INTRODUCTION

The decision to write *The Politics of Human Rights in Australia* was made because of the absence of any comprehensive study that examines the political nature of Australia's protection of human rights. The fact that the articulation and protection of human rights are legal processes – concerning the drafting, interpretation and enforcement of international as well as domestic laws – has led human rights studies to be somewhat captured by legal academics and practitioners who have an important function to fulfil but whose brief, naturally enough, concentrates on legal rather than political analyses. Our purpose is to show and discuss the way in which the articulation and protection of human rights are not only legal processes but also intensely political ones.

These processes are political because the institutions that debate, prioritise, articulate, protect and, at times, ignore human rights are engaged in determining how power is exercised in Australian society. When the High Court invalidates a ban on prisoners voting, it is not only fulfilling a legal function (in interpreting and applying the law) but it is also generating a political effect, constraining the operation of parliament (which can no longer ban all prisoners from voting). When the media criticise the government for undue secrecy in its anti-terrorism activities, that criticism contributes to a political debate about the unchecked power of government. When parliaments determine the extent to which they will articulate human rights into Australian statutes, that is a political process that will shape the freedoms and entitlements of individual Australians.

If anything, Australia has less reason than most countries to leave the study of human rights to lawyers, since the lack of a national bill of rights often leaves politicians, rather than judges, as the ultimate arbiters of whether Australia will recognise and defend a principle expressed in international law. In this sense, Australia, more than other countries, witnesses decisions about human rights being carried out by actors most commonly associated with politics – politicians.

Indeed, the pre-eminence of the Australian parliament in determining whether to make human rights domestically enforceable constitutes one of the central themes in this book. Our argument is that Australia's practice of largely leaving the job of rights definition and protection to parliaments instead of courts has served majority interests in Australia quite well, but it has not served well some notable minority groups, particularly Indigenous Australians, refugees, and gay and lesbian Australians. Nor has it always served well women as a group.

An obvious question for a book such as this to ask is whether Australia's system of rights protection would be improved by adopting a national bill of rights, a development that would address the one feature of Australia's rights system that sets it apart from all otherwise comparable countries. Would the adoption of a bill of rights constitute an improvement? While the authors take the view (for reasons set out in chapter 3) that it would, none of us believes that such a development would provide a magic settlement of the many and varied human rights debates that currently exist in Australia and that will continue to arise. This is borne out by just two of the contentious debates considered in this book. The Northern Territory intervention into Aboriginal communities, begun in 2007, was aimed at protecting the welfare of children, but in enacting the intervention, the raft of new laws – governing alcohol and internet restrictions and quarantining welfare payments – suspended one of Australia's core human rights statutes, the *Racial Discrimination Act*. That Act seeks to protect one of the most fundamental human rights – the right not to be discriminated against on the basis of race – yet the view was taken by the Australian parliament that suspension of this right was appropriate in the extreme circumstances facing Aboriginal communities in the Northern Territory. The right should not have been suspended, for reasons articulated in chapter 5. But we do not for a minute think that the mere continuation of the *Racial Discrimination Act*, which in effect is the same as a prohibition against racial discrimination that might

exist in a national statutory bill of rights, would settle the debate about how children in remote Aboriginal communities should be protected and what rights, if any, should be jettisoned in doing so. Nor has the pre-existing protection against racial discrimination provided much of substantive significance to many children and women in remote Aboriginal societies, or elsewhere in Australia, whom the institutions and norms of civil society appear to have abandoned. Our argument is that a bill of rights would provide one mechanism by which proposals that limit rights might be evaluated, and would be a useful safeguard in this regard. However, it would not in and of itself provide solutions to the significant problems that the intervention has sought to address.

Another contentious issue concerns the topic of terrorism (explored in chapter 8). When, if ever, does the threat of terrorism justify limitations on existing rights? Since we do not subscribe to the view that the threat of terrorism never justifies an incursion on existing rights, we must enter the complex terrain of determining when, and with what safeguards in place, are incursions defensible. Here again, a bill of rights would be a help rather than a hindrance in this balancing process, but a bill of rights would not provide all the answers. The debates about proportionality are just that, debates.

We hope that readers will be informed about the particular human rights debates explored in and engaged with in this book, and that they see more clearly than before the political nature of these debates.

In planning this book it was decided early on that its aim should be to cover thematic issues rather than to devote entire chapters to particular rights. Only one chapter concentrates on a single right, and that is chapter 4, which examines the extensive topic of electoral rights. An important human rights topic of its own accord, the right to vote is perhaps even more significant in Australia than elsewhere, since elected representatives in Australia play such an important role in deciding when and how to protect human rights. All the other chapters deal with thematic human rights topics. The reason for this is that our overriding concern in the pages that follow is not to provide an in-depth report card on how well Australia is faring in protecting each and every human right, but rather to show readers the political nature of debates about human rights.

It is for this reason that this book focuses more on what are labelled civil and political rights (those articulated in the International Covenant on

Civil and Political Rights) than on economic and social rights (as detailed in the International Covenant on Economic, Social and Cultural Rights). As a general observation, the parameters of political debates surrounding civil and political rights are easier to see than are those surrounding economic and social rights. The debate about whether the right to vote should extend to prisoners, for instance, is one that has been strongly debated in Australia, and the fault lines of this debate are clear. The political nature of debates about economic and social rights tends to be more abstruse. The right to housing, say, is a human right, and few people would object to its labelling as such. But to what quality of housing, with how many inhabitants, does it give rise? While we do not ignore economic and social rights in this book, our aim here is to provide an exploratory account of the political nature of human rights debates, and in doing so our study does have a pronounced tilt towards examining the protection of civil and political rights. We hope that a specific study might one day be made of the politics of economic and social rights in Australia (which could include chapters on social security, workers' rights, education, housing and health care), and that this book might even pave the way for such a study. But that will be a different book to this one.

The proceeding chapters are organised in the following way. Chapter 1 examines how the term 'human rights' has developed, what it means and how it has been used in Australia. Chapter 2 explores the various ways in which human rights are currently protected in Australia, which leads into the discussion in chapter 3 about why Australia does not have a national bill of rights. Chapter 4 examines voting rights, and the following three chapters examine the human rights positions of various historically marginalised groups in Australia: Indigenous Australians (chapter 5), women, gay and lesbian Australians (chapter 6) and refugees (chapter 7). In the final chapter we look at the implications of the war on terror for human rights in Australia.

Like most multi-authored books, each of the chapters that follow was originally drafted by one of the authors, with the other two providing feedback. This feedback and the debates that it stimulated took place in various workshops in Melbourne and Sydney. Louise Chappell wrote the initial drafts of chapters 2, 3 and 6. John Chesterman wrote the first drafts of the introduction and chapters 5 and 7, and Lisa Hill wrote the initial versions of chapters 1 and 4. Chapter 8 was substantially written by Hill, though Chappell and Chesterman both contributed new sections to it.

A final note. The human rights field in Australia is fast-changing, particularly so at the moment this book has been completed, barely 12 months after a government noted for its outspoken criticisms of the United Nations ended its 11 year reign. It has been replaced in office by the Australian Labor Party, which has traditionally been supportive of the concept of international norms guiding domestic arrangements (and is headed by a former diplomat). Already some key changes are evident, such as the signing of the Kyoto Protocol, the apology to the Stolen Generations, and the ending of the temporary protection visa regime for refugees. There are bound to be other developments between now and the publication of this book, but, at February 2009, the writing is up to date.

Chapter One

HUMAN RIGHTS

Even if we are sure that liberal democracy is the best possible regime for the realisation of human flourishing – and no matter how developed a liberal democratic system is – it would be a mistake to assume that justice can be achieved in such a system purely via electoral processes. Given that public decision making in democracies relies upon the approval of a time-poor and imperfectly informed electorate as well as on the actions of representatives who are obliged to accommodate the electorate's preferences in order to retain legitimacy and power, it is unsurprising that democracy turns out to be a rather blunt instrument for the delivery of individual and minority rights. This flawed but unavoidable dynamic between the electorate and its representatives is, undoubtedly, one of the virtues of – and chief justifications for – democracy, but it is also one of its weaknesses.

Despite his enthusiastic advocacy of representative government, British philosopher John Stuart Mill was acutely alert to this reality. Mill endorsed representative democracy because of its tendency to put power into the hands of the majority or, in his words, to admit 'all to a share in the sovereign power of the state' (Mill 1991 [1863], 256). And yet, while democracy might ameliorate the problem of tyranny by a select elite, it still held the potential for oppression by the democratic majority over minorities (via 'the acts of the public authorities') (Mill 1991 [1863], 8–9; Wolff 1996, 115). Mill was therefore motivated to think of ways to prevent this from happening, and thus protect individuals from the state and the society.

He believed that finding the 'limit to the legitimate interference' of the collective with the individual was 'indispensable to a good condition of human affairs' (Mill 1991 [1863], 9). Mill was not alone in this quest: determining where that limit might be has been one of the absorbing errands of Western legal and political theory. Imposing the proper means for patrolling and regulating that limit has been the task of legislators and courts. This book explores how well the Australian state has embraced this important assignment.

In the following account of the politics of human rights in Australia the focus is mainly on formal and substantive rights, those that are enshrined and enshrinable in statutes and constitutions, which are binding and enforceable, and on which claims can be made through legal and institutional channels. Many people think of this domain of rights as being associated exclusively with negative rather than positive freedoms; others (including the present authors) think this distinction is unstable.

Negative liberty is usually conceptualised in individualistic terms as freedom from constraints on an individual's freedom, while positive liberty concerns the freedom to act so as to realise one's own goals and life plan. On this understanding, negative liberty can only be infringed by other people (we would not say our liberty is being violated by a storm that prevents us from going outside or by tone deafness that prevents us from becoming an accomplished opera singer). The positive/negative liberty distinction was famously elaborated by the political theorist Isaiah Berlin who, in referring to the negative conception, posed the question, 'What is the area within which the subject – a person or group of persons – is or should be left to do or be what he is able to do or be, without interference by other persons?' The question he posed in relation to positive liberty was 'What, or who, is the source of control or interference that can determine someone to do, or be, this rather than that?' (Berlin 2002, 121–2). The extent and conditions of liberty are thus extremely important in shaping the extent to which human beings are enabled to flourish.

The rhetoric of human rights is the first resort in contemporary challenges to the use of power that negatively affects human welfare and dignity (Offord 2006, 13). As political theorist A. Belden Fields has noted, 'Human rights rank along with democracy and free markets in the normative language of our age'. For many, rights talk is 'the ultimate normative reference point' (Fields 2003, 1).

Understanding human rights

It is generally assumed that the idea of universal rights is an essentially modern, liberal-democratic idea. Yet, some scholars have argued that there is a recognisably modern conception of rights in ancient Greek and Roman thought (see, for example, Ober 2000; Ostwald 2004; Hill 2001). Our original ideas of equal rights as universal derive from the Epicurean, Cynic and especially Stoic traditions (Hill 2001). It has, for example, been suggested that 'Locke was writing as a disciple of the Stoics when he offered his theory of natural rights to seventeenth-century readers' (Cranston 1967, 2). But, as political theorist Duncan Ivison quite sensibly points out, 'many of the rights that most people associate with liberal societies presuppose specific institutions, material conditions and ways of life that have developed over time'(Ivison 2008, 4). Freedom of the press, the right to privacy and the right to vote would have been hard for ancient Greeks and Romans to grasp. Therefore '[a]rguments about rights have to be anchored in *some* way to human practices and ways of life within which they must gain their meaning and resonance' (Ivison 2008, 4). Antique cultures did not have all the right kinds of anchoring practices and norms to make the modern conception of rights fully realisable, though they did have some of them.

The best known transmitters of the human rights tradition are modern United Nations documents such as the 1948 Universal Declaration of Human Rights (UDHR), the 1966 International Covenant on Civil and Political Rights (ICCPR) and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR). The rights tradition is also reflected in myriad human rights statements and declarations produced by such organisations as the Council of Europe, the Organisation of American States and the African Union (Nickel 2006) as well as non-government organisations like Amnesty International. The moral reference point for domestic rights projects are frequently these supranational entities, particularly UN organisations, because they are perceived to embody a moral authority superior to that of potentially interested and narrowly focused domestic actors and institutions. Further, supranational entities such as the UN generate human rights norms because the treaties that they establish between nations create international law (Nickel 2006).

What are rights?

A right is an entitlement to act in a certain way and to have others act in a certain way toward us; a right permits actions and imposes obligations. More specifically, rights are high priority (Cranston 1967), morally enforceable claims or norms that exist to protect the political, legal and social interests of people as well as their dignity as human beings. They are distinct from other moral claims because they 'aspire towards institutional embodiment and enforceability' (Ivison 2008, 7). Rights exist at the domestic and the international level and are usually created by legislative enactment and judicial decisions (Nickel 2006). They set minimal standards for how human beings should be treated and, in most cases, are the entitlements attributed to individuals by virtue of their being human. A distinction is usually made between rights that are derived from *a priori* principles (natural, innate rights) and rights that are acquired or created by legislation (positive or statutory rights).

For American legal theorist Wesley Hohfeld, rights are directly correlated to duties, 'That is to say, if D has a *right* with respect to H to perform X then H has a *duty* not to interfere with D in X-ing' (1978 [1919]). Possessing a right to something provides an entitlement to it and an entitlement creates obligations in and towards others. In order to realise one's entitlement, the claim must be enforceable even if this only means that others can be prevented from acting. It is the state's job to ensure that such forbearance prevails (Shue 1996).

When people refer to rights they usually mean rights that are equal, inalienable and universal. Every human being is assumed to possess the same entitlements as everyone else, their rights are assumed to be universal in the sense that all human beings enjoy them (Donnelley 2003, 10). Such an understanding is reflected in the ICCPR and the ICESCR, which declare in their respective preambles that 'the equal and inalienable rights of all members of the human family' derives 'from the inherent dignity of the human person'. The imperative to respect such rights consists in the strong claim (made in both treaties) that such respect is the 'foundation of freedom, justice and peace in the world'.

It should be noted that some of the above claims about human rights are disputed. First, there are those who reject the whole idea of natural, universal and inalienable rights since their existence is claimed to be based

on the – usually Western – assumption that morality is independent of culture. These relativists argue that, since there is considerable disagreement between cultures as to what constitutes moral behaviour, there is no basis for the universalist claim that there are rights that are applicable or appropriate to all people at all times.

Second, even for those who accept the idea of universal rights, the claim that rights are always negative freedoms is problematic because the distinction between negative and positive freedom is not as clear as many assume: not all human rights are negative freedoms because even the basic right to security from invasion and harm – which at face value looks like a straightforward negative right – requires positive action on behalf of governments to provide a formal system of criminal law and enforcement (Nickel 2006). The line between positive and negative liberty may not be as bright as many liberals suppose.

Third, the claim that human rights are inalienable or absolute is controvertible. Some take the strong position that rights are absolute. For political theorist Jack Donnelley (2003, 10), regardless of how badly behaved or badly treated we are, we cannot 'stop being human', therefore human rights are inalienable. Others suggest that bad behaviour does render some rights alienable, suggesting that simply being human is not enough. If we accept that it is reasonable to punish people with imprisonment for serious crimes, then we have also accepted that 'people's rights to freedom of movement can be forfeited temporarily or permanently' (assuming the conviction is just). On this view, not every human right is inalienable; nevertheless, those that aren't should still be 'hard to lose' (Nickel 2006).

Fourth, the assumption that rights naturally or necessarily attach to all human beings is problematic, mainly because it is rarely justified in the kinds of documents that embody, promulgate and protect rights. As the philosopher L. W. Sumner notes, '[d]eclarations and manifestos seldom offer a grounding for their catalogues of rights, and they never offer an account of what makes a right a natural right' (Sumner 1987, 94). The United States *Declaration of Independence* (1776), for example, simply asserts that it is 'self-evident' that all people 'are endowed . . . with certain inalienable Rights'. But why are human rights natural rights? Are such rights inalienable or are they forfeitable and defeasible (that is, capable of being declared void)? Can rights exist in the abstract or independently of legal enactment? Why do rights attach to humans and where do they come from?