BOOK REVIEWS

The Hon John von Doussa QC[*]

THE NEW ZEALAND BILL OF RIGHTS

By Paul Rishworth, Grant Huscroft, Richard Mahoney & Scott Optican
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The New Zealand Bill of Rights introduces itself as 'a small book that grew', and the result is a remarkably accessible 900 page collection of more than a decade's thinking and jurisprudence on the *New Zealand Act*. The book details the consideration of the *Bill of Rights Act 1990* by New Zealand courts and discusses the theoretical underpinnings of the rights it protects. It also interweaves considerable international and comparative jurisprudence to help illuminate the nature of the domestic Act and to suggest proper direction for the development of the law. The book considers the history and application of the Act before moving to a detailed review of each of the specific human rights affirmed by the Act. Finally, the book considers the remarkable development by the courts of a remedial jurisdiction to deal with human rights breaches, even though remedial provisions were deliberately excluded during the passage of the bill through Parliament.

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The authors recognise that the New Zealand model will 'undoubtedly [be] perplexing to those familiar with bills of rights in the American tradition'.[1] The *Bill of Rights Act 1990* embodies the minimalist approach to bills of rights shared by the United Kingdom model and the recent Australian Capital Territory (ACT) enactment. It is an ordinary act of Parliament that can be overridden by inconsistent legislation. Section 4 states that inconsistent legislation enacted prior to the Bill of Rights is not to be taken as impliedly repealed by the Bill of Rights, and that enactments passed after its advent are similarly not to be considered invalid or ineffective. The *Bill of Rights Act 1990* requires no special procedure for its repeal or amendment, beyond the section 7 requirement that the Attorney-General should inform the House if it seems that there is inconsistency between the Act and any proposed legislation.[2] A further requirement that functions to encourage debate in the public sphere is the Cabinet Office Manual's requirement that ministers who present bills for inclusion in the government's legislative program draw attention to any implications arising under the *Bill of Rights Act.* There are no statutory manner-and-form requirements governing the validity of future legislation.[3] The Act seems to rely on the difficulty government would have in gaining sufficient political support to override an expressly granted statutory guarantee of rights.

This model is a far cry from the United States-style constitutionally entrenched bill of rights. The authors, however, identify — and demonstrate throughout their publication — convincing reasons why the Act's status as inferior legislation should not be considered its defining feature. They argue that its statutory nature cannot diminish the importance of the rights affirmed within it and that it, no less than constitutional bills of rights, sets standards not only for the courts but for government and public conduct. Despite the Act's susceptibility to amendment or repeal, the fact that there has been no such attempt points to the Act's practical, if not formal, sanctity. Indeed, Professor George Williams, in considering possible models for Australia, has suggested that the amendatory potential of a statutory bill of rights should be viewed positively as retaining the possibility of refinement of the law where necessary. This allows for 'more flexibility, as well as improvement, in the way that the community's rights are protected'.[4] In the words of Justice

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1 P Rishworth, et al, *The New Zealand Bill of Rights* (2003) 2.

2 Parliament is not however required to accept the Attorney-General's advice: *The New Zealand Bill of Rights,* 196, 200, and this provision depends on the opinion of the Attorney-General that action should be taken on a particular matter.

3 As opposed to, for example, the requirements under s 19 of the *Human Rights Act 1998* (UK) or Part 5 of the *Human Rights Act 2004* (ACT)

4 George Williams, 'Finally, Australia's First Bill of Rights', *Financial Review*, 4, and 'A Federal or State-based Bill of Rights for Australia?', *'On Line Opinion,* http://www.onlineopinion.com.au/view.asp?article=1281, posted 15 November 2000, 6 September 2004.

Keith of the New Zealand Court of Appeal, 'a balance is to be struck and not necessarily once and for all, but possibly from time to time'.[5]

An area of the book that illustrates the potential for the New Zealand experience to be relevant to the Australian context is its discussion of the protection of minority rights in Chapter 15. Section 20 of the *Bill of Rights Act 1990* states that persons belonging to an ethnic, religious or linguistic minority shall not be denied the right, in community with others of that minority, to enjoy their culture, practice and profess their religion or speak their language. The authors observe that the mere fact of including minority rights provisions constitutes a rejection of an approach which supposes that anti-discrimination principles at work in public law (or a mainstreaming approach to service delivery) obviate the need for special protection and recognition of minority culture, religion and language.[6]

There is a strong basis for concluding that the special protection of minority rights, and particularly Indigenous rights, is also desirable in the Australian context. Professor Larissa Behrendt suggests that 'where there is a vulnerability of rights protection for all Australians, it disproportionately impacts on Indigenous people'.[7] This was starkly evidenced in the practice of forcible removal of children from their families. In this regard, Professor Behrendt points to *Kruger v Commonwealth*[8] in which members of the Stolen Generation alleged contravention of, *inter alia,* freedom of religion under section 116 of the Australian Constitution, equality before the law and due process. She suggests that the Australian High Court's finding that the applicants failed on all counts highlights the occasional failure of the Australian Constitution to protect Indigenous human rights, and demonstrates that even where rights are specifically protected, they may not be easily invoked.[9]

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5 K J Keith, 'The Bill of Rights Experience: Lessons for Australia', paper from the 2002 Bill of Rights Conference, Sydney, 6.

6 Implementation of special measures for minority groups according to their needs is a path recommended for Indigenous communities by the Australian Law Reform Commission. See Elizabeth Evatt, 'Cultural Diversity and Human Rights' in Philip Alston (ed.), *Towards an Australian Bill of Rights* (1994) 83.

7 Larissa Behrendt, 'It's Broke so Fix It and Quit Getting Us to Pay the Highest Price for Its Faults: Arguments for a Bill of Rights', speech given at the Gilbert & Tobin Centre for Public Law Bill of Rights Conference, 21 June 2002, New South Wales Parliament House. On this matter, HREOC's Human Rights Commissioner Dr Sev Ozdowski has stated that '[t]he connection between an Australian charter of rights and multicultural Australia can best be summed up as follows: minority groups arguably have a harder time enacting change thru [sic] Parliament': 'A Charter of Citizen's Rights – Will this benefit Multiculturalism in Australia?', speech given at the FECCA National Conference, 5–7 December 2002, Canberra.

8 (1997) 190 CLR 1.

9 Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (2003) 28.

A large part of the book's discussion of minority rights is devoted to the relationship between the *Bill of Rights Act* and the Treaty of Waitangi. Clearly the issue of the interaction of a treaty and a bill of rights is not something of direct relevance in the present Australian context, but the observations made about the different spaces that each occupies in the public and legal sphere may be instructive. Chapter 15 discusses the Treaty's requirement for positive action in circumstances where section 20 would not be offended through a failure to act positively to enhance rights and cultural practice. Indeed the authors note that the *New Zealand Act*, like the ACT Bill of Rights and the UK model, specifically does not protect social, economic and cultural rights — which are, of course, highly relevant rights to Indigenous and other minority groups.[10]

The authors record at several points in the publication the fact that the Treaty of Waitangi was specifically excluded from the *Bill of Rights Act* in response to concern among Maori groups that the Treaty would thereby lose its special place in the national arena by becoming susceptible to restrictive judicial interpretation. This reflects the fact that the Treaty is characterised as a largely aspirational public document which outlines the way the nation should conceive of itself, rather than a legal document whose parameters are capable of being delineated by courts.

However, beyond these references to the resistance to inclusion of the Treaty in the provisions of the *Bill of Rights Act*, the book does not otherwise reveal which particular rights Maori wanted protected under the Bill of Rights, or what consultation there was with communities on this issue. Insight into this process would be of interest to Australian readers given the multiplicity of rights concepts and frameworks within Aboriginal leadership/community in Australia,[11] and the problems in legislatively entrenching contentious issues (and then letting the courts decide what they mean).[12]

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10 The briefest look at statistics on Indigenous health, education and employment illustrate why the recognition and protection of these rights are so important. To take but three examples: In 2001, the unemployment rate for Indigenous people was approximately three times higher than the rate for non-Indigenous Australians; in terms of health, the average life expectancy of Indigenous people was 20 years less than non-Indigenous Australians; 39.5 per cent of non-Indigenous Australians had completed Year 12 or equivalent compared with 16.8 per cent of Indigenous Australians: see Human Rights and Equal Opportunities Commission, 'A statistical overview of Aboriginal and Torres Strait Islander peoples in Australia' <http://www.hreoc.gov.au/social_justice/statistics/index.html> at 15 September 2004.

11 For an example of such conceptual multiplicity see the discussion of the various Indigenous notions of sovereignty in Sean Brennan, Brenda Gunn and George Williams, ''Sovereignty' and its Relevence Treaty-Making Between Indigenous Peoples and Australian Governments' (2004) 26 *Sydney Law Review,* 307–52 .

12 See K J Keith, above n 5, 7.

Thus the discussion also serves to alert Australian readers to difficulties in application of such a model in the Australian framework. The authors explain that no particular rights are enshrined in s 20 of the *New Zealand Act*, but that the rights protected will rather depend on the history and practice of the relevant minority. While this ensures flexibility in application of the Act to disparate groups, it squarely raises the difficulty in proving continuity and authenticity in cultural practice that Indigenous claimants have experienced in native title cases in Australia.[13]

Apart from the lessons to be learned about minority rights, there are more general insights into the bill of rights process to be gleaned for Australian readers. The book provides some sense of why New Zealand went the way of a bill of rights where Australia has been so resistant to that course. In particular, the authors' discussion of the role of international human rights law obligations in the formulation of the *Bill of Rights Act 1990* (section 20, for example, is almost identical to section 27 of the *International Covenant on Civil and Political Rights*) highlights the degree to which human rights norms have been taken seriously by New Zealand.[14] The extensive deferral to international jurisprudence evidenced by the authors in considering the meaning and scope of the New Zealand law is further confirmation of this fact.

However, a bill of rights is held up as a *means* to achieving better public rights consciousness and self-education rather than as the end-point of such consciousness.[15] In this sense a bill of rights might do some of the work that a treaty would, while being an approach more palatable than a treaty is in the current climate. Professor Behrendt suggests that the existence of a bill of rights might serve to normalise the use of a 'rhetoric of rights' to assert Indigenous claims without the antagonism to such language currently evident in Australia.[16]

Above all, without formal recognition such as is achieved in a bill of rights, human rights face the possibility of being overlooked by Parliament and by the courts. This reality is nowhere clearer than in McHugh J's conclusion in the recent Australian High Court decision in *Al-Kateb v Godwin*:

> It is not for courts, exercising federal jurisdiction, to determine whether the course taken by Parliament is unjust or contrary to basic human rights. The

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13 See *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58.

14 See K J Keith, above n 5, 1–4.

15 As noted, the section 7 requirement that attention be drawn to inconsistent provisions acts as a trigger for public debate and scrutiny. The success of the *New Zealand Act* in raising public rights awareness is widely accepted: see *Towards an ACT Human Rights Act: Report of the ACT Bill of Rights Consultative Committee* (2003) 48.

16 L Behrendt, above n 7, 6.

> function of the courts in this context is simply to determine whether the law of the Parliament is within the powers conferred on it by the Constitution. The doctrine of separation of powers does more than prohibit the Parliament and the Executive from exercising the judicial power of the Commonwealth. It prohibits the Ch III courts from amending the Constitution under the guise of interpretation.[17]

With this in mind, it is clear that a bill of rights for Australia should be a topic of serious debate. *The New Zealand Bill of Rights* is a book that will contribute to the public discussion on human rights — not only in New Zealand, but across the Tasman as well.

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17 *Al-Kateb v Godwin* [2004] HCA 37 (6 August 2004) 74.