BOOK REVIEWS

Human Rights under the Australian Constitution by George Williams (Melbourne: Oxford University Press, 1999) pages i–xxvi, 1–317. Price A$69.95 (hardcover). ISBN 0 19 551059 3.

I INTRODUCTION

The language of human rights is being spoken with increasing confidence by Australian lawyers and judges. This is evident in the number of recent works devoted to the subject of rights in Australian law[1] and in the jurisprudence of constitutional implications developed by the High Court during the 1990s.[2] One of the latest contributions to this burgeoning area of interest is George Williams' *Human Rights under the Australian Constitution*,[3] a book which Williams considers to be the 'first comprehensive text on human rights and the Australian Constitution.'[4] His claim for the book is bold, but as Sir Anthony Mason notes, Williams goes beyond traditional constitutional analysis to consider constitutional rights in the Australian legal system generally.[5] This book is not just about the express and implied rights and freedoms contained in the *Australian Constitution*; it is also about how rights are protected in the body of ordinary statute law and the common law, and how this relates to the *Constitution*. Williams focuses on the jurisprudence of the High Court and the book states the law to the end of September 1998.

The book is organised into 10 chapters, with a short foreword by Sir Anthony Mason. There is a very useful select bibliography and the *Constitution* is reproduced as an appendix to the book, which allows the reader to refer conveniently to the provisions that Williams discusses. Chapter one is an introduction and focuses on the nature of human rights and the various sources of Australian law which relate to the protection of rights. Chapter two is an historical analysis of the treatment of human rights at the federation conventions of the 1890s. This is followed in chapters three and four by an examination of basic constitutional

[1] See generally Peter Bailey, *Human Rights: Australia in an International Context* (1990); Kaye Healey (ed), *Human Rights* (1993); Murray Wilcox, *An Australian Charter of Rights?* (1993); Nick O'Neill and Robin Handley, *Retreat from Injustice: Human Rights in Australian Law* (1994); Sir Anthony Mason, *Human Rights and Australian Judges* (1996); Brian Galligan and Charles Sampford (eds), *Rethinking Human Rights* (1997); Frank Brennan, *Legislating Liberty: A Bill of Rights for Australia?* (1998); David Kinley (ed), *Human Rights in Australian Law: Principles, Practice and Potential* (1998).

[2] The development of implied freedoms in the jurisprudence of the High Court can be traced in the following cases: *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 ('*ACTV*'); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 ('*Lange*').

[3] George Williams, *Human Rights under the Australian Constitution* (1999).

[4] Ibid ix.

[5] Sir Anthony Mason, 'Foreword' in George Williams, *Human Rights under the Australian Constitution* (1999) vii.

concepts such as representative government and federalism, and the traditional interpretive methods adopted by the High Court when it considers constitutional provisions dealing with human rights. The interpretation by the High Court of express constitutional provisions protecting civil, political and economic rights is discussed next in chapters five and six. In chapters seven and eight Williams discusses the guarantees implied from the system of representative government for which the *Constitution* provides, and from the separation of judicial power in Chapter III of the *Constitution*. Williams revisits the methodology of the High Court from a more critical perspective in chapter nine and urges the Court to forge a coherent interpretive doctrine. Much of the analysis in chapter nine is tied together in chapter ten, which also proposes a strategy for legislative reform with a view to affording human rights greater protection and prominence in Australian law.

At the outset it is worth making some comments of a general nature. The book is written in clear and elegant prose and the arguments are tightly structured and well developed. Williams displays an intimate knowledge of constitutional law and his detailed analysis of High Court cases is extremely impressive and well researched. Also impressive is his extensive use of comparative material, especially from the United States and Canada. These features of the book will commend it to any reader.

Two minor shortcomings should also be noted, although these are of little significance when compared with the book's considerable strengths. First, the book is repetitive at times. For example, Williams notes at the conclusion of chapter five that *Street v Queensland Bar Association*[6] was the first case in which a plaintiff successfully invoked an express constitutional guarantee of a civil or political right in the High Court.[7] The same observation is made at the end of chapter six[8] and several times in chapters nine and ten.[9] More generally, much of chapters nine and ten seems to repeat what has already been said on the methodology of the High Court and the interpretation of express rights in previous chapters. However, perhaps this is inevitable in a book which aims to be comprehensive and which attempts to link disjunct ideas from a 'panoramic perspective'.[10] Second, the introductory section in each chapter does not always set out clearly the direction in which the chapter is heading. However, when weighed against the fluid style of Williams' writing and the cogency of his arguments, this minor matter can be overlooked.

One way in which to review Williams' book is to consider several of its recurrent themes. Although the book is not expressly structured around these themes, they provide a basis for Williams to analyse and criticise the current jurisprudence of the High Court. Furthermore, they assist the reader to understand Williams' own approach to human rights under the *Constitution*. Drawing on

6 (1989) 168 CLR 461 ('*Street*').
7 Williams, above n 3, 128.
8 Ibid 154.
9 Ibid 232, 240, 245.
10 Mason, 'Foreword', above n 5, vii.

these themes, this book review focuses on Williams' promotion of the role of the *Constitution* as a legal mechanism for the protection of human rights.[11]

II HISTORICAL INTERPRETATION OF THE *AUSTRALIAN CONSTITUTION*

The first of these recurrent themes is history. This theme is most prominent in chapter two of the book, 'Human Rights and the Drafting of the *Australian Constitution*', in which Williams undertakes a detailed historical analysis of the federation convention debates of the 1890s. These debates warrant close attention, especially after the High Court decision in *Cole v Whitfield*.[12] In that case the Court, for the first time, endorsed the use of the records of the convention debates as a permissible source of constitutional interpretation. Since *Cole v Whitfield* was decided in 1988, the use of the convention debates has become a live issue for the Court. Williams' contribution is extensively and carefully researched and his analysis very detailed. He pays particular attention to the debates about Andrew Inglis Clark's draft clauses on freedom of religion, trial by jury, equal protection of the law and due process of law. Moreover, Williams applies his own analysis to criticise the current judicial orthodoxy in relation to the federation conventions, as espoused by Mason CJ in *ACTV*.[13] These features of chapter two make it one of the highlights of the book.[14]

In *ACTV* Mason CJ expresses the 'widely held view'[15] that the framers believed 'there was no need to incorporate a comprehensive Bill of Rights in order to protect the rights and freedoms of citizens.'[16] Williams notes that proponents of this view typically argue that the framers considered and rejected the inclusion of a Bill of Rights for the reason that rights were adequately protected by the common law and by the doctrines of representative and responsible government.[17] Drawing heavily on the federation convention debates and on statistical data, Williams takes issue with this argument:

> This view is grounded on a fallacy. It is based on the premise that the framers were generally sympathetic to the need to protect the rights of minorities. It also assumes that the framers actually debated whether or not to include a comprehensive Bill of Rights. In fact, they merely debated a few ad hoc rights provisions.[18]

Williams argues that the framers, rather than being sympathetic to minorities, actively sought to ensure that the rights of others could be abrogated under the

[11] It should be noted that this book review focuses on Williams' argument mentioned above and is not intended as an exhaustive criticism of his analysis of individual cases.

[12] (1988) 165 CLR 360.

[13] (1992) 177 CLR 106.

[14] Williams also discusses the value of the convention debates as an aid to constitutional interpretation in chapter four of his book: Williams, above n 3, 79–84.

[15] Ibid 25.

[16] (1992) 177 CLR 106, 136.

[17] Williams, above n 3, 25.

[18] Ibid.

new *Constitution*, so that the States might keep in place racially discriminatory laws.

Furthermore, Williams reveals that beliefs about the rule of law and the traditions of a representative and responsible Parliament were not unanimously held, even during the convention debates.[19] Finally, he points out that the convention debates were not consistently of a high quality and that the records do not present the complete picture of the framers' views. He notes that '[d]ebate on fundamental constitutional concepts was unsophisticated and showed a lack of understanding by many speakers.'[20]

In light of this analysis, Williams puts to rest Mason CJ's view in *ACTV* and turns his attention to the question of whether the High Court should use the records of the convention debates as a source of guidance when interpreting the *Constitution*. He is highly critical of their use and concludes that they 'no longer provide an appropriate blueprint for the interpretation of the Constitution.'[21] Therefore, Williams leaves for the Court to decide the question of whether the convention debates offer anything at all to constitutional interpretation.

III PRECEDENT IN CONSTITUTIONAL INTERPRETATION

Williams provides a lengthy study of the precedents handed down by the High Court in its interpretation of express and implied rights and freedoms in the *Constitution*. His analysis follows similar lines to those followed by Hilary Charlesworth in her noteworthy works.[22] However, Williams again distinguishes himself through his exhaustive coverage of and his focus on recent High Court authority. He begins this analysis in chapter five, which focuses on the Court's treatment of the express constitutional provisions protecting civil and political rights, namely, ss 41 (right to vote), 80 (right to jury trial for indictable offences), 116 (freedom of religion) and 117 (freedom from discrimination on the basis of State residence). Williams shows that the Court has traditionally adopted a parsimonious attitude to these provisions and that as a result they have very limited operation in Australian law. For instance, s 41, which might have protected a right to vote at federal elections, was interpreted in *R v Pearson; Ex parte Sipka*[23] as a transitional provision. By 1988 it was considered moribund and the Constitutional Commission recommended its removal from the *Constitution*.[24] However, Williams also acknowledges that there are exceptions to this trend, such as *Street*[25] in the case of s 117 and *Cheatle v The Queen*[26] in the case of s 80.

[19] Ibid 40.
[20] Ibid 34.
[21] Ibid 45.
[22] See Hilary Charlesworth, 'The Australian Reluctance about Rights' (1993) 31 *Osgoode Hall Law Journal* 195; Hilary Charlesworth, 'Individual Rights and the Australian High Court' (1986) 4 *Law in Context* 52.
[23] (1983) 152 CLR 254.
[24] Williams, above n 3, 103.
[25] (1989) 168 CLR 461.
[26] (1993) 177 CLR 541.

Chapter six focuses on express provisions protecting economic rights. Williams traces the development of the Court's interpretation of s 92, which protects freedom of interstate trade, commerce and intercourse; s 51(xxiiiA), which prohibits civil conscription in relation to medical and dental services; and s 51(xxxi), which empowers the Commonwealth to acquire property 'on just terms'. He demonstrates that these provisions have traditionally been given robust and generous interpretations.

In exploring recent developments, Williams notes that the High Court has begun to interpret some economic rights more narrowly. One good example is the Court's rejection in *Cole v Whitfield*[27] of the 'individual rights' interpretation of s 92[28] in favour of an approach based on the views of the framers. While Williams accepts this development, noting that it limits the operation of economic rights, he does not acknowledge that it stands in opposition to an expansive interpretation of human rights under the *Constitution* generally.

From the express constitutional provisions protecting rights, Williams moves in chapters seven and eight to the implications which the High Court has drawn from the *Constitution*:

> The Australian Constitution lacks a Bill of Rights, and those express civil and political rights that it does contain have been, with one recent exception, interpreted almost out of existence ... It is not surprising, therefore, that in the context of ever increasing international recognition of human rights ... the High Court has looked to other avenues to foster civil liberties. One such avenue is the notion of deriving implications from the Constitution.[29]

Chapter seven explores the implications from the system of representative government for which the *Constitution*, notably in ss 7 and 24, provides. Chief among these is the implied guarantee of freedom of political communication, and Williams devotes most of the chapter to tracing the development of this freedom. The analysis moves through a detailed consideration of how the implied freedom was first espoused, then broadened, then narrowed and finally settled, thanks to the decisions of the High Court in *McGinty v Western Australia*[30] and *Lange*.[31] Williams concludes that '[t]he implied freedom of political communication is now entrenched in Australian constitutional jurisprudence'[32] and that this freedom can continue to develop with the aid of sound constitutional principles.

In chapter eight Williams examines the implications which the Court has derived from the separation of judicial power achieved by Chapter III of the *Constitution*. It is in chapter eight that constitutional interpretation reaches its limit, as precedent fails to offer clear guidance for the future. This is because the

[27] (1988) 165 CLR 360.

[28] In decisions like *Bank of NSW v Commonwealth* (1948) 76 CLR 1 (*'Bank Nationalisation Case'*), the Court established the principle that s 92 protected the activities of individuals, possibly including the right to contract. Such an interpretation amounted to a constitutional entrenchment of the capitalist laissez faire economy.

[29] Williams, above n 3, 155.

[30] (1996) 186 CLR 140.

[31] (1997) 189 CLR 520.

[32] Williams, above n 3, 190.

scope and range of rights implied from Chapter III is unsettled and remains a current challenge for the High Court. Williams suggests that implications from Chapter III have not been subject to the same level of debate and scrutiny which the implied freedom of political communication has attracted, and that this might help to explain the underdeveloped nature of these rights. He is critical of the Court's approach to implications derived from Chapter III, arguing that an approach must be developed which allows for the elected Parliament to shape notions of the judicial process, rather than allowing the Courts to shape such notions. However, Williams does not specify how this might occur. His approach to this aspect of constitutional interpretation raises questions of methodology, which is another recurring theme in the book and which is, in many ways, its central focus.

IV METHODOLOGY

When considering Williams' approach to the methodology of constitutional interpretation, the best place to begin is chapter four, which is called 'Constitutional Interpretation and Human Rights'. In this chapter he follows the development of constitutional interpretation from *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*[33] to the present. He argues that the legalism and, more particularly, the literalism for which the *Engineers' Case* stands, is a mask that the Court employs to disguise in value neutral terms what are in reality judgments based on policy and judicial values. By 'legalism' Williams means a close adherence to legal reasoning that creates 'a reliance on technical solutions rather than considerations of policy.'[34] Williams illustrates the impossibility of a pure literalism with a clever observation about the *Engineers' Case* itself. He reveals that in rejecting the use of US authority as a proper source of guidance in constitutional interpretation, the majority in the *Engineers' Case* actually relied upon non-textual considerations.[35]

Williams continues by arguing that literalism has been gradually eroded by other interpretive concepts developed by the Court. For instance, he notes that the concept of proportionality, when applied to purposive constitutional powers, has the potential to strike down laws abrogating human rights. Indeed, in cases like *Lange*[36] a proportionality test is already performing that role. The concept of popular sovereignty might also harbour similar potential, although the question as to whether its effect on constitutional interpretation would be purely symbolic or influential is left open.[37] In the conclusion to chapter four Williams contends that the selective application of literalism by the High Court has led to an 'unarticulated tendency' to defer to the doctrine of parliamentary sovereignty. Such an

[33] (1920) 28 CLR 129 ('*Engineers' Case*').

[34] Williams, above n 3, 73.

[35] Ibid 76. These non-textual considerations were the common sovereignty of all parts of the British Empire and the principle of responsible government. Neither concept finds expression in the *Constitution*.

[36] (1997) 189 CLR 520.

[37] Williams, above n 3, 91.

approach is no less political than one which seeks openly to foster human rights; it simply has different objectives. Furthermore, in a post-legalist era, when new concepts are beginning to inform constitutional interpretation, the Court has not developed a consistent approach, and as a result '[t]here is no articulated vision for constitutional rights in Australia.'[38]

The absence of a consistent and coherent approach to the interpretation of constitutional rights is a theme to which Williams returns in chapter nine. After asking whether the High Court has achieved doctrinal clarity in its interpretations of constitutional rights,[39] Williams proceeds to demonstrate that it has achieved neither consistency between rights of the same class nor between different classes of rights. His critical analysis focuses on two themes which are identified in the chapter title, 'Double Standards and Unarticulated Premises'. He regards these themes as the 'unfortunate consequence of the legalism that has pervaded constitutional interpretation for much of this century'[40] and he draws these themes out in relation to various aspects of High Court jurisprudence.

Williams refers to the 'unarticulated' preference of the Court for economic rather than civil and political rights. This aspect of the Court's jurisprudence has given rise to what Williams calls a 'double standard', which he maintains has now been redressed, if not reversed, through the advent of implied freedoms. He compares the Australian situation with the shift in approach of the US Supreme Court, which once favoured economic rights but now applies a 'double standard' in favour of civil and political rights.

For Williams, recent developments in Australia represent 'the rumblings of a deep change of approach' by the Court,[41] which will result in the ongoing construction of constitutional protections of civil and political rights, and a corresponding decline in the scope and range of economic rights. However, this conclusion seems a little premature. For example, Williams notes that the Court's decision in *Newcrest Mining (WA) Ltd v Commonwealth*[42] is inconsistent with a trend towards narrowing the scope of express provisions protecting economic rights, but he does not really explain why the inconsistency is the exception to his rule. The same might be said of the Court's cautious approach to s 116 in *Kruger v Commonwealth*.[43] It could be that the primary themes of chapter nine are better suited to an analysis of past developments, rather than to a consideration of where the Court is presently situated and where it is heading. Or perhaps Williams' observations are prescient. Only time will tell.

Williams concludes chapter nine with an examination of the High Court's inconsistent treatment of the concepts of representative government and the separation of judicial power. He contends that the Court's unanimous decision in

[38] Ibid 95.
[39] Ibid 227.
[40] Ibid 228.
[41] Ibid 240.
[42] (1997) 190 CLR 513.
[43] (1997) 190 CLR 1.

Lange[44] is significant primarily for its development of an interpretive methodology underlying the implied freedom of political communication. More particularly, *Lange* stands for the principle that the freedom of political communication is not a free standing principle, but is grounded in the text and structure of the *Constitution*. Williams contrasts this firmly anchored approach with the Court's approach to implications from the separation of judicial power. He returns to the analysis he applied in chapter eight, particularly in relation to the incompatibility doctrine espoused in *Kable v Director of Public Prosecutions (NSW)*[45] and finds the Court's interpretation of Chapter III implications wanting, concluding that it is based on free standing principles, rather than the text and structure of the *Constitution*. As a result of this departure from textual analysis, the legitimacy of the Court's decision making is jeopardised.[46] Williams demands a more rigorous interpretation of the *Constitution* at a time when '[t]he Court has firmly thrust itself between the people and their elected governments, as a bulwark against the expression of arbitrary governmental power.'[47]

It is against this background that Williams' own preferred methodology of constitutional interpretation must be considered. He alludes to this methodology in chapter three,[48] but it is in chapter four that he spells it out in detail:

> If any approach to constitutional interpretation underpins the analysis in this Chapter, it is a modest one that is in keeping with traditional methods of interpretation. It does, however, recognise the value choices left open to judges, and directs such choices towards the protection of rights. This interpretative approach might proceed in three stages. First, a judge should derive the meaning from the text and structure of the Constitution, as informed by precedent, constitutional principle such as the doctrine of responsible government ... and history. Second, it should be recognised that step one will frequently not determine a result but will leave open a range of choices for the judge. Third, where such indeterminacy exists, interpretations of the Constitution that are consistent with protecting fundamental freedoms ... should be preferred over interpretations that do not.[49]

The third interpretive step is consistent with the approach of Kirby J in *Newcrest*, who states that '[w]here the *Constitution* is ambiguous, this Court should adopt that meaning which conforms to the principles of fundamental rights rather than an interpretation which would involve a departure from such rights.'[50] Williams' preferred methodology informs his analysis in subsequent chapters; he seeks to demonstrate that even within the constraints of a *Constitution* whose protection of human rights is scattered and incomplete, there is scope for rights to play a much more significant role.

[44] (1997) 189 CLR 520.
[45] (1996) 189 CLR 51.
[46] Williams, above n 3, 244.
[47] Ibid 246.
[48] Ibid 50.
[49] Ibid 69–70.
[50] (1997) 190 CLR 513, 657.

Williams identifies the constraints imposed by constitutional interpretation by locating his own interpretive methodology squarely within the tradition of the *Engineers' Case*.[51] In fact, Williams had heralded the demise of the *Engineers' Case* in an earlier article,[52] but he resurrects the case, stating that 'its demand for a rigorous linkage between all constitutional doctrine and the text of the instrument still has a role to play in the field of constitutional rights.'[53]

Given that Williams expresses the desire to see rights protected to the fullest extent possible within a culture of rights, his reluctance to dismiss the *Engineers' Case* seems puzzling at first. However, Williams' endorsement of the *Engineers' Case* arises from his concern that anything other than a text based and structure based approach might undermine the legitimacy of the High Court's decision making, and might lead the Court to usurp what is properly the role of the popularly elected Parliament.

V REPUBLICAN THEORY

The theme of republican theory[54] is obscured because Williams' book does not aim to provide a detailed philosophical analysis. However, the theme is a crucial link in understanding how Williams moves from the interpretive methodology outlined above to his proposals for reform discussed below. It also suggests that those proposals are considerably more substantial than might be apparent initially. It should be noted at the outset that Williams does not expressly declare himself to be a republican theorist. However, from his treatment of republican theory, the reader is led to infer that he favours it over the traditional liberal conception of rights under the *Constitution*.

Republican theory makes its introduction in chapter one, where Williams undertakes a general review of the nature and meaning of rights, taking into account international instruments and the influential schema of rights developed by Wesley Hohfeld.[55] Williams describes republican theory as being concerned

[51] (1920) 28 CLR 129.

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

[53] Williams, above n 3, 247.

[54] For a discussion of republican themes see: Andrew Fraser, *The Spirit of the Laws: Republicanism and the Unfinished Project of Modernity* (1990); Käthe Boehringer, 'Against Clayton's Republicanism' (1991) 16 *Legal Service Bulletin* 275; Philip Pettit, 'Republican Themes' (1992) 6(2) *Legislative Studies* 29; Helen Irving, 'Boy's Own Republic' [1993] No 8 *Arena* 24; Brian Galligan, 'Regularising the Australian Republic' (1993) 28 *Australian Journal of Political Science* 56; Marilyn Lake, 'A Republic for Women?' [1994] No 9 *Arena* 32; M A Stephenson and Clive Turner, *Australia: Republic or Monarchy?: Legal and Constitutional Issues* (1994).

See also the debate between George Williams and Andrew Fraser: Andrew Fraser, 'In Defence of Republicanism: A Reply to George Williams' (1995) 23 *Federal Law Review* 362; George Williams, 'What Role for Republicanism? A Reply to Andrew Fraser' (1995) 23 *Federal Law Review* 376; Jeanette Hoorn and David Goodman (eds), *Vox Reipublicae: Feminism and the Republic* (1995); Philip Pettit, *Republicanism: A Theory of Freedom and Government* (1997); Glenn Patmore and John Whyte, 'Imagining Constitutional Crises: Power and (Mis)behaviour in Republican Australia' (1997) 25 *Federal Law Review* 181.

[55] Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Essays* (1923).

not just with freedom from interference by government, which is the central concern of liberalism, but also with 'freedom as non-domination'.[56] To be free from domination entails not being subject to the potential for arbitrary influence or interference by another.[57] This demands that rights act not just negatively as limits on government action, but also as positive claims, which are enforceable against the government, and which place the government under a corresponding duty.[58] Thus, for Williams, republican theory bolsters rights in a way in which liberalism cannot.

The *Constitution*, as currently interpreted, might be capable of supporting rights in the liberal sense, but is unable to do so in the republican sense. Many of the provisions that Williams encourages the High Court to interpret according to a rights-based methodology are expressed as limitations on the powers of government, as are the guarantees implied from the principle of representative government and from Chapter III of the *Constitution*.[59] The failure of the *Constitution* to meet republican ideals helps to explain why Williams is attracted to, and proposes, a Bill of Rights for Australia. A Bill of Rights can declare that rights exist without confining them to constraining only government action, which is essential to a republican conception.[60] Furthermore, a Bill of Rights can help to dilute the majoritarian effects of parliamentary sovereignty by permitting more judicial review of government action, which, as Williams notes in chapter nine, is another essential feature of republicanism.[61] It is against this republican backdrop that Williams' proposals for reform gain more depth; if he does envisage a Bill of Rights with a deliberate anti-majoritarian motive, then he advocates a very profound shift in Australia's constitutional system.

VI REFORM

In chapter ten Williams finally reveals his vision of legislative reform for the protection of human rights under the *Constitution*. This vision is foreshadowed in chapter one, where Williams considers the role of statute law as a 'de facto Bill of Rights',[62] and it is outlined in detail in chapter ten. Williams prefaces his proposals by discussing the history of failed attempts to bring about greater protection of rights in Australian law. He then examines arguments for and against a Bill of Rights and puts forward a considered and pragmatic programme

[56] Williams, above n 3, 7. When referring to the concept of 'freedom as non-domination', Williams draws from Philip Pettit, *Republicanism*, above n 54.

[57] Williams, above n 3, 230–1.

[58] See ibid 65–6, where Williams discusses the lack of effective remedies for enforcing rights under the *Constitution*. This is one difficulty with a conception of rights as limitations on government action which a republican system would overcome.

[59] In *Kruger v Commonwealth* (1997) 190 CLR 1, this point was emphasised by the Court in relation to the implied freedom of political communication. See also *Levy v Victoria* (1997) 189 CLR 579.

[60] Williams, above n 3, 7–8.

[61] Ibid 230–1.

[62] Ibid 10–15. Commonwealth anti-discrimination legislation has been effective in protecting human rights, as it has been interpreted as binding on State governments due to the operation of s 109 of the *Constitution*.

for reform. The starting point of this programme is a statutory Bill of Rights. In order to give weight to a statutory Bill of Rights, Williams also proposes the establishment of a joint standing committee of the Parliament, whose role would be to scrutinise legislation for compliance with the Bill.[63]

Protecting rights in ordinary statute law is seen by Williams as a step towards the ultimate aim of entrenching constitutionally a Bill of Rights. However, Williams clearly believes that such constitutional entrenchment is impossible and, indeed, not even desirable until a culture of rights has been nurtured and has matured in Australia.[64] The notion of a culture of rights drives much of what Williams proposes and certainly helps to explain his insistence on a gradualist approach. It is closely tied to republican theory, as Williams notes: 'One precondition of non-domination is that rights are known by the person entitled to the right and are a matter of common knowledge in the rest of the community.'[65] A statutory Bill of Rights, along with the holding of constitutional conventions dealing with the subject of entrenching rights, could help to bring about that common knowledge, which in turn would create a climate in which constitutional amendment might realistically occur.

Williams' emphasis on a culture of rights is well placed and consistent with much of the current thinking on rights.[66] However, he places great reliance on a statutory Bill of Rights as the vehicle for achieving such a culture. This reliance must be questioned, for is the enactment of legislation alone sufficient to trigger a change in public discourse, especially given the ignorance of most Australians about our system of government and governing laws?[67] Williams acknowledges the vital importance of citizen education in schools, the news media and popular culture. However, he only mentions, and does not dwell on, this point, and he certainly does not accord it the attention he devotes to legislative reform. On the other hand, Williams' proposal that constitutional conventions be convened in the future to continue to examine issues of rights[68] is an excellent idea for keeping debate about rights at the forefront of public consciousness and ensuring that the protection of rights in Australian law is seen to be an ongoing process, rather than a fait accompli.

63 Ibid 263.

64 Ibid 259, 269–70.

65 Ibid 259.

66 See the discussion by Williams in chapter three: ibid 67. In particular, Williams quotes Charlesworth, 'The Australian Reluctance about Rights', above n 22, 228: '[T]he assertion of rights can have great symbolic force for oppressed groups within a society offering a significant vocabulary to formulate political and social grievances which is recognised by the powerful.'

67 Williams makes this point himself: above n 3, 23–4. See also Brian Galligan and Ian McAllister, 'Citizen and Elite Attitudes Towards an Australian Bill of Rights' in Brian Galligan and Charles Sampford (eds), *Rethinking Human Rights* (1997) 144. They note the finding of their survey that only 51 per cent of Australian citizens had ever heard of proposals to create an Australian Bill of Rights: at 146.

68 Williams, above n 3, 257. Here, Williams follows the recommendation of the 1998 Constitutional Convention: Commonwealth, *Australian Constitutional Convention: Transcript of Proceedings* (1998) 654–7.

VII A LAWYER'S DILEMMA

When considered in terms of the themes outlined above, Williams' book is clearly characterised by a basic tension. This tension is between Williams' approach, which encourages expansive interpretations of constitutional provisions protecting human rights, and a recognition that interpretation of the existing *Constitution* is limited by the need to remain faithful to its text and structure and that, as a result, it can never adequately protect human rights. This view is most apparent in his discussion of the judgments of Murphy J and, to a lesser extent, Deane J. In chapter seven Williams refers to Murphy J as a 'supernova',[69] whose judgments were 'undoubtedly the most explicitly rights-oriented decisions ever handed down by a member of the High Court.'[70] However, in chapter ten he seems to maintain that Murphy J and, later, Deane J were unduly progressive when interpreting constitutional rights. Here, Williams argues that their judgments recognised what is almost an implied Bill of Rights in the *Constitution* and that such reasoning is dangerous: 'The course charted by Murphy and Deane JJ would intrude the court far into the legislative realm without an adequate constitutional mandate.'[71]

Williams steers a cautious and pragmatic course in arguing for a moderate interpretation of constitutional rights. His approach is to be commended, for it demonstrates thought, poise and skill. His argument for protecting human rights under the *Constitution* is lawyer-like in nature and, consequently, he is bound by the limited possibilities of constitutional interpretation. The tension evident in Williams' writing is familiar in constitutional jurisprudence and presents a dilemma familiar to lawyers — whether to embrace a narrow, moderate or generous interpretive approach. This dilemma is particularly acute for advocates of human rights, because the desire to adopt a generous interpretation is constrained by the limited protection of rights afforded by the current *Constitution*.

VIII CONCLUSION

Human Rights under the Australian Constitution is a welcome contribution to the important ongoing debate on human rights in Australia. In a sense, the book reflects the dynamic and uncertain state of contemporary rights discourse in Australia. It offers two potential future directions for the protection of rights under the *Constitution*: pursuing enhanced interpretations of the *Constitution* and adopting a new statutory framework for rights protection. In addition to being thought provoking for these reasons, Williams' book is a fine text, providing an excellent reference for practitioners, academics and, especially, given its comprehensive scope and approachable style, students. For these reasons, it might also find a market among persons who are otherwise unfamiliar with notions of human rights or constitutional law. The book concludes with the words: 'Australia needs

[69] Williams, above n 3, 156–8. Williams notes that a supernova was named after Murphy J in 1977: at 156 fn 3.
[70] Ibid 156.
[71] Ibid 247.

more than just a change to the text of the Constitution. It needs to continue to develop a culture of liberty.'[72] Surely there is no more effective way to develop a culture of liberty in Australia than to write, disseminate, read and talk about books like this.

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[72] Ibid 270.

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