



THE UNIVERSITY OF  
NEW SOUTH WALES



FACULTY OF LAW

27 May 2009

National Human Rights Consultation Secretariat  
Attorney-General's Department  
Central Office  
Robert Garran Offices  
National Circuit  
BARTON ACT 2600

Dear Sir/Madam,

**Submission on Federal Issues of Human Rights Protection**

We send you the attached submission for consideration by the Consultation Committee, chaired by Father Frank Brennan AO, and constituted also by Mary Kostakidis, Mick Palmer AO APM and Tammy Williams.

We are making this submission in our capacity as members of the Gilbert + Tobin Centre of Public Law and staff of the Faculty of Law, University of New South Wales. We are solely responsible for its contents.

We acknowledge the main submission to the Committee from our colleague, Mr Edward Santow, Director of the Centre's Charter of Human Rights Project. This submission offers supplementary arguments made in the specific context of federal issues arising in the protection of human rights.

If you have any questions relating to this submission, or if we can be of any assistance to the Consultation Committee, please do not hesitate to contact us.

Yours sincerely,

Handwritten signature of Paul Kildea in black ink.

**Mr Paul Kildea**  
Director, Federalism Project

Handwritten signature of Andrew Lynch in black ink.

**Dr Andrew Lynch**  
Centre Director

## **Part I: FEDERALISM ALONE DOES NOT SUFFICIENTLY PROTECT RIGHTS**

It is sometimes argued that the rights of individuals find protection in the federal nature of Australia's system of government. It is suggested that federalism, by dividing sovereignty between different levels of government, limits the power of governments to infringe rights, and guarantees due process.<sup>1</sup> The dispersal of power is seen as an important part of the checks and balances on the power of a central government. It is also claimed that federalism 'promotes rights-oriented citizenship',<sup>2</sup> and that a federal design protects the freedom of individuals by giving them the option of moving to the jurisdiction that best protects their liberty.<sup>3</sup>

These claims are problematic for several reasons. First, while the dispersal of power in a federal system offers some measure of protection to individual rights, it is not sufficient, in itself, to provide comprehensive human rights protection. Moreover, the weight of this argument has diminished over time with the increasing centralisation of legislative power. As the reach of federal legislative power has broadened, any capacity for 'divided sovereignty' to protect individual rights has been severely weakened. It has been further diminished by the continuing trend towards uniformity of Federal, State and Territory laws, which has accelerated as all levels of government have sought to adapt to the pressures of globalisation.

Secondly, it is plainly evident that the existence of a federal system in Australia does not prevent governments from passing legislation that infringe individual rights. In recent times, the federal Parliament has passed a range of laws which have been widely seen to breach human rights. The existence of a federal division of power has proved no impediment to the Commonwealth passing a range of laws that, to some extent at least, abrogate fundamental rights and liberties. These include recent laws that provide for the holding of children in immigration detention, the introduction of preventative detention without charge for fourteen days, and the interception of people's phone calls, emails and text messages without their knowledge. The enactment of such measures should not be considered a failure of the federal nature of our system of government. To rely on federalism as a main safeguard against the abuse of individual rights is inevitably to leave substantial 'gaps' in Australia's protection of human rights.

Thirdly, the argument that a federal system gives individuals the choice to 'vote with their feet' and move to the jurisdiction seen to best protect their liberty assumes that people have the resources to be able to do so. In reality, many Australians do not possess sufficient resources to take advantage of this. Even if they did, the increasing homogeneity of State legal systems in Australia could hardly be said to offer them much of a choice – though we note that the creation of formal legal protections for rights in the ACT and Victoria may be seen as an improvement in this regard, at least for as long as the enactment of other State Charters is delayed.

In short, while federalism is certainly one feature of the Australian human rights framework, it is insufficient to provide a comprehensive regime of human rights protection.

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<sup>1</sup> Brian Galligan, Rainer Knopff and John Uhr, 'Australian Federalism and the Debate Over a Bill of Rights' (1990) 20 *Publius* 53, 56.

<sup>2</sup> *Ibid.*

<sup>3</sup> Robert Bork, *The Tempting of America: The Political Seduction of the Law* (1990), 53.

## **PART II: APPLICATION OF A FEDERAL HUMAN RIGHTS ACT TO STATES AND TERRITORIES**

The remainder of our submission addresses the federal dimensions of any move to enact a national Human Rights Act ('HRA'). As stated in our covering letter, on the general desirability of such a law we refer the Committee to the major submission of our colleague, Mr Edward Santow.

The enactment of a federal HRA will unquestionably have an impact on the States and Territories. In this respect, there are two main alternatives open to the Commonwealth Parliament: to introduce a national HRA which binds the States or to introduce a national HRA which provides a mechanism for the States to 'opt in' to the national model on a voluntary basis. We favour the latter approach.

### **A Drawbacks to a HRA which seeks to bind the States**

It would be open to the Commonwealth Parliament to enact a national HRA which expresses an intention to operate on both federal and State laws and apply to their respective public authorities (the term 'public authorities' captures all governmental bodies and other entities performing functions on behalf of the government). There is little doubt that the Commonwealth Parliament has the legislative capacity to do this. Under such a model, the federal HRA would invalidate any inconsistent State laws by virtue of the operation of section 109 of the Constitution (in so doing, its effect, at the State level, would approximate the 'strong' form of HRA described in Mr Santow's submission to which we have earlier referred the Committee).

We suggest that such an approach would bring significant disadvantages. It would operate unevenly across different spheres of government, inhibit the development of existing and future human rights laws at State level, and risk placing ongoing strain on relations between the Commonwealth and the States.

#### *Uneven operation*

Even if the Commonwealth Parliament stated a clear intention for a national HRA to bind the States, it is important to recognise that the law and its procedures would not operate evenly across federal and State jurisdictions. This is so for two reasons.

First, as already averred to, the consequences for a State law that the courts determine is incompatible with a right protected by the federal HRA must be invalidity due to the constitutional mechanism of s 109. A similarly incompatible federal law would, on the other hand, continue in operation despite the judicial determination, awaiting further 'dialogue' from the Commonwealth legislature. As former High Court judge, the Hon Michael McHugh AC, has said, 'there is no dialogue between Federal courts and the State legislatures, nor constitutionally could there be'.<sup>4</sup> In short, a national HRA binding upon the States may produce uniformity with respect to the actual rights protected but not as to the legal and political consequences for their breach.

Second, though in the same vein, other key elements of the moderate 'dialogue' model of rights protection could not simply be made to apply in the same way to the States by the national regime. Under the constitutional doctrine of implied intergovernmental immunities, limitations exist on the power of the Commonwealth Parliament to legislate with respect to the States where to do so 'restricts or burdens one or more of the States in the exercise of their constitutional powers'.<sup>4</sup> A

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<sup>4</sup> *Austin v Commonwealth* (2003) 215 CLR 185, 257 (Gaudron, Gummow and Hayne JJ).

law which impairs the constitutional autonomy of the States will be invalid under this principle. Significant elements of an overriding national HRA will, potentially, fall foul of this limitation:

- the Commonwealth Parliament cannot direct State courts with respect to interpretation of State legislation,<sup>5</sup> and thus an overriding national HRA could not expressly require State courts to interpret State laws consistently with the protected rights (though, as a matter of practice they may do so in order to avoid a s 109 inconsistency with the federal law);
- the Commonwealth could not legislate so as to require a State Minister to introduce proposed bills to the State Parliament accompanied by a Statement of Compatibility with the national HRA;
- were the national HRA to establish a parliamentary body for the scrutiny of bills with respect to protected rights (such as the United Kingdom's Joint Committee on Human Rights), it is doubtful whether it could require the States to adopt similar mechanisms.<sup>6</sup>

It follows that some of the main benefits of a HRA, namely the institution of greater 'dialogue' between the different arms of government, would not translate to the State government level through application of an overriding national HRA. The only way for these benefits to be enjoyed equally, at both the federal and State levels, is for the States to voluntarily replicate the national scheme, including its processes and apparatus, by enacting their own legislation.

#### *Inhibition of development of State human rights laws*

A national HRA which binds the States may, by virtue of the operation of section 109, override existing human rights acts in the ACT and Victoria. It would also stymie the future development of similar human rights acts in other jurisdictions, including Tasmania and Western Australia which have both held independent inquiries recommending the introduction of a human rights act. In this way, an overriding national HRA would prevent Australians from enjoying the diversity which is one of the main advantages of a federal system.

#### *Strain on Commonwealth-State relations*

Another disadvantage of an overriding national HRA is that it may be viewed by the States as an unwarranted intrusion which undermines their independence as self-governing entities, and thus be a matter of some controversy. We agree with the argument, put forward by Mr Santow in his submission, that the potential benefits of a HRA are likely to be undermined if it operates without the institutional support of governments and parliaments in each jurisdiction. In addition, any discontent among the States as a result of the passage of an overriding national HRA may weaken the 'goodwill' that is essential to the success of cooperative arrangements between the different spheres of government in numerous other policy areas.

## **B Voluntary 'opt in' by the States**

We suggest that a national HRA should apply only to federal laws and public authorities, but it should include a mechanism whereby the States may 'opt in' by passing legislation that replicates or adopts the national law and its procedures. Such an approach carries the significant benefits of being consistent with federal theory, of facilitating a 'dialogue' between arms of government within the States, and of being simple to achieve. It also avoids the significant drawbacks of an overriding national HRA, which we have outlined above.

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<sup>5</sup> Cheryl Saunders, 'Protecting Rights in the Australian Federation' (2004) 25 *Adelaide Law Review* 177, 206.

<sup>6</sup> *Ibid.*

### *Consistent with federal theory*

Implementing a national HRA with an ‘opt in’ mechanism for the States is consistent with federal theory. First, by leaving the choice in the hands of the States, it respects their position as self-governing entities. It also respects their autonomy, leaving the way open for the States to develop their own rights protection regimes, just as Victoria and the ACT have already done. In other words, while the ‘opt in’ approach would promote a simple means by which a State could extend the protections of a federal HRA to their jurisdiction it would also allow different rights protection regimes to operate concurrently at federal and State levels.

Second, such an approach allows Australians to benefit from some of the strengths of a federal system. Despite the movement towards uniformity in many policy areas, Australia’s federal system retains a capacity to deliver variety and flexibility in addressing policy problems. This enables a diversity of approaches in developing policy solutions, the customisation of policy to local needs, and the potential for experimentation. Additionally, allowing different jurisdictions to develop their own rights protection regimes encourages competition between the States in providing optimal rights protection.

It might be argued that a national HRA that permits the States to join voluntarily is worrying in that it may result in a patchwork of rights regimes across different jurisdictions, meaning that individuals will receive differential rights protection depending on where they live.<sup>7</sup> However, we suggest that the existence of different rights protection regimes, operating concurrently in a federal system, is not so undesirable as to demand the imposition of a national HRA upon the other tiers of government. Indeed, the acceptability of differing and composite means of rights protection is clearly demonstrated by Australia’s various anti-discrimination laws. As we have argued above, such an arrangement allows diversity and fosters innovation. Moreover, this may be seen as part of a natural evolution in approaches to rights protection. In time, State approaches to rights protection may compete in some respects, and converge in others. Finally, any qualms we may have regarding the lack of uniformity in rights protections are insignificant compared to the more serious drawbacks of a HRA model which binds the States.

### *Facilitating dialogue*

Another advantage of the ‘opt in’ approach is that it will permit ‘dialogue’ about rights to occur concurrently at both Commonwealth and State levels. This is due to the fact that, when a State adopts the national HRA law and procedures for its own jurisdiction, the apparatus which enables such dialogue would be created at the State level. Such apparatus includes: the ability of State courts to interpret State laws consistently with protected rights and, where appropriate, issue declarations of incompatibility; a requirement that State Ministers attach Statements of Compatibility when introducing bills into State Parliament; and, a scrutiny committee established for the purpose of assessing bills with respect to protected rights. The adoption of this apparatus at State level will ensure that the benefits of dialogue enjoyed by the Commonwealth will equally be available to the States. By contrast, as we explained earlier in this submission, for constitutional reasons, these benefits would be restricted to the Commonwealth under a national HRA that bound the States involuntarily.

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<sup>7</sup> See, eg, the Hon Michael McHugh, ‘A Human Rights Act, the courts and the Constitution’, Paper delivered at the Australian Human Rights Commission, 5 March 2009, 34.

*Simple to achieve*

It would be a simple matter to restrict the application of a national HRA to federal laws and public authorities, requiring only the inclusion of a provision which stated this intention clearly and unequivocally.

### **PART III: CONCLUSIONS**

In summary:

1. The existence of a federal system alone is insufficient to provide comprehensive rights protection;
2. A national Human Rights Act which binds the States has significant drawbacks which outweigh any purported benefits which might arise from uniformity in rights protections;
3. A national Human Rights Act should be confined in operation to federal laws and public authorities, but include a mechanism whereby States may 'opt in' to the national law and its procedures.