

BOOK REVIEW*

Human Rights under the Australian Constitution

George Williams and David Hume

(South Melbourne, Oxford University Press, 2nd ed, 2013) xxxii + 388 pages
(including Acknowledgments and Index)

Retail recommended price paperback: A\$89.95 (ISBN: 978-0-19-552311-9)

Australia has a large literature on human rights despite having no national bill of rights, either constitutional or statutory. Amongst developed nations it is the only democracy without such a bill and despite this, as George Williams and David Hume point out, there is still much to be said about the subject. Although they take note of state laws, the nine chapters of the book provide a detailed examination of rights under the *Constitution*. These include freedom of political communication (Chapter 5); the right to vote (Chapter 6); religious rights and the rights of out-of-state residents (Chapter 7); three economic rights (ie, property, freedom of interstate trade, and civil conscription) (Chapter 8), while trial by jury is covered in part of Chapter 9. Of the other five chapters in the book, Chapter 1 deals with international and common law aspects of the subject. Chapter 2 covers the drafting of the *Constitution* and the debates on rights during the conventions of the 1890s, while Chapters 3 and 4 link constitutional interpretation and the text and structure of the *Constitution* to human rights protection. Much of Chapter 9 on the judicial power explores 'due process', a term given more attention recently in High Court examination of statutes passed by the states in cases such as *International Finance Trust Co Ltd v New South Wales Crime Commission*,¹ *South Australia v Totani*,² and *Wainohu v New South Wales*.³

The authors rightly observe that the protection of human rights depends in large measure on the operation of the law generally. For example, they provide an excellent account of the way the principle of legality operates through the presumptions guiding the interpretation of statutes. The list of presumptions at pages 41 to 43 should be included in courses on statutory interpretation. Other aspects of the subject covered in Chapter 1 include the role of international law in shaping Australian human rights jurisprudence, as well as general observations on defining human rights and the state of human rights protection in Australia.

While the book does provide a clear, thorough and very up-to-date account of the High Court jurisprudence on the rights dealt with in the book, the authors could have considered human rights in Australia in a wider context.

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1 (2009) 240 CLR 319.

2 (2010) 242 CLR 1.

3 (2011) 243 CLR 181.

This might include the following. First, to provide readers with a comparative overview of Australia's human rights record as assessed by various bodies, public and private, that rank countries for their human rights compliance. Readers ought to know that on a comparative basis Australia ranks very highly for human rights compliance. Websites such as Freedom House provide such rankings on a regular basis. That Australia should fare well is hardly a surprise given that human rights correlate with democracy and economic development, as well as with certain legal and constitutional traditions. One crucial feature of that tradition is the slow rise of moderation and tolerance (beginning in the late 17th century) making it possible, for example, for political opposition to be recognised as loyal not subversive.⁴ The other significant development was gradual acceptance that religion should be separated from the state and that diverse religions could be accommodated under the law within the same political system. This was a huge achievement in the history of human governance since it removed one of the main causes of political violence and laid the foundation for social and political peace. The contrast with contemporary societies elsewhere that have not managed to come to this realisation is obvious and telling.

The rise of non-discrimination in religion manifested itself in Australia in 1850 when legislation was passed to provide that there would be no religious test for admission to a university.⁵ This became a standard feature of legislation on universities.⁶ It is worth noting that the *1850 Act* preceded the English elimination of religious tests for admission to Oxford, Cambridge and Durham universities by 21 years.⁷

Second, it is worth noting that human rights as a term has a much longer history than either the *Constitution* or international statements on human rights such as the *Universal Declaration of Human Rights 1948* and the international conventions of 1966 discussed in Chapter 1. Human rights as a phrase predates the French Revolution of 1789 and entered the English language in the 17th century. The first mention of the phrase according to the online third edition of the Oxford English Dictionary is in 1629. Thanks to the digital newspaper database freely available from the National Library of Australia, it is now possible to read this history for Australia and to appreciate that human rights were much discussed in the 19th century and that this discussion formed the background to the present constitutional order.⁸ Between 1817 and 1948 there were over 7000 mentions of the phrase human rights in the Australian press. Even if the search is restricted to the phrase in the heading of articles there were approximately 1300 such mentions. Many were repeated articles and many were

4 Walter Raleigh (ed), *The Complete Works of George Savile: First Marquess of Halifax* (Clarendon Press, 1912) 100; David Hume, 'That Politics May Be Reduced to a Science' in Eugene F Miller (ed), *Essays, Moral, Political and Literary* (Liberty Fund, revised ed, 1987) 14, 27.

5 *An Act to Incorporate and Endow the University of Sydney 1850* (NSW) s 20 ('1850 Act').

6 *Technical Education and New South Wales University of Technology Act 1949* (NSW) s 44, as repealed by *University of New South Wales Act 1989* (NSW) s 23.

7 *Universities Tests Act 1871*, 34 & 35 Vict, c 26, s 3.

8 'The New Constitution', *Colonial Times* (online), 30 August 1853, 2 <<http://trove.nla.gov.au/ndp/del/article/8774387?searchTerm=%22human%20rights%22&searchLimits=exactPhrase=human+rights>>.

trivial, but not all. The notable feature of this coverage is that it shows that certain contemporary concerns actually existed before our own time. There was a keen awareness of human rights problems in other countries for instance. In the 1840s and 1850s the Australian press covered in detail the slave abolitionist debate in the United States.⁹ Other rights to come to notice included the human rights of the mentally ill¹⁰ and the lack of human rights of Aboriginal women.¹¹

There was also an appreciation of religious freedom and the need to allow the diverse religious groups in Australia both to practice their religion and, in particular, through the law of marriage, to permit marriages according to the religious rites of the religion concerned.¹² And of course the rights of married women to property¹³ and the right of women to participate in public life were also the subject of both the law and public debate.¹⁴

Aside from a discussion of particular rights some authors demonstrated a philosophical awareness of the foundations of human rights. In an article in the *Hebrew Standard of Australasia*¹⁵ the author links rights to man's moral nature and argues that this is a gift of the creator. This gives a glimpse into a much older tradition that predates international law on the subject and ultimately has its roots in notions of human dignity traceable to religious teaching, especially in the Judeo-Christian tradition.

Although there has been a steady expansion of statutory rights protection in Australia there were also setbacks. Apart from explicit discrimination on the basis of race in immigration legislation¹⁶ and the legislation on old age pensions,¹⁷ statutes were passed to take away rights. In the 1930s, for example, the New South Wales Parliament enacted a statute that female teachers and lecturers were to be dismissed on marriage.¹⁸ In legal theory statutory rights are vulnerable to repeal, though in modern Australia any political party that proposed to repeal equal opportunity legislation affecting women, for example, would commit political suicide.

Third, given that the title of the book is *Human Rights under, not in, the Australian Constitution*, rights elsewhere in the law, especially in statutes, might

9 JDD, 'American Slavery', *Empire* (Sydney), 11 December 1855, 3.

10 'Stigma of Mental Deficiency: Difficult to Win Back Human Rights', *The Examiner* (Launceston, Tasmania), 10 September 1938, 5.

11 'No Human Rights: Women Aborigines: Protection Demanded', *The Queensland Times* (Ipswich, Queensland), 10 June 1932, 6.

12 *An Act for the Confirmation of Certain Marriages in the Colony of New South Wales 1850* (NSW) s 1; *An Ordinance to Regulate Roman Catholic Marriages in South Australia 1844* (SA) s 2; *Marriage Act 1894* (WA) s 35; *Jewish Cemetery (Vesting) Act 1945* (Tas).

13 *An Act to Enable Married Women to Dispose of Reversionary Interests in Personal Estate 1858* (Tas).

14 *Legal Practitioners Act 1905* (Qld) ss 2–5; *Women's Legal Status Act 1923* (WA) s 2; *Women's Qualification Act 1926* (Vic) ss 2–4; *Juries (Women Jurors) Act 1964* (Vic).

15 Channey, 'Human Rights', *The Hebrew Standard of Australasia* (Sydney, New South Wales), 22 March 1907, 14.

16 *Immigration Restriction Act 1901* (Cth) s 3(a).

17 *Invalid and Old-Age Pensions Act 1908* (Cth) s 16(1)(a).

18 *Married Women (Lecturers and Teachers) Act 1932* (NSW) s 2.

have been given more prominence. The authors rightly notice these matters in Chapter 1, for example, where they list anti-discrimination and equal opportunity legislation made by the states and the Commonwealth. But an argument could be made that although there is no national human rights act or constitutional bill of rights, there is a distinctive Australian approach to human rights protection. Beginning in 1830 with the adoption in New South Wales of the *Roman Catholic Relief Act 1829*¹⁹ specific statutes have been passed to deal with specific problems. In the 19th century these included questions of religious freedom and the rights of women as noted above. In the decades since 1975 the same approach is evident. To take the Commonwealth example and a mere list makes the point.²⁰

A similar pattern exists in the states as the South Australian example demonstrates.²¹

Whether this approach is sufficient to protect and to extend human rights is open to debate and the authors prefer something broader. Nevertheless this approach does deal with Australian conditions and in a rigorous way. The *Same-Sex Relationships Act*, for example, was the result of a Human Rights and Equal Opportunity Commission audit followed by a similar audit of Commonwealth acts designed to identify legislation that discriminated against same-sex couples. The *Same-Sex Relationships Act* amended Commonwealth statutes across four portfolio areas. Although the authors criticise this approach as ad hoc and historically contingent, it remains the current approach adopted by both major political parties at the Commonwealth level and, in the absence of a change to a general statute, it will remain the approach for many years to come as long as the legislation listed above remains on the books. In any case the notion that a general human rights act overcomes this criticism is a fallacy. The rights included in a bill of rights are actually the product of particular historical circumstances (eg, the right to bear arms in the *United States Constitution*), and the case-by-case approach to dealing with complaints under such acts, whereby the courts work out the ambit of such rights, is necessarily piecemeal. The political advantage of the Australian approach is that particular statutes

19 10 Geo 4, c 27.

20 *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Australian Human Rights Commission Act 1986* (Cth); *Disability Discrimination Act 1992* (Cth); *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008* (Cth); *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—Superannuation) Act 2008* (Cth) ('*Same-Sex Relationships Act*'); *Workplace Gender Equality Act 2012* (Cth); *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth); *Disability Care Australia Fund Act 2013* (Cth).

21 *Municipal Corporations Act 1861* (SA) s 24 (women with certain property eligible to vote in local elections); *Constitution Amendment Act 1894* (SA) s 5 (women's right to vote); *Female Law Practitioners Act 1911* (SA) s 2 (right to enter the legal profession); *Sex Disqualification (Removal) Act 1921* (SA) s 2 (female lawyers could become a notary public); *Constitution Act Amendment Act 1959* (SA) s 3 (allowing women to stand, be elected and to sit in parliament); *Juries Act Amendment Act 1965* (SA) s 10 (allowing women to serve on a jury); *Prohibition of Discrimination Act 1966* (SA) (adopting the *United Nations Declaration on the Elimination of All Forms of Racial Discrimination 1963*); *Equal Opportunity Act 1984* (SA); *Sexual Reassignment Act 1988* (SA); *Constitution (Recognition of Aboriginal Peoples) Amendment Act 2013* (SA).

necessarily have political support, since parliament must enact these statutes, something that judicial decisions interpreting a bill of rights might lack.

The book is strongly recommended both for practitioners, who wish to bring themselves up to date on the High Court decisions on specific rights in the *Constitution*, and for law school courses either in constitutional law or in human rights law. The book has the virtue of clarity, is rigorously referenced including citations of the abundant journal literature on human rights in Australia, and is well argued. For these reasons the book deserves a wide audience and this reviewer hopes that the authors will produce in due course a third edition that includes such matters as the right to marry and found a family. This is, after all, a fundamental human right and one that the family law of the Commonwealth deals with in detail and on which the Commonwealth Parliament is authorised to legislate. As the text states the law to July 2013 the authors were not able to take into account the same-sex marriage case, *Commonwealth v Australian Capital Territory*.²² Another area of importance that comes under the ambit of Commonwealth legislation is the right to work, questions such as equal pay for equal work, and other work related rights dealt with in the *Paid Parental Leave Act 2010* (Cth). These topics would expand the book to embrace a broader view of human rights under the *Constitution*.

22 (2013) 88 ALJR 118.