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## SUBMISSION TO HUMAN RIGHTS CONSULTATION – CONSTITUTIONAL VALIDITY OF DECLARATIONS OF INCOMPATIBILITY

### Introduction

1. The ACT *Human Rights Act 2004* and the Victorian *Charter of Human Rights and Responsibilities Act 2006* contain provisions empowering, respectively, the Supreme Courts of the ACT and Victoria to make declarations of incompatibility (or declarations of inconsistent interpretation in Victoria) in circumstances where the Court is unable to interpret a provision consistently with the rights sets out in those Acts.

### Submission

2. There is significant doubt whether the Commonwealth Parliament could, consistently with Ch III of the Constitution, validly confer a similar power on a federal court or other court exercising federal jurisdiction. That does not mean that a mechanism could not be designed to substantially achieve the same purpose as a declaration of incompatibility. However, a Commonwealth provision that confers a power on a court to make a declaration of incompatibility – in similar terms to those given to the ACT and Victorian Supreme Courts – is unlikely to be held by the High Court to be constitutionally valid.

### Brief outline of position

3. I attach an article of mine published in the *Public Law Review* in 2008 that identified the constitutional difficulties with the declaratory powers given to the ACT and Victorian Supreme Courts. In short, the article argued that a declaration of incompatibility is not a power that can be exercised in the course of exercising Commonwealth judicial power to determine a ‘matter’ under Ch III of the Constitution. An exercise of Commonwealth judicial power to determine a ‘matter’ requires the court to determine the existence of an immediate right, duty or liability. A declaration of incompatibility under the ACT and Victorian Acts has no effect on any legally recognised rights. As foreshadowed in that article, the same constitutional difficulties would apply if a similar provision were included in a federal charter of rights.
4. The constitutional point is clearly open to argument. While some constitutional commentators have argued that a provision conferring a power on a federal court to

make a declaration of incompatibility is likely to be valid,<sup>1</sup> others, including former High Court Justice, Mr Michael McHugh, have expressed similar concerns about the constitutional validity of such a provision.<sup>2</sup>

5. However, it should be emphasised again that there are alternative mechanisms that can be designed that would avoid the constitutional difficulties, yet substantially achieve the same purpose of including a power to order a declaration of incompatibility. The submission by the Australian Human Rights Commission on these issues indicates possible approaches that could be adopted.

Yours sincerely

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<sup>1</sup> See, eg, Geoffrey Lindell, 'The Statutory Protection of Rights and Parliamentary Sovereignty: Guidance from the United Kingdom?' (2006) 17 *Public Law Review* 188; Dominique Dalla-Pozza and George Williams, 'The Constitutional Validity of Declarations of Incompatibility in Australian Charters of Human Rights' (2007) 12 *Deakin Law Review* 1; Stephanie Wilkins, 'Constitutional Limits on Bills of Rights Introduced by a State or Territory' (2007) 35 *Federal Law Review* 431.

<sup>2</sup> See, Michael McHugh, 'A Human Rights Act, The Courts and the Constitution', presentation given at the Australian Human Rights Commission, 5 March 2009; Jim South, 'Campaign for a National Bill of Rights: Would 'Declarations of Incompatibility' be Compatible with the Constitution' (2007) 9 *Constitutional Law and Policy Review* 2.