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FOREWORD

HUMAN RIGHTS IN AUSTRALIAN LAW

Editor: DAVID KINLEY

The Hon Justice Michael Kirby AC CMG

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This book chronicles nothing less than a legal revolution. Every chapter records the growing impact on Australian law of international human rights law.

In busy lives it is easy to overlook or forget particular developments: whether in statutory or judicial law. This book pulls the threads together. It demonstrates, in a way that even sceptics cannot ignore, that human rights law is now permeating the nooks and crannies of Australian substantive and procedural law.

One might perhaps expect these developments to occur in areas of federal public law: constitutional, administrative, migration, environmental and criminal law. There are found the actions of the Executive Government which, in its international aspect, is involved in, and increasingly committed to, the world-wide movement for the protection of human rights. But the development is now affecting public law in the States and areas of private law: family law, the protection of individual privacy and equal opportunity decisions. No

corner of Australian law, it seems, is now exempt from the influence of international human rights law.

The special value of this book is that it demonstrates this fact in a multitude of practical instances where courts and tribunals, faced with difficult decisions, have looked beyond the hitherto orthodox sources of legal reasoning to a new realm of intellectual discourse which is growing beyond Australia but which has relevance to the way in which we order our society.

The gradual reconciliation of Australian municipal law with the expanding notions of international human rights law has actually been going on for more than fifty years. However, it has gathered pace in recent decades. It received a notable impetus from the reasoning of the Justices of the High Court of Australia in *Mabo v Queensland [No 2]*¹ and in *Minister for Immigration and Ethnic Affairs v. Teoh*². To those brought up in the comfortable days of the British Empire and in the often cloistered, technologically resistant, world of the legal profession, the new notions were confronting, and sometimes uncongenial. They required something of a leap of the imagination - a feat unpleasant for many minds. But once it is

¹ (1992) 175 CLR 1

² (1995) 183 CLR 273

appreciated that the legal, political and technological world in which Australian law must operate has changed forever, the accommodation between that world and the international law of human rights became both desirable and inevitable.

Scarcely a week goes by in a sittings of the High Court of Australia that a case does not present which involves, in some way or other, an international treaty to which Australia is a party or values that find reflection in the principles of international law. The ultimate boundaries of the impact of the new sources of jurisprudence are not yet known. For example, in the *Hindmarsh Island Bridge* case³ I suggested that, in construing an ambiguous provision of the Australian Constitution (such as the race power), regard might be had to universal human rights. Not only does the Australian Constitution speak to the people of this nation who gave it birth. It speaks to the international community of which Australia is a part. Some have questioned this approach. But no one can doubt that, in the coming millennium, the basic laws of every nation will go through a process of *rapprochement* with the extraordinary developments of international law affecting nation states and their peoples. This is an outcome of globalisation and regionalisation; and also of the technology that links us together and of the common problems that demand multi-national solutions.

³ *Kartinyeri v The Commonwealth* (1998) 72 ALJR 722

It is important to see the legal developments, in the interstices of the detail of Australian law, recounted in this book in the context of the broad changes in the world about us. Fifty years after the adoption of the *Universal Declaration of Human Rights*, the changes increasingly concern the protection of fundamental human rights and the removal of derogations from those rights. The Parliaments of Australia, federal and state, have the primary responsibility to give effect to such standards. But the judges of Australia, aided by an informed legal profession, have functions that cannot be disclaimed. The central lesson of this book is that Australian courts and tribunals are accepting their new obligations in a way that would have seemed astonishing even twenty years ago.

The most striking feature of these essays is that they demonstrate beyond argument what a practical subject the study of human rights jurisprudence is now becoming for the judge and lawyer in Australia. In keeping with this practical approach, this book is not only a helpful anthology of pertinent law. It contains, at the end, a most useful collection of the references to the Internet sites where the relevant texts and jurisprudence can be found.

Australians, who have been blessed with a stable Constitution, independent judges and adaptive statute and common law have never been a backwater of antipodean legal isolation. For two centuries we have had the stimulus of legal principles from England and other countries of the common law. We still have these. But in

time for a new millennium we can now add to our treasury of ideas
an additional source of legal principle to guide us and to help us.
This book shows that an irreversible process has been set in train. It
is natural. It is timely. It is happening.

M D KIRBY

High Court of Australia
Canberra
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