1038

BOOK LAUNCH

UNIVERSITY OF NEW SOUTH WALES

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i - iv Frontispiece ; v, vi Foreward; vii-x Preface; xi-xiii Table of Contents; xv-xxvi Table of Cases; 1-226 Text; 267-281 Appendices of Constitutional Documents and Drafts; 283-298 Index; The Law Book Company Limited, Sydney 1993; soft cover; RRP $75.00

The Hon Justice Michael D Kirby AC CMG

If I close my eyes, I can imagine I am back in the heady days of 1973 when Lionel Murphy, new in Government, introduced the *Human Rights Bill* to the Senate. Believe it or not, the Senate was even more troublesome in those days than it is now. The Bill had some eloquent champions, including a young law lecturer, Mr Gareth Evans. It aimed to translate Australia's ratification of the *International Covenant on Civil and Political Rights* in 1966 into the enforceable law of this land.

The States became alarmed. Outrage spread. The Bill was stalled. Ultimately, it lapsed when Mr Billy Sneddon forced an early election. The Bill was never re-introduced. The high hopes of an Australian Bill of Rights - putting some basic privileges of Australian citizens beyond argument - were dashed to the ground. It seems only yesterday.

If I close my eyes again, I can hear the debates that surrounded the work of the Constitutional Commission in the 1980s. It then seemed certain that we would

get a major overhaul of our Constitution as a practical way of celebrating the Bicentenary of European settlement in Australia. Serious proposals to incorporate at least some basic rights in the Constitution were put forward. Some of them seemed uncontroversial:

- A guarantee for fair democratic parliamentary elections in every legislature of the country;
- An extension of the guaranteed right to trial by jury to the States;
- A provision for guaranteed freedom of religion in the States; and
- A protection against unfair acquisition of property by State Governments.

In those heady days, it really looked as if Australia was at last going to join the rest of the democratic world. We too were beginning the process which would end up with our own home-grown Bill of Rights. Those hopes were also dashed - in September 1988. Not a single proposal for Constitutional reform was accepted by the people in the Referendum at that time. The one we had to have for the Bicentenary. The average vote in favour of the 4 proposals was only 32%. 67% of our fellow citizens voted against them. Only one question passed in a single jurisdiction, viz, the guarantee of fair parliamentary elections, which snatched a narrow 51% in the Australian Capital Territory. And all of this, despite the fact that the polls three weeks before the referendum were showing marvellous majorities favour. Truly, Australia was once again shown as, constitutionally-speaking, the *"frozen continent"*.

So what is the point of another effort, so soon after the last, to revive this apparently doomed debate about a Charter of Rights for Australia? That is the question which Justice Murray Wilcox seeks to tackle head-on in this book. The structure of his book is simple. Like Caesar's Gaul, it is divided into three parts:

The first describes the United States' experience with its famous Bill of Rights. As Justice Wilcox points out, Americans virtually find it inconceivable that a democratic society could get by without an enforceable list of constitutional rights upheld in the independent courts;

He then follows with a longer section on the experience of Canada. They started with a simple Act of Parliament passed in 1960. But in 1982 the *Canadian Charter of Rights and Freedoms* was added, and given the force of constitutional superiority over every other law. The Canadian political and legal scenes are sufficiently similar to those of Australia to make the Canadian experience with the Charter highly relevant;

And then comes the section on Australia: the sorry history of past attempts to get a constitutional Bill of Rights, controversies which have dogged the suggested need for such a Bill and some hopeful pointers on the way ahead, with Justice Wilcox's suggestions for the basic content of a new Australian Charter of Rights.

There are passing references to the unentrenched New Zealand Bill of Rights Act and to other constitutional systems. They tend to show that in the rights business, Australia is now virtually alone in rejecting a Charter of Rights, and putting its entire faith in parliaments and the common law.

The reasons why this book is timely, despite the relatively recent rejection of the proposal of the Bbicentennial referendum, are as follows:

* It is inevitable that, as we approach the centenary of the Federal Constitution, there will be much debate and reflection about that instrument's adequacy to see Australia into a new millennium, with new hopes and different challenges facing our multicultural country.
* Virtually all of the other English-speaking democracies now have Bills of Rights of some kind. Even the courts of the United Kingdom are now

subject to review of their decisions in the European Court of Human Rights, according to the standards set by the *European Convention on Human Rights*.

* Recent decisions of the High Court of Australia have discovered implied constitutional rights to freedom of expression and political debate so that we are becoming more used to talking of basic rights which the law upholds.

* Australian courts are also increasingly looking to international human rights standards to assist in the development of the common law and to resolve ambiguities in local legislation. This process has been encouraged by the High Court's decisions in the *Mabo* case and in *Dietrich*, the case which upheld, in effect, a limited right to legal counsel in serious criminal trials.

* In 1991 Australia signed the First Optional Protocol to the *International Covenant on Civil and Political Rights*. Although this does not incorporate that *Covenant* into domestic law, it renders Australia answerable to the U N Human Rights Committee for alleged departures from the requirements of basic human rights. After exhausting local remedies, people dissatisfied with Australian law can now take their complaints to an international body. In Tasmania, a group protesting the criminal punishment of homosexual offences has brought such a complaint to the U N Committee in Geneva and it is now under active consideration. The Federal Government, on behalf of Australia, has said that it does not seek to uphold or justify that law.

* In a sense, it is something of a misfortune that the republican issue has highjacked the constitutional reform debate in this country. It threatens to swamp all other considerations. Sadly, the media, and it seems, some politicians, like to over-simplify the difficulties of constitutional reform in Australia. It will be a misfortune if larger issues of substantial reform are overlooked. That is where Justice Wilcox's book comes in.

I do not pretend that the question whether Australia should have a Bill of Rights allows a simple answer. Nor does Justice Wilcox. But one of the important

contributions of the book is that it collects the data, especially on the Canadian experience, so that we can base our decision in this issue upon fact, rather than fiction or presupposition.

I was recently told by a Canadian judge that the *Canadian Charter* had done nothing for the poor and the disadvantaged; but had only helped criminals to escape due punishment. Justice Wilcox comments on the statistics on *Charter* litigation. That will be a much sounder basis for action than judicial impressions.

Similarly, Canadian lawyers often complain that it is now virtually impossible to get issues of general legal significance to the Canadian Supreme Court. They are just too swamped with work on the *Charter*. But this book shows that only 24% of the workload of that court represents *Charter* cases - 150 cases in the Supreme Court in a decade. Inevitably, in the early days of such an important instrument, the highest court will be called upon to clarify its meaning and operation. But that leaves plenty of judicial time for the more mundane work of the rule against perpetuities and the law of cattle trespass.

The fundamental problems remain and Justice Wilcox does not seek to avoid them:

* Would it not be better to try to make the democratic parliaments work more effectively, rather than turning over such great powers to unelected judges?
* Would the judges, overwhelmingly male, middle-class, privately educated, middle aged, and tending to the conservative, really be as good as Parliament in protecting basic rights?
* Parliaments can change their Acts. If courts get constitutional rights wrong, a country may be stuck with the consequence for decades. Thus the US Supreme Court has made some seriously wrong decisions on the Bill of Rights over the past 200 years. It is difficult to overcome them once made. It upheld the legality of slavery. It refused protection to Japanese Americans during the Second World War. It declined to strike down legislation aimed at homosexual Americans. But it did much good as well which must be put

into the equation. It upheld the rule of law. It ultimately resulted in the desegration of the South. It demanded equal electorates. It faced up to the issues of police power and abortion.

* If judges get involved in determining controversial policy questions, will there not be a call for a different kind of judiciary, and for closer popular scrutiny of the people who are appointed to make such decisions?

All of these problems are squarely addressed by Murray Wilcox in this book. He seeks to answer them fairly, whilst maintaining the momentum of his call for an Australian Charter of Rights which he strongly favours.

My own feelings on this issue have changed over the years. Initially, I had an unquestioning faith in the Parliamentary system and rejected, as undemocratic, the assignment of great power on social questions to an elite judiciary. Then, during my law reform days, I saw too often how Parliament fails to deliver the goods.

* Take the Law Reform Commission's report on reform of the law of defamation. Justice Wilcox will remember this, for he led that project. Here we are, 15 years later and nothing has been achieved. Yet who can deny that the current laws of defamation are ineffective - presenting an unsatisfactory lottery? The Law Reform Commission urged a more effective regime: with emphasis on rights of correction and rights of reply, rather than the pot of gold for the determined few who have the means to take the risks of a major trial. The powerful media interests and others have resisted these reforms. Parliament has shown itself spineless, I am afraid. Little wonder people are now turning to the courts to extract from the Constitution the fundamental rights which Parliament has been ineffective to protect.

* The Law Reform Commission also put forward major proposals for a cautious protection of some Aboriginal customary laws. One would have thought that the International Year of Indigenous Peoples would have

afforded an occasion for adopting at least some of the Commission's proposal in respect of upholding the integrity of Aboriginal communities. Not so.

* In Aboriginal land title, some legislation has been enacted. But it took a decision of the nation's highest court to remedy an ancient wrong which Parliaments throughout Australia were prepared to tolerate. What fair-minded citizen could really support the legal myth that Australia was an empty continent when the settlers arrived after 1788? What sort of a democracy would tolerate the pretence of *terra nullius* and the uncompensated seizure of the land of the indigenous people? It did not happen in New Zealand. Why did our Parliaments accept it for so long? Why were we not prepared to guarantee to the Aboriginal communities the same protection against uncompensated seizures of property that we insisted upon for ourselves when we adopted our Federal Constitution? There was a shocking failure of the democratic system. It took a court decision in *Mabo* to right this wrong. I have no doubt that history will judge kindly the decision of the High Court in *Mabo*. It will contrast the judges' sense of justice there with the hypocrisy and neglect of 150 years of our Parliamentary institutions.

For all that, many still remain to be convinced that the better course would not be to try yet again to make Parliament work more effectively and justly. And there should be no doubt that the judges of Australia already have many means at their disposal to uphold fundamental rights:

* Common law principles and reinvigorated judicial review demand respect for basic rights, and courts enforce them.
* Judges are increasingly using international human rights law to resolve ambiguities, and to extend the common law of Australia.

* Now, implied Constitutional rights are being found.
* Important legislation to prevent discrimination and to re-educate the community against stereotypes has been enacted, and is being proposed in our parliaments.

I regard this book as a notable contribution to the debates. Its central appeal is for a less simplistic notion of what a modern constitutional democracy actually is. It is not a mechanical arrangement of the popular will to be translated from the ballot box into Parliament, ever responsive to the people. Few believe in that fairy tale any more. We can all see with our eyes how the political mandate and the Party platforms are quickly abandoned when they prove inconvenient; how our elected members become the captives of the Party in power; how the Executive and the Head of Government control and dominate Parliament; how the messy arrangements between the Houses of Parliament and governments, increasingly reliant on minority parties or Independents, cannot always carry through their promised programmes - even if there is a will to do so. In this sorry state of confusion, inaction and delay it is sometimes necessary to have effective weapons to defend basic freedoms and to uphold fundamental values. In Australia, fortunately, the judiciary already has many such means at its disposal. The fundamental question posed by Murray Wilcox is whether we need more. Do we need a *Charter of Rights*? At a time when constitutional fundamentals are under the microscope, this is an important question for the Australian community to ask and ask again. This book, by a most distinguished Australian judge, and a fine citizen, will help to provide some informed answers.