Book Review

Max Spry *

Frank Brennan, *Legislating Liberty: A Bill of Rights for Australia?* University of Queensland Press, 1998, pp xii + 201

As we approach the centenary of federation, there will undoubtedly be increased discussion of the need to reform Australia's Constitution as well as the publication of a range of texts championing constitutional reform. What direction such reform might take remains, only several years from the centenary of federation, uncertain. Unlike the drafters of the Commonwealth Constitution who sought to create a federation, advocates for reform today are far from clear as to what it is they wish to achieve. Should, for example, Australia become a republic? Should our constitution include an entrenched bill of rights? If so, what rights should be entrenched? Much of this discussion will remain, as it has been to date, the preserve of Australia's intellectual elites. It is doubtful whether Australia's elected representatives will demonstrate much enthusiasm for constitutional reform in the near future – the increasing immediacy of the Sydney Olympic games will see to that. Moreover, it would be unwise to embark on constitutional reform in the context of the Olympic games as such reform is unlikely to be well thought through. More than likely such reform would be an afterthought, 'window dressing' to satisfy the international community in Sydney to watch the swimming.

There seems little interest amongst the people generally for constitutional reform and the entrenchment of rights in the Constitution. This writer readily agrees with Brennan when he says "there is no way that the Australian people prior to the centenary of federation will vote for a constitutionally entrenched bill of rights" (p 10). I also agree with Brennan when he states "'public discussion about the freedoms

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and restrictions necessary for the good life for all needs to improve" (p 8). As a first step a greater appreciation of Australia's political system, and the role the Constitution plays in that system, is essential. What were the drafters of the Constitution hoping to achieve? How successful were they and what now needs to be done or undone?

Those who advocate constitutional reform often evidence considerable ambivalence about the nature of the Constitution and why it is as it is. In this regard, Brennan is no different. Brennan states, for example, "that the Australian Constitution was founded on racism" (p 25). And yet, later in the same paragraph he continues:

> Individual rights, gender equality and racial equality were not pressing issues. The Convention members had great faith in the common law, the restraint of politicians and the sovereignty of parliaments (p 25).

This writer has argued elsewhere that while the Convention delegates did not wish to see invalidated certain racially discriminatory colonial legislation, they were imbued with a tradition that considered 'human rights' best protected by responsible and representative government.[1] In assessing proposals for constitutional reform we need to appreciate the understanding of government held by the drafters of the Constitution and we need carefully to articulate the theory of government that underpins our own proposals for reform.

Legislating Liberty is disappointing. In his introduction, Brennan states that it is his intention to "argue against a constitutional bill of rights, which always leaves the final word to the judges, and argue for a statutory bill of rights which sets up a delicate power balance between politicians and judges" (p 1). The text, however, falls far short of meeting this objective. On the one hand, Brennan argues against a constitutional bill of rights as the important moral, ethical and political questions of the day cannot be left to be answered by unelected judges. Brennan considers the jurisprudence of the United States Supreme Court and contrasts that jurisprudence with developments in Australia in a number of controversial areas including gay rights, abortion, euthanasia, free speech and indigenous rights. In relation to gay rights, for example, Brennan notes that the United States Supreme Court, the custodian of the Bill of Rights, recently upheld anti-sodomy laws whereas following legal challenges by the Tasmanian gay rights activist, Nicholas Toonen:

> Homosexuals in Australia were finally guaranteed their legal privacy without judges having to constitutionalise the question. Politicians were compelled to weigh notions of individual liberties and public welfare and strike the appropriate balance, abandoning the idea of the Victorian era that criminal law could enforce morality when no community consensus against the activity endured (p 72).

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1 M Spry 'Jeremy Bentham, a Bill of Rights and Constitutional Reform' (1998) 9(1) *Political Theory Newsletter* pp 34-46.

Once an advocate for a constitutionally entrenched bill of rights, Brennan argues that following his first hand observations of the operations of the Supreme Court he is now of the view that it is inappropriate for unelected judges to be the final arbiters of fundamental moral and political issues such as euthanasia and abortion.

Nevertheless Brennan remains, somewhat inconsistently, wedded to the view that certain rights should be entrenched in the constitution:

> There should be a constitutional ban on capital punishment, a constitutional prohibition on racial discrimination, a constitutional prohibition on discrimination based on gender or sexual orientation, and a plenary power for the Commonwealth parliament to assume responsibility in relation to Aborigines and Torres Strait Islanders (p 11).

Later in the text, the constitutional ban on capital punishment seems forgotten and Brennan states that he would be "happy to see non-discrimination clauses included in the Commonwealth Constitution which would permanently fetter the Commonwealth parliament and government from discriminating against people on the grounds of race, gender or sexual orientation" (p 181). While we may not take issue with the inclusion of such non-discriminatory clauses in the Constitution, Brennan offers very little in the way of sustained argument in support of the inclusion of such clauses rather than others.

Leaving aside that issue, I now turn to Brennan's proposal for a statutory bill of rights. In short Brennan advocates, in addition to the inclusion of the non-discriminatory clauses referred to above, the adoption of a legislated bill of rights which leaves the final say on the ethical, moral and political issues of the day to Parliament.

> The shortfall in Australia's machinery for the protection and enhancement of individual rights could be rectified by the passage of a statutory bill of rights which could be overridden by specific later enactment of the Commonwealth parliament. A Senate Committee on Human Rights could scrutinise any bill proposing a limitation on the stipulated rights. Like the *Racial Discrimination Act*, the parliament's bill of rights would become a comprehensive legislative standard. Departure from the standard would require political argument more compelling than a routine invocation of the popular mandate by the major political parties. This way, the controversial issues would not regularly become the sole preserve of judges constitutionalising them; they would be resolved by the legislators and judges playing their respective roles (p 177).

Beyond assertion, Brennan offers little in the way of argument to support his proposal. In relation to his proposed Senate Committee on Human Rights, for example, there is no detailed discussion of the role, purpose or achievements of the existing Senate Scrutiny of Bills Committee.

In the end, I doubt whether *Legislating Liberty* will have any lasting impact on constitutional reform in Australia. Nevertheless, Brennan is correct when he concludes:

> In Australia, the pace of change and the balancing of rights and the public interest should still lie principally with the people through their elected representatives, while the judges maintain the rule of law and avoid politics-smuggled-into-law (pp187-188).

A sentiment with which, a century ago, the drafters of the Constitution would also no doubt have endorsed.