REVIEW ARTICLE*

Legislating Liberty – A Bill of Rights for Australia? by FRANK BRENNAN, (Australia: University of Queensland Press, 1998) pp xii + 201. Recommended retail price $29.95 (ISBN 0 7022 30111).

Over the last decade or so, Father Frank Brennan, lawyer and Jesuit priest, has made many valuable contributions to Australian public debate – notably in relation to indigenous people, for whom he has been a tireless champion. This book increases our indebtedness to him. Notwithstanding that I disagree with aspects of his reasoning and conclusions, I recommend this contribution to an important debate.

The book sprang from Brennan's 1995-96 sojourn in the United States as a Fullbright Scholar. In that situation, it is perhaps understandable that Brennan selected the United States Bill of Rights as his template. This choice adds interest to the book but constitutes its greatest weakness; the United States model is old and atypical. On the positive side, the book includes masterly accounts of the American (and Australian) experience in five contentious policy areas: gay rights, abortion, euthanasia, free speech and indigenous rights. In each case Brennan summarises, and critically analyses, the relevant United States jurisprudence and deals with Australian developments.

Those chapters are preceded by perceptive comments on inadequacies in current public discourse about moral issues, rights and freedoms and a brief but informative account of Australian proposals for a bill of rights. Brennan makes the point that Australia now "stands alone", amongst Western democracies, in not having a comprehensive bill of rights. Canada and New Zealand have recently adopted codes of rights and the United Kingdom government has subjected itself to the individual complaints procedure provided by the European Convention for the Protection of Human Rights and Fundamental Freedoms. Of course, Australia does not necessarily have to follow others, but it is not surprising these moves have generated debate as to whether we should do so; these other countries have found the common law to be an insufficient protector of individual rights. As Brennan points out, the proponents of an Australian bill of rights include people of the stature of Sir Anthony Mason and the members of the Constitutional Commission that reported in 1988. Moreover, as Brennan

* The Hon Justice Murray Wilcox. Justice Wilcox is the author of a 1993 publication "An Australian Charter of Rights?".

also reports, a 1993 survey showed strong public support (72.6%) for an Australian bill of rights guaranteeing basic rights and freedoms.

In an introduction to the book, Brennan says he went to the United States in 1995-96 "thinking that the shortcomings in Australia for the protection of rights could be rectified by some imitation of the United States model". He returned convinced that "Australia needs better techniques for the protection of rights" and improved public debate about rights, but "imitation of a United States constitutionally entrenched bill of rights would fail". His five chapters on contentious issues are designed to explain why that would be so, but they lead to the curious conclusion that, because the United States model would fail in Australia, there should be no constitutional bill of rights at all. Brennan does not appear to have considered the possibility that there may be (as there are) better models than the 207 year old American code. He offers a non-constitutional solution to which I will return.

Although I also reject the United States model, I recommend the five chapters on particular topics. They provide important insights into the role of judges in adjudicating claims of violations of constitutionally entrenched rights and the effect of a bill of rights on the relationship between courts and legislatures.

First, gay rights. In 1996 the United States Supreme Court considered an amendment to the Constitution of the State of Colorado, inserted by referendum, that forbade the State and any of its agencies, municipalities and school districts to adopt or enforce any legislative provision or policy

> whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. [pp 65-6]

It will be noted that the amendment went further than to prohibit preferment of homosexuals; it opened the way to discrimination against them. Under these circumstances, it is not surprising the Supreme Court struck down the amendment. Brennan contrasts this case with what he calls "the pragmatic Australian solution via Geneva", a reference to the complaint of Nicholas Toonan to the United Nations Human Rights Committee about Tasmania's continued criminalisation of homosexual activity. As Brennan notes, the Committee upheld the complaint and the Tasmanian criminal law was amended. But this was only because the then Commonwealth government was prepared to sponsor Commonwealth legislation, based on the external affairs power, to override a State. That may not always be the case, as was illustrated by the attitude of the Fraser government in the Franklin Dam controversy.

Although applauding this "pragmatic" Australian solution, Brennan surprisingly ends his chapter on gay rights by proposing the insertion in the Australian Constitution of a provision guaranteeing "the right to freedom from discrimination on the ground of gender or sexual orientation".

Brennan's chapter on abortion is notable for an excellent overview of the medical and moral issues raised by terminations at various stages of pregnancy. It also recounts the problems arising out of the United States Supreme Court's 1973 decision in *Roe v Wade*. That case provides the high point of any argument

against judicial determination of issues involving complex moral problems. But it is important to note the uncertain base upon which the Court operated. The United States Bill of Rights contains no express privacy provision. In 1965 the Court reacted to a seemingly outrageous Connecticut statute that prohibited the sale of contraceptives, even to married couples, by striking down the statute under the Ninth Amendment, which simply provides that the enumerated rights "shall not be construed to deny or disparage others retained by the people". The Court held this provision implied a right of privacy and used that decision in *Roe v Wade* to formulate a complex code concerning permissible abortion regulation. The Court had neither a firm constitutional basis for its intervention nor a sophisticated statutory framework to consider. Where these features are present, a court can deal satisfactorily with even such an emotive issue as abortion; as the Supreme Court of Canada demonstrated in its 1988 decision in *Morgentaler v The Queen*.

The euthanasia chapter contains a powerful argument against the shortlived Northern Territory legislation. But the chapter does not provide new insight into constitutional issues. Brennan notes the 1997 decisions of the United States Supreme Court dismissing challenges to Washington and New York legislation prohibiting assisted suicide. He makes the curious comment that the Court "solved nothing by opting out of the euthanasia debate". However, the Court did exactly what it had to do: determine whether the legislation violated any provision in the Bill of Rights.

It must be conceded that freedom of speech has proved a difficult area in United States jurisprudence. The same may be said of Australia, as is demonstrated by the conflicting High Court judgments in the *Political Broadcasting* case and the Court's reversal of *Theophanous* in *Lange*. In the United States, I believe, the problem arises from the fact that the First Amendment is framed in absolute terms ("Congress shall make no law ... abridging the freedom of speech, or of the press") when plainly some limitation is necessary. Having no textual foundation for any limitation on the absoluteness of the prohibition, the Supreme Court has had to devise for itself the concept of "constitutionally-protected speech". That concept imports subjective elements that have varied with changes in the Court's membership. In Australia the situation is worse. There is no express protection of speech; this must be derived from the Constitution by a process of inevitably contentious implication. How much better it would be to have an express provision subject to stated limitations, as in Canada and many other countries. The lesson of the United States travail in this area is not that courts cannot cope with a constitutional protection of speech but that the limits must be realistically chosen and carefully expressed.

Finally, indigenous rights; not really a constitutional issue in the United States or here. However, Frank Brennan has some interesting suggestions for Constitutional amendments that would accord our indigenous people the recognition they deserve. He also proposes a Constitutional guarantee of "freedom from discrimination on the ground of race, colour, ethnic or national

origin". This is an essential ingredient of any modern bill of rights, but one sadly lacking in the United States model.

In a final chapter, headed "Reconstituting Australia without a bill of rights", Brennan proposes the enactment, as an ordinary Commonwealth statute, of a "Commonwealth Charter of Espoused Rights and Freedoms". Few people would quarrel with his choice of specified rights, but the proposal has obvious limitations. First, it would apply only to Commonwealth legislation and actions. Many abuses occur in State jurisdictions. Second, it could be overridden by subsequent Commonwealth legislation in respect of a particular matter as, Brennan demonstrates, happened with the *Racial Discrimination Act* 1975 by the enactment of the Hindmarsh Bridge legislation. True, Brennan proposes the establishment of a Senate Committee for Rights and Freedoms, one of whose functions it would be to scrutinise legislation for conformity with the enacted Charter. However, we should have learned from the Native Title debate that, when the political stakes are high, the Senate will divide on party lines, even on a subject profoundly affecting individual rights.

A feature of this book is its awareness of a major issue in determining the desirability of constitutional guarantees: the role of judges, who are not elected, in relation to legislators, who are. However, I do not accept Brennan's assumption that constitutional guarantees eliminate the need for legislators to make the hard decisions. That has not been the experience in Canada. Canadian Parliaments have realised that legislation is better able to survive the constitutional test of imposing "such reasonable limits ... as can be demonstrably justified in a free and democratic society" if it is obviously the product of careful and sensitive judgment. And it is possible to have a mechanism for the last word to be given, to neither judges nor politicians, but to the people; once again as in Canada, although I suggest by referendum on the specific issue rather than by calling a general election.

If there is to be a constitutionally protected bill of rights, this seems to me the ideal system: the legislature formulates legislation designed to give effect to its policy objectives but with awareness of the constitutionally protected rights and freedoms; the court reviews the legislation (if asked) on the basis of whether it meets the constitutional test; the legislature revisits the legislation (if necessary) in the light of the court's analysis of that point; and, in the event of disagreement, the people decide.