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SCEPTICAL ESSAYS ON HUMAN RIGHTS

Edited by Tom Campbell, K.D. Ewing and Adam Tomkins
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The entry into force of the United Kingdom's *Human Rights Act* (1998) (HRA), was a significant development for Australia. It consolidated Australia's isolation as the only common law nation without a Bill of Rights. It also exemplified the warning made by Chief Justice Spigelman of the New South Wales Supreme Court who, in noting the increasingly incomprehensible body of jurisprudence emerging from the development of Bill of Rights instruments in the United Kingdom, New Zealand and Canada, said that Australia's common law tradition 'is threatened with a degree of intellectual isolation that many find disturbing'.[1]

Therefore as one of the few full-time Bill of Rights researchers in Australia and a human rights lawyer I eagerly anticipated reading this collection of sceptical reactions to the HRA. While the catalyst for the publication of the book was the domestic incorporation of the European Convention on Human Rights (ECHR) by the United Kingdom, the authors argue that prior to this collection the HRA had not been subject to a 'great deal of sceptical or critical analysis'.[2] As Adam Tomkins explains in the Introduction, entitled 'On Being Sceptical about Human Rights', amidst all the self-congratulation and back slapping with the introduction of the HRA, there was insufficient critique or public scepticism of such a monumental change to UK legal and political institutions.

The authors developed a mission statement, which was used in developing the book, to guide the essays that articulate the contributors' 'very considerable doubts about the wisdom of these developments within the British democratic tradition'.[3] While

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1 Spigelman, 'Access to Justice and Human Rights Treaties' (2000) 22 *Sydney Law Review* 141.

2 *Sceptical Essays on Human Rights*, T Campbell, K D Ewing & A Tomkins (eds), Oxford University Press (2000), 3.

3 Ibid 2.

the contributors 'endorse the importance of human rights within any democratic system of government', they 'question whether the primary responsibility for the articulation of these rights ought to be taken away from the normal political processes of representative government'.[4] This is a recurring theme throughout the collection. Another dominant theme of the collection is the issue of 'the extensive shift of political authority to the judiciary' that comes with legislative protection of human rights, an argument which is not new to the Australian public. *Sceptical Essays on Human Rights* is a challenging yet fascinating collection of essays. It provides generally very compelling, yet predictable, arguments about the implications of legislative approaches to human rights and the perceived misguided faith in, indeed expectation of, the judiciary to deliver upon such rights.

In the Introduction, Adam Tomkins explains what is meant by 'scepticism'. In predicting and countering criticism that post-HRA criticism or scepticism such as this collection is futile, Tomkins argues that because of the HRA, 'the search for better government for fairer administration or for more justly composed and enforced laws'[5] is even more important. He describes the contributors toward the collection as continuing such a search. According to Tomkins, 'scepticism is not the antonym of gullibility but rather … a contrast to celebration'.[6]

In describing the authors as mistrustful and questioning of the HRA, Tomkins defines three detectable variants of scepticism in the collection. First there are those who express scepticism that reflects concern about the changing relationship between the polity and the individual as imposed by rights. Second, there is scepticism about the role of judges in enforcing these rights, which encapsulates arguments of politicising the judiciary and the limitations of the legal system in catering to the protection of these rights. The third strain of scepticism arises from the actual content of the rights contained in the ECHR.

Part One of the collection consists of essays by prominent political theorists such as Tom Campbell and Richard Bellamy. The inclusion of political theorists reflects the shared scepticism within inter-related disciplines when considering the implications of incorporating human rights law into domestic legal systems and the resultant encroachment of law upon the traditional relationship between government and citizen. In Australia however, one would question the strength of that relationship, given our minimalist participatory democracy and the dominance of utilitarianism in Australian political life. Nevertheless Richard Bellamy's essay addresses the implications of rights legislation upon democratic values of participation, and is one of the most interesting contributions to the collection. Bellamy makes some convincing arguments about the political wisdom of the timing of the HRA given

4 Ibid.
5 Ibid 3.
6 Ibid.

the particular contemporary *milieu* of the UK manifest in its position within the European Union and the European Charter of Fundamental Rights and the rapidly changing nature of British constitutionalism with the HRA.

Part One continues with contributions from notable legal scholars such as Martin Loughlin, K D Ewing, Neil Walker and Jeffrey Goldsworthy. While this forum limits the ability to catalogue each contribution, Ewing's essay in particular is excellent. He questions the ascendancy of ubiquitous civil and political rights at the expense of social and economic rights. He highlights the constitutional imbalance that has occurred due to the contemporary dominance of civil and political rights in human rights discourse that has been entrenched in the HRA and thus provides a 'distorted vision of human rights' in the UK.[7] Ewing interestingly points out the resultant loss of neutrality of British constitutionalism as a consequence of the HRA. The newly imposed rights regime formalises an overt preference for civil and political rights in a tradition that previously afforded preference to neither. Ewing's essay surveys the danger in this development and makes the suggestion that incorporation of the Council of Europe's Social Charter may potentially redress the constitutional imbalance.

Part Two deals with the impact and implications of the HRA for particular areas of law. These essays provide detailed black-letter law analysis of how the HRA affects specific areas of law such as Labour Law (Sandra Fredman), Tort Law (Conor Gearty) Criminal Law (Alan Norrie) and Discrimination Law (Aileen McGolgan). These essays are notable for their informative reviews regarding the practical impact of the HRA upon their respective areas of law. They provide interesting insights for Australian practitioners and academics on the expected and unexpected effects of rights legislation like the HRA.

Indeed I found Maleha Malik's essay, 'Minority Protection and Human Rights', provided interesting arguments for the use of representative institutions as a more viable prospect for the protection of minority rights than judicial institutions. This is a ubiquitous argument against rights legislation in Western liberal democracies. Malik views the impact of the HRA and judicial resolution of rights within the context of the liberal theory of participatory democracy. She argues

> the fact that citizens are more likely to identify with the decisions of representative institutions makes the latter an ideal forum where minority protection policies require significant social change, re-allocation of power or resources and multi-culturalism.[8]

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7 Ibid 103.

8 Ibid 292.

Like most of the essays in this book, Malik's analysis provides fascinating and truly convincing arguments on paper. Nevertheless it is hard to escape continual reference to the reality of life for many minority groups in Australia, in particular for our indigenous people. Indeed, what is inescapable is the operation of Australia's political institutions which, given the nature of our representative democracy and party politics, does exclude the interests of minorities. It is essential to have these alternate views of imagining how our democracy can be reformed. For Australia, this would clearly require enormous political will and the sanction of the people, which is surely unlikely in the near future, given the historical difficulty of constitutional amendment in Australia coupled with inadequate civics education and awareness. Nevertheless, Malik's is an excellent contribution. The specialised essays of Part Two will prove an essential resource for both advocates and opponents of a Bill of Rights within the legal profession. The essays are intentionally uncompromising black-letter law interpretations of the HRA text.

The third part of the book is entitled 'The Experience of Elsewhere: Reasons to be Sceptical' and is a comparative analysis of the HRA from an international perspective. This naturally encompasses the common law experience of the United States, Canada, New Zealand and Australia. There are also essays from post-communist Eastern Europe and South Africa. The Australian contribution is an essay by Adrienne Stone called 'the Australian Free Speech Experiment' about the implied freedom of political communication and the historically challenging role of the High Court in implying rights into our constitution. In her historical analysis of the development of the right to freedom of political communication, Stone makes the link between the difficulty of the High Court's judicial development of rights and the challenge for the UK judiciary in elaborating 'the comprehensive rights scheme in the Human Rights Act'.[9] Stone's argument is that in the intense focus upon the constitution as the vehicle to deliver rights, the common law was perhaps sidelined and could have been utilised to greater effect. Indeed, Stone's central argument about the greater capacity of the common law to enhance rights protection is echoed throughout the collection by other authors. Like the other two parts in the collection, Part Three is useful in providing Australians with valuable lessons and insights on where Bill of Rights have not delivered on expectations, where outcomes and implications are significantly different to those that were envisaged.

As an ardent advocate of a Bill of Rights for Australia, I found the collection to be a truly excellent selection of criticisms, sceptical observations and concerns about rights based legislation and how juridical constitutionalism stymies the constitutive activity of citizens within a democratic structure. Many of the concerns raised, in particular by Ewing, about the neglect of socio-economic rights are equally shared by, and presently worrying, advocates of Bill of Rights in Australia.

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9 Ibid 392.

This invaluable collection provides a ready resource of potentially complex arguments that Bill of Rights advocates in Australia must prepare to counter in the inevitable public debate regarding the merits of a Bill of Rights. The significance of this collection is not simply its timing, given the relatively recent incorporation into UK domestic law of the ECHR, but also the ever-increasing influence of international human rights discourse. The collection cleverly and rightly questions the neglect of economic and social rights, something that Bill of Rights proponents like Professor Hilary Charlesworth are advocating in the growing debate over the content of a Bill of Rights for Australia.

Another incredibly important contribution that this collection makes is its persistent consideration of how rights legislation may impact upon representative democracy and indeed alternative ways that democracies of the liberal tradition can accommodate rights. The composition of the judiciary is another common concern because of its leading role in determining and judging the values, morals and general tenor of a community within a democracy. This raises necessary considerations such as approaches to statutory interpretation of the HRA, which Tom Campbell addresses powerfully in his essay 'Incorporation through Interpretation'. It also involves consideration of the implications for the citizenry when an unrepresentative and unelected judiciary is elaborating upon important rights in the already minimalist participatory environment that defines Western democracy to date. Indeed, Tomkins forcefully inquires from the outset:

> Why should it be the unrepresentative, overwhelmingly white male upper middle class judiciary of the UK creaking courts who enjoy the emancipation that will come to them with the Human Rights Act? [10]

Many of the sceptical essays mirror current criticisms of legislative protection of rights in Australia and forewarn of unanticipated obstacles in the movement toward a Bill of Rights for Australia. Naturally, one important aspect of this collection to keep in mind is that its writing was in response to the HRA, and that there are fundamental differences between the political and legal structures in the UK and Australia. In a utilitarian democracy like Australia, where minimalist ballot box participation means that indigenous people and women and other minority interests are excluded and overpowered by the hegemonic majority, a Bill of Rights is an appropriate and necessary weapon for these interests against a malevolent government of the day.

As a lawyer but also an indigenous woman, I see a very real and very visible chasm between equality before the law and Aboriginal people. While I have a great understanding and appreciation of important foundations of public law like parliamentary sovereignty and of representative government, the chasm between the

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10 Ibid 9.

theory and practice in Australia cannot be denied. The images and stories of Aboriginal Australia are surely a far more compelling and realistic argument for change in Australia than the maintenance of theoretical boundaries which are often respected in triumphant rhetoric only.

As the amendments to the *Native Title Act 1993* indicated, Australian governments have made it incredibly obvious that this Parliament is prepared to enshrine unjust laws discriminating against one particular group in the Australian community. *Kruger*[11] confirmed that and *Wilson*[12] illustrated that the High Court cannot do anything about it in the absence of the legislative protection of rights.

When the UN Committee on the Elimination of Racial Discrimination expressed concern at the lack of legislative protection of rights in Australia and the ease with which governments can discriminate against indigenous people with absolutely no legal recourse, the Australian Government reacted with incredible hostility sanctioned by an apathetic populace. Where but a Bill of Rights can indigenous people turn to in order to prevent their land rights being so clearly derogated in a manner that no other Australian's land rights have ever been destroyed? Representative democracy has failed us, the judiciary is hamstrung by an intentionally discriminatory constitution and international instruments are respected only when it comes to trade. While this collection is highly recommended for academics in the field of public law and practitioners either interested in, or sceptical of, a Bill of Rights, the reality for indigenous people is that we have neither the luxury nor the time to be sceptical of human rights.

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11 *Kruger v Commonwealth* ("The Stolen Generations Case") (1997) 190 CLR 1.

12 *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs* (1996) 189 CLR 1.