*Dianne Otto**

HUMAN RIGHTS UNDER THE AUSTRALIAN CONSTITUTION

By George Williams

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IS the Australian Constitution capable of offering real protection to fundamental rights and freedoms? This is the central question that George Williams asks in his most recent book, *Human Rights Under the Australian Constitution*, and he looks to the judges of the High Court, as the 'ultimate interpreters' of the Constitution, to provide the answer. In asking this question, Williams is intent on drawing attention to the unexplored potential of the Constitution with respect to human rights. In looking to the judiciary to provide the answer, his analysis is firmly grounded in a conservatising realism that keeps his optimism and his vision in firm check.

Williams proceeds from the premise that the Constitution does have an important role to play in the protection and promotion of human rights in Australia and argues that much more can be done to realise this potential, despite the limits of its present structure and text. Notwithstanding the thorough and compelling way that Williams makes this argument, it is not surprising, given these limitations, that he is forced to conclude that the Australian Constitution is incapable of providing anything that even remotely resembles an adequate system for the protection of human rights. However, en route to this conclusion, Williams draws a remarkably detailed map of the genealogy of constitutional rights discourse in Australia and makes a large number of compelling suggestions about how the present limits might be challenged and the boundaries redrawn.

The book has ten chapters, followed by an appendix containing the Australian Constitution and a select bibliography on the constitutional protection of rights in Australia. The first four chapters in many ways set the scene for Williams' analysis in the remaining six. In introducing the book, the first chapter provides a brief theoretical backdrop to the notion of 'human rights' and reminds us of the often more effective non-constitutional avenues for protecting rights in Australia, which are not the subject of this book. In chapter 2, Williams examines the drafting history of the few rights-oriented provisions that survived the overriding imperatives of the drafters to enshrine responsible government, federalism and the power of Australian governments to maintain race-based distinctions. The third chapter outlines the scope for the protection of rights in the text and the framework of the

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* BA (Adel), LLB, LLM (Melb), LLM (Columbia); Senior Lecturer in Law, University of Melbourne. Thank you to Glen Patmore for his invaluable comments.

Constitution, while also highlighting many of the limitations of the scheme in its present form. This is followed, in chapter 4, by an examination of the High Court's various approaches to constitutional interpretation and the effect they have had on the recognition of individual rights. Williams highlights the possibilities for both progressive and regressive future outcomes in the more recent moves away from literalism.

The remaining six chapters comprehensively review and critique the human rights jurisprudence of the High Court to date and suggest many strategies for building on this. Chapters 5 and 6 examine the way that the High Court has dealt with the few expressly rights-oriented provisions in the Constitution (civil and political rights in chapter 5 and economic rights in chapter 6), while chapters 7 and 8 discuss the implication of rights from the Constitution (from the notion of representative government in chapter 7 and the separation of judicial power in chapter 8). Williams then, in chapter 9, draws together the material covered in the preceding chapters to underline the 'double standards and unarticulated premises' that have characterised the High Court's human rights jurisprudence, and to stress the importance of developing interpretative methods that articulate the guiding principles and policy choices of this jurisprudence. Finally, chapter 10 looks to the future, suggesting that a human rights culture must be fostered in Australia, as a prelude to achieving constitutional reform in the form of a Bill of Rights. I will briefly outline Williams' mapping of the lineage of constitutional protections for human rights in Australia while, from my own perspective as an international human rights lawyer, noting some gaps with respect to international law that Williams leaves unattended. My criticism, however, should not be read as detracting from Williams' project which is rigorously researched, intelligently articulated and compellingly argued.

Williams' opening theoretical discussion in chapter 1, on the nature of human rights, is very brief and a little perplexing. He begins with the observation that human rights are contextually specific, citing the views of Brennan J in support of this contention.[1] This introduction is followed by the observation that the international community has, against the odds as it were, 'sought to entrench the notion that certain human rights are universal'.[2] He then goes on to employ a number of further dualisms in order to position the Australian approach to human rights, such that it is, in the tradition of liberalism, particularly the liberal concern with protecting individual freedom from governmental action. By employing Wesley Hohfeld's scheme to contrast the differences between negative and positive rights, Williams makes the point that, within the Australian system, rights have normally operated as 'privileges' (in the framework of the common law) or as 'immunities' (in the framework of the Constitution), rather than as 'claim-rights'. Claim-rights involve placing a positive obligation on governments to *realise* rights, rather than to merely *protect* them by refraining from action that would infringe them. While this is an important point to make, Williams leaves the impression that this is the cultural 'context'

1 *Gerhardy v Brown* (1985) 159 CLR 70, 126 (Brennan J).
2 George Williams, *Human Rights Under the Australian Constitution* (1999) 2.

for understanding the meaning of 'human rights' in Australia today. This is a cautious and conservative starting point which belies the innovative and aspirational flavour of much of what follows and, I think, the contemporary aspirations of many Australians. In concluding this theoretical discussion, Williams makes a brief reference to the republican tradition as providing an alternative to the liberal tradition, but it is not clear whether this is a course that Williams favours for Australia.[3] Republicanism is an underlying thread in Williams' thinking that surfaces on other occasions in the book but is, unfortunately, never really developed.

Evidence of Williams' caution recurs throughout the book. For example, he suggests that both Murphy and Deane JJ go beyond their constitutional mandate in treating the Constitution as an instrument that is concerned to protect individual freedom,[4] yet his own argument, that the Constitution has an important (albeit largely unrealised) role to play in this very regard, is different only in degree. The disjunction between caution and innovation is, in part, due to Williams' methodology, which is to base his analysis on the views of judges of the High Court. Where this approach provides him with scant material to draw on, Williams looks to judgments of other constitutional courts, particularly the Supreme Courts of the United States and Canada,[5] showing an impressive breadth of knowledge and enriching his discussion and the possibilities that flow from it. The method has many strengths, one of which is the end result of a ready-made compendium of possible constitutional challenges framed within the terms of the limited and incomplete High Court discussion of rights. But the method's primary weakness is that it does not allow Williams to fully address the underlying problems of the 'double standards and unarticulated premises' that he so lucidly reveals as having characterised the High Court's earlier rights jurisprudence, and which continue to thwart the development of a coherent vision and consistent method in the more recent broadening of the High Court's approach to constitutional rights. His method carefully avoids challenging constitutional orthodoxy, positioning him, as he describes it elsewhere, on 'granite' rather than the 'sand' of forward-looking modern norms.[6]

The second part of the first chapter critically analyses four other ways by which rights may be protected in Australia: the few rights-oriented provisions and the limited potential for implied rights in the State Constitutions and Territory self-government Acts; Commonwealth and State legislation, particularly anti-discrimination laws; the continual development of the common law; and international legal obligations assumed on

3 Elsewhere Williams has suggested that, while modern republicanism may enrich Australian debates about becoming a republic, it has little to offer to the process of interpreting the Australian Constitution. See George Williams, 'A Republican Tradition for Australia?' (1995) 23 *Federal Law Review* 133.

4 Williams, above n 2, 246–7.

5 Williams also draws on comparative material from South Africa, New Zealand, the United Kingdom and, on occasion, the human rights mechanisms of the Council of Europe.

6 George Williams, '*Engineers* is Dead, Long Live the Engineers!' (1995) 17 *Sydney Law Review* 62, 82.

Australia's ratification of various human rights treaties. Williams identifies three main ways in which international treaties currently affect rights protection in Australia: by, in certain instances, providing a further avenue of appeal once domestic remedies have been exhausted;[7] by creating a 'legitimate expectation' that Commonwealth administrative decisions will be taken in accordance with treaty obligations; and by shaping the development of the common law, the interpretation of Commonwealth statutes and, potentially, constitutional interpretation. It is regrettable, and another indication of Williams' preference for granite over sand, that he positions his reference to the 'enormous unrealised potential for [international law to influence] the construction of express and implied rights in the Australian Constitution' in this chapter, with avenues of rights protections that are alternatives to the federal Constitution.[8] The effect is to marginalise the potential of international law to play a role in constitutional interpretation, and to largely exclude the supporting arguments of Kirby J in *Newcrest Mining (WA) Ltd v Commonwealth*[9] and *Kartinyeri v Commonwealth*[10] from informing the serious discussions of constitutional interpretation later in the book.

The second chapter charts the drafting history of the few provisions in the Australian Constitution that were perceived by the framers as having implications for individual rights (ss 41, 80, 116 and 117). For me, its importance is two-fold. First, Williams lays to rest the widely held view that the framers' lack of concern for individual rights was based on the belief that they were sufficiently protected by the common law, representative democracy and responsible government. Instead, the drafters were motivated by a complex web of factors including the desire to protect States' powers to regulate Aborigines as they saw fit and to enable all Australian parliaments to maintain race-based distinctions in areas like employment, mining rights and immigration. Second, Williams presents a clear picture of the framers' almost total lack of concern with individual rights in general, although, it goes without saying, the racial, gender, social and economic privileges of the small elite from which the drafters were drawn remained well-protected. Instead, those who participated in the Constitutional Conventions of the 1890s were preoccupied with regulating finance and trade between the States, weighing the interests of different States and limiting the powers of the central government. Despite drawing heavily on the United States Constitution in other ways, these preoccupations, in

7 Williams only refers to one of the international avenues of individual complaint available to people within Australia's jurisdiction, that provided by the (first) Optional Protocol of the International Covenant of Civil and Political Rights (1966). Similar procedures are also available under art 14 of the Convention on the Elimination of All Forms of Racial Discrimination (1965) and art 22 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984). An additional avenue will open if Australia ratifies the (first) Optional Protocol of the Convention on the Elimination of All Forms of Discrimination Against Women when it is opened for ratification in late 1999 or 2000.

8 Williams, above n 2, 22.

9 (1997) 147 ALR 42, 148.

10 (1998) 152 ALR 540, 598–9.

combination with loyalty to the Westminster tradition 'of acting as honourable men',[11] were inconsistent with the republican motivations that could otherwise have inspired a concern with individual liberty. The huge debt owed to Andrew Inglis Clark for the remnants of rights protections that survived the scrutiny of 'honourable men' is more than apparent in Williams' telling of this history. It is clear that the motivations of the framers of the Constitution are out of step with the attitudes of Australians today and in contravention of Australia's international human rights obligations. This makes the originalist interpretation of the Constitution, adopted quite recently by the High Court in *Cole v Whitfield*,[12] highly problematic for constitutional rights.

In chapter 3, Williams commences his re-examination of the Constitution from the vantage point of a human rights perspective. He describes the coverage of rights in the text of the Constitution, outlines the constitutional structures and doctrines that may be capable of supporting the implication of rights, and alludes to some of the limitations of the protections offered. With respect to the text, he suggests that '[a]lmost any provision in the Constitution can be viewed as having a role to play in the protection of human rights',[13] although he also readily concedes that, even at its most generous construction, a minimal patchwork of rights emerges that lacks logic and order. Taking his lead from the views of Deane and Toohey JJ, as expressed in *Nationwide News Pty Ltd v Wills*,[14] Williams identifies four general doctrines of government that are inherent in the Constitution — federalism, the separation of powers, representative government and responsible government — and briefly discusses their unexplored potential as foundations for the implication of further constitutional rights. He expands on some of these possibilities later in the book, in chapters 7 and 8. While emphasising the wide scope for the recognition of further constitutional rights, Williams also points to limitations of the present scheme, including that certain rights do not extend to Australians living in the territories and to non-citizens, and that there is no protection from the action or inaction of private actors. He notes, as perhaps the most significant limitation, the interpretation of the Constitution as providing immunities from government action rather than conferring claim-rights. And, further, that the impact of this interpretation has been to limit remedies to a declaration rendering the statute in question invalid or void. Williams concludes the chapter with a fleeting reference to the critiques of rights proffered by critical legal scholars, insisting, correctly in my view, that while there is substance to such critiques, constitutionally entrenched rights nevertheless play a significant extra-legal role in shaping community attitudes and political imperatives.

Chapter 4 is devoted to a discussion of the various interpretative approaches that have been adopted by the High Court since Federation. Williams argues that, while literalism, which has dominated High Court jurisprudence until quite recently, inhibited the implication of

11 Williams, above n 2, 39.
12 (1988) 165 CLR 360.
13 Williams, above n 2, 48.
14 (1992) 177 CLR 1, 69–70.

rights from the Constitution, it does not explain the narrow approach to the interpretation of express civil and political rights. Rather, the effect of literalism (applied selectively), in combination with legalism, has been to mask the policy decisions underlying the High Court's methods which have supported an expansion of Commonwealth powers at the expense of constitutional freedoms. The more recent move away from literalism, towards more purposive constructions and the consideration of extrinsic factors, has assisted the recognition of implied rights and the broader interpretation of civil and political rights, as well as enabling some members of the Court to be more explicit about their policy choices. However, the parallel development of the High Court resiling from its general reluctance to rely on the constitutional debates of the 1890s for interpretative purposes, initiated by its decision in *Cole v Whitfield*, presents a new challenge to developing the jurisprudence of constitutional rights. Williams then embarks on an extremely useful and challenging discussion of the doctrine of proportionality, applied to determine the validity of the Commonwealth's use of its purposive powers, and how the doctrine might be further developed to factor human rights issues into the appraisal of the validity of legislation reliant on such powers. Further, he argues that the notion of 'popular sovereignty', which involves the recognition that ultimate sovereignty now lies with the Australian people rather than the British Parliament, has potentially far-reaching implications for constitutional interpretation which is sympathetic to the protection of human rights.

Chapters 5 to 8 brilliantly illustrate the double standards and unarticulated premises of the High Court's interpretations of constitutional freedoms to date. In exposing the contradictory approaches, and the almost universal failure of members of the High Court to make their underlying assumptions explicit, Williams hopes to inspire a re-examination of the interpretive methods of the High Court that will result, eventually, in fully developing the potential of the Constitution to foster rights. In so doing, Williams leaves no doubt as to his impressive grasp of the Constitution and constitutional doctrine, of comparative instruments and principles, and of the possibilities suggested by the High Court's existing jurisprudence for a more coherent and effective framework for the constitutional protection of human rights.

With respect to express constitutional rights, Williams deals comprehensively with the Constitution's few civil and political rights[15] in chapter 5 (whose drafting history he discusses in chapter 2) and economic rights[16] in chapter 6. In charting the High Court's

15 While acknowledging that many constitutional provisions have the potential to protect civil and political rights, Williams limits his discussion to those he considers most explicit and most important: s 41 (a right to vote?); s 80 (a right to trial by jury?); s 116 (freedom of religion?); and s 117 (the rights of out-of-state residents).

16 Williams discusses s 92 (freedom of interstate trade, commerce and intercourse); s 51(xxiii) (barring civil conscription with respect to providing medical and dental services); and s 51(xxxi) (acquisition of property on just terms). He does not discuss other provisions which have been characterised as guarantees of economic rights, like s 51(ii) (taxation) and s 99 (barring preferences given to one state, or part of a state, in the regulation of trade, commerce or revenue). These provisions, he argues, are better viewed as part of the

treatment of the two categories of rights separately, he is able to effectively illustrate one of the major incoherencies in the High Court's traditional approach to rights — that civil and political rights have been interpreted so narrowly as to almost render them meaningless, while economic rights have been interpreted expansively, to the point of finding powerful protections for individual rights in provisions that were ostensibly not rights-based at all, notably s 92. This was the case until *Cole v Whitfield*, when the High Court substantially reinterpreted s 92 on the basis of the intentions of the drafters of the 1890s, restricting its protection of individual rights to the guarantee of freedom of interstate 'intercourse'. Williams also discusses the individual guarantees that have been recognised as attached to the grants of Commonwealth power in s 51(xxiii) and s 51(xxxi), which extend to limit some other s 51 powers as well. Again, the broad approach taken to s 51(xxxi) as a general limitation on the Commonwealth's right to acquire property provides a striking contrast to the High Court's restrictive treatment of civil and political rights. Even so, Williams urges that much of the potential of both s 92 and s 51(xxxi) to foster interpretations that are sensitive to human rights concerns is yet to be explored.

In contrast to the robust interpretation of economic rights, it was not until 1989 that a plaintiff succeeded in invoking an express civil and political right to strike down state or federal legislation. Until then, the High Court's mostly unarticulated preference was to assist laissez faire economic development over the protection of civil and political freedoms. In *Street v Queensland Bar Association*,[17] the High Court, unanimously, took a different course, with Deane and Toohey JJ citing *Jumbunna Coal Mine NL v Victorian Coal Miner's Association*[18] and *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd*[19] as authority for a broad construction of s 117. These two decisions had often provided the authority for broadly interpreting Commonwealth powers, but had not previously been applied to broadly interpret limitations on governmental powers. Further, *Street* took a substantive approach to s 117 by looking at the effects of the law in question, moving a further step away from the narrow literalism that pervaded the earlier cases and almost interpreted s 117 out of existence. This heralded a turning point for the constitutional interpretation of civil and political rights, but the High Court has yet to follow this through. When given the opportunity to reconsider its approach to s 116 in *Kruger v Commonwealth*,[20] only Gaudron J expressed the view that limited constitutional guarantees, like that provided by s 116, should be construed liberally. Williams suggests many possibilities for further pursuit of the broader interpretation of the express civil and political rights in the Constitution that could, for example, support further implied rights, constitutionalise aspects of trial by jury, and place more effective limits on Commonwealth powers that threaten personal liberty.

'federal fabric' created by the Constitution and have not been interpreted by the High Court as rights-oriented provisions.

17 (1989) 168 CLR 461.

18 (1908) 6 CLR 309.

19 (1964) 113 CLR 207.

20 (1997) 190 CLR 1.

Chapter 7 discusses the constitutional rights that have been implied from the system of representative government enshrined in the Constitution. Williams acknowledges the important debt owed to Murphy J who discovered a number of rights in the Constitution by implication. Subsequently, the High Court has sought to find a firmer foundation for the implication of rights, and this chapter traces the developments that have relied on representative government as the source of implication. Williams commences with the High Court's initial recognition of the freedom of political communication as a requirement of representative government in 1992.[21] He traces the expansion of its scope to provide a defence to speech about political figures that would otherwise have constituted common law defamation,[22] to apply to discussion of political matters at the state level,[23] and to protect advice and support about immigration matters.[24] He then discusses its 1996 demise in *Langer v Commonwealth*,[25] *Muldowney v South Australia*[26] and, most significantly, *McGinty v Western Australia*.[27] In these cases, a majority of the differently composed High Court criticised the broad view adopted in the earlier cases and limited the freedom to the core characteristics of representative government as narrowly derived from the text and structure of the Constitution, not as a free-standing principle drawn from the system underlying the Constitution. Following this low point, the essential features of the freedom were reaffirmed in *Lange v Australian Broadcasting Corporation*[28] and *Levy v Victoria*,[29] in keeping with the *McGinty* approach, and *Theophanous* and *Stephens* were effectively overruled. There are undoubtedly further rights that can be implied from the system of representative government, even in its narrow sense of core minimal guarantees. Other likely contenders include the freedom of association and freedom of movement and, as Williams observes, the explosion of litigation in this area shows little sign of abating.

In contrast, the implication of rights from the separation of federal judicial power has not been so rigorously developed, as Williams illustrates in chapter 8. Yet this implication is an important source of implied rights and, as Deane J has suggested, it provides 'the Constitution's only general guarantee of due process'.[30] High Court judges have canvassed a number of possible implications from the separation of judicial power, most notably that involuntary detention of a punitive or penal character by a non-judicial body

21 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.
22 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104.
23 *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211.
24 *Cunliffe v Commonwealth* (1994) 182 CLR 272.
25 (1996) 186 CLR 302.
26 (1996) 186 CLR 352.
27 (1996) 186 CLR 140.
28 (1997) 189 CLR 520.
29 (1997) 189 CLR 579.
30 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 580; Williams, above n 2, 198.

or officer is a usurpation of judicial power (with certain exceptions),[31] and that the incompatibility doctrine that limits the non-judicial power that can be conferred on federal judges in their personal capacity (the persona designata rule) also limits state legislative powers.[32] Both of these principles have received majority support from members of the High Court. There are many other possibilities that have been suggested in High Court judgments, including that certain aspects of the criminal trial process might be impliedly entrenched such as forbidding the enactment of retrospective criminal laws, the requirement of fairness of judicial process, the principle of equality before the law,[33] and some form of due process in the exercise of judicial power. While the possibilities abound, Williams warns that the area lacks conceptual coherence, its scope and coverage remain an open question, and the implications emerging are not yet clearly linked to the text of the Constitution, which leaves the court open to charges of straying beyond its constitutional mandate.

In chapter 9, Williams draws together his analysis in the preceding chapters to highlight the many questions that must be addressed by the High Court before its fledgling human rights jurisprudence will be capable of fully exploiting the potential for constitutional protection of rights in Australia. He asks: Why has the High Court generally been averse to fostering human rights? How should the High Court deal with the racially discriminatory intentions of the framers and their general lack of concern with human rights? Why has a different approach been taken to express civil and political rights than to express economic rights? How should the apparent reversal of the earlier trends in *Street* and *Cole v Whitfield* be understood? How closely must implied rights be tied to the text of the Constitution itself rather than to the broader principles of the system of government underlying it? What accounts for the more rigorous interpretative approach taken to rights implied from the system of representative government than those implied from the separation of judicial power?

In answer, Williams, above all, stresses the need to move beyond the literalism and legalism spawned by the *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*,[34] that has camouflaged judicial policy choices by cloaking them in the guise of neutrality. These interpretative methods have mitigated against the articulation of foundational frameworks, theories and principles that would guide interpretation, which provides a dramatic contrast to the articulated approaches of the United States Supreme Court since the 1930s. Without openness about policy and principle, we are left to glean

31 *Chu Kheng Lim v Minister for Immigration, Local Government & Ethnic Affairs* (1992) 176 CLR 1; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; and *Kruger v Commonwealth* (1997) 190 CLR 1.

32 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

33 Some judges initially found a doctrine of equality before the law implied in Chapter III of the Constitution: see Deane and Toohey JJ in *Leeth v Commonwealth* (1992) 174 CLR 445. However, this view has now been rejected by a majority of the High Court: See Dawson, Gaudron and Gummow JJ in *Kruger v Commonwealth* (1997) 190 CLR 1.

34 (1920) 28 CLR 129.

preferences and biases by laboriously searching for trends in judgments, over time, as Williams does so capably in this book. Williams canvasses two obvious contenders for doctrines that could provide a coherent foundation for the High Court's rights jurisprudence: the doctrines of parliamentary sovereignty and of popular sovereignty (which again links with his occasional references to republicanism). He mentions the increasing influence of international law in lending support to the idea that judges have a central role in protecting human rights, but leaves as an open question whether international law could have a direct influence on constitutional interpretation. Yet surely the international framework of human rights that has developed since World War II is another contender for providing a coherent basis for the High Court's fostering of human rights? I will return to this point in my concluding remarks. Above all, Williams' plea is for the development of a coherent and sustainable approach to identifying rights in the Australian Constitution and giving them meaning. Without this, he cautions, constitutional rights will remain an uncertain and precarious source of human rights protection in Australia.

In his final chapter, Williams looks to the future of human rights in Australia. Clearly, the existing and potential human rights protections available by way of the present federal Constitution will always be inadequate and piecemeal. Accordingly, Williams advocates a gradual path to a constitutional Bill of Rights, in the light of the past and present Australian ignorance, reluctance, apathy and complacency about rights. He stresses the need to build a 'culture of rights' because, as he says, achieving the formal recognition of legal rights will be ineffective unless it is firmly grounded in the values and aspirations of the Australian people. His book makes an important contribution to the building of such a culture. The gradual path suggested by Williams includes the adoption of a statutory Bill of Rights at every level of government and the development of non-judicial monitoring mechanisms like parliamentary standing committees. By such means, he envisages that the rights that are important in the Australian context will be identified and a broad-based commitment to a constitutional system will be fostered. But, ultimately, I think that Williams' vision for the future could be less cautious. Although the Australian awareness of the importance of rights, and of the interconnections between international and domestic human rights regimes, has been slow in coming, this is now rapidly changing. The 'honourable men' of today's elites do not rule without challenge. Appeals by Australians to domestic human rights machinery are now common, while recourse to international human rights mechanisms has increased exponentially, with indigenous Australians leading the charge. The language of 'human rights' is finding a place in the Australian lexicon. The High Court's recent creativity with respect to constitutional rights is not occurring in a vacuum, but reflects a dynamic domestic context in which governments are increasingly expected to take steps to realise human rights, not just to refrain from infringing them.

In making some concluding observations, I want to draw attention to the 'modest' interpretative approach, 'in keeping with traditional methods of interpretation', that

Williams acknowledges as underlying his discussion in chapter 4.[35] His approach involves interpreting indeterminacies and ambiguities of constitutional text, principle and history in a way that is consistent with human rights norms, as identified by Australian and international law. Williams alludes again, briefly, to such an approach in chapter 9,[36] where he refers to Kirby J's finding in *Newcrest* that 'international law is a legitimate and important influence on the development of the common law and constitutional law, especially where international law declares the existence of universal and fundamental rights'.[37] It is frustrating that Williams' method does not allow him to develop these views. Rather, it leaves him to observe 'that it remains to be seen' whether Kirby J's views gain wider support from his High Court colleagues. Also, in the gradual route that Williams charts towards a constitutional Bill of Rights, there is no mention of the educative function of the international human rights regime and the potential for an enhanced awareness of Australia's international obligations to make invaluable contributions to the building of a 'culture of rights' within Australia.

However, the most important discussion that Williams does not have is the potential for international law to directly influence the High Court's human rights jurisprudence because it takes precedence over inconsistent Australian domestic law, including the Constitution. Mostly, international law regulates relations between states, which is outside the High Court's jurisdiction. But human rights law is different because it concerns the relationship between a state and individuals within its jurisdiction. There are two sources of international law that have pre-eminence: customary law and general principles of law. The first means that the obligation to prevent human rights abuses that violate customary international law, such as slavery, genocide, torture, mass killings, prolonged arbitrary detention and systematic racial discrimination,[38] binds the Australian state independently of whether it has also assumed such obligations under a treaty. The second source, general principles of law, is a largely undeveloped area of international law that might be described as including fundamental or peremptory principles of fairness and justice. In the words of the International Court of Justice, general principles rely on the idea that there are 'obligations ... based ... on certain general and well-recognised principles', among which are 'elementary considerations of humanity'.[39] In a sense, custom and general principles of law constitute a 'constitution' that Australia has in common with the rest of the world, which the High Court is bound to respect, if not actually enforce. Such a discussion is a long way from the granite foundations of Williams' analysis and vision, but I believe that

35 Williams, above n 2, 69–70.
36 Ibid, 232–3.
37 (1997) 147 ALR 42, 148.
38 Oscar Schachter, 'International Law in Theory and Practice: General Course in Public International Law' (1982) 178 *Recueil des Cours* 21, 336. There are many different views as to which human rights are a part of customary international law. Schachter's list falls somewhere in the middle of the range of approaches.
39 *Corfu Channel Case* [1949] ICJ Rep 4, 22.

excursions into the sand hills can often be productive and it is a pity that Williams does not allow himself, and his readers, this scope.

In conclusion, I must reiterate that my criticism should not be understood as detracting from Williams' project. He successfully sets out to initiate an important process of re-examining the Constitution from a human rights perspective and to argue that much more could be achieved by refinement of interpretative methods and increased clarity in the choice of guiding policy and principles. His genealogy leaves no doubt that the High Court has moved a long way on from the *Engineers* era, when Knox CJ, Isaacs, Rich and Starke JJ struggled to conceive of the possibility that 'the representatives of the people of Australia ... would ... use their national powers to injure the people of Australia' and, in the unlikely event that this occurred, considered the ballot box to provide sufficient protection, rendering the protection of the court neither 'necessary or proper'.[40] Williams succinctly, yet meticulously, maps this progression, discussing all the relevant High Court jurisprudence, making the book enormously informative for students of constitutional law, invaluable as a strategic tool for practitioners of constitutional law, and analytically useful for those interested in constitutional theory.

40 (1920) 28 CLR 129, 151–2.