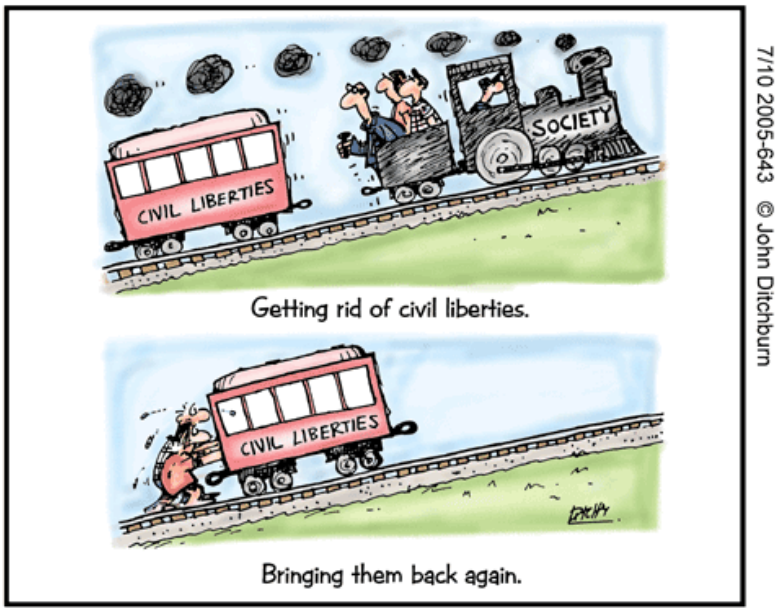
From history, into the future

> ***'The condition upon which God hath given liberty to man is eternal vigilance; which condition if he break, servitude is at once the consequence of his crime, and the punishment of his guilt.'[1] 1790***

> ***'The struggle for civil liberties … a journey that is never ending.'[2] 1995***

The conclusion from the earlier chapters, which partly illustrate probably millions of hours of selfless and volunteer toil by thousands of people seeking to maintain Australia's civil liberties, is that the challenge goes on. The situation is well summed up by the cartoon that Civil Liberties Australia uses:



People's liberties and freedoms in Australia rest on slippery sand. That was perfectly illustrated when the Covid-19 pandemic hit in early 2020, and personal freedoms disappeared. Fixing those issues will need major corrections to our laws, rules and practices.

> ***'A virus emergency turned politicians into dictators. Which was in greater danger, our health or our freedoms?'[3]***

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[1] John Philpot Curran, Speech on the Right of the Election for Lord Mayor of Dublin, 10 July 1790 https://tinyurl.com/h68vd2m

[2] Former judge of the High Court of Australia, Michael Kirby, in his speech *'We Are All Civil Libertarians Now'* at the 30th anniversary dinner of the NSW Council for Civil Liberties, Sydney, on 13 April 1995

[3] Bill Rowlings, CEO Civil Liberties Australia (CLA) 2020

But there are other fundamental, entrenched, major and long-standing problems that must be addressed, so that the agenda for protecting Australians' liberties and freedoms in the 2020s is clear:

- correcting never-ending **Indigenous disadvantage**/inequality;
- eliminating **inappropriate powers:**
    - reining back political, bureaucratic, security and police controls created under the false premise of major '**terror threat**" to Australia;
    - overturning the abused system of **police investigating police** (PIP), under which flagrant abuses of power are not held to account;
- literally, re-forming the nation's legal system to put "**justice**" at its core;
- protecting personal **privacy** from political and media intrusions, by law; and
- embedding a **national rights law** so citizens understand their responsibilities and enforce their liberties quickly and easily under the law in the nation's tribunals and courts.

Other issues will bubble up from time to time. The pandemic known as Covid-19 is a current, but temporary, phenomenon at the start of the 2020s. (See 'Covid-19', later).

Where to start?

Australia lacks a freedoms culture, despite its 'fair go' reputation. Government ministers promote military myths, wrapped in a flag dominated by the emblem of a foreign nation. They and our military officers sign formal obeisance to a germanic family half a world away that invaded our continent. We claim to be "special", but we are not even our own people: we're a subset of a monarchy, so we don't own our democracy. Day-to-day, we bow before another foreign power which controls world communications: it's naive to think we're not a pawn in a global game.

No-one is Australia is responsible for guaranteeing the people's liberties and freedoms. There is no rights law underpinning them. The Australian Human Rights Commission (AHRC) says of itself that it "is an independent third party which investigates complaints about discrimination and human rights breaches". It cannot enforce rulings. There is no rights and liberties education in Australian schools, or for migrants. By inaction, governments actively encourage keeping the people ignorant of their entitlements.

By contrast, there is a National Security Committee of Cabinet, and Australia is replete with agencies holding overt and secret powers to control the Australian people: Federal Police, Office of National Intelligence, Security and Intelligence Organisation, Secret Intelligence Service, Signals Directorate, Transaction Reports and Analysis Centre, Cyber Security, Geospatial Intelligence, High Tech Crime Centre…etc. These agencies are designed – and their legislation is drafted – to repress liberties and rights. They are all the spawn of the Australian Parliament.

The nation's unbalanced rights pendulum starts with the parliament. There is no mechanism for independently evaluating standards of morals and ethics to ensure that the government, its ministers, politicians and bureaucrats always act with propriety towards the Australia people in resource/funding allocation and decision-making. There is also no mechanism to hold people to public account, through a commission or tribunal process. States have commissioners against corruption, but there is no federal equivalent. While not strictly a civil liberties issue, having a corruption cornerstone is vital to make sure the nation stays straight and true.

Indigenous disadvantage

No fundamental rights and liberties concern has had more taxpayer money allocated to it to lesser effect than what goes to the "Indigenous industry". Some people might think the "industry" comprises Aboriginal groups from land councils to women's prisoner aid organisations. But no, much of the "industry" is actually non-Indigenous people making decisions, taking actions, and spending taxes supposedly for the betterment of Indigenous people.

There needs to be a national civil and political rights charter which acknowledges the special place that Indigenous Australians occupy in the history and future of the nation. The charter needs to empower Indigenous people to decide their issue for themselves, as part of the Australian whole.

Can you imagine a more prosperous Australia more equal than now? Until you can, we can't get there. An easy way to know when we make it will be when Aboriginal mythology and stories will be valued as much as the Anzac myths and Gallipoli re-tellings, and Australia has an Indigenous Day march each year.

Indigenous disadvantage also plays strongly into two specialist activities of CLA: prisons and sports. These cover the rights and responsibilities (and conditions/ censorship) of prisoners, and the rights and responsibilities of sports people/ administrators, particularly in junior sports.

Reining back powers – 'terror threat' excess

A muddle-headed analysis 20 years ago – immediately after "9/11" – has bequeathed us a legacy of frightened politicians. They actually fear a terror threat that focused on America: Australia was never a prime or even secondary or tertiary target. It's beyond time for a radical, sensible reassessment.

The imposition of draconian laws, in the name of "fighting terrorism", has been a signature effect of the first two decades of the 2000s. The moves began when anti-American terrorists flew four large aircraft into New York's Twin Towers, the

Pentagon and a remote field in September 2001, killing about 3000 people of whom 10 were Australians.

Australia has paid a considerable price – in military lives, financially and in domestic freedoms lost – through following the US into "wars" and escapades around the world in the 20 years since. We adopted the mindset of the misclaimed, ill-named 'war' on terror even though we were never on any international terrorist's to-do list. (15 of the 19 aircraft hijackers were Saudi Arabians: the Kingdom of Saudi Arabia has not paid the price that Australia has. Quite the opposite).

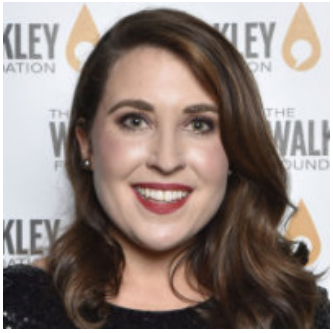
The lasting impact in Australia has been on domestic law. Australians have lost liberties and freedoms at an alarming rate. People's rights have been systematically transferred to police, security agencies and the military. For example, laws now allow governments to turn out the defence force, with unbridled powers to shoot and kill, anywhere in Australia. In late-2020, a proposal to grant similar powers to foreign troops in Australia was being considered by the Australian Parliament.

The Australian Human Rights Commission has issued a comprehensive publication: *A Human Rights Guide to Australia's Counter-Terrorism Laws.*[4] On-line media such as *New Matilda* have been constant in their protests.

> *"Something is wrong in our national debate when our federal government can flip the switch to terror so easily, and apparently with the wholehearted enthusiasm of most of our media."*[5]

However, the government then bit the media on the bum: it abused the terror laws to severely curtail journalists' freedom of speech, aptly summarised as:

> *Never has an Australian government talked so much about freedom while doing so much to undermine it. When it comes to national security and refugees we are increasingly pathetic.*[6]



The assault on media freedom was proven on 4 June 2019 by a major AFP raid, accompanied by full TV publicity, on the Canberra home of Walkley-award-winning journalist Annika Smethurst (photo) of News Corp Australia. The "bust" included seven hours of intimidatory rifling through her underwear and cookbooks and seizing her e-devices. The High Court later ruled the search warrant used by the AFP was illegal. The

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[4] https://www.humanrights.gov.au/human-rights-guide-australias-counter-terrorism-laws

[5] *New Matilda* 23 September 2014

[6] Ben Saul *The Drum* 7 October 2014 http://www.abc.net.au/news/2014-10-07/saul-the-light-of-human-rights-is-fading-in-australia/5794640

AFP graciously announced in May 2020 – after a year of Smethurst's mental health living dangerously – that she would not be charged. Her "sin"? She revealed that the departmental bosses of Defence and Home Security were plotting to allow Australia's cyber security agency to pry electronically into Australian citizens whenever they liked, something that was then banned. What is the long-term outcome? That type of prying is to be allowed in new laws.

Just 24 hours later after undie-bombing Smethurst, the AFP raided the ABC headquarters in Sydney[7], chasing down the sources for a two-year-old story of alleged murder ("unlawful killings") by Australian SAS troops in Afghanistan. The Federal Court later declared that raid legal. It targeted ABC News director Gaven Morris and journalists Dan Oakes and Sam Clark. It wasn't until October 2020 that all three were "freed" from the threat of federal government legal action: the Commonwealth Director of Public Prosecution, Sarah McNaughton (photo), announced she would not proceed against Oakes because, she claimed, there was sufficient evidence to charge him but it was "not in the public interest" to do so[8]. She did not explain why that was not immediately obvious to any senior federal law officer 16 months earlier, if not indeed before the raid took place. The outcome? Four years after a military reservist Supreme Court judge was given the job to investigate the allegations, the results had still not been revealed publicly.

Australia is darker, more repressed and secretive, a less open place entering the 2020s than it was in 2001.

The Executive and the Parliament of Australia – Coalition and Labor – have presided over a transfer of power from the people to a centralised, sometimes uniformed bureaucracy, represented most graphically by a black-shirted Department of Home Affairs, and most influentially by an Attorney-General's Department which stands for political corporate power rather than the people. The change suits the establishment: we now live in a closed, opaque system where ministerial responsibility is a vague memory, obfuscation is the first response to legitimate public questioning, and a born-to-rule mentality is replacing the old notion of serving the people.

So in the name of a "terror threat" that never eventuated in Australia, we have lost personal liberties, seen the collective rights represented by frank and open reporting diminished substantially, become cyber spied on and been transmogrified into digital entities of photos and facts corralled into a centralised database. The very people we've elected to safeguard representative democracy have made a mockery of it.

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[7] https://www.abc.net.au/news/2019-07-15/abc-raids-australian-federal-police-press-freedom/11309810

[8] https://www.abc.net.au/news/2020-10-15/dan-oakes-afghan-files-prosecution-decision/12771304

We'll know we are turning this sorry state around when we have achieved a federal anti-corruption commission, "with teeth" as the expression goes, which has exposed the first tranche of politicians, senior bureaucrats and agency chiefs for abusing their positions and power. There are at least a dozen major allegations on which such a commission could begin work immediately: it will be the busiest entity in Australia.

Justice

Just to show how uneven 'justice' is in Australia, for four years the alleged killers in the ADF (see above) have not even been charged. Their identities are known; there is video of their actions or inactions; there are copious written reports of what happened, and eyewitnesses prepared to testify. But no charges have been laid and the world's slowest public inquiry is grinding into its fifth year without a published result.

In South Australia, an Aboriginal man, Derek Bromley, has been 37 years in jail because he is innocent, not because he is guilty[9]. In the same state, the integrity of some 400 major trials for cases including violent attacks and baby-bashing deaths are in doubt, as is the legality of 400 autopsies…but the state government won't meet its responsibilities to investigate by a royal commission.

In Tasmania, two males continue to walk free, untroubled by the police, even though the state's most senior legal figures have been made aware with documented evidence that – at the very least – the relevant police and legal situation should be thoroughly investigated. A by-product of this inaction is that a woman has served 11 years, and counting, wrongfully convicted in prison.

In WA, Aborigines will no longer speak to police unless forced to because so many Aboriginal people have been killed by police action – or indeed, inaction – over the past few decades. Police speak though, too freely and too often: they name someone as a "person of interest", which immediately sets the media hounds running, when the police have no firm evidence that the person has committed any crime. Police Commissioners won't rein in their officers: the only thing that might stop the practice is the increasing compensation awards awarded to people wrongly named. At some stage, police need to hold the 2% of bad police responsible for giving the 98% of good officers a bad name.

In courts and tribunals, people who have trained for 20-30 years to be excellent barristers are made instantly into ersatz judges without even a week of required further education or training. No wonder so many wrongful convictions occur (about

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9 *' Shocking' scandal nobody wants to touch* https://www.cla.asn.au/News/shocking-scandal-nobody-wants-to-touch-mp/

6% of major cases in 2020, CLA believes[10]). Some errors are caught on appeal when the facts reach experienced appeal judges. No other pillar profession in society – doctors, scientists, academic professors – can be suddenly elevated into a new, higher role without mandatory training or extra study. But people becoming judges can be.

Australia's prisons are overcrowded: most of them hold near-double the numbers they were designed for. The theory is that people are jailed for punishment and rehabilitation…but there is no rehabilitating in any meaningful sense of the word. Prisoners can't readily access education, and ill-educated prison officers impose senseless censorship on mail and reading material.

The massive disconnect that is the legal system across Australia needs firstly a national inquiry into how it fits together (or doesn't), and whether it is fit for purpose in the 2020s to serve a modern democratic nation. Basic questions need addressing:

- can juries nowadays cope with highly technical forensic evidence (can judges cope is an equally valid question)?
- is a different type of trial needed for some types of cases?
- are better-trained judges needed?
- how can we reduce the roughly 6% of wrongful convictions that we know from analysis occurs in major cases like murder, rape and gross bodily harm? and
- is the error rate more like 10% for "minor" crimes?

We'll know we're on the right track with this challenge when the first federal, state or territory government initiates a full, open, transparent inquiry into the legal-justice system. There has never been one, not in 120 years of federation. No-one has ever taken the time or trouble to work out if Australian justice gives people a fair go.

Note: Civil Liberties Australia has long-term projects under way to improve justice for prisoners and for people involved in sport (from school age to adult). Both these areas appear to be little-covered by other liberties and rights bodies.

Privacy

The right to privacy is recognised as a fundamental human right in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR) and other international instruments and treaties. Article 17[11] of the ICCPR, to which Australia is a signatory, provides:

- No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation, and

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[10] https://www.cla.asn.au/News/prisoners-australia-7-innocent/

[11] https://tinyurl.com/yclwjeh8

- Everyone has the right to the protection of the law against such interference or attacks.

The Australian Law Reform Commission report in March 2014[12] drew attention to the emerging threats to privacy. It called for a new law, a "statutory civil cause of action for serious invasion of privacy". [13] There are civil action causes in NZ, UK, the USA and Canada…but Australians don't have equal rights to people in those countries.

Recently there has been much more attention paid to the rapidly-expanding technological capacity of organisations not only to collect, store and use personal information, but also to track people physically, to keep them under surveillance, to collect and use information posted on social media, to intercept and interpret the details of telecommunications and emails, and to aggregate, analyse and sell data from many sources.

New technologies inevitably involve extensive invasions and pervasions of privacy. There are also major issues around government and private surveillance techniques, like CCTV and drones in private and public places, along with rapid facial identification against photo/video databases. One centralised government database now holds masses of information and images on virtually all Australians: the potential tool of suppression/repression run by the Australian Criminal Intelligence Commission[14] but open to many other public – and private – bodies.

People can use/abuse mainstream and social media to destroy a person's reputation. Once traduced, a reputation is unredeemable. Prevention mechanisms are urgently needed, coupled with cures for privacy assaults that can't be prevented. Attacks can come from anywhere in the world, so that global solutions are needed. There are basically no personal privacy rights in Australia: no personal space is guaranteed in law. We have instead waffly "principles" seldom understood and even more infrequently enforced. The Attorney-General's Department was supposed to be working on a new social media privacy policy in 2019-20, but its annual report says the work is "delayed".[15]Unfortunately, abuse of the privacy of people is not.

We need specialist privacy law, criminal and civil, as a matter of urgency. Initial success will be when the first such law is passed by the Australian Parliament. While a major parliamentary consultation process was announced in late 2020, it will take at least another 10 years of campaigning to produce good, workable, operative laws.

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[12] https://tinyurl.com/y24lkyz6

[13] https://tinyurl.com/y2roqnjf

[14] The Australian Criminal Intelligence Commission (ACIC) is a law enforcement agency established by the Australian federal government on 1 July 2016, following the merger of the Australian Crime Commission (ACC) and CrimTrac. It has specialist investigative capabilities and delivers and maintains national information sharing systems. – Wikipedia 200801 https://en.wikipedia.org/wiki/Australian_Criminal_Intelligence_Commission

[15] https://tinyurl.com/yytt3l5g

***National rights law** (‘bill of rights’)*

When we try to evaluate the 20-year incursions that terror laws have perpetrated on traditional Australian rights and liberties, we have no yardstick to measure their impact, because we have no foundation document, no bill of rights.

A proposal for a bill of rights was put forward in the Constitutional Conventions in the 1890s. The proposal was lost 19 votes to 23. Most delegates were afraid a bill of rights would undermine the discriminatory legislation at that time, including those laws and practices which disadvantaged Aborigines and the Chinese. Australia’s Constitution was therefore founded with discrimination as an underlying principle: surely it is time to correct that ignorant error?

Photo: Delegates to the Australasian Federation Conference, Melbourne, 1890. One of the main drafters, Andrew Inglis Clark of Tasmania (top left), was the most progressive politician in Australia and an advocate for the US Constitutional model, which included a bill of rights.

The convention, which was well aware of the importance of the US Bill of Rights, rejected rights provisions in part because they believed the British tradition was enough protection for people in countries like Australia, Canada and New Zealand, which had inherited the Common Law from the Mother Country . Their thinking may have been vastly different if they had known that the UK, Canada and New Zealand would each have their own, individual bill of rights in future. Now, only Australia is rights-less.

Since Federation, there have been formal attempts or proposals to introduce a bill of rights or to insert rights into the Australian Constitution in 1929, 1959, 1973, 1983, 1988 and 2008-9.

The Fraser Government (1975–1983) established a national Human Rights Commission, a federal Ombudsman, and Freedom Of Information (FOI) provisions[16], as a form of compensation for not introducing the 1973 proposed a bill of rights. The next (Hawke) government[17] (1983-1991) established the Human Rights and Equal Opportunity Commission[18] but was far more focused on fiscal rather than social matters. During this period, Australia also ratified various international treaties,

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16 https://en.wikipedia.org/wiki/Fraser_Government

17 https://en.wikipedia.org/wiki/Hawke_Government

18 The News Manual National Security and anti-terror laws in Australia http://thenewsmanual.net/Resources/medialaw_in_australia_06.html

which are an important part of the nation's human rights obligations, even though they are widely ignored in practice because they have never been made mandatory by passing equivalent Australian legislation.

Realising the undeniable need for rights and liberties protections in Australia, the ACT in 2004, under former ACT Council of Civil Liberties President Jon Stanhope as Chief Minister, brought in a Human Rights Act. Victoria followed in 2006 with a Charter of Rights and Responsibilities sponsored by Attorney-General Rob Hulls.

In 2006 and 2007, Tasmania and Western Australia commissioned public consultation processes into human rights protections. Both recommended that a Charter of Human Rights be enacted at a State level[19] but neither was enacted. Queensland became the third jurisdiction with its own human rights law, enacted in 2019 and operating from 1 January 2020.

On 10 December 2008, Attorney-General Robert McClelland (photo, with CLA President Dr Kristine Klugman) launched the National Human Rights Consultation. The consultation was conducted by an independent Consultation Committee, which was chaired by Father Frank Brennan. After extensive community consultations across the nation, the Committee made 31 recommendations, including that Australia should adopt a federal Human Rights Act. But the political will in the Labor government was missing.

On 21 April 2010, AG McClelland instead introduced a wimpish 'Australia's Human Rights Framework' implemented by the *Human Rights (Parliamentary Scrutiny) Act 2011 (Cth)*. The Act, operating from January 2012, is a toothless tiger with gum disease: all it established was:

- a Parliamentary Joint Committee on Human Rights with five from the Senate and five the House of Representatives; and
- that new Bills must have a 'statement of compatibility', including an assessment of whether the Bill is compatible with human rights.

While the committee highlights areas where proposed laws are deficient, it has no power to mandate that human rights are inserted into Bills when they are missing. In practice, after an exchange of letters between the minister responsible for the Bill and the committee, the committee merely points out problems to the Parliament…which ignores them.

[19] UNSW Gilbert and Tobin Centre of Public Law http://www.gtcentre.unsw.edu.au/node/3070

The rest of the meaningless 'Framework' – at first heavily promoted on the AGD's website – disappeared totally a few years later, as did the 2008-9 consultation report.

As power continued to centralise into the federal sphere, a mechanism that should have helped ensure increasing attention to rights and liberties in Australia included the Council of Australian Government (COAG), representing the federal, state and territory and local government entities. But the ministerial consultative bodies stemming from COAG simply ignored human rights entirely, concentrating on police and security matters instead. In a long list of responsibilities for its "Law" sub-council, there is no mention of human rights or civil liberties.

On 29 May 2020, the Prime Minister Scott Morrison suddenly announced the death of COAG)[20] – his statement that "COAG is no more" came as a surprise to the states and territories, which were meant to be equal partners.

PM Morrison announced the forming of a new National Federation Reform Council (NFRC), under a system headed by a National Cabinet at the centre of the process. But again, there was and apparently is to be no mention of the need in Australia to tend to human rights, liberties and freedoms, which have languished in a fallow national field for 120 years. Untended, unwatered, they are gradually dying from neglect. No National Cabinet would be properly functional unless human rights, civil liberties and citizens' freedoms formed a core and consistent part of all its deliberations.

The Attorney-General of Australia (Christian Porter at time of writing) is the nation's First Law Officer and is responsible for "people's rights". This is no abstract concept: it lists precisely that responsibility in the annual report of the AG's Department (AGD). It is very concerning then to read of the AGD's 'Target and Performance result' in its 2020 annual report. There are five categories, and the aim is to record a satisfaction rating resulting from a formal consultation with stakeholders of 80% or more. For Legal (93%), Integrity (88%) and Security (81%) categories, the AGD achieves better than 80%. But it fails dismally in Justice (74%) and Rights (65%).[21] The 65% rating is an indictment on how much attention the AG, AGD and the Australian government generally pays to the rights of Australians…and to justice, for that matter.

Australia will know its rights and liberties culture is changing for the better when we have commitments to a bill of rights from our political leaders. Australia's business leaders, farmers and women's groups, Aboriginal bodies and of course all social justice organisations are already committed: politicians are well out of touch, and a long way behind the people they represent, on this core issue.

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[20] https://www.pm.gov.au/media/press-conference-australian-parliament-house-act-29may20

[21] AGD annual report 2019-20 https://tinyurl.com/yybq66yl

We should not lose sight of the fact that we also need to think globally at times. There are many issue to be considered, including:

- genetic engineering;
- mass relocation and re-education of populations; and
- climate change, caused by the rich few, drowning and killing the many poor.

<u>Keeping civil liberties running…together</u>

Of course, the battles outlined above can only be fought and won if bodies like Civil Liberties Australia, other councils for civil liberties, human rights groups and the like continue to operate.

The reaction of civil liberties groups around Australia to the terror laws incursions on traditional rights over the past 20 years has been to protest in submissions to parliaments on the various tranches of legislation, to make representations to ministers and put out media releases. Most vocal have been CLA, NSWCCL, and Liberty Victoria. Some limited joint submissions have been made, but it is starkly evident that genuine cooperation between all civil liberties and human rights groups across the nation would have been an advantage in presenting a united front of opposition to the government. Finding a cooperative model is a future challenge.

As well as adopting a joint approach of some sort, these bodies need individual support: they require individuals or families in reasonable numbers to think more frequently about their own and others' freedoms, and to contribute to highlighting how easy it is to lose them. Covid-19 and the emergency pandemic laws taught Australians an instant lesson – at a moment's notice, you can lose personal liberty to walk in the open, and the liberties of movement overseas, public assembly, going to work and school, and even enjoying a coffee shop or a restaurant at a moment's notice.

There wouldn't be more than about 5000 Australians currently volunteering to secure and safeguard rights and liberties. The first target must be to lift that number tenfold to 50,000. With a considerable core, it will be possible to create a culture of rights in Australia, forcing the politicians to follow what the people want, as survey after survey has shown: a bill of rights and protection of a 'fair go'.

If large numbers of Australians are not prepared to fight – and vote – to retain our liberties, perhaps we deserve to lose them even more than we have lost them in 2020.

> ***'It is the common fate of the indolent to see their rights become a prey to the active.'***[22]

[22] See footnote 1: Same speech: John Philpot Curran, Speech on the Right of the Election of the Lord Mayor of Dublin, 10 July 1790, in reform, newsletter of the Law Reform Commission, April 1986, no 42, p84

What the Covid-19 virus pandemic taught us:

"The virus shall pass, but behind it will leave the sour taste of how a sudden health emergency – a virus – turned politicians into dictators, raising the question of which was in greater danger, our health or our freedoms?" as Civil Liberties Australia's CEO Bill Rowlings wrote at the time.

Most civil liberties[23] and human right bodies initially supported the national and state/territory pandemic responses, along with emergency draconian laws and regulations: restrictions were needed in the cause of community health, they believed. But it's interesting to see what played out as the virus caused panic.

- Remote Aboriginal communities quickly ran out of essential foods and goods, which were stockpiled by suburbanites; communities couldn't buy hand sanitiser for love or the excessive money they are used to paying.
- Police commissioners were handed extraordinary powers over people's lives.
- Some police behaviour, as usual, became excessive, and citizens learned how traditional small liberties – a walk in the park, a sunbake at the beach – could be lost instantly on the say-so of a figure in uniform self-interpreting laws poorly thought out when passed.
- The concept of justice for the community gave way to strict legality.
- Personal privacy took a battering as cameras zoomed in to the working rooms of people locked and loaded with children in their own homes.
- And there was nowhere to go to defend or claim rights we thought we had, like travelling overseas when we choose to, and not being locked up for weeks in one hotel room where the windows didn't open and half-baked security guards were dangerous disease carriers.

Soon we all learned how politicians could close borders to their own political advantage. One state denied one territory right of passage over its roads for a week, making a nonsense of a long-withheld speech[24] by the Chief Justice of the High Court a year earlier which included the comment that Australians enjoyed "freedom of movement". While personal liberties – freedom of movement, freedom of association – are bound up in the borders questions, the problem requires solving constitutionally if the 120-year-old "federation" is not to disintegrate.

If you lock people in their houses, and don't let them out, then…

- Even tougher security laws won't make much difference when there's no crowds to bomb.
- More police don't help when their major work every day is stopping you doing what you have traditionally been free to do, at your leisure.
- Lower taxes are not much use if there are no cafes or restaurants open where you can spend your money.
- Cheaper petrol or electricity is pretty irrelevant if you're only allowed to drive 5km.
- Maybe we can spend a lot more money on health and mental health, because we're going to get very fat and highly stressed if we can't go to gym when we want.

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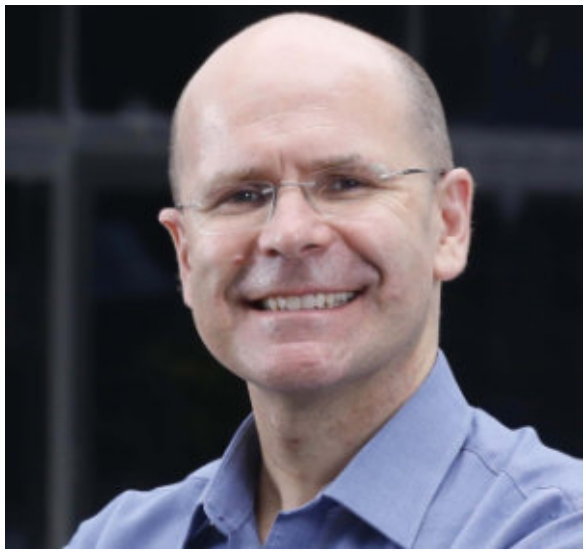
[23] Certainly, CLA agreed with need for most of the pandemic-dictated, temporary restrictions

[24] '*Human Rights Without an Enacted Statement of Rights*', essay/speech by Susan Kiefel, Chief Justice of Australia, published in NZ December 2019 (speech delivered on 1 February 2019 at University of Auckland) in *The Promise of Law: Essays marking the retirement of Dame Sian Elias as Chief Justice of NZ*, Lexis Nexis NZ Ltd 9781988546070

Summarising what has gone wrong over two decades…



Professor George Williams (photo) penned a revealing article in 2015:

An extraordinary number of Australian laws now infringe basic democratic standards, but we hardly bat an eyelid.

This year (2015) has borne out former prime minister Tony Abbott's prediction that "for some time to come, the delicate balance between freedom and security may have to shift". Government agencies can now access the metadata of every person, journalists can be jailed for reporting on matters of public interest and Australians can be banished after having their citizenship revoked. This … led one Liberal MP, Andrew Nikolic, to suggest that the idea of protecting civil liberties in the context of national security has become "redundant".

Comments such as this reveal how far the Coalition has travelled since it took office in 2013. As a new government, it cast itself as the champion of basic freedoms, and lambasted restrictions on speech such as section 18C of the racial discrimination act. Any such pretensions have since been demolished by the government's own rhetoric and actions. It has moved on from section 18C to introducing laws that jail people for up to a decade for disclosing information about intelligence operations that reveal a misuse of power.

This shift by the Coalition is more than just an example of changing political priorities. Indeed, the same change has been evident in Labor, which has voted for every one of the government's national security measures. Something deeper and more troubling is at work.

This year (2015) I conducted a survey of the statute book to find out how often our politicians have passed laws that infringe upon democratic rights. The results were surprising and disturbing.

> **'Something needs to change if the slide towards ever greater government power, and fewer rights for the people, is to be stopped.'**

First, an extraordinary number of Australian laws now infringe basic democratic standards. All up, I found 350 such laws in areas as diverse as crime, discrimination, anti-terrorism, consumer law, defence, migration, industrial relations, intellectual property, evidence, shipping, environment, education and health. The scale of the problem is much larger than might be thought, and extends well beyond a few well-known examples.

Second, what is striking is not only the number of laws raising a problem, but that so many have been enacted over recent years. Of the 350, around 60% have been made since the September 11, 2001, terrorist attacks (with a high number also enacted since 2013). That event marked an important turning point. It and subsequent acts of terrorism have

given ever greater licence to politicians to depart from long-accepted understandings about democratic rights. As a result, measures that were unthinkable have become commonplace.

Third, since September 2001, enacting laws that infringe democratic freedoms has become routine. Rights are not only being removed in the name of national security or counter-terrorism, but for a range of mundane purposes. Speech offences now apply to many public places and occupations, and parliaments have greatly expanded the capacity of state agencies to detain people without charge or arrest. Laws such as these have become so normal and accepted that they tend to be enacted without eliciting a community or media response. As a result, our elected representatives can abridge democratic rights without paying a political price. Indeed, in many cases, such laws pass with the support of the opposition, and after only cursory debate in parliament.

> **'Australia has entered an era in which politicians cannot be counted upon to uphold our most important rights.'**

Fourth, not only has the number of laws infringing democratic freedoms increased, but so has their severity. The survey reveals many laws enacted prior to September 2001 that run counter to democratic rights and freedoms. However, for the most part, these laws have a significantly lower impact upon those freedoms than the laws enacted after then.

For example, laws such as section 18C enacted prior to 2001 target freedom of speech, but impose relatively minor penalties, such as the possibility of having to pay compensation. The contrast with more recent laws is stark. A number carry the possibility of a lengthy term of imprisonment merely on the basis of a person's speech.

These observations reveal that Australia has entered an era in which politicians cannot be counted upon to uphold our most important rights. Rather than acting as a check upon laws that infringe democratic values, politicians are now campaigning for such infringements. Often, they are doing so with impunity.

This is especially a problem in Australia. We are unique among Western nations in lacking a national bill of rights or human rights act. In our system, rights usually exist only as long as they have not been taken away. This is not an issue if politicians exercise self-restraint, but if that disappears even the most important rights become vulnerable.

Something needs to change if the slide towards ever greater government power, and fewer rights for the people, is to be stopped. The long-term health of our democracy depends on it. The most obvious answer would be to follow the path of other nations, and to introduce a national bill of rights.[25]

ENDS Chapter-ENDS 'Book'

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[25] George Williams Professor of Law at the University of NSW, writing in the *Sydney Morning Herald* 27 December 2015. Prof Williams, now Vice-Chancellor UNSW, is a member of Civil Liberties Australia.