

## A New Constitution for Australia

**Bede Harris, Cavendish Publishing Ltd London 2002**

Proposals for constitutional change in Australia have been conspicuously unsuccessful over the years. So it takes a supreme optimist to contemplate a complete rewriting of the Constitution. Bede Harris not only contemplates such a task, but has drafted, as an Appendix, 'the best possible Constitution for Australia'.

Bede Harris, a Senior Lecturer in Law at the University of Canberra, has taught constitutional law in South Africa, New Zealand and Australia, and brings to bear his experience in the three countries as well as references to Germany, Ireland, Canada, the US and elsewhere. His starting point is that 'in Australia, constitutional development appears stultified'. One of the lessons taken by some from the failures of recent years is that there is a need for 'civics education' in schools and at the broad community level so as to provide Australians generally with a better understanding of the Constitution.

This book is both admirably concise and clearly written, and represents a useful contribution to this goal.

In the compass of 266 pages, he offers the following chapters:

1. 'Constitutional Reform';
2. 'A Bill of Rights';
3. 'The Judiciary and the Courts';
4. 'The Executive';
5. 'Federalism';
6. 'Indigenous Australians';
7. 'Direct Democracy';
8. 'Fair Representation';
9. 'Parliamentary Reform';
10. 'The Head of State'; and
11. 'Achieving Constitutional Reform'.

Given limitations of space, these comments are confined to a selection of two of the chapters: Chapter 2 'A Bill of Rights'; and Chapter 6 'Indigenous Australians'.

## **A Bill of Rights**

The author's starting point is the very limited protection offered to human rights by existing provisions in the Constitution, and the caution shown by the High Court in considering implied rights. Otherwise, any rights conferred under legislation or common law are vulnerable to legislative override. Accordingly, he argues the case for a comprehensive and justiciable Bill of Rights effective against all Australian governments.

He goes on to consider various counter-arguments that have been raised over the years. They include the danger of increased litigiousness; a potential disturbance to the federal balance if a Bill of Rights in the Commonwealth Constitution were extended to the States; the elevation of the power of the judiciary as against parliaments; the danger of courts becoming engaged in policy decisions; and the proposition that Australia, as a free society, has no need for a Bill of Rights. The author sets out to refute these counter-arguments.

He then goes on to consider the source of human rights in 'natural law' as evolved through theistic and rationalistic principles, and finding some support in customary international law. The next section involves the question of choice — what rights should be protected? He provides brief commentaries on the possible scope of guarantees of a range of particular rights. In doing so, he comments on the current state of the law in Australia in respect of each right, together with relevant experience in other countries.

The remaining sections of the chapter (the longest in the book) discuss 'To whom should the Bill of Rights apply?', 'Protecting a Bill of Rights through entrenchment', 'Justiciability, remedies and standing' and his 'Conclusion'.

Generally, the discussion is concise and illuminating, and the chapter works well. I have more problems with Chapter 6.

## **Indigenous Australians**

The discussion opens with a brief account of the case for separate Constitutional provision for Indigenous peoples deriving from the fact of imposed colonisation and their status as First Peoples. There follows a short discussion of the definition of Indigenous Australians, with reference to some of the judicial decisions on the matter.

The third part of the chapter is on Indigenous sovereignty and treaties. The references to experience in the US, in particular, and also Canada, New Zealand and

South Africa are helpful.

There are a few formal matters. On p 168, he refers to United Nations 'Declarations' as including treaties, whereas a declaration is quite distinct from a treaty: 'instrument' would be the preferred generic term to encompass both. On p 170 he refers to the Royal Proclamation of 1763 in North America as a treaty. Generally the book also contains a number of typographical errors, and would have benefited from closer proof reading.

In section 4 the author discusses Aboriginal sovereignty in Australia, and concludes with the statement:

The focus on the issue of sovereignty and a treaty over the past two decades has, I would argue, elevated symbol over substance, and has drawn attention away from the 'main game', which should be to secure indigenous rights within the Constitution' (178).

Section 5 is headed 'Recognising Indigenous Rights in Australia'. He picks up the issue of self-determination or self-government, and discusses some of the experiments in Indigenous government under legislation for the Northern Territory and Queensland, and especially for the Torres Strait Regional Authority. (In the past decade Queensland, in particular, has been working with Indigenous communities in the devising of interesting new models of community governance.) He proceeds to the topic of national representation, with a very brief discussion of ATSIC, and the assertion of a need to replace it, which requires fuller explanation. He discusses the question of reserved seats in parliament, though he does not refer to the recent NSW Parliamentary Inquiry and Report on the topic.

The discussion on the right to culture is a bit too brief and non-specific. It is followed by discussion of recognition of Indigenous laws. This is generally fine, though it overlooks legislative recognition, as considered in the ALRC 1986 report, and it does not pick up such recent initiatives in the area of social order and dispute resolution as the Queensland community justice program, the NSW circle sentencing pilot program in Nowra, or the SA Nunga Court experience. The importance of such initiatives is highlighted by the need to reduce the overrepresentation of Indigenous Australians in the criminal justice system.

Towards the end of the chapter he briefly refers to the issue of a preamble in the Constitution which would acknowledge Indigenous Australians. His own draft looks good.

Generally the chapter is useful in exploring the issues of Indigenous Australians that

may merit constitutional protection, though some of the discussion is not as strong as the rest. My major difficulty with the chapter is that it makes virtually no reference to the detailed reports and proposals put forward by ATSIC and the Council for Aboriginal Reconciliation in 1995 for the purposes of the Keating Government's proposed 'Social Justice Package'. Nor is reference made to the Council for Aboriginal Reconciliation's specific proposals in 2002 in its National Strategy to Promote Recognition of Aboriginal and Torres Strait Islander Rights, or in its final report *Reconciliation: Australia's Challenge*.

The book is valuable. But if it is to go into a second, some reworking of Chapter 6 would be justified. ●

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