

# FEDERALISM AND RIGHTS DELIBERATION

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*The relationship between federalism and rights is an under-studied aspect of Australia's constitutional system. It is rarely analysed in detail because the premise of most theories, which are drawn from the United States, is that federalism alters substantive outcomes on rights. These theories do not connect to Australia's constitutional experience because the country's federal system produces a large degree of policy uniformity. In this paper, I argue that Australia's federal system has a substantial impact on legislative deliberations on rights issues. Even when policy uniformity results, federalism introduces additional actors and alternative viewpoints into the lawmaking process, altering patterns of discourse. I employ three case studies — counterterrorism, same-sex marriage and organised crime — to highlight and analyse the connections between federalism and rights deliberation. This understanding of the relationship has implications for the place of federalism in Australia's constitutional system, which is often undervalued, and the country's approach to rights protection, which relies extensively on a deliberative process that is attuned to rights issues.*

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## I INTRODUCTION

The relationship between federalism and rights is rarely the subject of detailed analysis in Australia. The two topics are generally considered separate elements of the constitutional system that raise separate issues. Federalism concerns the levels of government and involves questions about the allocation of legislative power, fiscal responsibilities and policy coordination. Rights concern the arms of government and involve questions about the separation of powers and rights-based judicial review. To the extent that the two topics are connected, it is often in a sweeping, unsubstantiated manner, gesturing to the notion that federalism protects rights by preventing the accumulation of power in a single government. The lack of nuanced analysis of the connection between the two subjects is, I argue, misplaced.

In this paper, I demonstrate how federalism affects the deliberations on rights that occur in legislatures and by legislators. Facilitating deliberation is a central function of legislatures and expectation of legislators. Its quality is pivotal to the legitimacy of legislative actions because it ensures and evidences that a range of perspectives are heard, alternative options are considered, justifications are offered and dissent is not suppressed. Deliberation is especially important in the context of rights given that the dignity, equality and liberty of individuals are at stake and that some laws exclusively affect the rights of politically unpopular or under-represented groups in society. Federalism expands the process of legislative deliberations on rights through the admission of additional participants and perspectives, thus creating new patterns of discourse. The presence of multiple governments within the same geographical boundaries generates intergovernmental exchange, prompting moments of consultation, conflict and compromise.

Part of the reason for the theoretical lacuna in this area is, I contend, the failure of well-known American accounts of the relationship between federalism and rights to resonate with Australia's constitutional experience. A rich body of scholarship exists in the United States examining how its federal system might safeguard liberty by, for example, allowing persons to escape oppression through relocation. These theories are predicated on federalism creating enduring, substantive differences in policy — that is, a diversity of jurisdictions producing a diversity of positions on rights. Attempts to import

this framework into Australia fall flat because a high degree of policy uniformity exists across the federation. A variety of factors, including the federal government's fiscal power over the states and territories, and the small number of sub-national jurisdictions, tend to reduce the number of significant disparities and, when they do emerge, tend to eliminate them in short order. Australia's federal system does, however, affect the processes by which these positions on rights are reached — the arguments that are considered cogent, the factors that are taken into account, and the individuals and institutions that participate. By shifting the focus from outcomes to processes, this paper identifies an alternative, but no less significant, respect in which federalism and rights interact in the Australian context.

The paper proceeds in three parts. Part II illustrates how federalism and rights are related in the United States and why American theories have failed to influence debates in Australia. I propose legislative rights deliberation as a more appropriate framework of analysis for Australia, detailing what deliberation is, why it matters and how federalism can affect it. Part III provides three case studies in which federalism has affected the course of legislative rights deliberation: counterterrorism, same-sex marriage and organised crime. I demonstrate how federalism both positively and negatively influences the deliberative process. Similar to other constitutional mechanisms that facilitate deliberation, such as upper legislative chambers, federalism expands the *process* of deliberation, but does not always enhance — and sometimes impairs — the *quality* of deliberation. For each issue, I also assess how the High Court contributes to the relationship between federalism and rights deliberation. Part IV assesses the implications of my argument for the value of federalism in Australia's constitutional system and for Australia's approach to rights protection. Further, I suggest that my framework provides another lens through which to view the significance and effects of the High Court's decisions on questions of federalism.

## II THE CONNECTION BETWEEN FEDERALISM AND RIGHTS IN THEORY

### A *The United States*

It is useful to begin analysis with the United States to demonstrate that drawing connections between federalism and rights is neither novel nor

unusual.<sup>1</sup> American interest in federalism's effect on rights can be traced back to the constitutional ratification debates of the late 1780s.<sup>2</sup> Anti-Federalists asserted that a second level of government would pose a new threat to liberty — more government entailed the possibility of more oppression. Federalists asserted that a new, nationwide government would be a source of liberty — the federal government's large size would reduce the possibility of any single group, or faction,<sup>3</sup> seizing the reins of power and using the state to oppress others. In the modern era, Albert Hirschman's concepts of exit and voice are often employed to analyse the implications of America's federal system for the protection of rights.<sup>4</sup>

Federalism can provide individuals with choice, allowing them to move jurisdictions in the pursuit of dignity, equality and liberty (exit). While 'voting with your feet' is commonly associated with economic welfare,<sup>5</sup> it can also serve as a means of enhancing political freedom by allowing persons to leave jurisdictions that impose unreasonable burdens on, or fail to recognise, their rights.<sup>6</sup> Relocation is a direct form of empowerment because it 'enables the individual to make a decision that has a high likelihood of actually affecting

<sup>1</sup> Indeed, the connection is sometimes cast in strong terms: 'federalism is not an aspect of the *US Constitution* or even one of the *Constitution's* founding principles. It is, rather, an argument about what the *Constitution* is and how it best can be construed to serve liberty': Benjamin R Barber, *A Passion for Democracy: American Essays* (Princeton University Press, 1998) 134. See also Robert A Schapiro, *Polyphonic Federalism: Toward the Protection of Fundamental Rights* (University of Chicago Press, 2009).

<sup>2</sup> For a helpful overview of the debates between Anti-Federalists such as Patrick Henry and Federalists such as James Madison, see Michael W McConnell, 'Federalism: Evaluating the Founders' Design' (1987) 54 *University of Chicago Law Review* 1484, 1500–7.

<sup>3</sup> James Madison defined a faction as 'a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens': 'The Same Subject Continued' in E H Scott (ed), *The Federalist and Other Constitutional Papers* (Scott, Foresman & Co, first published 1788, 1898 ed) 53, 54 ('*Federalist No 10*') (attributed to James Madison).

<sup>4</sup> See Albert O Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Harvard University Press, 1970). On the relevance of Hirschman's third concept — loyalty — to the relationship between federalism and rights, see Heather K Gerken, 'Exit, Voice, and Disloyalty' (2013) 62 *Duke Law Journal* 1349.

<sup>5</sup> See, eg, Charles M Tiebout, 'A Pure Theory of Local Expenditures' (1956) 64 *Journal of Political Economy* 516.

<sup>6</sup> Jennifer Gerarda Brown, for example, argues that the economic and rights dimensions of federalism may intersect in the context of same-sex marriage because economic benefits attach to recognition of this right: Jennifer Gerarda Brown, 'Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage' (1995) 68 *Southern California Law Review* 745.

the outcome', unlike casting a vote at the ballot box.<sup>7</sup> Given the financial cost, time and uncertainty involved in launching legal proceedings, it also has advantages over challenging government acts in the courtroom. The possibility of exit promotes government awareness of rights given that a failure to protect rights may lead to an exodus of taxpayers and businesses.

A federal system can also create stronger and more direct links between the people and government (voice). Decentralised political structures provide sites where 'elected representatives are ... more immediately accountable to individuals and their concerns, government is brought closer to the people, and democratic ideals are more fully realized'.<sup>8</sup> Greater accountability enhances the ability of voters to monitor and control government, thereby protecting against the imposition of inadvertent, unnecessary and disproportionate restrictions on rights. Furthermore, citizen empowerment is increased through membership of two political communities. Federal and sub-national governments provide different points of access to government, each with their own mechanisms of participation and petition. Failure to take action on rights at one level of government can be offset by action at the other level.<sup>9</sup>

These rights-related rationales for federalism are, as one would expect, contestable.<sup>10</sup> Exit is limited by the extensive practical difficulties that accompany relocation — its disruption and cost prevent it from being a viable option in many circumstances. And for some people it is simply not available — prisoners are, for instance, unable to employ this method to protect their rights. Additionally, the possibility of exit may engender exclusive rather than inclusive attitudes toward rights — a government can justify a decision not to protect the rights of a minority on the basis that the minority is free to move elsewhere.

Voice may only serve to exacerbate the risk of exclusivity. Smaller, more accountable forms of government increase the likelihood that one group will obtain majority control and be able to employ the apparatus of state to oppress

<sup>7</sup> Ilya Somin, 'Foot Voting, Federalism, and Political Freedom' in James E Fleming and Jacob T Levy (eds), *Federalism and Subsidiarity: NOMOS LV* (New York University Press, 2014) 83, 83.

<sup>8</sup> David L Shapiro, *Federalism: A Dialogue* (Northwestern University Press, 1995) 91–2.

<sup>9</sup> Erwin Chemerinsky, 'The Values of Federalism' (1995) 47 *Florida Law Review* 499, 539; Justice William J Brennan Jr, 'The *Bill of Rights* and the States: The Revival of State Constitutions as Guardians of Individual Rights' (1986) 61 *New York University Law Review* 535.

<sup>10</sup> Reviewing the competing arguments, Charles Fried calls it 'at best a standoff': Charles Fried, 'Federalism — Why Should We Care?' (1982) 6 *Harvard Journal of Law and Public Policy* 1, 2.

other groups.<sup>11</sup> Here we see that federalism's proponents cannot have their cake and eat it too. Either federalism produces sufficiently responsive governments at the sub-national level to enhance citizen voice (a result that risks factional tyranny) *or* it retains sub-national governments that are large enough to resist factional tyranny (a result that erodes the ability of federalism to enhance citizen voice).

Exit and voice generate considerable scholarly interest in the United States because its federal system produces a diversity of positions on rights. In a wide range of areas, from reproduction<sup>12</sup> and firearms<sup>13</sup> to the environment<sup>14</sup> and criminal sentencing,<sup>15</sup> significant disparities are found along federalism's horizontal and vertical axes — that is, between state governments and between the federal and state governments. These points of difference lend salience to the procedural considerations of exit and voice. Policy diversity among the states means that people are presented with meaningful choices if they decide to relocate and indicates that federalism is generating governments that respond to the particular needs of local communities.

In the United States, therefore, federalism's positive and negative contributions to rights can be framed in substantive terms. On the one hand, some argue that a plurality of jurisdictions creates opportunities for policy experimentation and comparative education. As Brandeis J said, 'one of the happy incidents of the federal system [is] that a single courageous State may, if its citizens choose, serve as a laboratory'.<sup>16</sup> Providing room for innovation and differentiation is especially helpful in the context of rights given that measures for recognising and protecting rights often involve complex, contested matters of economic, political and social policy.<sup>17</sup> On the other hand, others argue that

<sup>11</sup> It is this issue that the Federalists argued a large, federal government would ameliorate: see above n 3 and accompanying text.

<sup>12</sup> Seth F Kreimer, 'The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism' (1992) 67 *New York University Law Review* 451.

<sup>13</sup> Michael P O'Shea, 'Federalism and the Implementation of the Right to Arms' (2008) 59 *Syracuse Law Review* 201.

<sup>14</sup> William L Andreen, 'Of Fables and Federalism: A Re-examination of the Historical Rationale for Federal Environmental Regulation' (2012) 42 *Environmental Law* 627.

<sup>15</sup> Rachel E Barkow, 'Federalism and Criminal Law: What the Feds Can Learn from the States' (2011) 109 *Michigan Law Review* 519.

<sup>16</sup> *New State Ice Co v Liebmann*, 285 US 262, 311 (1932).

<sup>17</sup> See generally Andrew Karch, *Democratic Laboratories: Policy Diffusion among the American States* (University of Michigan Press, 2007).

a plurality of jurisdictions prompts a ‘race to the bottom’<sup>18</sup> to prevent the converse of exit: entry. States may limit socio-economic rights ‘in order to avoid becoming “welfare magnets” whose high payments attract potential recipients from surrounding states’.<sup>19</sup> More problematically, electorally unpopular individuals and groups may find governments competing with each other to adopt ever-increasing restrictions on their rights to discourage them from relocating.

Many analyses of the relationship between federalism and rights in the United States are influenced by these substantive considerations because some of the country’s most important battles regarding rights have been fought along federal lines. As Heather Gerken notes:

Progressives are deeply skeptical of federalism, and with good reason. States’ rights have been invoked to defend some of the most despicable institutions in American history, most notably slavery and Jim Crow. Many think ‘federalism’ is just a code word for letting racists be racist.<sup>20</sup>

While this legacy continues to resonate in legal and political circles,<sup>21</sup> it has begun to dissipate as state and local governments have emerged as sites for experimenting with measures that adopt positions more in line with progressive views on rights.<sup>22</sup>

<sup>18</sup> Fried, above n 10, 4. But see Somin, above n 7, 97–8.

<sup>19</sup> Craig Volden, ‘The Politics of Competitive Federalism: A Race to the Bottom in Welfare Benefits?’ (2002) 46 *American Journal of Political Science* 352, 352. See also Richard B Stewart, ‘Federalism and Rights’ (1985) 19 *Georgia Law Review* 917, 919.

<sup>20</sup> Heather K Gerken, ‘A New Progressive Federalism’ (2012) 24 *Democracy: A Journal of Ideas* 37, 37. See also Chemerinsky, above n 9, 500.

<sup>21</sup> For example, President Barack Obama has said that

[y]ou can be somebody who, for very legitimate reasons, worries about the power of the federal government — that it’s distant, that it’s bureaucratic, that it’s not accountable — and as a consequence you think that more power should reside in the hands of state governments. But what’s also true, obviously, is that philosophy is wrapped up in the history of states’ rights in the context of the civil-rights movement and the Civil War and Calhoun. There’s a pretty long history there.

David Remnick, ‘Going the Distance’ (2014) 89(46) *The New Yorker* 40, 44.

<sup>22</sup> Justice Brennan, above n 9, 549–51; Jon O Newman, ‘The “Old Federalism”: Protection of Individual Rights by State Constitutions in an Era of Federal Court Passivity’ (1982) 15 *Connecticut Law Review* 21, 23; Catherine Powell, ‘Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States’ (2001) 150 *University of Pennsylvania Law Review* 245.

## B Australia

Australians tend to demonstrate little sustained interest in analysing and theorising the connection between federalism and rights.<sup>23</sup> The origins of this ambivalence are traceable to the point of constitutional creation. Brian Galligan and Cliff Walsh observe that

[f]or the most part ... the Australian founders focused on the practicalities of devising an appropriate scheme of federal government ... the theoretical exposition of federalism and its advantages was virtually absent from the Australian debates ...<sup>24</sup>

<sup>23</sup> Brian Galligan, *A Federal Republic: Australia's Constitutional System of Government* (Cambridge University Press, 1995) 138–9; James A Gillespie, 'New Federalisms' in Judith Brett, James Gillespie and Murray Goot (eds), *Developments in Australian Politics* (Macmillan Education, 1994) 60, 60–1. As Hugh Collins notes, '[t]here continues to be a lively interest in federalism in Australia, but it remains focused upon the practical working-out of fiscal, constitutional, and administrative arrangements between the states and the Commonwealth': Hugh Collins, 'Political Ideology in Australia: The Distinctiveness of a Benthamite Society' (1985) 114 *Daedalus* 147, 152. George Williams and David Hume's comprehensive book on human rights under the *Australian Constitution* devotes just over five pages to the contribution of federalism, much of which recites American theories and identifies freedom of movement (exit) as the primary protection Australia's federal system might offer: George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2<sup>nd</sup> ed, 2013) 116–21. Another illustrative example is Jeffrey Goldsworthy's chapter on rights protection in an edited volume on Australian federalism, in which he devotes a single paragraph to the connection between federalism and rights, dismissing it on the basis of substantive outcomes: 'it seems doubtful that federalism in itself either enhances or detracts from the protection of individual rights, which is not necessarily superior at State than at national level': Jeffrey Goldsworthy, 'The Constitutional Protection of Rights in Australia' in Gregory Craven (ed), *Australian Federation: Towards the Second Century — A Work to Mark the Centenary of the Australasian Federation Conference, Held at Parliament House, Melbourne, 6–14 February 1890* (Melbourne University Press, 1992) 151, 157; see generally at 157–8. Goldsworthy's focus is, instead, on bills of rights, a subject he attempts to divorce from federalism: at 161–2. Hilary Charlesworth does, however, argue that

[t]he structure of Australian human rights law has been shaped by both the politics of federalism and a dedication to legalism as the appropriate mode of legal reasoning. These two forces have operated in the same direction to create a culture wary of the discourse of rights.

Hilary Charlesworth, 'The Australian Reluctance about Rights' (1993) 31 *Osgoode Hall Law Journal* 195, 196.

<sup>24</sup> Brian Galligan and Cliff Walsh, 'Australian Federalism — Yes or No?' in Gregory Craven (ed), *Australian Federation: Towards the Second Century — A Work to Mark the Centenary of the Australasian Federation Conference, Held at Parliament House, Melbourne, 6–14 February 1890* (Melbourne University Press, 1992) 193, 195–6. They continue:

The theory of federalism ... was best articulated by Madison and his colleagues in the *Federalist Papers*. Surprisingly, this definitive exposition of federalism by its United States



Subsequent scholarship has not significantly remedied this lacuna. The principal reason is, I argue, that most American scholarship speaks neither to the Australian experience with federalism nor to its experience with rights.<sup>25</sup> Although Australians are understandably inclined to cast their gaze towards the United States for guidance given that many aspects of Australia's federal system are modelled on that of the United States,<sup>26</sup> disappointment tends to occur when they do.

Australia's experience with federalism is unlike that of the United States because Australia's federal system has not produced significant, enduring differences in substantive outcomes on rights. It is difficult to find analogues in Australia for the federal disparities in rights-related areas such as criminal sentencing, the environment, firearms and reproduction<sup>27</sup> — let alone the historical disparities in civil rights — that drive interest in federalism in the United States. Galligan and Walsh argue that '[a]s one might expect given the cultural homogeneity of the Australian people and the fiscal dominance of the Commonwealth, there are striking similarities in the policies of the various States'.<sup>28</sup> This is not to say that uniformity occurs in all areas at all times.<sup>29</sup> In

inventors was not well known to the Australian founders, and only in recent times has become a primary source for exposition of Australian federalism ...

At 196. See also Haig Patapan's comment that 'federalism was an innovation that was not fully understood but nevertheless accepted as a necessary solution for the difficulties faced by the Colonies': Haig Patapan, 'The Dead Hand of the Founders? Original Intent and the Constitutional Protection of Rights and Freedoms in Australia' (1997) 25 *Federal Law Review* 211, 232. *Contra* Greg Craven, *Conversations with the Constitution: Not Just a Piece of Paper* (UNSW Press, 2004) 62 ('[i]n opting for decentralised government [the founders] had in mind ... a federal philosophy of government gleaned from their American constitutional model').

<sup>25</sup> A growing body of scholarship in the United States adopts an approach similar to mine, analysing the discursive effects of federalism, although this work is rarely discussed in Australia: see, eg, Feature, 'Federalism as the New Nationalism' (2014) 123 *Yale Law Journal* 1889.

<sup>26</sup> See, eg, the influence of American theories in Brian Galligan, Rainer Knopff and John Uhr, 'Australian Federalism and the Debate over a Bill of Rights' (1990) 20(4) *Publius: The Journal of Federalism* 53, 53–6.

<sup>27</sup> Cf above nn 12–15 and accompanying text.

<sup>28</sup> Galligan and Walsh, above n 24, 199.

<sup>29</sup> However, those that argue against the uniformity thesis are required to concede that, at most, there are 'subtly different policy emphases' between the states and territories: Nicholas Aroney, Scott Prasser and Alison Taylor, 'Federal Diversity in Australia: A Counter-Narrative' in Gabrielle Appleby, Nicholas Aroney and Thomas John (eds), *The Future of Australian Federalism: Comparative and Interdisciplinary Perspectives* (Cambridge University Press, 2012) 272, 274 (emphasis added). See also Craven, *Conversations with the Constitution*, above n 24, 68–76.

*New South Wales v Commonwealth* ('Work Choices Case'), for example, Kirby J pointed to industrial relations as one field where the federal structure has historically produced an 'occasional diversity of approach, inventiveness in standards and entitlements and appropriate innovation'.<sup>30</sup> The Australian Capital Territory's and Victoria's human rights instruments are another example of Australia's federal system producing policy diversity in an area directly related to rights.<sup>31</sup> And we must be careful about identifying causal factors. Galligan and Walsh's claim is apt to mislead. There is considerable cultural diversity in Australia, however it is not expressed along federal lines, as is the case in, for example, Canada or Switzerland.<sup>32</sup> Further, other causal factors might be at play, such as the small number of states and territories in Australia. However, in recent decades the trend towards policy uniformity has only intensified as federal, state and territory governments have sought to achieve greater standardisation and more consistent administration under the banner of collaborative or cooperative federalism.<sup>33</sup>

Without significant, enduring differences in positions on rights between the jurisdictions, the option of exit is rendered ineffective and the benefits of voice are reduced and thus contestable. Allowing people to relocate matters little if the choices are all the same. Creating closer connections between the people and government is inherently valuable from a democratic standpoint even if each jurisdiction produces similar policies, but the attendant problems of expense, delay and duplication may lead to the conclusion that the costs outweigh the benefits. It must be remembered that there are ways of enhancing citizen voice other than federalism. Finally, fetting states as policy laboratories rings hollow if they tend to run the same experiments.

As a result, on the infrequent occasions when federalism is defended on the basis of its capacity to protect rights in Australia, those accounts are

<sup>30</sup> (2006) 229 CLR 1, 222 [534]. Further, Galligan and Walsh observe that 'there are also notable and persistent differences': Galligan and Walsh, above n 24, 199.

<sup>31</sup> See *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic).

<sup>32</sup> Aroney, Prasser and Taylor, above n 29, 272-3.

<sup>33</sup> Martin Painter, *Collaborative Federalism: Economic Reform in Australia in the 1990s* (Cambridge University Press, 1998); Paul Kildea and Andrew Lynch, 'Entrenching "Cooperative Federalism": Is It Time to Formalise COAG's Place in the Australian Federation?' (2011) 39 *Federal Law Review* 103, 108. However, it is important to note that these arrangements are not set in stone. See, eg, Prime Minister Tony Abbott's plans to transfer more power to the states and territories: Tony Abbott, 'White Paper on Reform of the Federation' (Media Release, 28 June 2014) <<http://www.pm.gov.au/media/2014-06-28/white-paper-reform-federati-on>>.

vulnerable to the criticism that they lack detail and substantiation. Drawing on James Madison's writings, Brian Galligan, Rainer Knopff and John Uhr state that 'a federal constitution is itself a bill of rights' because dividing power 'guarantee[s] due process in government' and 'promotes rights-oriented citizenship'.<sup>34</sup> James Gillespie criticises their account for being 'long on general assertions of principle, but rather short on explaining what they mean by "liberty" and on the presentation of empirical evidence'.<sup>35</sup> He notes that they do not cite 'a single case' to substantiate their argument.<sup>36</sup>

A further difficulty with drawing on American theories to explain the relationship between federalism and rights in Australia is that the two countries' constitutional systems are founded on different understandings of rights. Unlike the *United States Constitution*, which is largely predicated on the view that government is a potential threat to liberty that must therefore be carefully limited, the *Australian Constitution* is largely predicated on the view that government is a precondition for liberty that must therefore be allowed to implement measures for individuals to enjoy their rights. As James Bryce observed:

When [the *United States Constitution*] was enacted, the keenest suspicion and jealousy was felt of the action of the Government to be established under it. ... [W]hen Englishmen in Canada or Australia enact new Constitutions, they take no heed of such matters ... [T]heir struggles for a fuller freedom took the form of making Parliament a more truly popular and representative body, not that of restricting its authority.<sup>37</sup>

Similarly, Harrison Moore observed that the *Australian Constitution* 'bears every mark of confidence in the capacity of the people to undertake every function of government'.<sup>38</sup> Rights are protected not through the imposition of

<sup>34</sup> Galligan, Knopff and Uhr, above n 26, 56.

<sup>35</sup> Gillespie, above n 23, 70.

<sup>36</sup> Ibid. While Gillespie's complaint about the lack of substantiation is fair, his target is not. Galligan, Knopff and Uhr do not assert this argument themselves. They instead suggest that Australia has not enacted a bill of rights 'partly because of the strength of reasons that were articulated by opponents of such bills', attributing these reasons to the opponents of bills of rights: Galligan, Knopff and Uhr, above n 26, 56. They do, however, argue that the defeat of bills of rights 'indicate[s] the continuing vigor of Australian federal democracy': at 66.

<sup>37</sup> James Bryce, *Studies in History and Jurisprudence* (Oxford University Press, 1901) vol 1, 419–20.

<sup>38</sup> W Harrison Moore, *The Constitution of the Commonwealth of Australia* (Sweet & Maxwell, 2<sup>nd</sup> ed, 1910) 613.

constitutional limits on government,<sup>39</sup> but instead by means of the principles of representative democracy and responsible government.<sup>40</sup> In Moore's words, 'the rights of individuals are sufficiently secured by ensuring as far as possible to each a share, and an equal share, in political power'.<sup>41</sup> While for America's founders federalism was an essential component of the *United States Constitution's* system of checks and balances, for Australia's founders federalism was a pragmatic arrangement adopted first and foremost for the reason that it was the only feasible option — a unitary state would have been too large a pill for the Australian colonies to swallow.<sup>42</sup>

To the extent that these different constitutional histories continue to resonate in contemporary society, Australia's approach to government creates, at best, agnosticism and, at worst, hostility toward federalism's contribution to rights. The agnostic view is that federalism neither adds to nor subtracts from the protection of rights in Australia as long as each jurisdiction provides a system of representative democracy and responsible government. It simply means two levels of government are responsible for taking action on rights rather than one. The hostile view is that the federal division of powers inhibits government from taking action on rights. This position has a long pedigree in Australian debates about federalism. Gordon Greenwood wrote in 1946 that 'the federal system has outlived its usefulness ... the retention of the system now operates only as an obstacle to effective government and to a further advance'.<sup>43</sup> Lamenting the inefficiencies and impediments that stem from

<sup>39</sup> Patapan, above n 24, 231–2.

<sup>40</sup> Galligan, above n 23, 139–42.

<sup>41</sup> Moore, above n 38, 616.

<sup>42</sup> Gregory Craven states that '[g]iven a choice between a centrally dominated federation and no federation at all, most of the founding fathers would undoubtedly have had little difficulty in accepting disunity as the lesser of two evils': Gregory Craven, 'The States — Decline, Fall, or What?' in Gregory Craven (ed), *Australian Federation: Towards the Second Century — A Work to Mark the Centenary of the Australasian Federation Conference, Held at Parliament House, Melbourne, 6–14 February 1890* (Melbourne University Press, 1992) 49, 51.

<sup>43</sup> Gordon Greenwood, *The Future of Australian Federalism: A Commentary on the Working of the Constitution* (Melbourne University Press, 1946) viii. This view reflected the dim view of federalism held by many British writers. A V Dicey, for example, wrote that it leads 'to a certain waste of energy. A federation therefore will always be at a disadvantage in a contest with unitarian states of equal resources': A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10<sup>th</sup> ed, 1959) 172. See generally Galligan, above n 23, 56–61.

federalism, politicians from both major political parties and from both levels of government have called for the abolition of the states.<sup>44</sup>

The foregoing demonstrates that, if federalism is viewed through the lens of substantive outcomes on rights as it is in the United States, the connection between the two areas of constitutional concern is weak in Australia. Federalism is of little relevance to the resolution of rights issues either because it does not meaningfully affect positions in one direction or the other at the state and territory level or because it inhibits the federal government's ability to take action to recognise and implement rights. As a result, federalism's contributions to governance in Australia are primarily studied from other perspectives such as finance, especially the vertical fiscal imbalance,<sup>45</sup> and policy centralisation, especially the High Court's contribution to the growth of federal power.<sup>46</sup>

### C *Evaluating Federalism and Rights through the Lens of Legislative Deliberation*

A general absence of significant, enduring differences between Australia's governments in the positions they adopt on rights does not necessarily mean that there is no connection between federalism and rights. We can and should evaluate not only the outcomes that are reached, but also the processes by which they are reached. In this section, I employ legislative deliberation as a lens through which to view and evaluate the relationship between federalism and rights. I begin by examining the concept of legislative deliberation and its

<sup>44</sup> This is a position historically associated with the Australian Labor Party: see Galligan, above n 23, ch 4. However, political leaders from all parties and levels have derided Australia's federal system, including John Howard, Bob Hawke, Peter Beattie and Jeff Kennett: see 'Td Abolish States: PM', *The Sydney Morning Herald* (online), 18 May 2007 <<http://www.smh.com.au/news/national/id-abolish-states-pm/2007/05/18/1178995369568.html>>; Troy Bramston, "'Scrap States' to Drive Reform: Hawke Calls on Politicians, Business and Unions to Work Together", *The Australian* (Sydney), 1 January 2013, 1; Sid Maher, 'Beattie Backs Hawke Call to Abolish States, or Redefine Them', *The Australian* (Sydney), 2 January 2013, 2; Nicole Hasham, 'State Governments Should Be Lamer to Go, Says Kennett', *The Sydney Morning Herald* (Sydney), 27 April 2013, 3. This scepticism is also reflected in public opinion polling on Australia's federal system: see A J Brown, 'Escaping Purgatory: Public Opinion and the Future of Australia's Federal System' in Gabrielle Appleby, Nicholas Aroney and Thomas John (eds), *The Future of Australian Federalism: Comparative and Interdisciplinary Perspectives* (Cambridge University Press, 2012) 365.

<sup>45</sup> See, eg, Iain McLean, 'Fiscal Federalism in Australia' (2004) 82 *Public Administration* 21.

<sup>46</sup> See, eg, Brian Galligan, 'Processes for Reforming Australian Federalism' (2008) 31 *University of New South Wales Law Journal* 617, 631–2.

importance before setting out how federalism can affect legislative deliberations on rights.

### 1 *What Is Deliberation and Why Does It Matter?*

Deliberation requires more than the expression of opinions — more than just talk.<sup>47</sup> Two actors are not engaged in deliberation if one ignores the other. Ideal deliberation is widely considered to have six characteristics: *participation* by all citizens in *respectful* exchanges of *truthful* claims that are *logically justifiable* and expressed in terms of the *common good* in circumstances where participants are *willing to yield* to the force of better arguments.<sup>48</sup> While in reality political discourse usually falls far short of the ideal type, we can nevertheless use it as a benchmark against which to measure practice.<sup>49</sup> When these standards are applied to legislative deliberation, we must remember that deliberation does not deny the existence of partisanship and does not require accord.<sup>50</sup> Legislative deliberation is consultative, but not necessarily consensual.<sup>51</sup> Indeed, to value deliberation is to accept discord because deliberation is a principal means of allowing people to recognise and articulate the different opinions they have on issues.<sup>52</sup> However, it does require accommodation because legislators act on behalf of, and take decisions that affect, others. As John Stuart Mill argued:

One of the most indispensable requisites in the practical conduct of politics, especially in the management of free institutions, is conciliation; a readiness to compromise; a willingness to concede something to opponents, and to shape

<sup>47</sup> This definition should not be taken to denigrate talk in any way — it is a necessary yet insufficient condition for deliberation. On the inherent value of talk in relation to rights, see Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999) ch 4.

<sup>48</sup> See, eg, Jürg Steiner et al, *Deliberative Politics in Action: Analyzing Parliamentary Discourse* (Cambridge University Press, 2004) 19–24.

<sup>49</sup> *Ibid* 17–19.

<sup>50</sup> John Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament* (Cambridge University Press, 1998) ch 1.

<sup>51</sup> The notion of deliberation as consultation not consensus is traceable back to Aristotle: *ibid* 25. This does not deny that consensus ‘might well stand as the most desirable institutional outcome in the best of circumstances’: at 27.

<sup>52</sup> As John Uhr states, ‘[t]he virtue of democracy is that it is open to difference ... Democratic regimes ... stand out as promising a fair hearing for deliberation’: *ibid* 24.

good measures so as to be as little offensive as possible to persons of opposite views ...<sup>53</sup>

Appropriate procedures and processes are essential for generating favourable conditions for deliberation in organisations as large and complex as legislatures. As Jeremy Waldron notes, they are the ‘formalities necessary for political discourse in a numerous and diverse society’,<sup>54</sup> providing structure to focus on specific issues, to keep channels of debate open, to allocate sufficient time for evaluation, and to create opportunities for compromise. The legislative committee is a paradigmatic instance of a procedure that facilitates deliberation. They allow the public to express opinions on rights through written submissions and oral hearings, create space on the parliamentary calendar to scrutinise and respond to these opinions, bring together small groups of legislators from different political parties in a venue removed from the primary legislative chamber so as to encourage, where possible, accommodation, and require legislators to articulate detailed justifications for the positions they adopt in the form of committee reports.<sup>55</sup>

Deliberation’s role in legitimating the actions of government has come to the fore in recent decades in large part due to the scholarship of Jürgen Habermas, who claims that ‘the central element of the democratic process resides in the procedure of deliberative politics’.<sup>56</sup> Deliberation has both instrumental and intrinsic value. Political discourse that comes closer to the benchmark can help improve legislative outcomes by ensuring that relevant, valuable perspectives are not overlooked or ignored. It can also help legitimate the lawmaking process because the provision of logical justifications grounded in the common good creates a reason for those that disagree with legisla-

<sup>53</sup> John Stuart Mill, *Considerations on Representative Government* (Parker, Son, and Bourn, 1861) 233.

<sup>54</sup> Waldron, *Law and Disagreement*, above n 47, 70.

<sup>55</sup> For a discussion of how legislative committees can contribute to the deliberative process in the context of the Australian Senate, see Uhr, *Deliberative Democracy in Australia*, above n 50, 144–5, 147–8; John Uhr, ‘Explicating the Australian Senate’ (2002) 8(3) *Journal of Legislative Studies* 3, 13–14.

<sup>56</sup> Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg trans, Polity Press, 1996) 296 [trans of: *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (first published 1992)]. For evidence of the growing importance attached to deliberation, see generally Seyla Benhabib (ed), *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton University Press, 1996); James Bohman and William Rehg (eds), *Deliberative Democracy: Essays on Reason and Politics* (MIT Press, 1997); Jon Elster (ed), *Deliberative Democracy* (Cambridge University Press, 1998); Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* (Princeton University Press, 2004).

tive outcomes to abide by them and remain committed to the process. Quality deliberation is especially important in the context of rights. As many questions of rights raise difficult moral and political issues about which people have good faith, reasonable disagreements,<sup>57</sup> it is important to adopt procedures that provide opportunities for different views to be expressed and for different positions to be accommodated. We must remember that rights often raise issues of fundamental importance such as personal dignity,<sup>58</sup> equality and liberty, and that the risk of exclusion and marginalisation can be particularly acute because many laws on rights affect politically unpopular or under-represented segments of the community such as criminal suspects, prisoners, indigenous persons and non-citizens. This only increases the need for thorough pre-enactment scrutiny, for interested persons to be heard, for less restrictive alternatives to be considered and for cogent justifications to be offered.

## 2 *How Does Federalism Affect Rights Deliberation?*

Federalism is another procedure for introducing additional *participants* who bring new *perspectives* and are capable of altering the *patterns* of legislative deliberation on rights. State and territory governments become an important set of interlocutors in the federal lawmaking process, especially in areas where the federal government cannot act without their assistance or consent. Even in areas where the federal government can act unilaterally, the states and territories can serve as prominent platforms to express dissent and propose alternative policies. And the converse applies with arguably greater strength — the federal government can be, and often is, a prominent influence on decision-making processes at the state and territory level. Finally, the states and territories can influence and be influenced by each other.

Here I am identifying something different than the concept of voice in the American context. My present focus is on the links federalism creates between governments rather than the links it creates between governments and citizens. The two types of links are connected, but not in a single direction — they can work in tandem or against each other. A state or territory govern-

<sup>57</sup> Waldron, *Law and Disagreement*, above n 47, ch 7.

<sup>58</sup> On the contested place of dignity in the realm of human rights, see, eg, Jürgen Habermas, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights' (2010) 41 *Metaphilosophy* 464; Michael Rosen, *Dignity: Its History and Meaning* (Harvard University Press, 2012); Jeremy Waldron, *Dignity, Rank, and Rights* (Oxford University Press, 2012); Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press, 2013).



ment may serve as a platform for citizens to place an issue on the legislative agenda of the federal government that the latter would have preferred to ignore (intergovernmental interaction enhances voice). Alternatively, a federal government may use its position and power to direct legislative deliberation in a state or territory towards its preferred outcome on an issue rather than respecting the wishes of the voters as expressed through their elected representatives (intergovernmental interaction erodes voice).

A federal system can generate large, visible impacts on the terms of debate by, for example, facilitating a public sphere where multiple governments introduce and advocate for alternative opinions on a rights issue. Yet it can also produce more subtle effects on discourse. In a unitary state, proponents of the status quo can often succeed by mounting negative arguments and employing defensive tactics. If, for example, a proposal divides the major political parties and the balance of power is held by a bloc of independents, all proponents of the status quo need to do is convince the independents to block the proposal, thus taking it off the table for the time being. If, however, several jurisdictions can take action on the issue, proponents of the status quo will not be able to rely on the same narrow strategy. Instead, they will have to develop broader affirmative arguments in support of their position to attempt to win the debate on the policy's merits. Federalism can have this effect even if policy uniformity is the end result — the mere fact that multiple jurisdictions are able to take the first step on an issue can force participants to change their arguments.

While this might be considered a positive contribution to the deliberative process, it can also negatively affect the terms of debate. The presence of two levels of government provides proponents of the status quo with an additional argument for opposing change that is unrelated to the proposal's merits. If the federal government proposes to take action, they can argue that it is an issue best left to the states and territories. Conversely, if a state or territory government proposes to take action, they can argue that it is an issue that demands a consistent, nationwide response.

Federalism's effects are readily observed when it prompts engagement and accommodation. As the presence of the Council of Australian Governments ('COAG') attests, there are many areas where the federal government needs to work with the states and territories in order to secure their public support or their cooperation in the implementation of a national scheme. Conversely, state and territory governments need to work with the federal government to

obtain funding or to prevent the possibility of a federal takeover.<sup>59</sup> The need for federal cooperation and coordination requires governments to elucidate and defend the merits of their proposals not only to the public, but also to other governments.

Another way in which federalism might negatively influence rights deliberation is through the creation of presumptive positions. If one state adopts a certain position on rights, other states may come under pressure to follow their lead. When the issue comes before the legislature, the scales may be tipped in favour of emulation as arguments for policy uniformity trump other, merits-based arguments.

To understand federalism's effects on rights deliberation, upper (or second) legislative chambers provide an illuminating point of comparison. As with federalism, upper legislative chambers are a procedural mechanism capable of affecting legislative rights deliberation.<sup>60</sup> They introduce an additional group of legislators into debate that can, depending on how members are elected or selected, supply an alternative set of perspectives.<sup>61</sup> They create another point of engagement and accommodation that varies with the chamber's ability to delay or block the passage of legislation.

On the one hand, upper legislative chambers possess a number of advantages over federalism in terms of rights deliberation. They can typically contribute to every proposed law, and thus every rights issue, put before the legislature. By contrast, federalism generates intergovernmental interaction on a reduced range of issues because some subjects may admit little influence from the other level of government.<sup>62</sup> Upper legislative chambers can proffer detailed, nuanced positions on rights by proposing specific amendments to draft laws. By contrast, federalism may not admit such precise inputs because

<sup>59</sup> If the states and territories refuse to work with the federal government, the latter may attempt to exercise unilateral authority by testing the limits of its legislative power.

<sup>60</sup> See generally George Tsebelis and Jeannette Money, *Bicameralism* (Cambridge University Press, 1997).

<sup>61</sup> Of course, if the same political party controls a majority of seats in the lower and upper legislative chambers, the latter's capacity to affect rights deliberation is significantly diminished.

<sup>62</sup> Section 52 of the *Australian Constitution*, for example, contains subjects that fall within the exclusive competence of the federal legislature. Beyond this limited category, the states and territories may nevertheless have little power to influence federal decisions if the subject matter falls within a well-established aspect of a subject specified in s 51 where the Commonwealth has covered the field.

interactions between multiple governments may require areas of agreement and disagreement to be cast in broad terms.<sup>63</sup>

On the other hand, federalism is not without its comparative virtues. Federalism introduces legislators that stand at greater institutional and geographical distances from each other. Say, for example, the New South Wales Parliament is considering a change to a law. A member of its upper chamber (the Legislative Council) is steeped in the same norms and political environment as a member of the lower chamber (the Legislative Assembly). However, if Western Australia's Parliament has considered the same issue, it can provide a perspective that originates from legislators from a different part of the country steeped in a different political culture.

Moreover, intergovernmental deliberation is less susceptible to coercion than inter-cameral deliberation. Members of a lower legislative chamber have direct mechanisms for obtaining the agreement of the upper legislative chamber. Examples include the threat of a double dissolution election and, for individual parliamentarians, the threat of party de-selection and the promise of executive appointment. A federal system also contains mechanisms of intergovernmental coercion, but they tend to operate at a higher level of abstraction. The Commonwealth's ability to, for example, withdraw funding from a state or territory is a blunt instrument that may be of diminished assistance in obtaining agreement on finer policy details.

In sum, federation is a structural mechanism for expanding the ambit of legislative deliberation on rights through the addition of participants, perspectives, and points of engagement and accommodation. Given the intrinsic and instrumental value of deliberation to the evaluation and determination of rights issues, this framework of analysis points to a significant connection between federalism and rights in Australia. However, as with other devices that expand the deliberative process, we should not expect every contribution to be a positive one. Just as second legislative chambers can detract from the deliberative process by shifting debate away from an issue's merits to unrelated matters, so too can another government. To get a firmer grip on the positive and negative dimensions of federalism's contribution to legislative deliberations on rights, it is necessary to turn to practice. In the following Part, I provide three case studies where the connection between federalism and rights is evident. The first, counterterrorism, illustrates how sub-national action affects legislative rights deliberation at the federal level. The second,

<sup>63</sup> To achieve intergovernmental agreement on complex, contested topics such as schooling or health provision, specific rights issues may be omitted from the agreement and thus left to each individual jurisdiction to determine.

same-sex marriage, illustrates how actions at each level of government affect legislative rights deliberation at the other level. The third, organised crime, illustrates how sub-national action affects legislative rights deliberation in other sub-national jurisdictions. In all three, I consider the effect of the High Court's interventions in the area.

### III THE CONNECTION BETWEEN FEDERALISM AND RIGHTS IN PRACTICE

#### *A Counterterrorism*

Following the terrorist attacks in London in July 2005, Prime Minister John Howard announced that the Commonwealth would introduce an extensive range of new counterterrorism measures,<sup>64</sup> many of which had significant implications for rights. The proposals included new provisions on preventative detention, access to airline passenger information, control orders, stop, question and search powers, expanded search warrants, and modified sedition offences. Federal authorities would, for example, be empowered to detain a person without charge for up to 14 days with '[s]evere restrictions' on whom the detainee could contact and to apply for control orders for up to 10 years that could impose 'severe restrictions on movement (such as a tracking device or house arrest), association, communication, work, and use of telephone and internet'.<sup>65</sup> Despite the immensity of the measures, the Commonwealth Government sought to minimise legislative and public scrutiny.<sup>66</sup> Draft legislation was classified as confidential in an 'attempt to keep a lid on the detail of [the] measures'<sup>67</sup> and a tight deadline for parliamentary passage was

<sup>64</sup> John Howard, 'Counter-Terrorism Laws Strengthened' (Media Release, 8 September 2005) <[http://pandora.nla.gov.au/pan/10052/20051121-0000/www.pm.gov.au/news/media\\_releases/media\\_Release1551.html](http://pandora.nla.gov.au/pan/10052/20051121-0000/www.pm.gov.au/news/media_releases/media_Release1551.html)>.

<sup>65</sup> Department of Parliamentary Services (Cth), *Bills Digest*, No 64 of 2005–06, 18 November 2005, 1.

<sup>66</sup> Andrew Byrnes and Gabrielle McKinnon, 'The ACT *Human Rights Act 2004* and the Commonwealth *Anti-Terrorism Act (No 2) 2005*: A Triumph for Federalism or a Federal Triumph?' in Miriam Gani and Penelope Mathew (eds), *Fresh Perspectives on the 'War on Terror'* (ANU E Press, 2008) 361, 367. As George Williams notes, 'a common theme that applied until the fall of the Howard government in late 2007 ... [was that parliamentarians] sponsoring the new measures sought to see them passed by Parliament as quickly and with as little scrutiny as possible': George Williams, 'A Decade of Australian Anti-Terror Laws' (2011) 35 *Melbourne University Law Review* 1136, 1164.

<sup>67</sup> Andrew Lynch, 'Legislating with Urgency — The Enactment of the *Anti-Terrorism Act [No 1] 2005*' (2006) 30 *Melbourne University Law Review* 747, 768.

set. The Government planned to introduce the proposed legislation into Commonwealth Parliament in early November and have it enacted before Christmas.<sup>68</sup>

Once Prime Minister Howard announced the measures in September 2005, federalism immediately entered the picture, altering the course of debate and frustrating the Commonwealth Government's attempt to minimise public scrutiny. The Commonwealth sought the agreement and cooperation of the states and territories due to concerns that it did not have sufficient legislative power under the *Australian Constitution* to enact the measures itself.<sup>69</sup> At a meeting of COAG in late September, the states and territories agreed to refer legislative power to the Commonwealth pursuant to s 51(xxxvii) of the *Australian Constitution* and to enact complementary legislation in their respective jurisdictions.<sup>70</sup>

Australian Capital Territory Chief Minister Jon Stanhope objected to the level of secrecy surrounding the process. On 14 October 2005, he released a draft of the proposed legislation on his website, claiming the need for public scrutiny, and released legal advice on the draft law's compatibility with Australia's international human rights obligations and the *Human Rights Act 2004* (ACT).<sup>71</sup> His actions set off a round of intensive community debate.<sup>72</sup> The Premiers of New South Wales, Victoria, Queensland, South Australia and Western Australia denounced the proposed 'shoot-to-kill' provisions<sup>73</sup> and the Law Council of Australia expressed particular concern about the proposal to allow minors as young as 16 to be detained for 14 days without charge.<sup>74</sup> After

<sup>68</sup> Byrnes and McKinnon, above n 66, 367.

<sup>69</sup> As the communiqué from a meeting of COAG noted:

State and Territory leaders agreed to enact legislation to give effect to measures which, *because of constitutional constraints*, the Commonwealth could not enact, including preventative detention for up to 14 days and stop, question and search powers in areas such as transport hubs and places of mass gatherings.

COAG, 'Council of Australian Governments' Special Meeting on Counter-Terrorism' (Communiqué, 27 September 2005) (emphasis added) <<http://pandora.nla.gov.au/pan/82622/20080515-0841/www.coag.gov.au/meetings/270905/index.html>>.

<sup>70</sup> Ibid.

<sup>71</sup> Byrnes and McKinnon, above n 66, 367.

<sup>72</sup> Ibid 369–70.

<sup>73</sup> Andrew Clennell and Louise Dodson, 'States Draw the Line at Shoot-to-Kill Powers', *The Sydney Morning Herald* (Sydney), 21 October 2005, 1.

<sup>74</sup> 'Police State Fears over Terrorism Laws', *The Sydney Morning Herald* (online), 16 October 2005 <<http://www.smh.com.au/news/national/police-state-fears-over-terrorism-laws/2005/10/16/1129401135040.html>>.

the Commonwealth's legislation was enacted, the Australian Capital Territory Legislative Assembly provided a further contribution to the debate when it enacted its complementary legislation.<sup>75</sup> That legislation contained similar measures to the Commonwealth legislation, but with fewer limitations on rights. Differences included enhanced judicial scrutiny,<sup>76</sup> greater provision of information to affected persons,<sup>77</sup> reduced application to minors,<sup>78</sup> limitations on the monitoring of legal communications,<sup>79</sup> and provision of legal aid to affected persons.<sup>80</sup>

How substantial was federalism's influence in this area? Did the Australian Capital Territory's actions bring about only minor alterations to the course of legislative rights deliberation — additional time for pre-parliamentary public scrutiny and an alternative set of measures — especially when considered against the wealth of counterterrorism legislation enacted following the attacks in the United States in September 2001?<sup>81</sup> Three observations may help us reach an answer.

First, Chief Minister Stanhope's release of the draft legislation and the legal advice he commissioned led to considerable public criticism of the Commonwealth Government's proposed measures. Andrew Byrnes and Gabrielle McKinnon observe that 'the extra time that Stanhope's actions provided for scrutiny appears to have been valuable'.<sup>82</sup> The legislation that was introduced into Commonwealth Parliament on 3 November 2005 included 'significant changes' to the draft Chief Minister Stanhope released on 14 October.<sup>83</sup> The legislation's impact on rights was reduced through modifications to the rules

<sup>75</sup> See *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT).

<sup>76</sup> See, eg, *ibid* s 18. Cf *Anti-Terrorism Act (No 2) 2005* (Cth) sch 4 ss 100.1(1) (definition of 'issuing authority' para (a)), 105.8.

<sup>77</sup> *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) div 2.9. Cf *Anti-Terrorism Act (No 2) 2005* (Cth) sch 4 s 105.52(4).

<sup>78</sup> *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) s 11. Cf *Anti-Terrorism Act (No 2) 2005* (Cth) sch 4 ss 105.5, 105.39, 105.43(4), 105.43(9)–(11).

<sup>79</sup> *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) ss 55–6.

<sup>80</sup> *Ibid* s 13(4). See generally Byrnes and McKinnon, above n 66, 371–2.

<sup>81</sup> For an overview of these legislative changes, see Andrew Lynch and George Williams, *What Price Security? Taking Stock of Australia's Anti-Terror Laws* (UNSW Press, 2006).

<sup>82</sup> Byrnes and McKinnon, above n 66, 370.

<sup>83</sup> Department of Parliamentary Services (Cth), *Bills Digest*, No 64 of 2005–06, 18 November 2005, 4. It is, of course, impossible to identify what prompted the changes, but it is not unreasonable to suggest that the considerable public scrutiny was a possible factor.

of contact for minors, adding detail to the conduct of legal proceedings and changing the process for issuing control and preventative detention orders.<sup>84</sup>

Second, federalism's contribution to the process of legislative rights deliberation extended beyond the actions of Chief Minister Stanhope. The federal dimension added time, participants and scrutiny to the lawmaking process. Over the course of several months (September to December), the Commonwealth conferred with the states and territories, the states and territories debated the Commonwealth's draft legislation, and the states and territories enacted legislation referring legislative power to the Commonwealth.<sup>85</sup> Without the federal impediment, the Commonwealth could have acted unilaterally, which may have resulted in a considerable reduction in time for legislative deliberation, as the events of 2 and 3 November illustrate.

While the states and territories were approving the package of anti-terrorism measures, Prime Minister Howard announced on the morning of 2 November (the day of the Melbourne Cup) that the Commonwealth Government would introduce an urgent amendment to federal counterterrorism legislation because it had 'received specific intelligence and police information' that gave 'cause for serious concern about a potential terrorist threat'.<sup>86</sup> The amendment modified the wording of certain anti-terrorism offences. The Senate was recalled and the amendment passed on the afternoon of 3 November.<sup>87</sup> It was passed with such speed that most parliamentarians did not understand the amendment's effect, which was more extensive than the Commonwealth Government claimed.<sup>88</sup> Andrew Lynch has incisively

<sup>84</sup> Ibid.

<sup>85</sup> See *Terrorism (Commonwealth Powers) Act 2002* (NSW); *Terrorism (Commonwealth Powers) Act 2002* (Qld); *Terrorism (Commonwealth Powers) Act 2002* (SA); *Terrorism (Commonwealth Powers) Act 2002* (Tas); *Terrorism (Commonwealth Powers) Act 2002* (Vic); *Terrorism (Commonwealth Powers) Act 2002* (WA).

<sup>86</sup> John Howard, 'Anti-Terrorism Bill' (Media Release, 2 November 2005) <[http://pandora.nla.gov.au/pan/10052/20051121-0000/www.pm.gov.au/news/media\\_releases/media\\_Release1659.html](http://pandora.nla.gov.au/pan/10052/20051121-0000/www.pm.gov.au/news/media_releases/media_Release1659.html)>.

<sup>87</sup> See *Anti-Terrorism Act 2005* (Cth).

<sup>88</sup> Lynch, above n 67, 764–5 (citations omitted):

What is deeply worrying is that this change occurred not just absent any principled debate over the legitimate breadth of criminal responsibility, but seemingly without any awareness that this was the clear effect of the amendments. The element of haste must account for this, at least in part. The only express recognition from anyone that '[t]he effect of the amendments is to widen the scope of each offence' came from the Bills Digest produced by the Parliamentary Library. But by the time the Bills Digest was available to assist parliamentarians to appraise the legislation, it had already been passed by the

criticised the claim of urgency, noting that the Government did not assert that the terrorist threat was, in fact, imminent and that law enforcement agencies had been calling for the amendment for eighteen months.<sup>89</sup> While it is not possible to know how the Commonwealth Government would have acted in respect of the broader package of anti-terrorism measures without the federal impediment, the urgent amendment provides a telling example of the haste with which the Government was willing to act during this period.

Third, evaluations of federalism's impact should not forget the performance of other mechanisms for facilitating legislative rights deliberation, none of which fared especially well in the area of counterterrorism in the period following September 2001. John Uhr notes that Commonwealth Parliament was 'generally docile and reactive' during the 'war on terror'.<sup>90</sup> In 2005, Prime Minister Howard's Coalition Government held a majority of seats in both Houses of Parliament, attenuating the Senate's ability and willingness to scrutinise the Government's actions, including its proposed laws. The Senate Legal and Constitutional Legislation Committee was given less than a month to complete its review of the counterterrorism measures: 'a six day period of calling for submissions, three days of hearings and 10 more days to prepare the final report'.<sup>91</sup> Thus, federalism's contribution to rights deliberation was especially valuable when viewed against this broader institutional backdrop.

The High Court subsequently cast doubt on whether the Commonwealth did, in fact, need to secure the agreement and cooperation of the states and territories. In *Thomas v Mowbray*, a majority of the Court held that the Commonwealth's power to legislate with respect to defence was sufficient to support the control order regime.<sup>92</sup> Casting off the traditional limitations attaching to the defence power,<sup>93</sup> it was restated in broad terms. Gleeson CJ, for example, held that it

House of Representatives. It is unclear whether senators had the benefit of its independent assessment of the effect of the amendments.

<sup>89</sup> Ibid 767–75.

<sup>90</sup> John Uhr, 'Terra Infirma? Parliament's Uncertain Role in the "War on Terror"' (2004) 27 *University of New South Wales Law Journal* 339, 341.

<sup>91</sup> Williams, 'A Decade of Australian Anti-Terror Laws', above n 66, 1165 (citations omitted).

<sup>92</sup> (2007) 233 CLR 307. According to Gleeson CJ and Gummow and Crennan JJ, the external affairs power provided subsidiary support for the small areas not covered by the defence power: at 326 [9] (Gleeson CJ), 364 [150] (Gummow and Crennan JJ).

<sup>93</sup> See *Australian Constitution* s 51(vi).



is not limited to defence against aggression from a foreign nation; it is not limited to external threats; it is not confined to waging war in a conventional sense of combat between forces of nations; and it is not limited to protection of bodies politic as distinct from the public, or sections of the public.<sup>94</sup>

While *Thomas v Mowbray* only concerned one aspect of the counterterrorism legislation, it provides the Commonwealth with a stronger foundation to act unilaterally in respect of future laws pertaining to national security if it so chooses.

### B Same-Sex Marriage

In 2003, two Australian same-sex couples travelled to Canada to marry.<sup>95</sup> Upon their return, they instituted proceedings in the Family Court to have their marriages recognised in Australia in accordance with the *Marriage Act 1961* (Cth) ('*Marriage Act*').<sup>96</sup> While the proceedings were afoot, in 2004 the Commonwealth Parliament responded with legislation amending the *Marriage Act* to define 'marriage' as 'the union of a man and a woman to the exclusion of all others'<sup>97</sup> and to prohibit same-sex marriages solemnised in foreign countries from being recognised in Australia.<sup>98</sup> These events brought public prominence to the issue of same-sex marriage in Australia.

Two interconnected dimensions of same-sex marriage raise implications for rights, especially the right to equality. The first concerns the legal *entitlements* of same-sex relationships, which include the ability to adopt children, and to access the same financial benefits and to make the same estate planning arrangements as opposite-sex couples.<sup>99</sup> The second concerns the legal

<sup>94</sup> *Thomas v Mowbray* (2007) 233 CLR 307, 324 [7]; see also at 359–64 [132]–[148] (Gummow and Crennan JJ), 449–60 [411]–[445] (Hayne J), 511 [611] (Heydon J).

<sup>95</sup> Kristen Walker, 'The Same-Sex Marriage Debate in Australia' (2007) 11 *International Journal of Human Rights* 109, 110. Canada enacted legislation permitting same-sex marriage in 2005: *Civil Marriage Act*, SC 2005, c 33. For an overview of these developments, see generally Wade K Wright, 'The Tide in Favour of Equality: Same-Sex Marriage in Canada and England and Wales' (2006) 20 *International Journal of Law, Policy and the Family* 249.

<sup>96</sup> Walker, above n 95, 110.

<sup>97</sup> *Marriage Amendment Act 2004* (Cth) sch 1 s 1, amending *Marriage Act* s 5(1).

<sup>98</sup> *Marriage Amendment Act 2004* (Cth) sch 1 s 3, inserting *Marriage Act* s 88EA.

<sup>99</sup> Many other areas exist: see generally Justice Michael Kirby, 'Same Sex Relationships — Some Australian Legal Developments' (1999) 19 *Australian Bar Review* 4, 8–9; Human Rights and Equal Opportunity Commission, *Same Sex: Same Entitlements — National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits* (Report, May 2007).

recognition of same-sex relationships, which includes marriage but also other forms of recognition such as civil unions and registration schemes. While the second will ordinarily alter the first, the first need not involve altering the second. Federalism has played, and continues to play, a central role in affecting legislative deliberations in both areas.

In respect of the first dimension (legal entitlements), in the 1970s states and territories began to adopt legislation recognising *de facto opposite-sex* relationships.<sup>100</sup> Opposite-sex couples in a *de facto* relationship ‘were treated in a manner virtually identical’ to married opposite-sex couples.<sup>101</sup> In the late 1990s and early 2000s, states and territories started to extend the category of *de facto* relationships to same-sex couples, granting them the same legal entitlements as opposite-sex couples in a *de facto* relationship.<sup>102</sup> Each jurisdiction’s actions helped foster discussion about the treatment of same-sex couples in other jurisdictions. Sub-national reforms had a perceptible impact on legislative deliberations at the federal level, which was the last jurisdiction to act. Commonwealth Parliament enacted a package of laws in 2008 to extend the legal benefits of opposite-sex couples to same-sex couples in most, but not all, areas of federal law.<sup>103</sup> Parliament’s position was largely based on the Human Rights and Equal Opportunity Commission’s inquiry into the treatment of same-sex couples in federal law, which extensively drew on experiences at the sub-national level to highlight the issue’s implications for same-sex couples and to formulate proposals for reform.<sup>104</sup>

Greater community and legislative disagreement surrounds the second dimension (legal recognition).<sup>105</sup> There is, for example, disagreement about whether same-sex marriage would advance the interests of lesbian, gay, bisexual, transgender, queer and intersex (‘LGBTQI’) individuals. Kristen Walker argues that

<sup>100</sup> See, eg, *Family Relationships Act 1975* (SA).

<sup>101</sup> Walker, above n 95, 110.

<sup>102</sup> Human Rights and Equal Opportunity Commission, above n 99, 69–73.

<sup>103</sup> *Same-Sex Relationships (Equal Treatment in Commonwealth Laws — General Law Reform) Act 2008* (Cth); *Same-Sex Relationships (Equal Treatment in Commonwealth Laws — Superannuation) Act 2008* (Cth); *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth); *Evidence Amendment Act 2008* (Cth) s 94.

<sup>104</sup> ‘The state and territory reform process provides a useful model for federal law reform’: Human Rights and Equal Opportunity Commission, above n 99, 69.

<sup>105</sup> ‘[T]here does not appear to be consensus about the most appropriate way to recognise same-sex relationships when given the choice between registration schemes, civil unions, or same-sex marriage’: *ibid* 74.

lesbian and gay rights activists in Australia should not be fighting for same-sex marriage. ... I hold this view ... because I consider marriage a problematic institution and one which would have negative effects on the lesbian and gay communities in Australia ...<sup>106</sup>

Walker suggests that it would diminish the freedom of gay men and lesbians by pressuring them to marry to recognise their relationships.<sup>107</sup> By contrast, Raimond Gaita argues that same-sex marriage is essential to securing equal dignity for same-sex attracted people.<sup>108</sup>

Federal interactions have affected the course of debate and reform on the topic of legal recognition. In 2006, the Australian Capital Territory and Commonwealth Governments sparred over civil unions. The Australian Capital Territory enacted legislation allowing same-sex couples to enter into civil unions.<sup>109</sup> The Commonwealth Government resisted the move, understanding it to be inconsistent with its 2004 legislative amendments prohibiting same-sex marriage. Soon after the law was enacted in the Australian Capital Territory, the Commonwealth Executive Council instructed the Governor-General to disallow the law pursuant to its power under s 35 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth).<sup>110</sup> Commonwealth Attorney-General Philip Ruddock publicly opposed the Australian Capital Territory's law on federal grounds, stating that the Australian Capital Territory Government 'provocatively ... and deliberately intended to make the ACT arrangements as close as possible to marriage; when the marriage power is clearly vested in the Commonwealth'.<sup>111</sup>

From 2007 until 2011, the Australian Capital Territory and Commonwealth Governments sparred over the provision of public ceremonies for civil

<sup>106</sup> Walker, above n 95, 122–3. See also Nancy D Polikoff, 'We Will Get What We Ask for: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage"' (1993) 79 *Virginia Law Review* 1535; Paula L Eitelbrick, 'Since When Is Marriage a Path to Liberation?' in Suzanne Sherman (ed), *Lesbian and Gay Marriage: Private Commitments, Public Ceremonies* (Temple University Press, 1992) 20.

<sup>107</sup> Walker, above n 95, 123.

<sup>108</sup> Raimond Gaita, 'Same Sex Marriage — A Philosophical Perspective' (Paper presented at Same Sex Marriage Forum, Castan Centre for Human Rights Law, Monash University, Melbourne, 26 May 2005).

<sup>109</sup> *Civil Unions Act 2006* (ACT).

<sup>110</sup> 'G-G to Disallow Civil Unions Laws', *ABC News* (online), 13 June 2006 <<http://www.abc.net.au/news/2006-06-13/g-g-to-disallow-civil-unions-laws/1776566>>.

<sup>111</sup> Interview with Philip Ruddock (Doorstop Interview, 13 June 2006) <[http://pandora.nla.gov.au/pan/21248/20070722-0007/www.ag.gov.au/agd/www/MinisterRuddockHome.nsf/Page/Interview\\_Transcripts\\_Transcripts\\_2006.html](http://pandora.nla.gov.au/pan/21248/20070722-0007/www.ag.gov.au/agd/www/MinisterRuddockHome.nsf/Page/Interview_Transcripts_Transcripts_2006.html)>.

unions. After a change of government in 2007, Prime Minister Kevin Rudd announced that the Commonwealth Government would not disallow Australian Capital Territory legislation allowing for civil unions. Appearing to take a different stance from former Attorney-General Ruddock on the federal dimension, he stated in December 2007 that '[o]n these matters, state [sic] and territories are answerable to their own jurisdictions'.<sup>112</sup> However, the Government's position appeared to change several months later when the Australian Capital Territory proposed to introduce legislation on the subject. Commonwealth Attorney-General Robert McClelland voiced opposition to the 'ceremonial aspects of the ACT model',<sup>113</sup> stating that the Commonwealth Government would not allow a ceremonial measure that 'mimics marriage'.<sup>114</sup> Conforming to the Commonwealth Government's position, the Australian Capital Territory removed the ceremonial aspects and enacted legislation allowing same-sex couples to register civil unions in a manner similar to the schemes in existence in Tasmania and Victoria.<sup>115</sup> In 2009, the Australian Capital Territory convinced the Commonwealth to agree to public ceremonies if same-sex couples were required to register their intention before the ceremony.<sup>116</sup> Then, in 2012, the Australian Capital Territory enacted legislation permitting identical ceremonies for same-sex civil unions and opposite-sex secular marriages,<sup>117</sup> which the Commonwealth Government did not challenge. Through persistence and incremental change, therefore, the Australian Capital Territory achieved its original objective of public ceremonies for civil unions. In the same year, Queensland went in the opposite direction on legal recognition of same-sex relationships, removing the ceremonial aspects from its system and changing the name of 'civil unions' to 'registered relationships'.<sup>118</sup>

In 2013, the Australian Capital Territory and the Commonwealth clashed over proposals to allow same-sex marriage. Going further than

<sup>112</sup> Annabel Stafford, 'Rudd Refuses to Overrule ACT on Gay Partnership Bill', *The Age* (Melbourne), 7 December 2007, 5.

<sup>113</sup> Paul Maley, 'Gay Unions Are OK ... Just Don't Do It in Public', *The Australian* (Sydney), 7 February 2008, 9.

<sup>114</sup> ABC Radio National, 'Labor vs Labor over Same Sex Marriage', *AM*, 1 May 2008 (Robert McClelland) <<http://www.abc.net.au/am/content/2008/s2232218.htm>>.

<sup>115</sup> *Civil Partnerships Act 2008* (ACT); *Relationships Act 2003* (Tas); *Relationships Act 2008* (Vic).

<sup>116</sup> See *Civil Partnerships Amendment Act 2009* (ACT).

<sup>117</sup> *Civil Unions Act 2012* (ACT).

<sup>118</sup> *Civil Partnerships and Other Legislation Amendment Act 2012* (Qld). Other states have also implemented same-sex relationship registers: *Relationships Register Act 2010* (NSW); *Relationships Act 2008* (Vic).

same-sex civil unions, the Australian Capital Territory Legislative Assembly enacted legislation providing for same-sex 'marriage'.<sup>119</sup> The Commonwealth Government opposed this move, with Attorney-General George Brandis invoking the federal division of powers and appealing to the need for national consistency, stating:

At the moment, the Commonwealth *Marriage Act* provides that consistency. The ACT's proposed law is a threat to that well-established position. It has been understood for more than half a century that there is a single Commonwealth law governing marriage in Australia. The Abbott government believes that that should continue to be the case.<sup>120</sup>

New South Wales Premier Barry O'Farrell agreed with this view, stating that, while he supported same-sex marriage, 'I don't want to see a return to the patchwork quilt of marriage laws that existed in this country in the 1950s and earlier'.<sup>121</sup>

As the Governor-General's power to disallow Australian Capital Territory legislation was removed in 2011,<sup>122</sup> the Commonwealth pursued its opposition to the Australian Capital Territory's legislation in the High Court, arguing that it was incompatible with the amendments made to the *Marriage Act* in 2004 and therefore of no effect due to s 28 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth). The High Court agreed, holding that 'whether same sex marriage should be provided for by law ... is a matter for the federal parliament'.<sup>123</sup>

Several aspects of the relationship between federalism and legislative rights deliberation in the context of same-sex marriage merit comment. First, although most intergovernmental interactions took place through the executive, not the legislature, the executives' actions were informed by prior and proposed legislative actions and legislative deliberations. The Common-

<sup>119</sup> *Marriage Equality (Same Sex) Act 2013* (ACT).

<sup>120</sup> Lisa Cox, 'Same-Sex Marriage Law High Court Challenge Confirmed', *The Sydney Morning Herald* (online), 10 October 2013 <<http://www.smh.com.au/federal-politics/political-news/samesex-marriage-law-high-court-challenge-confirmed-20131010-2vaqe.html>>.

<sup>121</sup> Mark Coultan, 'O'Farrell Won't Back NSW Labor Legislation for Same-Sex Marriage', *The Australian* (online), 31 October 2013 <<http://www.theaustralian.com.au/national-affairs/ofarrell-wont-back-nsw-labor-legislation-for-same-sex-marriage/story-fn59niix-1226750034419>>.

<sup>122</sup> *Territories Self-Government Legislation Amendment (Disallowance and Amendment of Laws) Act 2011* (Cth).

<sup>123</sup> *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441, 452 [1] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

wealth's decision to challenge the Australian Capital Territory's same-sex marriage legislation in the High Court was, for instance, based on prior legislative acts in the Australian Capital Territory and Commonwealth.

Second, intergovernmental interaction has served to highlight the issue's complexity and contestability. Same-sex marriage is not only about marriage, but also the adequacy of other types of legal recognition and their incidents such as nomenclature ('civil unions' versus 'registered relationships') and public ceremonies. These issues have come to the public's attention in part through disagreements between the Australian Capital Territory and the Commonwealth, and within Queensland.

Third, federalism has both hindered and helped legislative deliberation on same-sex marriage. On the one hand, interlocutors have invoked federal considerations to avoid debating substantive questions. Commonwealth Attorneys-General Ruddock, McClelland and Brandis rejected the Australian Capital Territory's actions on federal grounds rather than engaging with the merits of the Australian Capital Territory's actions. Premier O'Farrell invoked federal considerations to avoid expending political capital on taking action on the issue. On the other hand, Australia's federal system supplied multiple legislative venues to deliberate, foster public awareness of, and campaign for change on the legal recognition of same-sex relationships. It helped place and keep the issue in the public sphere, requiring advocates of the status quo to provide affirmative grounds for their position and to take affirmative steps to defend that position, ensuring that their view would not prevail merely by allowing the issue to languish.

Fourth, the High Court's decision in *Commonwealth v Australian Capital Territory* ('*Same-Sex Marriage Case*')<sup>124</sup> significantly reduced the capacity of federalism to continue to influence legislative deliberations on the subject.<sup>125</sup> The effect of its decision is to funnel future deliberation about same-sex marriage exclusively into the federal sphere. Indeed, it arguably went a step further, opening the door for the Commonwealth to monopolise the domain of relationship recognition if it so chose. The Court defined the Common-

<sup>124</sup> (2013) 250 CLR 441.

<sup>125</sup> For differing opinions on the decision, see Brad Jessup, 'The Court Hurts: A Personal Reflection on *Commonwealth v ACT* ("*Same Sex Marriage Case*")' (2014) 39 *Alternative Law Journal* 45; Patrick Parkinson and Nicholas Aroney, 'The Territory of Marriage: Constitutional Law, Marriage Law and Family Policy in the ACT *Same Sex Marriage Case*', (Research Paper No 14-20, T C Beirne School of Law, The University of Queensland, 19 March 2014).

wealth's power to legislate with respect to 'marriage'<sup>126</sup> in broad terms. Marriage, the Court said, refers to

a consensual union formed between natural persons in accordance with legally prescribed requirements which is not only a union the law recognises as intended to endure and be terminable only in accordance with law but also a union to which the law accords a status affecting and defining mutual rights and obligations.<sup>127</sup>

The Court also said that no specific formal requirements attach to marriage: it 'may be very simple (for example, no more than the exchange of certain promises before witnesses)'.<sup>128</sup> Finally, the Court said 'the topic within which the status falls must be identified by reference to the legal content and consequences of the status, *not merely the description given to it*'.<sup>129</sup> Thus, the Court's definition of the marriage power arguably encompasses civil unions — the legal effects and formal requirements of civil unions are not appreciably different from marriage — especially if the term used — marriage or civil union — is not determinative.

### C Organised Crime

In March 2009, a chance meeting between members of the Hells Angels and Comancheros Motorcycle Clubs on a flight from Melbourne to Sydney resulted in the murder of a Hells Angels associate in the departure hall of Sydney Airport.<sup>130</sup> The victim's brother was shot and seriously injured at the family home a week later.<sup>131</sup> Shortly after, the New South Wales Parliament enacted the *Crimes (Criminal Organisations) Control Act 2009* (NSW). Two weeks later, the Standing Committee of Attorneys-General discussed 'a comprehensive national approach to combat organised and gang related crime

<sup>126</sup> See *Australian Constitution* s 51(xxi).

<sup>127</sup> *Same-Sex Marriage Case* (2013) 250 CLR 441, 461 [33] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

<sup>128</sup> *Ibid* 462 [34].

<sup>129</sup> *Ibid* 469 [60] (emphasis added). This observation is from Gabrielle Appleby, 'High Court: Same-Sex and Polygamy In. Bestiality Out.' on *Public Law and Policy Research Unit Blog* (12 January 2014) <<http://blogs.adelaide.edu.au/public-law-rc/2014/01/12/high-court-same-sex-and-polygamy-in-possibly-bestiality-out/>>.

<sup>130</sup> *R v Hawi* [2012] NSWSC 332 (10 April 2012) [5]–[37] (R A Hulme J).

<sup>131</sup> Geesche Jacobsen et al, 'Shooting Sparks Gang Demand for Deadly Retribution', *The Sydney Morning Herald* (Sydney), 31 March 2009, 4.

and to prevent gangs from simply moving their operations interstate'.<sup>132</sup> In June, the Commonwealth Attorney-General introduced legislation into Parliament to implement the measures agreed to at the meeting.<sup>133</sup> Organised crime legislation was enacted in the Northern Territory<sup>134</sup> in October and in Queensland<sup>135</sup> in November.

This spate of legislative activity was neither the first nor the last to address organised crime associated with motorcycle groups.<sup>136</sup> New South Wales, the Northern Territory's and Queensland's laws were based on South Australia's<sup>137</sup> organised crime legislation enacted the previous year.<sup>138</sup> The Queensland Parliament enacted another package of laws<sup>139</sup> in October 2013 following a violent incident involving two motorcycle groups.<sup>140</sup> Three weeks later, the Western Australian Government announced that its organised crime legislation,<sup>141</sup> which was enacted the previous year, would come into effect.<sup>142</sup>

Legislative responses to organised crime associated with motorcycle groups have been strikingly similar to, and thus raise similar rights issues to, terrorism. State and territory organised crime legislation 'draw[s] substantially

<sup>132</sup> Standing Committee of Attorney-General, 'Communique' (17 April 2009) <[http://pandora.nla.gov.au/pan/21248/20091120-0012/www.attorneygeneral.gov.au/www/ministers/mccllelland.nsf/Page/MediaReleases\\_2009\\_SecondQuarter\\_17April2009-Communique-StandingCommitteeofAttorneys-General.html](http://pandora.nla.gov.au/pan/21248/20091120-0012/www.attorneygeneral.gov.au/www/ministers/mccllelland.nsf/Page/MediaReleases_2009_SecondQuarter_17April2009-Communique-StandingCommitteeofAttorneys-General.html)>.

<sup>133</sup> Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 (Cth). It was enacted early the following year: *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth).

<sup>134</sup> *Serious Crime Control Act 2009* (NT).

<sup>135</sup> *Criminal Organisation Act 2009* (Qld).

<sup>136</sup> For an overview of the legislation enacted prior to 2010, see Lorana Bartels, 'The Status of Laws on Outlaw Motorcycle Gangs in Australia' (Research in Practice Report No 2, Australian Institute of Criminology, 2<sup>nd</sup> ed, March 2010).

<sup>137</sup> *Serious and Organised Crime (Control) Act 2008* (SA). See also *Statutes Amendment (Anti-Fortification) Act 2003* (SA).

<sup>138</sup> L Blayden, 'Anti-Gang Laws in Australia' (Issues Backgrounder No 5, Parliamentary Research Service, New South Wales, 2013) 3.

<sup>139</sup> *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld); *Tattoo Parlours Act 2013* (Qld); *Vicious Lawless Association Disestablishment Act 2013* (Qld).

<sup>140</sup> 'Queensland Police Declare Crackdown on Bikies after Massive Gold Coast Brawl', *ABC News* (online), 28 September 2013 <<http://www.abc.net.au/news/2013-09-28/queensland-police-declares-crackdown-on-bikies-after-brawl/4987030>>.

<sup>141</sup> *Criminal Organisations Control Act 2012* (WA).

<sup>142</sup> Liam Ducey, 'Bikie Gangs on Notice as New WA Criminal Organisation Laws Target Members', *WA Today* (online), 29 October 2013 <<http://www.watoday.com.au/wa-news/bikie-gangs-on-notice-as-new-wa-criminal-organisation-laws-target-members-20131029-2wdx9.html>>.



upon measures contained in the federal anti-terrorism legislation',<sup>143</sup> seeking to address the issue through a combination of control orders, new offences, harsher penalties and restrictions on association (anti-consorting provisions). Politicians have not hesitated to draw direct links between the two subjects, with South Australian Premier Mike Rann stating in 2007 that organised crime is 'a form of terrorism'<sup>144</sup> and that motorcycle group members engaged in illegal activity are 'terrorists'.<sup>145</sup> The speed of some legislative activity, engendering a concomitant dearth of public and legislative scrutiny, is another attribute the two subjects share. New South Wales' organised crime legislation was introduced into Parliament at 11:06 am on 2 April 2009 and was approved by both Houses by 10:00 pm the same day.<sup>146</sup> Queensland's second package of laws was introduced into Parliament at 2:30 pm on 15 October 2013 and approved just over 12 hours later at 2:50 am<sup>147</sup> without any community consultation.<sup>148</sup>

Federalism has affected the course of legislative rights deliberations on organised crime in several respects.<sup>149</sup> Debates about the adequacy of existing legislative arrangements and the effect and effectiveness of proposed amendments have been influenced by developments in other states and territories. New South Wales both drew on and distinguished its legislation from that in South Australia. Minister for Police Tony Kelly said that the *Crimes (Criminal Organisations Control) Act 2009* (NSW)'s 'declaration provisions owe much to

<sup>143</sup> Gabrielle J Appleby and John M Williams, 'A New Coat of Paint: Law and Order and the Refurbishment of *Kable*' (2012) 40 *Federal Law Review* 1, 2–3. See also Arlie Loughnan, 'The Legislation We Had to Have?: The *Crimes (Criminal Organisations Control) Act 2009* (NSW)' (2009) 20 *Current Issues in Criminal Justice* 457, 458–9.

<sup>144</sup> 'Mike Rann Calls on States to Adopt SA's Anti-Bikie Laws', *The Advertiser* (online), 23 March 2009 <<http://www.adelaidenow.com.au/news/adopt-our-bikie-laws-urges-rann/story-e6freo8c-1225700733991>>.

<sup>145</sup> Pia Akerman, 'Rann Targets Bikie "Terror"', *The Australian* (online), 5 June 2007 <<http://www.theaustralian.com.au/news/nation/rann-targets-bikie-terror/story-e6frg6nf-1111113680188>>. See generally Nicola McGarrity, 'From Terrorism to Bikies: Control Orders in Australia' (2012) 37 *Alternative Law Journal* 166.

<sup>146</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 2 April 2009, 14 439 (John Aquilina); New South Wales, *Parliamentary Debates*, Legislative Council, 2 April 2009, 14 386–7 (Robert Brown).

<sup>147</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 15 October 2013, 3154, 3269 (Jarrod Bleijie).

<sup>148</sup> Explanatory Notes, Vicious Lawless Association Disestablishment Bill 2013 (Qld) 3; Explanatory Notes, Criminal Law (Criminal Organisations Disruption) Amendment Bill 2013 (Qld) 8.

<sup>149</sup> Other factors have also contributed to the focus on and discourse surrounding organised crime associated with motorcycle groups: see, eg, Loughnan, above n 143, 457–8.

the South Australian model', and he 'congratulate[d] Premier Mike Rann on having the courage to be the first in the country to attempt such a scheme', but he also noted that the New South Wales Parliament 'ha[d] not slavishly followed the South Australian provisions' and that 'there are some differences in the model contained in [the Crimes (Criminal Organisations Control) Bill 2009 (NSW)]'.<sup>150</sup> The principal difference concerned the manner in which control orders were made.<sup>151</sup> Some welcomed this departure,<sup>152</sup> but others expressed concern.<sup>153</sup> Lee Rhiannon engaged in comparison to oppose the legislation, arguing that South Australia's legislation 'is clearly an abuse of civil rights and has been denounced as such by the majority of justice groups in South Australia'<sup>154</sup> and that New South Wales' legislation was not appreciably different.<sup>155</sup> Several months later in Queensland, most parliamentarians agreed that South Australia's and New South Wales' laws should not be replicated; debate centred on whether the State's proposed legislation was appreciably different.<sup>156</sup>

<sup>150</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 2 April 2009, 14 341. Attorney-General John Hatzistergos said '[w]e have clearly looked at the South Australian legislation and we have sought to improve it': at 14 376.

<sup>151</sup> Neither method, however, survived High Court scrutiny: *South Australia v Totani* (2010) 242 CLR 1; *Wainohu v New South Wales* (2011) 243 CLR 181. For other differences, see New South Wales, *Parliamentary Debates*, Legislative Council, 2 April 2009, 14 344–5 (Christine Robertson).

<sup>152</sup> Minister for Police Tony Kelly said that it allowed Parliament to close a loophole that existed in South Australia's legislation: New South Wales, *Parliamentary Debates*, Legislative Council, 2 April 2009, 14 341.

<sup>153</sup> Leader of the Opposition Michael Gallacher said

it is worth noting how drastically it has changed the legislative template used by the South Australian and Western Australian governments. At the core of the legislation in those jurisdictions was the regulatory and authoritative oversight of the Attorney General. The community expects that legislation targeting serious crimes that has the potential to impinge upon the civil liberties of individuals without trial by jury should, at the very least, be overseen and regulated by a democratically elected parliament.

Ibid 14 339.

<sup>154</sup> Ibid 14 353.

<sup>155</sup> Ibid 14 356–7.

<sup>156</sup> See, eg, Queensland, *Parliamentary Debates*, Legislative Assembly, 25 November 2009, 3603 (Lawrence Springborg), 3615 (Ros Bates), 3619 (Vaughan Johnson), 3627 (Andrew Powell), 3631 (Alex Douglas), 3633 (Jann Stuckey). Jarrod Bleijie, for example, said:

We should be leading the way, but we do not need to lead the way when it comes to encroaching on the freedoms and liberties of our people. The Bligh Labor government has a history of copying legislation and other material from its southern counterparts. I have said in this place before that it is a sad state in the history of politics in Queensland when

Changes in one jurisdiction have tended to place pressure on other jurisdictions to follow suit so as to avoid negative spillover effects, namely the relocation of criminals. When New South Wales' legislation came before Parliament, Leader of the Opposition Michael Gallacher criticised the Government for taking so long to take action after South Australia. He said that the State had become 'a safe haven for bikies' and that 'the evidence of motorcycle gang members fleeing South Australia and coming to States like New South Wales is there for all to see in our newspapers'.<sup>157</sup> Queensland Attorney-General Cameron Dick said that the 'one of the major reasons' for its legislation was 'to prevent this state from becoming a safe haven for outlaw motorcycle gangs from interstate'.<sup>158</sup> Some states have sought to outbid each other to have the 'toughest' laws in Australia.<sup>159</sup> Others have, however, resisted the trend. In response to the actions of other jurisdictions in 2009, Victorian Attorney-General Rob Hulls said '[t]here's no evidence to suggest that legislation to criminalise motorcycle gangs, including the laws introduced in South Australia have actually been effective in addressing the organised criminal activities of these groups'.<sup>160</sup> However, after a change of government

this government looks to the southern states, in particular New South Wales, as a great example of legislative reform.

At 3620. On the other side of the debate, see, eg, at 3623 (Steve Kilburn); Queensland, *Parliamentary Debates*, Legislative Assembly, 26 November 2009, 3671–2 (Kerry Shine), 3690 (Julie Attwood), 3697 (Wayne Wendt), 3708 (Steve Wettenhall), 3710 (Cameron Dick).

<sup>157</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 2 April 2009, 14 337.

<sup>158</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 26 November 2009, 3709. See also Queensland, *Parliamentary Debates*, Legislative Assembly, 25 November 2009, 3637 (Neil Roberts). Rob Messenger criticised the government's inaction, stating that 'Queensland has become the organised crime capital of Australia because of mismanagement by the Labor Party on law and order issues': Queensland, *Parliamentary Debates*, Legislative Assembly, 26 November 2009, 3702.

<sup>159</sup> In 2001, Western Australian Premier Geoff Gallop said that the proposed legislation would 'give Western Australia the toughest laws in Australia for combating the sinister and complex activities of criminal gangs': Western Australia, *Parliamentary Debates*, Legislative Assembly, 6 November 2001, 5038. In 2008, South Australian Premier Mike Rann said 'South Australia will soon have the world's toughest laws to combat criminal motorcycle gangs': Mike Rann, 'SA Set for World's Toughest Anti-Bikie Laws' (Press Release, 8 May 2008) <<http://pandora.nla.gov.au/pan/86202/20081007-1101/www.premier.sa.gov.au/news863.html?id=3097&page=64>>. In 2013, Queensland Premier Campbell Newman said 'we will introduce to this parliament the toughest laws against these thugs this state has ever seen. Indeed, they are amongst the toughest in the world': Queensland, *Parliamentary Debates*, Legislative Assembly, 15 October 2013, 3114.

<sup>160</sup> ABC Radio, 'Victoria Bucks National Bikie Laws', *AM*, 16 April 2009 <<http://www.abc.net.au/am/content/2008/s2544129.htm>>. Several months later, it was reported that Police Minister Bob Cameron said 'he [was] happy with the current approach, which [took] a broad

in 2010, the Victorian Government followed through on its election promise<sup>161</sup> to implement legislation targeted at motorcycle groups in 2012.<sup>162</sup>

As is well known, the High Court has intervened in this area on several occasions, invalidating aspects of the states' control order regimes for conferring powers that require the judiciary to deviate to an impermissible degree from established legal procedures thereby undermining the judiciary's independence and institutional integrity contrary to ch III of the *Australian Constitution*, as first established in *Kable v Director of Public Prosecutions (NSW)* ('*Kable*').<sup>163</sup> In 2010, in *South Australia v Totani* ('*Totani*'), the High Court invalidated s 14(1) of the *Serious and Organised Crime (Control) Act 2008* (SA).<sup>164</sup> Under the legislation, South Australia's Attorney-General was empowered, upon application of the Commissioner of Police, to make a declaration in respect of an organisation if satisfied that members of the organisation were involved in serious criminal activity and the organisation represented a risk to public safety and order.<sup>165</sup> A declaration allowed the Commissioner to apply to the Magistrates Court of South Australia for control orders in respect of members of the declared organisation. Section 14(1) stated that the Magistrates Court 'must' make a control order 'if the Court is satisfied that the defendant is a member of a declared organisation'. Any information classified as 'criminal intelligence' could not be disclosed to the defendant.<sup>166</sup> The High Court invalidated s 14(1) because, in the words of French CJ, it 'represents a substantial recruitment of the judicial function of the Magistrates Court to an essentially executive process'<sup>167</sup> or, in the words of Gummow J, 'the Magistrates Court is called upon effectively to act at the behest of the Attorney-General to an impermissible degree'.<sup>168</sup>

view of organised crime rather than NSW and South Australian laws which specifically target bikie gangs': Geoff Wilkinson and Edwina Scott, 'Union Calls for State to Adopt Anti Bikie Gang Laws as Documents Reveal Arrival of Two Notorious Outlaw Groups in Victoria', *The Herald Sun* (online), 26 November 2009 <<http://www.heraldsun.com.au/news/arrival-of-two-notorious-outlaw-motorcycle-gangs-sparks-fears-of-bikie-war-in-victoria/story-e6frf7jo-1225803902822>>.

<sup>161</sup> John Ferguson, 'Baillieu Takes on Bikie Gangs', *The Australian* (Sydney), 15 April 2011, 7.

<sup>162</sup> *Criminal Organisations Control Act 2012* (Vic).

<sup>163</sup> (1996) 189 CLR 51.

<sup>164</sup> (2010) 242 CLR 1.

<sup>165</sup> *Serious and Organised Crime (Control) Act 2008* (SA) s 10.

<sup>166</sup> *Ibid* s 21.

<sup>167</sup> *Totani* (2010) 242 CLR 1, 52 [82].

<sup>168</sup> *Ibid* 67 [149].

In 2011, in *Wainohu v New South Wales* ('Wainohu'), the High Court invalidated the *Crimes (Criminal Organisations Control) Act 2009* (NSW).<sup>169</sup> New South Wales' control order regime was similar to that of South Australia except that an 'eligible judge'<sup>170</sup> of the Supreme Court of New South Wales was empowered to make declarations, not the Attorney-General.<sup>171</sup> Members of the organisation were entitled to make submissions to the eligible judge, but the judge was not required to give reasons for the declaration or decision.<sup>172</sup> The Supreme Court was empowered, upon application of the Commissioner of Police, to make control orders in respect of members of a declared organisation.<sup>173</sup> The High Court invalidated the legislation because, in the words of French CJ and Kiefel J,

[t]o the extent that the statute effectively immunises the eligible judge from any obligation to provide ... reasons, it marks the function which that judge carries out as lacking an essential incident of the judicial function.<sup>174</sup>

These decisions produced two effects on legislative deliberation.

The first was defiance. States and territories did not take the rulings as an opportunity to revisit the merits of their approaches and seek a new balance between protection from criminal activity and limitations on rights. To the contrary, they redoubled their efforts. South Australia enacted a set of additional offences.<sup>175</sup> Attorney-General John Rau announced that the Government's response to the High Court decision would be

comprehensive and, in particular, designed so that the effectiveness of the government's policy to harass and disrupt criminal gangs is restored and the intent of the government's policy is not thwarted by constitutional issues.<sup>176</sup>

It passed remedial legislation creating a control order regime similar to that of Western Australia.<sup>177</sup> New South Wales did the bare minimum to comply with the decision in *Wainohu*, re-enacting the same legislation with the addition of

<sup>169</sup> (2011) 243 CLR 181.

<sup>170</sup> *Crimes (Criminal Organisations Control) Act 2009* (NSW) s 5.

<sup>171</sup> *Ibid* s 9.

<sup>172</sup> *Ibid* s 13(2).

<sup>173</sup> *Ibid* ss 14, 19.

<sup>174</sup> *Wainohu* (2011) 243 CLR 181, 219 [68].

<sup>175</sup> *Statutes Amendment (Serious and Organised Crime) Act 2012* (SA).

<sup>176</sup> South Australia, *Parliamentary Debates*, House of Assembly, 15 February 2012, 78.

<sup>177</sup> *Serious and Organised Crime (Control) (Miscellaneous) Amendment Act 2012* (SA). See South Australia, *Parliamentary Debates*, House of Assembly, 15 February 2012, 98 (J R Rau).

a requirement to provide reasons.<sup>178</sup> As a Member of New South Wales Parliament noted, '[i]t is the smallest thing one can do to make the bill valid'.<sup>179</sup> In the course of passing the 2013 package of laws, Queensland Premier Campbell Newman was undeterred by the prospect of constitutional challenge, stating: 'If we fail [in the courts], if it is challenged, I have said before and I say again tonight, we will keep trying'.<sup>180</sup>

The second effect was to narrow the scope of debate. In 2013, in *Assistant Commissioner Condon v Pompano Pty Ltd* ('*Pompano*'), the High Court upheld Queensland's control order regime.<sup>181</sup> Queensland's legislation empowers the Supreme Court of Queensland to declare an organisation to be a 'criminal organisation'<sup>182</sup> (rather than the Attorney-General, as in South Australia,<sup>183</sup> or an eligible judge, as in New South Wales<sup>184</sup>). After the High Court's decision, New South Wales<sup>185</sup> and South Australia<sup>186</sup> amended their legislation to emulate Queensland's control order regime. The High Court's act of validation elevated Queensland's legislation to the status of preferred model notwithstanding that it is far from an exemplar of good judicial process, as even members of the High Court noted.

Under Queensland's approach, information classified as 'criminal intelligence'<sup>187</sup> cannot be disclosed to the respondent or any representative of the respondent.<sup>188</sup> Applications to classify information as criminal intelligence are held in closed hearings in the absence of affected persons.<sup>189</sup> Control orders can, therefore, be made against persons on the basis of evidence they have not seen. French CJ observed that '[n]o plausible explanation was offered' for the legislation's 'remarkable constraints' on the open court principle and rules of

<sup>178</sup> *Crimes (Criminal Organisations Control) Act 2012* (NSW) s 11, as inserted by *Crimes (Criminal Organisations Control) Amendment Act 2013* (NSW) s 11.

<sup>179</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 15 February 2012, 8330 (Paul Lynch).

<sup>180</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 15 October 2013, 3210. An initial challenge to the legislation failed, in part because the plaintiff lacked standing: *Kuczborski v Queensland* (2014) 314 ALR 528.

<sup>181</sup> (2013) 295 ALR 638.

<sup>182</sup> *Criminal Organisation Act 2009* (Qld) s 10(1).

<sup>183</sup> *Serious and Organised Crime (Control) Act 2008* (SA) s 10.

<sup>184</sup> *Crimes (Criminal Organisations Control) Act 2009* (NSW) s 9.

<sup>185</sup> *Crimes (Criminal Organisations Control) Amendment Act 2013* (NSW).

<sup>186</sup> *Serious and Organised Crime (Control) (Declared Organisations) Amendment Act 2013* (SA).

<sup>187</sup> *Criminal Organisation Act 2009* (Qld) s 59.

<sup>188</sup> *Ibid* s 82.

<sup>189</sup> *Ibid* ss 70, 78.

procedural fairness.<sup>190</sup> Similarly, Gageler J said that '[i]t is not difficult to see how unfairness to a respondent might arise'<sup>191</sup> and that 'use by the commissioner of declared criminal intelligence could in some circumstances amount to an abuse of process'.<sup>192</sup> In the end, French CJ and Gageler J upheld the legislation because it did not displace the Supreme Court's inherent power to stay proceedings if 'practical unfairness [to a respondent] becomes manifest'.<sup>193</sup> Hayne, Crennan, Kiefel and Bell JJ reached a similar conclusion,<sup>194</sup> noting that the Supreme Court can take into account the respondent's inability to know or challenge criminal intelligence when determining what weight to give that evidence.<sup>195</sup>

The reaction to the High Court's decision in *Kuczborski v Queensland* ('*Kuczborski*')<sup>196</sup> provides another example. In that case, the plaintiff failed in his challenge to the constitutional validity of Queensland's 2013 package of laws. Following the decision, Premier Newman urged other states and territories to adopt similar legislation,<sup>197</sup> which the governments of Western Australia, the Northern Territory and South Australia said they would consider.<sup>198</sup> However, part of the plaintiff's challenge failed because the Court held he lacked standing, meaning that the '[t]he question of [constitutional] validity ... must await consideration on another day'.<sup>199</sup> The Court's decision was far from an endorsement of the policies contained in the legislation, with Crennan, Kiefel, Gageler and Keane JJ observing that 'the possible reach of these provisions is very wide, and ... their operation may be excessive and even harsh'.<sup>200</sup>

This pattern of events in respect of organised crime associated with motorcycle groups reveals several connections between federalism and rights

<sup>190</sup> *Pompano* (2013) 295 ALR 638, 664 [83].

<sup>191</sup> *Ibid* 692 [202].

<sup>192</sup> *Ibid* 694 [212].

<sup>193</sup> *Ibid*; see also at 663–6 [82]–[89] (French CJ).

<sup>194</sup> *Ibid* 684 [167].

<sup>195</sup> *Ibid* 684 [166].

<sup>196</sup> (2014) 314 ALR 528.

<sup>197</sup> 'Anti-Bikie Laws: High Court Rejects Challenge to Queensland VLAD Laws', *ABC News* (online), 15 November 2014 <<http://www.abc.net.au/news/2014-11-14/high-court-rejects-challenge-to-vlad-anti-bikie-laws/5890254>>.

<sup>198</sup> Cleo Fraser, 'States, NT May Adopt Qld Anti-Bikie Laws', *Perth Now* (online), 14 November 2014 <<http://www.perthnow.com.au/news/breaking-news/court-rejects-challenge-to-qld-bikie-laws/story-fnhrvfuw-1227122720200>>.

<sup>199</sup> *Kuczborski* (2014) 314 ALR 528, 536 [16] (French CJ).

<sup>200</sup> *Ibid* 576 [217].

deliberation. The case study demonstrates that the possibility of exit (relocation) is not entirely absent from the Australian federal context, and it has consequences for legislative rights deliberation. As motorcycle groups voted with their feet and moved jurisdictions — or were perceived to be doing so — the tenor of deliberation took on a comparative dimension. Governments competed with each other to have the country's 'toughest' organised crime legislation to prevent their jurisdiction from becoming a 'safe haven' for criminals. As a result, the rights of affected individuals received less weight in the deliberative process. Federalism's effect on legislative deliberation has not, however, been entirely negative. The cross-jurisdictional responses to organised crime created a debate that has spanned a number of years and employed comparative evaluation to enhance the quality of discussion. Parliamentarians in New South Wales, Queensland and Victoria have drawn on developments in other jurisdictions to critically evaluate measures proposed in their own jurisdictions.

The issue of organised crime illustrates how state and territory legislatures can on occasion be exemplars of poor parliamentary process, enacting complex legislation in a single day with no community consultation or committee review. This raises the question: is there an inherent connection between federalism and substandard legislative deliberation? For the most part, the answer is no. As the case study of counterterrorism illustrates, poor parliamentary process also occurs at the federal level. New Zealand, a unitary state, has also suffered from the problem of hasty legislative action. In the second half of the 20<sup>th</sup> century, the country was described as an 'executive paradise'<sup>201</sup> where, as Geoffrey Palmer observed, Parliament could enact 'the fastest law in the West'.<sup>202</sup> Reflecting on his time as New Zealand Prime Minister in the late 1970s and early 1980s, Robert Muldoon spoke of the speed with which laws could be enacted:

the New Zealand Cabinet can meet, resolve that a change in the law is necessary, have it drafted immediately — and usually it is a fairly simple matter —

<sup>201</sup> Leslie Zines, *Constitutional Change in the Commonwealth* (Cambridge University Press, 1991) 47.

<sup>202</sup> Geoffrey Palmer, *Unbridled Power? An Interpretation of New Zealand's Constitution and Government* (Oxford University Press, 1979) ch 7.



get the approval of the government members in caucus, take it into the House, and force it through in a single sitting.<sup>203</sup>

Inadequate legislative deliberation is, therefore, a product of lawmaking processes that centralise too much power in the executive, not federalism. After New Zealand's second legislative chamber was abolished in 1951 and before the introduction of mixed member proportional representation in 1996, the country suffered from an especially acute case of executive dominance. It had a unicameral legislature and a system of single-member electorates with first-past-the-post voting, a structure that tended to give a single political party complete control over the lawmaking process.

Part of the answer may, however, be yes. Australia's federal system may indirectly contribute to inadequate legislative deliberation by centralising power at the federal level. As Gabrielle Appleby and John Williams note, the expansion of federal legislative power over the course of the 20<sup>th</sup> century has left 'law and order [as] one of the few areas of responsibility over which the states [and territories] continue to hold the reins'.<sup>204</sup> Consequently, state and territory 'political leaders have sought to maximise political gain from tough law and order policies'.<sup>205</sup>

The High Court's decisions have produced decidedly mixed results in terms of their impact on legislative deliberation. On the one hand, the Court's judgments invalidating aspects of the control order regimes have forced state legislators to reconsider their approaches to addressing organised crime. Politicians have had to develop measures that respect the institutional integrity and impartiality of their courts. The *Kable* doctrine, in effect, sets a baseline for state and territory policy innovation.<sup>206</sup> While the *Australian Constitution* grants sub-national jurisdictions a largely free hand to experiment with different policy solutions, the Court imposes certain thresholds, in order to preserve features of the country's integrated judicial system, that legislatures cannot cross.

On the other hand, the Court's decisions have had a deleterious effect on legislative deliberation. States and territories have used favourable decisions as

<sup>203</sup> Philip Worthington, 'Mr Muldoon Defines Executive Role', *The Press* (Christchurch), 25 February 1980, 16, quoted in Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (Law Book, 1993) 218.

<sup>204</sup> Appleby and Williams, above n 143, 1.

<sup>205</sup> *Ibid* 2.

<sup>206</sup> For an insightful discussion of how the *Kable* doctrine affects experimentation at the state and territory level, see Brendan Lim, 'Laboratory Federalism and the *Kable* Principle' (2014) 42 *Federal Law Review* 519.

signifiers of credence, drawing on the High Court's rulings as imprimatur for their policies. Queensland's Attorney-General, for instance, switched from criticising the State's organised crime legislation while a member of the Opposition<sup>207</sup> to lauding it following the High Court's decision in *Pompano*.<sup>208</sup> This can occur even if a challenge is dismissed for procedural reasons and contains statements noting the excessive and harsh nature of the law's measures, as evidenced by Premier Newman's statements after *Kuczborski*.

A finding of constitutional validity creates a further impediment for those seeking to criticise a law's effects on rights, making an already difficult task even more arduous. A favourable High Court decision appears to put the matter to rest, as evidenced by South Australia's and New South Wales' prompt decisions to emulate Queensland's model after *Pompano*. But that decision addresses a very narrow question, leaving many other rights issues open, such as the propriety of expanding the use of secret evidence and the appropriateness of relying on control orders to address organised crime. The Court has steadfastly cast the *Kable* doctrine in terms of institutions not individuals — the object is to protect the place of state courts in Australia's integrated judicial system, not to safeguard individual rights.<sup>209</sup> When the Court upholds a law under the *Kable* doctrine, it is not validating the law's interference with rights, but legislators often take this to be one consequence of the decision.

#### IV THE IMPLICATIONS FOR FEDERALISM, THE IMPLICATIONS FOR RIGHTS

The three case studies demonstrate that shifting our analytical focus from policy differentiation to deliberative processes reveals important connections between federalism and rights. The intervention of an external government into the lawmaking process can force the legislature to consider issues it may have preferred to ignore and, in doing so, facilitate more detailed public scrutiny and oversight, as was the case in the counterterrorism case study.

<sup>207</sup> See above n 156.

<sup>208</sup> As noted by Leader of the Opposition Anastacia Palaszczuk: Queensland, *Parliamentary Debates*, Legislative Assembly, 15 October 2013, 3200; see also at 3217 (William Byrne).

<sup>209</sup> For an example of this distinction at work in argument before the High Court, see *Fardon v A-G (Qld)* (2004) 223 CLR 575, 586 [2] (Gleeson CJ), 601 [41] (McHugh J). The *Kable* doctrine's focus on institutions not individuals is starkly demonstrated by the 'paradox' it creates. If a function cannot be conferred on state courts due to the *Kable* doctrine, a state legislature can typically confer it on an executive body or individual that affords even fewer safeguards for individual rights than courts: at 586 [2], 591 [18] (Gleeson CJ), 602 [44] (McHugh J).

Federalism can counteract legislative inertia by lowering the threshold for minorities to place issues on the political agenda, as was the case in the same-sex marriage case study. And federalism can foster more informed deliberation by creating a set of legislative iterations where each jurisdiction draws on the lessons of its predecessors, as was the case in the organised crime case study. Yet it can also allow legislators to avoid deliberating on rights issues by instead focusing on issues of federal responsibility, as occurred in the context of same-sex marriage. It can also foreclose rights deliberation by creating reasons for action that are independent of the issue at hand, namely the avoidance of negative spillover effects, as occurred in the context of organised crime.

A focus on deliberation helps us evaluate the value and role of federalism in Australia's constitutional system. While it is common to devalue Australia's federal system,<sup>210</sup> it does function as another safeguard in the lawmaking process. The federal system can require the participation of other levels of government, as we saw in the context of counterterrorism, or require multiple rounds of legislative consideration, as we saw in the context of organised crime. And as we saw in the context of same-sex marriage, federalism can operate as a process that 'connect[s] both formally (through public hearings and consultation procedures) and informally with wider debates in the society'.<sup>211</sup> As with any safeguard, it does not always work and can be misused. We see that federalism both positively and negatively affects the *quality* of legislative deliberations on rights. However, in all three cases it arguably expanded the *process* of deliberation. In this sense, there are parallels with bicameralism. While an upper legislative chamber does not always make edifying contributions to legislative deliberation, it expands the deliberative process, helping prevent the executive from being able to control or truncate that process at will. This analysis thus provides an additional reason for Australians to strive to maintain a robust federal system with effective and responsible state and territory governments.

A focus on deliberation also helps us assess the strength of Australia's approach to rights protection. The absence of a comprehensive system of rights-based judicial review is a contested feature of Australia's constitutional system, as evidenced by the repeated attempts to introduce change over the

<sup>210</sup> See above n 44 and accompanying text.

<sup>211</sup> Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115 *Yale Law Journal* 1346, 1361.

past four decades.<sup>212</sup> The arguments for and against change have both a legislative and a judicial dimension. The judicial dimension, which refers to the positive and negative consequences of empowering courts to interpret and enforce a bill of rights, often dominates debate. Yet the legislative dimension, which refers to the legislature's ability and willingness to respect rights, is also important. If legislatures are found to routinely overlook, ignore or undervalue rights, the case for some form of judicial oversight is significantly strengthened.

Jeremy Waldron's well-known argument against rights-based judicial review acknowledges the importance of the legislative dimension. He states that his argument is premised on four assumptions and 'if any of the conditions fail, the argument may not hold'.<sup>213</sup> The first assumption is that a jurisdiction has 'democratic institutions in reasonably good working order, including a representative legislature elected on the basis of universal adult suffrage' and the third is 'a commitment on the part of most members of the society and most of its officials to the idea of individual and minority rights'.<sup>214</sup> A legislature in 'reasonably good working order' is one where 'the procedures for lawmaking are elaborate and responsible, and incorporate various safeguards, such as bicameralism, robust committee scrutiny, and multiple levels of consideration, debate, and voting'.<sup>215</sup> As this paper demonstrates, federalism is another important structural feature that fits within this category and that can contribute to the 'working order' of legislatures.

Finally, this paper's analytical approach illustrates how the High Court mediates the relationship between federalism and rights. The Court's expansive interpretation of the defence power in *Thomas v Mowbray* broadened the range of security issues on which the Commonwealth can act without seeking the consent of the states and territories. Its finding in the *Same-Sex Marriage Case* has reduced the ways in which the states and territories can participate in and provoke debate on same-sex marriage, channelling deliberation predominantly into the federal sphere. Its rulings in *Totani* and *Wainohu* produced further rounds of legislative consideration and action in the states

<sup>212</sup> For an overview of these efforts, see George Williams, *Human Rights under the Australian Constitution* (Oxford University Press, 1999) 250–7; Galligan, above n 23, ch 6; Scott Stephenson, 'Constitutional Reengineering: Dialogue's Migration from Canada to Australia' (2013) 11 *International Journal of Constitutional Law* 870, 887–9. The Australian Capital Territory and Victoria have adopted systems of rights-based judicial review: *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic).

<sup>213</sup> Waldron, 'The Core of the Case against Judicial Review', above n 211, 1360.

<sup>214</sup> *Ibid.*

<sup>215</sup> *Ibid* 1361.

and territories, but its decision in *Pompano* fostered uniformity and narrowed debate, prompting other states and territories to adopt a single model for organised crime control orders based on Queensland's regime. There are indications that the decision in *Kuczborski* may have a similar effect.

In their cumulative effect, these decisions raise concerns from the perspective of legislative rights deliberation. The decisions in *Thomas v Mowbray* and the *Same-Sex Marriage Case* centralise even more policy areas within the federal sphere, leaving the states and territories to focus increasingly on 'law and order' issues. Furthermore, the limits imposed by the High Court in its decisions on organised crime have become *benchmarks* against which states and territories calibrate their proposals. Politicians have used judicial validations of their measures to help put an end to debate even though the Court has not reviewed these measures for compatibility with rights. James Bradley Thayer identified this problem in 1901 when he argued that judicial review leads legislators to 'fall into a habit of assuming that whatever they can constitutionally do they may do'<sup>216</sup> or, as Kent Roach has put it more recently, 'upholding legislation as constitutional sends a message to the legislature and society that all is well and may well discourage continued debate and reform of a law'.<sup>217</sup>

This is not to say that the Court's decisions are incorrect or that judges should attempt to take into account the effect their decisions will have on future instances of rights deliberation.<sup>218</sup> It does, however, highlight the need to place the Court's case law in a broader context. *Thomas v Mowbray* is not merely a judgment about the defence power or even the federal division of powers. The *Same-Sex Marriage Case* is not merely a judgment about the scope of the marriage power and federal-state/territory incompatibility. *Pompano* is not merely a judgment about ch III of the *Australian Constitution* and the inherent powers of state courts. All three judgments should be understood as decisions that shape the course of legislative rights deliberation in Australia.

<sup>216</sup> James Bradley Thayer, *John Marshall* (Houghton, Mifflin, 1901) 104.

<sup>217</sup> Kent Roach, 'Constitutional and Common Law Dialogues between the Supreme Court and Canadian Legislatures' (2001) 80 *Canadian Bar Review* 481, 529.

<sup>218</sup> It does, however, give cause for scepticism about judicial statements that attempt to minimise the scope of their decisions, such as the High Court's in the *Same-Sex Marriage Case*, when it opened by saying that '[t]he only issue which this court can decide is a *legal issue*': (2013) 250 CLR 441, 452 [1] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) (emphasis added).

## V CONCLUSION

The relationship between federalism and rights is, as I have demonstrated, one worthy of careful analysis in Australia. By shifting our focus from policy differentiation to deliberative processes, we see that federalism has numerous effects on the way in which government — and thus society — addresses rights issues. To place new issues on the agenda, to change the terms of debate, to require explanations and to admit new participants are cogent sources of influence on the lawmaking process. For a constitutional order that privileges the legislature's position in respect of rights, as is the case in Australia, it is especially important.

Federalism expands the deliberative process, but it does not always improve the quality of deliberation. The interventions of another government may distort and pre-empt legislative consideration of certain issues. Yet every deliberative process is vulnerable to manipulation and abuse. Committees may be used for political grandstanding and upper legislative chambers may be used to extract concessions unrelated to the legislation under consideration. And as the three case studies illustrate, Australia's legislative processes are vulnerable to deliberations that are hasty, exclusionary and unresponsive, a point that underscores the need for structural mechanisms such as federalism that protect the inclusiveness and robustness of decision-making procedures on rights. It does not mean we should revere Australia's federal structure, but it does mean we should pay closer attention to its capacity to influence the way rights issues are deliberated.