SUBMISSION BY THE ATTORNEY GENERAL TO THE NATIONAL HUMAN RIGHTS CONSULTATION COMMITTEE

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Dear Father Brennan,

I am writing in response to your letter inviting comment on the National Human Rights Consultation. I am opposed to the imposition of a national human rights act, but would like to advance the New South Wales model of rights protection as a successful framework for protecting and promoting human rights, and as a useful model for the Commonwealth.

A national human rights act?

There should not be a national human rights act for the following reasons:

1. **Anti-democratic**: Abstract human rights principles give unelected judges an additional layer of subjectivity and discretion; their decisions become political and personal rather than legal. 'The greater the degree of vagueness in the law, the greater the power of the judges in charge of it.'[1] This encourages judicial activism.[2] As stated by the NSW Solicitor General, Michael Sexton SC, 'law cannot be a substitute for politics. To hand these questions over to courts does not make them legal rather than social or economic questions.' Many rights 'rest on controversial propositions, matters open to reasonable disagreement, issues that should properly be debated in the public arena'.[3] These are 'essentially political questions'[4] which courts should not be adjudicating upon.

   Judges focus on single cases of private conflicts and apply the law. Conversely, parliaments are better placed to weigh up competing rights within diverse societies – they are institutions designed for consultation, discussion and resolution of challenging political questions.[5]

[1] James Allan, Grant Huscroft and Nessa Lynch, 'The Citation of Overseas Authority in Rights Litigation in New Zealand' (2007) 11 *Otago Law Review* 433, quoted in Human Rights Law Resource Centre, 'The National Human Rights Consultation – Engaging in the Debate' at 105
[2] As found by the Standing Committee on Law and Justice, 'Report 17 A NSW Bill of Rights', *NSW Parliamentary Library*, 3 October 2001
[3] Professor Helen Irving, 'Might a right, but let's not bill the rest', *Sydney Morning Herald,* 9 December 2008
[4] Former High Court Judge Ian Callinan, quoted in P Maley and C Kerr, 'Critics read the rights act over panel', *The Australian*, 11 December 2008
[5] As found by the Standing Committee on Law and Justice, 'Report 17 A NSW Bill of Rights', *NSW Parliamentary Library*, 3 October 2001

2. **Undermines parliamentary sovereignty**: The interpretation provisions in other jurisdictions' human rights acts compel courts consciously to interpret legislation in a way parliament never intended – this undermines interpretation doctrines and parliamentary supremacy. In New Zealand, judges have granted remedies for breaches of the *Bill of Rights Act 1990* that are not provided for in the legislation and are contradictory to the then prime minister's public statements.[6]

   Parliaments would face unacceptable political pressure from the judiciary. By declaring incompatibility with human rights, even when such a 'violation' is entirely practical, reasonable and necessary, or by invoking the interpretation division, democratically elected representatives are branded human rights abusers and held accountable to unelected appointees. This breaches the principle of parliamentary supremacy, forces legislatures 'into the position of saying "we intend to breach your fundamental rights"', and conveys the impression that judges have the only authoritative, definitive answer on rights.[7] Other jurisdictions report trepidation from legislatures lest their democratically passed law be condemned for human rights violations, causing overcautiousness based on speculative interpretations of abstract human rights principles. The notion of a dialogue also deprives the legislature of its finality and authority, allowing courts effectively to send back legislation and tell parliaments to redo it. Dialogue should be between the elected representatives of parliament and their constituents, rather than with the judiciary via declarations of incompatibility.

3. **Politicisation of the judiciary**: Rights decisions are inherently contentious and political, and are at odds with the weight of certainty given to legal decisions. Judicial decisions regarding human rights will be dragged through the media, embroiling the judiciary in controversy. The judiciary in the UK has been forced to make decisions that are publicly unpopular with government. Professor Yves-Marie Morisette has stated in relation to the Charter of Rights in Canada: 'With this devolution [of power from legislatures to the courts] comes the inevitable politicisation of the judiciary. Concerns are now expressed about judicial appointments which previously were only heard in the electoral process.' Where the division of duties between parliament and the judiciary is blurred, both institutions suffer.

4. **Legal uncertainty**: Charters generate uncertainty about the meaning of laws and undermine the finality of legislation by imposing an additional layer of interpretation over all legislation. In Victoria and the ACT, international law and judgments of domestic, foreign and international courts and tribunals can be considered in interpretation.[8] Even at face value, the Victorian (s 7) and ACT Acts provide that the rights are limited to the extent that is demonstrably justified in a free and democratic society – a notion open to any number of judicial interpretations with a dearth of jurisprudence. Human rights acts do not require ambiguity in a statute before they can operate, meaning that previously settled statutory interpretation may be revisited and overturned.[9]

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[6] Human Rights Law Resource Centre, 'The National Human Rights Consultation – Engaging in the Debate', at 10-11

[7] James Allan, 'The Victorian *Charter of Human Rights and Responsibilities:* Exegesis and criticism' (2006) MULR 28

[8] Section 32(2), *Charter of Human Rights and Responsibilities Act 2006* (Vic); Section 31, *Human Rights Act 2004* (ACT)

[9] Rachel Ball & Melanie Schleiger, 'Think global, act local', 83.1/2 *Legal Institute Journal* (Jan/Feb 2009) 46 at 47. This has occurred in the United Kingdom – see *Ghaidan v Godin-Mendoza* [2004] AC 557 where the Court went so far as to say the *Human Rights Act* may require a court to depart from the intention of the Parliament which enacted the legislation.

There is a danger that Parliaments will feel unduly pressured, becoming timid and overcautious under the sword of Damocles of judicial indictment of their legislation. This, according to its supporters, has been the major effect of the ACT human rights act.[10] For public authorities, regular amateur interpretation of the Act will be necessary in performing their roles,[11] potentially exposing governments to liability. For business and government, legal uncertainty means increased risk and more money allocated to legal budgets. This ultimately benefits lawyers because it makes them even more indispensable in the everyday speculations about what would and would not be human rights compliant, yet ultimately only litigation will determine the effect of a human rights act.

The practical effects of human rights acts are also unpredictable. Examples of rights that could have unintended consequences are:

a) The right to life affecting the legality of abortion and the right to choose to die with dignity;
b) The right to religious practice affecting the freedom of speech right to criticise religions;
c) The right to equality and protection from discrimination affecting a church or religious body's ability to consider a person's religion or gender in matters of employment.[12]

5. **Erosion of the federal system**: Federalism itself is an effective mechanism for protecting rights. Moreover, the federal system in Australia (the Constitution, the Senate and the States) have been instrumental in democratically defeating previous attempts to bring in a national human rights law.[13]

   The States have plenary legislative power and any attempt to erode that power, directly or indirectly, through a human rights statute at the Commonwealth level, raises significant constitutional issues, and is likely to be of significant concern to state governments.

   The Victorian and ACT Acts instruct courts to interpret statutory provisions in a way that is compatible with human rights so far as it is possible to do so consistently with their purpose.[14] This means that a federal law, informed by international law,[15] could cause state parliamentary intention to be circumvented, effectively overturned by the courts. States should be free to pass their own human rights acts, as the ACT and Victoria have done, as and according to the wishes of their disparate citizenries.

   I query the effectiveness of a national human rights act if the State governments are not wholly committed to it.

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[10] A Byrnes, H Charlesworth & C McKinnon, *Bills of Rights in Australia: History, Politics and Law* (2009) at 86

[11] For example, 'it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right' under the *Charter of Human Rights and Responsibilities Act 2006* (Vic), and the police are to 'have regard to the human rights' in the act under the *Police Regulation Act 1958* (Vic).

[12] HRLRC, above n6, at 13

[13] Brian Galligan, 'No Bill of Rights for Australia', *Papers on Parliament No. 4* (July 1989), available at: http://www.aph.gov.au/Senate/pubs/pops/pop04/pop4.pdf

[14] Section 32(1), *Charter of Human Rights and Responsibilities Act 2006* (Vic); Section 30, *Human Rights Act 2004* (ACT)

[15] Section 32(2), *Charter of Human Rights and Responsibilities Act 2006* (Vic); Section 31, *Human Rights Act 2004* (ACT)

6. **Unconstitutional**: Federal Courts cannot give advisory opinions or opinions on purely hypothetical matters[16] - it is not clear that a declaration of incompatibility will give any real remedy, and so the whole scheme may be unconstitutional.[17]

7. **Costly and inefficient**: The cost of this project to tax-payers is unacceptably high. Obvious costs include: research and formulation of the legislation and consequential amendments; administration costs (including funding and resources for organisations); compliance costs (training and monitoring public bodies subject to the Act); training for lawyers and judges; education for the public to avoid the misperceptions that plague the UK Act; and legal costs.[18] The availability of assistance and advocacy would be essential in the implementation of a national human rights act, including funding to community legal centres, National Legal Aid and the Australian Human Rights Commission.[19] There is also a huge cost in time and resources if the Attorney-General is to be joined to proceedings where declarations are sought.

   The ACT and Victoria do not report a flood of litigation due to their human rights acts, although this is not surprising given that actions can only be brought if the person has a claim otherwise than because of the Charter (ie it is contingent on an independent claim).[20] It is more difficult to quantify the court time dedicated to human rights arguments, which are very often used as auxiliary arguments, causing court cases to be prolonged. The 'most obvious effect of the Charter is to add opportunities to defence lawyers in criminal matters'.[21]

   For individuals, too, rights can only be asserted through the court system. For reasons of time and expense, the court system may not be the most accessible or efficient available for redress of human rights breaches. The models available provide human rights only to the few with resources to litigate.

8. **Stagnation of rights**: Enacting a human rights act may be the first and last chance to get it right: although a statutory charter is theoretically subject to change by the legislature, the political reality is that it would become semi-rigid, or 'constitutionalised'. Professor Helen Irving has stated that rights 'should be able to evolve, and the best way to do this is through the political process. The political process is accountable, and it is flexible. It allows for compromise, where litigation is usually a matter of winning or losing.' Rights may be inadvertently limited either by omission or by the words chosen and the courts' interpretation. It is also possible that a human rights act would give us a false sense of security, encouraging an intellectual disengagement from the necessary scrutiny of executive power, as has been the UK experience.[22] Some rights will never be litigated by an individual, for example the UK's *Human Rights Act* is criticised for doing nothing to halt the steady increase in surveillance. Targeted legislation is a far more efficient and effective method of protecting rights.

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[16] *Bass v Permanent Trustee Co Ltd* (1999) CLR 334 at [49]

[17] See Michael Pelly, 'Brennan foresees constitutional glitch with rights charter', 14 March 2008, *The Australian*, available at: http://www.theaustralian.news.com.au/story/0,25197,23371136-17044,00.html?source=cmailer ; Professor Helen Irving, 'Might a right, but let's not bill the rest', *Sydney Morning Herald,* 9 December 2008, available at: http://www.smh.com.au/news/opinion/might-a-right-but-lets-not-bill-the-rest/2008/12/08/1228584738166.html

[18] The Victorian Government Solicitor had a 20 per cent increase in revenue, largely fuelled by the newly introduced Charter according to Lawyers Weekly, 5 August 2008.

[19] HRLRC, above n6, at 17

[20] Section 39, *Charter of Human Rights and Responsibilities Act 2006* (Vic)

[21] Bob Carr, 'Lawyers Are Already Drunk with Power', *The Australian*, 24 August 2008

[22] See the UK experience: Henry Porter, 'Why I told Parliament: you've failed us on liberty', 9 March 2008, *The Guardian*, available at: http://www.guardian.co.uk/commentisfree/2008/mar/09/constitution/print

9. **Democratic, responsible, decentralised government is enough**: Australia's constitutional system combines a range of federal institutions with parliamentary responsible government. Federalism, bicameral legislatures, preferential voting, proportional representation, standing committees and inquiries, a free press, ministerial accountability and decentralised government are all commensurate with rights protection. Sir Harry Gibbs (1991) stated that 'the most effective way to curb political power is to divide it. A Federal Constitution, which brings about a division of power in actual practice, is a more secure protection for basic political freedoms than a bill of rights, which means those who have power to interpret it say what it means.'[23] Our institutions are stable and have ensured peaceful development of nation within the context of maximum personal freedom.

Former NSW Supreme Court Justice the Hon Malcolm McLelland QC noted that 'the public interest in Australia would be better served by avoiding the confusion, the difficulty, the time and expense involved in Australian courts and lawyers trying to understand these various different [overseas human rights] provisions and instead trying to be consistent with their own national culture and traditions.'[24]

The NSW status quo

In NSW, a system of parliamentary oversight, independent supporting bodies and targeted legislation provides effective human rights protection and promotion.

1. **Legislative Review Committee**: The Legislative Review Committee scrutinises all bills and many regulations introduced to NSW Parliament. The Committee reports to both Houses of Parliament on whether the legislation unduly trespasses on personal rights and liberties; makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers or non-reviewable decisions; or insufficiently subjects the exercise of legislative power to parliamentary scrutiny.[25] In determining the meaning of 'rights and liberties', the Committee considers international and domestic law rights (whether or not they are enforceable) including United Nations Conventions. The Committee enhances the parliamentary process by highlighting human rights issues to the legislature as a matter of course, which may, in turn, review and amend the bill or regulation. The Committee's Annual Review (06-07) reports that members and ministers frequently refer to or quote from the Committee's reports on Bills during debate. This procedure ensures that rights and liberties continue to be at the forefront of the mind of parliamentarians, compromised only when there is compelling reason to do so. The Committee also publishes discussion papers and receives submissions on issues such as strict and absolute liability and the right to silence, encouraging broader participation in the legislative review process.

2. **NSW Ombudsman**: The independent Ombudsman assists with monitoring government agencies and investigates complaints about government administration. It conducts important *ad hoc* reviews of government services such as the recent investigations into support for foster care children and the management of school suspensions. It is also involved in ongoing Freedom of Information and Joint

[23] Sir Harry Gibbs, *A Constitutional Bill of Rights*, in K. Baker (ed), *An Australian Bill of Rights; Pro and Contra* (1986) at 325

[24] The Hon Malcolm McLelland, Evidence 26/06/00 p7-8 in Standing Committee on Law and Justice, *A NSW Bill of Rights Report* (2001)

[25] Section 8A, *Legislation Review Act 1987* (NSW)

Guarantees of Service reviews, in which the Office scrutinises government, publicises its findings for public comment, and assists in formulating improvements. The Office has also been very active on the issues of emergency powers, crime, child protection, university and police complaint-handling, accessibility of services, particularly for young people, and most recently, Freedom of Information laws in NSW.

3. **NSW Anti-Discrimination Board**: The Anti-Discrimination Board administers the *Anti-Discrimination Act 1977* (NSW) and aims to promote anti-discrimination and equal opportunity principles and policies. There are ten grounds of discrimination covered (sex and pregnancy, sexual harassment, disability, race, homosexuality, marital status, age, transgender and carers' responsibilities), together with vilification (on grounds of race, homosexuality, HIV/AIDs status and transgender status), providing a practical way of protecting human rights in employment, state education, goods and services, accommodation and registered clubs. The Board provides an enquiry and complaints service and has dealt with over 34,000 cases in its 32 years of operation, helping to safeguard rights. Further, it actively promotes human rights awareness through consultations, education programs, seminars, talks, participation in community functions and written information. The Board also advises government, which takes these principles into account in making sound and positive policy decisions.

4. **Office of the NSW Privacy Commissioner**: The Office of the NSW Privacy Commissioner is responsible for educating the public about their privacy rights and responsibilities and promoting best practice by all holders of personal information – both public and private entities. It administers the State's privacy laws and advises individuals, government agencies, businesses and other organisations on protecting privacy, receives complaints and conducts investigates, and assists in attaining remedies for breaches. The Office also publishes best practice guidelines for practical use.

5. **Community Relations Commission**: The Community Relations Commission was established to promote equal rights and responsibilities for all residents of NSW and seeks to advance community harmony, participation and access to services. The Commission fulfils the function of promoting human rights awareness in the community as well as facilitating community access to avenues of asserting those rights. It recognises multiculturalism as a deliberate public policy and takes proactive steps through translation services, the Community Language Allowance Scheme (CLAS) and the Multicultural Entry Scheme (which assists students with foreign language skills to enter tertiary health courses). These services support anti-discrimination and equal opportunity legislation in a practical and effective way. The Commission facilitates the democratic process through projects such as CommuniLink, which provides online forums for dialogue between the community and the NSW Government, as well as through Regional Advisory Councils. The Commission also supports not for profit community organisations through Community Development Grants.

6. **Administrative Decisions Tribunal**: For over ten years, the Administrative Decisions Tribunal has provided independent, external review of government decisions as well as adjudicating in disputes between private citizens including anti-discrimination complaints and professional misconduct inquiries. The Tribunal has been instrumental in promoting and protecting the rights of citizens as against the administration, receiving over 8000 applications since its inception, and effecting changes such as a requirement for administrators to give reasons for decisions. The

Tribunal has greatly enhanced the transparency of government and the avenues of redress for individuals, while pursuing the objects of its creating Act, including accessibility, efficiency, effectiveness and fairness.

7. **Legislation**: In NSW, human rights are effectively protected by a series of targeted legislation. This includes: the *Privacy and Personal Information Protection Act 1998, Health Records and Information Privacy Act 2002, Administrative Decisions Tribunal Act 1997, Anti-Discrimination Act 1977, Freedom of Information Act 1989, State Records Act 1998, Criminal Records Act 1991* (spent convictions), *Listening Devices Act 1984, Workplace Surveillance Act 2005, Telecommunications (Interception and Access) Act 1987, Access to Neighbouring Land Act 2000* and *Crimes (Forensic Procedures) Act 2000* (DNA testing). This legislation has practical and predictable effect and is supported by public authorities such as those mentioned above.

The NSW model applied to the Commonwealth

State legislatures are in touch with local needs and concerns, and so are in a prime position to formulate human rights policy. State powers to govern as they see fit must not be unduly fettered by Commonwealth interference, yet more cooperative models can yield very positive results. The Standing Committee of Attorneys-General ('SCAG') is a forum in which individual State differences can be advocated and negotiated in a democratic fashion. The States are moving towards uniform model legislation in a number of areas, which, through extensive consultation and discussion, we hope will result in best practice across the country. In particular, in March 2008, the Standing Committee of Attorneys General (SCAG) placed the question of harmonisation of discrimination laws in Australia on its agenda. Ministers established an officers working group and agreed to focus on non-legislative ways to enhance access to complaint handling procedures, needs analysis for reform, and institutional and cooperative arrangements. Spent convictions are also under discussion by SCAG.

The Federal *Privacy Act 1988* and its NSW counterparts have recently been or are currently under review by the respective law reform commissions, and it is anticipated that SCAG will be asked to consider implementing some uniform privacy standards across all Australian jurisdictions.

The NSW human rights bodies above are all scaleable to a federal level, and some already have federal counterparts. Through increased cooperation and expertise sharing across jurisdictions, best practice can be achieved through dedicated government bodies, support of the non-governmental sector, and a culture of protecting human rights as a matter of course through the political system.

If a human rights act were to be adopted

The arguments presented in this submission militate strongly against a national human rights act and I recommend that the Commonwealth does not choose to enact a human rights bill, charter, or other similar instrument. Many groups and individuals throughout the community have shared the concerns that I and others have raised in the public domain about such a model and there has been significant public discussion about the negative consequences of imposing an instrument of this kind on the Australian people without a referendum.

If such a model were to be adopted there would be a need for it to be limited in several different ways. The proponents of a Charter or Bill model have steadily wound back their

claims and recognized the need to place significant limitations on such a model. In outlining what these limitations need to be I do not in any way endorse the enactment of a human rights act and maintain the position that it would be an error to do so.

1. The Act should be non-constitutional.
2. There should be no ability for courts to invalidate legislation.
3. An existing cause of action should be required before human rights claims can be raised in a court (as per the Victorian Act[26] and ACT Act); there should be no freestanding cause of action or remedy.
4. There must be a savings provision as per Section 5 of the Victorian Act – a right not included in the Act must not be taken to be abrogated or limited.
5. There must be a review provision after 12 months.
6. The Act should only deal with civil and political rights, not economic, social and cultural rights (as per the ACT Act). The ACT Twelve-Month Review found that it would be unclear how courts would deal with the resource implications of such decisions,[27] there is insufficient domestic jurisprudence,[28] and economic, social and cultural rights are better protected through inclusion in a foundation planning document.[29]
7. The Act should apply only to natural persons, not bodies corporate (as per the Victorian Act and ACT Act).[30]
8. There should be an abridging provision allowing overrides of the Act (as in the ACT Act, Victorian Act, Canadian Charter, and NZ Bill of Rights) as well as specific but non-exhaustive limitations on particular rights. There should be no criteria or threshold for the limitation of rights by legislation – the Canadian Charter[31] states that rights are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" (s 1), which has given rise to a legal test that the courts designed themselves.[32]
9. Any provision that legislation should be interpreted consistently with the Act should be limited to where that interpretation would not defeat or undermine the purpose of the Act.[33]
10. The Act should apply only to Commonwealth laws and bind only federal public authorities so as not to impinge on States' abilities to govern. This would prevent courts being tied up with inconsistency matters and maintain the integrity of a legislative model by avoiding the consequence of unelected judges striking down State laws.[34] Alternatively, State participation should be optional.
11. Public authorities should be defined as in the Victorian Charter.[35] Parliament should be an exception to "public authority".
12. Failure to comply with charter-imposed parliamentary processes must not result in the invalidity of a law (as in the Victorian Act and ACT Act).

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[26] Section 39, *Charter of Human Rights and Responsibilities Act 2006* (Vic)
[27] ACT Department of Justice and Community Safety, *Human Rights Act 2004: Twelve-Month Review – Report* (2006) available at: www.jcs.act.gov.au/HumanRightsAct/Publications/twelve_month_review.pdf at 46
[28] Id at 42
[29] Id at 41, quoting the Government Response to the Report of the ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act,* Tabling Speech, 23 October 2003
[30] See Afua Hirsch, 'Do hedge funds have human rights?' 28 January 2009, *The Guardian*, available at: http://www.guardian.co.uk/commentisfree/libertycentral/2009/jan/28/hedge-fund-human-rights
[31] Section 1
[32] *R v Oakes* [1986] 1 SCR 103
[33] Per Recommendation 5, ACT Department of Justice and Community Safety, above n27 at 3
[34] See HRLRC, above n6, at 119
[35] Section 4

13. Notice must be given to the Attorney-General if a declaration of incompatibility is being sought, as under the Victorian Charter (s 36(3)) and ACT Human Rights Act (s 34(2)), allowing the Attorney-General to intervene.
14. The Act should state that the rights conferred in the human rights Act are in addition to any rights available at common law or contained in other legislation, including State legislation, rather than an exhaustive list.
15. There should be an override provision such as that in the Victorian charter (s 33)..
16. There should be further attention to the issue of limiting the risk of judicial rewriting of laws contrary to Parliamentary intentions.

Thank you for the opportunity to make this submission.

Yours faithfully,

(John Hatzistergos)