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BOOK REVIEW

HUMAN RIGHTS - THE AUSTRALIAN DEBATE  
by Professor G Nettheim, Redfern legal centre Publishing, 1

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HUMAN RIGHTS - THE AUSTRALIAN DEBATE

The Hon Justice Michael Kirby

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"It is perfectly correct to say that there is no protection of religious freedom in this country. But tell me when it has been put under challenge!". Federal opposition front bencher John Spender QC throws down that challenge towards the end of this book. An exasperated Juliet Sheen then proceeds to list some of the instances - the Church of Scientology refused rate exemption; members of the Hare Krishna movement refused accommodation; Jehovah's Witnesses instructors refused access to public schools. There are about 400 enquiries a year to the Anti-Discrimination Board in New South Wales about religious discrimination. This exchange reminded me of Chief Justice Latham's statement about s 116 of the Australian Constitution "Is not required for the protection of the religion of the majority". That religion, he declared "can look after itself". It is required "to protect the religion "or absence of religion" of minorities and, in particular, of unpopular minorities". See (1942) at 67 CLR 116, 124.

That is the way this well produced book finishes. The exchange rounds off a lengthy dialogue between the proponents and opponents of various forms of human rights protection in Australia. Are they needed? Does not the common law do the job adequately? Should we not depend upon specific legislation enacted by a democratic parliament? Would a Bill of Rights unduly enlarge the power of the unelected judges?

The book is the record of a conference organised by the Law School of the University of New South Wales. The conference took place at an unidentified time in 1985. At that time, Australia was facing the prospect of enforceable federal legislation for a Bill of Rights. That prospect died in 1986 as a result of noisy opposition from a number of minority groups. Nonetheless the record remains useful. It is plain that the human rights debate is anything but dead in Australia. It is likely that the Bicentenary will focus attention particularly on the human rights of Aborigines. It may also raise a debate concerning constitutional reform and whether we are, as Professor Nettheim in his foreword to this book suggests - at the same position as Canada was in 1960. Canada now has a Charter of Fundamental Rights and Freedoms. This document is providing a great challenge to the judges and lawyers of that country. In Australia, things are different.

The essays collected in the book include an interesting conspectus on the history of human rights protection in Australia by Nick O'Neill (NSW IT). It opens the collection. The local debate is put into the perspective of the world movement for the declaration and protection of human rights by

two contributions, including one by Justice Elizabeth Evatt. There then follows a comparison with developments in the United States, New Zealand and Canada. The last is offered by Justice Walter Tarnopolsky, former academic and now Judge of Appeal in Ontario. He was the principal overseas guest at the conference recorded here. He contributed vigorously, as the record of the oral debate shows. There is then a collection of papers on the Federal/State tensions in Australia, so far as it affects the protection of human rights. Federal Solicitor General Dr Gavan Griffith asks whether cooperative federalism can work. He offers a few examples suggesting conflicting answers to that question. Mr Terry Sheahan, former NSW Attorney General, lists a number of reforms which he claims represent blows for the protection of human rights by specific legislation: equal employment opportunity laws and practices, election of the legislative council; reform of criminal law, particularly bail; a new body of law on defacto relationships; Aboriginal land rights etc. By inference he asks: What more could you want?

John Dowd MP provides a vigorous critique of the Bill of Rights idea. "We are" he says "still the freest country in the world". This panegyric provokes a number of acid remarks from John Basten, a Sydney barrister, particularly in relation to the rights of Aborigines and poor people before the Australian courts.

The papers then turn to non-judicial approaches to the protection of human rights. There is a typically vigorous and balanced defence of Parliament by the late Senator Alan Missen - a stalwart champion of human rights if ever there was one.

There is then a collection of papers by "workers in the field". These include reviews of equal opportunity and racial discrimination laws and an examination of the role of various non-governmental organisations. The latter include Lawasia, the United Nations Association, Amnesty International, the International Commission of Jurists and the Councils for Civil Liberties - all busy collections of concerned citizens.

The book closes with a now sadly dated paper arguing for an Australian Bill of Rights read by Federal Attorney General Lionel Bowen. Other political perspectives are offered by John Spender, Lesley Vick (for the Australian Democrats) and Senator Chris Puplick, one of Alan Missen's proteges.

So much for the content of the book. Its strengths lie in the range of topics dealt with and the pen picture it provides of the state of institutional protection of human rights in Australia in the middle of the 1980's. The Bill of Rights idea does not die. It simply fades away only to reappear bright and shining in the succeeding generation. We have had at least three such waves: the first at Federation, the second in 1974 by the then Senator Lionel Murphy - and then the Evans-Bowen Bill. When the next wave comes, we will at least have this book to remind us of the well worn debate we have just gone through. Forces may be at work in our society to increase the urgency of fashioning new human rights protections. Economic down turns may necessitate fresh protections for the disadvantaged. Technology may require novel protections for new challenges from informatics and biotechnology. Multiculturalism, when it fails, may demand redress which was not previously thought necessary.

The weaknesses of the book are obvious. A few typographical mistakes escaped the editor's eye. Some of the essays are patchy and bear the hallmark of unrevised oral presentations. I question whether a number of the oral interventions deserved preservation. On the other hand, the freshness of a few of the clashes at the conference (such as the exchange with John Spender, above) helps to bring the book to life. The most notable defect is the absence of an index. No book of this kind should ever be published without an index to pull together the assortment of formal and informal contributions. I realise that preparing an index is tedious and costly, because time consuming. But the absence of a ready means through these pages is a serious flaw. This injunction should be remembered by the editors who are probably young enough to make it likely that they will be involved in the fourth wave of the Australian Bill of Rights debate. Perhaps fourth time lucky.