ‘rights-mindedness’

‘Rights-mindedness’

The title of this speech employs the idea of ‘rights-mindedness’, by which I mean the embedding of human rights understanding in thinking about policy across the public service and the community. It is about building a culture of respect for human rights and dignity—the ‘collective will’ embraced in Alice’s aspirations.

The linking of rights and responsibilities is also woven into the text of the UDHR itself. If we go back the opening lines of article 1 it reminds us that ‘All human beings are born free and equal in dignity and rights’. The opening words of each article reiterate this point:

Everyone is entitled to...

Everyone has the right to...

No one shall be (subject to torture)...

All are equal before the law...

And so on

¹⁷ Alice Tay, ‘Toward the 21st Century: Challenges and Opportunities’ (Speech Delivered at the International Symposium on World Human Rights, People’s Republic of China, October 1998).

¹⁸ Ibid.

¹⁹ Ibid.

But in article 29(1) the Declaration concludes with the corollary of this: that everyone is also *responsible* for human rights: 'Everyone has duties to the community in which alone the free and full development of his personality is possible.' This is where rights-mindedness comes in.

So I want to explore how we enliven this idea that human rights are everyone's responsibility. To me it is about increasing the 'rights-mindedness' of people across the nation, across generations, and across all aspects of government. Or in terms of the Australian Human Rights Commission's motif, making human rights about 'everyone, everywhere, everyday', not just for government to deal with, or that is solely a matter for legal processes.

How do we do this? There are several audiences that are relevant to the answer. I will first look at public servants.

Public servants

The Australian Public Service Values (APS Values) state that it is the responsibility of federal public servants to respect 'all people, including their rights and their heritage'. Guidance on the APS Values goes on to say:

Employees should recognise the importance of human rights and understand Australia's human rights obligations, and comply with all relevant anti-discrimination laws. They should recognise and foster diversity and be open to ideas in policy development, implementation, program management and regulation.²⁰

This is different from having a general awareness of human rights at the community level. It is an obligation in decision making processes as public servants to act consistently with human rights.

There is a related obligation that applies when public servants prepare draft legislation for the Parliament. All legislation has an Explanatory Memorandum that accompanies a bill—a plain English description of what the bill does and, since 2011 and the establishment of the Parliamentary Joint Committee on Human Rights (PJCHR),²¹ a statement of compatibility with human rights. This is, as the name suggests, an analysis of the human rights impact of a bill, noting how human rights are affected, both negatively and positively. If negatively

²⁰ Australian Public Service Commission, *Values and Code of Conduct in Practice* (APSC Electronic Document) <https://www.apsc.gov.au/aps-values-and-code-conduct-practice>.

²¹ *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

affected, it must set out the justification for a bill that restricts human rights, using a proportionality analysis.²²

Requiring Explanatory Memoranda and statements of compatibility with rights is a good way of expanding the culture of 'rights-mindedness', by requiring departmental officers to turn their minds to questions of justification for provisions against possible rights encroachments. But is it working?

In an inquiry I led at the Australian Law Reform Commission, on encroachments on rights and freedoms in Commonwealth laws, one particular aspect of consideration was the parliamentary review processes, including the preparation of statements of compatibility for the PJCHR. The report was completed in December 2015.²³ We noted that, in the period January 2013 to December 2015, the JCHR had identified over 80 statements of compatibility that did not meet its expectations. In the same period, another committee, the Senate Standing Committee for the Scrutiny of Bills, asked the relevant Minister to include further information and justification in Explanatory Memoranda for 78 Bills.²⁴

The need for proper Explanatory Memoranda is an ongoing concern both in the UK and in Australia; and, similarly, in relation to drafting detailed and evidence-based assessments of proposed provisions that interfere with rights.

The Law Council of Australia even suggested that an independent statutory body, like the Australian Human Rights Commission, could perform a more centralised role in preparing statements of compatibility.²⁵ However, we (the ALRC) thought that such an approach would not be consistent with a goal of the *Human Rights (Parliamentary Scrutiny) Act 2011*, which sought to encourage early and ongoing consideration of human rights issues in the policy and law-making process. Hence, centralising the preparation of statements of compatibility worked against extending the culture of 'rights-mindedness' among policy makers as a whole—and was not favoured.

But the ALRC suggested that training for policy makers and parliamentarians on human rights and proportionality analyses could be useful—and indeed that

²² Before the creation of the PJCHR and the requirement for legislation to be accompanied by a statement of compatibility, there was 'no specific imperative for legislation proponents or a parliamentary committee to consider the human rights implications of legislation and it was not usually apparent that those aspects had been assessed': Zoe Hutchinson, 'The Role, Operation and Effectiveness of the Commonwealth Parliamentary Joint Committee on Human Rights after Five Years' 79.

²³ Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, (Report No 129, December 2015).

²⁴ *Ibid* [3.69].

²⁵ *Ibid* [3.75].

bodies like the Australian Human Rights Commission may also be 'well placed to conduct such training'.²⁶

Significant time constraints have an impact on both the big and the small pictures. Parliamentarians have reported that the main thing that would make parliamentary scrutiny more effective is more time. Bills may pass into legislation with little or no consideration of the committees' reports. The ALRC noted that, between 2000 and 2015, 109 bills had passed into law before the Senate Standing Committee for the Scrutiny of Bills had published its reports; and for the PJCHR there were over 50 Bills up to the end of 2015 where this had happened.²⁷

Are minimum timeframes for scrutiny committees the answer? Suspension of debate? Reference to a committee for review is there is adverse comment? To what extent do parliamentarians take into account the Scrutiny of Bills and PJCHR reports? Such are the ongoing questions in relation to the efficacy of the current operations of the scrutiny committees.

But I am an optimist and a distinct adherent of the 'ripple principle'. By virtue of having to address the mind to matters of compatibility of rights there is an impact. As we said in the ALRC report:

Influencing policy debate, improving transparency within the bureaucracy, holding the government to account by scrutiny and questioning, and creating incentives to draft or amend legislation to avoid negative comments from the Committee, are all examples of other important functions of scrutiny committees.²⁸

Zoe Hutchinson, the Principal Research Officer for the PJCHR, in an article concerning the operation and effectiveness of the Committee concludes that it is 'not ineffective, but not a human rights panacea'.²⁹ In its more than five years of operation, she remarked, it has been successful in

Informing members of parliament about the human rights implications of legislation; contributing to dialogue with the executive; and creating scope for engagement around human rights issues.³⁰

²⁶ Ibid [3.77].

²⁷ The issue of timeliness is also considered in Hutchinson, above n 23, 85–91.

²⁸ Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, (Report No 129, December 2015) [3.86].

²⁹ Hutchinson, above n 23, 106–107.

³⁰ Ibid 106.

The statement of compatibility is an accountability tool—providing transparency about the policy development process and how the competing rights of citizens are balanced in the situation where human rights are in conflict.

The challenge that exists with statements of compatibility is that it requires policy makers to understand what human rights are in a technical way, so that they can complete their basic obligations to present a narrative explanation of how rights are impacted by legislation.

And yet ‘human rights literacy’ across the public service is not something that is prioritised. This results in statements that are often not of an acceptable standard. This is not a judgement that I am making. It is something that the PJCHR has stated in successive reports, having sent statements back to the sponsors of bills for clarification and further information.

So we do need to find a way to raise the rights-mindedness of public servants so that they can give due attention to human rights issues.

The current review of the Australian Public Service provides an opportunity to draw attention to such concerns. The Commission has made a submission to that review in which we propose a strengthening of the obligations for public servants to recognise and protect human rights.

The annual State of the Service report, for example, could ask questions about how well public servants understand human rights and the extent to which leadership chains in departments promote ‘fearless and frank’ discussion of human rights in policy and legislative development processes.

The Commission has also suggested that in the absence of federal human rights legislation, the most effective way to increase ‘rights-mindedness’ and promote a human rights culture in the APS is by way of specific amendment of the APS Code of Conduct.

The Commission has recommended that the APS Code of Conduct provide a positive duty on APS employees to act consistently with human rights and to actively promote, respect and protect human rights.

Such a duty exists in the United Kingdom in relation to racial equality legislation. It exists in the ACT and Victoria under the Human Rights Act in those jurisdictions. It gives an explicit endorsement to the importance of thinking about human rights when performing public service.

The community

Another of the audiences to address in making human rights for ‘everyone, everywhere, everyday’, is the community at large. How do we build a proactive culture that thinks of human rights, and related concepts like respect and dignity, upfront, and uses this thinking to guide our actions and our relationships?

Part of the challenge of building a community culture of rights-mindedness is the way that human rights are framed in Australia.

In Australia, our discussion of human rights most frequently occurs in a ‘negative space’. Human rights are invoked in public debate as inhibitors—reasons why you *can’t* do certain things. ‘You can’t do that because you are breaching my rights’ is an example of this. The formal limitations are expressed in statutory form in the suite of anti-discrimination laws,³¹ although often when people identify ‘rights’ that are being breached they are not legally protected.

It is absolutely correct to state negative impacts flow from the application of a law. People should object when they feel their rights are breached. We must continue to speak out in these circumstances.

The work of the Commission regarding complaints handling reflects this ‘speaking out’. To give you a sense of this work, complaints usually start with just a phone call or email — some form of contact — by, on average, 15,000 people a year who consider that they have been badly done by in one way or another, and businesses just trying to understand their obligations. They are assisted or referred. About 2,000 people pursue our formal complaints process, one that is based on conciliation. Only a tiny number of these ever end up in court; and most participants, both those who complain and those who are complained against, are very satisfied with the professionalism of the process and its outcomes. In the now almost 37 years of the Commission’s operation this is an enormous number of individuals who have been assisted.

My point is that this is but one element of human rights. And our dialogue in Australia often goes no further than this negative framing of human rights.

Just as we should call out why things can’t be done, in the name of human rights, we should also be discussing why other actions should be taken in order to promote and protect human rights. We should reflect on how our own actions contribute to or inhibit the enjoyment of human rights by our fellow citizens.

³¹ *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act 2004* (Cth).

Fundamentally I think we all know that building respect is a much better approach than dealing with the consequences of disrespect. Building respect is inherent in Alice's framing of the need for 'trust, education, honesty and collective will'. One key contribution of the Australian Human Rights Commission concerns building understanding of rights and freedoms across all levels of the school curriculum. Most recently the Commission released resources for years 7–10, including a number of animated videos.³² They articulate with the school curriculum in the subjects History, Civics and Citizenship.

'The Story of Our Rights and Freedoms' gives teachers the flexibility to choose which of the resources best suit their classrooms and supports Australian teachers to become human rights educators. The resources are designed to teach students about the key role that rights and freedoms, and the responsibilities that sit alongside them, play in Australian democracy. They do this in a way that is engaging, inclusive, participatory and, we hope, empowers students and teachers to act in ways that promote and protect their own human rights, and the rights of others. One example is the video on the Magna Carta, prepared in 2015 to mark the 800th anniversary of the sealing of the Magna Carta in 1215. In 2016–17, it was downloaded around 50,000 times—an extraordinary outreach.

Alice and the AHRC

Alice's sense of rights was tested during her Presidency of HREOC. The Twin Towers attacks in September 2001 increased fear and suspicion of Muslims and consequent racial disquiet;³³ and near the end of her Presidency her sense of the institution as an independent one was brought sharply into focus. It was also a time when she was seriously unwell with the cancer that ultimately caused her death in April 2004.

As President, Alice worked both publicly and behind the scenes to defend the Commission's independence, conscious of the role of the Commission as the National Human Rights Institution.³⁴ With HREOC's intervention in the MV Tampa litigation in 2001, *Ruddock v Vadarlis* (Tampa case),³⁵ that defence became public and intense. It was, perhaps, her 'blowtorch' moment. In a speech I gave in October last year at the International Bar Association conference in Sydney, I coined this expression. I said this:

³² Australian Human Rights Commission, *The Story of Our Rights and Freedoms* <<https://www.humanrights.gov.au/education/human-rights-school-classroom>>.

³³ Horne, above n 5, 15–16.

³⁴ Ibid 16.

³⁵ *Ruddock v Vadarlis* [2001] FCA.

Having a ‘Devil’s Advocate’ for human rights is a healthy, indeed necessary, thing in the context of the promotion and protection of those rights. Even if it means we should expect criticism—for calling out Government against the commitments made to the international community in signing up to the international treaties that set the benchmark for human rights. Even if it means that Government sees us more of the Devil’s Blowtorch than the Devil’s Advocate.³⁶

Alice recognised that, even when endeavouring to work constructively with Government, ‘it is inevitable’, she said, ‘if the Commission is doing its job properly, that we will not always agree with the Government of the day’.³⁷

HREOC then, and the Commission now, has a power to intervene in litigation, with the leave of the court, in matters involving human rights issues. At the time, the Commission had used those powers in approximately 35 cases before Australian courts and tribunals and had never been refused leave to intervene.³⁸

To date, the power has been exercised 84 times. By way of example, most recently the Commission intervened, on the invitation of the Family Court of Australia, in litigation concerning transgender children and their access to ‘stage two’ hormone treatment.³⁹ We are currently intervening in another matter before the Federal Court and seeking leave in another—concerning limitations on private speech by public servants. At times the Commonwealth Attorney-General also intervenes; at times the Commission’s interventions may not always be welcomed with open arms, shall we say. The intervention in the Tampa litigation was just such a case.

Interventions are by ‘the Commission’, which means the Commissioners. At the time of the Tampa case the Commissioners were, in addition to Alice, Bill Jonas (Social Justice and Acting Race Discrimination Commissioner), Sev Ozdowski (Human Rights Commissioner) and Pru Goward (Sex Discrimination Commissioner). As President, Alice had the casting vote, and although she and her Commissioners would seek consensus, on serious points of principle, decisions of how to proceed could come down to counting votes.⁴⁰ In the Tampa matter, the Commissioners were not *ad idem* about intervention.

³⁶ Rosalind Croucher, ‘National Human Rights Commissions—What’s the Point?’, International Bar Association Conference, Sydney, 12 October 2017. This prompted a cartoon by Rocco Fazzari in the *Law Society Journal*.

³⁷ *Statement: Professor Alice Tay, President of HREOC* (30 May 2003)

<<https://www.humanrights.gov.au/news/media-releases/statement-professor-alice-tay-president-hreoc>>.

³⁸ *Ibid*.

³⁹ *Re: Kelvin* [2017] FamCAFC 258 (30 November 2017).

⁴⁰ Horne, above n 5, 15.

One person who worked with her at the time recalled how precisely this happened on this occasion. Alice was actually in hospital having treatment and was very ill. The Commissioners voted in her absence: two against, one for, seeking leave to intervene.

That night, after the vote, someone from the Commission was required to rush down to Alice's hospital bed and brief her on what had happened and the reasons re intervention or not. It was a Friday night—she said, 'Absolutely— and I use my veto to intervene!'.⁴¹

A conservative by inclination, Alice's decision took on the government.

An amendment to the HREOC legislation was proposed, in the Australian Human Rights Commission Legislation Bill 2003, including that, to intervene, the Commission required *permission* from the Attorney-General.⁴² If approval were not granted, then 'HREOC effectively would be gagged, unable to assist the courts on human rights obligations', as Julia Horne observed.⁴³

The Senate Legal and Constitutional Committee conducted an inquiry into the legislation, receiving over 400 submissions. The report supported HREOC's independence.⁴⁴

Alice's last public act on her last day at the Commission, on 30 May 2003, was to welcome the report:

I am heartened that Senators from both sides of politics have accepted that this Bill raises serious problems for human rights in Australia.

It is vital, in these difficult times, that free democracies like Australia maintain and reaffirm their commitment to fundamental human rights by ensuring the continued viability and independence of National Human Rights Institutions like the Human Rights and Equal Opportunity Commission.⁴⁵

The Hon Kim Santow, then Chancellor of Sydney University, recalled at her retirement in December 2002, Alice's dealing with the Tampa issues and their aftermath, while recovering from throat surgery. 'Whether you agreed with her

⁴¹ Personal exchange, September 2018, with Natasha de Silva, Senior Policy Executive: Partnerships & International Engagement.

⁴² Australian Human Rights Commission Legislation Bill 2003.

⁴³ Horne, above n 5, 16.

⁴⁴ Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Provisions of the Australian Human Rights Commission Legislation Bill 2003* (Report, May 2003).

⁴⁵ *Statement: Professor Alice Tay, President of HREOC*, above n 38.

or not', he said, 'she claimed your respect; there was never anything lukewarm about her'.⁴⁶ The journalist Paul Sheehan called her 'a tough little tempest'.⁴⁷

In April 2004 Alice died. She was only 70. There was no time to write an autobiography. Her obituary in the University of Sydney News, said that

Her five year term at the commission was distinguished by her capacity to deal effectively with senior officials in parliament, government and the bureaucracy. Her tenacity and ability to push the debate, as well as her Asia-Pacific network of relationships, ensured that her voice did not go unheeded.⁴⁸

In this obituary were concentrated so many aspects of Alice's life and work.

I admired Professor Tay greatly as her student. As her boss, Alice was rather challenging. I remember discussing a particularly tricky issue in the Dean's office (*my office*) in 1997. But, as the ancient saying goes, 'de mortuis nihil nisi bonum' (Speak nothing but good of the dead).

I miss being able to speak with her now—at a lunch perhaps. She hosted marvellous lunches. Michael Kirby remembers them well: that she was 'vivacious and voluble, talkative, excitable';⁴⁹ 'nothing if not stimulating'.⁵⁰

Alice's penchant for entertaining was a distinctive, indeed legendary, part of her life. When she and Eugene settled in Canberra in the early 1960s, they established a 'salon' for world scholars and intellectuals, 'a centre of generous hospitality', as Julia Horne writes.⁵¹ Such dinners played an important role in the life of Alice and Eugene.⁵² Although Eugene was only six years older than she, Alice recalled:

I was always the youngest person. Everybody was in their fifties, sixties and all so serious, and all so able and so respected. Listening to this, I thought, oh my God, I don't know this! I must get to know that, I should read this up!⁵³

⁴⁶ Kim Santow, 'Preface for the Festschrift of AEST' in *Alice Erh-Soon Tay: Lawyer, Scholar, civil servant* (Franz Steiner Verlag, 2004) 35, 35.

⁴⁷ Paul Sheehan, 'No Credit in Devalued Degree' *The Sydney Morning Herald*, 8 January 2003.

⁴⁸ *A Champion of Human Rights* News <<http://sydney.edu.au/news/84.html?newsstoryid=304>>.

⁴⁹ *Memories of Professor Alice Erh-Soon Tay—Interview with the Honourable Michael Kirby, 14 March 2015* 13 <<https://www.michaelkirby.com.au/images/stories/speeches/2015/2781>>.

⁵⁰ *Ibid* 10.

⁵¹ Horne, above n 7, 426.

⁵² Horne, above n 5, 27.

⁵³ *Ibid*.

Today, this might be described as ‘imposter syndrome’, but, if so, it was a passing feeling on her part. She was very much Eugene’s intellectual equal.⁵⁴

It is curious to see a parallel in this regard with Eleanor Roosevelt—another powerful woman and the chair of the Commission on Human Rights and the drafting committee of the Universal Declaration. Alice and Eleanor shared an appreciation of the value of social interactions to foster collegiality and encourage discussion.⁵⁵ Immediately after the conclusion of the first session of the drafting discussions, Mrs Roosevelt invited the key people to her apartment on the weekend for afternoon tea. As they ‘settled down over the teacups’, she said, a heated philosophical discussion got underway. But, after a while, ‘so lofty had the conversation become, I simply filled the teacups again and sat back to be entertained by the talk of these learned gentlemen!’⁵⁶

Alice’s tradition of the networking meal continued in Sydney. She was the mistress of the ‘long lunch’; and on the rooftop at the Astor, Alice’s apartment in Macquarie Street, she gathered final year law students to meet judges and other leading Sydney lawyers.⁵⁷ I was in one of these cohorts in the late 1970s.

I remember being invited to a more modest function in her office in the Department of Jurisprudence at Sydney University. Eugene died in 1994, but Alice’s life and work hardly skipped a beat. She was such an ‘outwardly focused’ person. Even when she was gravely weakened through the treatments involved with her cancer, Alice still managed to entertain at her Sydney home, now in Hunter’s Hill, with her new partner, Günther Doeker-Mach, whom she married shortly before her passing. It was her way of generating a sense of what was ‘normal’ and grounding in her life.

Alice was honoured by a street named after her in Canberra, in the suburb of Watson. There she is in fine company with Dame Roma Mitchell, the very first Chair of the Human Rights Commission, the predecessor of HREOC, and Professor Phillipa Weeks (the late ANU Law Professor), in close proximity.

When she retired from Sydney University in December 2002, towards the end of her period as HREOC President, her colleagues arranged a ‘Festschrift’ to mark

⁵⁴ Horne, above n 7, 427.

⁵⁵ They did not share the same stature: Eleanor was almost 6ft tall; Alice not much over 5ft. Eleanor was also reputedly a terrible cook, while Alice was renowned for her exceptional cooking.

⁵⁶ Extracted in Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House, 2002) 47. See also Mary Ann Glendon, ‘John P Humphrey and the Drafting of the Universal Declaration of Human Rights’ (2000) 2 *Journal of the History of International Law* 250, 251–252.

⁵⁷ Horne, above n 5, 28.

the occasion. The collection of her papers is accompanied by a small volume of tributes.⁵⁸

The Hon Murray Gleeson AC QC wrote of her as ‘one of those rare, and valuable, people who have combined scholarship with an active engagement in public affairs’.⁵⁹ Her long-time colleague, Klaus A Ziegert, reflecting on how to describe Alice, said that ‘the closest category that comes to mind and which could cover the phenomenon [of Alice] in this respect is “institution”—if it were sociologically possible that a person “is” an institution’.⁶⁰ He also described her as an ‘industry’: and that her achievements were ‘one of a kind’.⁶¹

I admired Alice greatly and was deeply saddened at her passing. That sadness and the inability to continue our conversations returned to me acutely in the writing of this lecture. So much was left unsaid. This is my way of honouring her.

On the 70th anniversary of the Universal Declaration of Human Rights it is fitting to recall what Alice said on the 50th: that respect for human rights has become part of our thinking, but that ‘we need trust, education, honesty and collective will. We need to uncover in ourselves the human strengths of benevolence, tolerance and justice’. Building rights-mindedness across the public service and the community is a crucial aspect of this: to build the *human strengths of benevolence, tolerance and justice*.

⁵⁸ Guenther Doeker-Mach and Klaus A Ziegert (eds), *Alice Erh-Soon Tay: Lawyer, Scholar, Civil Servant* (Franz Steiner Verlag, 2004).

⁵⁹ Murray Gleeson, ‘A Tribute to Professor Alice Tay’ in *Alice Erh-Soon Tay: Lawyer, Scholar, civil servant* (Franz Steiner Verlag, 2004) 11, 11.

⁶⁰ Klaus A Ziegert, ‘AEST—An Attempt at Explaining the Phenomenon’ in *Alice Erh-Soon Tay: Lawyer, Scholar, civil servant* (Franz Steiner Verlag, 2004) 7.

⁶¹ *Ibid* 9.