

## A FEDERAL HUMAN RIGHTS ACT – WHAT IMPLICATIONS FOR THE STATES AND TERRITORIES?

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### I INTRODUCTION

This paper examines whether a federal Human Rights Act ('HRA'), as recommended by the National Human Rights Consultation Committee ('NHRCC') in its Report,<sup>1</sup> would be likely to impact upon the exercise of legislative, executive or judicial power at the state level. Ostensibly, it should not, to any significant degree. While the NHRCC recommended that any federal HRA protect the rights of all people in Australia and all people who are overseas but subject to Australian jurisdiction,<sup>2</sup> it also made the following limiting recommendation:

The Committee recommends that any federal Human Rights Act protect the rights of human beings only and that the obligation to act in accordance with those rights be imposed only on federal public authorities – including federal ministers, federal officials, entities established by federal law and performing public functions, and other entities performing public functions under federal law or on behalf of another federal public authority.<sup>3</sup>

The reason which the NHRCC gave for this recommendation was that it would be 'counter-productive and unwise' to have federal Parliament impose on the states and territories a catalogue of human rights and a process for determining the regular limitation of those rights.<sup>4</sup> The NHRCC contemplated that different jurisdictions might experiment with different laws and policies; and that over time, different human rights outcomes may emerge between different states or territories and indeed the Commonwealth.<sup>5</sup>

Thus, the expressed intention of the NHRCC is that states and territories will be left to pursue their own approaches to human rights protection, both in deciding whether to have a HRA, and as to what rights and methods of protection

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1 National Human Rights Consultation Committee, *National Human Rights Consultation Report* (2009) ('Report').

2 *Ibid* xxxv (Recommendation 21).

3 *Ibid* xxxiv (Recommendation 20).

4 *Ibid* 364.

5 *Ibid* 363.

would be reflected in any such Act. Whether a uniform, nationwide approach to rights protection will emerge, or what shape it might take, would be for future governments and peoples to decide.

Proponents of strong rights protection will be disappointed with the modesty of the NHRCC's approach. They would prefer that federal Parliament seized the initiative for the nation, legislated for all the rights found in covenants such as the *International Covenant on Civil and Political Rights*,<sup>6</sup> *International Covenant on Economic, Social and Cultural Rights*<sup>7</sup> and *Universal Declaration of Human Rights*<sup>8</sup> and then allowed for section 109 of the *Constitution* to do its work invalidating any (and probably many) inconsistent state laws.

However, the limiting approach of the NHRCC can be justified on four, mutually reinforcing grounds. Firstly, it is underpinned by a firm sense of realism: if overall there are sufficient perceived net benefits to strive for the introduction of a federal HRA, Australian political history strongly suggests that to seek to impose it formally and legally at the outset on the states is likely to provoke sufficient public opposition to scare off federal Parliament from any measure at all. Sections 10.2–10.4 of the Report contain a useful summary of the failed history of federal attempts to introduce rights protection, either by referendum or statute, which would have impacted directly and squarely on state power.<sup>9</sup> Particularly pertinent are each of the failed 1973 Murphy Bill, 1983 Evans Bill and 1985 Bowen Bill. Each Bill, to varying extents, sought to apply internationally recognised rights in a way directly binding the states; each provoked sustained opposition on this (as well as other) grounds and failed in the political process.<sup>10</sup>

In an ideal world, a better solution might be the 'entrenched but non-constitutional' model recommended by Anne Twomey, where the federal and all state Parliaments would legislate a uniform, national set of rights protections.<sup>11</sup> Twomey's argument draws strength at the theoretical level from the earlier analysis by Cheryl Saunders that, within a federation, the principle of equality between polities and the importance of consent suggest that matters such as rights protection, which lie at the heart of arrangements for the governance of the federation, ought to be dealt with on a national uniform standard. Indeed, Saunders went further and urged that the *Constitution* should be amended to protect human rights on the national level.<sup>12</sup> However, achieving rights protection by an amendment to the *Constitution* as suggested by Saunders was beyond the terms of reference of the NHRCC.<sup>13</sup> The political judgement of the NHRCC was

6 Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

7 Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

8 GA Res 217A (III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/Res/217A (10 December 1948).

9 National Human Rights Consultation Committee, above n 1, 230–7.

10 For further review of the history of previous rights proposals, see Cheryl Saunders, 'Protecting Rights in the Australian Federation' (2004) 25 *Adelaide Law Review* 177, 183–93.

11 Anne Twomey, Submission to the National Human Rights Consultation Committee, *National Human Rights Consultation*, 5 May 2009, 20–1.

12 Saunders, above n 10, 209–10.

13 National Human Rights Consultation Committee, above n 1, 383.

that in relation to a non-constitutional model, the practical prospect of achieving unanimity across Australian Parliaments in the short to medium term is low.

As is now apparent from the federal government's response to the NHRC Report issued on 21 April 2010,<sup>14</sup> not even the pragmatism of the NHRCC has been sufficient to induce the government to progress a federal HRA at this time. Thus the issues discussed in this paper will await a future government's enhanced bravery and ambition in the statutory protection of rights.

Secondly, at a more theoretical level, defenders of a strong, functioning, evenly balanced federal system may be pleased with the NHRCC's approach. It expressly resists the 'opportunistic federalism' often criticised in the United States ('US') where the national government cherry picks issues of state jurisdiction for political or ideological reasons without a systematic good government rationale.<sup>15</sup> Further, by recognising that the states have a legitimate role to play in determining human rights outcomes, as opposed to a single decision being made by the national representatives of all of the people, the NHRCC's proposal respects the conception of the federation as involving a true balance of both federal and national elements, as appealed to many of the significant founding fathers.<sup>16</sup> It is also consistent with the view strongly expressed by Brian Galligan and others in 1990 that the federal Labor's then failed attempts to nationalise standards for the protection of rights bespoke an unwise preference for centralism and a failure to allow the dynamic benefits from differential state experimentation on key issues of public policy, sometimes referred to as 'competitive federalism'.

Indeed, when complaint is often forcefully made of the lack of a clear conception in the constitution of federal values, leading to suggestions for a need for reform by (difficult to achieve) referenda,<sup>17</sup> modest restraint by the federal Parliament in not legislating to the full reach of its powers so as to bind the states would seem commendable. It is consistent with the practical, small steps agenda for revitalising federalism recently urged by Galligan.<sup>18</sup>

Thirdly, the NHRCC's proposal to limit the reach of the federal HRA coheres with its other recommendation for a dialogue model.<sup>19</sup> Once the position at the national level is that incompatibility between a law and a protected right invites 'dialogue' between the Parliament and the courts but does not invalidate the law,

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14 Australian Government, *Australia's Human Rights Framework* (2010); Robert McClelland, 'Launch of Australia's Human Rights Framework' (Speech delivered at the National Press Club of Australia, Canberra, 21 April 2010).

15 See Tim Conlan, 'From Cooperative to Opportunistic Federalism: Reflections on the Half-Century Anniversary of the Commission on Intergovernmental Relations' (2006) 66 *Public Administration Review* 663.

16 See Nicholas Aroney, 'Imagining a Federal Commonwealth: Australian Conceptions of Federalism, 1890–1901' (2002) 30 *Federal Law Review* 265.

17 See, eg. Andrew Lynch and George Williams, 'Beyond a Federal Structure: Is a Constitutional Commitment to a Federal Relationship Possible?' (2008) 31 *University of New South Wales Law Journal* 395, 423–4; Anne Twomey, 'Reforming Australia's Federal System' (2008) 36 *Federal Law Review* 57.

18 Brian Galligan, 'Processes for Reforming Australian Federalism' (2008) 31 *University of New South Wales Law Journal* 617.

19 National Human Rights Consultation Committee, above n 1, xxxiv (Recommendation 19).

it is difficult to justify why the consequences for an inconsistent state law should be more draconian for the inconsistent federal law: section 109 will render the inconsistent state law inoperable whereas the inconsistent federal law remains valid but subject to ‘dialogue’.<sup>20</sup>

Fourthly, even in Canada and the US where statutory rights protection is far better (and longer) entrenched than in Australia, and federal protection extends in varying measures to bind the states, that position has been reached only after a sustained history of interaction between federal and state based instruments.<sup>21</sup> This history suggests that a cautious first step may over time result in a larger, more effective outcome.

This paper makes the assumption that a federal government in the future returns to the recommendations of the NHRCC and takes up its proposals, but with the restraint reflected in Recommendation 20.<sup>22</sup> It asks the question: in those circumstances, would there nevertheless be impacts on the exercise of state legislative, executive or judicial power and, if so, what form might they take? Answering that question necessarily involves an element of crystal ball gazing, but may assist, when taken with other papers in this issue, in obtaining the fullest appreciation of the likely impact of a future federal HRA following the NHRCC model.

While there is an existing body of literature which has addressed the connections between federalism and human rights, it has not precisely addressed the present question. As noted above, Saunders, Galligan and others have considered the theoretical question whether enhanced rights protection should be introduced on a national basis which directly binds the states, a proposal which the NHRCC has rejected. Other authors, such as Pamela Tate<sup>23</sup> and James Stellios,<sup>24</sup> have considered various aspects of the operation of the statutory Charters introduced in the Australian Capital Territory (‘ACT’) in 2004 and Victoria in 2006, in particular in the context of how they sit within the federation established by the *Constitution*. Yet again, Chief Justice James Spigelman has

20 See Twomey, above n 11, 7; Paul Kildea, Andrew Lynch and Edward Santow, ‘Australian Federalism and a National Human Rights Act – Implications and Challenges’ (Paper presented at the Australian Political Studies Association Conference, Sydney, 30 September 2009) 17–23. For a detailed recent review of the respective merits of the dialogue model as exemplified by the Victorian, ACT and UK Charters over a Canadian style Charter containing provisions for strong judicial remedies, see Rosalind Dixon, ‘A Minimalist Charter of Rights for Australia: the UK or Canada as a Model?’ (2009) 37 *Federal Law Review* 335, 361–2. Dixon touches upon consequences which the dialogue model may have for the states, but in a scenario unlike that recommended by the Committee where the national Charter applies directly to the states.

21 See Kildea, Lynch and Santow, above n 20, 10–12 for a discussion of, in Canada, the precursors to the current *Canada Act 1982* (UK) c 11, sch B pt I (‘*Canadian Charter of Rights and Freedoms*’), and, in America, the continuing (although declining) role of state Bills of Rights.

22 National Human Rights Consultation Committee, above n 1, xxxiv.

23 See Pamela Tate, ‘Protecting Human Rights in a Federation’ (2007) 33 *Monash University Law Review* 220; Pamela Tate, ‘Victoria’s *Charter of Human Rights and Responsibilities*: A Contribution to the Debate on the National Charter’ (Speech delivered at the Commonwealth Law Conference, Hong Kong, 6 April 2009).

24 James Stellios, ‘Federal Dimensions to the ACT Human Rights Act’ (2005) 47 *Australian Institute of Administrative Law Forum* 33.

considered statutory interpretation issues which would arise with any statutory protection of rights.<sup>25</sup>

However, to date, the literature has not had to consider the forward looking aspects if statutory protection is introduced at the federal level which deliberately determines not to bind the states and, for reasons of political necessity, will operate for the foreseeable future without parallel statutory protections across all states. This paper focuses on the impact of this scenario on those states without a statutory Charter.<sup>26</sup>

Part II identifies from the Solicitor-General's opinion annexed to the Report the legal propositions which provide the launch pad for the NHRCC's approach on this issue. Part III provides a closer analysis of the NHRCC's recommendations and the nature of the rights which the NHRCC recommends should be created. Part IV considers the impact on the states of the recommended interpretative provision. Part V considers how the obligations imposed on federal authorities might affect the states in six areas: retrospective criminal laws; state laws impinging on freedom of expression or intercourse; state action under federal funding agreements; state prisons housing prisoners convicted under federal and state laws; joint policing; and administrative bodies established jointly under federal and state law. Part VI considers the impact upon the state judiciaries.

This paper concludes that, while the limiting force of Recommendation 20 has real work to do, and should assist in making a federal HRA more achievable politically, there will undoubtedly still be real flow on effects at a state level. That is an inevitable function of the legal and political realities of the modern federation, where much of the time the best the states can hope for is a form of 'cooperative federalism' where they have some choice and ability to negotiate, but ultimately usually have to accept the common standards urged by the Commonwealth. One significant, and immediate, effect will be on the state courts: as the bodies charged with hearing most of the criminal cases in the country – cases in which the proposed rights will frequently arise – it will be the state judges who will play a prominent role in developing what will become a national jurisprudence on the meaning and application of the rights (subject of course to High Court appellate review).

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25 Chief Justice James Spigelman, *Statutory Interpretation of Human Rights* (University of Queensland Press, 2008) vol 3.

26 There may be a separate question whether, despite the NHRCC's expressed intention that concurrent operation will be allowed to Charters in those states which choose to adopt one, there will in fact be some difficulties at points of intersection between federal and state Charters, difficulties under s 109 of the *Constitution* or otherwise. That question is not considered further here.

## II THE SOLICITOR-GENERAL'S OPINION

The NHRCC's Report includes in Appendix E a supplementary opinion by the Solicitor-General, Stephen Gageler SC, of 7 September 2009.<sup>27</sup> In his discussion of and answers to Questions 1–6, he opines as follows:

- (a) the external affairs power (section 51(xxix) of the *Constitution*) would support a federal HRA containing rights along the lines of the Victorian Charter. These rights include six absolute and non-derogable rights as well as the other more general rights in the Victoria *Charter*;
- (b) the external affairs power would further support the federal HRA being made so as to bind the executive governments of the states and their agencies, and by force of section 109 of the *Constitution*, to prevail over any state law to the extent of any inconsistency. Specifically this would not involve 'singling out' of the states for some 'differential treatment' or 'special burden' so as to infringe the implied constitutional limitation protecting the capacity of states to function as governments;<sup>28</sup>
- (c) to the extent the federal HRA only bound Commonwealth public authorities, it would also be supported by the express incidental power in s 51(xxxix) of the *Constitution* and the incidental powers that accompany each of the substantive grants of power in sections 51 and 52 of the *Constitution*. This is because such incidental powers extend to the regulation and supervision of the Commonwealth's own activities, including by compelling observance of human rights;<sup>29</sup>
- (d) it would then simply be a matter for the careful drafting of the federal HRA to specify the extent to which it would incidentally bind state agencies as well as Commonwealth public authorities. For example, the federal HRA might be made to extend to state prison authorities in relation to Commonwealth prisoners. This would be within the scope of the incidental grants of power in sections 51 and 52 of the *Constitution*. It is then a policy question whether the Commonwealth Parliament wishes to impose its law on state prisons only in relation to federal prisoners, thus introducing a form of discrimination, when state prisons remain for all intents under state control;
- (e) if the Commonwealth desired that the federal HRA not have a general reach into the area of the state legislative power, there could be an express provision indicating that it did not cover the field and was intended to operate concurrently with state law. The result would be that section 109 of the *Constitution* would operate only in cases of direct inconsistency: i.e. where the state law in its legal or practical operation would otherwise operate to alter, detract from or impair the limited operation given to the right by the federal HRA.<sup>30</sup>

This statement of law is largely unexceptionable.<sup>31</sup> The main question is how it would be taken up in the drafting of the federal HRA. As I interpret Recommendation 20 and the accompanying discussion in the Report the NHRCC is recommending that the federal HRA be drafted so as not to operate to the full

27 Stephen Gageler and Henry Burmester, *In the Matter of Constitutional Issues Concerning a Charter of Rights: Supplementary Opinion*, Solicitor-General Opinion Nos 40, 68 (2009).

28 See *Clarke v Federal Commissioner of Taxation* (2009) 83 ALJR 1044.

29 See *State Chamber of Commerce and Industry v Commonwealth* (1987) 163 CLR 329, 357.

30 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 400–1.

31 The assumptions in proposition (d) are explored in Part V below.



available reach of federal power.<sup>32</sup> Specifically, it would not be expressed to bind the executive agencies of the states in relation to any rights, non-derogable or otherwise (see (b) above). It would not go beyond federal public authorities (see (d) above). Further, it would have an express non-cover the field clause, so as to allow state laws to operate save if there were direct inconsistency (see (e) above).

### III CLOSER ANALYSIS OF THE NHRCC'S RECOMMENDATIONS

It is convenient at this point to analyse the NHRCC's recommendations more closely to see how they cohere to the stated objective of not intruding on the states, and what is the nature of the rights to be created. The rights identified by the NHRCC fall into three broad groups: non-derogable civil and political rights;<sup>33</sup> the additional civil and political rights which are capable of derogation in appropriate circumstances;<sup>34</sup> and finally economic, social and cultural rights.<sup>35</sup>

There are then two separate levels of rights enforcement contemplated. First, for each and all of these rights, including the economic, social and cultural rights, federal public authorities will be required to give proper consideration to the rights when making decisions;<sup>36</sup> the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('ADJR Act') would be amended to make them a relevant consideration in government decision-making; and the Australian Human Rights Commission ('AHRC') would have jurisdiction to seek to settle complaints about rights violations through a process of conciliation.<sup>37</sup>

Second, for the narrower set of rights, being the non-derogable and the derogable civil and political rights (but not for the economic, social and cultural rights), there will be the additional requirement that Commonwealth public authorities act in a manner compatible with such rights;<sup>38</sup> and an individual would be able to institute an independent cause of action against a federal public authority for breach of such rights, with the court able to provide the usual suite of remedies, including damages.<sup>39</sup> It follows that while the AHRC can conciliate complaints in respect of all rights, the matter cannot proceed to a determination by a court where the rights fall solely into the economic, social and cultural category.

What then is the nature of the rights intended to be created? Recommendation 13 involves an expansion of the definition of 'human rights' in the *Australian Human Rights Commission Act 1986* (Cth) ('AHRC Act') so as to extend to rights

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32 National Human Rights Consultation Committee, above n 1, 363-4.

33 Ibid xxxv (Recommendation 24).

34 Ibid xxxvi (Recommendation 25).

35 Ibid xxxv (Recommendation 22).

36 Ibid xxxviii (Recommendation 30).

37 Ibid xxxii (Recommendation 13).

38 Ibid xxxvi (Recommendation 30).

39 Ibid xxxviii (Recommendation 31).

conferred by a wider range of international covenants and conventions than at present under the Act.<sup>40</sup> The contemplation is that the AHRC will have its current functions under Part II Division 3 of the *AHRC Act* to hear complaints against infringements of such rights and attempt to settle them. This current power of the AHRC extends to complaints about acts or ‘practices’, whether by federal, state or territory bodies.<sup>41</sup>

Where conciliation fails, the intention of the NHRCC, except in relation to economic, social and cultural rights, is that the matter could proceed to a court such as the Federal Court, presumably in a similar manner that currently applies under Part IIB Division 2, where a complaint of unlawful discrimination has been terminated without a successful settlement in the AHRC. ‘Unlawful discrimination’ is defined by reference to acts, omissions or ‘practices’ that are unlawful under a range of federal Acts. While ‘practices’ for this purpose, unlike under the human rights division, are limited to those engaged in by federal authorities or under federal or territory enactments,<sup>42</sup> the acts or omissions limb is not so limited, and the federal anti-discrimination Acts in question do in a variety of circumstances extend to bind the states.<sup>43</sup>

Thus, what is contemplated is that, in respect of the expanded list of human rights (save for the area of economic, social and cultural rights), legally enforceable rights will be created. The AHRC will deal with complaints of infringements of those rights at an administrative level by seeking to reach a settlement.<sup>44</sup> Failing a successful settlement, a court will exercise judicial power over the matter, such matter being the alleged infringement of the human right in question.

What is not made explicit in the NHRCC’s Report, but would need careful attention in the drafting of the federal HRA, is whether it is intended at the conciliation stage that the AHRC will be able to consider alleged infringements of the expanded category of human rights only by federal public bodies, or by the states as well. In its other recommendations, the NHRCC was keen to emphasise that the propounded rights were to operate only against federal public authorities. Yet the structure of the human rights division of the current Act, as noted, does not have this limitation. As the list of human rights will be significantly expanded under the Act, the states will presumably have a real interest in whether any or all of their executive activity is capable of being brought before the AHRC for examination, even if only at the conciliation stage.

If the states succeed in limiting the drafting of the federal HRA to bind only federal authorities even at AHRC level, it should still be recognised that the

40 Ibid xxxii.

41 See *Australian Human Rights Commission Act 1986* (Cth) s 20. See also s 3 (definition of ‘state’) and s 30 (definition of ‘practice’).

42 See *ibid* s 3 (definition of ‘practice’), which is picked up in pt IIB div 2.

43 See, eg, *Racial Discrimination Act 1975* (Cth) s 6 (the Act binds the Crown in the right of the States) and also ss 8–16 (the prohibitions extend to ‘persons’ generally and in some cases to states specifically).

44 However, without statutory power to adjudicate finally in a binding way on the claim, thereby avoiding the problems in *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 of a non-Chapter III court exercising judicial power.



activities of state officials could tangentially come under scrutiny by the AHRC. The states are the primary providers of services in the areas of health, education, housing and so on. The economic and social rights fall into this sphere. Much of the legislative (or executive) activity by each state in relation to health, education or housing necessarily involves some form of cooperation, whether informal or formal, funding based or otherwise, with Commonwealth officials. Even though the subject matter of the complaint may be in terms of the conduct of a federal official, examination of the complaint by the AHRC may necessarily involve examination of the actions of the state official, as part of the factual matrix.

Further, for consistency with the balance of the NHRCC's recommendations, when the rights are spelt out in the Act at the stage of conferring jurisdiction on a court to grant remedies, it will be necessary to clearly and expressly delimit the scope of the rights, namely to indicate that what each protected right does is no more than to impose a correlative obligation to act in accordance with the right on (only) federal public authorities. In a case where there is a relevant inconsistency established between the federal law and the state law, it is not open to federal Parliament to deem section 109 of the *Constitution* not to be satisfied or to deny its operation.<sup>45</sup> To avoid falling foul of that principle, the drafting of the federal HRA should not bring the catalogue of human rights into law as the subject of the award of remedies by courts, without any limitation upon whom the rights are enforceable against, but purport to save the operation of any state laws which may be inconsistent. Instead, the only rights created must be rights directly limited by the expression of who is bound to observe them, namely federal public authorities. As noted above, the current legally enforceable rights under Part IIB Division 2 of the Act have some application against the states, so the drafting will need to address this.

Before concluding this section, one aspect of the economic and social rights should be noted. It is recommended that federal public authorities be required to give proper consideration to economic and social rights (amongst others) when making decisions, although they would not be required to act in a manner compatible with economic and social rights.<sup>46</sup>

Even assuming such rights, as with all others, are expressed as binding only on federal public bodies, there may be an indirect effect on the states. Where the conduct in question involves decision-making or implementation by public authorities at both federal and state level, the requirement that the federal public authorities give proper consideration to the economic and social rights when making decisions, and the judicial or administrative scrutiny of compliance with that requirement may at a practical level call into scrutiny the related behaviour of the state public authority.<sup>47</sup>

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45 See *University of Wollongong v Metwally* (1984) 158 CLR 447.

46 National Human Rights Consultation Committee, above n 1, xxxviii (Recommendation 30).

47 Judicial scrutiny could arise under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) or under the constitutional writs arising from s 75(v) of the *Constitution* for which the Federal Court is given original jurisdiction under *Judiciary Act 1903* (Cth) s 39B(1). Administrative review could arise under the *Administrative Appeals Tribunal Act 1975* (Cth).

At the least, as standards of behaviour and decision-making at federal level come to conform more closely and regularly to those required by the reviewing bodies (whether they be the AHRC, the Administrative Appeals Tribunal or the Federal Court) in respecting the economic and social rights, state behaviour is likely to converge with the federal example.

#### IV IMPACT ON THE STATES OF THE INTERPRETATIVE PROVISION

The NHRCC recommended that any federal HRA contain an interpretative provision requiring federal legislation to be interpreted in a way that is compatible with the human rights expressed in the Act and consistent with Parliament's purpose in enacting the legislation.<sup>48</sup> This was intended to be the same as the interpretative provision in the Victorian and ACT laws,<sup>49</sup> thereby avoiding the extremes of the United Kingdom ('UK') approach.<sup>50</sup>

This recommendation of the NHRCC appears straightforward. States can continue to have their legislation interpreted in accordance with their own norms. However, as Twomey pointed out there are an increasing number of situations in which there is related legislation at Commonwealth and state level which would benefit from a consistent interpretation.<sup>51</sup> One example given by Twomey is the application of laws in Commonwealth places. The Commonwealth, acting under section 52 of the *Constitution*, applies to Commonwealth places the law of the state in which the place is situated.<sup>52</sup> The Commonwealth statute requires courts applying the state provisions to use state interpretation laws rather than the *Acts Interpretation Act 1901* (Cth).<sup>53</sup> The evident purpose is to ensure a seamless operation of law inside and outside the Commonwealth place. That becomes difficult if the federal law applying state law to the Commonwealth place has to be interpreted as per the federal HRA, whereas the state law operating directly outside the place is not so interpreted.

The problems go further. There is now a great deal of uniform, or at least complementary, federal–state legislation designed to address particular needs within the community, whether water management, health, national security and

48 National Human Rights Consultation Committee, above n 1, xxxvii (Recommendation 28).

49 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(1); *Human Rights Act 2004* (ACT) s 30. See *ibid* 372–3.

50 The UK approach has been described as giving primacy to Parliament's intention in s 3 of the *Human Rights Act 1998* (UK) c 42 over Parliament's intention in enacting later law such as to constitutionalise the *Human Rights Act*: Spigelman, above n 25, 77.

51 Twomey, above n 11, 10–13.

52 *Commonwealth Places (Applications of Laws) Act 1970* (Cth) s 4.

53 *Ibid* s 5.

so on.<sup>54</sup> The use of such schemes, dating from the establishment of the Council of Australian Governments ('COAG') in 1992, is only likely to increase in the years ahead.<sup>55</sup>

For example, under the banner of COAG, a new intergovernmental agreement was made in 2009 governing the distribution to the states of \$7 billion in additional funding over five years, as well as regulating almost \$100 billion in existing funding in areas of health, education, employment, disability and housing. Agreements also exist in areas including gene technology, cloning and the Murray Darling Basin.<sup>56</sup> The current Prime Minister has long been a public proponent of this form of cooperative federalism.<sup>57</sup>

The NHRCC noted Twomey's submission that the federal HRA could undermine the utility or effectiveness of such schemes if the interpretative clause for the federal HRA led to a different interpretation to that placed on identical language in the correlative state Act. Twomey suggested two possible solutions: one that the states adopt in their mirror laws a requirement that the law be consistent with the federal HRA; and an alternative that exemptions be given from the federal HRA, on a case by case basis, for laws requiring uniform national interpretation.<sup>58</sup>

The NHRCC's conclusions in chapter 15 do not contain any express reference to, or solution for, this problem.<sup>59</sup> It may be doubted whether future federal governments will be interested in the later solution as it would water down the reach of the federal HRA. Practically, it is likely over the medium term that what is otherwise a plus for the states – that is, the ability to have some real input into funding and policy questions by cooperative arrangements – will carry with it the burden of signing up to the first option. This will see the federal HRA enacted into state law, by the states themselves, in an increasing number of areas.

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54 For an early appraisal of the role of such schemes in producing agreed joint benefits through federal solutions, while preserving the interdependency and autonomy of the state and Commonwealth governments, see Martin Painter, 'The Council of Australian Governments and Intergovernmental Relations: A Case of Cooperative Federalism' (1996) 26(2) *Publius* 101 and more recently Martin Painter, 'Multi-Level Governance and the Emergence of Collaborative Federal Institutions in Australia' (2001) 29(2) *Policy and Politics* 137. For an analysis of the nature, scope, purposes and constitutional bases of inter-governmental agreements, see Cheryl Saunders, 'Intergovernmental Agreements and Executive Power' (2005) 16 *Public Law Review* 294.

55 For a discussion of whether the *Constitution* embodies a co-ordinate or a broader cooperative federalism, and the impact on the reach of such schemes, see Graeme Hill, 'Revisiting *Wakim and Hughes*: The Distinct Demands of Federalism' (2002) 13 *Public Law Review* 205.

56 Council of Australian Governments, *Guide to Intergovernmental Agreements* (9 July 2009) <<http://www.coag.gov.au>>.

57 See, eg, Kevin Rudd, 'The Case for Cooperative Federalism' (Speech delivered at the Don Dunstan Foundation, Brisbane, 15 July 2005).

58 National Human Rights Consultation Committee, above n 1, 306–7; Twomey, above n 11, 12–13.

59 National Human Rights Consultation Committee, above n 1, 377–8.

## V HOW OBLIGATIONS IMPOSED ON FEDERAL PUBLIC AUTHORITIES MAY IMPACT UPON THE STATES

In this section, I consider six areas where the legally enforceable rights to be created by the federal HRA – even though expressed to bind only federal public bodies – may impact on the states, legally or practically.

### A Retrospective Criminal Laws

The NHRCC recommended that six absolutely fundamental civil and political rights be accorded a non-derogable status.<sup>60</sup> Although the Solicitor-General saw no constitutional difficulty in the states being bound by such rights, as noted, the NHRCC did not recommend that this be done directly.<sup>61</sup> Nevertheless, one right stands out as operating in an area where there may be conflict at a practical level with state legislative activity (either with the terms of the state statute itself or with delegated legislation or executive action made or done under it).

The NHRCC recommended a series of bars against retrospective criminal laws. In particular, a person must not be found guilty of a criminal offence as a result of conduct that was not criminal at the time it was engaged in; nor can the penalty imposed on a person for a criminal offence be greater than that which applied when the offence was committed.<sup>62</sup>

Crime is an area where the states regularly and pervasively exercise their legislative power. There is no barrier under state constitutions to retrospective criminal laws or retrospective sentencing.<sup>63</sup> It is open to both federal and state law to criminalise in different ways the same activity.

Several possibilities can then be contemplated. First, if the federal Act, interpreted to accord with the federal HRA, does not reach so as to criminalise conduct done before its enactment, but the state Act does, there may be a direct inconsistency. Section 109 may then operate to render inoperative the state Act.

Second, sentencing is an area where states regularly respond to perceived community concerns about particular criminal activity with either increasing punishments or increasingly rigorous limitation of the discretion of the courts to fix the appropriate punishment. Changes in sentencing laws at state level may sometimes be retrospective, either in terms or effect. Where the same conduct is prosecuted under both federal and state criminal law, the matter is then in federal jurisdiction. The state court's warrant to proceed to convict and then sentence the prisoner comes from the *Judiciary Act 1903* (Cth) ('*Judiciary Act*'), especially section 68. As such, the state court is acting as a Chapter III court. The laws of

60 Ibid xxxv (Recommendation 24).

61 Ibid xxxiv (Recommendation 20).

62 Ibid xxxv (Recommendation 24).

63 Cf *Polyukhovich v Commonwealth* (1991) 172 CLR 501 which found there was no implication arising even out of the *Commonwealth Constitution* prohibiting retrospective criminal laws provided the Court was left with its usual functions of determining guilt. *Siganto v The Queen* (1998) 194 CLR 656 confirms that a state or territory can validly impose a retrospective increase in sentence.

the state respecting sentence are then to be applied subject to the dictates of section 68 and to the *Constitution* itself, such as the Chapter III mandate to quell the controversy.<sup>64</sup> The state court must quell the controversy by the application of the sentence appropriate to the wrongful conduct. Section 68 will be interpreted to conform to the federal HRA. Arguably then, there would be disconformity if the state Act, picked up in the federal jurisdiction, could allow for a sentence by reference to a standard first imposed by law after the wrongful conduct occurred, when section 68 would not do so. If so, section 68 may not pick the retrospective aspect of the state sentence law.

Third, there is an amalgam of principles which come under the rubric of ‘double jeopardy’ which may come into play.<sup>65</sup> If a prosecution or sentence under federal law has proceeded to finality and the retrospective prohibition of the federal HRA has cut in to the accused’s benefit, then ‘double jeopardy’ would protect the accused from a later prosecution under state law which sought to achieve, through retrospectivity, a conviction or sentence denied at federal level.

## **B State Laws Impinging on Freedom of Expression or Intercourse**

Next there are what the NHRCC recommends as the additional civil and political rights which would be included in the federal HRA but are derogable; that is, may be made subject under law to reasonable limits which can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.<sup>66</sup> A number of those additional and civil and political rights fall into areas typical of state legislative activity. One group of such rights includes the right to freedom of movement; freedom of thought, conscience and belief; freedom of expression; freedom of association; and the right to peaceful assembly.<sup>67</sup> A recent example of a law in New South Wales which would arguably have infringed such rights, if they were applicable by law, is the (controversial) Act making it a criminal offence for a newspaper to publish league tables in relation to the performance of students in different schools.<sup>68</sup> While that law appeared to be within state legislative power, the judgment made at federal level, even without an HRA, was that there ought to be free publication of such information to facilitate public discussion about the quality of education.

As it happened, the federal government did not need to pass its own law to this effect so as to activate section 109, as it could achieve the result by other means: publication of the very information which it had access to anyway, along with the information for schools in all other states, on a new national web site

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64 See *Wong v The Queen* (2001) 207 CLR 584, 602, 616–17.

65 See the discussion in *Pearce v The Queen* (1998) 194 CLR 610 and *R v Carroll* (2002) 213 CLR 635 of the various doctrines which come together under the heading of ‘double jeopardy’ and their application to sentencing. For NSW, see further the *Crimes (Sentencing Procedure) Act 1999* (NSW) s 20, which gives statutory recognition to double jeopardy protection between federal and state laws, depending on order of prosecution.

66 National Human Rights Consultation Committee, above n 1, 368–72 (Recommendation 25).

67 *Ibid* 369.

68 *Education Amendment (Publication of Schools Results) Act 2009* (NSW).

called ‘My School’ from 28 January 2010. What this example demonstrates however is that what is likely to happen at a practical level, and on an increasing basis, is that as federal laws, policy and behaviour strive to conform to the derogable rights, which is the very purpose of the dialogue model for the federal HRC recommended by the NHRCC,<sup>69</sup> conflicting state laws will have to give way: either by direct application of section 109 where a federal law is involved or simply because the federal government administratively achieves the perceived rights friendly outcome.

Another possible difficulty for the legislative power of the state arises by reason of section 92 of the *Constitution* which provides that ‘[o]n the imposition of uniform duties of customs, trade, commerce and intercourse among the states, whether by means of internal carriage or ocean navigation, shall be absolutely free’. While most cases under this section concern freedom of interstate trade, the requirement for freedom of intercourse among the states remains a real, and in the modern world potentially increasing, requirement of section 92. With most modern communication, such as the internet, inescapably crossing state boundaries, any attempts by states to legislate in the area of this group of freedoms is likely to raise an issue under section 92.<sup>70</sup> It might be argued that once the federal HRA enacts this category of non-derogable rights, and requires that they be limited only in the manner authorised by the HRA, this should come to inform the conception of free intercourse required by section 92. This type of reasoning has already been applied to the ‘free trade’ limb of section 92. In *Betfair Pty Ltd v Western Australia*,<sup>71</sup> the High Court placed some reliance on the development since 1995 of a National Competition Policy, under intergovernmental agreements, as informing the conception of free trade within a modern national economy now mandated by the section.

With the derogable civil and political rights, the form of limitation recommended by the NHRCC is that of the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* (‘*Victorian Charter*’).<sup>72</sup> The factors to be taken into account include the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose, and any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.<sup>73</sup> As the federal law increasingly seeks to limit this category of rights only by reference to these multifactorial criteria, these federal judgments as to what represents reasonable limitation will arguably inform correlatively the operation of the constitutional guarantee of free intercourse under section 92.

69 National Human Rights Consultation Committee, above n 1, 371 (Recommendation 29).

70 The wider operation of the guarantee of freedom of intercourse was noted in *Cole v Whitfield* (1988) 165 CLR 360, 393. See also *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 and the discussion in Leslie Zines, *The High Court and the Constitution* (Federation Press, 5<sup>th</sup> ed, 2008) 190–4.

71 (2008) 234 CLR 418, 452–4.

72 National Human Rights Consultation Committee, above n 1, xxxv (Recommendation 23).

73 *Victorian Charter* s 7(2).



### C State Action under Federal Funding Agreements

As noted in Part IV above, one aspect of the cooperation between Commonwealth and states in the modern national economy is that much state executive action is done in accordance with funding agreements reached with the Commonwealth.<sup>74</sup> Section 96 of the *Constitution* empowers the federal Parliament to grant financial assistance to any state on such terms and conditions as the Parliament thinks fit. In many areas, the Commonwealth seeks to establish national policies and then provide the funds to one or more of the states to implement the policies, with the terms being defined in the funding agreements.

In recent times, this has given rise to constitutional challenges in relation to the application of the guarantee in section 51(xxxi) that acquisition of property shall be on just terms. The particular factual context of those challenges has been twofold. First, state legislation had traditionally granted rights to persons to extract groundwater under bore licences. Pursuant to a recent interlocking scheme of federal and state legislation, and section 96 funding agreements, states have proceeded by administrative action to replace the bore licences with what are now called 'aquifer access licences' but which permit the taking of less water than before. Second, by interlocking federal–state legislation and section 96 funding agreements, the ability of landowners to clear native vegetation from their property has been restricted.

To date, plaintiffs in these cases have been unsuccessful. In two recent cases, a 6:1 High Court majority has ruled that the pre-existing water rights conferred at state level did not relevantly constitute property capable of being the subject of the guarantee under section 51(xxxi) of the *Constitution*.<sup>75</sup> In a third case, concerning restrictions on clearing of native vegetation, Emmett J at first instance in the Federal Court, at the stage of a pleading challenge, was prepared to assume that there may be a relevant acquisition of property within section 51(xxxi). However, the pleading was struck out because, on their proper construction, each of the Commonwealth statute, and the various funding and other agreements made with the state, went no further than placing the state in funds which it *might* use in a manner which resulted in an ultimate reduction of his water entitlements. Because the legislation and agreements did not make it a *condition* or *requirement* that the state proceed to acquire those water entitlements, the Commonwealth Act did not meet the description of a law with respect to the acquisition of property within section 51(xxxi).<sup>76</sup>

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74 See the recent analysis by Alan Fenna, 'Commonwealth Fiscal Power and Australian Federalism' (2008) 31 *University of New South Wales Law Journal* 509.

75 *ICM Agriculture Pty Limited v The Commonwealth* (2009) 261 ALR 653; *Arnold v Minister Administering the Water Management Act* (2010) 84 ALJR 203.

76 Decision of Emmett J in *Spencer v Commonwealth* [2008] FCA 1256 (26 August 2008), upheld by the Full Federal Court in *Spencer v Commonwealth* (2009) 174 FCR 398 ('*Spencer*'). A special leave application has been adjourned to the Full High Court for further hearing: Transcript of Proceedings, *Spencer v Commonwealth* [2010] HCA Trans 55 (12 March 2010).

These are clearly important authorities under section 51(xxxi) jurisprudence. For example, four of the judges in *ICM Agriculture Pty Ltd v Commonwealth*<sup>77</sup> held that the guarantee of just terms under section 51(xxxi) applies to grants of financial assistance under section 96, contrary to the Commonwealth's submission. And the same four judges lent support to the view in deciding that whether a law effects on 'acquisition', the Court looks beyond the legal operation of the law to its practical operation, which brings in examination of the funding agreement and the state legislative and executive activity.<sup>78</sup>

For present purposes, however, what is important is not the direct impact of these authorities on section 51(xxxi) jurisprudence, but rather the conceptual underpinning of these cases and what it reflects for the relationship between the proposed federal HRA and state action under section 96 funding agreements. Three points can be made. First, it is likely, perhaps inevitable, that the federal Parliament through the terms of the individual legislation, or the federal executive, through the terms of the individual funding agreement, will seek to bind the states to respect the protected human rights, in any area where they are likely to have application. The states will then be faced with a take it or leave it position.<sup>79</sup>

Second, where the federal Act, expressly, or by necessary implication, authorises the making of agreements with a state making it a *condition* or *requirement* that the agreement contain terms which infringe one of the protected rights, then the federal Act will face the same consequences as any other federal Act conflicting with the federal HRA. That is, it will presumably fail the required statement of compatibility when introduced as a Bill into Parliament, and be subject to critical review by the proposed Joint Committee on Human Rights.<sup>80</sup> Under the dialogue model the High Court will have power to make a declaration of incompatibility.<sup>81</sup> If such a declaration is made, and federal Parliament responds by repealing or amending its legislation, there will be a necessary flow on effect to validity and operation of the funding agreement and the related state legislation or state administration action: the latter can hardly survive without the former.

Third, the interpretative provision of the federal HRA will require the postulated federal legislation to be interpreted compatibly with the human rights expressed in the HRA so far as it is consistent with Parliament's purpose in enacting the legislation.<sup>82</sup> If there is room to do so as a matter of language, the federal HRA will be interpreted as only authorising the making of such agreements with the state as are in fact compatible with such rights. In those

77 (2009) 261 ALR 653 ('*ICM Agriculture*'). The joint judgment of French CJ, Gummow and Crennan JJ at 661–5 concurred on this point with Heydon J who was dissenting in the result: at 696; the other majority judgment of Hayne, Crennan and Kiefel JJ not deciding the point: at 679.

78 Ibid 665 (French CJ, Gummow J and Crennan J). See also Justice Heydon's dissent: at 696; again, the other majority judgment did not need to address this question.

79 See above Part IV.

80 National Human Rights Consultation Committee, above n 1, xxxvii (Recommendation 26).

81 Ibid (Recommendation 29).

82 Ibid xxxviii (Recommendation 28).

circumstances, entry of an agreement incompatible with the right would be beyond the power granted under the federal law and invalid. As the point was expressed in a related context in *ICM Agriculture*,<sup>83</sup> the executive power conferred by section 61 of the *Constitution* does not authorise the entry of a funding agreement which exceeds relevant limitations on federal power. Once the funding agreement is invalid, then where administrative discretion is involved at state level, it may be infected by an error of law, namely a belief that there was a valid funding agreement.<sup>84</sup> Further the simple lack of a valid right to the funds may practically end the proposed state action.

These concerns should not be dismissed as fanciful. Amongst the non-derogable rights, the freedom from coercion or restraint in relation to religion and belief could potentially be infringed, in a particular case, by the terms of a funding agreement in relation to hospitals or schools. More importantly, the list of derogable rights includes the right to property.<sup>85</sup> One of the concerns expressed by the Hon Bob Carr<sup>86</sup> was that the right to property could be used by a conservative court to prevent a government stopping clearing of native vegetation on farms, the very issue raised in the *Spencer* case.

#### D State Prisons

As noted in Part II, the Solicitor-General concluded that there is no constitutional obstacle to the federal HRA extending rights to state prisons in relation to persons convicted under both federal or state law. He reached this conclusion both under the external affairs power and under the incidental powers in sections 51 and 52. He said that it is a matter of policy how far the federal HRA should reach.

The conduct of state prisons could well involve rights under the federal HRA. The derogable rights include the right to liberty and security of person and the right to humane treatment when deprived of one's liberty. Also potentially relevant are the derogable rights of children to be protected by the society and state.

This conclusion that the federal HRA could, if desired, validly reach to the entire operation of state prisons, whether housing federal or state prisoners, would seem correct. The federal HRA, in this respect, would be a law supported by section 120 of the *Constitution*, being a law giving effect to the obligation imposed upon every state by section 120 to make provision for the detention in its prisons of persons accused or convicted of offences against the laws of the Commonwealth and for the punishment of persons so convicted. To ensure that all persons in such prisons are treated in accordance with the same defined

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83 (2009) 261 ALR 653, 661.

84 See the analysis in *Arnold v Minister Administering the Water Management Act 2000* (2010) 84 ALJR 203, 214, 218.

85 National Human Rights Consultation Committee, above n 1, xxxvi (Recommendation 25).

86 *Ibid* 290.

human rights would assist in avoiding a source of disharmony in the state prisons, and thus be a proper subject matter of such a federal law.<sup>87</sup>

The NHRCC's conclusions in chapter 15 are not explicit on how to deal with the state prisons issue. Presumably, absent a deliberate decision to draft the federal HRA otherwise, the general language of Recommendation 20 – extending the HRA to 'other entities performing public functions under federal law or on behalf of another federal public authority'<sup>88</sup> – would pick up the state prison authorities at least as far as they dealt with federal prisoners.

Two possibilities then arise. The first is that the federal HRA is drafted to the full reach of available power in this respect and accords its rights on a non-discriminatory basis to both federal and state prisoners in the state prisons. As noted above, this appears to be constitutionally valid. The states would then come under a legal obligation to modify the management and conduct of their prisoners to conform to the federal HRA.

The second possibility is that the federal HRA defines the state prisons to be federal public authorities only to the extent that they are housing federal prisoners, leaving the state prisons legally free to accord lesser standards of rights protection to state prisoners in the same prisons. An argument might then be made that the federal HRA in this respect so invites discriminatory treatment between persons in essentially the same position as to fall outside the scope of section 120 of the *Constitution*, and not otherwise be supported as a valid section 51 law. Based on current authority as recognised by the majority in *Leeth v The Commonwealth*,<sup>89</sup> such an argument would face difficulties.

However, at a practical level, it is hard to conceive how a state can sensibly run its prisons by according differential standards of treatment to prisoners depending upon whether the original crime was committed under federal or state law. That is, whether the federal HRA in terms extends to accord its rights to all prisoners in state prisons, or purports to discriminate based on the source of the original crime, in practice, one would expect states will have to devise policies, commit expenditure and instruct prison officers to accord a single standard of conduct conformable to the federal HRA.

Thus, taking up the rights noted above, it would seem likely that if the right to liberty and security of person involves providing a prison environment where bashing and forced drug use or sexual behaviour do not occur, prisoners convicted under either (or both) systems of law would have a legal or practical expectation of being accorded these rights. If the right to humane treatment when deprived of liberty requires limits on solitary confinement, all prisoners should be accorded such rights. And if the rights of children to due protection require segregation from adult and serial offenders, again state prisons, either legally or practically, will need to accord these rights.

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87 See the discussion by various of the Justices in *Leeth v Commonwealth* (1992) 174 CLR 455, 478–9, 491–2, 499–500. The law would also be supported by the primary grants of power in s 51 and the incidental power in s 51(xxxix) of the *Constitution*.

88 National Human Rights Consultation Committee, above n 1, xxxiv.

89 (1992) 174 CLR 455.

### E Joint Policing

The same is true, at a practical level, in relation to joint policing operations. These are an increasing feature of the modern world. Modern policing includes sophisticated interception of telecommunications, whether telephone calls, internet downloading or internet communication.<sup>90</sup> When federal and state police officers work together on such policing, they practically must operate to a common standard. If an operation is directed and resourced largely at state level, but with some federal cooperation, inevitably the state is going to have to conform to any applicable requirements of the federal HRA. This is so whether in terms the federal HRA applies to the state officers or whether its dictates apply only at a practical level. Thus, to the extent that derogable rights such as the right to freedom of movement, the right to privacy, the right to freedom of expression, the right to peaceful assembly or freedom of association and the right to liberty and security of person<sup>91</sup> must, after application of the demonstrable justification test,<sup>92</sup> be observed by the federal police officers in a joint policing operation, state action will practically if not legally also need to conform to the requirements of the federal HRA.

### F Federal–State Administrative Bodies

Finally, it is a further increasing feature of the modern, national economy<sup>93</sup> that cooperative regulation of industry and society is accompanied by the establishment of administrative review bodies which derive their legal authority from both federal and state laws. One example is the Australian Competition Tribunal. While it is established by federal law and its members appointed at federal level,<sup>94</sup> its jurisdiction in particular areas often arises from federal and state cooperative legislation. Examples include the regulation of infrastructure such as electricity, gas, water and so on.<sup>95</sup> The members of such a Tribunal would be characterised as officers of the Commonwealth within section 75(v) of the *Constitution* and thus their decisions are susceptible to judicial review. Further, decisions of this body are regularly made the subject of statutory judicial review.<sup>96</sup>

Such joint federal–state bodies would fall within any definition of a federal public authority as proposed by Recommendation 20.<sup>97</sup> They would be bound to

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90 As illustrated by the facts of recent terrorism trials. See *Cheikho v The Queen* (2008) 261 ALR 57 (an interlocutory appeal in the recently concluded large terrorism trial in NSW).

91 See National Human Rights Consultation Committee, above n 1, xxxvi (Recommendation 25).

92 See *ibid* xxxv (Recommendation 23).

93 Originally legitimated in *R v Duncan; Ex parte Australian Iron & Steel Pty Ltd* (1983) 158 CLR 535; see now *R v Hughes* (2000) 202 CLR 535.

94 *Trade Practices Act 1975* (Cth) pt III.

95 See, eg, the cooperative schemes for gas (see *East Australian Pipeline Pty Ltd v ACCC* (2007) 233 CLR 229, 246–8) and electricity (see *Application by Energy Australia* [2009] ACompT 8 (12 November 2009)).

96 See *ADJR Act*.

97 National Human Rights Consultation Committee, above n 1, xxxiv.

act compatibly with all of the listed human rights, save for economic and social rights, and further bound to give proper consideration to the entire gambit of rights.<sup>98</sup> To the extent that they sit in review on decisions made in whole or in part by state bodies, those underlying state bodies in turn will practically need to conform to the requirements of the federal HRA.

Many of the parties before such bodies will be corporations not humans, and thus not accorded the rights.<sup>99</sup> But some parties will be humans, and some rights (such as the rights to privacy and reputation, or the right to property) may intersect with the essentially commerce-related jurisdiction of such bodies. Experience in other jurisdictions has shown that rights protection emerges in strange places.

The point for the states is that, as they increasingly come to accept that such bodies are the inevitable product of cooperative legislative schemes, they subject their behaviour, and that of their citizens, to bodies which must conform to all federal law, including a federal HRA.

## VI IMPACT ON THE STATE JUDICIARY

### A The Background Position in Victoria and the UK

The *Victorian Charter* has application to the courts in two fashions:

- (a) it applies directly to courts to the extent they have functions under Part 2 and Division 3 of Part 3. (Broadly speaking, Part 2 establishes and confers the rights, and Part 3 of Division 3 contains the interpretative obligation and the power to grant declarations of incompatibility);
- (b) the *Charter* applies to public authorities to the extent they have functions under Division 4 of Part 3. (Broadly speaking, this Division renders it unlawful for a public authority to act in a way incompatible with a human right, or to fail to give proper consideration to a relevant human right in making a decision. It further confers the right to a remedy in respect to an act or decision of a public authority which is unlawful on these grounds, but excluding the remedy of damages. The result is that courts have jurisdiction to determine and award remedies in cases where it is argued that a public authority has acted inconsistently with any of the rights in Part 2. Courts themselves are defined not to be public authorities, save when acting in an administrative capacity).<sup>100</sup>

There is an open question whether, in the first category, the court is given power to enforce directly any of the rights set out in Part II that *relate* to court proceedings, or more narrowly, whether the power is limited to those rights that

98 Ibid xxxviii (Recommendation 30).

99 Ibid xxxiv (Recommendation 20).

100 *Victorian Charter* ss 4(1)(j), 6(2), 38, 39.



are explicitly and exclusively *addressed* to courts.<sup>101</sup> On either view, it is clear that courts do not have a general jurisdiction to enforce all rights within Part II.

A wider approach is taken in the UK. There, courts fall within the definition of public authority such that it is unlawful for them to act in a way which is incompatible with any protected right. However, a claim that a court has acted in an unlawful manner in respect of a judicial act may be brought only by the usual processes within the court system of appeal or judicial review.<sup>102</sup>

The approach in the UK has led to the common law being modified in claims between private parties.<sup>103</sup> By contrast, the view has been expressed that under the Victorian (or the ACT) *Charter*, the court does not have a general ability to modify the common law to bring it into accord with the protected rights. Partly, this arises because, as noted, the functions of courts are narrower than the whole of Part 2 and courts (save in administrative matters) are defined not to be public authorities bound by the Act. A further ground given is that, since there is only one common law of Australia, it would be inappropriate for a single state or territory court to attempt to develop that single common law in response to its local Charter without a clear statutory direction to do so.<sup>104</sup> Further, Tate has expressed the view that it would be beyond the power of a state Parliament to direct state courts to develop the common law by analogy with the values protected by one state's Charter as this would entail intentionally the differential development of the common law in Victoria from its development in the rest of Australia.<sup>105</sup>

The NHRCC's Recommendation 20, together with the accompanying discussion that the federal HRA broadly follow the Victorian model,<sup>106</sup> suggests that courts generally would not be regarded as 'public authorities', save if acting in a (federal) administrative capacity. It is difficult to conceive of a practical circumstance in which a state court would be called upon to act in a *federal* administrative capacity. Thus, the application of the federal HRA to public authorities, making it unlawful for them to act incompatibly with the protective rights, will not directly operate on the state courts. The question then is in what circumstances might the general grant of federal jurisdiction to state courts extend to claims under the federal HRA?

## B State Courts Exercising Federal Jurisdiction

First, where a state court is exercising federal jurisdiction, then to the extent that an issue arises under federal legislation that conflicts with a protected right,

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101 The competing views are discussed, and the wider view favoured, in Carolyn Evans and Simon Evans, *Australian Bills of Rights: The Law of the Victorian Charter and ACT Human Rights Act* (LexisNexis Butterworths, 2008) 11–14.

102 *Human Rights Act 1998* (UK) c 42, ss 6(1), 6(3), 7(1), 9(1).

103 See, eg, *Campbell v Mirror Group Newspapers Ltd* [2004] 2 AC 457.

104 Evans and Evans, above n 101, 155–6.

105 Tate, 'Protecting Human Rights in a Federation', above n 23, 224.

106 National Human Rights Consultation Committee, above n 1, 364.

then the interpretation obligation will be called into play.<sup>107</sup> Thus the state court, as much as a federal court in identical situation, will be bound to observe the interpretation obligation of the federal HRA.

Second, where an accused is charged under a federal criminal law, it will be a matter of drafting of the federal HRA, whether it carries through the jurisdictional construct of the *Victorian Charter*,<sup>108</sup> such that the federal HRA applies to courts ‘to the extent they have functions under’ the relevant part which confers the rights. There is no express recommendation to this effect. However, as noted, there is text suggesting the Victorian model be followed.<sup>109</sup> Further, where the rights as drafted in Recommendations 24 and 25 relate to, or indeed are explicitly addressed to, courts, the NHRCC may be assuming a jurisdictional provision like in Victoria.

If there is to be a grant of jurisdiction like in Victoria, then it should resolve expressly the uncertainty noted above: is it a grant in all matters where a protected right arises which relates to a court, or only where the right is explicitly addressed to a court? It would be safest to identify specifically which rights out of the total package are the subject of the grant of jurisdiction.

Assuming such a grant of jurisdiction, an example of a right which may have application within federal jurisdiction in criminal matters is the proposed non-derogable right to a fair trial.<sup>110</sup> Other examples include the derogable rights to due process in criminal proceedings, the right not to be tried or punished more than once and the right to be compensated for a wrongful conviction.<sup>111</sup> A state court exercising such federal jurisdiction could respond to a claim respecting such a right by the administration of its usual remedies. For example, if proceedings have moved to a stage of infringing the right to a fair trial, the remedy of stay might be available.

If the state court makes an error in dealing with such rights within federal jurisdiction, the consequences will be the usual ones that flow within the judicial process, for example, appeal to a higher court.

That leads to a further consequence. Section 79 of the *Judiciary Act* provides:

The laws of each state or territory, including the laws relating to procedure, evidence and the competency of witnesses, shall, except as otherwise provided by the *Constitution* or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that state or territory in all cases to which they are applicable.<sup>112</sup>

Under section 39(2), the courts of the states, within the limits of their jurisdictions, are invested with federal jurisdiction in defined matters. Where, for example, a criminal prosecution is brought in a state court alleging a contravention of a federal law and, in the alternative, a state law, the whole of the

107 Ibid xxxvii (Recommendation 28).

108 *Victorian Charter* s 6(2)(b).

109 National Human Rights Consultation Committee, above n 1, 364.

110 Ibid xxxv (Recommendation 24).

111 Ibid xxxvi (Recommendation 25).

112 *Judiciary Act* s 79(1).

proceedings in the state court occur within federal jurisdiction. On the assumption the federal HRA applies because of the exercise of federal jurisdiction, the relevant rights, such as the right to due process, must extend to the *whole* of the grant of federal jurisdiction. It is legally impossible for the accused to have a right to due process so far as the Commonwealth offence is being prosecuted, but to lack such a right so far as the state offence is being prosecuted in the same matter.

### C Consequences for State Jurisdiction?

The above point may go further. It would be a strange consequence if, in a circumstance where an accused could be prosecuted under both federal or state law, the decisions of the prosecuting authorities to either include or omit the federal charge alters the right of the accused to due process. Even if that is the strict legal outcome of limiting the federal HRA to federal bodies, one might think it an anathema to a state court to consider that a right to due process, once fleshed out into a more practical series of legal rules by the cases,<sup>113</sup> is accorded to federal accuseds in a more extensive manner than to state accuseds. Accordingly, there is a likelihood that the state courts would modify or develop the common law, bearing in mind there is but one common law of Australia<sup>114</sup> so as to accommodate it to the requirements of the right of due process under the federal HRA.

As most of the criminal cases in Australia come before state courts (whether under state or federal law), and human rights issues will frequently arise in criminal cases, the state judiciaries would have an important role to play in the development of what will become a national human rights jurisprudence, subject of course to appellate review by the High Court.

To summarise the above: making the assumption I have in section (b) above about the scope of drafting of the grant of jurisdiction under the federal HRA, the end position likely to be reached by a federal HRA in terms of the development of the common law is somewhere between the current position under the state or territory Charters and that in the UK. The federal HRA will entail that state courts when they are exercising federal jurisdiction, which can include the adjudication of related state claims, will need to develop the single common law of Australia in accordance with the federal HRA. Further, at least arguably, even when exercising state jurisdiction in matters where federal jurisdiction could have been invoked, the state courts could properly develop the single common law of Australia to respect the human rights outcomes, which would have been mandated had the matter been in federal jurisdiction expressly. It follows that the further development of the single common law to conform to the federal HRA

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113 *Dietrich v The Queen* (1992) 177 CLR 292 discussed some aspects of the common law conceptions of fair trial and due process respected in Australia. Once a statutory right is adopted, the overseas jurisprudence would be expected to become more significant.

114 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 563–4; *Lipohar v The Queen* (1999) 200 CLR 485, 505–10; *Commonwealth v Mewett* (1997) 191 CLR 471, 522.

will occur in those matters which are either in or could have been brought in federal jurisdiction. This is still likely to fall short of the UK position since the state courts will be not given a freestanding mandate to modify any and every area of the single common law of Australia to cohere with the rights protected by the federal HRA.

#### **D State Courts Administering Remedies against Federal Public Authorities?**

Finally, the NHRCC is not explicit on which courts will be conferred with jurisdiction to determine whether there is a cause of action against a federal public authority for breach of human rights and what remedies should be conferred.<sup>115</sup> Absent any limitation in the federal HRA, the ordinary work of section 39(2) of the *Judiciary Act* would be to invest this federal jurisdiction in the several courts of the states subject to their own limits. A claim that there has been a breach of a human right will of necessity involve federal jurisdiction. The matter will arise under a law made by the Parliament within section 76(ii) of the *Constitution*. In addition, often the Commonwealth will be a party within section 75(iii). Thus, authority to determine the matter will need to be conferred upon a court which satisfies the requirements of a Chapter III court.<sup>116</sup>

Again, viewing the matter practically, if state courts increasingly determine claims for breaches of human rights under the federal HRA, they will become familiar with and develop human rights jurisprudence. They will do so consistently with the decisions of intermediate appellate courts throughout the country and subject to ultimate review by the High Court, but will have their own important role to play in the development of a national human rights jurisprudence. Further, there is a likelihood that the state courts will carry that jurisprudence into their own development of the common law even where the HRA does not apply, bearing in mind again there is one common law for Australia.

And if the assumption I have made in Part VI(B) above about the drafting of the federal HRA is wrong, then the enforcement of the rights relevant to the (federal) criminal trial process will occur by this indirect means, again involving the state courts. On this view, if an accused is denied due process within a federal criminal trial, the remedy he has is in an action against the federal public authority (here the prosecutor) responsible for the denial of the right. The independent cause of action against the prosecutor will lead to the usual suite of remedies, including damages.<sup>117</sup> By this means, the state court will pronounce on the requirements of due process. Indeed, why would the ‘usual suite of remedies’

115 Cf National Human Rights Consultation Committee, above n 1, 377, xxxviii (Recommendation 31).

116 *Commonwealth v Anti-Discrimination Tribunal (Tas)* (2008) 169 FCR 85; *A-G (NSW) v 2UE Sydney Pty Ltd* (2006) 236 ALR 385; *Trust Company of Australia Ltd (t/as Stockland and Property Management) v Skiwing Pty Ltd (t/as Caf Tiffany's)* (2006) 66 NSWLR 77. For a criticism of the reasoning, but not conclusion, of these cases, see Geoffrey Kennett, ‘Fault Lines in the Autochthonous Expedient: The Problem of State Tribunals’ (2009) 20 *Public Law Review* 152, 165–6.

117 National Human Rights Consultation Committee, above n 1, xxxviii (Recommendation 31).

not extend to the grant of an injunction? And why should not the 'independent' cause of action be vindicated in the same matter as the criminal trial? If so, even this route of limiting the jurisdiction of state courts may end up producing practical results close to those achieved if there were the express grant of jurisdiction I contemplated earlier.

## VII CONCLUSION

Assuming that a future federal government returns to a federal HRA based on the NHRCC 'dialogue' model, the NHRCC's Recommendation 20 is and remains a realistic and prudent limitation. The alternatives of provoking vigorous state opposition by seeking to bind the states directly to a federal HRA, or seeking to persuade all governments to move together on better rights protection, hold little prospect of achievement within years, if not decades. The recommendation also has theoretical support in at least one version of federalism theory.

That said, it would nevertheless be overly simplistic and naïve to assume that such a federal HRA would not have any impact on the workings of state legislative, executive and judicial power in those states without their own Charter. It will not be an impenetrable Iron Curtain that is erected.

The above analysis, admittedly with the dangers of prognostication, has sought to demonstrate that there a variety of mechanisms – some practical, others more strictly legal – by which a federal HRA is likely, increasingly over time, to impact on the exercise of state power.

At the practical level, one would be likely to see over the medium term that the conditions upon which the federal government would be prepared to enact, or maintain, uniform or complementary legislation would include that the states legislate to accept any applicable requirements of the federal HRA, including but not limited to its interpretative obligation. Likewise, the terms on which federal authorities would be prepared to enter funding agreements with the states would inevitably seek to conform to applicable requirements of the federal HRA. In areas of joint federal–state executive activity such as joint policing or prisons, it is hard to conceive that the activity could be carried on effectively without common standards being followed, and the common standards would be those modified to conform to the federal HRA. As the states cooperate with the Commonwealth to constitute joint administrative bodies, those officers would be bound by the federal HRA.

Further, where cooperative federal–state action is involved, complaints against federal officials to the HRC would be likely to involve examination of the related activity of state officers. Where judicial or administrative review is sought of the actions of the federal officer, again the position would be likewise.

In addition to these pervasive practical consequences, there would also be likely to be, although perhaps less often, strict legal consequences for the exercise of state power. These would arise through (probably occasional) findings of direct inconsistency between laws under section 109 of the

*Constitution*; an expanding reach of the guarantee for an intercourse under section 92 of the *Constitution* as informed by the federal HRA; the operation of double jeopardy; the principles of federal jurisdiction and the *Judiciary Act* within the criminal process; and the inherent requirements that judicial power be exercised in a manner which accords equality and respect to all citizens subject to the court's jurisdiction and without undermining confidence in the court.

I express no view that this is a bad thing. For strong rights proponents, it would be a good, although imperfect, thing. It is not much different to what is occurring practically and legally across many other areas of the modern polity where states are increasingly required to conform to federal standards. Cooperative federalism, which is about the best the states can hope for, will carry this burden with it.

In short, the realism which underpins Recommendation 20 should be matched by the further realism that the impact of a federal HRA upon states without a Charter of Rights is likely both practically and legally to be more significant than would occur if it were simply another state or territory within the federation choosing to protect rights by a statutory means. The gravitational pull of a federal HRA would be a lot stronger than there being simply a Charter in another state or territory.