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FEMINISM AND FEDERALISM

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INTRODUCTION

I would like to begin by acknowledging the traditional owners of the land on which we are meeting, the Gadigal people of the Eora nation.

I would also like to acknowledge my previous employer, the University of Melbourne, Law School, for the internal small grant funding for my work on Feminism and Federalism, and in particular, my former research assistant Anna Hood who contributed to the preparation of this paper.

I am delighted to have taken up my new position at the ANU College of Law as Director of the Centre for International and Public law and this speaking arrangement is my first in that new capacity. One of the opportunities flowing from the appointment will be my ability to concentrate more on my various research projects that all fall within the Centre's concern. One of those is the subject upon which I will be addressing you today, Feminism and Federalism, in the context of this session's dramatic title, The Death of Federalism.

Over the 105 years since federation there has been a significant amount of research into the impact that our constitutional system of government has on life in Australia.¹ One area that has received particular attention has been the issue of how the federal nature of our system affects different elements of Australian society and how it could potentially be altered to improve living conditions. This has often been done in the context of the subject of Fiscal Federalism where extensive research has been undertaken into the appropriateness of the financial arrangements between the Commonwealth and states.

Despite the large amount of research and political interest around the concept of Australian federalism, very little analysis has been conducted into the way in which federalism affects Australian women.² I am currently seeking to remedy this situation by conducting a study into the way in which the federal nature of Australia's constitutional system affects women's lives. This study is part of a wider project I am undertaking on the impact the Constitution has on Australian women, first begun many years ago with my colleague Deborah Cass. The earlier part of this study examined how representative democracy impacted upon women³ and in the longer term I intend to look at responsible government and separation of powers and how those concepts affect the lives of women.

Underpinning this project is a theory that while women and men may share many similar needs and concerns when it comes to the political process, there is the undeniable matter of practical reality that women experience the world differently to men and regardless of how many different voices women may have. Moreover, there is value in considering women both as a singular group, given women account for over half of the population, *as well* as considering the varying groups and needs within that singular group.

¹ For one example, see Geoffrey Sawer, *Modern Federalism* (1976).

² An example of work that has touched on this subject includes Helen Irving, 'Fair Federalists and Founding Mothers' in Irving (ed) *A Women's Constitution* and Marian Sawer has also written about it in the context of women's policy in Australia and in comparative contexts, such as Marian Sawer and Jill Vickers, "Women's Constitutional Activism in Australia and Canada" (2001) 13 *Canadian Journal of Women and the Law* 3. In Canada Jill Vickers has conducted research into the connection between feminism and federalism: Jill Vickers, 'Why Should Women Care About Federalism?' in Douglas Brown and Janet Hiebert (eds) *Canada: The State of the Federation* (1994).

³ Deborah Cass and Kim Rubenstein, 'Representation/s of Women in the Australian Constitutional System' (1995) 17 *Adelaide Law Review*, 3-48.

The aspect of my study investigating the impact of federalism on women is divided into three primary areas of inquiry: the first is historical, ascertaining women's views about the move to federation and how they believed it would affect their lives; the second focuses on how the practice of federalism in Australia impacts on women; and the final section analyses the philosophical principles underpinning the federal system to determine whether federal values are consistent with feminist principles. Today I would like to discuss some of the work I have undertaken in the second part of the study about the impact the practice of federalism has had on women in Australia since federation. In particular, I would like to focus on the effect of the division of legislative power between the Commonwealth and State governments.

Since federation, the way legislative power has been divided over issues of concern to women has changed significantly. At various times and with respect to different issues the Constitution has given the states a monopoly of power, the Commonwealth and States shared power, and most recently the Commonwealth complete competence over certain areas of interest to women. This presentation explores how these three different partitions of legislative power have impacted on Australian women's lives and draws some early conclusions from the findings about the extent to which the concepts of federalism and feminism are complementary.

THE IMPACT THE COMMONWEALTH'S LACK OF LEGISLATIVE COMPETENCE OVER CERTAIN AREAS HAS HAD ON AUSTRALIAN WOMEN

The way the division of legislative power in Australia's federal system of government affects the lives of women has been an issue of concern to women since federation.⁴ At that time a leading suffragist Rose Scott expressed fears that the advent of federation would greatly disadvantage women because the Constitution would bestow little, if any, power on the Commonwealth government over issues of importance to women.⁵ She predicted that the Constitution would limit the Commonwealth's legislative competence

⁴ Judith Allen, *Rose Scott. Vision and Revision in Feminism* (1994) 146.

⁵ *Ibid*, 146

to public matters premised on expressions of male power and authority such as the military, government buildings and foreign affairs. Scott worried that this Constitutional division of power would leave women and the private sphere issues they were concerned about grossly under represented at the federal level.

Unfortunately for women, the public-private split of legislative power that Scott envisaged would occur between the Commonwealth and states did in fact eventuate to a significant extent when the Constitution entered into force. The lack of federal power over matters in the private sphere was particularly evident with respect to the Commonwealth's inability to legislate over welfare matters in the first half of the twentieth century.⁶ At that time the only power with which the Commonwealth could pass welfare legislation was section 81 of the Constitution, a section completely inadequate for this purpose.⁷ For example, the scope of section 81 did not extend to support child welfare legislation as evidenced by the fact the federal government had to abandon attempts in 1927 to pass a bill that would have established a national child endowment scheme.⁸ It was also inadequate to support, as the High Court confirmed in the *Pharmaceutical Benefits Case*⁹ of 1945, legislation concerning health schemes.¹⁰

This absence of federal power over welfare issues had ramifications for women and their families. Most significantly, it meant they were dependent on their respective state governments for protection and support in many areas of the private sphere. This was a somewhat illogical and problematic state of affairs. Matters of concern to women, as distinct from men, were not and are not necessarily territorially based. Indeed whether a woman lives in Queensland or Victoria is often not determinative of the effect that issues underpinning social welfare have on her life.

⁶ Helen Irving, 'A Gendered Constitution? Women, Federation and Heads of Power' (1994) 24 *The University of Western Australia Law Review*, 186.

⁷ 'All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund to be appropriated for the purpose of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution'.

⁸ Peter Hanks, *Constitutional Law in Australia* (1997), 448.

⁹ *Pharmaceutical Benefits Case* (1945) 71 CLR 237.

¹⁰ *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 256-258, 263, 266.

THE IMPACT THE COMMONWEALTH'S PARTIAL LEGISLATIVE COMPETENCE OVER CERTAIN AREAS HAS HAD ON AUSTRALIAN WOMEN

While the constitution left much of the legislative power over issues in the private sphere to the states, it would be fallacious to assert the Commonwealth attained absolutely no authority over issues of particular concern to women in the 20th century. There were two sectors of law where the constitution did in fact grant the federal government some control over the private sphere. First, under sections 51 (xxi), the marriage power, and 51 (xxii), the divorce and matrimonial power, the federal government was given some competence over family relationships. Additionally, in 1946, a constitutional amendment was introduced in the form of section 51(xxiiA) endowing the Commonwealth with some specific power over social welfare issues.

It might well be expected that the Commonwealth's power in these two areas was of great benefit to women as it enhanced the federal protection and support they were able to receive. The potential benefit of these powers was, however, significantly undermined by the fact they were partial and incomplete.¹¹ Indeed while section 51(xxiiA) gave the Commonwealth power over specific categories of welfare such as maternity allowances, widows' pensions, child endowment and unemployment it stopped short of providing it with a general power over social services, social security or welfare.¹² Similarly, the Commonwealth's power over family matters failed to cover all aspects of family relationships including important issues relating to children and property.¹³

The partial nature of these two powers meant that women received only piecemeal protections from the federal government in these areas and consequently had to rely to a significant extent on additional legislative action being taken by the states. This generated a host of problems. Most significantly, it meant women had to respond to the state in its

¹¹ Peter Hanks, above n 8, 435-448; *Constitutional Commission Final Report* 1988, AGPS, 691, 692;

¹² *Constitutional Commission Final Report*, above n 16, 692; Hanks, above n 8, 448; *Distribution of Powers Report of the Advisory Committee to the Constitutional Convention*, AGPS, Canberra, 1987, 135.

¹³ Hanks, above n 8, 436;

different guises making their lives more complicated and costly than they would have been if they had had only one manifestation of the state to contend with. This is well illustrated by the difficulties the division of power between the Commonwealth and the states over family relationships caused through much of the twentieth century.

For example, the Constitution provides the Commonwealth government with the power to pass legislation with respect to de facto couples' children's disputes but not their property disputes.¹⁴ This means that when de facto couples with children separate, they had to spend time and money navigating their way through both the Federal Family Court and the relevant state court.

A further instance of the problems generated by the division of legislative competence over family relationships surrounded issues concerning children. Until the mid 1980s the federal government had jurisdiction to determine custody over, maintenance of, or access to nuptial but not ex-nuptial children.¹⁵ With the advent of different types of family relationships in the late twentieth century this had the extraordinary effect of subjecting some children in a family to federal family laws but other children from the same family unit to state laws.¹⁶

An example of the way the Commonwealth's incomplete power over family relationships continues to complicate matters with respect to children today is its lack of power over child welfare matters and specifically child protection issues. In this I draw from the excellent work undertaken by Professor Belinda Fehlberg from the University of Melbourne and Fiona Kelly.¹⁷ The *Constitution* grants the Federal Family Court power to make parenting orders about where children will live in the event that their parents

¹⁴ See also L Wilmot, B Mathews, G Shoebridge, 'De Facto Relationships, Property Adjustment Law – A National Direction' (2003) 17 *Australian Journal of Family Law* 37, 38-41. For some time the cross-vesting scheme helped but post *Re Wakim*; *Ex parte McNally*; *Re Wakim* [1999] HCA 27 the situation remains. There is currently a referral of powers in relation to de facto property disputes to the Commonwealth in progress, but not all states have referred their powers and even if they do, there will still be fragmentation in relation to homosexual couples and spousal maintenance.

¹⁵ *Russell v Russell* (1976) 134 CLR 495, 508-509, 525, 527;

¹⁶ HA Finlay and RJ Baileys-Harris, *Family Law in Australia* (1989) 77; Hanks above n 8, 435-447.

¹⁷ Fiona Kelly and Belinda Fehlberg, 'Australia's Fragmented Family Law System: Jurisdictional Overlap in the Area of Child Protection' (2002) 16 *International Journal of Law, Policy and the Family*, 38

separate.¹⁸ However, it reserves for the states the authority to make orders determining where children live when they have been abused or placed at risk.¹⁹ The result of this division of powers is that in the 5 per cent of separation cases that come before the Federal Family Court where a child has been abused,²⁰ there is the potential for a clash to occur between the federal and state jurisdictions as both theoretically have the power to determine where the child will live.²¹

In an attempt to circumvent this potential conflict, the Family Court has developed Protocols with each state jurisdiction providing that in cases where child abuse allegations arise in the context of family separations, the Family Court is to refer the matter to the state and state orders will prevail.²² Research shows, however, that these Protocols are frequently deviated from in various ways, resulting in two significant problems.²³

First there is at times a duplication of proceedings in the federal and state courts as communication between the two court systems is often very poor.²⁴ Not only is this phenomenon a waste of the courts' and parties' time and resources but it also has

¹⁸ *Constitution* ss 51(xxi); 51(xxii); 51(xxxix); Fiona Kelly and Belinda Fehlberg, 'Australia's Fragmented Family Law System: Jurisdictional Overlap in the Area of Child Protection' (2002) 16 *International Journal of Law, Policy and the Family*, 38, 40.

¹⁹ Kelly and Fehlberg, above n 17, 40.

²⁰ T. Brown, R. Sheehan, M. Frederico, L. Hewitt, *Resolving Violence to Children, Report No. 3: An Evaluation of Project Magellan and the Pilot Program for Managing Residence and Contact Disputes in the Family Court when Child Abuse Allegations are Involved* (Social Work at Monash University) (2001) 70-71.

²¹ Kelly and Fehlberg, above n 17, 42-43. In particular, p 42 "where overlap occurs, the *Family Law Act* makes clear that orders made pursuant to state/territory child welfare laws take precedence over Family Court orders".

²² Protocol between Department of Human Services and Family Court (1996) (Vic); Protocol Between Child Protection Board, the Department of Community Services and Family Court of Australia (1992) (Tas); Protocol Between Department of Family Services and Aboriginal and Islander Affairs and the Family Court of Australia (Qld); Protocol for Interaction Between the Family court of Australia (Darwin Registry) and the northern Territory Department of Health and Community Services (1994) (NT); Department of Family and Community Services (1996) (SA). See also *Family Law Act 1975* (Cth) ss 69ZK; 67Z and 67ZA.

²³ Kelly and Fehlberg, above n 17, 42-43, 47.

²⁴ *Ibid* 43, 47, 53; *Re Karen and Rita* (1995) 19 FLR 528, 556 (Nicholson CJ); Family Law Council, *Family Law and Child Protection, Final Report* (2002) 26.

detrimental effects on the children concerned as they are dragged through two systems and made to face two sets of interviews and assessments.²⁵

A second, potentially more alarming, problem arises when deviations from the Protocols result in child abuse allegations not being dealt with in either jurisdiction. This issue can arise in one of two ways. First it can occur if, when the Family Court refers an instance of alleged child abuse to the state authorities, the state chooses to ignore the referral.²⁶

Research by Brown et al suggests that worryingly this situation occurs in up to 50 per cent of cases in Victoria.²⁷

The second way that allegations of child abuse go unattended because of the split of legislative powers is if, when the state authorities are dealing with allegations of abuse, they become aware that the parents are separating.²⁸ In such cases the authorities are prone to refer the matter to the Federal Family Court because they believe the risk of abuse posed to the child will be removed by the Family Court refusing parenting orders to the abusive parent.²⁹ While *prima facie* this practice appears unproblematic, it is in fact very unsatisfactory because the Family Court has no investigatory powers to determine whether or not a child has been abused.³⁰ This means when matters involving potential child abuse are referred to it from the states, the Family Court is solely dependent for information as to the veracity of allegations on the evidence adduced by the private parties before it.³¹ Often the parties to the dispute will have limited resources to garner the necessary evidence leaving the child concerned in a position of significant

²⁵ Kelly and Fehlberg, above n 17, 43; Australian Law Reform Commission and Human Rights and Equal Opportunity Commission Report, *Seen and Heard; Priority for Children in the Legal Process*, AGPS, Report No. 84 (1997), para 15.17.

²⁶ Kelly and Fehlberg, above n 17, 43; Family Law Council, above n 24, 28; P. Armytage, *Children in the State Child Protection Services*. Paper presented at the Australian Association of Family Lawyers and Conciliators Seminar, 'Children at Risk, Now and in the Future' (University of Melbourne, 1997).

²⁷ Thea Brown, Rosemary Sheehan, Margarita Frederico, Lesley Hewitt, *Violence in Families, Report Number One; The Management of Child Abuse Allegations in Custody and Access Disputes Before the Family Court of Australia* (Social Work at Monash, Monash University, 1998) 83.

²⁸ Kelly and Fehlberg, above n 17, 47, 50.

²⁹ Also, Family Court orders are can stay in place indefinitely until the child turns 18, whereas Children's Court orders usually last 1-2 years. *Ibid.* at 50.

³⁰ Family Law Council, above n 24, 9.

³¹ *Ibid.*, 9, 46-47.

risk.³² Despite the Attorney General's Family Law Council, *Family Law and Child Protection, Final Report (2002)*³³ to make changes to improve upon the current system, no further changes have occurred.

It is apparent then from these problems that while the *Constitution's* conferral of piecemeal power over family relationships to the Commonwealth has not left women solely dependent on the whim of the states for protection in these matters, the limited nature of the power that has been granted has made women's lives more complicated, difficult and time consuming.

THE IMPACT THAT THE COMMONWEALTH'S ASSUMPTION OF MORE COMPREHENSIVE POWERS OVER CERTAIN WOMEN'S ISSUES HAS HAD ON AUSTRALIAN WOMEN

The limited extent of the Commonwealth's power over women's issues for much of the twentieth century has, over the last twenty years, begun to change. Since the mid 1980s the Commonwealth has begun to assume more power over the private sphere and areas of interest to women more generally both by receiving powers traditionally wielded by the states in accordance with section 51 (xxxvii) of the *Constitution* and also by introducing legislation that covers the field in certain areas. Two prominent areas of law where this has occurred are family law and industrial relations.

Given the complications generated when legislative power over issues of concern to women is split between the Commonwealth and state governments one would assume that the Commonwealth obtaining greater power over these two areas would be advantageous for women. To some extent it has been. For example, where the legislation and systems surrounding family law have been streamlined under Commonwealth laws there have been significant practical benefits for families. Between 1986 and 1990 all state governments, with the exception of Western Australia, transferred their powers over

³² *Ibid*, 47; Women's Legal Service, Queensland, Submission to Family Law and Council, 12th July 2001, 6.

³³ Above n 24, Recommendations at pp 1-5.

child custody, guardianship, access, maintenance and expenses to the Commonwealth.³⁴ This had the effect of ensuring that from that time the Federal Family Court has had jurisdiction over both nuptial and ex nuptial children thus eradicating the complications that previously plagued this area.³⁵ More recently, most of the states and territories have transferred, or are in the process of transferring, their powers over de facto property disputes to the Commonwealth.³⁶ Although this transfer of power was limited by the fact the Commonwealth refused to accept jurisdiction over homosexual de facto property disputes, it at least ensured that the federal government now has the capacity to streamline separation processes for heterosexual de facto couples under the Family Law Act and eliminate some of the complications the previous division of power entailed.³⁷

While *prima facie* it appears that to the extent legislative power over family relationships has been streamlined under the Commonwealth's jurisdiction, it has been beneficial for women, it would be shortsighted and naïve to conclude that transferring legislative power to the Commonwealth is advantageous for women in all respects. Although streamlining legislative power can simplify procedures and help eradicate practical difficulties, it can simultaneously generate new problems for women if the laws which the Commonwealth enacts do not adequately cater for the needs and interests of women. This has become apparent with the passage of the *WorkChoices Bill*.³⁸

After more than a century of having industrial relations' issues controlled by a matrix of Commonwealth and State laws, the federal government has sought over the last 9 months

³⁴ *Commonwealth Powers (Family Law – Children) Act 1986* (NSW), *Commonwealth Powers (Family Law – Children) Act 1986* (Vic), *Commonwealth Powers (Family Law – Children) Act 1990* (Qld), *Commonwealth Powers (Family Law) Act 1986* (SA), *Commonwealth Powers (Family Law) Act 1987* (Tas).

³⁵ The one limitation of this transfer of power was that unfortunately the states failed to hand over their power over child welfare and protection with the result that the jurisdictional overlap over this issue continues to plague families around Australia.

³⁶ *Commonwealth Powers (De Facto Relationships) Act 2003* (Qld); *Commonwealth Powers (De Facto Relationships) Act 2003* (NSW); *Commonwealth Powers (De Facto Relationships) Act 2004* (Vic); *Commonwealth Powers (De Facto Relationships) Bill 2005* (WA).

³⁷ Pamela Tate, 'New Directions in Co-operative Federalism: Referrals of Legislative Power and their Consequences' (Paper presented at Constitutional Law Conference, Sydney, 18 February 2005) 15.

³⁸ *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

to implement a comprehensive national industrial relations scheme.³⁹ It has asserted that the scheme will not only simplify the current litany of laws surrounding workplace relations⁴⁰ but that it will also benefit women and their families by generating new jobs and greater incomes that will in turn raise living standards for households across the country.⁴¹ Even if it is accepted that the legislation simplifies procedures, a proposition that is far from clear in light of the uncertain scope of the corporations power⁴² and the thus questionable extent to which this legislation applies to different corporations in Australia,⁴³ it is not beneficial for women or their families.

There is a multitude of ways the *WorkChoices* legislation detrimentally impacts many women. The first is through its expansion of Australian Workplace Agreements (AWAs) in Part VB of the Act.⁴⁴ AWAs are individual employment agreements premised on the concept that each individual employee should be able to bargain freely with their employer about the terms and conditions of their employment.⁴⁵ The Government asserts that through such agreements employees are given more choice, flexibility and power over their working conditions and pay.⁴⁶ For the majority of women, however, this contention is questionable.

³⁹ Rosemary Owens, 'The Constitution and the Law of Work in the New Economy: *The Workplace Relations Amendment (Work Choices) Bill 2005* (Cth)' (Paper presented at A Working Constitution? The Tenth Anniversary Annual Public Law Weekend, Australian National University, 11-12 November 2005) 23.

⁴⁰ The Parliament of the Commonwealth of Australia, House of Representatives, *Workplace Relations Amendment (Work Choices) Act 2005, Explanatory Memorandum* (circulated by authority of the Minister for Employment and Workplace Relations, the Honourable Kevin Andrews MP).

⁴¹ Australian Government, *Work Choices. A New Workplace Relations System*. Commonwealth of Australia (2005) 63-67.

⁴² *Australian Constitution* s 51(xx).

⁴³ Owens, above n 43, 9; George Williams, 'The Constitution and a National Industrial Relations Regime' (2005) 10(2) *Deakin Law Review* 498, 503-507; Ron McCallum, 'The Australian Constitution and the Shaping of our Federal and State Labour Laws' (2005) 10(2) *Deakin Law Review* 460, 465-466.

⁴⁴ *Workplace Relations Amendment (Work Choices) Bill 2005* (Cth) part VB; Andrew Stewart, 'Workplace Relations: The Revolution Begins Here' (2005) *New Matilda*, 1.

⁴⁵ Australian Government, above n 45, 21.

⁴⁶ *Ibid*, 63-67,

First, and perhaps most significantly, the majority of women are not in an equal position to their employers when bargaining for work conditions.⁴⁷ Indeed many have very little bargaining power at all. Sixty per cent of people in the low skilled, low paid sectors of the workforce are women.⁴⁸ The result of this is that these women have very little professional leverage to push for better work or pay conditions when negotiating AWAs. What is more, due to their lack of resources the women in this low income bracket are unlikely to be able to risk unemployment by demanding certain work conditions.⁴⁹ Indeed in their vulnerable positions they may be forced to accept sub-standard conditions and pay in order to secure jobs.

A further reason the enhancement of the AWA system will negatively impact on women is that research by Lisa A. Barron has revealed in work negotiation situations, women request considerably lower salaries than their male counterparts.⁵⁰ This means that under the negotiation-focused AWAs there is a significant risk that women's pay will end up being based, not on the value of their work, but rather on the strength of their bargaining power.⁵¹

The *WorkChoices* legislation will not only negatively impact on women's work conditions and pay, it will also severely threaten their work-life balance. Despite the Government's expressed commitment to the increased flexibility for families under the new scheme, there are in fact insufficient guarantees offered by the legislation to ensure that women will be afforded the time necessary to care for their families. Specifically, there are inadequate provisions to ensure women with families will not be coerced into working in the evenings and weekends when they have family commitments.⁵² For example, although the legislation provides maximum ordinary working hours,⁵³ it states

⁴⁷ Women's Electoral Lobby Australia and National Pay Equity Coalition, *Submission to the Senate Inquiry into Workplace Relations Amendment (Workchoices) Bill 2005*, 2; Working Women's Centres, *Submission to the Senate Inquiry into Workplace Relations Amendment (Workchoices) Bill 2005*, 3.

⁴⁸ Working Women's Centres, above n 51, 3.

⁴⁹ Women's Electoral Lobby, above n 51, 3.

⁵⁰ L. Barron, 'Ask and You Shall Receive? Gender Differences in Negotiators' Beliefs and Requests for a Higher Salary' (2003) *Human Relations*, 635, 643.

⁵¹ Women's Electoral Lobby, above n 51, 7-9.

⁵² Working Women's Centres, above n 51, 9-10; Women's Electoral Lobby, above n 51, 6.

⁵³ *Workplace Relations Amendment (Work Choices) Bill 2005* (Cth) s 91C (1)(a).

they can be spread across the duration of a year and are not subject to any weekly limit.⁵⁴ The consequence of this is that women could potentially be compelled to work extensive hours, regardless of their families' needs for several weeks on end.

It is apparent then that, in light of the impact that the family and industrial relations law changes have had on women, transferring power over issues of concern to women to the Commonwealth can be a double edged sword. On one side it may simplify procedures for women by eradicating the need for them to navigate two systems and deal with all the inconsistencies and complications that that entails. On the other side, however, it leaves women vulnerable to the whims of just one power. If that power is unsympathetic to their needs and interests then they are placed in a position of considerable jeopardy.

CONCLUSION

What conclusions then can be drawn from this analysis so far about the impact the federal division of power has on women and more broadly about the compatibility of federal principles and feminist values? *Prima facie* it would appear the concepts of federalism and feminism are at odds with one another as federalism is premised on dividing power territorially whereas, as was demonstrated by the discussion of the Commonwealth's power over welfare, women's interests are not necessarily geographically based.

Such a conclusion is, however, too superficial and simplistic. While federalism and feminism are divided by the territorial nature of federalism, they do share two very important values: pluralism and diversity.⁵⁵ Feminist legal theory focuses on recognising the diversity and pluralism of different women's experiences compared to those of men.⁵⁶ Similarly, as my former Dean, Professor Michael Crommelin has stated, federalism is a 'species of pluralism, which distributes power among groups that enjoy a measure of

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*, 13.

⁵⁶ *Ibid.*

autonomy and participate in an ordered and permanent way in the exercise of political power by the central entity'.⁵⁷

Thus, in light of this common foundation, if we could extend federalism's basic premise of pluralism beyond its current territorial framework, it could potentially be employed as a very useful tool to help recognise the diversity of women's experiences. Indeed it could help the Commonwealth recognise the limitations of its industrial relations changes and generate legislation and policies that directly encompass and respect the diverse experiences, needs and interests of women in Australia. In this sense, those advocating on behalf of the needs of women in Australia may not be too happy to see the death of the concept of Federalism.

⁵⁷ Michael Crommelin, 'Federalism' in PD Finn (ed), *Essays on Law and Government, Vol 1 Principles and Values* (1995) 168.