Launch of “Don’t Leave Us with the Bill: The Case Against an Australian Bill of Rights”

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It is a formidable challenge to launch this comprehensive series of some 25 essays arguing the case against a Bill or charter of Rights. Not only is the topic a vast one but the 25 writers present a wide diversity of talents and insights and come equipped with a rich variety of disciplines and experience. As some of these writers are present and are going to speak, and in the interest of time, I will not presume to present the highlights of their essays and will leave the field open to them.

The first portion of the book, entitled Overview, contains three essays which can be described as anchor essays.

The first by Chief Justice Paul de Jersey, Chief Justice of Queensland, addresses major issues such as judicial independence and Parliamentary Sovereignty. He notes that there is already in existence wide judicial recognition at the highest level whereby courts presume that even general words are to be subject to the basic rights of the individual. Here then no Bill or Charter is necessary.

In this context, Chief Justice de Jersey refers to the work of another Chief Justice who has expressed serious doubts about a Bill or Charter, namely Chief Justice Spigelman of New South Wales, who lists a number of presumptions from which it can be said Parliament does not intend to depart. These include the presumption against the invasion of fundamental rights, freedoms and immunities;

- That against restricting access to the courts;
- That against excluding the right to claims of self-incrimination;
- That against permitting a court to extend the scope of a penal statute;
- That against denial of procedural fairness to persons affected by the exercise of public power;
- That against interference with vested property rights;
- That against alienation of property without compensation; and
- That against interference with equality of religion.

Chief Justice de Jersey expresses as his principal concern:
"...the prospect of investing non-elected judges with a broad, socially-based jurisdiction which they would be ill-equipped, whether by training or experience, to discharge, and the discharge of which would inevitably erode public confidence in the judiciary's fulfilment of its mission, the delivery of justice according to law. The abiding assumption in the citizenry is that the 'law' which judges apply is clearly articulated and predictable in application. Bills of right do not fit that pattern."

The second Overview essay is that by Senator The Honourable George Brandis, Shadow Attorney-General in the Federal Parliament.

He describes the debate about a bill of rights not as being about whether Australians should enjoy the full range of civil and other rights characteristic of modern liberal democracies. Rather it is about means not ends. It is, he writes:

"...about two things: first, whether the protection of the rights which our citizens undoubtedly have would be better served by the enactment of a bill of rights than they are under the existing law; and secondly, whether the debate on the question of what substantive rights Australians should enjoy takes place in the open forum of elected and accountable Parliaments, or is determined by unelected and largely anonymous judges in the cloistered environs of the courts."

He points out that commonly a Bill or Charter of Rights is not a source of rights. They create, he writes, no new rights at all and in this regard, he points to the A.C.T or Victorian bill or charter.

In this, I can verify he has the support of the person who was the architect of the Victorian Charter, namely the Honourable Rob Hulls, State Attorney-General. I was present at the Windsor Hotel this year when the Attorney-General was a guest speaker as part of the Brennan Committee Consultations. He said, "There is no new law in this Charter."

That leads to the obvious question, why have the Charter? Senator Brandis answers by saying—"there is no case for enactment of a Bill or Charter in the absence of any demonstrated need for one."
It is this absence of need which is addressed in some detail in the third of the Overview essays by one of the two editors, Julian Leeser. He points out:

“One of the most important issues in government is the quality of service delivery. The way government impacts regularly and directly on most citizens is through its provision of public hospitals, schools, motor registry offices, refuse collection services and so on.

Many of the significant problems identified by the bill of rights inquiries arise not from what would be commonly regarded as human rights abuses but from poor service delivery.”

In a very valuable Appendix, he analyses specific human rights concerns documented in enquiries held by the ACT and Victoria following their enquiries. This analysis bears out that what was invariably at issue was not the absence of a right or remedy but the failure to enforce an existing Act or regulation or policy.

Before I had read the book the subject of today's launch, I had lodged my own submission to the Brennan Committee. I entitled this, 'A Human Rights Act or Charter – How not to make democracy work.' I had come to the same conclusion as Julian Leeser on the question of need but by a slightly different road. I decided to read the latest Annual Reports bearing on the operation of the ACT Act and the Victorian Charter, I also studied a 10 year official Report on the operation of the UK Human Rights Act.

Turning first to the UK Act, I found that its Report pointed to 16 new case studies that could be added to 15 case studies in an earlier report. I concluded in my submission:

"These cases do not demonstrate that the UK Act made possible an intervention and a beneficial result that was not otherwise available. At best, the case studies generally show that when unjust or unfair situations are pressed or brought to the notice of those in authority, the latter often, if not invariably, respond positively. The Report does not address the fact that most, if not all, of the cases described could have been resolved by resort to existing legal or political remedies.

Many of the cases relied upon in the UK Report as examples of the success of the UK Human Rights Act relate to health. In this area, where poor treatment or neglect has occurred, it has been due to two main causes:
- Failure by the health service in question to perform its obligations under existing legislation, whether statute or regulation;
- Failure by Government to provide sufficient staff or funds.

Neither situation is assisted by a Federal Charter. There are already existing remedies as to poor treatment or neglect which traverse a series of possible steps, including complaint procedures set up as a health accreditation requirement, independent statutory watchdogs and consumer organisations.”

Turning to the Victorian Charter, I submitted to the Brennan Committee no case could be made from actual cases that the Charter provided benefits not already available. I refer to one today by way of illustration – namely, the claim that the Charter was valuable where a prisoner was being transported in an over-heated vehicle and consequently became very distressed. It was reported that the Ombudsman was able to request Corrections Victoria to provide better and satisfactory transport of prisoners.

But this would have happened anyway without recourse to this Charter and I recall illustrations of the wide powers of the Ombudsman vividly as I was the Counsel retained to act for and advise the Ombudsman when the Act first came into force in 1973. So I wrote in my submission:

“Recently, a Supreme Court Judge directed the Prison Authorities on a similar issue in a terrorism trial. There was no reference to the Charter or Human Rights. Any Judge would say it would be otiose. A Judge has wide inherent powers to secure a fair trial without recourse to “human rights” or a Charter.”


I pointed out in my submission that “the largest number of complaints were – as was the case in the UK – in the health area. But “human rights” could scarcely be credited with any progress since Health was already covered by the Community and Health Services Complaints Commission, which was brought within the area of Human Rights Commission. Examination of the case studies published – see page 17 ff – show that these cases had little to do with human rights as a source of relief but rather related to the enforcement of proper operating standards for health facilities.”
I return to the book before us. The second main collection of Essays is collected under the heading of Separation of Powers. The first essay here is that by John Howard, former Prime Minister, who describes the strength of Australia’s democracy as resting on three pillars:

"...our Parliament with its tradition of robust debate; the rule of law upheld by an independent and admirably incorruptible judiciary; and a free and sceptical press. These are the best guarantees any society can have of fundamental rights and we have them in Australia."

Professor James Allen warns us that judges are not gods and that there is no reason at all to think that their view on some moral or political issue is by definition the correct one.

After 21 years as a barrister and 16 years as a judge, I have to agree.

Judges come in all shapes and sizes. When I was at the Bar, the best judges were those who understood the depth and humanity of the common law. They were the ones who found a remedy in difficult, gut-twisting cases. I did not look for a judge who hammered it up, with inevitable risk of failing on appeal. I am troubled by judges who find it necessary to embrace a fashion, hopefully a passing one of inserting a rotund call to human rights when the case can be decided anyway without recourse to imprecise formulas unable to withstand rigorous intellectual scrutiny.

Perhaps some of this is reflected in the final paragraph of Justice Kenneth Hildley’s essay where he writes:

"Human rights are the flavour of the month for some, but the public should realise that they are a sugar-coated pill. An accurate title for such an Act would be the Parliament (Transfer of Powers to the Courts) and Lawyers (Augmentation of Incomes) Act. Politicians and others who advocate a Human Rights Act do so either because they do not understand what would happen or because they understand only too well. The latter hope to increase their power and influence and achieve legal and social change through the Courts they cannot achieve through Parliament. This is government by litigation and when change occurs in this way no one is accountable, not the judges and not the politicians."
More specific challenges are taken up in the next section where the essayists include Dr David Bennett QC, former Solicitor-General for the Commonwealth, and Dr Gary Johns, a former Minister in the Keating Government. Professor Helen Irving discusses the Cost and Inflexibility of Rights committed to an Act or Charter and some Constitutional Problems. She also points to the difficulties of the “Dialogue” proposal in a particularly apposite discussion since the recent Brennan Committee Report appears to favour this model.

In the next Section, we have a range of essayists who have again and again demonstrated their gift for a telling sentence. We have for example, Professor Geoffrey Blainey, H.E. Cardinal Pell and Rabbi John Levi.

So Geoffrey Blainey writes:

“In the Victorian Charter there is the right, under s16, to join a trade union, but not the right to refuse to join a trade union. There are rights for children but not real rights for parents. You will search the Charter in vain for a definite right to own property; instead there is a crafty excuse for that specific omission. Most of the rights set out can be in conflict with each other, and therefore even rights mentioned will, at times, have to give way to other conflicting rights deemed superior by a court or tribunal. If rights listed in the Charter can at times be trampled upon, how much more readily can rights excluded from the Charter be trampled upon?”

As to the familiar lament that Australia is one of the very few countries without a Bill of Rights, he writes:

“It is a really strange argument – that the laws and rights of the people of all nations should be alike. There could be no experiments in the world, even the heartening experiment with democracy in the modern era, if it were agreed that all nations must hold the same basic laws and illusory safeguards.”

Cardinal Pell provides some telling illustrations of the fictions inherent in the likely development of a charter of rights. One such fiction is that which says that majority vote, whether in Parliament or in elections, regularly means injustice for the minority. But alongside this risk, he writes, is the “disproportionate influence that organised minorities can have over the political process.” He refers to the debates in the USA on same-sex marriages which led to legislative prohibitions of same-sex marriages. This led he writes, one academic jurist “to criticise the majority of his countrymen for
using the law to impose their understanding of marriage (as being between a man and a woman only) on the homosexual minority." This, Cardinal Pell writes, is a deliberate distortion of the real situation, in which a minority are actively seeking to impose their redefinition of marriage on the rest of the population.

The final section of the book contains detailed reflections on the A.C.T Human Rights Act, which as I have already indicated, merits close consideration. If the A.C.T Act is — as can fairly be argued — a somewhat useless exercise or worse, then why should we embark on a much wider exercise covering not just the A.C.T but the whole Commonwealth?

May I now turn briefly to one area which is not really covered in this book or in the Brennan Report. I refer to the fact that Australians have successfully in recent years found remedies for difficult issues or, if you like, breach of rights. I refer to the whole system of Ombudsmen and analogous Commissioners or Complaint bodies. One might think, for example, that the right not to be wrongfully or arbitrarily deprived of credit facilities is high up in the list of rights worth defending. This right is not talked about as a human right, mainly because it is adequately protected through the Banking Ombudsman Scheme. I speak with some experience of this Scheme as I was Chairman of this Scheme, which began in 1990 and in which I succeeded Sir Ninian Stephen. This Scheme was followed by Schemes covering insurance, power, water, telecommunications and IT services. It further developed into health complaints, transport, small business, dispute settlement centres, Legal Aid and privacy. These are significant because they resolve disputes at no cost to the complainant and cover approximately half a million transactions each year.

Finally, I have been asked to offer some brief comments on the very recently published report of the Brennan Committee.

The Report is a valuable discussion in that it seeks to put the case for and against a Bill or Charter before coming to a series of recommendations.

There are, however, some brief criticisms of the Report, which I submit. In the limited time available, I refer to just three.
The first relates to the Committee’s response to the question which it commended as an important one. It is set out at page 16, where it found, “many Australians are sceptical about human rights and to calls for human rights legislation.” The Report reads:

“John McCarthy is typical of this group:

I have 3 questions which this consultation should answer: 1. Name a ‘fundamental right’ that isn’t currently protected in Australia; 2. Name a situation in which that ‘right’ has been abused in Australia, with no recourse available to law; 3. Explain how a bill of rights (or charter) will protect that ‘right’ to any greater extent, without limiting others. So far I have seen nothing meeting these criteria to justify any change to the status quo.”

It is these very clear, simple and important questions which the Report never directly addresses. Perhaps the Report may be said to cover this in the Section entitled, ‘Are human rights adequately protected and promoted?’ But this Section simply provides 3 pages each on the Constitution, the Common Law Legislative Protections and Administrative Law. There is no attempt to relate these to John McCarthy’s questions. At the end, the Committee makes its findings in two pages without answering in terms of the three critical questions posed.

Secondly, the Committee should have closely and in detail, considered the operations of the UK Act and the two Australian statutes in the A.C.T and in Victoria to identify what benefits they yielded.

Thirdly, the Committee, both in the Report and in the public interviews which followed its release, placed much store on the record number of submissions it received and the wide consultations it carried out and the support for a Bill or Charter.

As to this, Appendix H of the Report sets out the source – in general terms – for the submissions. When analysed 27,000 of the 35,000 submissions were campaign submissions from GetUp! (14,600) and Amnesty International Australia (10,488) and other campaigns 2,020, leaving 7,900 submissions from individuals and organisations. The campaign submissions were predominantly, if not all, in favour of a Human Rights Act. One might have expected campaign submissions, whatever their source, to be treated with caution, if not scepticism. If non-campaign submissions are considered, it may be well that a majority of these were against the Act. In any event, the Committee appears to place much weight on the numbers and popular support for a Human Rights Act. This raises the obvious question – if the popular will is important in this matter, why not a recommendation that the
proposal for a Human Rights Act be subjected to a plebiscite? The answer may be the 1988 Referendum results suggest the likelihood of an overwhelming rejection.

One last comment. The Report shows much evidence of industry and consultation. It is a pity therefore that in a report of 373 pages of text, there are only three pages on the common law. There are, fortunately, five lines which I quote:

"Over time, the common law has come to recognise particular human rights, including the right of an accused to a fair trial, the right against self-incrimination, immunity from search without warrant, and the onus of proof in criminal proceedings (and the requirement for proof beyond reasonable doubt)."

Whilst acknowledging this, I would have thought that the writ of habeas corpus might have rated a mention. I was educated in two famous law schools where human rights were never mentioned but where the humanity and riches of the common law were passed onto generations of lawyers. One of its great remedies was the writ of habeas corpus, which, from time to time, I applied for as Counsel and later as a judge, granted.

On that note of nostalgia, I bring to a conclusion this launch by congratulating the editors, Julian Leeser and Ryan Haddrick, the essayists and the publishers, the Menzies Research Centre Limited. I quote Sir Ninian Stephen's final sentence in his Foreword: "Australia's democracy is surely the better for the publication of this work" and I have much pleasure in launching it.
TRANSCRIPT OF A SPEECH BY
GENERAL PETER COSGROVE AC, MC, CNZM
LAUNCHING
DON'T LEAVE US WITH THE BILL: THE CASE AGAINST AN AUSTRALIAN BILL OF
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Thanks very much indeed, Tom, for that introduction and, indeed, to the research centre for your kind invitation to me through Julian to launch Don't Leave Us with the Bill.

Just before I make a start, awhile ago in referring to ructions between the official level of the Department of Defence and the ministerial level, some reporter opined that it had been thus for years.

There was a significant break when Robert Hill was there - don't leave us with the Hill might have been what the journalists were implying. But I'm delighted to see Robert home. He was a wonderful steward of the portfolio and I said so in my great work of fiction, my memoirs. It doesn't need to be that ministers and their - the servants they have in their departments are automatically at daggers drawn.

I've had the opportunity to launch many books over the last couple of years, maybe 10 or 15 - anthologies and poems, historical accounts, great works of drama and fiction masquerading as memoirs. But this is without doubt the most significant, grasping as it does, not touching upon but grasping, one of the most crucial issues of our time, our time, not of the economy domestic or global, the problems there pressing but ultimately solvable and transitory; not of security, even though these issues can at times cause us the greatest dread and anguish.

Instead it is an issue which goes to the heart of our democratic conditioning, our expectations of the law of our governments and of our judiciaries. Such a book is Don't Leave Us with the Bill.

One of the reasons why when commentators were opining of relationships of times past within the Department of Defence and between the department and its ministry, that I remain silent was a bit of a convention that old CDFs are better to be seen but not heard and not seen too often.

So I just kept my peace as a member of the silent majority. In our lifetimes, a pundit coined that term, the silent majority. He didn't mean that the majority of which he wrote were in favour of this thing or that thing. I'm sure he meant that the majority was simply silent, a sort of vocal inertia, a retreat into the form guide of life unless reluctantly enraged.

In 1975, Gough Whitlam must have known as he famously intoned, 'maintain your rage', that he had a couple of weeks at most before the test cricket started and Christmas came around.
Isn't it interesting that the republic referendum gained our full public interest for longer than the dismissal and the replacement of a government? Now, I'll agree that the battle raged on in the esoteric levels of academia and politics and the commentariat, but not within the public.

Now, in both of those seminal moments, the dismissal and the referendum republic, I remained a member of the silent majority for the obvious reasons. First, my duty - I was in uniform on both occasions - and my confidence in our system and the silent wisdom of the Australian people, sometimes an unlearned, intuitive wisdom but a great wisdom nonetheless.

Such silence guides governments as much as does the occasional outburst of passionate reaction. Relative silence has so far characterised the renewed interest in an Australian bill or charter of rights, and hereafter for simplicity I'll simply refer to it as a bill.

For many Australians, we are comfortable that the national debate on high policy issues be evolved, fought out and decided at esoteric levels. For most of us, a quick read of the op-ed pages of our favourite broadsheet to provide us with a point of view to express at the water cooler suffices for our in-depth knowledge of arcane issues, cautionary, arcane compared with the goings on in our favourite football code.

Referenda are somewhat different. We learn at our father's knee that the Federal Government would not ask for a decision through a referendum unless the matter involved was far-reaching and contentious.

After a few false starts over the years, the notion of a bill of rights, now resurrected through the medium of the Brennan Review, is as important an issue, possibly more important as an issue than, say, the debate on the republic. Yet until now, it has largely been an issue confined to the commentariat.

Many Australians, not least many Victorians and Australian Capital Territorians, would be surprised to find that their jurisdictions were operating statutory bills of rights. It seems that unless a bill of rights is invoked relative to you, to your advantage or to your detriment, then it remains an obscure fabric, part of the great legal security blanket of our society, keeping us warm and safe and taken very much for granted.

It probably takes a referendum in this country to properly get the public juices flowing. Republicanism did it for us just as the conscription referenda did in World War I. Something needs to do it for us, for the bill of rights, or its mundanity might become its monstrosity.

As, by now, a well travelled person, I like our democracy. I've been to countries where their bill of rights have not made a jot of difference to the crushing inequities within their societies. Yet their diplomats and intelligentsia will froth on, advising Australia of our shortcomings in this regard. Our forward scout in the United Nations, Robert Hill, can probably enumerate the lectures he has received on the subject.

Australians are rightly suspicious of apparent me-tooism. Profound and enduring laws ought not to be a fashion statement. Are these societies, where bills of rights overarch the
administration of law, better places to live than Australia? Places where inequities are immediately prevented or immediately redressed.

The founders of our federation left us with a Constitution, but not a bill of rights. They wanted the elected government to make laws and for the judiciary to administer them. It seems they had intended for the constitution to be the only immutable. But the Constitution itself was available for change, but only by an irresistible majority. Perhaps they understood that a bill which sought to codify rights then, would chafe badly on an evolving society.

Immigration policies, social justice issues, particularly those involving Indigenous Australians, these and other important rights issues, would have been differently treated in 1901. It seems that the founders expected that the elected governments of the day would do their job of responding to the contemporary needs and demands of the people, paying the usual price for inattention, or error.

That principle has brought us through many sea changes in social attitudes. The ideologies and policies of many governments in our federal system, have been tried and exploited and discarded, along with the Governments which had espoused them. Those elected governments, with their dynamic ability to create laws which may be contemporary and often transitory, are balanced by the longevity and narrowly profound expertise of the judiciary, in interpreting and applying the laws made.

Australians, perhaps intuitively, like and prefer this system. It allows us to respect and support the judiciary, because they administer the laws of the land, laws that they have been given. It allows us to pressure the Governments to react with policies and laws, to meet particular needs and demands within the boundaries of our constitution.

Our judges are not elected. They are good men and women for whom we have enormous respect, although I once did hear a man in the dock at the Old Bailey use frightful language at a judge, and at least one of the essayists joined them in the term unrepresentative swill. I'm sure he joked.

By definition, they have an encyclopaedic knowledge of the law and over time a profound knowledge of human nature, but in the particular. They live necessarily in a cloistered environment - not too many high court judges have had substantial second careers. We understand and approve of this notion of the cloistered judiciary.

One of the features of a bill of rights is the interpretative role of the judiciary in comparing the generic, indicative language of the bill with other legislation to produce an outcome. Judges may be empowered to read down - that is to change the apparent affect of the other legislation, to conform with the personal interpretation of the bill. Judges don't have the personal experience, or the wider resources, to comprehend the full gamut of policy issues involved in decisions which, often made in the particular, may have the broadest impact. Politicians in power have the advantage and the burden of the full range of bureaucratic advice, policy options and community pressure, all this before making law or policy for which he or she is directly and speedily accountable.
Much has been made of the possible statutory nature of an Australian bill of rights. In other words, the Parliament giveth and the Parliament taketh away. Even a mildly cynical review of the history of statutory bills of rights in other similar democracies, shows that the overarching nature and the superficially appealing language of these makes it extremely hard for a government to roll it back in whole or part.

I was interested, and then fascinated when I read through *Don't Leave Us with the Bill*. It canvasses the history and the import of bills and charters and rights and comprehensively and persuasively argues against this course for Australia. The essayists, which include the editors - and compliments to you both - number some of the most well known and respected members of our national community.

The 25 essays, the foreword and the afterword, are not only fascinating, but an exhaustive treatment of a subject of seminal and immediate significance. It is a vital and timely contribution to a debate, which needs to pass from Chambers and common rooms, to Speakers Corner and the Public Bar. I commend Julian Leeser and Ryan Haddrick as editors, and the Menzies Research for bringing you the thoughts of the essayists, to us, in this way. And I thank the essayists on behalf of the Australian public for this powerful collective contribution.

Before reading this publication, which I have the honour now to launch, like most Aussies I was perplexed but vaguely worried about the prospect of a bill of rights for this nation. The rights to be described were unassailable. The probable language; soothing, seductive even. The effect though would be sedative and insidious. Don't leave us with the bill.