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PROTECTING RIGHTS IN THE AUSTRALIAN FEDERATION

I INTRODUCTION

This article explores the link between federalism and rights protection in Australia, both generally and with a view to considering the form that an Australian Bill of Rights might take. It is dedicated to Geoffrey Lindell, a friend and colleague for more than 30 years.[1] Like the other papers in this issue of the *Adelaide Law Review*, it is written to mark his retirement from full-time university service but not, I am pleased to say, from constitutional scholarship, which does not seem remotely in the offing.

Historically, Australia has eschewed general legal protection of rights standards in a form now commonly understood as a Bill or Charter of Rights. This was less surprising at the time when the Constitution was drafted, in the last decade of the 19th century, when the views of A V Dicey[2] were in the ascendant[3] and the United States' Bill of Rights was an isolated example of express rights protection in the common law world, explicable by local circumstances and with limited effect.[4] Unlike other comparable countries, however, Australia has maintained its resistance to formal protection of rights. Certainly, in the latter part of the 20th century, there were rights movements in Australia,[5] influenced by the same forces that led to the introduction of Bills of Rights elsewhere: revulsion at the behaviour of states during the second World War, recognition of the universality of rights standards and acceptance of the principle of the equal dignity of all people, irrespective of ethnic, religious or cultural difference. In the event, however, successive Australian proposals for general rights protection were abandoned, at the policy-making stage,

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1 We first met in connection with the Australian Constitutional Convention (ACC), in the mid-1970s, when Geoff was an officer in the Attorney-General's Department and I was a PhD student, seconded to assist the secretariat of the ACC.

2 Albert Venn Dicey, *The Law of the Constitution* (first published 1885, 1982 ed) with subsequent editions by Dicey himself in 1886, 1889, 1893, 1897, 1902 and 1908.

3 Geoffrey Marshall, 'The Constitution: Theory and Interpretation' in Vernon Bogdanor (ed), *The British Constitution in the Twentieth Century* (2003) 29, 42; Martin Loughlin, *Sword and Scales* (2000) 136–7.

4 James Bryce, to whose work the framers of the Australian Constitution were indebted to an 'incalculable' extent, according to Deakin, dealt with rights only briefly, in a chapter dealing generally with the federal system: *The American Commonwealth Vol 1* (first published 1888, 1995 ed) 280, 326–7. On the significance of Bryce, see J A LaNauze, *The Making of the Australian Constitution* (1972) 18–9.

5 See below Part III.

in Parliament, or following failure at referendum,[6] although some more specific, legislative, measures were implemented and remain in place.[7]

In recent years, there has been some renewal of interest in rights in Australia. It is prompted in part by concern about the lack of clear rights standards against which to measure contested actions of governments in relation to, for example, treatment of asylum-seekers, anti-terrorism legislation and mandatory sentencing of offenders, but it also followed hard on the heels of the enactment of human rights legislation in the United Kingdom,[8] hitherto the exemplar of a country that, like Australia, relied on institutional mechanisms for the protection of rights. There is still no real sign of change in Australia, at least at the national level, although the recent enactment of human rights legislation in the Australian Capital Territory (ACT)[9] may herald similar such initiatives by the Northern Territory or one or more States. Nevertheless, as the experience of other developed common law countries suggests, the opportunity to introduce more effective protection for rights often arises suddenly, in response to particular pressures or new political leadership.[10] If and when that happens in Australia, the impact of a Bill of Rights on existing institutions, within both spheres of government, will undoubtedly be a focus of attention. There is advantage in considering well in advance the model that might best suit.

It is widely assumed that the most significant impediment to formal, legal protection of rights in this country is the Australian attachment to a form of parliamentary sovereignty[11] or, at least, to the operation of a parliamentary system untrammelled by legally binding rights standards for the exercise of legislative power.[12] This assumption leads naturally to the view that, if Australia were to seek

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6 See below Part III.

7 *Racial Discrimination Act 1975* (Cth), *Sex Discrimination Act 1984* (Cth), *Human Rights and Equal Opportunity Commission Act 1986* (Cth), *Privacy Act 1988* (Cth), *Disability Discrimination Act 1992* (Cth), *Human Rights (Sexual Conduct) Act 1994* (Cth).

8 *Human Rights Act 1998* (UK) C42.

9 *Human Rights Act 2004* (ACT).

10 Geoffrey Palmer, *New Zealand's Constitution in Crisis* (1992) 51–70; Paul Rishworth, 'Common Law Rights and Navigation Lights: Judicial Review and the New Zealand Bill of Rights' (2004) 15 *Public Law Review* 103; Peter Russell, *Constitutional Odyssey* (2nd ed, 1993) ch 3; Vernon Bogdanor, 'Conclusion' in V Bogdanor (ed), *The British Constitution in the Twentieth Century* (2003) 689, 716–8.

11 Necessarily modified, in the face of entrenched Constitutions: *Attorney-General (WA) v Marquet* (2003) 78 ALJR 105, 116 (Gleeson CJ, Gummow, Hayne and Heydon JJ).

12 Sir Robert Menzies' explanation of the Australian position in his Virginia lectures still broadly represents this view: Sir Robert Menzies, *Central Power in the*

more formal legal rights protection, it should do so in the form of legislation, preferably enacted by the Commonwealth Parliament, whether or not as a precursor to constitutional protection at a later date.[13] The attraction of such an approach for Australia is given some impetus by the examples of the first Canadian experiment with a statutory Bill of Rights in 1960,[14] and of the more sophisticated and effective rights statutes of New Zealand[15] and the United Kingdom,[16] enacted respectively in 1990 and 1998. The recently enacted *Human Rights Act* in the ACT draws broadly on the United Kingdom model.

I argue here, however that, whatever its attractions from the standpoint of the parliamentary sovereignty, a legislative Bill of Rights pays insufficient attention to the federal character of the Australian polity and to the requirements of the Australian Constitution. The argument is developed as follows. In the next part, I identify the characteristics of a federal form of government that, on any view, raise additional questions to be resolved in designing a regime for protection of rights. In Part III, I examine how successive attempts at national rights protection in Australia necessarily have had to respond to these, in one way or another. Part IV provides the opportunity to consider more closely the lessons from comparative experience. I focus in particular on Canada, as another common law federation sharing similar concerns about parliamentary sovereignty, and on the United Kingdom, where the challenge of designing an effective legislative bill of rights has been most impressively met. Taking the features of these two models, I consider in Part V whether and how they would translate into the Australian form of government, so as to offer a comparably satisfactory balance between effective rights protection and other constitutional principles, including the principles of parliamentary sovereignty. In Part VI, I present some brief conclusions.

II RIGHTS AND FEDERALISM

Federalism complicates rights protection in several ways. The most obvious is that federalism by definition implies two spheres of government, each with its own institutions, through which its constitutionally assigned powers are exercised, in a manner that directly affects the people of the particular community. Typically, a Bill of Rights applies at least to the exercise of public power by the executive branch,[17] and it may apply much more widely, to the exercise of power by courts,[18]

Australian Commonwealth: An Examination of the Growth of Commonwealth Power in the Australian Federation (1967) 49–55.

13 George Williams, *The Case for an Australian Bill of Rights* (2004) 80.

14 *Canadian Bill of Rights, RSC 1960* C44.

15 *New Zealand Bill of Rights Act 1990* (NZ).

16 *Human Rights Act 1998* (UK) C42.

17 *The Human Rights Act 2004* (ACT) is an exception in this regard.

by Parliaments[19] and by private institutions exercising public power.[20] On any view, in a federal system, a threshold question thus arises about whether both spheres of government are to be bound by a Bill of Rights and, if so, how. A Bill of Rights introduced by a constituent unit of the federation would be prevented from applying to national institutions by a combination of the operation of s 109 of the Constitution and intergovernmental immunities principles.[21] The question whether a Bill of Rights should apply to one or both spheres of government therefore may be confined to a national Bill of Rights.

This is a tricky enough question in its own right, to which different answers have been given in different federations and, in the Australian federation, at different times. It is complicated further by concern about the impact of a Bill of Rights on the integrity of democratic institutions. The contemporary trend is to design rights instruments so as to balance effective protection of rights, interpreted and enforced by courts, with the legitimate authority of the other institutions of government. If this feature is important, presumably it should apply within each of the spheres of government affected by the rights instrument.

Let us assume, at least for the moment, that if a national Bill of Rights were now to be introduced in Australia it would apply to both the Commonwealth and the States and Territories. The assumption is reasonable: the existing specific rights statutes enacted by the Commonwealth have an application to both spheres of government,[22] although they apply to the private sector as well; rights instruments in other federal countries generally apply to both spheres of government; the national and international significance of rights suggests that protective measures should apply against both spheres of government, as a matter of principle. From the standpoint of exploring the interaction between rights and federalism, moreover, this assumption presents the most interesting challenge to the question with which this article is centrally concerned, of whether a Bill of Rights should take the form of national legislation or should be entrenched in the national Constitution.
Australian constitutionalism accepts that there may be limits on public power that stem from the allocation of matters over which public power might be exercised

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18 *Human Rights Act 1998* (UK) C42, s 6; *The Constitution of the Republic of South Africa 1996,* C2, s 8; *New Zealand Bill of Rights Act* (NZ), s 3

19 *The Constitution of the Republic of South Africa 1996,* C2, s 8; *Canadian Charter of Rights and Freedoms*, s 32.

20 *Human Rights Act 1998* (UK) C42, s 6. Rights may also apply to the private sector, albeit usually indirectly, through the development of the common law.

21 *Re Residential Tenancies Tribunal (NSW) and Henderson; Ex parte Defence Housing Authority* (1997) 190 CLR 410. Nor would s 64 of the *Judiciary Act 1903* (Cth) be attracted if, as is likely, the Bill of Rights applied only against the public sector.

22 *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act 2004* (Cth).

between the spheres of government for federal purposes and between branches of government in accordance with principles of separation of powers.[23] On one view, human rights are merely another such matter, to be allocated to one or other sphere of government and to be protected through institutional checks and balances. The usefulness of this understanding varies with different categories of rights. In what follows I confine attention to civil and political rights, as the likely core of any Australian general rights instrument, which also present some particular difficulties for treating rights as a discrete subject — matter of governmental power.[24]

Nevertheless, there is a sense in which the legal and institutional arrangements for the protection of civil and political rights in Australia since federation can be understood as part of the wider story of the federal division of public power. Power to make laws with respect to rights was not conferred specifically on the Commonwealth Parliament at the time of federation and therefore remained with the States, subject to the exercise of particular Commonwealth powers that might affect rights protection, negatively or positively.[25] Over time, two significant developments took place. First, it was established contrary, apparently, to the expectations of the framers of the Constitution, that Commonwealth power could be exercised to bind the States themselves.[26] Secondly, the external affairs power[27] was interpreted to authorise the Commonwealth Parliament to make laws to incorporate into Australian law international treaties to which Australia is a party.[28] Australia is a party to all significant United Nations human rights treaties;[29] the Commonwealth Parliament therefore now has extensive power to make laws with respect to human rights, subject to whatever constraints are involved in the requirement for the statute to be a law 'with respect to external affairs'.[30]

There is no doubt about the power of the Commonwealth Parliament to enact a legislative Bill of Rights that applies to both spheres of government although, as will be seen, there is doubt about its power to replicate some of the additional features of such an instrument that have contributed to the effectiveness of the Human Rights Act 1998 (UK). The question here is whether, in principle, the power

23 Sir Owen Dixon, *Jesting Pilate* (1965) 102, referring to Australian 'faith…in plenary legislative powers distributed, but not controlled'.

24 Note, however, the other categories of rights, which might also be included in an Australian rights instrument: ACT Bill of Rights Consultative Committee, ACT Legislative Assembly, *Towards an ACT Human Rights Act* (2003) ch 5.

25 It was clear from the outset that the 'race power' (Constitution s 51(xxvi)) fell into this category, for example.

26 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

27 Constitution s 51(xxix).

28 *Commonwealth v Tasmania* (1983) 158 CLR 1; see also *Koowarta v Bjelke –Petersen* (1982) 153 CLR 168.

29 ACT Bill of Rights Consultative Committee, above n 24, [2.30].

30 *Commonwealth v Tasmania* (1983) 158 CLR 1, 260 (Deane J).

should be exercised to introduce a Bill of Rights, even as a temporary measure, in preference to seeking constitutional change. The protection of civil and political rights in fact differs in some important respects from other heads of power that are distributed between spheres of government in a federation. Protection of such rights involves restraint on the part of public authorities in the exercise of all public power as well as, in some instances, positive action. Thus the debate on rights during the framing of the Constitution, such as it was, was directed not to whether a rights power should be allocated to the Commonwealth, but to the extent to which particular rights should receive constitutional protection against a particular sphere of government, rather than being left to the institutions of both spheres of government, without legal protection at all.[31]

If Australian opinion moves to the point where general legal protection for rights is desired, the federal division of powers does not resolve the form that it should take, although it may identify one form that it can take. The normative question can be answered, at least in part, by reference to principle. I argue here for the relevance of two principles, interrelated to each other. One is equality between the spheres of government in the application and operation of a rights instrument. The other is legitimacy, or the perception of legitimacy, derived from the form of consent.

The argument is as follows. Federalism involves multiple overlapping political communities, each with a degree of constitutional autonomy. They are necessarily in a hierarchical relationship for some purposes. Most obviously, given the inevitability of conflict in the exercise of power, the laws of the central legislature generally are entitled to prevail. This is because the centre represents the wider national community. This may also justify its superiority in other respects, including the exercise of external sovereignty.[32] Otherwise, however, the polities are not subordinate to each other. Each necessarily relies on the good faith and integrity of others, presupposing some commonality of standards and requiring mutual respect. Equality is an element of the relationship, to this extent.

Rights protection lies at the heart of arrangements for the governance of a political community; hence the care taken in all modern rights instruments to strike an appropriate balance between the rights of individuals and the capacity of democratic institutions to make decisions in the interests of the community as a whole. Change in these arrangements is a change of a constitutional order, with implications for the manner in which it is given effect, suggesting the need for an appropriate measure of consent, whether actual or constructed. Consent has practical advantages as well, for the acceptance by each polity of the consequences of the change and for the prospects for institutional dialogue.

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31 J A LaNauze, above n 4, 227, 231.

32 *New South Wales v Commonwealth* CLR 337 (‘*Seas and Submerged Lands Case*’) (1975) 135.

For the first 100 years of its existence, Australian federalism left rights protection largely to the institutions of each polity, on the basis of two assumptions. The first was that this was an adequate means of protecting rights. The second was that rights would be protected to a broadly common standard. Unlike in the United States, the second assumption proved correct. The doubts that have arisen concern the first. If these require response, national action is preferable, to change the common standard, affecting the operation of the institutions of all spheres. The mechanism suggested by recent international experience combines substantive rights protection with enhanced institutional accountability for decisions affecting rights. Such a mechanism further enhances the argument for equality between the polities in the application of a rights instrument. In the case of national action, however, equality can be achieved only through the national Constitution. As it happens, this would meet the requirement for consent as well. Alteration of the Australian Constitution does not involve the consent of a majority in each polity, but it involves the consent of a majority within each sphere, under conditions agreed in the constituent instrument setting out the terms of federal union, and in circumstances that ensure public deliberation.

III FEDERAL DIMENSIONS OF PREVIOUS PROPOSALS

The history of attempts to impose national measures to protect human rights begins with the drafting of the Australian Constitution itself, with the limited results that can still be seen in the Constitution today. A series of attempts to extend this protection subsequently took place in the latter half of the 20th century, but led to no substantial change. Each of these measures necessarily had to respond, one way or another, to the additional questions raised for the design of rights measures, by a federal form of government. The purpose of this part is to examine these responses and to identify any insights that they may offer into the form of yet another attempt at national rights protection.

A *The Making of the Constitution*

There was no consideration of a Bill of Rights for Australia during the making of the Australian Constitution. There was, however, some discussion of rights in the context of citizenship, including the unfamiliar concept of dual citizenship,[33] and in connection with a relatively narrow range of other rights-related proposals. In the course of debate on these issues, opposition was expressed, on a range of grounds, to constitutional rights protection. From these observations, the view that the framers of the Constitution opposed a Bill of Rights for Australia seems to have

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[33] On the range of difficulties encountered by the framers in dealing with concepts of citizenship, see Kim Rubenstein, *Australian Citizenship Law in Context* (2002) ch 2.

been derived.[34] This may indeed be a reasonable inference, from the absence of such a proposal, as well as from the various observations that in fact were made. But as an inference, it needs to be treated cautiously, making allowance for the extent to which other factors were at work, complicating the conclusions that might be drawn from the failure of the original Constitution to provide express protection for individual rights.

One such factor was federalism. The principal challenge for the framers of the Australian Constitution was to design a federal system, on what now might be described as minimalist lines,[35] and to enshrine it in a Constitution that would be acceptable to the colonial Parliaments, the people of the colonies, and the British government and Parliament. The influence of these considerations can be traced through all the debates on rights that did occur.

The most far-reaching proposal for rights protection originated with Andrew Inglis Clark.[36] Clark was the author of two successive versions of a clause[37] that would have limited the law-making power of the States in a manner similar to the XIV amendment to the Constitution of the United States but would not, notably, have included central power to enforce the provisions of the clause.[38] The later and more elaborate version of his proposal, which also incorporated aspects of the "privileges and immunities" clause in Article IV sec 2 of the Constitution of the United States, was considered by the Melbourne session of the Convention in 1898.[39] It provided that:

> The citizens of each State, and all other persons owing allegiance to the Queen and residing in any territory of the Commonwealth, shall be citizens of the Commonwealth, and all shall be entitled to all the privileges and immunities of citizens of the Commonwealth in the several States: and a State shall not

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34 For example, in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 136 (Mason CJ), 228–9 (McHugh J), 182 (Dawson J).

35 One of the principles on which the federation was based was '[t]hat the powers and privileges and territorial rights of the several existing colonies shall remain intact, except in respect to such surrenders as may be agreed upon as necessary and incidental to the power and authority of the National Federal Government': J Quick and R R Garran, *The Annotated Constitution of the Australian Commonwealth* (first published 1901, 1976 ed) 125.

36 The history of Clark's attempts in this regard is well canvassed in John Williams, 'In Search of the Federal Citizen: Andrew Inglis Clark and the '14th Amendment'' (Federalism Research Centre Discussion Paper No 30, Federalism Research Centre, Australian National University, 1995).

37 Ibid 5.

38 Cf *United States Constitution* amend XIV, sec 5.

39 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 8 February 1898, 667–91.

> make or enforce any law abridging any privilege or immunity of citizens of the Commonwealth; nor shall a State deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of its laws.[40]

Unlike most of the other framers of the Australian Constitution, Andrew Inglis Clark openly espoused "fundamental laws for the protection of natural rights of the individual beyond the reach of the majority of the hour".[41] The principal objective of the proposed clause 110, however, was more directly related to the task of creating a federation. Both Inglis Clark's own memorandum and the debates that took place on the clause suggest that its guiding purpose was to determine and protect what the establishment of federal union meant for the members of each of the political communities that were about to become States of the union.[42]

This can be seen most clearly from the first part of the clause, debated in 1898, recognising a concept of Commonwealth citizenship, derived from citizenship of the States, to which certain "privileges and immunities" attached, and preventing individual States from interfering with such privileges.[43] These limitations on State power were conceived as part and parcel of creating a federal or "inter-state" citizenship,[44] the properties of which would depend, in large part, on the laws of the States themselves.[45] A similar understanding of the XIV Amendment prevailed at the time; in the *Slaughterhouse cases* Justice Miller characterised the effect of the clause as "to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens…the same, neither more or less, shall be the measure of the rights of citizens of other States within your jurisdiction".[46]

The second part of the clause went further, limiting State power in terms identical to the due process and equal protection guarantees of the XIV amendment to the Constitution of the United States. In a long address informing delegates about the

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40 Quoted in J Williams, 'In Search of the Federal Citizen', above n 36, 5.

41 Andrew Inglis Clark, 'Why I am a Democrat', in Richard Ely (ed), *A Living Force: Andrew Inglis Clark and the Ideal of Commonwealth* (2001) 29, 33.

42 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 8 February 1898, 664.

43 In his 'Proposed Amendments to the Draft of a Bill to Constitute the Commonwealth of Australia', Clark described this aspect of the provision as necessary both to prevent a State from enacting 'discriminatory laws for the exclusive benefit of its own citizens and to the disadvantage of other citizens of the Commonwealth' and to 'settle the question of the status…of aliens who have been naturalised in only one State', Australian Archives Series R216, Item 310, 4.

44 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 2 March 1898, 1756.

45 Ibid 1763 (Josiah Symon).

46 *Slaughter-House Cases,* 83 US (16 Wallace) 36 77 (1872).

comparable position in the United States, Isaac Isaacs drew attention to the potential impact of such guarantees on State power to enact discriminatory legislation and on State administration of justice.[47] There are signs in the debates, however, that this second part of the clause also was understood, by some, as linked with the wider question of the protection of Australian citizenship from incursion by the States. Thus O'Connor: 'I think that the reason of the proposal is obvious. So long as each state has to do only with its own citizens it may make what laws it thinks fit, but we are creating now a new and a larger citizenship.'[48] He continued by asking why if a state were to 'set aside all principles of justice…the citizens of the Commonwealth who did not belong to that state [should not] be protected?'[49]

The failure of the clause in this form[50] commonly is attributed to the faith placed by the framers in representative institutions, and concern about the implications of the clause for racially discriminatory laws. Certainly, both were part of the explanation.[51] Looming equally large in the debate, however, was concern about the impact of the clause on the position of the States in an Australian federation.[52] Thus when Wise argued for the clause as 'a necessity for federation, if federation is to be a reality and not a sham',[53] Symon replied:

> I think the honourable member … has expanded the spirit of federation far beyond anything any of us has hitherto contemplated. He has enlarged, with great emphasis, on the necessity of establishing and securing one citizenship. Now, the whole purpose of this Constitution is to secure a dual citizenship. We are not here for unification, but for federation.[54]

The final Constitution included three other, specific, rights-type provisions dealing respectively with compensation for acquisition of property,[55] trial by jury[56] and

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47 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 8 February 1898, 686–8. He observed also that agreement to the clause would 'simply be raising up obstacles unnecessarily to the scheme of federation': 688.

48 Ibid 689 (Richard O'Connor).

49 Ibid.

50 The core conception of the original proposal was revived and reintroduced in somewhat weaker form into the text of the Constitution, as s 117.

51 See, for example, Cockburn: '…the insertion of these words would be a reflection on our civilisation. People would say – "Pretty things these states of Australia; they have to be prevented by a provision in the Constitution from doing the grossest injustice"'. Official Record of the Debates of the Australasian Federal Convention, Melbourne, 8 February 1898, 688 (John Cockburn).

52 Reid opposed it, for example, on the grounds of its possible effects on State taxation: Ibid 675 (George Reid).

53 Ibid 674 (Bernhard Wise).

54 Ibid 675.

55 Constitution s 51(xxxi).

56 Constitution s 80.

religious freedom.[57] All apply only in relation to Commonwealth law, for reasons that also shed some light on the influence of federal considerations on the framers view of rights protection.

The "just terms" requirement tempers the legislative power to acquire property, itself inserted out of an abundance of caution.[58] Unlike most other Commonwealth powers, this one clearly had the potential to affect individual as well as State rights, which the framers were not prepared to risk.[59] The guarantee of trial by jury was confined from the outset to trials involving a Commonwealth element, even in the draft of Andrew Inglis Clark, by whom it was first proposed.[60] The explanation for its selective application lies in a combination of the influence of the Constitution of the United States, where a similar clause is confined to offences against federal law[61] and the location of s 80 in the chapter establishing the federal judiciary, suggesting that, like much else in the Constitution, it was regarded as an aspect of the institutional design of the newly established Commonwealth.[62]

The guarantees of religious freedom had a rather more volatile history. Their origins also can be traced to Inglis Clark, whose early draft would have precluded both spheres of government from "prohibiting the free exercise of any religion".[63] Clark's proposed restraint on Commonwealth power did not survive into the draft considered by the Convention in 1891, apparently on the ground that Commonwealth power would not enable it to make laws for religion in any event.[64] At this stage, therefore, the prohibition applied only to the States. But in Melbourne in 1898, the tables were completely turned. Inclusion of a reference to 'Almighty God' in the preamble raised the possibility, albeit remote, that the Commonwealth might have power to make laws for religion after all,[65] or at least be perceived to

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57 Constitution s 116.

58 J Quick and R Garran, above n 35, 640.

59 Ibid 641.

60 John Williams '"With Eyes Open": Andrew Inglis Clark and our Republican Tradition" (1995) 23 *Federal Law Review* 149, 174.

61 United States Constitution art III s 2 cl 3.

62 Quick and Garran refer at this point in their commentary to analysis of the United States Constitution as 'established by the people for their own government as a nation, and not for the government of the individual States': Quick and Garran, above n 35, 808. Cf Williams, 'With Eyes Open', above n 60, 174.

63 In clauses 46 and 81 respectively: see Williams, above n 60, 175. Clause 46 would also have precluded the Commonwealth Parliament from making a law to establish or 'support' or give 'preferential recognition to any religion'.

64 La Nauze, above n 4, 228.

65 Richard Ely, 'Andrew Inglis Clark on the Preamble of the Australian Constitution', (2001) 75 *Australian Law Journal* 36, 40.

have such power, exposing the Constitution to unnecessary criticism.[66] Application of the clause to the States, on the other hand, was omitted as 'inconsistent with..[t]he principle of federation…that the states shall retain all such powers as they do not hand over to the Commonwealth, but this clause attempts to legislate for the states.'[67] Perversely, in view of these changes, the clause was retained in the chapter dealing with 'The States'.

In conclusion, three general observations may be made about the interrelationship between rights and federalism in the Constitution that came into effect in 1901. First, in ss 92 and 117, the Constitution imposed absolute limits on the powers of both the States and (presumably) the Commonwealth in areas where this was considered necessary to achieve the goals of federation itself. Secondly, however, the remaining few rights-type provisions applied only to the Commonwealth, in areas where it was perceived to have power that might impinge on rights. Thirdly, the rationale for rejecting the application of rights to the States lay as much in the framers' preoccupation with the design of the federation, as in faith in institutions of democratic government. Oddly, much of this aspect of the debate took place in the context of a clause that would have bound only the States and not the Commonwealth, itself driven by considerations of federalism.

B *Subsequent Rights Proposals*

Any consideration of rights during the drafting of the original Constitution was incidental to the main goal of constructing a federation. By contrast, in the latter part of the 20th century, rights protection emerged as a goal in its own right. In this section I will canvass the major proposals for general rights protection made at a national level, from 1973. Each necessarily was designed to fit within the legal framework created by the federal Constitution. This task was simplified as it became increasingly clear that the Commonwealth Parliament had power, pursuant to s 51(xxix) of the Constitution, to legislate to implement international human rights instruments to which Australia is a party, if it chose to do so. Each proposal was also designed with an eye to potential political opposition, including opposition from the States, and each provided a very different answer to the broader question of principle: how should a national rights instrument deal with the existence of two spheres of government, each with a parliamentary system and each with significant power to infringe on or to advance human rights? To explore the proposals from this perspective it is convenient to consider separately proposals for legislative protection of rights and those for alteration of the Australian Constitution.

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66 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 8 February 1898, 663.

67 Ibid 662 (Sir John Downer).

1 *Legislation*

Two major attempts were made, in 1973[68] and 1985,[69] to enact Commonwealth legislation to implement for Australia the International Covenant on Civil and Political Rights.[70] These two instruments dealt quite differently with the challenge presented by a federal form of government; in neither case, however, would the legislation have applied to both spheres of government in the same way.

The Human Rights Bill 1973 was expressed to bind 'Australia and each State.'[71] Its application to the States would have been delayed, to a date to be fixed by proclamation.[72] Once the proclamation was made, however, the Act would have overridden any inconsistent State law, through the operation of s 109 of the Constitution. Necessarily, from the standpoint of the Commonwealth, the instrument would have had the same status as any other law, able to be overridden by later, inconsistent legislation. In an endeavour to give the Bill maximum effect, however, clause 5 provided that inconsistent laws of 'Australia or ... a Territory',[73] even if enacted subsequently, were to have no 'force or effect'[74] unless 'an Act expressly declares that that provision shall operate notwithstanding this Act.'[75] The Bill thus sought to impose a requirement as to the 'form' in which subsequent Commonwealth legislation was to be enacted, drawing on s 2 of the Canadian Bill of Rights 1960, which had recently been interpreted in *R v Drybones*[76] as rendering 'inoperative' legislation that was inconsistent with it but was not expressed to override. Unlike the Canadian provision, clause 5 of the Australian Bill was not expressed as an interpretative measure, and offered no explicit encouragement to courts, of the kind that now has become familiar in legislative rights instruments,[77] to interpret other legislation consistently with the protected rights. Writing in 1980, George Winterton nevertheless suggested that the provision would have been both

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68 Human Rights Bill 1973 (Cth).

69 Australian Bill of Rights Bill 1985 (Cth).

70 The Human Rights Bill 1973 (Cth) would also have approved ratification for Australia of the ICCPR and the Convention on the Political Rights of Women: clause 6.

71 Human Rights Bill 1973 (Cth) s 5(1).

72 Human Rights Bill 1973 (Cth) s 2 (3).

73 Defined to exclude Papua New Guinea, which was on the cusp of independence: Human Rights Bill 1973 (Cth) s 4.

74 Human Rights Bill 1973 (Cth) s 5(2).

75 Human Rights Bill 1973 (Cth) s 5(3).

76 [1970] SCR 282. *R v Drybones* concerned the effect of the Bill of Rights on prior legislation but the Supreme Court's analysis suggested that it would be effective in relation to subsequent legislation as well, as has been the case: Peter Hogg, *Constitutional Law of Canada* (4th ed, 1997), 793–4.

77 *New Zealand Bill of Rights Act 1990* (NZ) s 6; *Human Rights Act 1998* (UK) C42, s 3.

effective and valid,[78] a conclusion that has been strengthened by developments elsewhere in the common law world over the intervening 20 years, although the position in Australia remains unclear.[79] Even if the technique had been effective in 1973, however, the legislation would have operated unevenly on the spheres of government, as the Attorney-General acknowledged, in his second reading speech.[80]

The Human Rights Bill 1973 sought to save State legislation, capable of operating concurrently with it.[81] Allegations of breach of the protected rights would have arisen in federal jurisdiction and the Bill vested jurisdiction for that purpose in the Australian Industrial Court, pending establishment of the Superior Court of Australia.[82] The Bill provided in addition for the establishment of an Australian Human Rights Commissioner, to whom complaints might also be taken,[83] and for the appointment of an Australian Human Rights Council, to advise the government on a range of human rights issues, including implementation of international human rights obligations.[84] The Bill proved a controversial measure, not least on the grounds of its effect on State powers,[85] and lapsed with the prorogation of the Commonwealth Parliament in 1974.[86]

By contrast, the Australian Bill of Rights Bill 1985, introduced into the Commonwealth Parliament 12 years later, did not purport to override State legislation at all.[87] Like its predecessor, it sought to render subsequent federal legislation inoperative in the absence of express words or also, in this case, 'express words of plain intendment'.[88] This effect was subject to a process by which, if a court declared that 'grave public inconvenience or hardship' otherwise would

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78 George Winterton 'Can the Commonwealth Parliament Enact "Manner and Form" Legislation?' (1980) 11 *Federal Law Review* 167, 201.

79 See below, Part V.

80 'Only this Parliament will be able to abrogate the rights thus established and I would hope this Parliament would not lightly subtract from rights guaranteed by this legislation': Commonwealth, Parliamentary Debates, Senate, 21 November 1973, 1972 (Lionel Murphy, Attorney-General).

81 Human Rights Bill 1973 (Cth) cl 5(4).

82 Human Rights Bill 1973 (Cth) cl 41.

83 Human Rights Bill 1973 (Cth) pt III.

84 Human Rights Bill 1973 (Cth) pt V.

85 Michael Crommelin and Gareth Evans, 'Explorations and Adventures with Commonwealth Powers' in G Evans (ed), *Labor and the Constitution 1972–1975* (1977) 24, 47; John McMillan, Gareth Evans and Haddon Storey, *Australia's Constitution: Time for Change?* (1983) 331.

86 McMillan, Evans and Haddon, above n 85, 320.

87 Australian Bill of Rights 1985 (Cth) cl 9(1).

88 Australian Bill of Rights 1985 (Cth) cl 12. See generally Constitutional Commission, *Final Report of the Constitutional Commission* (1988), [9.54–9.62].

ensue, the offending legislation might nevertheless continue to apply, during the period before the declaration and for up to three months afterwards.[89] In addition, the Bill would have given the Human Rights and Equal Opportunity Commission powers of investigation and conciliation, not only in relation to Commonwealth government acts or practices but also in relation to those of the governments of the States.[90] The Bill passed the House of Representatives but not the Senate, and eventually was abandoned.[91] A Human Rights and Equal Opportunity Commission was established in the following year,[92] but its jurisdiction in relation to State governments was confined to the terms of specific Commonwealth anti-discrimination statutes, in the absence of agreement to the contrary with a particular State.[93]

2 *Constitution alteration*

By the latter part of the 20th century, scepticism about whether Australian voters could ever be induced to accept substantial — or even more minor — proposals for constitutional change was well established. It deepened further as the century progressed, not least as a result of the rejection of referendum proposals that would have provided greater protection for rights. The question of the difficulty of securing constitutional change in Australia has strategic relevance for proponents of a Bill of Rights. It is not directly relevant for present purposes, however, and may for the moment be put aside.

Three broad reviews of the Australian Constitution took place during this period: the Joint Committee on Constitutional Review of the Commonwealth Parliament, 1957–59; the Australian Constitutional Convention, 1973–85; and the Constitutional Commission, 1985–88.[94] Only the last of these, the Constitutional Commission, concluded that a Bill of Rights of some kind was desirable, and so considered the form that such an instrument might take.[95] The Commission recommended that a wide range of civil and political rights should be protected by the Commonwealth Constitution against legislative, executive or judicial action by

89 Australian Bill of Rights 1985 (Cth) cl 14; Constitutional Commission, ibid [9.56–9.57].

90 Australian Bill of Rights 1985 (Cth) pt V.

91 Constitutional Commission, above n 88, [9.59].

92 *Human Rights and Equal Opportunity Act 1986* (Cth); Constitutional Commission, ibid [9.19–9.22].

93 Constitutional Commission, ibid [9.21].

94 Cheryl Saunders, 'The Parliament as Partner: A Century of Constitutional Review' in G Lindell and R Bennett (eds), *Parliament, The Vision in Hindsight* (2001) 454.

95 See also, however, Senate Standing Committee on Constitutional and Legal Affairs, Parliament of the Commonwealth, *A Bill of Rights for Australia? An Exposure Report for the Consideration of Senators* (1985), preferring a legislative Bill of Rights to constitutional change: Constitutional Commission, above n 88, [9.64].

any sphere of government, 'subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.[96] In justifying this aspect of its proposal, the Commission noted that both spheres of government would be 'equally constrained' by the guarantees of rights.[97] It opposed, in particular, any suggestion that constraints should apply against Commonwealth action alone, noting that the rationale for positive protection of rights[98] applied in relation to any sphere of government.[99] It dismissed arguments that it would be illegitimate for rights guarantees in the national Constitution to apply to actions by a State in the absence of acceptance by the voters of that State, on the grounds that the Constitution itself legitimates the form of weighted 'majoritarian rule' for which s 128 provides.[100]

Two other aspects of the Commission's recommendations deserve note, for present purposes. First, the Commission rejected proposals to confer power with respect to human rights on the Parliament of the Commonwealth as unnecessary, given its recommendations for a constitutional Bill of Rights and as problematic, from the standpoint of characterisation and breadth of power.[101] It noted, however, that, if a Bill of Rights were added to the Constitution, the Parliament would have some additional capacity to make laws for its effective enforcement, through s 51(xxxix) of the Constitution, coupled with s 61.[102] Secondly, the commissioners divided over the desirability of what they termed an 'opt-out' clause,[103] of the kind found in s 33 of the Canadian Charter of Rights and Freedoms. A majority of the Commission opposed such a procedure, as inconsistent with the purpose of rights protection.[104] Commissioners Zines and Campbell, in the minority, developed an argument in support of an override provision as striking, in effect, an appropriate institutional balance.[105] Consistently with the guiding principle of the Commission's recommendations on rights, however, that they should be enshrined in the Constitution on terms that drew no distinction between spheres of government, the minority view would have conferred power to override rights for a renewable period of three years on the Parliaments of both the Commonwealth and the States.[106]

96 Ibid [9.139].
97 Ibid [9.193].
98 Ibid [9.100–9.105].
99 Ibid [9.193].
100 Ibid.
101 Ibid [9.942].
102 Ibid [9.943].
103 Ibid [9.210].
104 Ibid [9.211].
105 Ibid [9.228]–[9.234].
106 Ibid [9.212].

In the event, these recommendations were never pursued. The government instead drew a much more narrow referendum proposal from the Commission's recommendations on the extension of existing rights and freedoms that also, as it happens, would have achieved equality between the spheres of government, in another way.[107] Constitution Alteration (Rights and Freedoms) was put to referendum in 1988 with three other sets of proposals drawing on other aspects of the Commission's recommendations.[108] Rights and Freedoms would have extended to the States the three principal existing constitutional rights-type provisions that apply only to the Commonwealth: just terms in connection with the acquisition of property, trial by jury and freedom of religion. All four referendums were rejected, failing to satisfy even the requirement for national majorities.[109]

There is of course a sense in which this result reinforces the case against constitutional protection of rights, suggesting that the voters themselves have expressed their opposition, in relatively recent times. On the other hand, the peculiar circumstances in which the referendum took place, including the somewhat odd selection of proposals for change, which could be construed as cynical and which could not be explained as necessary, makes this result a doubtful indicator of the real views of voters towards constitutional rights protection or the form that such protection should take.

IV COMPARATIVE PROTOTYPES

There is no shortage of models for rights protection in countries around the world, which might be used as examples to explore the question of the model that might best suit Australia. Two are particularly useful for the purpose, however. The Canadian Charter of Rights and Freedoms provides a contemporary example of constitutional rights protection in a country that, like Australia, is a federal parliamentary democracy broadly in the British tradition. Like Australia also, but unlike South Africa, with its even more recent model for a constitutional bill of rights, Canada retains a degree of faith in the virtues of parliamentary sovereignty. The United Kingdom Human Rights Act, for its part, is a remarkable example of legislation that achieves a significant degree of rights protection through a combination of political accountability and judicial review, while leaving a form of parliamentary sovereignty ostensibly intact. The United Kingdom, at least in legal form, is a unitary system in which there is, nevertheless, a substantial degree of

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107 Ibid [9.701–9.833]. The Commission had been asked by the government to provide early advice on these matters and did so in its First Report dated 27 April 1988: at [1.80–1.83].

108 Ibid [1.90–1.910.

109 Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (3rd ed, 2002) 1307–8.

devolution of power to constituent parts of the state and, in particular, to Scotland. The rights instrument in each country thus was drafted to respond to circumstances and concerns that would need response in Australia as well.

A *Canadian Charter of Rights and Freedoms*

The federal character of the Canadian polity was instrumental in debates about the legitimacy of the Charter of Rights and Freedoms, shaped its substance and has influenced its development.

The Canadian Charter was introduced in 1982 after two decades of experience with a relatively ineffective legislative Bill of Rights that, in part because of limitations on federal power, applied only against the national government and Parliament. The opportunity to entrench rights protection was presented by the obvious need to 'patriate' the Canadian Constitution, at least to the extent of securing a procedure by which it could be altered within Canada, without recourse to the British government and Parliament. In the view of the then Canadian government, such a major step in Canadian constitutional evolution deserved more than technical patriation and a complex amending formula. Thus the Charter emerged: a crisp and clear statement of the rights and freedoms of people within Canada, written so as to maximise its educational potential. As a further aid to comprehension, the rights and freedoms are organised conceptually as follows: fundamental freedoms,[110] democratic rights,[111] mobility rights,[112] legal rights,[113] equality rights[114] and language rights.[115]

The opportunity presented by patriation became a burden as well, as the Charter became entangled in the dispute between Canadian governments over the need for provincial consent for an approach to the British Parliament to amend the Canadian Constitution one last time. When the Supreme Court of Canada affirmed the need for 'substantial provincial compliance or approval',[116] the provinces acquired a genuine voice in the form of the instrument, which also gave them some ownership of it. Failure to secure the agreement of Quebec, in circumstances where the precise requirements for alteration were disputed, undermined the legitimacy of the

110 Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK) c11, s 2.
111 Ibid, ss 3–5.
112 Ibid, s 6.
113 Ibid, ss 7–14.
114 Ibid, s 15.
115 Official Languages of Canada: Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK) c11, ss 16–22; Minority Language Educational Rights: s 23.
116 *Reference re Amendment of the Constitution of Canada* [1981] 1 SCR 753, 789.

Charter in the view of that province, fuelling the secession movement that followed.[117]

The result is an instrument that takes both rights and federalism seriously. The Charter applies equally to the Parliament and government of Canada and to the legislature and government of each province.[118] It can be enforced in any court of competent jurisdiction, including courts at the provincial level.[119] Section 31 expressly precludes interpretation of the Charter to extend the legislative authority of either sphere of government, in direct contrast to the Fourteenth amendment to the Constitution of the United States, denying even the limited extension of federal power foreshadowed for Australia by the recommendations of the Constitutional Commission.[120] Section 27 requires interpretation of the Charter 'in a manner consistent with … the multicultural heritage of Canadians.'

Two further features of the Charter preserve a space for decisions of elected institutions at both spheres of government, which might otherwise have been threatened by constitutional protection of rights, enforced by judicial review. Thus s 1 recognises that a law may subject rights 'to such reasonable limits … as can be demonstrably justified in a free and democratic society'. Section 33 allows the Canadian Parliament, or any provincial legislature, to declare that a particular Act shall operate 'notwithstanding' certain Charter guarantees, for a limited, but renewable, period of five years. From the standpoint of the design of rights instruments, both provisions appear to be driven by a concern for the role of the elected institutions, while enhancing their accountability for decisions, deliberately taken. As it happens, however, both are also linked with federalism. The 'notwithstanding' clause was introduced into the Constitution at the behest of the provinces,[121] as a condition of their support. It was used by the provinces, and notably by Quebec,[122] in the years immediately following the introduction of the Charter, to protect specific or general[123] policy initiatives. The limitation clause has proved adaptable to the reality that, in a federal system, different jurisdictions may make different policy choices that affect rights in different ways, which may

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117 P Russell, above n 10, ch 8.

118 Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK) c11, s 32.

119 Ibid, s 24.

120 Constitutional Commission, above n 88, [9.943].

121 Janet Hiebert, 'Parliament and Rights' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Human Rights* (2003) 231, 235.

122 Jeffrey Goldsworthy, 'Judicial Review, Legislative Override and Democracy' in Campbell, Goldsworthy and Stone (eds), ibid, 263, 277.

123 Quebec initially used s 33 to protect its legislation generally. This use of the section survived constitutional challenge: *Ford v Quebec* [1988] 2 SCR 712.

nevertheless represent 'reasonable limits' that 'can be demonstrably justified in a free and democratic society'.[124]

It has been argued that, in some respects, the Canadian Charter of Rights and Freedoms has had an homogenising effect on Canadian values. This may be inevitable, not least because of the educative function that an instrument of this kind is intended to play. In other respects, however, as James Kelly has shown, the Charter has made a positive contribution to Canadian federalism, over a period of 20 years.[125] He draws attention in particular to the emergence of an 'explicit federalism jurisprudence',[126] enabling the court to achieve a 'reconciliation between rights and federalism'.[127] Reconciliation in turn has taken at least two forms, both made possible by the design of the Charter. First, in applying the limitation clause, to determine whether a provincial law that was inconsistent with a protected right represented a reasonable limit that could be 'demonstrably justified in a free and democratic society' the court has recognised that policy diversity is to be expected in a federal state.[128] Secondly, the institutional dialogue prompted by the Charter, both through the capacity of a legislature to override a Charter provision in relation to a particular law[129] and as a result of the Supreme Court's use of suspended decisions,[130] is a dialogue involving the institutions of both spheres of government 'that share responsibility for the protection of rights and freedoms in Canada'.[131] The shares are unequal; Kelly notes the dominance of governments over legislatures in developing legislation to accord with the Charter and more elaborate mechanisms for Charter review in the federal than provincial spheres, although he attributes the latter to provincial choice.[132] Should Australia adopt an instrument of this kind, at some stage in the future, it would have the opportunity to anticipate the

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124 James Kelly, 'Guarding the Constitution' in J Peter Meekison, Hamish Telford and Harvey Lazar (eds), *Canada: The State of the Federation 2002* (2004) 77, 90.

125 Ibid.

126 Ibid 89.

127 Ibid 82.

128 Ibid 90, referring for example to *R v Jones* [1986] 2 SCR 284; *R v Edwards Books and Art Ltd* [1986] 2 SCR 713; *McKinney v University of Guelph* [1990] 3 SCR 229; *R v S(S)* [1990] 2 SCR 254.

129 The exact nature of this dialogue, in relation to which there is a vigorous debate in Canada, is not relevant for present purposes: see J Kelly, above n 124, 93–4 and the sources there cited; see also J Hiebert, above n 121.

130 J Kelly, above n 124, 94–8, showing the use of suspended decisions in 28 per cent of Charter cases involving the validity of provincial laws between 1982 and 2001: at 95. See also Kent Roach, 'Remedial Consensus and Dialogue under the Charter: General Declarations and Delayed Declarations of Invalidity' (2002) 35 *University of British Columbia Law Review* 211, 218–20.

131 J Kelly, above n 124, 94.

132 Ibid 101–3.

need for parliamentary involvement and heightened State institutional capacity, in the light of Canadian experience, should it choose to take it.

B *Human Rights Act 1998 (UK)*

Enactment of the Human Rights Act 1998 (UK) (HRA) was driven by the desire to give the European Convention on Human Rights (ECHR) domestic effect in United Kingdom law.[133] A preoccupation of its proponents was to do so in a way that preserved the sovereignty of the United Kingdom Parliament,[134] at least to the extent of avoiding a procedure by which a court could declare an Act of the Parliament invalid. The HRA was negotiated and implemented at a time when a range of other proposals for change of a constitutional kind were under consideration by the United Kingdom government and Parliament. One such proposal, implemented in the same year, involved devolution of authority, in varying degrees, to governmental institutions in Scotland, Northern Ireland and Wales.[135] The HRA had binding effect on these institutions as well. For present purposes the United Kingdom experience is relevant both as a recent and highly sophisticated example of legislative human rights protection and for its impact on the institutions of devolved government. For this latter purpose, however, the significance of the legally unitary character of the United Kingdom state must be taken into account.

The achievement of the HRA lies in providing significant rights protection without judicial review of the validity of primary Act of the United Kingdom Parliament. Its effect depends upon a range of interconnected mechanisms, now too well known to need more than brief mention. The protected rights and freedoms are drawn directly from the ECHR, the relevant Articles of which are set out in schedule 1 of the Act,[136] subject to derogation or reservation pursuant to ss 14 and 15 of the HRA.[137] Section 6 makes it 'unlawful' for a public authority, broadly defined,[138] to 'act in a way which is incompatible' with a protected right. A court has broad

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133 Lord Irvine of Lairg, 'The Development of Human Rights in Britain' [1998] *Public Law* 221, 223.

134 *United Kingdom Rights Brought Home: The Human Rights Bill*, Cm 3782 (1997) [2.13].

135 See the *Scotland Act 1998* (UK) C46; the *Northern Ireland Act 1998* (UK) C47; and the *Government of Wales Act 1998* (UK) C38 respectively.

136 *Human Rights Act 1998* (UK) C42, s 1.

137 *Human Rights Act 1998* (UK) C42, s 1(2). A derogation or reservation must be made by order of the Secretary of State: at 14(1)(b), 15(1)(b). A derogation has effect for a maximum period of 5 years (which may be renewed): at s 16.

138 *Human Rights Act 1998* (UK) C42 s 6(3) defines public authority to include courts and tribunals and persons 'certain of whose functions are functions of a public nature'; it excludes the Houses of the Parliament.

power to grant relief in such a case, and may award damages.[139] The HRA does not affect the 'validity, continuing operation or enforcement of … incompatible primary legislation',[140] nor of subordinate legislation if the source of the incompatibility is the primary legislation itself.[141] But it authorises such legislation to be construed in a way that is compatible with Convention rights 'so far as it is possible to do so'.[142] Failing a solution through interpretation, a court may make a 'declaration of ... incompatibility',[143] triggering a process by which a Minister, by 'remedial order', may amend the legislation to remove the incompatibility.[144] In relation to each new Bill, the responsible Minister must make a statement to the relevant House as to whether or not, in the Minister's view, the Bill is compatible with the protected rights.[145]

The *Human Rights Act* thus relies for its efficacy on a combination of judicial review and heightened accountability of elected institutions for decisions affecting rights, coupled with, perhaps, the greater clarity and general accessibility of protected rights that can be provided by an instrument of this kind.[146] In the relatively short time since it came into effect, it has been an undoubted success.[147] The courts have given it teeth, through judicial review, but not so many as to attract the serious ire of other branches. Government and Parliament have responded positively to the challenge as well, not least through the establishment of a parliamentary Joint Committee on Human Rights, to complement the accountability mechanisms in the HRA itself.[148] Before leaving office, Lord Irvine of Lairg, who had presided over the introduction of the HRA, as Lord Chancellor, described it as having 'breathed new life into the relationship between Parliament, Government and the Judiciary'.[149]

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139 *Human Rights Act 1998* (UK) C42, s 8.

140 *Human Rights Act 1998* (UK) C42, s 3 (2)(b).

141 *Human Rights Act 1998* (UK) C42, s 3(2)(c).

142 *Human Rights Act 1998* (UK) C42, s 3(1).

143 *Human Rights Act 1998* (UK) C42, s 4.

144 *Human Rights Act 1998* (UK) C42, s 10, sch 2. The procedure may also be used to respond to a decision of the European Court of Human Rights: at s 10(1)(b).

145 *Human Rights Act 1998* (UK) C42, s 19.

146 The *New Zealand Bill of Rights Act 1990* (NZ) also combines these features and influenced the HRA; the UK instrument developed them further, however.

147 *ACT Bill of Rights* Consultative Committee, above n 24, [3.42–3.47], providing relevant statistics to mid 2003.

148 Through, for example, scrutiny of bills and consideration of proposals for remedial orders: Joint Committee on Human Rights <http://www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights.cfm>, at 7 August 2004.

149 Lord Irvine of Lairg, 'The Human Rights Act Two Years On; An Analysis' (Speech delivered at the Inaugural Irvine Human Rights Lecture, Durham University, November 2002, quoted in ACT Bill of Rights Consultative Committee, above n 24, [3.47].

In Scotland, Wales and Northern Ireland, however, the effect of the HRA on decisions of institutions exercising devolved power is quite different. In the discussion that follows, I will focus on Scotland, where the degree of devolution is more extensive than in Wales and has been able to function without interruption, in contrast to Northern Ireland.[150]

The three devolution Acts were passed in 1998. In all three regions, devolution followed successful referendums.[151] In Scotland, the legislation established an elected Parliament with an executive responsible to it.[152] Broad power to make laws was conferred on the Scottish Parliament,[153] subject to an extensive range of reserved matters and other restrictions,[154] and the administration was given executive power to match.[155] Pre-enactment procedures for the scrutiny of Scottish laws,[156] involving both Scottish and UK institutions,[157] sought to prevent questions of invalidity arising. The need for judicial review was also envisaged, however, with the Privy Council as the final court of appeal.[158]

The model for devolution to Scotland thus incorporated many features of a common law federation, recognising distinct spheres of government with their own institutions and allocating power between them. Despite appearances, the model is at best 'quasi-federal',[159] however, for one reason above all: the continuing sovereignty of the Parliament at Westminster. As in relation to the HRA, the devolution legislation was designed to achieve a desired effect without impairing the legal sovereignty of the Westminster Parliament. Despite the Sewel convention, that 'Westminster would not normally legislate with regard to devolved matters …

150 For a comparative table of devolution provisions see Robert Hazell, 'Introduction: the First Year of Devolution' in R Hazell (ed) *The State and the Nations* (2000), 1, 4–5. The Northern Ireland Assembly and Executive have been suspended since October 2002.

151 John Curtice, 'The People's Verdict' in R Hazell (ed), ibid 223. Curtice draws attention, however, to the low turn-out in Wales and to the bare majority Protestant support in Northern Ireland.

152 *Scotland Act 1998* (UK) C46, s 1, pt II.

153 *Scotland Act 1998* (UK) C46, s 28.

154 *Scotland Act 1998* (UK) C46, ss 29, 57; see generally sch 4, 5.

155 *Scotland Act 1998* (UK) C46, ss 52, 53.

156 *Scotland Act 1998* (UK) C46, ss 31–6. These include a procedure for obtaining, in effect, an advisory opinion from the Privy Council: at s 33.

157 The UK Secretary of State has the power to prohibit submission of a bill for Royal Assent, in certain cases: *Scotland Act 1998* (UK) C46, s 35.

158 *Scotland Act 1998* (UK) C46, sch 6.

159 R Hazell, above n 150, 1, 1.

without the consent of the Scottish Parliament',[160] Scottish institutions are subject to UK legislative authority, with all the legal consequences that this entails.[161]

Ironically, the sovereignty of the United Kingdom Parliament would have enabled it to replicate for Scotland the delicate balance struck by the HRA between the institutions of the United Kingdom. It has not sought to do so, although, as will be seen, some features of the HRA apply in relation to the possible infringement of Convention rights by Scottish institutions, as a by-product of the devolution arrangements. One feature notably absent, however, is the combination of the declaration of incompatibility procedure with a power to make remedial orders, designed to preserve the authority of the United Kingdom Parliament vis-a-vis the courts. The international character of the instrument given effect by the HRA may provide part of the explanation. The government of the United Kingdom may be prepared to be answerable to the European Court for its own failure to respond to a declaration of incompatibility, but not for that of the Scottish authorities.[162]

In the absence of provision to the contrary, the HRA could have applied directly to Scottish institutions, as an Act of the United Kingdom Parliament. Indeed, there are signs that it does so. The definition of 'public authority' in s 6 of the HRA is broad enough to include the Scottish executive and administration. Section 21 defines subordinate legislation to include Acts of the Scottish Parliament and subordinate instruments made pursuant to such Acts. On this basis, it would have been unlawful for Scottish authorities to act in a way incompatible with a protected right, attracting the broad remedial powers of courts under s 8, to make orders that are 'just and appropriate'. Section 3 could also be construed to require Acts of the Scottish Parliament to be read in a way that is compatible with the protected rights 'as far as it is possible to do so', failing which, as subordinate legislation, they would have been subject to invalidation.[163]

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160 United Kingdom, House of Lords Debates , vol 592, 21 July 1998, col 791 (Lord Sewel), quoted in Alan Page and Andea Batey, 'Scotland's Other Parliament: Westminster Legislation about Devolved Matters in Scotland since Devolution' [2002] *Public Law* 501, 501. Page and Batey show that Westminster legislation has been substantial, with 30 Sewel motions in the Scottish Parliament to April 2002; at 503–5.

161 *Scotland Act 1998* (UK) C46, s 28(7) specifically provides that the conferral of legislative authority on the Scottish Parliament 'does not affect the power of the Parliament of the United Kingdom to make laws for Scotland'.

162 A similar point is made in the context of the powers of the Scottish executive in *HM Advocate v R* [2003] SLT 4, 17 (Lord Hope of Craighead).

163 Section 4(4) would not apply, because the *Scotland Act 1998* (UK) does not prevent removal of the convention right; see also Iain Jamieson, 'Relationship between the Scotland Act and the *Human Rights Act*' [2001] Scots 43, 44.

The Scotland Act itself, however, also protects Convention rights,[164] and in a manner that has been held to make breach by Scottish institutions a devolution issue, rather than an issue arising under the HRA.[165] Under s 29, a provision incompatible with Convention rights is 'outside the legislative competence" of the Scottish Parliament.[166] Section 57 (2) restricts executive power to act in a way that is "incompatible with any of the Convention rights'. As a constituent element of the framework of power of Scottish institutions, rights protection thus attracts other provision of the Scotland Act. A Minister in charge of a Bill must state whether, in his or her view, the Bill is within the legislative competence of the Parliament, which includes a judgement about compatibility with Convention rights.[167] The Privy Council may be asked for an advisory opinion on whether a Bill is within the legislative competence of the Scottish Parliament[168] and the presiding officer is required to delay submission for Royal Assent accordingly.[169] Each Act and subordinate instrument is required to be read 'as narrowly as is required for it to be within competence, if such a reading is possible'.[170] Initially, only the United Kingdom government, but not the Scottish government, was empowered to make subordinate legislation to, as the marginal note describes it 'remedy ultra vires acts'.[171] More recently, however, the Scottish Parliament has conferred comparable authority on its own executive.[172] Courts may determine questions of ultra vires, with an avenue of final appeal to the Privy Council.[173]

From the perspective of federal principle, it may be seen as appropriate to have imposed rights based limitations on Scottish institutions through their constituent legislation, rather than in a general Act of the United Kingdom Parliament, albeit also 'constitutional' in character.[174] Nevertheless, differences in the schemes of the two Acts, which in turn are attributable to differences in their underlying purposes, have tended further to increase the disparity between the rules applicable to Scottish and to United Kingdom institutions, raising concerns about federal principle of another kind. The concept of lawfulness of public action under s 6 of the HRA, for example, coupled with the provision for flexible judicial remedies in s 8, is less

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164 Defined to have the same meaning as in the *Human Rights Act 1998* (UK): *Scotland Act 1998* (UK) C46, s 126.

165 *Mills v HM Advocate (No2)* [2001] SLT 1359; *HM Advocate v R* [2003] SLT 4.

166 The *Human Rights Act 1998* (UK) is also a 'reserved matter': *Scotland Act 1998* (UK) C46, sch 4, cl 1(2)(f), s 29(2)(b)

167 *Scotland Act 1998* (UK) C46, s 31.

168 *Scotland Act 1998* (UK) C46, s 33.

169 *Scotland Act 1998* (UK) C46, s 32. The Scottish Parliament is required to adopt procedures that complement pre-enactment scrutiny: at s 34, 36.

170 *Scotland Act 1998* (UK) C46, s 101.

171 *Scotland Act 1998* (UK) C46, s 107.

172 *Convention Rights (Compliance) (Scotland) Act 2001* (Scot) asp 7, pt 6.

173 *Scotland Act 1998* (UK) C46, ss 102–3, sch 6.

174 *Thoburn v Sunderland City Council* [2003] QB 151.

rigid than s 57(2) of the *Scotland Act*, which denies power altogether to the Scottish executive to act in a way that is incompatible with a Convention right.[175] Thus in *HM Advocate v R*[176] a majority of the Privy Council held that the effect of s 57(2) of the *Scotland Act* was to preclude the Lord Advocate from prosecuting without further delay in a case in which the delay that had already occurred was in breach of article 6(1) of the Convention, even though such a sanction was more severe than that required by the jurisprudence of the European Court of Human Rights, and even though a different result was possible in relation to England and Wales, pursuant to the HRA.[177]

Not surprisingly, given the continuing sovereignty of the Westminster Parliament, the manner in which rights protection is blended with devolution in the United Kingdom has both federal and unitary features. Rights protection is secured through the legislation constituting the Scottish institutions, which arguably is the appropriate vehicle. But the focus of the devolution legislation is on absolute boundaries of power and this has sometimes served to magnify differences in the impact of rights protection on the institutions in the two spheres. The devolution legislation provides a range of procedures for the pre-enactment scrutiny and interpretation of legislation, which in other jurisdictions have been identified as conducive to institutional dialogue. At least some of these procedures involve United Kingdom institutions, however, reinforcing the final legal authority of Westminster.[178] Significantly, the key feature underpinning institutional dialogue, conferring on legislatures themselves a choice to insist on the continuing operation of legislation, in conditions that enhance accountability for the choice, is missing. From the standpoint of rights protection this does not matter; indeed, it may be deemed a good thing. But in the context of a scheme of rights protection designed to respect and preserve the role of elected institutions, it makes a statement about the respective importance of the institutions of the two spheres that is hard to reconcile with federal principle.

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175 For the difference between an 'unlawful act' and a 'purported act', see *HM Advocate v R* [2003] SLT 4, 29 (Lord Rodger of Earlsferry).

176 [2003] SLT 4.

177 Ibid (Lord Hope of Craighead, Lord Clyde and Lord Rodger of Earlsferry, Lord Steyn and Lord Walker of Gestingthorpe dissenting). Lord Hope of Craighead was inclined to justify the application of distinctive rules to Scotland on the grounds that '[t]he Scottish system has accepted the imposition of statutory time limits on the prosecution of offences which are far more onerous than anything that the English system has been able to accept': at 21. In *Attorney-General's Reference (No 2 of 2001*) [2004] 2 AC 72, the House of Lords duly held that there would be no automatic termination of the right to proceed in England and Wales in these circumstances, with some criticism of the result in the Scottish case.

178 *Scotland Act 1998* (UK) C 46, s 33 (allowing the Attorney-General to seek an advisory opinion on a Scottish Act), s 35 (precluding submission of a Scottish Bill for Royal Assent), s 107 (making delegated legislation to overcome a vires problem).

V RIGHTS PROTECTION IN AUSTRALIA

An Australian model for rights protection, at the national level, would be likely to be driven by two factors in particular, apart from the desire for rights protection itself. One is the federal character of the state. The other is concern for the authority of representative institutions. In this part, I explore the implications of these factors for the choice between legislative or constitutional protection of rights by reference to questions of power, both legal and political and questions of principle, from the standpoint of both federalism and parliamentary sovereignty.

A *Power*

1 *Legal power*

The Australian Constitution places legal constraints on what governments and Parliaments may do. It presents no legal obstacle to constitutional protection of rights, which itself depends on constitutional change; admittedly a formidable practical obstacle, to be dealt with below. A legislative Bill of Rights enacted by the Commonwealth Parliament, on the other hand, must fit within the terms of the present Constitution and would be likely to be significantly affected by it.

The Parliament may rely on the external affairs power to enact a legislative Bill of Rights as long, at least, as it takes the form of incorporating into domestic law international human rights instruments to which Australia is a party.[179] Difficulties would arise, however, in implementing the other features of a legislative Bill of Rights that make the United Kingdom Human Rights Act so effective.

Even in application to the Commonwealth sphere of government, at least one such difficulty arises. It may be assumed that the Parliament may legislate to require courts to construe legislation in a manner compatible with protected rights, 'so far as it is possible to do so'. Once the limits of interpretation are reached, however, legislation authorising courts to make a declaration of incompatibility, having no legal effect, would surely be invalid, as an attempt to confer non-judicial power on a court, contrary to the separation of judicial power. While the question before the court would not be abstract, the answer to it would not be a 'step in the judicial determination of the rights and liabilities in issue in the litigation'.[180]

The key to the success of this aspect of the United Kingdom model lies in its use of judicial review to force a greater measure of political accountability for decisions affecting rights, in order to achieve more effective rights protection without

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179 *Commonwealth v Tasmania* (1983) 158 CLR 1.

180 *Mellifont v A-G (Qld)* (1991) 173 CLR 289, 303 (Mason CJ, Deane, Dawson, Gaudron, McHugh JJ).

sacrificing the sovereignty of the Westminster Parliament. There is a question whether, in Australia, this effect might be achieved in another way, if the declaration of incompatibility procedure is not available. One possibility is suggested by the technique used effectively in relation to the Canadian Bill of Rights Act 1960 (BORA), adapted for Australia in earlier Commonwealth human rights proposals.[181] Section 2 of the Canadian BORA provides that laws are to be interpreted and applied so as not to abrogate the protected rights, unless the conflicting law is declared to operate 'notwithstanding' the Bill of Rights Act. The course of judicial interpretation of that provision has made it clear that the BORA applies to legislation that came into effect both before and after its enactment and that if an inconsistency cannot be resolved through interpretation, the conflicting legislation is 'inoperative'.[182] This result can be understood as recognition by the courts of the effectiveness of a 'form' requirement, which does not fetter the legal capacity of subsequent Parliaments to enact the legislation of their choice, but restricts the form in which they do so.

A procedure pursuant to which courts interpret other laws so as to be consistent with a Bill of Rights statute, failing which an inconsistent law is held to be inoperative, goes further than the United Kingdom model,[183] but has some similarities to it. The process begins with judicial review, to resolve a legal dispute; a decision by a court not to apply a statute would be of some moment and would attract attention accordingly; Parliament retains the authority to override the protected rights, by legislation, as long as it enacts the law in the required form. It is not clear whether Australian courts would accept such a clause as a "form" requirement and apply it in this way.[184] There are, however, arguments in favour of doing so. Recognition of the effectiveness of form requirements is compatible with at least one respectable version of parliamentary sovereignty.[185] Such a development is consistent with others, conceptually related to it, in Australia and in other parts of the common law world; most obviously the refinement of principles of statutory interpretation to avoid interference with common law and statutory

181 See above, Part III.

182 *R v Drybones* [1970] SCR 282; *Singh v Minister for Employment and Immigration* [1985] 1 SCR 177; *MacBain v Lederman* [1985] 1 FC 856. Cf Hogg, above n 76, 795, arguing that, logically, subsequent legislation should be considered invalid, rather than inoperative.

183 In New Zealand, s 4 of the *New Zealand Bill of Rights Act 1990* countered this result: Paul Rishworth et al, *The New Zealand Bill of Rights* (2003) 131.

184 Even if they were to do so, it is doubtful whether the form requirement could limit the operation of expressly inconsistent legislation to a period of years, as proposed by Williams, above n 13, 87. In this connection, see the distinction drawn by Hogg, above n 76, 319, between provisions imposing a manner and form for legislation and those imposing substantive restrictions.

185 G Winterton, above n 78, 176; Jeffrey Goldsworthy, *The Sovereignty of Parliament* (1999) 14, 15.

rights[186] but also, in the United Kingdom and Canada, the emerging acceptance of a hierarchical order of statutes.[187] On any view, the concept of parliamentary sovereignty as it operates in Australia differs from Dicey's traditional conception, in ways once attributable to overriding imperial authority, although now sustained by 'Australian sources'.[188]

Despite this, there must still be doubt about whether the High Court would recognise the effectiveness of a "form" requirement imposed by a Parliament established by a Constitution that confers specific powers on it and that also provides another mechanism[189] for protecting legal norms from abrogation by legislation.[190] Australian jurisprudence is not entirely unsympathetic to a broader application of manner and form.[191] The existing doctrine, however, has been developed primarily in the context of questions about the scope of authority of State Parliaments to impose or avoid manner and form requirements or about the effectiveness of procedures already prescribed by the Commonwealth Constitution.[192] Perhaps ominously, in the most recent foray of the High Court into manner and form, the course of reasoning of the majority suggests the continuing influence of the narrow jurisprudence of imperial times, while emphasising that the sources of all 'constitutional norms' are now Australian.[193] In these circumstances it is at least possible that, faced with a 'form' requirement in a Commonwealth legislative Bill of Rights, the Court would, at best, treat it as interpretative, discouraging implied repeal. In this event, if interpretation failed, the conflict would be resolved by reconciling the statutes, using traditional mechanisms of statutory interpretation.

Another kind of difficulty with adoption of the legislative model for rights protection in Australia lies in its application to the States. It is difficult for one sphere of government to create for another, by its own legislation, an institutional balance of the kind found for Westminster institutions in the HRA. It is more difficult still where that sphere of government itself is controlled by a written Constitution. Commonwealth legislation can extend to the States, impose duties on

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186 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; *Shergold v Tanner* (2002) 209 CLR 126.

187 *Thoburn v Sunderland City Council* [2003] QB 151; Hogg, above n 76. 318.

188 *Attorney-General (WA) v Marquet* (2003) 78 ALJR 105, 116 (Gleeson CJ, Gummow, Hayne and Heydon JJ).

189 The Constitution Alteration process in s 128.

190 *A-G (WA) v Marquet* (2003) 78 ALJR 105, 116 (Gleeson CJ, Gummow, Hayne and Heydon JJ).

191 *A-G (NSW) v Trethowan* (1931) 44 CLR 394, 426, Dixon J.

192 *Victoria v Commonwealth* (1975) 134 CLR 81 ('*PMA Case*').

193 *A-G (WA) v Marquet* (2003) 78 ALJR 105, 116–7 (Gleeson CJ, Gummow, Hayne and Heydon JJ).

State governments subject, perhaps, to immunities principles,[194] and override inconsistent legislation of State Parliaments. In this case, however, the Commonwealth legislation has the effect of paramount law, beyond the authority of State Parliaments, although subject to ordinary legislation of the Commonwealth Parliament. The unequal application of a legislative Bill of Rights to the two spheres of government in Australia would be aggravated further by the inevitable absence of other elements of the HRA model in relation to the States. 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, although the States themselves might do so if they wished.

It may be that the effects of the HRA could be approximated most closely in Australia through an intergovernmental scheme, pursuant to which the Commonwealth rolled back national legislation in its application to the institutions of particular States once it was satisfied that complementary and satisfactory State legislation was in place. This is not the occasion to explore this option further; two brief observations should, however, be made. The first is that, if other States and territories were to follow the lead of the Australian Capital Territory by introducing legislative rights protection, this would provide a foundation on which such a co-operative scheme might build. Secondly, however, any such scheme would lack the clarity and simplicity desirable for national rights protection. This problem would be magnified if, as seems likely, there were significant variations in rights instruments between jurisdictions.

2 *Political power*

The argument in the preceding section identified some legal difficulties for the design of a legislative Bill of Rights, enacted by the Commonwealth Parliament, suggesting that constitutional protection has an advantage on this score. On the other hand, at least at first glance, the political difficulties of constitutional protection are extreme. Constitutional change has become almost automatically controversial in Australia. The record of success at referendum is low. Constitution Alteration bills that have failed badly at referendum in the relatively recent past include proposals to extend constitutional rights.

Achievement of legislative protection of rights, on the other hand, appears much more straightforward. A legislative bill of rights is often suggested as a precursor of

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194 Query whether a Bill of Rights could be held to prevent States '[functioning] as governments': *Austin v Commonwealth* (2003) 195 ALR 321, 357. Cf *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 163–4 (Brennan J), 242 (McHugh J). Cf also Constitutional Commission, *Report 1988*, above n 88, [9.111].

constitutional protection, for this reason.[195] Its advantage in this respect should not be overstated, however, particularly if undertaken unilaterally, without State co-operation. Even legislative protection requires public support or, at least, the absence of vigorous public opposition. Previous attempts at legislative protection of rights have failed, in part through opposition from the States. The legal difficulties of legislative protection, identified in the earlier section, complicate design of an Australian legislative model so as to capture the benefits of institutional balance and draw on positive comparative experience. Conversely, objections to constitutional protection may be minimised by a model that can be portrayed as enhancing institutional dialogue in the course of more effective protection of rights, in a manner applicable equally to both the Commonwealth and the States.

B *Principle*

1 *Federalism*

Throughout this paper I have made the assumption that federal principle suggests that, if national rights protection were now introduced for Australia it should apply equally, or as equally as possible, to both the Commonwealth and the States. That argument was developed in Part II of the paper, and I will not repeat it here.

I acknowledge that a contrary argument is possible, both generally and in relation to Australia in particular. Not every federation adheres to a principle of equality of this kind: the United States is an obvious exception. Even if the principle were generally correct, its modification in relation to Australia may be justified. Unlike Canada, the national sphere of government in Australia has the power to enact a legislative Bill of Rights, albeit one with differential operation between the Commonwealth and the States: why then should it not do so? Differential application may in any event be less important in Australia, an increasingly centralised federation in which the mobility of people, coupled with a somewhat pragmatic attitude to governance, has altered the perception of States as distinct political communities. Australian history is at best an ambiguous guide to acceptance of a principle of federal equality for this purpose; and at worst, it suggests that equality does not matter. The few specific rights instruments already enacted by the Commonwealth apply unequally between the Commonwealth and the States.

These arguments are respectable, but they do not, in my view, outweigh those in favour of the equal application of an Australian rights instrument, drawn from the logic of the Australian federal structure, at the point where it intersects with representative democracy. In any event, however, the difficulties of designing a

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195 Williams, above n 13, 88, 89, referring also to the usefulness of legislative instruments, in both spheres of government, to encourage a 'rights culture'.

legislative Bill of Rights for the Australian federation do not rest on federal principle alone. My point here, therefore, is simple: to the extent that equality is important, for reasons of federal principle or, for that matter, political pragmatism, constitutional change is indicated. Even this would need to be crafted with care, to minimise the automatic increase in federal legislative,[196] executive[197] and judicial[198] power associated with inclusion in the Australian Constitution.

2 *Parliamentary sovereignty*

The principle of parliamentary sovereignty is used here as a form of shorthand, to refer to the final authority of elected institutions, operating within a system of responsible government, which hitherto has prevailed in Australia in relation to the protection of rights, which would need to be taken into account in designing any general rights instrument.

Parliamentary sovereignty, thus understood, also suggests that a national rights instrument should apply more or less equally to the spheres of government, for the following reasons. Both spheres of government have representative institutions, of a similar kind, operating on similar lines. Australia traditionally has relied on the institutions of both spheres to protect rights, both negatively and positively. If the system were changed, by the introduction of a Bill of Rights in some form, there would be concern to protect the authority of elected institutions from too substantial a transfer of power to courts. To the extent that such protection also resulted in enhanced institutional dialogue and accountability, so much the better. These concerns are not confined to one sphere of government; they apply to both. A rights instrument that preserved the authority of Commonwealth institutions, but not those of the States, would be vulnerable to criticism on that ground.

From this perspective also, therefore, constitutional protection of rights has an advantage. Such a conclusion is ironic, in the sense that constitutional protection offers a greater potential threat to elected institutions than does legislative protection, at least for the institutions of the enacting jurisdiction. At this point, however, the limitation and override clauses of the Canadian Charter of Rights and Freedoms become relevant. These would be likely to be components of an Australian constitutional rights instrument. In this case they should be applicable to the legislative authority of both spheres, as in Canada.

It may be objected that these mechanisms have proved inadequate to maintain a satisfactory institutional balance in Canada, because the potential opprobrium of legislating 'notwithstanding' a protected right has proved too great for the elected

196 Constitution s 51(xxxix), in association with s 61.
197 Constitution s 61.
198 Constitution s 76(1).

institutions to be prepared to accept.[199] To the extent that this is regarded as a problem for Australia, it could be met readily enough, by alterations to the wording of the Canadian clause, along lines that others have suggested elsewhere.[200] But I am sceptical about significance of the problem in Australia, in any event. Political attitudes to the override clause in Canada were coloured by the circumstances in which it was introduced, grudgingly, at the insistence of the provinces. From the outset, the Canadian government portrayed the clause as undesirable and its use as inappropriate.[201] In Australia, such a clause should be presented as a component part of an innovative and contemporary scheme for rights protection, designed to suit Australian needs and expectations. Cultural differences between countries also make the operation of borrowed mechanisms difficult to predict; compare, for example, the apparent willingness of successive New Zealand governments to introduce legislation that is admittedly inconsistent with the New Zealand Bill of Rights with the low number of such admissions in the United Kingdom and the limited use of the override clause in Canada.[202] Australian governments could be expected to be more assertive still. If anything, the challenge in Australia might be precisely the opposite: to develop sufficient respect for the rights instrument in the first few years of its operation to ensure that it was not overridden too readily.

VI CONCLUSION

In this paper I suggest two things. The first is that the federal character of the Australian polity should be taken into account in designing systemic rights protection. The second is that, as a consequence, carefully crafted constitutional protection of rights may be more acceptable than statutory protection.

The latter flies in the face of orthodoxy on two counts. First, 100 years of failed constitutional referendums has left us inclined to avoid constitutional change if any reasonable alternative is available. Minimalism was not born with the republican debate, but affects most discussion of change in relation to the system of government. Secondly, the principal impediment to systemic protection of rights is generally assumed to be parliamentary sovereignty.

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199 J Goldsworthy, above n 121, 274–8, canvassing other writings on this issue.

200 Christopher Manfredi, *Judicial Power and the Charter. Canada and the Paradox of Liberal Constitutionalism* (2001) 193, quoted in Janet Hiebert, 'Is it too late to Rehabilitate Canada's Notwithstanding Clause?'.

201 Ibid. Hiebert draws attention to the Canadian Department of Justice's own description of the clause (until 2003) as '[a]n escape clause for provincial governments': at 6.

202 P Rishworth, above n 10, 117.

As usual, there is much to be said for both orthodox positions. I do not seek to deny them, but to encourage deeper reflection on whether the problem is more complex than they suggest, and whether there are other ways of overcoming apparently endemic attitudes to rights protection. My own view is that, properly conceived and presented, constitutional change to protect an agreed core of rights in a way that has some regard to both parliamentary sovereignty and federalism is not only feasible but is likely to produce more healthy democratic communities in the long run. But I have always been an optimist in these matters.