

**Submission from Jim South**  
**to the National Human Rights Consultation Committee**

(Submission reference number AGWW-7QY6BN)

This submission is additional to the submission and paper that I gave to Father Frank Brennan at the community roundtable session held in Brisbane on the evening of 23 March 2009.

The purpose of this submission is to draw attention to difficulties and concerns associated with the Bill of Rights model proposed by former High Court judge Michael McHugh in his paper, “A Human Rights Act, The Courts and the Constitution”.

Justice McHugh proposed his model (the McHugh model) after identifying that the “dialogue” model of a Bill of Rights “is fraught with constitutional difficulties in the federal sphere”. Under the McHugh model, courts exercising federal jurisdiction would have the power to make rulings that would have the effect of invalidating State and Territory laws, or “disapplying” federal laws, that are found to be incompatible with human rights. However, the McHugh model also is fraught with constitutional difficulties. Those difficulties and other concerns are identified below.

**Difficulty associated with the use of “notwithstanding clauses”**

Under the McHugh model, the Federal Parliament would be able to insert a “notwithstanding clause” in any federal law to prevent or override its “disapplication”. However, the Federal Parliament cannot prevent its successors from impliedly amending its laws, and probably cannot impose a binding “manner and form” requirement for the use of “notwithstanding clauses”.<sup>1</sup> There can be no guarantee that in the absence of a “notwithstanding clause”, the courts would always “disapply” a federal law that is found to be incompatible with human rights.

**Difficulty associated with the severing of objectionable parts of legislation**

In cases where a part or parts of a federal law are found to be incompatible with human rights, the courts would lack the power to make a new law from the unobjectionable parts of the old.<sup>2</sup> What would happen when the objectionable part/s cannot be severed without changing the operation of the unobjectionable parts?

**Potential difficulty in relation to the way that the McHugh model would protect economic, social and cultural rights within the States**

Justice McHugh has suggested that his model could be used to give legal effect to the *International Covenant on Civil and Political Rights* and, if thought necessary, the *International Covenant on Economic, Social and Cultural Rights*. However, a constitutional difficulty could possibly arise if it were decided to enact legislation, based on the McHugh model, to give legal effect to the latter Covenant within the States.

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<sup>1</sup> *Kartinyeri v Commonwealth* (1998) 195 CLR 337, [13]–[16] (Brennan CJ and McHugh J).

<sup>2</sup> *Bank of NSW v The Commonwealth* (1948) 76 CLR 1, 372 (Dixon J); *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468, 492 (Barwick CJ), 503, 506 (Menzies J).

The Commonwealth would no doubt contend that its legislation is valid as it “has an actual and immediate operation within a field [the external affairs power] assigned to the Commonwealth as a subject of legislative power”.<sup>3</sup>

Nevertheless, the objection could be raised that the legislation arguably breaches “the prohibition against [federal] laws of general application which operate to destroy or curtail the continued existence of the States or their capacity to function as governments”.<sup>4</sup>

It could be argued that the external affairs power does not extend to the enactment of legislation that would operate to destroy or curtail the capacity of the States to determine and prioritise their resourcing and funding allocations on core areas of State government responsibility such as education, health and housing.

It is not suggested that this argument would be likely, or unlikely, to succeed. Rather, the argument is raised to draw attention to the existence of the identified potential difficulty.

### **Inconsistency with the right to know the law**

The McHugh model is inconsistent with the principle, inherent in the rule of law, that citizens (including public officials) have a right to know the law. Under the McHugh model, the validity or operation of any legislation limiting a right would depend on a judicial assessment of whether the limit is reasonable and demonstrably justified in a free and democratic society. This would lead to great uncertainty and unfairness in the law. Citizens and public officials would be forced to make decisions without knowing their legal rights, duties and liabilities in relation to those decisions.

### **Inconsistency with parliamentary sovereignty in relation to State Parliaments**

The McHugh model is inconsistent with the doctrine of parliamentary sovereignty to the extent that the model applies to State and Territory laws.

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<sup>3</sup> *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31, 79 (Dixon J).

<sup>4</sup> *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31; *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192, 217 (Mason J); *Re Australian Education Union & Australian Nursing Federation; Ex Parte Victoria* (1995) 184 CLR 188, 231 [54] (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).