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Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia* (UNSW Press, 2009), ISBN: 978 1 92140 17 8 (Pbk)

BOOK REVIEW
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The Hon. Michael Kirby AC CMB

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I come to praise this book. Well, he would, wouldn't he, perhaps I hear you say? Yet even for the critics of the idea of some form of bill or charter or statute of rights in Australia, this book is a handy compendium of the arguments about the idea of expressing basic rights in Australia in an accessible statutory form.

As Professor Philip Alston points out in his thoughtful foreword, Australia is now almost alone amongst what used to be called 'civilised nations' in not having any bill of rights. Alston adds that we are also almost alone amongst uncivilised ones as well. So this peculiar situation properly focuses the attention of everyone, not just lawyers, on whether Australia is the only nation in step. Or whether there are some features of in our governmental arrangements (or superlatives about our tradition national values) that render this idea inappropriate to the Australian context.

The book is only 169 pages of basic text. So an avid reader or busy reviewer can digest it in a single autumn afternoon. Although each of the authors has been involved in the development of statutory bills of rights (and presumably had his or her heart in the project) the text is mercifully free of rhetoric and polemics. As well, it acknowledges candidly the sources of the Australian scepticism about statements of fundamental rights. It also points out that, within the Australian Labor Party, which is in government in most parts of the Commonwealth, there are deep divisions about the wisdom, necessity and timeliness of enacting a human rights statute.

The special value of the book is that it coincides with the national consultation, initiated by the federal Attorney-General (the Hon. McClelland MP) to advise the

Government on whether Australia's current protection for basic rights is adequate and, if not, what form of protection should be introduced, excluding a constitutional or like amendment which the Government recognises would go beyond the mood and inclination of the present time. Professor Frank Brennan is leading this consultation. He is obliged to report, possibly before the reader has this review. It would certainly enhance the value of the submissions, and perhaps attract submissions from citizens outside the legal profession and special interest groups, if this book were to enjoy a wide readership. Certainly, it lays bare the essence of the problem that our country must address; the various models that have existed or are now on the table; and the way forward if it is decided to proceed with a national statutory bill of rights for Australia.

As befits the high talent and personal experience of the three authors the structure of the book is clear and logical. Their first chapter examines the very notion of human rights and describes how the idea of rights, inhering in human beings because of their very nature, came to enjoy popular support around the world. And how that support was, in turn, translated into the corpus of international law, substantially adopted by or under the United Nations following its creation by the Charter of 1945. That instrument was originally intended to include a section devoted to fundamental human rights. However, the project proved too complex and controversial so that it was postponed until December 1948 when the General Assembly (with the Australian Dr. H.V. Evatt in the chair as President) adopted the *Universal Declaration of Human Rights* in the form proposed to the Human Rights Commission by a drafting group chaired by Eleanor Roosevelt.

The book is pitched at the general reader. It does not pre-suppose a deep knowledge of the international system of treaties which, supplemented by developments in international customary law, now express universal principles of human rights to which states parties to the treaties commit themselves. The relevant expressions are explained and defined. The treaty framework is itemised and illustrated. A short section explains Australia's approach to international human rights. That approach has included participation in leading roles in the practical

efforts to protect human rights in countries such as East Timor and Zimbabwe and in the establishment of the International Criminal Court.

However, the book also explains the reluctance that has existed, virtually from the start, in the translation of rights provisions in UN treaties into domestic legislation of the Australian Commonwealth. During the previous federal government, there was considerable sensitivity and resentment towards criticism, voiced in Geneva and New York, about Australia's record in areas of human rights, particularly in relation to issues of race, Aboriginality and the treatment of refugees. It was part of the electoral mandate of the Rudd government to restore 'a more constructive relationship with the United Nations'. Yet conflicts of such a kind tend to leave the ordinary Australian unmoved. Many citizens regard with contempt the backroom deals that are negotiated in the halls of power in the United Nations. They would treat as absurd the concentration on criticism of Australia's human rights record when many other countries have manifestly worse records but are protected by tit-for-tat moderation in criticism by the UN's racial or regional blocs.

Having laid the ground by describing the modern context of human rights protection in both national and international law, the book turns to a brief history of Australia's consideration of the enactment of a bill of rights. The idea was debated at the Australian constitutional conventions in the 1890s. However, it was rejected in what was then a typically British view that parliament was the best protector of civic rights and could be trusted with such protection without need for generalised statements of basic rights in a compendious constitutional bill of rights. Many contemporary opponents of the move towards legal protection of human rights adhere to this traditional approach. Yet as the authors point out, it has been substantially abandoned in the other nations of the Commonwealth which once adhered to this viewpoint, including the 'old dominions' of the United Kingdom, Canada, New Zealand and South Africa. Now, only Australia amongst those nations, holds out.

The third chapter of the book examines the various models that are available for the creation of an Australian bill of rights and the themes that have so far emerged in the Australian debates. We have had plenty of opportunity to consider those themes because of the abortive effort in the last quarter of the 20th century to adopt some form of human rights legislation. One by one, those efforts failed, including a seemingly innocuous endeavour, coinciding with the bi-centenary of British settlement in 1988, to incorporate in the federal constitution basic rights protection in respect of the States that were already protected in respect of federal laws. None of the earlier proposals got up. So what, one might ask, has changed?

To this question, the authors devote the next two chapters, examining the history, provisions and operation, respectively, of the ACT Human Rights Act 2004 and the Victorian Charter of Human Rights & Responsibilities Act 2006. The most interesting section of the analysis of these two statutes (the first such statutes ever adopted in Australia) appears in the examination of the cases that have already arisen under them and the rather cautious approach taken by the courts to their provisions. To have an impact, such legislation needs to be known and understood by practising lawyers. Only then, will they perceive their relevance to cases coming across the lawyers' desks. Then it requires a willingness on the part of the lawyers to research, track down, analyse and seek to apply decisions on like statutory provisions in other jurisdictions. It then requires a willingness and interest on the part of judges to consider such novel concepts and to add to already heavy burdens, new obligations to think in broader and more conceptual terms.

To say the least, all of these demands represent a big ask. One Law Lord in the 1960s, visiting Australia for a legal convention, said that each generation of lawyers takes 20 or 30 years to realise that the law has moved on from their law school notes. Whilst this may have been a slight exaggeration, it is certainly sometimes difficult to get lawyers to embrace significant change in the law. The grafting on to our hostile legal system of notions of fundamental human rights is a challenge for any investigation that examines the idea. The challenge may be even greater for any government that decides to act upon it.

The final chapter of the book is titled “Towards an Australian Bill of Rights”. It mentions the importance of community education, consultation with special interests, securing effective media involvement and addressing particular problems of enforcement. Obviously enough, the most important of the foregoing issues is the suggested constitutional difficulty in enacting a provision by which federal courts, or courts exercising federal jurisdiction, were asked to make a declaration of incompatibility between enacted laws and the national bill of rights. The difficulty is said to be created in Australia by past High Court authority. On this critical issue, the authors simply say: ‘The uncertainty surrounding the constitutional validity of a declaration being a compatibility mechanism is unlikely to be resolved until such a provision is considered by the High Court. It will be possible to include a declaration provision in a national bill of rights that is severable from the remaining provisions; thus a negative determination by the High Court on this issue would not invalidate the remainder of the bill of rights. It has also been suggested that the declaration provision could simply be omitted altogether’.

The authors review other options that might be adopted to strengthen the determinative effect of the bill of rights or charter. However, on the whole, they leave this issue in the air and come quickly to their conclusion. This is that a bill of rights, like the 1948 Universal Declaration of Eleanor Roosevelt, would add weight to the scales of legal determination and thereby helps to maintain an equilibrium between individual rights and majoritarian politics. The mere fact that perfect equilibrium is never entirely achieved is not a reason for failing to improve the current dis-equilibrium.

Given the apparent purpose of this book, namely to inform general readers or introductory classes of law students about the bill of rights debate, it fully achieves its aims. One would not expect any other result from such a distinguished team of writers. Andrew Byrne is professor of international law at the University of New South Wales and chair of the Australian Human Rights Centre. He has been a

leading commentator on the Hong Kong Bill of Rights. Hilary Charlesworth is director of the Centre for International Governance and Justice at the Australian National University. She chaired the ACT Bill of Rights consultative committee and was instrumental in the development of the Human Rights Act of that Territory. Gabrielle McKinnon is the director of an ARC project at the ANU. That project is examining the impact and implementation of the ACT Human Rights Act over its first five years. The authors therefore have a conceptual and a practical grip on the entire subject they have tackled.

If I have is a criticism of the book, it is that, for such concentrated brain power, it ends up being a little too bland. There is just a little hint of this assessment in the foreword written by Philip Alston. By reference to the developments in the United Kingdom, which are often placed before the Australian community as the goal and objective of the 2009 national consultation, Alston suggests that 'mere' declarative principles that carry no legal weight or clout, together with simple rules of interpretation, may not 'represent a step forward from the existing situation in which the Federal Parliament is free at any time to extend or withdraw rights. Likewise, from his own unique experience in this subject, Professor Alston is obviously disappointed at the failure of the United Kingdom model to embrace the new generation of economic social and cultural rights. He expresses the fear that 'the message being sent might look like empty symbolism'.

This is the basic problem we now seem to face in Australia. Our history has produced a country with a high measure of scepticism and even hostility towards the notion, derived from natural law thinking. There continues to be a huge faith in so-called 'parliamentary sovereignty' to fix up all our problems. Yet, when this supposed cure-all is measured against parliamentary neglect and injustice in relation to Aboriginals, Asian Australians (during White Australia), women, gays, refugees and other minorities, this faith might seem to an impartial observer misplaced or, at the very least, over-romantic. Yet the federal government that has initiated the national consultation has made it abundantly plain that it will do nothing that impairs

the so-called ‘sovereignty’ of parliament. And constitutional amendment is totally excluded as even a theoretical or long-term outcome.

What, in these circumstances, should be done? Would even the bland symbolism of declaratory orders be constitutionally impermissible? Should the Australian consultation point to the desirable way ahead and leave it to the political process to engage the citizens to move in the direction of *real* change? Is it better, in short, to grasp an extremely modest possibility on the footing that our history suggests that nothing more is achievable in fact?

For my own part, I would have preferred a hard-nosed closing chapter on the options that lie ahead and how Australia could achieve them. Perhaps when the consultation report is finally published, a second edition of this book may give rise to such a chapter. If there is such a further edition (and no three editors are better positioned to write it) I express a personal stylistic preference for footnotes over endnotes. In contemporary publishing technology, this presents no problem. Presumably the other choice was made to emphasise the purpose of this book, which is, from start to finish, to present a text for the lay reader but with appropriate references to further research, most of which can now be tracked down through the internet.

There are excellent tables, book and case lists and a fine index. The problem for a knowledgeable reviewer is that the names of the three authors herald an expectation of positive solutions that neither the book, nor the current stage of the debate, really permit.

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