Answers to questions on notice

- From the Chair:

    1. Should consideration be given to whether a federal HRA should include courts in the definition of 'public authority' (see submission number 61, p. 4)? Are there any constitutional limitations in including courts in the exercise of their judicial function?

Yes, this is an important consideration for the exposure draft of the bill. Courts should be included as far as is possible, but this must account for limitations arising from chapter III of the Constitution that protect the independence of the judiciary. The relevant clause should be drafted to account for this.

    2. What do you think of the AHRC model that when the courts have found a parliamentary intention to override human rights the Attorney-General should be required to trigger a process for reviewing the law?

        i. If the comments from judges are treated as a 'notification' that sets in train a process requiring action by the executive is this so like a declaration of incompatibility such that there would be the same constitutional concerns (see submission 61, p. 4).

The AHRC has taken the constitutionally cautious path of not including a formal declaration process, as is found in some other like instruments. It is difficult to see that a mere notification within the body of a judgment could give rise to anything like the same constitutional concerns. The process would not amount to a formal order of a court.

Again, the key would be drafting this in an appropriate way that accounts for the constitutional risk while still providing a mechanism to enliven parliamentary debate.

- From Senator Thorpe:

    1. Is there a way a tribunal could be established that would be compatible with Chapter III of the constitution for a First Peoples Tribunal Lore and Justice delivered through self-determined local mechanisms by individual nations as per Principles of UNDRIP?

Yes, such a tribunal could be established so long as care is taken about the capacity of the tribunal to make binding decisions. The High Court has set down strict rules for nonjudicial bodies when it comes to the enforceability of their findings.

So long as these constraints are observed, it is possible to establish tribunals and other bodies, as indeed has been the case in other areas of federal law.

    2. It is true that constitutional Bill of rights in federal and sub-national jurisdictions might affect the legislative power; the notion of Parliamentary sovereignty seems rather odd as the Constitution already binds both Commonwealth and States Parliaments. Their powers are already either expressly or impliedly limited and as such not sovereign in any event. Why is this an issue if we choose to use constitutional power to ensure compliance with human rights principles?

It is a good question, and I agree with its premise. There should be no issue should Parliament decide to use its constitutional powers to ensure compliance with human rights principles. This would be an instance of Parliamentary sovereignty being exercised to protect human rights. This would be consistent with the exercise of legislative power conferred by the Constitution on Parliament.