Your Excellency General the Honourable David Hurley, Governor of NSW,

The Honourable Don Harwin MLC, President of the Legislative Council,

The Honourable Shelley Hancock MP, Speaker of the Legislative Assembly,

Ms Janet Stewart, President of the Commonwealth Day Council and Mr David Harvey and Mr Jason Collins, Vice-Presidents.

The Hon Max Willis, President of the Australia Youth Trust

Members of the Commonwealth Day Council

It's a tremendous honour to address you on Commonwealth Day.

And it's great to see so many school students who understand that our Commonwealth of Nations, uniting 53 countries home to 2.2 billion citizens, stands for equality, the Rule of Law, human rights and our theme this year, inclusivity, throughout all of those countries, whether they are monarchies or, in the case of most members, republics.

It's 47 years since I first learned about the Commonwealth of Nations as a Girl Guide looking at the requirements to become a Queen's Guide. As well as the requirements of service, the one compulsory badge was the Commonwealth Knowledge badge. There was some solid learning in that, and practical reaching out, by writing to girls of diverse race and culture and it took years to complete. At a time when, here in Australia, there was less racial diversity and certainly less inclusivity, our experience in Guiding was to learn about, and from, our sister Guides in India, Asia, various African countries and the Caribbean. We often had the opportunity to welcome them at World Camps and jamborees and I still treasure life-long friendships I made with girls in countries I would have known nothing about without the Commonwealth.

The Commonwealth has always fostered equality in status between its member nations. Discrimination on the basis of race is recognised as a truly evil thing and member nations aim progressively to eliminate the disparity of living standards among its members.

The Commonwealth grew, of course from a union of countries with constitutional ties to Britain, but newer member countries have brought with them other members with different political and geographic links.

Member countries support each other to prosper, in peace, and share core tenets, from tolerance, respect and freedom of expression to addressing the needs of the more vulnerable states to health and education.

Our Commonwealth Day Council here in New South Wales not only promotes the Commonwealth and its member countries but also supports the Australia Youth Trust, which it established back in the 80s. The trust provides financial and physical support for young people in Commonwealth countries who suffer poverty, illness, exploitation and abuse, and literacy and other training programs for youth in developing countries. The Trust also supports programs that involve the exchange of information and expertise between young people in Australia and those in other Commonwealth nations.

All member countries cherish the rule of law, which we inherit from Magna Carta. 801 years ago, King John of England and all future sovereigns were made subject to the law. The rule of law means that every citizen, including the king, or the queen, or the prime minister or president or any member of government, is subject to the law like everyone else. No one is above the law.

This principle, respected throughout the Commonwealth, gives to at least a third of the world's citizens (and to many in countries outside the Commonwealth too, of course) protection, equality and certainty.

One of the first things I was taught as a young law student was that countries with legal systems based on the English system that developed since Magna Carta are called "common law" countries because they have taken pride in the extent to which they gave effect to the common custom of the country. Although some of our early law in this State came from England, much was left to the operation of the common law, which embraced the principle that only so much of the general law of England as was suitable to our much different conditions was imported and the rest was left to develop as the local community required it. Soon, in 1824, New South Wales had its own Supreme Court which is now one of the oldest continuously sitting courts in the world.

So our common law is inclusive. It is inclusive of every citizen in its jurisdiction.

The common law system, with all its appeals, formalities and procedures, checks and balances, hard-won evidentiary rules developed for the protection of individual liberty, may be slow or arcane. But the hierarchy of the courts, and the many sets of eyes that review every allegation at every point, ensure that the citizen is not subject to the arbitrary view of asingleperson in whom is reposed the functions of investigator, judge and gaoler.

The right to a fair trial is an essential human right in all countries respecting the rule of law. In fact the right is much more widespread than that. Article 11 of the Universal Declaration of Human Rights declares that:

"Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law".

That principle has been described as the "one golden thread always to be seen" throughout the web of our common law. That was Lord Sankey back in 1935 in the House of Lords in the case of 21 year old Reginald Woolmington, a Dorset farmhand whose 17 year old wife, Violet, sustained a fatal shotgun wound when only the two of them were present. At his trial for murder, the judge had directed the jury that it was up to Reg to prove that the shooting was accidental. Three days before his scheduled execution, the House of Lords acquitted him, saying:

"No matter what the charge or where the trial, the principal that the

prosecution must prove the guilt of the prisoner" (beyond reasonable doubt) is part of the common law … and no attempt to whittle it down can be entertained".

The presumption of innocence finds expression in the direction to the jury of the onus of proof that rests upon the Crown. It is proof beyond a reasonable doubt of every element of an offence as an essential condition precedent to conviction which gives effect to the presumption.

In fact, the very important role that juries play in trials of serious criminal matters reinforces the inclusivity of our criminal law. We depend on juries to represent the community in the practical application of the common law.

Not only are we confident that they offer a tribunal of fact that is, because there are twelve minds and twelve sets of life experience, more worldly than a

single set of eyes, but we know that between twelve people any prejudice that may be present in one person is leavened out and eliminated.

Juries are invariably instructed that they must give the accused the benefit of any reasonable doubt. They are also directed that suspicion that the accused is guilty can never be a substitute for proof beyond reasonable doubt, any more than a finding that the accused probably committed the offence can suffice.

Juries are warned not to talk to their friends or families, or anyone else about the case. This is because the other people have not heard all the evidence and their opinions are not only irrelevant but are unreliable because they may be affected by prejudice, misinformation or ignorance.

At the start of a trial a jury is warned to keep an open mind and that it will not be until all the evidence is heard that they will be in a position to evaluate it.

Juries are also told that they must not look at any media reports on the trial because the reporters are unlikely to have seen, or to report on, the whole of the evidence. And juries are directed that they must be completely dispassionate, and not allow bias, prejudice, emotion or sympathy to colour their opinions.

The only evidence that is admitted, and can possibly become public, is evidence that is admissible. In other words, it is material which is relevant; it hasn't been obtained illegally and it is not unfairly prejudicial.

Prosecutors in common law States are subject to additional ethical rules governing their conduct in court that do not apply to other barristers. Prosecutors at the NSW Office of the Director of Public Prosecutions are obliged to follow Guidelines which remind them that they are not on a side but are to strive to do justice between the community and the accused according to law and the dictates of fairness.

Enshrined in the prefatory words of the Guidelines is guidance from a former Senior Crown Prosecutor of NSW, Mr R R Kidston QC who said, back in 1958,it behoves the prosecutor:

"(not) to speak for conviction except on credible evidence of guilt; nor to do even a little wrong for the sake of expediency, or to pique any person or please any power; ….to do right to all manner of people, to seek justice with care, understanding and good countenance".

The Prosecutors Guidelines state that prosecuting is a specialised and demanding role, not easily assimilated by legal practitioners. Any advocacy in the role must be conducted temperately and with detachment and restraint.

And prosecutors are reminded that they are not investigators. They have neither the training nor the hierarchy of investigative experience behind them.

Lawyers are trained to elicit evidence from a witness in the courtroom. But they did not gather the evidence.

It is the professional detective who is trained in ethical and effective investigative techniques, such as the cognitive interviewing model that aims to enhance the interviewee's memory of the event. The trained and ethical investigator commences with an open mind, seeking knowledge of all facets of an event, those consistent with innocence and those consistent with guilt. There is no pre-determined hypothesis in the modern police force. And each investigation has terms of reference which establish a focus and set limits on itself. There is never a justifiable reason for a professional investigator to suppress relevant information obtained during his or her investigation.

You may not be surprised to hear that, this being the 40th year in which I have served in our common law system, I have developed a guarded sense of caution about governments creating self-contained, autonomous investigating bodies that are not courts and which have no judicial functions but which have extraordinary powers which abrogate fundamental common law and human rights and privileges, such as the right to silence andthe privilege against self-incrimination.

As the High Court of Australia has said:

"The duties of the commission are to inquire and report…the commission can neither decide nor determine anything and nothing that it does can in any way affect the legal position of any person. Its powers and functions are non-judicial"

These bodies have no power to determine guilt but that message is lost because the media machines that they invariably have ensure that any apparently damaging material they can suggest about their targets is spread across the press, often embroidered by media outlets wanting to sell papers, with salacious associations that are tenuous at best and wild and malicious fiction at worst.

Some of these bodies maintain that because they are an arm of executive government rather than part of the judicial arm that they are not required to meet the standards of natural justice which apply in our courts.

But surely bodies with coercive powers which exceed those of the police, ability through their self-promoting media machines to inflict serious damage on the lives and reputations of individuals even during the course of their investigations, and power to issue public reports that condemn people irreparably without need of proper proof, should be required to apply high standards of natural justice.

Frankly it would be disturbing, wouldn't it, if our courts of law pro-actively encouraged the media to come to particular court cases and issued press releases about criminal cases in order to satisfy the public, as it were, that all the judges, lawyers and police were working hard enough? Journalists do come to a very small percentage of cases, when the charge is very serious or the accused or the alleged crime is well-known. But the vast majority of criminal cases, and even most murder trials, get no publicity whatsoever.

And remember, courts are dealing with cases after police and prosecutors, separately, have determined that there is sufficient evidence for charges to be laid. The only evidence that is made public is that which a court has determined is admissible after questions of whether the evidence has been lawfully obtained or whether it is unfairly prejudicial to the accused have been decided by a disinterested judge.

These government investigative bodies, commissions of various sorts, are concerned with a much earlier phase – determining whether to recommend that a charge be laid – and their recommendation is not determinative. They bring together, in a single office, the roles of investigator, prosecutor, judge and media unit, abandoning the traditional separation of those roles, and the objectivity and fresh sets of eyes on an allegation, or suspicion, that the proper criminal justice system boasts.

Everyone within the organisation is part of a team, championing their achievements with a crusading zeal. And the specific ethical obligations applying to those roles in the criminal justice system are blurred by people performing several roles, defending as it were, the investigation which they have initiated and directed.

Even with the best will in the world, the people making the decisions in these bodies to search and seize and go public are highly likely to be influenced by the suspicions that are part of the investigative process and susceptible to making subjective rather than objective assessments of the need for the use of invasive powers.

Last week retiring NSW Deputy Police Commissioner, Mr Nick Kaldas APM, called for a curb to the powers of several state investigatory bodies.

"They have extraordinary powers that bypass fundamental rights …and are not matched with extraordinary checks and balances that come with these powers…..When you look at the intense accountability and scrutiny applied to the police force it is incompatible with the almost total absence of similar scrutiny to the oversight bodies themselves". He spoke of the many lives that have been unfairly ruined by these bodies who are not accountable, and know it, and can go wherever they want.

When there are no controls and no accountability, in any organisation, the conditions for corruption to flourish are rife.

"We need a strong commission for this or that purpose", the catchcry goes. Well we need a strong police force, even more, and we have one because of the stringent accountability and constant scrutiny to which it is subject, including the way its methods and decision-making are tested each day in our proper courts.

In 1998, the then Chief Justice of our Commonwealth of Australia, the Honourable Murray Gleeson, AC QC lamented:

"the ever widening gap between what is required to be done in a court of law to prove that a person is guilty of misconduct, and what is sufficient, outside a court of law, to create about a person such an atmosphere of suspicion, distrust and hostility, that for all practical purposes it does not matter whether anything can be proved against him".

And last year, a leader of the criminal bar and former Bar Association President, Mr Phillip Boulten SC, said in the Jeff Shaw Memorial Lecture that a parallel justice system has emerged in the last 20 years that is a form of competition to "the real criminal courts".

He said that the media's unqualified acceptance of what goes on in these investigative bodies has led to a public admiration of them which poses risks for the proper courts. He warns:

"There may come a time when the public have more confidence in" (these bodies') ability to dispense justice through exposure and shaming than in the courts' ability to dispense justice through the mechanism of a fair trial and sentencing following upon, and only following upon convictions beyond reasonable doubt".

Because these government agencies are not courts and can therefore not convict and not pass sentence, they have developed a means of punishment which is in many cases far worse.

The media is co opted into the role of the punisher, and the role is embraced in some quarters with a relish that could easily be confused with malice.

Unlike the case when some of these bodies were set up by governments for no doubt what seemed a good reason at the time, we are now in the age of the

internet, the 24 hour news cycle, online comments on news pieces and the Twittersphere.

A damaging headline based on some carefully selected but as yet untested scrap of information (which I can't call evidence because evidence is only that which is considered admissible by a proper court) was bad enough 20 years ago. But in those days the maligned person could fortify him or herself with the encouraging, but even then somewhat unconvincing fish and chip wrapper theory.

But the justice that our community is permitting to be dispensed in the form of shaming the targets of these investigatory bodies is now far worse. Well in advance of any charge being laid, often in cases where charges will never be laid and even in cases where the decision that no charge will be laid has already been made by the proper authorities, investigative bodies are justifying their existence by condemning the presumed innocent in the media. Today that means that the ill-informed and the vindictive go on the attack in the manner of a cyber lynch mob.

Judges tell juries not to read news reports on the trials they are in because they are likely to be incomplete, inaccurate or partial. Yet investigative bodies make press releases and use the media to promote themselves by painting their targets in the worst possible light. Of course they do. They have to justify their existence and their massive cost to the taxpayer. Then the vilification and wholesale destruction of the target is underway.

Newspapers want sales. And I'm sure you'll agree, the tawdry, gossipy, nasty, catty trash that passes for headline news in some of our papers has never in history been so vulgar or unedifying.

Then the bloggers and tweeters take up the cudgel. Fine them, sack them, gaol them, tar and feather them, castrate them, hang them, feed their entrails to the hyenas.

This is not inclusivity.

This is civilisation in retrograde.

At a time in history when we have never been more considerate and compassionate of people in difficulty, the anxious, the depressed, the bullied,

the discriminated against, we are allowing the presumed innocent to be disgraced, debilitated and destroyed.

This is prejudice in its most obvious form. Pre-judgment. And prejudice is incompatible with inclusivity.

It doesn't matter that, as so frequently happens, the unfortunate target is exonerated or not even charged. No press release for that. And the mud sticks. And the person, if their physical and mental health hasn't been completely destroyed, is forever labelled "embattled" or "disgraced" or "controversial" or "let off on a technicality" or "once accused of".

(My experience as a Commissioner. Where it was likely we would recommend criminal charges, we sat after hours and in camera so no damage done to the reputation of those about whom we later recommended charges in a confidential volume and no damage done to the fairness of subsequent trials).

I would venture to suggest that there is a much more vicious and vociferous attack on people shamed in the media by, or because of the methods of, these government agencies than there is on murderers, terrorists and paedophiles.

Perhaps it's because the vilifiers think this could never happen to them. That because they are not in a particular job that no government agency would ever be able to take their phones or computers or search their homes or offices or conduct surveillance on them or listen to their phone calls. And of course they are all perfect and entirely without sin, and so are all the members of their families, their friends and indeed everyone they've ever met.

But it does happen, and it happens to ordinary people, and to their families even if none of them has any criminal record whatsoever.

In courts people of good character who are put on trial for a criminal offence are allowed to use it in two ways. The jury is told that they may take into account the good character in assessing the likelihood that such a person would commit a crime and also that a person of good character is less likely to be lying when they say they did not commit the offence.

No quarter is given for good character, or the benefit of the doubt, in the relentless campaign set off by a government investigative agency.

As greater powers are conferred on these agencies, greater powers are used against the citizenry in general.

Even if we have done nothing for which the proper law would punish us, can any of us be confident that we won't be caught up in an effort to investigate the perceived breach of some pettifogging ordinance that a government official has decided is suddenly of such importance that all the protections of the common law are to be circumvented? Or can we be satisfied we will not be targeted for intrusive inspection and character destruction because of who we are or what we believe?

As a society we should be inclusive of people who have been held up to public spectacle even in the absence of proof of guilt. We should not join the twitter vigilantes who engage in punishment without trial. We should demand that the common law principle of the presumption of innocence is clearly observed by all commentators. And we should insist that all government agencies remain subject to the rule of law.

If we don't, we can be certain that our hard-won freedoms and protections under the common law will be inexorably eroded.

In 1990 a current Royal Commissioner who was then a barrister, Peter McClellan, wrote a paper on an investigative commission which is frequently making news these days. He said:

"It is difficult to believe that the removal of trial by jury and the continuance of the protection offered by the courts against excesses by the Crown (both traditions extending back to the thirteenth century can be overthrown in New South Wales as a result of a single election victory, especially when these important principles for the protection of the ordinary citizen were not even mentioned.,,

The Commission, he said "will ultimately be effective only if its performance justifies its extraordinary powers. If the Commission is to justify those powers it must be scrupulously fair, value the rights of individuals and accept that persons should only be convicted after due process in the relevant court. The

experience of the first 12 months is that as a result (of its) actions, great harm has been done to many innocent people".