Bills of Rights in Australia: history, politics and law

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A committee chaired by Father Frank Brennan SJ AO is currently consulting the Australian community about human rights, including whether there should be a national Charter of Rights. This book informs that public discussion. It is overdue, since much of the commentary that occupies newspaper space repeats dead arguments over the idea that Australia should have a constitutionally entrenched Bill of Rights. There is little enthusiasm for that idea, and, as a result, no prospect of it becoming a reality.

The model being promoted by charter advocates is based upon the kind of statute that operates in the UK, Victoria and many other democracies. This model is said by its advocates to overcome the "democracy objection" that a Bill of Rights transfers power to an unelected judiciary. A statutory charter requires courts to interpret legislation in a way that is compatible with the rights recognised in it. The UK Act provides for a judicial declaration of compatibility. Legislation is not declared invalid, and it remains for the Parliament to decide whether to amend the law.

Objections exist to these "dialogue bills of rights". Professor James Allen says that the UK government's positive response to most declarations of incompatibility proves that there is a lack of dialogue. The authors suggest that it proves the opposite. Advocates of a charter say that it improves the quality of the legislative process in the first place, and has a positive impact on policy development by bureaucrats. The

authors explain that jurisdictions that have adopted the modern form of charter have not experienced an explosion of litigation.

This work gives a history of failed attempts to introduce bills of rights in Australia, and an account of the operation of statutory bills of rights in the ACT and Victoria. A critical issue is the courts' interpretative obligation under a charter. In the UK it is expansive and permits courts to depart from the clear intent of the legislature in order to give effect to protected rights. By contrast, the charters in Victoria and the ACT require judicial interpretation to be consistent with the purpose of the law.[1]

The book discusses the recurrent themes in Australian debates about whether there should be a bill of rights. The "democracy objection" is rejected as crude majoritarianism. The final chapter focuses on the possible content of a national bill of rights, including tricky issues such as whether the rights recognized should extend beyond political and civil rights to include economic, social and cultural rights. A vexed question is the remedies that might be available for serious breaches of human rights.

Many myths exist about how a statutory charter of rights would operate in Australia.[2] So do many legitimate questions. If the model in contemplation is that adopted in the ACT and Victoria, then will it make a difference? Is that model little more than a

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[1] This point was discussed by Chief Justice Spigelman in the third of the 2008 McPherson lectures: "Statutory Interpretation and Human Rights" http://www.lawlink.nsw.gov.au

[2] Kirby, "The National Debate about a Charter of Rights" http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_21aug08.pdf

glorified Acts Interpretation Act? Courts already construe legislation as not abrogating fundamental rights or freedoms in the absence of clear words or a necessary implication to that effect.[3] They do so under what has been described as the Common Law Bill of Rights. So what difference would a Charter make?

The authors respond to this question by giving the example of *Al-Kateb*, in which a majority of the High Court ruled that a stateless person who was refused a visa could be held in indefinite detention. After leaving the bench Justice McHugh lamented that the lack of a Bill of Rights led to his narrow reading of the *Migration Act* in that case. Yet the minority were able to reach the opposite result without a charter.

This accessible work is about history, politics and the law. It makes a contribution to a debate that predates our federation, when Andrew Inglis Clark tried to include additional rights in the draft of our Constitution. He saw the "rights of man" as countering "the tyranny of the majority, whose unrestricted rule is so often and so erroneously regarded as the essence and distinctive principle of democracy". Over the last century many have celebrated the choice not to include a Bill of Rights, enforced by an unelected judiciary, in our Constitution. Justice Keane observed that it was "a deliberate choice to embrace an ideal of democracy which reposes a great responsibility on the citizenry to act justly towards their fellows", and stated that the choice has made it easier for our judiciary to maintain public confidence in its work as the non-political arm of government.[4] He also noted that the debate on a statutory

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3 *Coco v R* (1994) 179 CLR 427, 437

4 Keane "In Celebration of the Constitution" http//www.archive.sclqld.org.au/judgepub/2008/Keane120608.pdf

charter of rights “raises quite different issues from those raised by constitutional limitations on legislative power”.

Those issues are canvassed in this timely book. Its last words are those of a poet, not a lawyer. Seamus Heaney reflected on the Universal Declaration of Human Rights, and the observation of Simone Weil that “if we know in what direction the scales of society are tilted, we must add weight to the lighter side of the scale”. The authors quote Heaney’s words to argue that, like the Universal Declaration, a bill of rights “adds this kind of weight and contributes thereby to the maintenance of an equilibrium – never entirely achieved – between individual rights and majoritarian politics”.

Reviewed by Justice Peter Applegarth