Ninth Manning Clark Lecture

Citizens' rights and the rule of law in a civil society: not just yet

Delivered by Julian Burnside

On Monday 10 March 2008, at the National Library of Australia

In the the epilogue to his epic *A History of Australia*, Manning Clark wrote: "This generation has a chance to be wiser than previous generations. They can make their own history. With the end of the domination by the straiteners, the enlargers of life now have their chance. … It is the task of the historian and the mythmaker to tell the story of how the world came to be as it is. It is the task of the prophet to tell the story of what might be. The historian presents the choice: history is a book of wisdom for those making that choice."

On 24 November 2007, history presented Australia with a choice. To the surprise of some and the delight of a narrow majority, Australia chose the ALP and brought to an ignominious end 11½ years of John Howard's Government. Although later historians may hold various opinions about the reason for the choice, at this close distance it seems likely that John Howard was removed from Government and from Parliament for exactly the same reason as Stanley Melbourne Bruce suffered the same fate three generations earlier: the public did not like the Government's approach to industrial relations. Personally, I would have preferred to see the Government removed because of its lamentable approach to human rights and the rule of law. But perhaps Australia is not ready to embrace such notions: not just yet. In any event, the electorate saw industrial relations as a more pressing matter.

Whatever the reason, Australia made its choice.

Sorry

The magnitude of the choice became clear soon afterwards. In the first sitting of the new parliament, the Government said 'sorry' to the stolen generations. It seemed almost too good to be true: the apology so many had waited so long to hear. And it was astonishing and uplifting to hear some of the noblest and most dignified sentiments ever uttered in that place on the hill. It is worth recalling some of the words:

"Today we honour the indigenous peoples of this land, the oldest continuing cultures in human history.

We reflect on their past mistreatment.

We reflect in particular on the mistreatment of those who were stolen generations – this blemished chapter in our nation's history. …

We apologise for the laws and policies of successive Parliaments and Governments that have inflicted profound grief, suffering and loss on these our fellow Australians. …

For the pain, suffering and hurt of these stolen generations, their descendants and for their families left behind, we say 'sorry'.

To the mothers and the fathers, the brothers and the sisters, for the breaking up of families and communities, we say 'sorry'.

And for the indignity and degradation thus inflicted on a proud people and a proud culture, we say 'sorry'. …

We today take this first step by acknowledging the past and laying claim to a future that embraces all Australians.

A future where this Parliament resolves that the injustices of the past must never, never happen again. …"

13 February 2008 will be remembered as a day the nation shifted, perceptibly. The apology was significant not only for marking a significant step in the process of reconciling ourselves with our past: it cast a new light on the former government. It set a new tone. And I think it reminded us of something we had lost: a sense of decency.

Most of the worst aspects of the Howard years can be explained by the lack of decency which infected their approach to government. They could not acknowledge the wrong that was done to the stolen generations; they failed to help David Hicks when it was a moral imperative: they waited until his rescue became a political imperative; they never quite understood the wickedness of imprisoning children who were fleeing persecution; they abandoned ministerial responsibility; they attacked the courts scandalously but unblushing; they argued for the right to detain innocent people for life; they introduced laws which prevent fair trials; they bribed the impoverished Republic of Nauru to warehouse refugees for us. It seemed that they did not understand just how badly they were behaving, or perhaps they just did not care. And they are unable to change their ways in defeat: prominent back-benchers are scrambling for the lifeboats.

One of the most compelling things about the apology to the stolen generations was that it was so decent. Suddenly, a dreadful episode in our history was acknowledged for what it was.

Unfortunately, when announcing that the Government would apologize to the stolen generations, the Prime Minister also said that the Government would not offer compensation. Let me explain why I think that was unfortunate.

First, let us look at the realities of the stolen generations and the attempts of some of their members to achieve recognition of what was done wrong and compensation for the harm which resulted.

There have been three attempts to recover damages by members of the stolen generations. Actions in the Northern Territory and New South Wales failed. Recently, in August 2007, an action brought in South Australia succeeded.

Bruce Trevorrow's case

In the South Australian case, the Plaintiff was Bruce Trevorrow. Bruce was the illegitimate son of Joe Trevorrow and Thora Lampard. They lived at One Mile Camp, Meningie, on the Coorong. They had two other sons, Tom and George Trevorrow.

They lived at One Mile Camp because in the 1950s it was not lawful for an aborigine to live closer than one mile to a place of white settlement, unless they had a permit.

When Bruce was 13 months old, he got gastroenteritis. Joe didn't have a car capable of taking Bruce to the hospital, so some neighbours from Meningie took him to the Adelaide Children's Hospital where he was admitted on Christmas Day 1957. Hospital records show that he was diagnosed with gastroenteritis, he was treated appropriately and the gastro resolved within six or seven days. Seven days after that he was given away to a white family.

The baby's family lived in suburban Adelaide. They had a daughter who was aged about 16 at the time. She gave evidence at the trial as a woman in her late middle age. She remembered the day clearly. Her mother had always wanted a second daughter. They had seen an advertisement in the local newspaper offering aboriginal babies for fostering. They went to the hospital and looked at a number of eligible babies and saw a cute little girl with curly hair and chose her. They took her home and when they changed her nappy they discovered she was a boy. Such was the informality with which aboriginal babies could be given away in early 1958 in South Australia.

A short time later, Bruce's mother wrote to the Department asking how he was doing and when he was coming home. The magnitude of her task should not be overlooked: pen and paper, envelope and stamp were not items readily obtained in the tin and sackcloth humpies of One Mile Camp, Meningie. But Thora managed to write a letter which still exists in the State archives. The reply is still in existence. It notes that Bruce is doing quite well but that the doctors say he is not yet well enough to come home. Bruce had been given away weeks earlier.

The laws relating to fostering required that foster mothers be assessed for suitability and that the foster child and foster home should be inspected regularly. Although the laws did not distinguish between white children and aboriginal children, the fact is that Bruce's foster family was never checked for suitability and neither was he checked by the Department to assess his progress. He came to the attention of the Children's Hospital again when he was three years old: he was pulling his own hair out. When he was eight or nine years old, he was seen a number of times by the Child Guidance Clinic and was diagnosed as profoundly anxious and depressed and as having no sense of his own identity.

Nothing had been done to prepare the foster family for the challenges associated with fostering a young aboriginal child. When Bruce was 10 years old, he met his natural mother for the first time. Although the Department had previously prevented his mother from finding out where Bruce was, the law had changed in the meantime and they could no longer prevent the mother from seeing him.

The initial meeting interested Bruce and he was later to be sent down to stay with his natural family for a short holiday. When the welfare worker put him on the bus to send him down to Victor Harbour, the foster mother said that she couldn't cope with him and did not want him back. His clothes and toys were posted on after him.

Nothing had been done to prepare Bruce or his natural family for the realities of meeting again after nine years. Things went badly and Bruce ended up spending the next six or eight years of his life in State care. By the time he left State care at age 18, he was an alcoholic. The next 30 years of his life were characteristic of someone who is profoundly depressed and who uses alcohol as a way of shielding himself from life's realities. He has had regular bouts of unemployment and a number of convictions for low-level criminal offences. Every time he has been assessed by a psychiatrist, the diagnosis has been the same: anxiety, profound depression, no sense of identity and no sense of belonging anywhere.

The trial had many striking features.One was the astonishing difference between Bruce – profoundly damaged, depressed and broken – and his brothers, who had not been removed. They told of growing up with Joe Trevorrow, who taught them how to track and hunt, how to use plants for medicine, how to fish. He impressed on them the need for proper schooling. They spoke of growing up in physically wretched circumstances, but loved and valued and supported. They presented as strong, resilient, resourceful people. Their arrival to give evidence at the trial was delayed because they had been overseas attending an international meeting concerning the repatriation of indigenous remains.

The second striking feature was the fact that the Government of South Australia contested every point in the case. Nothing was too small to pass unchallenged. One of their big points was to assert that removing a child from his or her parents did no harm – they even ventured to suggest that removal had been beneficial for Bruce. This contest led to one of the most significant findings in the case. Justice Gray said in his judgment:

"[885] I find that it was reasonably foreseeable that the separation of a 13 month old Aboriginal child from his natural mother and family and the placement of that child in a non-indigenous family for long-term fostering created real risks to the child's health. The State through its emanations, departments and departmental officers either foresaw these risks or ought to have foreseen these risks. … "

That finding also accords with commonsense. We all have an instinct that it is harmful to children to remove them from their parents. It was based on extensive evidence concerning the work of John Bowlby in the early 1950s, which showed that it is intrinsically harmful to remove a child from his or her parents, in particular when this occurs after nine months of age.

The harm of which the Prime Minister spoke when he said 'sorry' was harm which Governments knew in advance would result from their conduct.

At the time Bruce was removed, the Aborigines Protection Board of South Australia had already been advised by the Crown Solicitor that it had no legal power to remove aboriginal children from their parents. One of the documents tendered at the trial was a letter written by the secretary of the APB in 1958. It read in part:

"... Again in confidence, for some years without legal authority, the Board have taken charge of many aboriginal children, some are placed in Aboriginal Institutions, which by the way I very much dislike, and others are placed with foster parents, all at the cost of the Board. At the present time I think there are approximately 300 children so placed. …"

After a hard-fought trial, the Judge found in Bruce's favour, and awarded him a total of $800,000 plus costs.

There are a few things to say about this. First, Bruce's circumstances are not unique. There are, inevitably, other aboriginal men and women who were taken in equivalent circumstances while they were children and suffered as a result. Although they may seek to vindicate their rights, the task becomes more difficult as each year passes. Evidence degrades, witnesses die, documents disappear.

Second, litigation against a Government is not for the fainthearted. Governments fight hard. It took Bruce's case eight years to get to court, and the trial ran from November 2005 to April 2006. If he had lost the case, Bruce would have been ruined by an order to pay the Government's legal costs.

The third thing to note about Bruce's case is that the same facts would not necessarily have produced the same result in other States. The legislation concerning aborigines was not uniform in all the States and Territories.

The Prime Minister's apology makes no difference whatever to whether or not Governments face legal liability for removing aboriginal children. But it acknowledges for the first time that a great moral wrong was done, and it acknowledges the damage which that caused. The most elementary instinct for justice tells us that when harm is inflicted by acts which are morally wrong, then there is a moral, if not a legal, responsibility to answer for the damage caused. To acknowledge the wrong and the damage and to deny compensation is simply unjust.

From this point, events can play out in a couple of different ways. One possibility is that members of the stolen generations will bring legal proceedings in various jurisdictions. Those proceedings will occupy lawyers and courts for years, and will run according to the circumstances of the case and the accident of which State or Territory is involved. The worst outcome will be that some plaintiffs will end up the way Lorna Cubillo and Peter Gunner ended up eight years ago: crushed and humiliated. Or they might succeed, as Bruce Trevorrow did. Either way, it is a very expensive exercise for the State, and a gruelling experience for the plaintiff.

A second possibility is a national compensation scheme, run by the States, Territories and the Commonwealth in co-operation. The scheme I advocate would allow people to register their claim to be members of the stolen generations. If that claim was, on its face, correct then they would be entitled to receive copies of all relevant Government records. A panel would then assess which of the following categories best describe the claimant:

- removed for demonstrably good welfare reasons;
- removed with the informed consent of the parents;
- removed without welfare justification but survived and flourished;
- removed without welfare justification but did not flourish.

The first and second categories might receive nominal or no compensation. The third category should receive modest compensation, say $5,000-$25,000, depending on circumstances. The fourth category should receive substantial compensation, between say $25,000-$75,000, depending on circumstances.

The process should be simple, co-operative, lawyer-free and should run in a way consistent with its benevolent objectives.

If only the Governments of Australia could see their way clear to implement a scheme like this, the original owners of this land would receive real justice in compensation for one of the most wretched chapters in our history.

Until such a scheme is introduced, members of the stolen generations will have good reason to think that they have been denied justice: for them, Australia is not Just yet.

The Rule of Law

In ***Law, Legislation and Liberty*** , Friedrich Hayek wrote:
"The effective limitation of power is the most important problem of social order. Government is indispensable for the formulation of such an order only to protect against coercion and violence from others. But as soon as, to achieve this, Government successfully claims the monopoly of coercion and violence, it becomes the chief threat to individual freedom."

The rule of law is democracy's answer to the rule of men. In 1603 James I considered himself as standing above the law. He could and did deal with people as he saw fit. He authorised the torture of Guy Fawkes, he exacted compulsory loans from the nobility without the sanction of parliament. The establishment of the rule of law was the great product of the constitutional struggles in England during the 17th century. By the time the Stuart monarchs were replaced by the House of Hanover, they acknowledged that they ruled under the law and subject to it.

The rule of law requires that all people, including the head of state and the executive government, are subject to the law, and that independent judges are the arbiters of law. By this means, governments are accountable for their actions.

Incommunicado detention

In 2002 the ASIO legislation was amended to permit the incommunicado detention, for a week at time, of people not suspected of any wrong-doing: it is enough if they are thought to have information about others who may have been involved in terrorist offences. The person may be taken into isolated custody, and will not have a free choice of legal help; they will not be permitted to tell friends or family where they are; they must answer questions, or face 5 years imprisonment. When released, they are not permitted to tell anyone where they were or what happened to them, on pain of imprisonment.

All of this happens without the intervention of a court, unless extensions of the detention time are sought.

Control orders and preventative detention

In 2005 further anti-terror legislation was introduced. The Commonwealth Criminal Code was amended to provide that a member of the Federal Police may apply for a preventative detention order in relation to a person. A preventative detention order will result in a person being jailed for up to 14 days in circumstances where they have not been charged with, much less convicted of, any offence. The order is obtained in the absence of the person concerned, and authorises that the person be taken into custody. When the person is taken into custody, they must not be told the evidence on which the order was obtained.

Thus, a preventative detention order can be made not only without a trial of any sort, but in circumstances where the subject of the order will not be allowed to know the evidence which was used to secure the order, even after the event.

Similarly, the Criminal Code allows the Federal Police to obtain a control order against a person. A control order can include an order confining a person to a single address for up to 12 months, without access to telephone or the internet. When the subject of the control order is served with the order, they are to be given a summary of the grounds on which the order was made, but not the evidence. Thus, a person's freedom of movement can be grossly interfered with for up to 12 months in circumstances where they have no opportunity to know the evidence against them.

Control orders and preventative detention orders are, in theory, subject to judicial review. However the scope for judicial review is drastically limited when the person affected by the order is not allowed to know the evidence used against them.

Withholding evidence

Adverse security assessments from ASIO create another, related problem. An adverse security assessment can prevent a person obtaining a government job, or may result in the cancellation of a visa or passport.

A citizen can challenge an adverse security assessment in the Administrative Appeals Tribunal. The Administrative Appeals Tribunal Act contains provisions enabling the Attorney-General to grant a certificate which, in substance, prevents the applicant and the applicant's lawyer from being present in the Tribunal while the government witnesses give their evidence and while the government's lawyers make their submissions. Here is the text of one such certificate, issued early in 2006:

"I, Philip Maxwell Ruddock, the Attorney-General for the Commonwealth of Australia hereby certify that disclosure of the contents of the documents. described in the schedules hereto, and the schedules, would be contrary to the public interest because the disclosure would prejudice security.

I further certify ... that evidence proposed to be adduced and submissions proposed to be made by or on behalf of the Director-General of Security concerning the documents . are of such a nature that the disclosure of the evidence or submissions would be contrary to the public interest because it would prejudice security.

As the responsible Minister ... I do not consent to a person representing the applicant being present when evidence described . above is adduced and such submissions are made .."

The practical effect of this certificate is that the person challenging the cancellation of his or her passport can have no idea what case they have to make. It is a matter of real concern that the Attorney General can prevent a person or their lawyer from knowing the evidence and the arguments which will determine the person's fate.

While security is an important and delicate matter, it is indecent to deprive a person of their liberty or other basic rights without giving them a fair opportunity to understand the case against them, and to defend themselves properly.

Civil rights and the rule of law

Unfettered, unreviewable Ministerial power is an important element in the erosion of the rule of law. The power to suppress or withhold evidence is one example. Another is the power to deport a non-citizen on "character" grounds regardless how long the person has lived in Australia. The Howard Government

introduced the power in 1999. Previously, permanent residents who had lived in Australia for 10 years or more could not be deported. The amendment gave the Minister a discretionary power to cancel a person's visa on character grounds and then deport the person, regardless how long they have lived here.

The power is generally exercised to deport people who have committed serious crimes. While this may seem like a good idea in the abstract, it begins to look a bit brutal when the person to be deported has been absorbed into the Australian community.

In the three years to June 2005, 233 permanent residents were deported on "character" grounds after serving a term of imprisonment of one year or more. The countries to which they have been deported include Iraq, Lebanon, Romania, Serbia, Turkey and Vietnam.

Many of the deportees have been alcoholics, drug addicts or mentally unstable. Many of them have spent most of their lives in Australia. They have been sent to places where they do not speak the language and have no family or other connections. In some cases no care has been arranged for deportees when they arrive in the country to which they have been sent.

Let a few examples serve to illustrate the problem.

- Stefan Nystrom's parents had lived in Australia since 1966, but in 1974 his parents were on holiday in Sweden when it became apparent that the mother's pregnancy would make it unsafe for her to fly home. Stefan was born in Sweden and arrived in Australia in 1974, 27 days after he was born. As an adult he has a history of fairly serious criminal convictions, one of which resulted in him serving 7 years in prison.. He lived here continuously until the age of 33 when he was deported to Sweden. He had not taken out Australian citizenship. Because of Nystrom's criminal record, the Immigration Minister exercised his power to cancel Nystrom's permanent residency visa and deported him to Sweden, where he was born but with which he has no other ties. He does not speak Swedish. His mother, father and sister continue to live in Australia.
- Robert Jovicic was born in France to Serbian parents and came to Australia at two years of age. He lived here until he was 38 years old. Because Jovicic had a string of convictions, Immigration Minister Philip Ruddock decided to cancel Jovicic's permanent residency visa and Jovicic was deported to Serbia at age 38. His family remains in Australia. The Australian Government only obtained a 7 day Serbian visa for him, so he was unable to work, and the Serbian authorities decided that he was stateless. He lived, destitute, on the streets of Belgrade until media publicity prompted the Government to permit his return in 2006. After initially insisting that Jovicic apply for Serbian citizenship, Immigration Minister Vanstone granted him a temporary visa expiring on 4 January 2009. To his credit, the current Minister has just granted Mr Jovicic a new permanent residency visa.
- Steve Ongel arrived in Australia aged 18 months in 1970 and was deported to Turkey in 2003 leaving behind a wife and two daughters aged two and four.

Plenty of Australian citizens have criminal records; plenty of Australian citizens have worse criminal records than Nystrom or Jovicic or Ongel. They serve their time in prison and are regarded as having repaid their debt to Society. But under the law

introduced by the Howard government, you can pay the price and then be deported if you are not a citizen, even if you have spent virtually your entire life here.

Deportation in circumstances like these causes terrible hardship. No-one with a sense of decency could watch with unconcern as someone like Nystrom or Jovicic or Ongel was cast out of the only country they know. .

The people who suffer as a result of this ministerial power are generally people who have problems, but they are problems they developed in Australia. They have all paid their price to society: it seems unreasonable and cruel then to throw them out, to cope as best they can in a wholly foreign country. In addition, they often leave behind wives and children who are Australian citizens and who have to face the prospect of losing their husband or father, or losing their country.

A man who has spent the past 26 years in Australia served his prison term and, on the day he was to be released, Kevin Andrews cancelled his permanent residence visa. He was transferred from gaol to immigration detention and remains there as he seeks to avoid being deported. He served 4 years in prison, and 7 years in immigration detention. His children and grandchildren are all Australians. If he is deported, will Australia be better off for his going, or worse off for the fact that his family can be destroyed by a Minister of the Crown?

Erosion of rights

Over the life of the Howard government, the ordinary rights of people in Australia have been significantly eroded with no public discussion of the need for, or extent of, that erosion.

A simplistic analysis, often put about by the popular media, is that it is "better to be safe than sorry". In other words, we should sacrifice rights in order to protect ourselves. In principle, that is right. In practice, it ignores the essential task of balancing the erosion of rights against the gains in security.

The point can be illustrated by a thought experiment. There is one strand of criminal behaviour which is relatively common in Australia and other societies: child abuse and spouse abuse. Both these offences have a unifying characteristic: they almost always take place in the home. Everyone would agree immediately that they are very nasty offences. They could be wiped out very quickly by the simple expedient of installing closed circuit TV cameras in every room of every house and monitoring those cameras centrally. Very quickly, child abuse and spouse abuse would be stopped. Those instances which occurred would be easy to prosecute because the evidence would be on tape. I do not imagine that more than a tiny number of Australians would support the idea of video-monitoring every room in every house: despite the benefits, the sacrifice of rights is far too great.

It is common for people to respond to arguments about closed-circuit TV surveillance by saying that "If you have nothing to hide you have nothing to fear". I suspect that not many people would advance that argument if confronted with the prospect of universal closed-circuit TV monitoring of homes.

Exactly the same logic applies to the more difficult calculation involved when basic rights are sacrificed in order to protect us from terrorism or from people considered to be of bad character. But there are two important differences. First, the scale of the threat of terrorism is much less easy to determine than the measurable risk of child abuse and spouse abuse. No terrorist attack has happened in Australia; child

abuse and spouse abuse are relatively common. Second, compulsory video-monitoring of every room in every house would have an immediate and obvious impact on the rights and freedoms of every member of the Australian community; the anti-terror laws have a disproportionate effect on a limited segment of society. That segment is usually thought of as "potential terrorists" but under the surface it is really Muslims. Muslims in Australia are increasingly feeling isolated and targeted, and they have every reason to feel that way.

Most "ordinary Australians" do not think at all about the anti-terror legislation because they imagine that it has nothing to do with their rights. This exposes the basic problem: we have been led to the position that we are willing to see the rights of others sacrificed if it provides a benefit to us, but we are not willing to see our own rights sacrificed if that sacrifice will produce a gain to others.

The argument for a Bill of Rights

Most people understand, even if only vaguely, that living in a complex society requires all members of society to adhere to a commonly agreed set of norms and ideals. These are usually so basic to our thinking that we rarely give them any attention. Most of those norms are captured by the notions of manners and decency. The fact that this sounds old-fashioned is the reason we have a problem.

Australians have a strong instinct for human rights. Public and political rhetoric tends to favour human rights. Although Australia does not have a written Bill of Rights, we have a shared sense that some ideals are basic to our society. Most of the basic elements of a constitutional democracy are found in our Constitution, but others are taken for granted: we tacitly accept them as basic and inalienable. The American formulation "life, liberty and the pursuit of happiness" is not only familiar to us from TV dramas; it is a pretty fair reflection of our own assumptions. For most of us, the assumption remains untested.

The starting point in an argument about a Bill of Rights is that, within the scope of its legislative competence, Parliament's power is unlimited. The classic example of this is that, if Parliament has power to make laws with respect to children, it could validly pass a law which required all blue-eyed babies to be killed at birth. The law, although terrible, would be valid. One response to this is that a democratic system allows that government to be thrown out at the next election. This is not much comfort for the blue-eyed babies born in the meantime. And even this democratic correction may not be enough: if blue-eyed people are an unpopular minority, the majority may prefer to return the government to power. The Nuremberg laws of Germany in the 1930s were horrifying, but were constitutionally valid laws which attracted the support of many Germans.

Generally, Parliament's powers are defined by reference to subject matter. Within a head of power, Parliament can do pretty much what it likes. Thus, the Commonwealth's power to make laws with respect to immigration has in fact been interpreted by the High Court as justifying a law which permits an innocent person to be held in immigration detention for life, where he is liable for the daily cost of his own detention.

The question then is this. Should we have some mechanism which prevents parliaments from making laws which are unjust, or which offend basic values, even if those laws are otherwise within the scope of Parliament's powers? If such a mechanism is thought useful, it is likely to be called a Bill of Rights, or Charter of Rights, or something similar.

A Bill of Rights limits the power of Parliament but not by reference to subject matter. A modern Bill of Rights introduces, or records, a set of basic values which must be observed by parliament when making laws on matters over which it has legislative power. It sets the baseline of human rights standards on which Society has agreed. Because this is so, it is wrong to say that a Bill of Rights abdicates democratic power in favour of unelected judges. Judges simply apply the law passed by the parliament. That is their role. Many cases raise questions about Parliament's powers. Judges are the umpires who decide whether Parliament has gone beyond the bounds of its power. A Bill of Rights is a democratically created document, like other statutes. Enforcing it is not undemocratic at all.

Modern Bills of Rights are concerned with such things as:

- The right not to be deprived of life
- The right not to be subjected to torture or cruel treatment
- Electoral rights
- Freedom of thought, conscience, and religion
- Freedom of expression
- Manifestation of religion and belief
- Freedom of peaceful assembly
- Freedom of association
- Freedom of movement

Here it is important to distinguish the special case of the US Bill of Rights. It is not much concerned with human rights. It is largely a reflection of the anxiety of the American colonists that the Federal experiment might replicate the excesses of the Stuart monarchs: its contents are a reflection of the Petition of Right of 1627, with a hint of Magna Carta. It has little in common with the Bills of Rights which have been adopted throughout the Western world during the 20th century.

Australia needs a Bill of Rights. The time has passed when we could safely assume that parliament would never pass laws which offended decent values.

Minorities and the rule of law

The central tenet of democracy is the majoritarian principle. Parliament makes laws which reflect the will of the majority. In principle, the combination of democracy and the rule of law should achieve justice for all. That is the theory. In practice, it is different.

The difference is largely felt by individuals or groups who are powerless or unpopular. Injustices generally stem from one of two sources: first, bad laws which operate harshly against minorities, but have the support of the majority who vote and whose interests are not harmed by those laws; secondly it is often the case that powerless minorities do not have the practical ability to vindicate the rights given them by the law. Access to justice requires access to lawyers. As Lord Darling noted ironically: "Like the doors of the Ritz hotel, the courts are open to rich and poor alike".

The Australian legal system, like the English and American, is an adversary system. It is predicated on the assumption that parties will be adequately represented. Unfortunately, this assumption is often unfounded. The reason? Litigation is expensive – too expensive for most people. Legal aid is grossly under-funded. As a general proposition it is only available in criminal cases and some family law cases. All applications are subject to a means test.

Legal Aid

In Australia today it is not necessarily a blessing to be an aborigine, a permanent resident with a criminal conviction, a terror suspect or a Gold Coast doctor. But there is another group in our society who can also fairly claim to be victims of injustice. They are not readily grouped under a convenient label as the stolen generations can be. They are that desperate group of people with valid legal rights to protect or enforce, but who abandon or compromise those rights because they cannot afford to go to lawyers and are not eligible for Legal Aid. It is a very large group.

In June 2004 the Senate Legal and Constitutional References Committee delivered its report on Legal Aid and Access to Justice. It is a lengthy report. In summary, it found that legal aid funding was inadequate to meet the need, that Community Legal Centres were inadequately funded, and that as a result there was serious injustice to vulnerable groups and an undesirably high number of unrepresented litigants. The principal findings are set out in an appendix to this lecture. They include the following:

- the Commonwealth Priorities and Guidelines deny adequate assistance in family and civil matters
- there is gender disparity in the distribution of legal aid funds in practice, resulting in indirect but significant discrimination against the circumstances and needs of women in their access to justice
- it is imperative that there be adequate funding of legal assistance for actions taken under state/territory law involving domestic violence
- where violence has taken place, legal representation is needed to ensure that women can participate effectively in the legal system
- (there are) overwhelming deficiencies in the legal aid system as it relates to Indigenous people in Australia
- gaps in the legal aid system are greatly magnified in regional, rural and remote areas
- Guidelines introduced in 1997 have resulted in a reduction of available legal assistance for migrants and refugees. Migrants and refugees are amongst the most disadvantaged groups in terms of access to justice
- improving access to justice is essential to breaking the cycle that leads to homelessness and poverty
- (pro bono legal help) is not a substitute for an adequately funded legal aid system

These are very serious findings. In practice, grants of legal aid are tailored to fit the available funding. The funding is inadequate. We need is a system which is funded to meet the demand, rather than a system trimmed to fit the budget. Legal aid funding needs to be increased to 3 or 4 times its present level. A substantial increase in legal aid funding would solve many problems for many people, and would generate a massive return in the form of increased confidence in the legal system.

A significant amount of important legal work is done, very inexpensively, by Community Legal Centres (CLCs). CLCs are independent, non-profit organisations which provide legal help to more than 350,000 people each year. They do not charge for their work. There are more than 200 CLCs in Australia, ranging in size from centres with no paid staff to centres with up to a dozen employees. In recent years, the Federal government has reduced the funding to CLCs and during its last couple of years in office had begun threatening to reduce funding further.

The people who receive legal help from CLCs are generally the most disadvantaged in our society. Reducing the funding to CLCs inflicts real hardship and harm on those who can least bear it. Inadequate funding of CLCs is a direct source of great injustice in a country which still prides itself on the ideal of a fair go for everyone. The Senate enquiry report included a finding that CLCs should be properly funded to enable them to provide services that can respond to community need. The Report said that the difficulties CLCs are experiencing were unacceptable. Those difficulties were a direct result of inadequate levels of funding and increased demand on CLCs, caused by restricted Legal aid funding.

The practical result of the present system is that only the very rich and the very poor are able to secure adequate representation in court in criminal matters and in some family law matters. And the rest? They represent themselves or abandon their rights. The results are not happy for the courts or for the litigants. A great deal of court time is wasted as Judges and Magistrates try to explain the procedure to self-represented litigants. Many cases go on appeal because they miscarried at first instance. Many litigants walk away from their encounter with the legal system feeling bruised, cheated or betrayed; feeling that they have not had Justice. The dismal truth is that their perception is too often justified by the facts.

Justice is one of the deepest yearnings of the human spirit, and one of the most important promises of democracy. When Law and Justice part company, we are betrayed; when Parliament makes unjust laws we are betrayed; when Justice is promised but is placed beyond reach, democracy fails.

Access to Justice is a popular catch-cry of politicians. If the public at large is to have confidence in the legal system and the rule of law, it is important that their encounters with the legal system are more satisfactory than they are at present. If governments are serious about Access to Justice, they need to increase legal aid and CLC funding substantially.

There is room for cautious optimism that a sense of decency has been restored to government in Australia. The next few years will tell whether the possibilities which stirred on 13 February 2007 will be carried into effect. There is work to be done, because Australia is not Just, yet.

Appendix

The following are direct quotes from the Senate Legal and Constitutional References Committee Report on Legal Aid and Access to Justice (June 2004)

paragraph 2.88 The Committee is concerned that the Commonwealth Priorities and Guidelines deny adequate assistance in family and civil matters.

paragraph 4.22 Evidence presented to the Committee suggests that there is gender disparity in the distribution of legal aid funds in practice, resulting in indirect but significant discrimination against the circumstances and needs of women in their access to justice. The Committee is concerned about the Commonwealth Government's apparent lack of recognition of some of the particularly grave consequences of family law disputes. The Committee does not believe that legal aid funding for criminal law matters should come at the expense of funding for family law.

paragraph 4.49 The Committee agrees that the "cap" in relation to family law funding creates significant problems. The Committee believes that if the "cap" is to remain, there needs to be greater discretion to exceed it in particular cases. However, the Committee reiterates its view in the Third Report that, given the lack of funding generally, 'any exercise of the discretion becomes an exercise in robbing Peter to pay Paul.'61 It is not appropriate that applicants in more expensive cases benefit at the expense of other equally meritorious applicants. The Committee strongly believes that more funding is required.

paragraph 4.70 The Committee considers that it is imperative that there be adequate funding of legal assistance for actions taken under state/territory law involving domestic violence since the scope for action under Commonwealth law is extremely limited.

paragraph 4.100 The Committee shares the concerns of a number of witnesses in relation to the high levels of self-representing women in family law matters. In particular, the Committee considers that where violence has taken place, legal representation is needed to ensure that women can participate effectively in the legal system.

paragraph 5.123 The Committee is gravely concerned by the evidence it received about the overwhelming deficiencies in the legal aid system as it relates to Indigenous people in Australia, particularly those living in remote areas.

paragraph 6.80 Evidence presented to the Committee during the course of the inquiry clearly indicates that gaps in the legal aid system are greatly magnified in RRR areas. Overwhelmingly, the evidence suggests that the current arrangements throughout RRR areas of Australia are inconsistent and inadequate, ….

paragraph 7.26 The Committee is concerned that the Guidelines introduced in 1997 have resulted in a reduction of available legal assistance for migrants and refugees. ….

paragraph 7.27 Migrants and refugees are amongst the most disadvantaged groups in terms of access to justice.

paragraph 8.21 The Committee considers that improving access to justice is essential to breaking the cycle that leads to homelessness and poverty. ….

paragraph 9.40 The Committee considers pro bono legal services to be an important and growing part of the response to the need for legal assistance. However, it is neither a substitute for an adequately funded legal aid system nor a panacea for overcoming gaps in other publicly funded legal services. ….

paragraph 10.42 The Committee is disappointed that the Government continues to avoid collecting empirical data on a fundamental issue in the legal aid funding debate: whether the costs saved by reducing legal aid funding are outweighed by the costs potentially caused by an increasing number of self-represented litigants. ….

paragraph 10.95 There is much evidence to demonstrate a strong link between restrictions on legal aid funding and the growing numbers of self-represented litigants. The Committee is concerned about this increase and the impact it may have on the administration of justice. ….

paragraph 11.46 The Committee strongly believes that CLCs have a vital role to play in helping to achieve a fairer and more effective legal aid system that is available and accessible to all Australians. It is important that CLCs are properly funded to enable them to provide services that can be responsive to community need. The Committee considers the difficulties CLCs are experiencing to be unacceptable. These difficulties appear to be a direct result of inadequate levels of funding and increased demand on CLCs, caused by restricted LAC funding. ….