

National Human Rights Consultation Submission

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Submission Text:

The following points express views which differ slightly from any I have noted so far as being published:

(a) The Australian Constitution does not empower the Commonwealth Parliament to enact a law which authorises a Court to make a non-binding declaration of incompatibility, because such a declaration would not amount to an exercise of judicial power. The function of requiring a response from Parliament is not an exercise of judicial power and inappropriately bridges the separation of powers between the judiciary and the Parliament. The attempt to create that bridge is emphasised by those laws which do purport to vest that power in courts limiting it to superior courts.

(b) The United Kingdom, New Zealand and the Australian States and Territories (whose constitutions are partly written and partly unwritten) do not have such a clearly stated separation of powers between the Judiciary and the other arms of government as is provided for in respect of the Commonwealth of Australia by section 71 and 72 of the Constitution (Cth): see *Attorney-General (Commonwealth) v R; Ex parte Boilermakers' Society of Australia* (1957) 95 CLR 529. In that respect the position under those jurisdictions, which have vested a power in judicial officers to make non-binding declarations of incompatibility of laws and refer the same to Parliament, is distinguishable from the position under the Constitution of the Commonwealth of Australia, which clearly separates the power of judicial officers exercising federal jurisdiction from the legislative and executive functions of government.

(c) The function of making non-binding findings of incompatibility and reporting the same to the Parliament is more appropriately a function of a standing commission of inquiry, such as the Human Rights and Equal Opportunity Commission, which fits within the executive rather than the judicial arm of government.

(d) Courts exercising federal jurisdiction are presently empowered by the operation of section 109 of the Constitution (Cth) to make declarations of invalidity with respect to inconsistency between State laws and any Commonwealth Human Rights Act and to interpret a Human Rights Act as intended by the Parliament to repeal any earlier inconsistent Commonwealth law.

The Law Society of Western Australia has adopted a Position Paper on an Australian Human Rights Act which expands on the law supporting the views above. As Convenor of the Society's Human Rights Committee I drafted the paragraphs concerning the role of Federal Courts and am responsible for the final content of the paper (which has been forwarded as an attachment to a submission immediately before this).