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Owen Dixon Chambers

15 July 2023

Submission to Senate Finance and Public Administration Committee

Governor-General Amendment etc Bill 2023 ("the Bill")

I have practiced for 41 years as a senior counsel, now designated KC, in all jurisdictions in Australia, and overseas.
Between 1984 to 1997 I held office as Solicitor-General of Australia as the principal legal advisor and counsel for the Commonwealth. Since 1998 I have practiced offshore as an International disputes Arbitrator under the aegis of the World Bank, the Permanent Court of Arbitration other institutions.
This submission is made in my personal capacity.

Summary

For the reasons briefly stated below my submissions to the Committee are

1. The purpose and scheme of the Bill is *ultra vires* unconstitutional beyond the powers of the the Parliament to enact. Any purported termination of vested pension and other entitlements under its terms would be invalid and of no effect as constituting an acquisition of property other than on just terms. No provision for just terms is provided, and indeed non e could its expropriatory intent.

2. Further, the Bill is framed in terms that are repugnant, and offensive to almost every basal principle of the Rule of Law and proper and fair practice to establish legislative, and administrative law standards, adhered by by the Commonwealth's Parliament and its executive.
   In particular -
   (a) In fact, if not in form, it is an ad hominem law directed to effect one person.
   Were it creating a criminal offence it would be invalid. It is no less offensive for imposing a forfeiture.
   (b) It is of unlimited retrospective operation.
   (c) It offends principles of double jeopardy.
   (d) In spirit and it intent it constitutes an prohibited Act of Attainder and Penalties.
   (e) The definition of "misconduct' is unconfined by other than open-ended parliamentary discretion and prejudice.
   (f) Concepts of procedural fairness are completely excluded.
   (g) The Bill offends fundamental principles of small "c" constitutional law and procedural fairness: the Australian ethos of "a fair go".

3. In substance, the Bill is directed to establish parliamentary "curial" jurisdiction for arbitrary forfeiture akin to those abrogated by the 1641 Act for the Abolition of the Court of Star Chamber. Its enactment in any form would be demean and debase the governance and standards of public life established under the Constitution as a compact with the Australian people.

4. The Bill is unprecedented in its reach ant intent. Plainly it is the product departmental drafting instructions and standards, but instead engineered to bypass the accepted conventions and limitations drafting conventions to obtain a pre-determined targeted result against one person. Clause 4AGB (Ministerial declaration) is a sham provision, self-evidently never intended to be invoked, as a diversion from its real purpose effected by clause

ACGB to empower the Senate to effect a forfeiture by resolution of a single House directed *ad hominem* to a single person. Fortunately, it is beyond Constitutional power.

5. Even were it a valid law, the Bill, as a whole, and particularly in its operative clause 4ACBG, the Bill in, form and substance, offends every principle of legislative propriety and fairness. Further, the attached "Statement of Compatiblity with Human Rights" declares black is white, and false by any standard.

6. This Bill shocks my conscience in form and intent. I am surprised these obvious and fundamental criticisms have not stopped the process going so far as drafting and consideration by the Committee. My submission is that the Senate, and the entire Parliament, would demean itself and its reputation were the Committee to bring the Bill forward.

7. As for the Voice referendum, the advice of the Solicitor-General should be sought by the Committee before the Bill advances further through the legislative process, both as to its validity and also as to its underlying repudiation to small "c" constitutional norms, the common law Rule of Law precepts and the propriety of compliance with administrative law principles and standards for the regulation and governance by the Parliament of its peoples.

Brief reasons –

1 The pension and other entitlements of a retired Governor-General and his or her surviving partner constitute property rights whose abrogation under the terms established by the Bill would constitute an acquisition other than just terms contrary to *placitum 51(xxxi)* of the Constitution. For that reason, if enacted the Act would be invalid.

The Bill must be abandoned. At the least, the opinion of the Solicitor-General is required to be sought by the Committee, on request to the Attorney-General, before the Bill advances. This is a "stop here" issue.

2 As much as for the exercise of executive power, common law principles of universal application derived from the rule of law inform, and limit, the framing and enactment of laws by the Parliament. In their submissions to the Committees the movers and promoters of the Bill, are united that their inspiration and purpose, dressed -up superficially as a law of general application, to forfeit vested pension rights, *ad hominem*, of one person, as a second forfeiture arising from his actions and inactions years prior to his office of Governor-General.

Such a law would be invalid were it imposing criminal liability by a court: Kable v DPP (1996)189 CLR 51. AS a law directed to impose forfeiture of accrued pension and other rights by legislative sanction, the Bill's characterisation remains equivalent to an Act of Attainder long abolished under English la, and now Australian law. Such a law should not be sought revived by the Parliaments of because it is repugnant and offensive to our legal standards.

(a) Retrospective operation. The Bill would be objectionable if retrospectively confined in its application to actions or inactions during Bishop Hollingworth's office of Governor General. Doubly so, that it reaches back for his 86 years without limit. It is a universal principle and presumption that laws imposing pains and penalties should not have retrospective operation save in exceptional circumstances. Plainly, there are no such circumstances here.

(b) The entire circumstances invoked by the Bill's proponents have been exhaustively examined and finally determined by the Anglican Professional Standards Board under the Statutes of the Church, with each party represented by counsel. The prosecutors now filing submissions were successful in their forum of choice. Bishop Hollingworth admitted and frankly apologised for errors and mistakes in his actions and inactions as an Archbishop dealing with entirely unacceptable and criminal conduct by third parties. That was the subject matter of complete and exhaustive enquiry by a body equivalent to a judicial tribunal, with both proponents and Bishop Hollingworth being accorded full procedural fairness to present and defend the claims to finality. The decision of the Tr bunal, below, was to find misconduct, to reprimand and order an apology (which has been given) but not revoke Bishop Hollingworth's licence -

The Professional Standards Board has recommended:

10. *That the Archbishop of Melbourne, on behalf of the Melbourne Diocese and the Anglican Church in Australia, reprimand the Respondent for his decisions to retain John Elliot and Donald Shearman in ministry and his harsh and insensitive communications with and letters about the victims of those abusers, Beth Heinrich and BYB and his family;*
11. *That as a condition of being granted permission to officiate in any Church service, the Respondent be required by the Archbishop of Melbourne to offer the following apologies, subject to the recipients being willing to receive them, and in person or in writing as the recipients may prefer:*
    1. *To BYB (the true name of whom is known to the Respondent and to the Archbishop) and his family for his two decisions to retain John Elliot in ministry despite his knowledge of sexual abuse committed by John Elliot, for his failure to understand and give proper weight to the harm suffered by John Elliot's victims, and for his harsh and insensitive letter to BYB's brother of 11 September 1995; and*
    2. *To Beth Heinrich for his decision to retain Donald Shearman in ministry despite his knowledge of Donald Shearman's sexual abuse of Ms Heinrich, for his failure to understand and give proper weight to the harm suffered by Ms Heinrich as a result of Donald Shearman's abuse, and for his harsh, dismissive and insensitive words about Ms Heinrich as broadcast on "Australian Story" in February 2002.*

Clearance for Ministry

The Professional Standards Board has further determined:

1. *That there will be no unacceptable risk of harm to any person if the Respondent continues to hold the role office or position he currently holds;*
2. *That the Respondent is fit for ministry subject to the condition that his ministry be confined to the role office or position in the Church that he currently holds, that is to say the office of priest –*
    1. *(a) Assisting with services at his local parish, currently St George's, Malvern;*
    2. *(b) Taking quarterly Eucharist at the Community of the Holy Name;*
    3. *(c) Taking lunchtime Eucharist at St Paul's Cathedral monthly;*
    4. *(d) Facilitating weddings, funerals, baptisms, and other services when invited; and*
    5. *(e) Taking part in various ceremonies at the Cathedral, such as the Ordination of Priests and Consecration of Bishops –*

and pursuant to section 81 of the Professional Standards Uniform Act 2016 has directed the Office of Professional Standards to grant the Respondent clearance for ministry accordingly.

Further, the Professional Standards Board has recommended to the Archbishop of Melbourne that he grant the Respondent, pursuant to section 58 of that Act, such licence, permission to officiate or other relevant authority as may be necessary to authorise him to engage in ministry in the role, office or position referred to in paragraph 2 immediately above.

Subsequently Bishop Hollingworth voluntarily surrendered his licence.

(c) These proceeding should remain finality as to these issues. However, the same complainants before the Church proceedings now propose and support the admitted purpose of the Bill is to agitate the very same circumstances and complaints to impose a statutory penalty of forfeiture of the Bishop Hollingworth's vested pension and other entitlements, based on the circumstance that after the impugned events and as a former Head of State he was vested with these rights. This is to expose him, *in personam,* to double jeopardy in the rawest and most extreme form, inappropriately supplemental to the finality of the Church proceedings.

(d) *Act of Attainder*. In Kable, and in the different context of exercise of judicial power, two members of the High Court referred to the issue of validity of actions characterised as unlawful "Acts of Attainder". That issue becomes live here with the repository of the power proposed to be vested, not as lawmaking, but by resolution a single House of Parliament.

(e) *"Misconduct".* The Constitution provides for removal of a federal judge for undefined misconduct. In connection with the 1987 Murphy case, as Solicitor-General I advised the Government that matters constituting criminal conduct were required. The Professional Standards Board here considered "misconduct in a moral context under Church legislation. The objection to the Bill is that the misconduct is defined in unlimited terms with a reach in content and time is so subjective and broad as to be without limitation. The proponents and submissions in support are explicit as to this absence of limitation, which suffices, in itself, as a principled reason for the Bill's rejection.

(f) *Absence of procedural fairness*. In the Murphy issue, Parliament delegated former judges the function of finding the facts constituting misconduct (which were terminated by Justice Murphy's death in office). No such procedure to accord procedural fairness is contemplated by the Bill, which is predicated only upon passing of a motion in Parliament. This is to repudiate the universal principle that a citizen should not incur sanctions a without being accorded procedural fairness of definition, full particulars and an opportunity to respond. It is striking that clause. 4AGB.(2)(b) required reasons for making the Ministerial direction. The Senate declaration under clause 4AGC embraces no such requirement. This difference merely confirms Bishop Hollingworth as the Bill's single target. On any view, conventional principles of fairness require more than particulars by notice and an opportunity to respond/.

(g) "Fair Go". Bishop Hollingworth has accepted and apologised for errors and shortcomings of action and inaction anterior to holding office as our Head of State. These matters have been finally and completely determined within the Church's statutes. The complainants have had their day in the appropriate (church) Tr bunal of their choice. accorded complete procedural fairness of process It is contrary to all principles of reasonableness and fair play to re-agitate the same facts and complaints to enable a Parliamentary finding of essentially undefined misconduct and consequent forfeiture of accrued rights. because of the accident Bishop Hollingworth's subsequent service Governor-Gneral.

For the reasons summarised, it presents to me as unconscionable for Bishop Hollingworth to be targeted as the last person standing in double jeopardy liability in vicarious liability for now exited principal actors. He has admitted mistakes and apologised. The Church Tribunal has made final findings which he accepts. He has surrendered his church licence. There is no role for. this Bill to re-enter the lists as to these issues.

Gavan Griffith

13 July 2022