

Submission to the National Human Rights Consultation Committee

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Introduction

This submission addresses the constitutional issues that the Committee should take into account in making its recommendations to the Commonwealth Government.

In summary, it makes the following points:

1. That any charter of rights adopted in Australia must not simply mimic the provisions of other charters or treaties, but must be framed to meet Australian constitutional requirements.
2. That if the external affairs power is to be the primary head of power used to support the enactment of a charter of rights, particular attention should be directed to ensuring that the treaty provisions relied upon are not too vague and aspirational to support legislation, that partial implementation does not result in the charter being substantially inconsistent with a treaty upon which it relies and that the charter does not breach express or implied provisions of the Constitution.
3. That any charter ought to make clear how it applies, to whom it applies, with respect to which laws it applies (eg past/future and Commonwealth/State laws), the role of the Commonwealth Parliament, the role of the courts and the nature and enforceability of any remedies.
4. That constitutional risks may arise from any attempt to enforce social and economic rights as legal rights through the courts.
5. That the potential effects of any charter on the federal system need to be closely considered, including the operation of s 109 of the Constitution, the effect of the charter upon State public authorities and the consequences for the uniformity of Commonwealth/State cooperative laws.
6. That there is a real risk that any provision allowing federal courts to make 'declarations of incompatibility' would be held invalid, but that there are other ways of drawing incompatibility to the attention of the Commonwealth Parliament; and
7. That there are problems with the adoption of a model based upon the Canadian *Bill of Rights* 1960, but that there are other types of models that might be considered.

1. An *Australian* charter of rights

One of the problems with commenting on a charter of rights¹ for Australia is that it is difficult to make critical or constructive comments in the absence of a draft Bill. Some proponents of a charter have addressed that problem by publishing proposed models, the New Matilda Human Rights Bill² and Geoffrey Robertson's 'Statute of Liberty'³ being the most prominent amongst them. What these model Bills reveal most starkly, however, is that insufficient thought has been given to how they fit in with the Commonwealth Constitution and the Australian federal system.

Borrowing words from treaties (which are drafted broadly and vaguely because they need to be applicable to a wide range of countries) or from charters that apply in unitary states (which do not take into account the federal division of legislative and executive power) is fraught with difficulty. If we are to have an *Australian* charter of rights, then it needs to meet the requirements of the Commonwealth Constitution. So far, the terms of these draft models fail to meet this condition.

Take, for example, the way the New Matilda Bill and the Robertson Bill deal with democratic rights. The New Matilda Bill provides:

- 31 Every citizen has the right, and is to have the opportunity -
- (a) to take part in the conduct of public affairs, directly or through freely chosen representatives;
 - (b) to vote and be elected at periodic elections, held in accordance with universal and equal suffrage, and by secret ballot in a manner that guarantees the free expression of the will of the electors;
 - (c) to have access, on general terms of equality, to public service and public office.

The Robertson Bill states:

- 19 Every citizen and/or resident and/or taxpayer over the age of eighteen has the right and must have the opportunity without discrimination:
- (i) to take part in the government in Australia, directly by standing for parliament or by voting, freely and secretly, for chosen representatives;

¹ The term 'charter' is used throughout, for ease of reference, but it could just as easily be replaced by 'bill of rights' or *Human Rights Act*, as thought advisable.

² See a copy of the draft Bill: http://www.humanrightsact.com.au/download/Human_Rights_Bill_Draft.doc [viewed 28 April 2009].

³ Geoffrey Robertson, *The Statute of Liberty* (Vintage Books, Sydney, 2009), ch 8.

(ii) to have access, on terms of equality and merit, to the public service and to all public offices, including the office of head of state in any Australian republic.

Both have their own drafting problems.⁴ The New Matilda Bill refers to a right to vote and be elected, but does not refer to which institution one may be elected. Does it refer to elections to the Commonwealth Parliament, a State Parliament, a local government body, the local school council or the executive of the RSL? Robertson at least refers to ‘parliament’, but not to which one. Assuming that both, as proposed Commonwealth Acts of Parliament, are intended to be interpreted as applying only to elections to the Commonwealth Parliament⁵ and to the Commonwealth public service and public offices (although this is by no means certain), there is still a fatal constitutional flaw. Section 44 of the Commonwealth Constitution provides that a range of people, including those with a foreign allegiance, those under sentence for certain crimes, undischarged bankrupts, persons holding an office of profit under the Crown or a pecuniary interest in any agreement with the Commonwealth public service, are incapable of being chosen as a member of the Commonwealth Parliament. Accordingly, any provision in a Commonwealth law, be it a charter of rights or any other law, that stated that every citizen (or in Robertson’s case, even certain non-citizens)⁶ has a right, without discrimination, to be elected to the Commonwealth Parliament, would simply be constitutionally invalid or be required to be read down so that it could operate validly.⁷ The alternative is to hold a referendum to amend s 44 of the Commonwealth Constitution, but neither Robertson nor the New Matilda supporters appear to advocate this path.

An Australian charter of rights needs not only to accommodate the constraints, both express and implied, imposed by the Commonwealth Constitution but also to build on the rights that it gives. Both the Robertson and New Matilda Bills refer to property rights and the protection of people from the compulsory acquisition of their property except on just terms.⁸ Neither, however, gives recognition to the existence of s 51(xxxi) of the Constitution and the jurisprudence surrounding it. Robertson goes so far as to explain to his readers that ‘just terms’ has a defined meaning at international law.⁹ What about addressing how it has been interpreted by the High Court? The focus needs to shift from

⁴ Note, for example, that Robertson’s provision would allow a non-citizen to be the head of state of an Australian republic as long as he or she was a resident or a taxpayer. This would potentially include the Queen, who could certainly claim relevant experience for the job, as long as she had sufficient Australian financial interests to be an Australian taxpayer.

⁵ Note that a Commonwealth law which interfered with State constitutional provisions concerning the election of representatives to State Parliaments would probably be regarded as constitutionally invalid because of the operation of the *Melbourne Corporation* principle: *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 242 (McHugh J).

⁶ Note, in contrast, s 18 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) which refers to every ‘eligible’ person having a right to vote and be elected. ‘Eligible’ is left undefined, but presumably takes into account constitutional and legislative constraints.

⁷ Note the difficulty that the High Court has found in reading down provisions: *Befair Pty Ltd v State of Western Australia* (2008) 234 CLR 418.

⁸ Robertson Bill, cl 15; New Matilda Bill, cl 35.

⁹ Geoffrey Robertson, *The Statute of Liberty* (Vintage Books, Sydney, 2009), p 196.

borrowing international provisions and definitions to building an Australian law that is consistent with the Commonwealth Constitution, the constitutional jurisprudence of Australian courts and the Australian federal system. Attempts to piggy-back on foreign models are likely to be inadequate.

2. Head of power to enact a charter

While on the one hand, an Australian charter should not simply copy treaty provisions that are inappropriate to our constitutional context, on the other hand, if the Commonwealth Parliament is to have a head of legislative power to enact a charter, it is likely that there will need to be reliance upon the implementation of treaty obligations.

The external affairs power in s 51(xxix) of the Constitution would support the enactment of a law that implemented treaty obligations, such as those arising from Australia's ratification of the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic and Social Rights*. However, care would have to be taken to ensure that an Australian charter did not go further than those obligations (unless there were another head of power to support the provision), or in partially implementing them, did not result in the law being inconsistent with the treaty.¹⁰ Questions will also arise as to whether some of the rights in these treaties, especially the economic and social rights, are too vague and aspirational to support legislation.¹¹

As noted above, charter provisions must also not conflict with any express constitutional provisions (such as s 44 regarding election to Parliament or s 116 regarding freedom of religion) or any constitutional implications, such as those concerning freedom of political communication or implications protecting the continuing functioning and integrity of the States. Constitutional requirements trump international treaty obligations.

3. The importance of making clear how a charter is intended to apply

Previous attempts at introducing bills or charters of rights in other countries have often exhibited a lack of clarity in the drafted provisions leading to a great deal of uncertainty about how they apply and leaving it to the courts to make fundamental decisions about their operation that ought to have been made by the enacting Parliament.

For example, the Canadian *Bill of Rights* 1960 left unclear whether it simply applied as an interpretative measure, requiring the courts to interpret federal laws in a manner consistent with specified rights, or whether it had the effect of rendering invalid or

¹⁰ 'Deficiency in implementation of a supporting Convention is not necessarily fatal to the validity of a law; but a law will be held invalid if the deficiency is so substantial as to deny the law the character of a measure implementing the convention or if it is a deficiency which, when coupled with other provisions of the law, make it substantially inconsistent with the Convention': *Victoria v Commonwealth* (1996) 187 CLR 416, 489 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ)

¹¹ *Victoria v Commonwealth* (1996) 187 CLR 416, 486 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ). Note the reference to a treaty obligation 'to promote full employment' as being aspirational and incapable of supporting legislation to fulfil the aspiration. Cf the right to work in cl 38 of the New Matilda Bill.

inoperative federal laws that were inconsistent with those rights. After a decade of uncertainty, the Canadian Supreme Court decided that the effect of the *Bill of Rights* was to render conflicting federal laws inoperative.¹² There was also uncertainty as to the extent to which the *Bill of Rights* affected future federal laws, in the face of the principle of parliamentary sovereignty. Again, this was left to the Supreme Court to decide.

In New Zealand, a remedies clause that had been included in the draft bill set out in a White Paper was excluded from the *Bill of Rights Act* 1990. In the absence of express remedies, the New Zealand courts have filled the gap by creating remedies that have no statutory basis.¹³

Matters so fundamental to the operation of a charter of rights should be decided as a policy matter by the Parliament and expressed clearly in any legislation. Any proposed charter ought to be clear about how it applies, to whom it applies, with respect to which laws it applies (eg past and future laws, Commonwealth laws only or State and Territory laws too), the role of the Commonwealth Parliament, the role of the courts and the nature and enforceability of any remedies.

4. Economic and social rights

In my view the inclusion of economic and social rights in an Australian charter of rights is inappropriate and, depending on how they apply, potentially constitutionally invalid. Economic and social rights should not be enforced by a court as legal rights.¹⁴ The problems that could arise from strict legal enforcement of economic and social rights are recognised by the interpretative provision in cl 42 of the New Matilda Bill, which acknowledges that these rights ‘are subject to progressive realisation and their realisation may be limited by the financial resources available to government’. However, this involves courts in making policy judgments about the value and effectiveness of government policy and the allocation of resources.

A court may have before it evidence about the cost of acting in a manner compatible with a right and the financial circumstances of a government, but it is not its place to make a budget decision about whether to give priority to that particular cost above and beyond any number of other government priorities, which might be election promises or international obligations or measures considered necessary to deal with an economic crisis. This is an executive role, not a judicial role. It may therefore be considered to be a breach of the separation of powers. It may also be seen as undermining the independence of the courts by leading to them being perceived as an arm of the executive.

As McHugh J stated in *Kable v DPP (NSW)*:

¹² *R v Drybones* [1970] SCR 282.

¹³ *Simpson v Attorney-General* [1994] 3 NZLR 667.

¹⁴ Note the use of directive principles of a non-justiciable nature in Part IV of the Indian Constitution as a means of addressing economic and social rights.

While nothing in Ch III prevents a State from conferring non-judicial functions on a State Supreme Court in respect of non-federal matters, those non-judicial functions cannot be of a nature that might lead an ordinary reasonable member of the public to conclude that the Court was not independent of the executive government of the State. A State law which gave the Supreme Court powers to determine issues of a purely governmental nature – for example, how much of the State Budget should be spent on child welfare or what policies should be pursued by a particular government department – would be invalid. It would have the effect of so closely identifying the Supreme Court with the government of the State that it would give the appearance that the Supreme Court was part of the executive government of the State.¹⁵

If this is a constitutional problem at the State level where the separation of powers does not apply, it would certainly be unconstitutional at the Commonwealth level where the separation of powers does apply.

5. A Charter and Federalism

Neither the New Matilda Bill nor the Robertson Bill has adequately addressed how a ‘dialogue model’ charter would operate, in practice, within Australia’s federal system and whether the consequences of its operation are appropriate. This is particularly important because many of the ‘rights’ proposed directly affect areas of State responsibility. For example, cl 37 of the New Matilda Bill¹⁶ gives every person the right ‘to primary education which is compulsory and available free to all without discrimination’. How many primary schools does the Commonwealth operate? None.¹⁷ Clearly this is a meaningless right unless it is intended to be imposed upon and implemented by the States.¹⁸

The experience of charters of rights in places such as Canada and New Zealand has shown that in practice the greatest litigation has concerned criminal procedure rights, such as those concerning searches, arrest, detention and the admissibility of evidence in criminal trials, as well as sentencing and bail.¹⁹ While the Commonwealth has a small area of criminal jurisdiction (primarily concerning drug and corporate offences) most criminal law comes under state jurisdiction. Other significantly litigated areas in which ‘rights’ questions are likely to arise concern mental health and the right to refuse medical treatment. Again, these fall within areas of state jurisdiction.

¹⁵ (1996) 189 CLR 51, 117 (McHugh J).

¹⁶ See also cl 18(i) of the Robertson Bill.

¹⁷ Note that in a very small number of cases in the territories the Commonwealth is responsible for providing primary education. However, the operation of these schools is out-sourced. For example, the schools on Christmas Island and the Cocos (Keeling) Islands are operated by the WA Department of Education and Training and the Jervis Bay School is operated by the ACT Department of Education.

¹⁸ Query, however, whether it could be used by the States to require the Commonwealth to make s 96 grants in sufficient amounts to permit the States to offer free primary education as required by a Commonwealth charter of rights?

¹⁹ P Joseph, *Constitutional and Administrative Law in New Zealand* (Thomson Brookers, Wellington, 3rd ed, 2007), p 1175.

How would the New Matilda and Robertson Bills operate within the federal system? Clause 4 of the New Matilda Bill declares that the ‘human rights in this Act are exercisable by everyone within Australia’s jurisdiction’.²⁰ Clause 10 provides that these rights are ‘guaranteed’ by the Act, ‘subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society’. It does not specify whether that law may only be a Commonwealth one, or could also be a State or Territory law. Part 5 of the Act, which is confined to dealing with Commonwealth laws, then imposes an obligation on courts and others, so far as it is possible to do so, to interpret Commonwealth primary and subordinate legislation in a manner which is compatible with human rights (cl 49) and permits a Court (being the High Court, Federal Court, Family Court or a Supreme Court exercising federal jurisdiction) to make a declaration of incompatibility (cl 51).

Clause 53 also states that it is ‘unlawful for a public authority to act in a way which is incompatible with a right or freedom’ unless the authority could not have acted differently as a result of the application of Commonwealth primary legislation. A public authority includes a court (defined as including State and Territory courts in the exercise of federal jurisdiction) or tribunal and ‘any person or entity, irrespective of its structure or organisation, whose functions include functions of a public nature to be exercised on behalf of the Commonwealth...’ (cl 53).

S 109 inconsistency: The first federalism question that arises is how such a charter would apply with respect to a conflicting State law. State laws that are inconsistent with Commonwealth laws are, according to s 109 of the Constitution, ‘invalid’ to the extent of the inconsistency, which the High Court has interpreted as meaning inoperative rather than *ultra vires*.²¹ On its face, the New Matilda Bill declares that the rights it sets out are ‘exercisable’ by everyone within Australia and are ‘guaranteed’ by the Act subject to such reasonable limits, prescribed by law, as can be demonstrably justified in a free and democratic society. Any State law inconsistent with these Commonwealth provisions would therefore be held inoperative if a court did not find that the State law²² contained reasonable limits that were demonstrably justified. Is this what is intended? If so, it would seem both incongruous and inappropriate that a Commonwealth charter would result in inconsistent State laws, including those enacted in the past and the future, being struck down as inoperative while inconsistent Commonwealth laws were preserved by the charter with the courts simply drawing attention to their incompatibility.

As for the Robertson Bill, it is unclear as to how it is intended to operate. Robertson states that ‘all those who exercise governmental or executive power should be subject to the charter’ (p 210). He also states that the charter provisions must ‘have the status of

²⁰ Note, however, that contrary to this assertion some rights are confined to everyone ‘lawfully within Australia’ (cl 30) or to Australian citizens (cl 30-1) or to groups such as indigenous peoples (cl 36).

²¹ *Carter v Egg and Egg Pulp Marketing Board (Vic)* (1942) 66 CLR 557, 573 (Latham CJ); *Butler v Attorney-General (Vic)* (1961) 106 CLR 268, 286 (Windeyer J); and *Western Australia v Commonwealth* (1995) 183 CLR 373, 464-5 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

²² Query whether the use of the term ‘law’ in clause 10 would include State laws?

Commonwealth law, which means they will prevail over previous federal legislation, and by operation of Section 109 of the constitution, will override inconsistent state laws (whether past or future)’ (p 211). Yet on p 212 he states that where it is not possible for a court or tribunal to interpret a statute consistently with the charter, it has the power to grant a declaration of incompatibility, which the Attorney-General must consider and report upon to the Parliament. This suggests that his proposed Bill is not intended to repeal by implication past inconsistent Commonwealth legislation. If so, it is not clear what status he would give to past or future inconsistent State laws.

Two issues of principle arise with respect to the question of whether a Commonwealth charter should affect State laws. The first principle is that rights are universal in their application and international human rights obligations apply to all levels of government within a federation. That is why rights are usually protected in federations by inclusion within a national Constitution and apply to all spheres of government.²³ The second principle is that of shared but equal sovereignty within a federation. If the Commonwealth Constitution were amended to include a bill of rights, this would have the advantage of Commonwealth and State consent (though the double majority requirement in s 128 of the Constitution) and an equal application to Commonwealth and State governments, legislatures and courts.²⁴ In contrast, a ‘dialogue’ model, that renders all inconsistent State laws inoperative but which protects the validity of all inconsistent Commonwealth laws and triggers a ‘dialogue’ between the courts and the Commonwealth Parliament (but not State Parliaments), would be inherently unbalanced, unfair and probably unsaleable.²⁵ The fundamental problem with a dialogue model enacted by Commonwealth legislation is that it is not capable of treating the States and the Commonwealth equally.²⁶

Even if it is the intention of a Commonwealth Parliament, in enacting a charter, that it only apply with respect to Commonwealth laws, a problem might still arise with respect to the application of s 109 of the Constitution. As it is a constitutional provision, it cannot be ‘turned off’ by the Commonwealth Parliament with respect to particular legislation. A Commonwealth charter could state that it was not intended to ‘cover the

²³ See, for example, the application of entrenched rights in Canada (since 1982), Germany, India, Mexico, Nigeria, South Africa and Switzerland. See also: Cheryl Saunders, ‘Protecting Rights in the Australian Federation’ (2004) 25 *Adelaide Law Review* 177, 180. Note that the *Human Rights Act* 1998 (UK) binds devolved governments within the United Kingdom, but it does so through the legislation establishing devolved institutions, so that breaches of rights are beyond the legislative competence of the devolved legislatures.

²⁴ Constitutional Commission, *Final Report of the Constitutional Commission*, (AGPS, 1988) Vol 1, para 9.193.

²⁵ Note that the fact that the *Human Rights Bill* 1973 (Cth) would have bound the States by way of s 109 of the Constitution has been seen as one of the major reasons for opposition to it and its eventual failure: J McMillan, G Evans and H Storey, *Australia’s Constitution – Time for Change?* (Allen & Unwin, 1983) 331; and Cheryl Saunders, ‘Protecting Rights in the Australian Federation’ (2004) 25 *Adelaide Law Review* 177, 190.

²⁶ Note Saunders’ comment that the ‘Commonwealth Parliament cannot prescribe rules for the interpretation of State legislation, impose “form” requirements with which State legislation must comply, nor establish pre-enactment scrutiny mechanisms for State laws’: Cheryl Saunders, ‘Protecting Rights in the Australian Federation’ (2004) 25 *Adelaide Law Review* 177, 206.

field' of human rights and was intended to operate concurrently with consistent State legislation, but it could not prevent State laws being rendered inoperative because of direct inconsistency with provisions of the Commonwealth law.²⁷ Provisions of a charter of rights that state 'everyone has the right to ...' and 'no one may be ...' are likely to be regarded as laws to which State laws must not be inconsistent, even though at the Commonwealth level these so-called rights are only exercisable against public authorities or as an interpretative obligation. It would need to be made very clear that these 'rights' have no effect, creating no legal rights or obligations, except to the extent that rights are given with respect to the actions of public authorities and for the purposes of the interpretation of Commonwealth laws.²⁸ This might undermine the 'feel-good' nature of a charter of rights, but it would be more honest about what the charter actually does.

Public authorities: Assuming that a proposed charter is not intended to override inconsistent State laws and that this is effectively achieved by express provisions, to what extent would the charter apply to the States through the actions of 'public authorities'? As noted above, the definition of public authority in cl 53 of the New Matilda Bill includes State courts (although, by reason of the definition in cl 5, only in the exercise of their federal jurisdiction) and any other person or entity 'whose functions include functions of a public nature to be exercised on behalf of the Commonwealth'. Robertson's Bill has a similar definition, although it includes persons or entities that have functions 'substantially funded by the Commonwealth' (p 212).

State and Territory police, who exercise federal functions, would therefore be 'public authorities' bound by charter rights, along with judges, magistrates and a myriad of State and Territory public servants who fulfil Commonwealth functions under arrangements made between governments.²⁹ If the alternative criterion of possessing functions substantially funded by the Commonwealth were added, it could arguably cover all State and Territory authorities and all State and Territory public servants, given the substantial amount of Commonwealth funding received by the States and Territories through grants. It would also cover all local government bodies which are funded directly and indirectly by the Commonwealth, as well as arts, sporting and charitable bodies that receive Commonwealth funding through grants.

Under cl 53 of the New Matilda Bill, it would be unlawful for these State, Territory or local government officers or bodies to act in a way which is incompatible with a right or

²⁷ *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545.

²⁸ See, for example, cl 9(1) of the *Australian Bill of Rights Bill* 1985 (Cth) which sought to achieve this outcome.

²⁹ For examples of Commonwealth statutory provisions that authorize the making of arrangements for State public servants to exercise Commonwealth functions, see: *Census and Statistics Act* 1905, s 6; *Commonwealth Electoral Act* 1918, s 84; *Crimes Act* 1914, s 3B; *Customs Act* 1901, s 11; *Environment Protection and Biodiversity Conservation Act* 1999, s 398; *Family Law Act* 1975, ss 70NFI, 112AN and 122B; *Human Rights and Equal Opportunity Commission Act* 1986, s 16; *International Criminal Court Act* 2002, s 186; *International War Crimes Tribunals Act* 1995, s 82; *Interstate Road Transport Act* 1985, s 6; *Marriage Act* 1961, s 9; *Mutual Assistance in Criminal Matters Act* 1987, s 39; *National Environment Protection Measures (Implementation) Act* 1998, s 39; *National Health Act* 1953, ss 9C and 11; *Port Statistics Act* 1977, s 8; *Public Service Act* 1999 (Cth), s 39; *Statistics (Arrangements with States) Act* 1956, s 5; and *Therapeutic Goods Act* 1989, s 9.

freedom in the Bill unless under a *Commonwealth* law³⁰ it could not have acted differently. No account seems to have been taken of the effect of State laws on State public authorities. Clause 53 is not even confined in its application to the acts of public authorities *when exercising* Commonwealth powers or fulfilling Commonwealth functions. Instead it appears to apply generally to all the acts of public authorities, with the exercise of Commonwealth functions being relevant only for the purpose of defining a public authority. The same problems arise with respect to the Robertson Bill (pp 211-2).³¹

Any provision regarding public authorities in a Commonwealth charter needs to make very clear either that it only binds Commonwealth public authorities, or that if it also binds State public authorities, it does so *only to the extent* that the relevant act is performed by the authority in the exercise of a power conferred on it by a Commonwealth Act or pursuant to an arrangement under a Commonwealth Act.³²

Statutory interpretation: The primary manner in which these charters are proposed to operate is by way of statutory interpretation. Clause 49 of the New Matilda Bill provides that ‘so far as it is possible to do so, primary and subordinate legislation must be read and given effect in a way which is compatible with human rights’. The Robertson Bill states that ‘All statutory provisions must be interpreted, consistently with their purpose, so far as possible in a way that is compatible with the human rights set forth in this charter’.³³ The issue then arises as to what is ‘possible’ and where the line is drawn between statutory interpretation (especially where it is contrary to parliamentary intention) and the exercise of legislative power by the courts in re-writing the meaning of legislation. In the United Kingdom courts have interpreted s 3 of the *Human Rights Act* as requiring courts to interpret laws consistently with human rights as long as it is ‘possible’ to do so, even when the interpretation is contrary to the intention of Parliament.³⁴ As Chief Justice Spigelman has noted, the English courts have given primacy to Parliament’s intention in s 3 of the *Human Rights Act* over Parliament’s intention in enacting later law. He has observed that in substance this approach ‘constitutionalises the *Human Rights Act*’.³⁵

Such an approach in Australia is likely to be regarded as breaching both the separation of powers and parliamentary sovereignty.³⁶ Any Australian charter should make it clear that

³⁰ The reference to primary legislation in cl 53(2) is presumably governed by cl 47.

³¹ Compare s 4(1)(c) of the *Charter of Human Rights and Responsibility Act* 2006 (Vic), which only applies to an entity with public functions ‘when it is exercising [functions of a public nature] on behalf of the State or a public authority’.

³² Whether a State public authority should be excused from the requirement to act consistently with rights in a Commonwealth charter when performing a Commonwealth function, if a State law obliges the public authority to act otherwise, will depend upon the application of s 109 of the Constitution.

³³ Geoffrey Robertson, *The Statute of Liberty* (Vintage Books, Sydney, 2009), p 212.

³⁴ *Ghaidan v Godin-Mendoza* [2004] 2 AC 557; and *Sheldrake v Director of Public Prosecutions* [2005] 1 AC 264.

³⁵ James Spigelman, *Statutory Interpretation and Human Rights*, The Macpherson Lecture Series, Vol 3, (UQP, 2008), p 77.

³⁶ See: Michael McHugh, ‘A Human Rights Act, the courts and the Constitution’, Presentation to the Australian Human Rights Commission, 5 March 2009, p 27; and James Spigelman, *Statutory Interpretation and Human Rights*, The Macpherson Lecture Series, Vol 3, (UQP, 2008), pp 67 and 79-80.

courts are not to interpret an Act contrary to the intention of the Parliament that enacted it.³⁷

Assuming that a Commonwealth charter were drafted in such a manner as not to invalidate inconsistent State laws through s 109 of the Constitution, then issues will arise as to the interpretation of laws where the uniform operation of Commonwealth and State laws is desired. In some cases there is a significant benefit in having seamless interpretation of certain Commonwealth and State laws. One example is the application of laws in Commonwealth places.³⁸ Section 52 of the Constitution gives the Commonwealth Parliament exclusive legislative power with respect to ‘all places acquired by the Commonwealth for public purposes’. There are thousands of Commonwealth places scattered across Australia, such as airports, post offices and office buildings, and in many cases it is not obvious at all that a place is a ‘Commonwealth place’ for constitutional purposes.

Rather than having different laws applying inside and outside a Post Office, the Commonwealth Parliament has taken the sensible approach of ‘applying’ to Commonwealth places the law of the State in which the place is situated.³⁹ This means that the law applying to the Commonwealth place is a Commonwealth law, but that its content is derived from current State laws. This needs to be done in a seamless way to avoid problems arising from the fact that the status of a place as a ‘Commonwealth place’ might not be recognised. Hence s 14 of the *Commonwealth Places (Application of Laws) Act* 1970 permits the continuance of proceedings where it is discovered part way through that an act took place in a Commonwealth place and that the law applying is therefore a Commonwealth law. Most importantly, in interpreting these Commonwealth laws that ‘apply’ state provisions, courts are required to use State interpretation laws rather than the *Acts Interpretation Act* 1901 (Cth)⁴⁰ so that there is no difference between the application of the law inside the Commonwealth place and outside of it.⁴¹ If a charter required the courts to interpret Commonwealth laws that adopt State provisions in a manner that is consistent with the rights contained in the charter, then it is likely that the law as it applies to a Commonwealth place would operate differently to the law that applied outside that Commonwealth place, leading to all manner of difficulties.

Other difficult questions would arise as to the application of ss 68 and 79 of the *Judiciary Act* 1903 (Cth). Section 68 provides that State laws regarding the arrest and custody of persons charged with offences, State procedures for their trial and conviction on indictment and the hearing of appeals arising out of the conviction and State bail laws

³⁷ See *Charter of Human Rights and Responsibility Act* 2006 (Vic), s 32(1) and *Human Rights Act* 2004 (ACT), s 30.

³⁸ *Commonwealth Places (Application of Laws) Act* 1970 (Cth). For similar examples, see the *Crimes Act Sea Act* 2000 (Cth); and the *Commonwealth Places (Mirror Taxes) Act* 1998 (Cth).

³⁹ *Commonwealth Places (Application of Laws) Act* 1970 (Cth), s 4.

⁴⁰ *Commonwealth Places (Application of Laws) Act* 1970 (Cth), s 5. For another example of the same approach, see *National Environment Protection Measures (Implementation) Act* 1998 (Cth), ss 15 and 20.

⁴¹ Differences do arise, however, when mandated by the Commonwealth Constitution. If the Commonwealth Parliament could not enact a particular law because of constitutional prohibitions, then it cannot ‘apply’ such a law even if it was validly enacted by a State Parliament.

shall apply to persons charged with Commonwealth offences. The intention was to avoid having two separate systems of criminal justice.⁴² Section 79 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.

How would a Commonwealth charter apply to such a provision? Would it mean that State laws on procedure or evidence would be interpreted in a manner consistent with charter rights when picked up and applied in cases of federal jurisdiction, or would they be picked up and applied according to their State meaning,⁴³ or would they not apply at all because a Commonwealth law has ‘otherwise provided’ by requiring consistency with charter rights? Again, significant practical problems could arise if evidential and procedural provisions were to apply differently depending upon whether federal jurisdiction was being exercised, particularly if a person was charged with both State and Commonwealth offences.

Similar problems would arise with respect to cooperative legislative schemes, such as uniform schemes that involve the Commonwealth adopting a State law (eg *Australian Energy Market Act 2004*) or more commonly where the Commonwealth and the States enact mirror legislation to ensure the uniformity of provisions across Australia (eg classification and censorship laws, some evidence laws, some criminal laws, gene technology and human cloning laws, sports drug testing laws and some aspects of terrorism laws). Uniformity will again be undermined if the Commonwealth law is given one interpretation and State laws, using the same words, are interpreted differently.

One of the risks of a Commonwealth charter of rights is therefore that it will not only create inconsistency for previously uniform legislative schemes, but it will also undermine and curtail the use of Commonwealth-State cooperative schemes. This will not always be the case.⁴⁴ In some cases the States might agree to adopt for their own mirror laws the same requirement that the law be consistent with charter rights, in order to ensure uniformity.⁴⁵ In other cases (such as the application of State laws to

⁴² *Williams v The King [No 2]* (1934) 50 CLR 551, 560 (Dixon J). See also: Gim Del Villar, ‘Implications for the Commonwealth of state and territory bills of rights’, Paper given at AGS Constitutional Law Forum, 27 September 2007, p 11.

⁴³ On the reverse issue of whether there is an obligation to interpret Victorian laws picked up by s 79 consistently with the Victorian Charter, see: Pamela Tate, ‘Protection of Human Rights in a Federation’ (2007) 33(2) *Monash University Law Review* 220, 243.

⁴⁴ Note also the argument that the parliamentary intention in enacting legislation that is part of a uniform scheme is to maintain uniformity and that a court should therefore interpret the legislation, consistently with that purpose, even if it is contrary to a charter right: James Spigelman, *Statutory Interpretation and Human Rights*, The Macpherson Lecture Series, Vol 3, (UQP, 2008), p 69.

⁴⁵ The adoption of Commonwealth interpretative provisions commonly occurs where States ‘apply’ a Commonwealth law. See the following examples of the application of the *Acts Interpretation Act 1901*(Cth) to New South Wales laws: *Agricultural and Veterinary Chemicals (New South Wales) Act 1994*, s 7; *Australian Crime Commission (New South Wales) Act 2003*, s 7; *Competition Policy Reform (New*

Commonwealth places) this will not be practicable because of the wide variety of State laws affected.

The Committee may wish to consider recommending that consideration be given to exempting from the application of a charter, on a case by case basis, laws where uniformity in interpretation is needed.

Common law development: One final point arises concerning consistency in interpretation. In the United Kingdom, the application of the *Human Rights Act* to the courts entails an obligation to develop the common law consistently with the rights set out in the Act.⁴⁶ As Australia has a single common law, would a Commonwealth charter of rights be intended to affect the development of the common law throughout Australia? If so, difficulties may arise because some courts, when exercising federal jurisdiction, would be obliged to develop the common law in this fashion while other courts would not. This could lead to divisions in the way the common law is developed and applied.

6. The Constitutional Validity of Declarations of Incompatibility

Michael McHugh has recently written a comprehensive analysis of the question of whether a federal court could make a declaration of incompatibility or whether this would be in breach of the separation of powers.⁴⁷ Others have also expressed serious doubts about the constitutionality of declarations of incompatibility at the Commonwealth level.⁴⁸

I agree that there is real doubt as to the constitutional validity of conferring on federal courts and the High Court the power to make a declaration of incompatibility. As the arguments have been well rehearsed, there is no point in repeating them. Given these doubts, if it were proposed to adopt a ‘dialogue’ model which supports both human rights

South Wales) Act 1995, s 7; Crimes at Sea Act 1998, Schedule 1, cl 11; Gene Technology (New South Wales) Act 2003, s 7; Insurance (Application of Laws) Act 1986, s 3(2); Poisons and Therapeutic Goods Act 1966, s 32; Price Exploitation Code (New South Wales) Act 1999, s 7; Research Involving Human Embryos (New South Wales) Act 2003, s 7; Road Transport (Driver Licensing) Act 1998, s 5; Road Transport (Safety and Traffic Management) Act 1999, s 6(1); Road Transport (Vehicle Registration) Act 1997, s 5; Road and Rail Transport (Dangerous Goods) Act 1997, s 9; Sports Drug Testing Act 1995, s 13; Terrorism (Commonwealth Powers) Act 2002, s 100.5; and Water Efficiency Labelling and Standards (New South Wales) Act 2005, s 7.

⁴⁶ See further: Pamela Tate, ‘Protection of Human Rights in a Federation’ (2007) 33(2) *Monash University Law Review* 220, 244.

⁴⁷ Michael McHugh, ‘A Human Rights Act, the courts and the Constitution’, Presentation to the Australian Human Rights Commission, 5 March 2009.

⁴⁸ Cheryl Saunders, ‘Protecting Rights in the Australian Federation’ (2004) 25 *Adelaide Law Review* 177, 203; Sir Gerard Brennan ‘The Constitution, Good Government and Human Rights’, Paper presented to the Human Rights Law Resource Centre, Melbourne, 12 March 2008; James Stellios, ‘Federal Dimensions to the ACT *Human Rights Act*’ *AIAL Forum No 47*, 33, at 35; and Helen Irving, Submission to the National Human Rights Consultation, paras 11.1-11.4. Note, however, the defence of the legality of declarations of incompatibility by: Pamela Tate, ‘Protection of Human Rights in a Federation’ (2007) 33(2) *Monash University Law Review* 220; and Pamela Tate, ‘Victoria’s *Charter of Human Rights and Responsibilities: A Contribution to the Debate on a National Charter*’, Address to the 2009 Commonwealth Law Conference, Hong Kong, 6 April 2009, paras 40-52.

and parliamentary sovereignty, it would be preferable to adopt a slightly different means of achieving the same ends to avoid issues of constitutional validity.

Instead of courts issuing formal ‘declarations of incompatibility’ (or declarations of inconsistent interpretation), a charter could provide that any party to a proceeding was entitled to notify the Australian Human Rights Commission if a court made a finding that although the interpretative provisions in the Charter applied, it could not interpret a law consistently with charter rights. The Australian Human Rights Commission could then be obliged to prepare a report, to be tabled in Parliament, of cases where the courts have made such findings. The charter could also require the Attorney-General or a relevant Minister to respond to such a report within a specified period. This would avoid any suggestion that the courts were exercising non-judicial powers or making orders that did not involve the determination of a matter or interfering with political matters by ordering Parliament to reconsider a law. The function of the court would be the ordinary judicial function of interpreting legislation and making findings as to how a law is to be or cannot be interpreted. The initiation of the parliamentary response would be through parties and an executive body, being the Australian Human Rights Commission.

The reason for proposing parties rather than court registries as the initiators of the process is that such proceedings are likely to arise in lower courts, including State courts, and it would be an unreasonable burden to impose upon registries to monitor all such proceedings and judgments. If a party is arguing for an interpretation consistent with a charter right, then he or she can be assumed to be aware of this further avenue if the court finds that the legislation cannot be interpreted consistently with charter rights. It also adds an element of choice, allowing a party to take active steps to pursue the matter or to drop it, as the party chooses. The reason for proposing the use of the Australian Human Rights Commission as an intermediary body is to ensure that all notifications received meet the legislative criteria and are not under appeal, to add some order to the process and to ensure that the whole process is properly monitored.

7. Alternatives

A number of alternatives to the ‘dialogue model’ have been suggested. The most obvious is a constitutionally entrenched bill of rights, but this is beyond the Committee’s terms of reference. Others have suggested that Australia should adopt a legislative model similar to that of the Canadian *Bill of Rights* 1960 or the current New Zealand model. A further option is the use of the *Australia Acts* to give a charter of rights a fundamental and entrenched status in a constitutionally legitimate manner.

Alternative 1 – a Canadian *Bill of Rights* 1960 model

Michael McHugh has suggested that a model similar to that in the Canadian *Bill of Rights* 1960 be adopted. This was the approach largely adopted by the *Australian Bill of Rights Bill* 1985 (Cth). The Canadian *Bill of Rights* 1960⁴⁹ only applies to federal legislation

⁴⁹ The Canadian *Bill of Rights* 1960 continues to apply but has been largely supplanted by the constitutionally entrenched *Charter of Rights and Freedoms* 1982.

(not provincial laws), but McHugh has argued that in Australia this model should also extend to State and Territory laws that, if inconsistent with the bill or charter of rights, would be regarded under s 109 of the Constitution as ‘invalid’ (i.e. inoperative) to the extent of the inconsistency. This would have the advantage of avoiding the problems that have been outlined above concerning differing interpretations of laws, but it would impose a great and unequal burden on the States and their laws.

McHugh proposed a model under which all federal legislation must be read subject to the specified human rights, as per the Canadian model of 1960, with a right for Parliament to provide in any law that it apply ‘notwithstanding’ the bill of rights. He argues that this model would have only a minimal effect on parliamentary sovereignty and would be ‘well within federal constitutional power and would not be open to the constitutional attacks that undoubtedly await the dialogue model’.⁵⁰

Section 2 of the Canadian *Bill of Rights* 1960 states:

Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared...

There are at least three ways of interpreting this provision. On its face, it appears to be an interpretation clause. It appears to require courts to construe federal laws so as not to breach the listed rights. The first way of interpreting it is therefore to say that to the extent that it is possible to do so, consistent with the purpose of the Act, laws should be construed and applied so as not to abrogate, abridge or infringe the listed rights.

The second way of interpreting it takes matters a step further, authorizing courts to construe and apply a federal law so as not to abrogate, abridge or infringe the listed rights, even if to interpret it in such a manner would be to change the meaning of the words from that intended by Parliament, to read in new words or effectively re-write the offending Act.⁵¹ This would involve the court in exercising legislative power, and is something to which McHugh has objected as unconstitutional as it breaches the separation of powers.⁵²

The third possible interpretation, which is the one that was eventually adopted by the Canadian courts,⁵³ is that the courts should not ‘apply’ a statute which abrogates, abridges or infringes a listed right. As Hogg has described it:

⁵⁰ Michael McHugh, ‘A Human Rights Act, the courts and the Constitution’, Presentation to the Australian Human Rights Commission, 5 March 2009, pp 19 and 36.

⁵¹ This was the view of Lord Nicholls in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, [32].

⁵² Michael McHugh, ‘A Human Rights Act, the courts and the Constitution’, Presentation to the Australian Human Rights Commission, 5 March 2009, p 27.

⁵³ *R v Drybones* [1970] SCR 282.

On this view, the courts should first “construe” a statute to avoid as far as possible any conflict with the Bill of Rights, but if the conflict cannot be avoided by interpretation, then the courts should hold the statute to be inoperative.⁵⁴

This was because the *Bill of Rights* was not regarded as an ordinary statute, but rather a fundamental law or a ‘quasi-constitutional instrument’.⁵⁵ In other cases, the Canadian courts have held that human rights legislation in the Provinces, as well as nationally, takes on a ‘special’ status so that it cannot be impliedly repealed – it can only be amended or repealed by express provisions.⁵⁶

In translating the Canadian approach to Australia, further analysis is required as to how such a charter would operate with respect to different categories of laws, being: (a) State laws; (b) Commonwealth laws enacted before the charter; and (c) Commonwealth laws enacted after the charter.

(a) State laws – As discussed above, assuming that the charter was a valid Commonwealth law and it contained expressly stated ‘rights’ that were declared to be held by ‘everyone’ in Australia, it would, by virtue of s 109 of the Constitution, override any inconsistent State law. Although the State law would have been validly enacted and would remain a law of the State – it would simply be rendered inoperative to the extent of the inconsistency as long as the inconsistency existed. Once the inconsistency was removed (for example by the repeal or amendment of the Commonwealth law) the State law would resume its full operation.

(b) Prior Commonwealth laws – A charter would operate differently with respect to any Commonwealth law enacted before the charter. Under the doctrine of implied repeal, the later law would be deemed to have impliedly repealed provisions of the earlier Commonwealth law, to the extent that they conflict. It would not render them ‘inoperative’ as in the case of State laws, but rather, would repeal the conflicting parts so that those provisions ceased to be law altogether.⁵⁷

(c) Later Commonwealth laws – How then would a charter affect laws enacted after the charter came into existence? The orthodox answer is that if there is a clear inconsistency,⁵⁸ then the doctrine of implied repeal would apply so that the later law impliedly repealed the conflicting provision in the earlier law.⁵⁹ This doctrine finds its

⁵⁴ P Hogg, *Constitutional Law of Canada* (Thomson Carswell, 2004), p 701.

⁵⁵ *Hogan v The Queen* [1975] 2 SCR 574, 579 (Laskin J).

⁵⁶ See, for example, *Winnipeg School Division No 2 v Craton* [1985] 2 SCR 150.

⁵⁷ Note, however, the struggle by the New Zealand courts to distinguish between implied repeal and the rendering of statutes inoperative: P Joseph, *Constitutional and Administrative Law in New Zealand* (Thomson Brookers, Wellington, 3rd ed, 2007), p 512.

⁵⁸ There is a presumption that the legislature does not intend to contradict itself, so the inconsistency must be very clear to support implied repeal. There is also a principle that specific provisions override general provisions. This is also relevant in a rights context, where there is a general right and a later specific provision that affects the application of that general right.

⁵⁹ This is a long standing principle which is summed up in the Latin maxim: *leges posteriores priores contrarias abrogant*. It has been upheld in numerous cases over centuries. See, for example: *Goodwin v Phillips* (1908) 7 CLR 1, 7 (Griffith CJ).

source in the notion of parliamentary sovereignty – that one Parliament cannot bind a future Parliament because no generation can claim to have greater wisdom than future generations. The High Court, in the early twentieth century tried to modify this doctrine. In *Cooper v Commissioner of Income Tax for Queensland* (1907) 4 CLR 1304 and *McCawley v The King* (1919) 26 CLR 9, a majority of the High Court took the view that State Constitutions had the status of a ‘fundamental law’ and therefore could not be impliedly repealed. A State Constitution had to be amended expressly by the Parliament for an amendment to be effective. This was rejected by the Privy Council in *McCawley v The King* [1920] AC 691, where it was held that State Constitutions were Acts of Parliament with the same status as all other Acts, including a *Dog Act*, and could be impliedly amended in the same manner as any other legislation.

Since 1920 all un-entrenched laws have been vulnerable to implied repeal. Laws may be entrenched by manner and form provisions that are supported by a law of a higher status (eg the *Commonwealth of Australia Constitution Act* 1900, the *Colonial Laws Validity Act* 1865 and the *Australia Acts* 1986), but otherwise the rule stands that later laws prevail over earlier laws. Latham CJ put the position thus:

The Parliament cannot limit the legislative power of Parliament by providing that a statute shall not be amendable or repealable, or that it shall operate notwithstanding any subsequent legislation.⁶⁰

For example, the statement in s 6 of the *Real Property Act* 1886 (SA) that no future inconsistent law could apply to land the subject of the Act unless it was expressly enacted that it so applied ‘notwithstanding the provisions of *The Real Property Act* 1886’ was held by the High Court in *South-Eastern Drainage Board v Savings Bank of South Australia* (1939) 62 CLR 603 to be ineffective. It was itself impliedly repealed by later legislation.⁶¹ The doctrine of implied repeal continues to apply in Australia, even with respect to human rights laws such as the *Racial Discrimination Act* 1975 (Cth).⁶²

In Canada the courts ‘have assumed without discussion that the Bill of Rights applies to post-1960 statutes’.⁶³ This was the case, even though commentators at the time of its enactment had assumed that the orthodox doctrine of parliamentary sovereignty would apply, so that the Bill would have no more than an interpretative effect on future legislation.⁶⁴ Hogg concluded that the only way to justify this position was to conclude that s 2 of the *Bill of Rights* was a valid manner and form provision. He explained:

⁶⁰ *Wenn v Attorney General (Vic)* (1948) 77 CLR 84, 107 (Latham CJ). See also: *Ellen Street Estates Ltd v Minister of Health* [1934] 1 KB 590, at 597 where Lord Maugham stated that the legislature cannot ‘bind itself as to the form of subsequent legislation, and it is impossible for Parliament to enact that in a subsequent statute dealing with the same subject-matter there can be no implied repeal’.

⁶¹ See also: *Travinto Nominees Pty Ltd v Vlattas* (1973) 129 CLR 1, 35 (Gibbs J).

⁶² *Pareroutija v Tickner* (1993) 42 FCR 32, 46 (Lockhart J). See also: *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 74 (McHugh J) re human rights legislation; and *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 357 (Brennan CJ and McHugh J).

⁶³ P Hogg, *Constitutional Law of Canada* (Thomson Carswell, 2004), p 704.

⁶⁴ See the sources listed in: P Hogg, *Constitutional Law of Canada* (Thomson Carswell, 2004), p 704, n 37.

The argument would be that Parliament has bound itself to enact laws inconsistent with the Bill of Rights only in a specified manner and form: that manner and form is the inclusion of an express declaration that the statute “shall operate notwithstanding the Canadian Bill of Rights”. The conclusion of this argument would be that the Bill of Rights is entrenched, and that a later statute inconsistent with it is invalid unless it contains the express declaration described in s 2 (the exemption clause).⁶⁵

In Australia, while the States have power to enact manner and form constraints,⁶⁶ the Commonwealth has been regarded as not having such a power, as any limitation on the legislative power of the Commonwealth or the legislative procedures mandated by the Constitution would breach the Constitution.⁶⁷ Some, however, have regarded provisions such as s 2 of the Canadian *Bill of Rights* as interpretative provisions, which might be enacted by the Commonwealth Parliament.⁶⁸

Nonetheless, it is arguable that there is a significant difference between an interpretative provision that merely requires a court to interpret a provision consistently with human rights where it is possible to do so⁶⁹ and a provision which allows a court to hold a provision ‘inoperative’, overriding the intention of Parliament that the provision operate. The latter involves more than mere interpretation – it involves the judiciary overriding the will of a more recently elected Parliament pursuant to an instruction from an earlier Parliament. It is all very well to say that Parliament need only expressly state that its law is intended to override the charter of rights and that limitations of ‘pure procedure or form’ do not restrict parliamentary sovereignty,⁷⁰ but given the uncertainty involved in

⁶⁵ P Hogg, *Constitutional Law of Canada* (Thomson Carswell, 2004), p 704.

⁶⁶ *Australia Acts* 1986, s 6. See also s 85(5) of the *Constitution Act* 1975 (Vic) which imposes a ‘form’ restraint that requires the implied amendment of the Supreme Court’s jurisdiction to be expressly acknowledged in the amending Act and reasons given in Parliament for the change. The effectiveness of this provision remains a matter of doubt: G Taylor, *The Constitution of Victoria* (Federation Press, 2006) pp 496-509; G Carney, *The Constitutional Systems of the Australian States and Territories* (CUP, 2006), p 203.

⁶⁷ P Hanks, P Keyzer and J Clarke, *Australian Constitutional Law* (Lexis Nexis Butterworths, 7th ed, 2004) para 5.4.48.

⁶⁸ See: G Winterton, ‘Can the Commonwealth Parliament Enact “Manner and Form” Legislation?’ (1980) 11 *Federal Law Review* 167, at 190-1, where Winterton applied a ‘self-embracing’ theory to support the enactment of ‘form’ provisions such as s 2 of the Canadian *Bill of Rights*. See also: Julie Taylor, ‘Human Rights Protection in Australia: Interpretation Provisions and Parliamentary Supremacy’ (2004) 32 *Federal Law Review* 57.

⁶⁹ Note that there it is already a principle of statutory interpretation that legislation is not intended to interfere with fundamental rights unless it makes it abundantly clear that it is intended to do so: *Potter v Minahan* (1908) 7 CLR 277; *Coco v The Queen* (1994) 179 CLR 427, 437-8 (Mason CJ, Brennan, Gaudron and McHugh JJ); *Al-Kateb v Godwin* (2004) 219 CLR 562 [19]-[20] (Gleeson CJ); [241] (Hayne J); and *Thomas v Mowbray* (2007) 233 CLR 307 [208] (Kirby J).

⁷⁰ J Goldsworthy, ‘Manner and Form in the Australian States’ (1987) 16 MULR 403; H P Lee, ‘“Manner and Form”: An Imbroglia in Victoria’ (1992) 15(2) UNSWLJ 516; J Goldsworthy, ‘The “Principle in *Ranasinghe*”: A Reply to H P Lee’ (1992) 15(2) UNSWLJ 540.

interpreting rights,⁷¹ Parliament might well intend the operative effect of its law without ever anticipating that it would be regarded by a court as in breach of a right and therefore inoperative.⁷²

In countries such as the United Kingdom, the notion has developed that certain types of laws have a ‘constitutional’ status which renders them immune from implied repeal.⁷³ This notion is inconsistent with *McCawley’s* case and the long history of ‘manner and form’ in Australia. Its adoption in Australia cannot be assumed.⁷⁴

The point that I am making here is that simply adopting the words used in s 2 of the Canadian *Bill of Rights* does not mean that it will necessarily have the same effect in Australia as it does in Canada.⁷⁵ There are many uncertainties that arise as to how it would operate and whether the Commonwealth Parliament has the constitutional power to affect future Parliaments in this manner.⁷⁶ As McHugh J put it in *Chu Kheng Lim v Minister for Immigration*:

There is no principle of statutory interpretation which requires a later Act to be consistent with an earlier enactment. Given that Parliament cannot bind its future legislative power it would be unconstitutional for such a principle of statutory interpretation to be adopted.⁷⁷

Alternative 2 – an informal dialogue model

The New Zealand *Bill of Rights* 1990 does not provide for declarations of incompatibility. It does, however, require courts to prefer an interpretation of a provision

⁷¹ See for example *R v Jeffries* [1994] 1 NZLR 290, where the New Zealand Court of Appeal construed rights against unreasonable search and seizure as giving rise to a right to privacy that extends beyond property to matters such as the examination of personal records.

⁷² Note that cl 14 of the *Australian Bill of Rights Bill* 1985 proposed permitting the courts to undertake prospective overruling where grave consequences would arise from the Bill of Rights rendering inconsistent laws inoperative.

⁷³ *Thoburn v Sunderland City Council* [2003] QB 151. See also: *R v Drybones* [1970] SCR 282 and *R v Pora* [2001] 2 NZLR 37, where the NZ Court of Appeal split upon the application of implied repeal, even though s 4 of the *Bill of Rights Act* 1990 (NZ) provides that no past or future Act may be impliedly repealed by the operation of the *Bill of Rights Act*.

⁷⁴ Note, however, the acceptance by Spigelman CJ that human rights statutes are ‘entitled to be characterized as “quasi-constitutional”’, and his observation that *McCawley* would be unlikely to be decided the same way today: James Spigelman, *Statutory Interpretation and Human Rights*, The Macpherson Lecture Series, Vol 3, (UQP, 2008), pp 56 and 69.

⁷⁵ See the doubts expressed by Sir Harry Gibbs as to whether the High Court would adopt the same approach as the Canadian Supreme Court in *R v Drybones*: H Gibbs, ‘Eleventh Wilfred Fullagar Memorial Lecture – The Constitutional Protection of Human Rights’ (1982) 9 *Monash University Law Review* 1, at 11.

⁷⁶ Cheryl Saunders, ‘Protecting Rights in the Australian Federation’ (2004) 25 *Adelaide Law Review* 177, 204-5; and Pamela Tate, ‘Victoria’s *Charter of Human Rights and Responsibilities*: A Contribution to the Debate on a National *Charter*’, Address to the 2009 Commonwealth Law Conference, Hong Kong, 6 April 2009, para 60.

⁷⁷ *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 74-5 (McHugh J). See also: *Thomas v Mowbray* (2007) 233 CLR 307, [212] (Kirby J); and [456] (Hayne J).

that is consistent with the rights and freedoms contained in the Bill (s 6). In addition, s 4 states that no court shall hold any provision of an Act to be impliedly repealed or revoked or ineffective by reason only that it is inconsistent with any provision of the Bill of Rights. The courts may only interpret a provision in a manner that is ‘tenable on the text and in light of the purpose of the enactment’.⁷⁸ Courts cannot use interpretation as a concealed legislative tool,⁷⁹ and can only apply a ‘reasonably viable’ meaning of a provision according to an ‘orthodox approach to interpretation’.⁸⁰ The New Zealand Supreme Court has regarded it as valuable to make it clear in its judgments that a law is a disproportionate and unreasonable breach of a right, seeing this as the initiation of a ‘dialogue’ with the legislative branch which might cause it to amend the law.⁸¹ It is not necessary that there be a formal declaration, as proposed by the New Matilda dialogue model.

Alternative 3 – entrenchment other than by the Constitution

The option of a constitutional amendment to entrench a charter is outside the Committee’s terms of reference. Apart from anything else, such a proposal would be likely to fail in a referendum.

One other possibility, however, which has not received any attention, would be the use of Commonwealth and State Parliaments to amend the *Australia Acts* 1986 to insert a new chapter setting out an agreed set of rights, and applying those rights equally, in the same binding fashion, to both the Commonwealth and the States.⁸² Such a model would be consistent with the principles of federalism. It would also have the benefit of entrenchment, although not constitutional entrenchment, so changes could still be made legislatively, through s 15 of the *Australia Acts*, by the cooperative enactment of State and Commonwealth legislation. Such a proposal would also be within the Committee’s terms of reference, because it does not amount to constitutional entrenchment.

If more flexibility were required (to support parliamentary sovereignty), the Commonwealth and State Parliaments could be granted by the *Australia Acts* the power to enact provisions that expressly exempt particular laws from the application of the rights set out in the *Australia Acts*.⁸³ Policy concerns about parliamentary sovereignty

⁷⁸ *Hansen v R* [2007] 3 NZLR 1, [25] (Elias CJ).

⁷⁹ *Hansen v R* [2007] 3 NZLR 1, [156] (Tipping J).

⁸⁰ *Hansen v R* [2007] 3 NZLR 1, [252] (McGrath J).

⁸¹ *Hansen v R* [2007] 3 NZLR 1, [253]-[254] (McGrath J); and [267]-[268] (Anderson J). See also *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 [20].

⁸² Section 15 of the *Australia Acts* 1986 (Cth) and (UK) provides that the *Australia Acts* can be amended by a Commonwealth Act of Parliament passed at the request or with the concurrence of the Parliaments of all the States, but not otherwise (unless the Constitution is amended to give the Commonwealth Parliament such a power). There is doubt as to whether s 15 of the Commonwealth version of the *Australia Acts* is effective in binding the Commonwealth Parliament in this manner. However, s 15 of the *Australia Act* 1986 (UK) is effective in its self-entrenchment and its conferral on the Commonwealth and State Parliaments of the power to amend it by collective action. Hence it could be amended to include a charter of rights which would be effectively entrenched.

⁸³ See s 33 of the *Canadian Charter of Rights and Freedoms*, and the minority view in: Constitutional Commission, *Final Report of the Constitutional Commission*, (AGPS, 1988) Vol 1, paras 9.230-9.234.

and the role of the judiciary would still arise, but many of the other technical problems raised by this submission concerning the differential application of a charter of rights would be resolved.

Conclusion

This submission does not address the primary policy questions which the Committee has been asked to report on, such as whether Australian rights are adequately protected and what rights should be given protection. Instead it focuses on the constitutional and legal issues which dictate the parameters within which the Committee must work in making its recommendations and the practical issues that flow from these constitutional constraints, which ought to influence the Committee in drawing up options for the Government's consideration.

Anne Twomey
5 May 2009