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Feels Like Déjà Vu: An Australian Bill of Rights and Religious Freedom

Paul Babie & Neville Rochow***

I. INTRODUCTION: HAVEN'T WE BEEN HERE BEFORE?

While the world undergoes a religious revival,¹ the protection of religious freedom, particularly of minority religious groups, seems increasingly under threat.² Most religious scholars report that religious liberty is “treading water at best, retreating at worst.”³ According to the Pew Forum on Religion & Public Life, nearly 70 percent of the world’s 6.8 billion people live in countries with high restrictions on religion.⁴ Religious constraints take two forms: “official curbs on faith and . . . hostility that believers endure at the

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1. WILLIAM TWINING, GENERAL JURISPRUDENCE: UNDERSTANDING LAW FROM A GLOBAL PERSPECTIVE 6–7, 125 (2009).

2. The mainstream media continues to demonstrate this threat. See, e.g., Joshua Kurlantzick, *The Downfall of Human Rights*, NEWSWEEK, Mar. 1, 2010, at 30. Religious leaders have also drawn attention to this threat. See, e.g., Denis Hart, *The Right to Religious Freedom*, SWAG, Summer 2009, at 26. And it has received recent scholarly attention. See, e.g., Elizabeth H. Prodromou, *International Religious Freedom and the Challenge of Proselytism*, in THINKING THROUGH FAITH: NEW PERSPECTIVES FROM ORTHODOX CHRISTIAN SCHOLARS 247 (Aristotle Papanikolaou & Elizabeth H. Prodromou eds., 2008).

3. *Religious Freedom: Too Many Chains*, ECONOMIST, Dec. 19, 2009, at 111–12.

4. PEW FORUM ON RELIGION & PUB. LIFE, GLOBAL RESTRICTIONS ON RELIGION 1 (2009), available at <http://pewforum.org/uploadedFiles/Topics/Issues/Government/restrictions-fullreport.pdf>.

hands of fellow citizens.”⁵ All of this is troubling, especially in light of the fact that The Universal Declaration of Human Rights (“UDHR”),⁶ one of the great international breakthroughs in the protection of human rights, came only in the last century. From any perspective, human rights such as religious freedom appear to be under threat,⁷ making current both its international status and domestic protection through constitutional or other legislative means.

Although there have been recent breakthroughs with the international protection of religious freedoms, not every democratic state provides the comprehensive protection for human rights—including religious freedom—found at the international level. Australia’s record, for instance, demonstrates the discordance that can exist between domestic and international protection. While successive federal governments have made it a matter of policy to be critical of what are considered to be human rights abuses and denial of due process in other countries, even ratifying several international covenants relating to human rights and freedoms, Australia has implemented few of them as part of its domestic law. It may in fact come as a surprise for many people to learn that Australia is the only Western democracy still lacking, at a minimum, a legislated bill or charter of human rights and freedoms.⁸ No comprehensive protection of rights and freedoms exists—either at the federal constitutional or at the state legislative level—and any protections that are afforded are on the narrowest of bases.

Still, from the moment of its Federation in 1901, the “bill of rights question”—whether to adopt one and, if so, what rights it should protect and how they should be enforced—looms large in Australia’s constitutional history, oscillating between periods of wild enthusiasm, on the one hand, to apathy coupled with a lack of sophisticated discussion, on the other. A new era in this history dawned when, in late 2008 (on the sixtieth anniversary of the

5. *Religious Freedom: Too Many Chains*, *supra* note 3, at 111.

6. See Universal Declaration of Human Rights, G.A. Res 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948), available at <http://www.un.org/en/documents/udhr/>.

7. Kurlantzick, *supra* note 2, at 30.

8. The terms “bill” or “charter” of human rights and freedoms tend to be used interchangeably in the Australian debate. This Article uses “bill of rights” or “bill” in reference to either a bill or a charter of human rights and freedoms.

UDHR), the Attorney-General of Australia launched the National Human Rights Consultation (“the Consultation”).⁹ The Consultation empowered a National Human Rights Consultation Committee (“the Committee”) to seek the views of the Australian community on how human rights and responsibilities should be protected in the future and to promote a broad discussion on the range of available options. For many, this meant a renewed, but by no means new, discussion about whether or not Australia should adopt a national bill of rights.¹⁰

In late 2009 the Committee, having received more than 35,000 submissions and conducted over sixty-five community roundtables and public hearings in more than fifty urban, regional, and remote locations across the country, delivered its Consultation Report to the Attorney-General.¹¹ The Committee favored the protection of human rights (including religious freedom) within what has come to

9. This was an outcome of an election promise made by the Labor Party in 2007. ANDREW BYRNES, HILARY CHARLESWORTH & GABRIELLE MCKINNON, *BILLS OF RIGHTS IN AUSTRALIA: HISTORY, POLITICS AND LAW* 146–47 (2009).

10. Robert McClelland, *A Message from the Attorney-General the Hon Robert McClelland MP*, http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Who_AMessagefromtheAttorney-GeneraltheHonRobertMcClelland (last visited Aug. 27, 2010).

The Terms of Reference given to the Committee included asking the Australian community:

- (i) which human rights (including corresponding responsibilities) should be protected and promoted,
- (ii) whether those human rights are currently sufficiently protected and promoted, and
- (iii) how could Australia better protect and promote human rights?

In accepting these Terms, the Committee agreed to:

- (i) consult broadly with the community, particularly those who live in rural and regional areas,
- (ii) undertake a range of awareness raising activities to enhance participation in the consultation by a wide cross section of Australia’s diverse community,
- (iii) seek out the diverse range of views held by the community about the protection and promotion of human rights, and
- (iv) identify key issues raised by the community in relation to the protection and promotion of human rights.

NAT’L HUMAN RIGHTS CONSULTATION COMM., *TERMS OF REFERENCE*, http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Terms_of_Reference (last visited Aug. 27, 2010).

11. NAT’L HUMAN RIGHTS CONSULTATION COMM., *NAT’L HUMAN RIGHTS CONSULTATION REPORT (2009)*, available at http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReportDownloads; see also *Australia Recieves National Human Rights Consultation Report*, GOV MONITOR (Oct. 1, 2009), http://thegovmonitor.com/world_news/asia/australia-releases-national-human-rights-consultation-report-7855.html.

be known as a “weak dialogue” model bill of rights¹² (one in which the judiciary plays a role in determining the consistency between laws and administrative acts and the rights enumerated in the bill of rights, but in which the legislature retains the ultimate or final say in the constitutionality of such legislation or acts). Since the release of the Consultation Report, however, with a federal election looming sometime in 2010, and an intractable split within the federal cabinet on this issue, the political climate has changed, and doubt exists as to whether Australia will adopt a national bill of rights any time soon.

Obviously, the fact that this is a renewed discussion means that every previous Australian attempt to entrench human rights in domestic law met with opposition and, ultimately, failure. Andrew Byrnes, Hilary Charlesworth, and Gabrielle McKinnon identify two recurrent themes in this opposition.¹³ The first, a powerful “States’ rights” stream of thought, argues that entrenching human rights at the federal level will unacceptably encroach on State legislative powers and consequently undermine the federal system. The second advances a democratic claim—pointing to the apparent incompatibility of such instruments with Australian parliamentary democracy. In Australia’s early history, in the 1890s, the concern involved the impropriety of admitting that such limitations might be needed in a parliamentary democracy, while in more recent times this has morphed into an argument that legislatures enjoy a superior capacity, as compared to the judiciary, to protect human rights, and that a bill of rights will disrupt, and perhaps even undermine, the political process.¹⁴

Australia’s failure, yet again, to adopt a bill of rights therefore has a familiar ring. In fact, this story evokes what we refer to in this Article as a strong feeling of *déjà vu*, a sense that we have been here before and that we have already heard all of the arguments in one form or another. More to the point, the Consultation, the attendant concern about a bill of rights, and the final outcome of failure add a new chapter in this long national story of failure, eliciting an even stronger sense of *déjà vu*. It is not the purpose of this Article to canvass in detail the reasons advanced in opposition to a bill of rights

12. The Terms of Reference for its consultation required the Committee not to pursue options inconsistent with a “weak dialogue” model. NAT’L HUMAN RIGHTS CONSULTATION COMM., *supra* note 10.

13. BYRNES ET AL., *supra* note 9, at 35–36.

14. *Id.*

in those previous failed attempts. Nor is the purpose to examine all of the reasons advanced in opposition to a bill during the Consultation. Rather, we focus on the reasons advanced, one might think paradoxically, by religious groups opposed to a bill of rights. We focus on those arguments because they are representative of the sorts of reasons typically advanced in the past by the range of groups who opposed comprehensive human rights protection.

Finding those reasons in the contemporary debate is not difficult, for in establishing the Consultation, the Australian Government unleashed, perhaps unwittingly, a torrent of national concern amongst religious communities regarding the protection of religious freedom should a bill of rights be enacted. Many religious groups made formal submissions to the Committee in relation to the protection of religious freedom.¹⁵ And while some supported a bill, those voices were drowned out in large part by those opposed. Two themes emerged from this opposition (which parallel opposition to previous attempts to entrench human rights): (i) a concern with the protection of equality, and (ii) a concern that a bill or charter would confer powers on the judiciary to override the will of the executive and legislative branches of government.

This Article traces this story of déjà vu in four parts. The first is found in Part II, which briefly outlines the historical background to the current attempt to entrench human rights in Australian domestic law. Because the federal Constitution provides no comprehensive protection for human rights, there have been a number of attempts since Federation in 1901, both constitutional and legislative, to fill that gap. Focusing on Section 116 of the Constitution, which comes closest to a protection of religious freedom, we outline those attempts at comprehensive coverage, and their ultimate failure.

Part III describes the second chapter of this story: the current domestic Australian protection of human rights other than the minimal protection found in the Constitution. Again, as with constitutional amendment, these efforts result in little more than piecemeal protection. In other words, they merely add to, rather than alleviate, the feeling of déjà vu evoked by the constitutional story outlined in Part II.

15. See, e.g., AUSTL. CHRISTIAN LOBBY, SUBMISSION TO THE NAT'L HUMAN RIGHTS CONSULTATION, (2009) available at <http://australianchristianlobby.org.au/wp-content/uploads/090615-ACL-NHRC-submission.pdf>.

Part IV examines the two principal recommendations contained within the Consultation Report: that the government adopt a dialogue model for a bill of rights, and that the bill itself protect a range of human rights, among them religious freedom. This Part explores the nature of a dialogue model and, specifically, the weak dialogue model recommended by the Committee. It then considers the right to religious freedom. As the Consultation Report itself says little about that right, this Part focuses more on the reaction of religious groups during the consultation process. The concerns expressed by some of these groups relate to the enforcement of rights and the possibility that dialogue, of any kind, between the legislative and judicial branches of government would weaken parliamentary sovereignty. These concerns form part of the contemporary feeling of *déjà vu*, for they have been seen before in previous failed attempts and in the minimal domestic protection currently afforded human rights. At their core, while religiously motivated, the concerns expressed really constitute a general discomfort with the conferral of power on the judiciary, a discomfort seen throughout the historical debate about a bill of rights in Australia.

Part V adds the most recent chapter to this story of *déjà vu*, bringing us back to where we began: failure. The first two months of 2010 brought the news that the federal government was backing away from the proposal for a bill of rights contained in the Consultation Report. This Part briefly outlines the waning enthusiasm, both amongst the public and within the government, for a bill of rights. In light of the history mapped in the first three parts of the Article, this seeming failure of the most recent attempt to protect human rights ought to come as no surprise. Quite the contrary, this latest chapter is entirely consistent with that long history; indeed, it is in the contemporary failure that one feels *déjà vu* most acutely.

II. HISTORIC ATTEMPTS TO PROTECT HUMAN RIGHTS: THE FIRST TIME AROUND

This Part mirrors the two categories of historic attempts to entrench human rights in Australian law. The first section examines those attempts involving the Commonwealth Constitution, focusing specifically on a representative example of the minimal protection found there: Section 116, which provides only apparent protection

for religious freedom. The second section considers Commonwealth legislative efforts to entrench human rights.

A. The Australian Constitution

1. Minimal protection of rights and freedoms

The earliest attempts to entrench human rights occurred during the Federation Conference held in Melbourne in 1890 and in the Constitution Conventions held in various cities in 1891 and 1897–1898. Yet even during the Melbourne stage of the 1898 Convention, which produced the most extensive discussion in this regard, rights were more ridiculed than supported, especially as they might have applied to the States.¹⁶ Somewhat less concern, though, was expressed in relation to limiting the federal Australian (Commonwealth) Parliament.¹⁷ Indeed, some even viewed the lack of specific protection for human rights as an attribute, clearly demonstrating the democratic character of the Constitution.¹⁸ Robert Moffatt explains that at the time of the drafting of the Australian Constitution, there was not, as had been the case in the United States, a “recent memory of a bitter struggle against tyrannical devices to make [the drafters] determine to erect permanent protections against their use again [T]hey must have felt that the protections to individual rights provided by the traditions of acting as honourable men were quite sufficient for a civilised society.”¹⁹

Thus, while the Constitution empowered the federal Australian Parliament to make laws “with respect to . . . external affairs,”²⁰ enabling it to implement by way of legislation international treaties and covenants, including those that contain human rights norms,²¹ the Framers ultimately did not include a bill of rights in Australia’s

16. BYRNES ET AL., *supra* note 9, at 24–25.

17. *Id.*

18. *Id.* at 25–26.

19. Robert C. L. Moffatt, *Philosophical Foundations of the Australian Constitutional Tradition*, 5 SYDNEY L. REV. 59, 85–86 (1965).

20. AUSTRALIAN CONSTITUTION s 51(xxix).

21. *See* Commonwealth v. Tasmania (1983) 158 CLR 1; Koowarta v. Bjelke-Petersen (1982) 153 CLR 168.

Constitution,²² providing only the barest protection of rights, as follows:

- (i) Section 51(xxxi)—the Commonwealth acquisition of property must be on just terms;²³
- (ii) Section 80—providing a right to trial by jury on a Commonwealth indictment for an offense against Commonwealth law;²⁴
- (iii) Section 116—the Commonwealth is not to make any law for the establishment of any religion or prohibiting free exercise of any religion;²⁵ and
- (iv) Section 117—a resident of a state may not be subject to any state law that provides for a disability or discrimination.²⁶

These four rights operate mainly to limit legislative and executive action by the federal government and are amenable to review by courts established under Chapter III of the Constitution (including the High Court of Australia). This is significant, for in addition to these limited express rights, the courts have found a number of implied rights affording (i) freedom of political communication,²⁷ (ii) freedom of political communication as a limitation on the law of defamation,²⁸ (iii) the right to due process ensuring equality before the law,²⁹ and (iv) privilege of communications between a lawyer and client.³⁰ The courts, in other words, have filled gaps the framers saw

22. BYRNES ET AL., *supra* note 9, at 24–25.

23. *Ex parte Lawler* (1994) 179 CLR 270; *Burton v. Honan* (1952) 86 CLR 169; *Bank of New S. Wales v. Commonwealth* (1948) 76 CLR 1; *Minister of State for the Army v. Dalziel* (1944) 68 CLR 261.

24. *Cheatle v. R* (1993) 177 CLR 541; *R v. Brown* (1986) 160 CLR 171; *see also Cheng v. R* (2000) 203 CLR 287.

25. *Church of the New Faith v. Comm’r for Payroll Tax* (1983) 154 CLR 120; *Ex rel. Black v. Commonwealth* (1981) 146 CLR 559; *Adelaide Co. of Jehovah’s Witnesses Inc. v. Commonwealth* (1943) 67 CLR 116; *Krygger v. Williams* (1912) 15 CLR 366; *see also Kruger v. Commonwealth* (1997) 190 CLR 1; *Grace Bible Church v. Reedman* (1984) 36 S.A.S.R. 376; *Harkianakis v. Skalkos* (1999) 47 N.S.W.L.R. 302.

26. *Leeth v. Commonwealth* (1992) 174 CLR 455; *Street v. Queensland Bar Ass’n* (1989) 168 CLR 461.

27. *Nationwide News Pty Ltd. v. Wills* (1992) 177 CLR 1; *Austl. Capital Television v. Commonwealth* (1992) 177 CLR 106.

28. *Lange v. Austl. Broad. Corp.* (1997) 189 CLR 520; *Theophanous v. Herald & Weekly Times Ltd.* (1994) 182 CLR 104; *Stephens v. W. Austl. Newspapers Ltd.* (1994) 182 CLR 211.

29. *Leeth v. Commonwealth* (1992) 174 CLR 455.

30. *See Evidence Act 1995* (Cth) s 121 (Austl.); *see also Daniels Corp. Int’l Pty Ltd. v. Austl. Competition & Consumer Comm’n* (2002) 213 CLR 543, [11]

fit to leave open. But this, of course, provides only a minimal expansion of rights and nothing like the comprehensive protection found in the constitutional bills of rights of other democratic states.

2. Section 116 of the Australian Constitution

Focusing on one of the express rights offers valuable insight into the approach taken by the Framers in excluding a bill of rights from the Constitution. Section 116, which expressly deals with religious freedom,³¹ found its way into the Constitution as a result of petitions circulated by Christian organizations during the Constitutional Conventions of the 1890s. The petitions “asked for the recognition of God as the supreme ruler of the universe; for the declaration of national prayers and national days of thanksgiving and ‘humiliation.’”³² The essence of the petitions was to demand that the Constitution include reference to the Christian identity of the new nation. Difficult though drafting such reference was, the Framers settled on including these words in the Preamble: “Whereas the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God”³³

The mention of “Almighty God” reopened a debate about prohibiting religious tests and religious establishment, on the one hand, and a concern to limit restrictions on the free exercise of religion, on the other.³⁴ Ultimately, this settled itself in the disclaimer of Section 116, which struck a balance between the two sets of interests and the opposing fears they represented.³⁵

(“Legal professional privilege is not merely a rule of substantive law. It is an important common law right or, perhaps, more accurately, an important common law immunity. It is now well settled that statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or a necessary implication to that effect.”).

31. On the history of this provision, see J.A. LA NAUZE, *THE MAKING OF THE AUSTRALIAN CONSTITUTION* 228–29 (1972); HELEN IRVING, *TO CONSTITUTE A NATION: A CULTURAL HISTORY OF AUSTRALIA’S CONSTITUTION* 165–68 (1999); JOHN QUICK & ROBERT RANDOLPH GARRAN, *THE ANNOTATED CONSTITUTION OF THE AUSTRALIAN COMMONWEALTH* 951–53 (1901).

32. IRVING, *supra* note 31, at 166.

33. *Id.*

34. *Id.* at 167.

35. *Id.* at 167–68; see also RICHARD ELY, *UNTO GOD AND CAESAR: RELIGIOUS ISSUES IN THE EMERGING COMMONWEALTH, 1891–1906* (1976).

Yet while this may appear at first blush to be a largely happy reconciliation of the competing interests, the text of Section 116 itself limits its potential. Because it operates as a constraint only upon the federal legislature,³⁶ Section 116 prohibits the Commonwealth, but not the States, from legislating to establish a religion or to limit the free exercise of religion.³⁷ And while the Australian provision goes further than the First Amendment, prohibiting not only federal laws “establishing any religion,” but also the use of law to impose religious observance or to administer a religious test as a qualification for public office, the potential contained in the text, unlike its counterpart American provision, remains largely unrealized.³⁸

Responsibility for the limited use of Section 116 lies squarely with the Australian courts. While the American judiciary invokes the First Amendment to the United States Constitution to protect the right to freedom of religion, Australian judges historically treat its counterpart, notwithstanding its remarkably similar wording, as part of a nineteenth century British statute, rendering it a virtual dead letter as a means of conferring any substantive rights, and rendering it of little practical import as a tool for protection of religious freedom in Australia. Paradoxically, this narrow interpretation flows from the judicial assertion that Section 116 is dislocated from a bill of rights, properly understood. In the celebrated *DOGS Case*,³⁹ for example, the High Court noted that:

[Section 116] does not form part of a Bill of Rights. The plaintiff's claim that it represents a personal guarantee of religious freedom loses much of its emotive and persuasive force . . . [when it is recognised that] s. 116 is a denial of legislative power to the Commonwealth, and no more.⁴⁰

Despite its being the most direct adoption of an American constitutional provision, the narrow construal of Section 116

36. See *Kruger v. Commonwealth* (1997) 190 CLR 1; see also *Grace Bible Church v. Reedman* (1984) 36 SASR 376.

37. See *LA NAUZE*, *supra* note 31, at 228–29; *IRVING*, *supra* note 31, at 165–68.

38. *Attorney-General (Victoria); Ex rel. Black v. Commonwealth (DOGS Case)* (1981) 146 CLR 559, 579 (Barwick, C.J.); see also *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Everson v. Bd. of Educ.*, 333 U.S. 1 (1947); *FREDERICK GEDICKS, THE RHETORIC OF CHURCH AND STATE: A CRITICAL ANALYSIS OF RELIGION CLAUSE JURISPRUDENCE* 44–61 (1995).

39. *DOGS Case*, 146 CLR at 579.

40. *Id.* at 652 (Wilson, J.).

confines its operation when compared to its American counterpart,⁴¹ despite an apparent expectation on the part of some Framers that American jurisprudence might influence its interpretation.⁴² This has led the High Court to reject claims that legislation infringes upon the freedom of religion when it has been argued that:

- (i) compulsory peacetime military training offends the religious convictions of persons who believe that military service is opposed to the will of God;⁴³
- (ii) the use of legislation for compulsory removal of Aboriginal children from their families prohibited them from access to and free exercise of their tribal religion;⁴⁴ and
- (iii) government funding of religiously-based schools amounted to an establishment of religion.⁴⁵

41. See Clifford L. Pannam, *Travelling Section 116 with a U.S. Road Map*, 4 MELB. U. L. REV. 41 (1963); GEDICKS, *supra* note 38, at chs 1, 5, 6.

42. In their discussion of the anticipations expressed in the Constitutional debates on Section 116, QUICK & GARRAN, *supra* note 31, refer to the debates which considered its inclusion:

The strongest argument, however, for the adoption of the earlier part of sec. 116, was found in the special form of the preamble of the Constitution Act, which recites that the people of the colonies, "humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Commonwealth." Referring to this recital, it was stated by Mr Higgins that, although the preamble to the Constitution of the United States contained no such words as these, it had been decided by the courts in the year 1892 that the people of the United States were a Christian people; and although the Constitution gave no power to Congress to make laws relating to Sunday observance, that decision was shortly afterwards followed by a Federal enactment declaring that the Chicago exhibition should be closed on Sundays. *Id.* at 952.

Quick and Garran go on to discuss how it is a matter of conjecture as to why Section 116 was limited to the Commonwealth and did not extend its prohibition to the States. The debate cited in this connection again makes reference to American First Amendment jurisprudence. *Id.* at 953; see *Bradfield v. Roberts*, 175 U.S. 291 (1899); *Davis v. Beason*, 133 U.S. 333 (1890); *Reynolds v. United States*, 98 U.S. 145 (1879); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866); *Permoli v. Municipality No. 1 of New Orleans*, 44 U.S. (3 How.) 589 (1845). It seems, though, that not all Framers took the view that Section 116 would protect all manner of religious practice. Tasmania's Premier, Sir Edward Braddon, for instance, argued during the Convention Debates for an amendment that "shall prevent the performance of any such religious rites as are of a cruel or demoralising character or contrary to the law of the Commonwealth." IRVING, *supra* note 31, at 168 (citing I-V OFFICIAL RECORD OF THE DEBATES OF THE AUSTRALASIAN FEDERAL CONVENTION, ADELAIDE, SYDNEY, MELBOURNE, 1897-1898, at 657 (1986)).

43. *Krygger v. Williams* (1912) 15 CLR 366.

44. *Kruger v. Commonwealth* (1997) 190 CLR 1.

45. *Attorney-General (Victoria) v. Ex rel Black v. Commonwealth* (1981) 146 CLR 559.

In its origin, its text, and its judicial interpretation, then, Section 116 fails to provide a robust protection of religious freedom. Only a change in jurisprudence might rescue it from irrelevance, and such a change requires either a constitutional amendment or the revival of the views seemingly held by some of the Founding Fathers that the Australian courts might follow the American First Amendment jurisprudence that influenced its inclusion. The latter seems unlikely while attempts at the former, as the next section shows, have ended in failure.⁴⁶

3. *Constitutional amendment*

There have been two attempts to amend Australia's Constitution so as to provide greater protection for human rights (including religious freedom).⁴⁷ Both of these amendments failed due, in large measure, to an onerous amending formula. Section 128 of the Constitution provides that a government-proposed amendment requires a national referendum with a double-majority of both electors and states.⁴⁸ Since 1901, forty-four such referenda have been held; as of 2010, only eight have received the required consent.⁴⁹ Needless to say, in the words of former Prime Minister Sir Robert Menzies, "to get an affirmative vote from the Australian people on a referendum proposal is one of the labours of Hercules."⁵⁰

While providing the necessary background to understand the current protection of human rights in Australia, these failed attempts are also relevant and similar to the current debate about a bill of rights. This section briefly recounts the two failed amendments that sought to achieve the protection of human rights. A third attempt, in 1959, never went as far as a referendum, failing when the Parliamentary Joint Committee established to assess the need for a constitutionally entrenched bill of rights concluded that the absence of such protection "had not prevented the rule of law from

46. See QUICK & GARRAN, *supra* note 31.

47. BYRNES ET AL., *supra* note 9.

48. AUSTRALIAN CONSTITUTION s 128; see also PETER HANKS, CONSTITUTIONAL LAW IN AUSTRALIA 28–32 (2d ed. 1996).

49. AUSTL. GOV'T, PARLIAMENTARY HANDBOOK OF THE COMMONWEALTH OF AUSTRALIA 2008, pt. 5 (2008).

50. J.B. Paul, *Political Review*, 46 AUSTL. Q. 116, 117 (1974).

characterising the Australian way of life.”⁵¹ It concluded that democratic elections and responsible government were sufficient protections for human rights.⁵²

The first attempt put to a referendum occurred in 1942–1944 as a response to the Commonwealth’s power to manage post-World War II reconstruction. A Constitutional Convention proposed that there be inserted into the Constitution federal legislative power over the “four freedoms”: speech and expression, religious freedom, freedom from want, and freedom from fear.⁵³ The legislation⁵⁴ proposed by the Commonwealth government would have given it full power to legislate in relation to these freedoms. Because the war prevented the bill from progressing to a referendum, the Labor government introduced similar legislation⁵⁵ in 1944 so as to give the Commonwealth power to legislate over fourteen specific areas, including a provision preventing State and Commonwealth governments from abridging the freedom of speech in order to protect against the perceived threat of imposed socialism, and another provision extended Section 116 to the States. The referendum lost decisively, achieving only a slim majority in South Australia and Western Australia.⁵⁶

Proponents of human rights protection waited forty-one years for a second attempt to pass an amendment—a wait rewarded only with a second failure. In 1985 the Commonwealth Labor Government established a Constitutional Commission charged with reporting on the revision of the Australian Constitution. An Advisory Committee on Individual and Democratic Rights assisting the Commission made minor proposals in 1987, drawing largely on the International Covenant on Civil and Political Rights (“ICCPR”). In an attempt to capitalize on the bicentenary of European settlement of Australia, and before the Commission had issued its final report,

51. Brian Galligan, *Australia’s Rejection of a Bill of Rights*, 28 J. OF COMMONWEALTH & COMP. POL. 344, 351 (1990).

52. *Id.* at 350–52; *see also* BYRNES ET AL., *supra* note 9, at 27.

53. The “four freedoms” were first enunciated in President Franklin D. Roosevelt’s 1941 State of the Union Address to the United States Congress. *See* CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* 1–16 (2004).

54. *Constitution Alteration (War Aims and Reconstruction) Bill 1942* (Cth) (Austl.).

55. *Constitution Alteration (Post-War Reconstruction and Democratic Rights) Act 1944* (Cth) (Austl.).

56. BYRNES ET AL., *supra* note 9, at 26–27.

the Commonwealth government proceeded with a referendum in 1988, placing four groups of amendments before the people, including provisions to extend to the States the right to trial by jury and, as in 1944, Section 116.⁵⁷ The proposals were resoundingly defeated and, while the Commission ultimately recommended that a much more robust bill be inserted into the Constitution, all political momentum for such reform evaporated with the failed referendum.⁵⁸

B. Commonwealth Legislative Efforts

While both proposed amendments to the Constitution failed, the Commonwealth government also attempted, once in the 1970s and again in the 1980s, to provide legislative protection for human rights. The first attempt failed and the second attempt achieved only modest success.

1. 1970s: Human Rights Bill

Following its 1972 election victory, the Labor Government introduced a human rights bill in an attempt to fulfil its obligations under the recently signed ICCPR.⁵⁹ In the long term, the Government intended to amend the Constitution to provide for individual liberties, and suggested that its proposed legislation would precede such an amendment by protecting fundamental rights and freedoms defined in terms similar to those found in the ICCPR.⁶⁰ The proposed legislation was to apply to both the Commonwealth and State governments as well as to private actions,⁶¹ and it contained protections for defined rights, including the right contained in Article 18 protecting the right to freedom of thought, conscience, and religion.

The proposed bill also contained an enforcement mechanism requiring that any Commonwealth laws would be inoperative if found by a competent court to be inconsistent with the legislation unless they contained an express provision that they were to operate notwithstanding the legislation. State laws would be invalid by virtue

57. *Constitutional Alteration (Rights and Freedoms) Act 1988* (Cth) (Austl.).

58. BYRNES ET AL., *supra* note 9, at 32–33.

59. *Human Rights Bill 1973* (Cth) (Austl.).

60. *International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI), U.N. GAOR, Mar. 23, 1976, Supp. No. 16, U.N. Doc. A/6316.

61. *Id.* ¶ 18.

of the Commonwealth law paramountcy clause found in Section 109 of the Constitution. And courts would enjoy the power to grant a range of remedies. Attacked as unnecessary in a parliamentary democracy and likely to politicise the judiciary and undermine States' rights, Parliament never enacted the bill.⁶²

2. 1980s: *Human Rights Commission*

In 1981, the Liberal-National Coalition government, eschewing a bill of rights, enacted the Human Rights Commission Act 1981 (Cth) ("the HRC Act"). This legislation created administrative remedies for breaches of rights recognized in human rights treaties, such as the ICCPR, and a Human Rights Commission authorized to examine Commonwealth laws and report to the Commonwealth Parliament any inconsistencies with standards set by international human rights standards.

The Labor party denounced the HRC Act as a "toothless tiger"⁶³ and, when it came to power in 1983, set about implementing a judicially enforceable bill of rights as a replacement. As had been the case with its human rights bill in the 1970s, this legislation involved a two-stage process: the introduction of a legislated bill of rights followed by constitutional amendment. Commentators described the draft bill as a general translation of the ICCPR into Australian law, declaring protected rights to have the status of Commonwealth law prevailing over federal legislation and, in the case of conflict with State law, over that by virtue of Section 109 of the Constitution. The Human Rights Commission would have the power to investigate complaints and resolve those through conciliation, settlement, or reporting to Parliament. The only judicial power contained in the legislation was the Federal Court's power to hear complaints from those not subject to proceedings under impugned legislation and to declare such laws repealed or inoperative if it found them to be inconsistent with protected rights. The States mounted a strong attack against the proposal, arguing it would have an adverse effect on their legislative powers. An early federal election in 1984 put an end to this proposal, but not the attempt to implement a bill of rights.⁶⁴

62. BYRNES ET AL., *supra* note 9, at 28–29.

63. *Id.* at 30.

64. *Id.* at 31–32.

In 1985, the Australian Senate Standing Committee on Constitutional and Legal Affairs launched an inquiry into the desirability of an Australian bill of rights. While the Standing Committee would ultimately endorse a bill of rights, before it could report the Australian Parliament introduced a revised draft bill of rights into Parliament. The bill, which was passed by the House of Representatives, failed to win support in the Senate. Opposed both by those who thought it ineffectual and by those against bills of rights generally, it was ultimately withdrawn in 1986. Having therefore failed to implement a bill of rights, the Parliament set its sights instead on the Human Rights Commission Act 1981—which was due to expire five years from the date of its enactment—and passed the Human Rights and Equal Opportunity Commission Act 1986 (Cth).⁶⁵

In the result, neither the attempts at constitutional amendment nor the Commonwealth legislative efforts to effect comprehensive human rights protection ended with complete success. Rather, failure overwhelmingly summarizes these attempts. The next Part turns to the second chapter in this story of *déjà vu*—the resulting piecemeal protection afforded by these minimal federal efforts and the marginal additions made by the States and Territories.

III. CURRENT PROTECTION OF HUMAN RIGHTS IN AUSTRALIA: ONE MORE TIME

Australia currently protects human rights through a patchwork of international law, commonwealth and state laws, and institutional arrangements. Because other scholars have comprehensively examined these laws,⁶⁶ this Part provides an overview of the provisions offering protection for religious freedom. This exercise provides further support for and background to the current feeling of *déjà vu*. Specifically, some religious groups argue that a bill of rights is unnecessary because protection of human rights already exists.

65. *Id.* at 32.

66. *Id.* at 36–41, 73–138; AUSTRALIAN CAPITAL TERRITORY, TOWARDS AN ACT HUMAN RIGHTS ACT: REPORT OF THE ACT BILL OF RIGHTS CONSULTATIVE COMMITTEE (2003), available at <http://www.jcs.act.gov.au/prd/rights/documents/report/BORreport.pdf> (last visited Aug. 27, 2010). For some of the history, see RYSZARD PIOTROWICZ & STUART KAYE, HUMAN RIGHTS IN INTERNATIONAL AND AUSTRALIAN LAW (2000).

A. International and Commonwealth Protection

At the international level, Australia accepts the procedures which allow U.N. human rights bodies to provide redress to individuals who claim violations of their rights under the International Convention on the Elimination of All Forms of Racial Discrimination 1965 (“CERD”), the Optional Protocol to the ICCPR, and the Convention Against Torture 1984 (“CAT”).⁶⁷ At the Commonwealth level, the Racial Discrimination Act 1975 (Cth) and the Sex Discrimination Act 1984 (Cth) are the primary legislative protections for human rights, although these take the narrow foci suggested by their titles.

Institutionally, the Human Rights and Equal Opportunity Commission Act 1986 (Cth), discussed in Part II, established the Human Rights and Equal Opportunity Commission—since renamed the Australian Human Rights Commission⁶⁸—and conferred upon it a number of functions concerning human rights. These functions include research and education, examining existing and proposed legislation for consistency with such rights, reporting to Parliament on the need for laws or other actions to implement international obligations, and examining Acts or practices of Commonwealth authorities for consistency with protected rights.⁶⁹ Still, reports and recommendations of the Commission have no binding force in law; in fact, Commonwealth governments frequently ignore them.⁷⁰

B. State and Territory

The States and Territories provide somewhat wider legislative protection against discrimination than that found in Commonwealth legislation. More importantly, the advent of human rights legislation in the Australian Capital Territory (“ACT”) and Victoria—the Human Rights Act 2004 (ACT) (“the ACT HRA”) and the Charter of Human Rights and Responsibilities Act 2006 (Vic) (“the

67. BYRNES ET AL., *supra* note 9, at 37.

68. *The Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth) sch 3, s 1 (No. 70, 2009) (Austl.), amended the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (Austl.) by renaming it the *Human Rights Commission Act 1986* (Cth) (Austl.), and renaming the Commission the Australian Human Rights Commission.

69. *Human Rights Commission Act 1986* (Cth) s 11(e) (Austl.).

70. BYRNES ET AL., *supra* note 9, at 39–40.

Victorian Charter”)—expands the power of administrative bodies in those jurisdictions to monitor human rights violations.⁷¹

1. Human Rights Act 2004 (ACT)

The ACT HRA, Australia’s first bill of rights of any kind, protects a range of human rights and freedoms. In relation to religious freedom, for example, section 14 enshrines the right to freedom of thought, conscience, religion and belief, while section 27 protects the rights of minorities to enjoy their own culture, religion, and language. In addition to these specific religious rights, the ACT HRA also covers the right to equality before the law,⁷² the right to life,⁷³ the right to privacy,⁷⁴ freedom of peaceful assembly and association,⁷⁵ freedom of expression, the right to take part in public life,⁷⁶ and the right to liberty and security of the person.⁷⁷

While the legislation preserves parliamentary sovereignty by leaving ultimate decisions concerning the violation of human rights to the ACT Legislative Assembly, there nonetheless exists a range of enforcement mechanisms:⁷⁸ (i) an obligation on decision-makers to interpret ACT laws (excluding the common law) to be consistent so far as possible with human rights;⁷⁹ (ii) jurisdiction vested in the ACT Supreme Court to issue declarations of incompatibility in cases where legislation cannot be interpreted so as to be consistent (not, however, affecting the validity of the legislation);⁸⁰ (iii) a duty on the Attorney-General to present written statements on the compatibility of each government bill presented to the Legislative Assembly;⁸¹ and

71. *Id.* at 40–43.

72. ACT HRA s 8.

73. *Id.* s 9.

74. *Id.* s 12.

75. *Id.* s 15.

76. *Id.* s 16.

77. *Id.* s 18.

78. See BYRNES ET AL., *supra* note 9, at 74–79, for the history and legislative background to the ACT HRA. The ACT Government itself commissioned a study into the options for human rights legislation prior to the enactment of the ACT HRA: AUSTRALIAN CAPITAL TERRITORY, *supra* note 66.

79. ACT HRA s 30; see BYRNES ET AL., *supra* note 9, at 83–85 for a detailed discussion of the operation of this provision.

80. ACT HRA ss 32, 33, 39.

81. *Id.* s 37.

(iv) the office of Human Rights Commissioner, which has the power to review laws for compatibility with the ACT HRA.⁸²

The ACT HRA does, however, contain two significant limitations. First, section 6 provides that “[o]nly individuals have human rights.”⁸³ Second, and more significantly, none of the enumerated rights are absolute—section 28(1) imposes a general qualification on each of the rights found in the Act:⁸⁴ “[h]uman rights may be subject to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.” As such, any limitations placed upon enumerated rights must be proportionate to the objective sought to be achieved by the legislation; a list of factors contained in section 28(2) assists in determining proportionality.⁸⁵

In deciding whether a limit is reasonable, all relevant factors must be considered, including the following:

- (i) the nature of the right affected;
- (ii) the importance of the purpose of the limitation;
- (iii) the nature and extent of the limitation;
- (iv) the relationship between the limitation and its purpose;
- (v) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.⁸⁶

Critics predicted an increase in litigation following the enactment of the ACT HRA; however, this prediction proved to be unfounded. Indeed, some supporters might have hoped for a more vigorous invocation of the Act by the courts rather than the cautious, often superficial consideration given to enumerated rights usually to bolster decisions reached on other grounds. While several decisions considered the interpretive provision of section 30,⁸⁷ and other important issues relating to the application of the ACT HRA,⁸⁸ as of

82. *Id.* s 41; *see also id.* ss 38, 43, 44, sch 2.

83. *Id.* s 6.

84. This is similar in its terms to the limitation found in section one of the Canadian Charter of Rights and Freedoms. Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, Ch. 11 (U.K.), 1982, Ch. 11.

85. BYRNES ET AL., *supra* note 9, at 82.

86. ACT HRA s 28(2).

87. BYRNES ET AL., *supra* note 9, at 99–104; *see* Commissioner for Housing in the ACT v. Y (2007) ACTSC 84; SI bhnf CC v. KS bhnf IS (2005) ACTSC 125.

88. *See* R v. YL (2004) ACTSC 115; Hausmann v. Shute (2007) ACTCA 5; Stevens v. McCallum (2006) ACTCA 13; R v. Griffin (2007) ACTCA 6; Capital Property Projects v. Australian Capital Territory Planning & Land Authority (2008) ACTCA 9.

2008, no judicial decision had issued a declaration of incompatibility, and no case had invoked the religious freedom provisions.⁸⁹

The most significant impact of the ACT HRA on the development of human rights protection has not come in the courts, but through its effect on policymaking and legislative processes. This impact is largely seen in changes wrought to the culture of government—improving the quality of lawmaking in the Territory through the pre-enactment scrutiny of proposed legislation⁹⁰ and, significantly, affecting the national debate⁹¹ about bills of rights in other states and territories, including the Victorian Charter (to which we turn in the next section).

2. *Charter of Human Rights and Responsibilities Act 2006 (Vic)*

Following broad community consultation, with the ACT HRA serving as an impetus, in 2006 the Victorian Parliament enacted the Victorian Charter, which shares many of its characteristics with its ACT counterpart. The parliamentary scrutiny and compatibility processes found in the Victorian Charter came into effect on January 1, 2007, while provisions relating to public authorities and the courts—the interpretation of law, declarations of inconsistent interpretation, and new obligations on public authorities⁹²—commenced on January 1, 2008.⁹³

The Victorian Charter applies to Parliament, courts, tribunals, and to public authorities in order to protect human persons.⁹⁴ Most of the same human rights found in the ACT HRA are also protected by the Victorian Charter. These include: the right to recognition and equality before the law;⁹⁵ the right to life;⁹⁶ freedom of thought,

89. BYRNES ET AL., *supra* note 9, at 99.

90. *Id.* at 86–98.

91. *Id.* at 106–07.

92. Victorian Charter, pt 3, div 3–4.

93. For the background to the enactment of the Victorian Charter, see BYRNES ET AL., *supra* note 9, at 109–14; ALISTAIR POUND & KYLIE EVANS, AN ANNOTATED GUIDE TO THE VICTORIAN CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES (2008); CAROLYN EVANS & SIMON EVANS, AUSTRALIAN BILLS OF RIGHTS: THE LAW OF THE VICTORIAN CHARTER AND ACT HUMAN RIGHTS ACT (2008); GREG TAYLOR, THE CONSTITUTION OF VICTORIA 51–52 (2006).

94. Victorian Charter ss 6–7.

95. *Id.* s 8.

96. *Id.* s 9. By virtue of section 48, the Victorian Charter does not affect any law applicable to abortion or child destruction passed before or after the Charter.

conscience, religion and belief;⁹⁷ freedom of expression;⁹⁸ freedom of assembly and association;⁹⁹ and cultural rights (affirming the rights of members of all cultural, religious, racial or linguistic communities to exercise various rights related to membership in those communities).¹⁰⁰

As with the ACT HRA, section 7 of the Victorian Charter provides that its enumerated rights are subject to such reasonable limits as can be demonstrably justified in a free and democratic society based upon human dignity, equality and freedom. Additionally, the same non-exhaustive set of factors used to determine whether a limitation is reasonable found in the ACT HRA is found in the Victorian Charter.

Enforcement provisions of the Victorian Charter are also similar to those found in the ACT HRA: compatibility statements must be prepared when legislation is introduced into Parliament;¹⁰¹ legislation may be overridden for a period of five years;¹⁰² and all statutory provisions must be interpreted by the courts and any other decision-maker in a way compatible with human rights, so far as it is possible to do that consistently with their purpose and, if that is not possible, the court or decision-maker may make a declaration of inconsistent interpretation.¹⁰³ Remedies for breaches of obligations of public authorities are limited to those causes of action and grounds for review that exist outside the Charter.¹⁰⁴

To date, as with the ACT HRA, the most significant impact of the Victorian Charter has been in the executive and legislative spheres.¹⁰⁵ Use of the Charter in the courts has been limited primarily to criminal matters.¹⁰⁶

The impetus generated by the ACT HRA and the Victorian Charter—enactments seen as having contributed to knowledge about how bills of rights might operate in the broader political

97. *Id.* s 14.

98. *Id.* s 15.

99. *Id.* s 16.

100. *Id.* s 19.

101. *Id.* ss 28, 30.

102. *Id.* s 31. On these grounds, see BYRNES ET AL., *supra* note 9, at 123–33.

103. Victorian Charter ss 32, 36–37.

104. *Id.* s 39.

105. BYRNES ET AL., *supra* note 9, at 123–33.

106. *See, e.g.*, R v. Benbrika (Ruling No. 20) (2008) VSC 80; R v. Williams (2007) VSC 2; R v. White (2007) VSC 142.

landscape and, thus, overcoming the resistance and suspicion to such protections¹⁰⁷—resulted in public consultations in Tasmania in 2006 and Western Australia in 2007; neither process successfully produced a bill of rights in those jurisdictions.¹⁰⁸ Indeed, if anything, it appears that the achievements of the ACT and Victoria paved the way for diversity rather than uniformity of approach, opting for state- or territory-based protection rather than a comprehensive national enactment.

IV. THE CURRENT NATIONAL DEBATE AND THE NATIONAL HUMAN RIGHTS CONSULTATION REPORT: DÉJÀ VU

Notwithstanding the failure of the state and territory processes to catalyse comprehensive national action, the National Human Rights Consultation generated debate around a loosely coalescing consensus for a “dialogue” model bill of rights. And, as Part V will show, while that process seems to have stalled, if not failed, it nonetheless reveals the current trend. This Part contains two sections. The first outlines the dialogue model for a bill of rights and, specifically, the weak dialogue model recommended by the Consultation Committee in its Report. The strong contemporary feeling of déjà vu comes, however, from the negative response of some religious groups to a proposed bill of rights of any kind, even if it included a protection for religious freedom (which, in fact, the Report recommended). That response forms the focus of the second section.

A. *Can We Talk?: Dialogue*¹⁰⁹

The Consultation Report contained an extensive comparative discussion of “dialogue” models for bills of rights found in other jurisdictions—New Zealand, United Kingdom, ACT and Victoria¹¹⁰—and recommended a “weak” dialogue model federal Human Rights Act (bill of rights).¹¹¹ All legislation in some way

107. BYRNES ET AL., *supra* note 9, at 139–40.

108. *Id.* at 141–45.

109. *Id.* at 44–72. On the full range of models, see AUSTRALIAN CAPITAL TERRITORY, *supra* note 66, at 43–60; *see also* HON. SIR ANTHONY MASON AC KBE, HUMAN RIGHTS AND THE COURTS ¶¶ 11–15 (2009) *available at* <http://www.iclrs.org/docs/Human%20Rights%20and%20the%20Courts%20-%20Canberra.pdf>.

110. CONSULTATION REPORT, *supra* note 11, at 241–62.

111. *Id.* at 361–64, 371–79. This recommendation may be regrettable, as it is not clear that either constitutional amendment or legislative enactment as a weak dialogue model is the

affects the distribution of power between the three branches of government. In that sense, “dialogue” or “institutional interaction”¹¹² is not new. First introduced as a metaphor by Peter Hogg and Allison Bushell for interaction between the three branches in response to criticisms that judicial review under constitutional bills of rights was anti-democratic or anti-majoritarian,¹¹³ dialogue has always occurred in all Australian jurisdictions between the legislature and the judiciary and, to a lesser extent, the executive. Moreover, it comprises a feature of many constitutional systems, even those in Canada and the United States, where the judiciary has the power to invalidate legislation, seemingly giving it the last word on human rights issues.¹¹⁴

Because human rights protection, whether constitutional or legislative, directs the executive and the judiciary to conduct their business in certain ways, dialogue models for bills of rights encourage “conversation” between the three branches,¹¹⁵ allowing the judiciary to comment upon the adequacy of legislation or to be critical of the actions of the executive. The legislature can respond in turn by amending legislation or administrative practices or the bill might even leave open the possibility of allowing for an explicit rejection of the judicial decision, all of which is generally seen as a desirable outcome of the implementation of a bill of rights.¹¹⁶

Dialogue has generally taken two forms. First, in its “strong” form, as in the United States, it may redistribute powers to such an extent that the judiciary is given the power to invalidate acts of the legislature for the infringement of enumerated rights. How strong the dialogue is depends on whether the legislature has any recourse to respond once the courts have spoken.

Strong dialogue has received extensive academic scrutiny in Canada, where section 33 of the Canadian Charter of Rights and

only way forward. See Neville G. Rochow, *Paying for Human Rights Until the Bill Comes*, University of Adelaide Law Research Paper No. 2009-004, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1356382 (last visited Aug. 27, 2010).

112. Leighton McDonald, *Rights, “Dialogue” and Democratic Objections to Judicial Review* 32 FED. L. REV. 1 (2004) (Austl.).

113. Peter Hogg & Allison Bushell, *The Charter Dialogue Between Courts and Legislatures (or Perhaps the Charter of Rights Isn’t Such a Bad Thing After All)*, 35 OSGOODE HALL L.J. 75 (1997).

114. AUSTRALIAN CAPITAL TERRITORY, *supra* note 66, at 61.

115. BYRNES ET AL., *supra* note 9, at 51.

116. AUSTRALIAN CAPITAL TERRITORY, *supra* note 66, at 61–62.

Freedoms of 1982 constitutionally entrenches this model.¹¹⁷ The focus of debate in Canada turns on whether in practice the Charter involves genuine dialogue or simply allows the judiciary's view of the meaning of human rights to supersede those of the other branches.¹¹⁸ Some in fact argue that rather than true dialogue, the outcome of the process mandated under the Charter is in fact judicial "monologue" or even "ventriloquism."¹¹⁹

Dialogue may, however, take a "weak" form, allowing the judiciary to play a role in the enforcement of human rights short of invalidation of legislation.¹²⁰ This form permits institutional interaction amongst the three branches of government and the community while conferring on the legislature the "final say" in relation to human rights issues. Under such a scheme, the judiciary is not given the power to invalidate legislation (although it could do so in relation to executive acts, including subordinate legislation) but instead may express its opinion that a law is incompatible with enumerated rights. It is then up to the legislature to determine whether or not to amend the legislation in question so as to bring it into conformity with the protected rights.¹²¹

The United Kingdom Human Rights Act of 1998, the New Zealand Bill of Rights Act of 1990, the ACT HRA and the Victorian Charter are all weak dialogue models.¹²² These enactments reflect the current trend in national legal systems to move away from the American strong dialogue model, which gives substantial power—or at least the courts have arrogated that power to themselves¹²³—to have the final say in matters of human rights protection and towards a model preserving to the legislature its democratic function to decide how best to protect human rights.¹²⁴ Indeed, both the ACT HRA and the Victorian Charter tip this balance further in favor of the legislature by ensuring against judicial invalidation and in favor of

117. See BYRNES ET AL., *supra* note 9, at 52.

118. Peter Hogg, Allison Thornton & Wade Wright, *Charter Dialogue Revisited—or "Much Ado About Metaphors,"* 45 OSGOODE HALL L.J. 1 (2007); *Special Issue: Charter Dialogue Ten Years Later*, 45 OSGOODE HALL L.J. 1, 1–202 (2007).

119. Christopher Manfredi & James Kelly, *Six Degrees of Dialogue: A Response to Hogg and Bushell*, 37 OSGOODE HALL L.J. 513, 520–21 (1999).

120. AUSTRALIAN CAPITAL TERRITORY, *supra* note 66, at 61.

121. *Id.* at 61–62.

122. BYRNES ET AL., *supra* note 9, at 52–54.

123. *Marbury v. Madison*, 5 U.S. 137 (1803).

124. BYRNES ET AL., *supra* note 9, at 51.

judicial declarations of incompatibility, thus leaving it to the legislature to respond and, if it does nothing, leaving its policy position and legislation to stand.¹²⁵

As part of its weak dialogue package, the Consultation Report recommended that only federal “public authorities” should be required to comply with enumerated human rights—this would include ministers, public servants, and government departments. In the case of legislation, however, the bill of rights would require that other laws be interpreted consistently with enumerated rights, provided that this was consistent with Parliament’s intent. Where incompatible, no invalidation would be possible; rather, only the High Court would have the power to issue a “declaration of incompatibility.” Such declarations would notify the government of the incompatibility while leaving Parliament the final word in the “dialogue” between the two branches of government as to whether to amend the law.¹²⁶

Yet, even before the National Human Rights Consultation released its Report proposing a weak dialogue model, some religious groups had already made their view clear on a bill of rights of any kind.

B. Religion

Opposition to an Australian bill of rights certainly did not begin with the establishment of the National Human Rights Consultation. As we have seen, throughout the history of the Australian federation, opposition is the rule rather than the exception when it comes to protecting human rights. The current opposition, far from being anything new, feels a lot like “déjà vu all over again,”¹²⁷ with some religious groups, paradoxically, leading the way.

This section provides an overview of the religious arguments, pro and con, concerning a bill of rights, and the reasons for that position. It is not exhaustive; rather, while it canvasses the views of some members of the monotheistic traditions, it makes no pretence to cover the range of views for and against a bill. The point of the

125. *Id.* at 52–54.

126. CONSULTATION REPORT, *supra* note 11, at 361–64, 372–79; *see also* Edward Santow & George Williams, National Human Rights Consultation Report: A Brief Summary, (Oct. 19, 2009), http://www.gtcentre.unsw.edu.au/Resources/docs/cohr/Brennan_Committee_Report_Summary.pdf.

127. YOGI BERRA, THE YOGI BOOK 30 (1998).

exercise is to use the protection of religious freedom to represent the underlying grounds for opposition to a bill of rights, and in doing so, to examine the specific religious concerns founded upon those grounds. This exercise demonstrates the thread of *déjà vu* running through the contemporary debate.

1. Support

Two principal positions supporting a bill emerge from the religious debate: neutral or conditional support on the one hand, and strong support on the other.

a. Neutral or conditional. The clearest example of neutrality is found in the agnostic position advanced by the Australian Catholic Bishops Conference, which takes the position that once the government issues concrete proposals in relation to a bill it will engage in dialogue on the proposed model.¹²⁸ The Anglican Church of Australia, on the other hand, offers conditional support dependent upon the inclusion in any proposed bill of very strong protection for religious freedom consistent with Article 18 of the ICCPR.¹²⁹

b. Strong. The strongest Christian support comes from the Peace and Legislation Committee of the Religious Society of Friends (Quakers) and the Uniting Church of Australia (a union of the Methodist, Presbyterian, and Episcopal Churches). In 2008, for instance, the Uniting Church resolved to support a national bill of rights which would (i) implement Australia's international law commitments to human rights; (ii) hold public institutions and officials accountable for upholding and promoting human rights; (iii)

128. Some comments on the discussion paper: *Freedom of Religion and Belief in the 21st Century* at the Australian Catholic Bishops Conference, available at http://www.hreoc.gov.au/frb/submissions/Sub995.Australian_Catholic_Bishops_Conference.doc (last visited Aug. 27, 2010). See also Hart, *supra* note 2.

129. Patrick Parkinson, Christian Concerns with the Charter of Rights 2 (unpublished manuscript presented at the Cultural and Religious Freedom Under a Bill of Rights Conference, August 13–15, 2009, Canberra, Austl. Cap. Terr.) (on file with Professor Parkinson at the University of Sydney Law School) [hereinafter Parkinson, Christian Concerns]; Patrick Parkinson, Christian Views on the Idea of the Charter (unpublished PowerPoint presentation from 'Christian Concerns with the Charter of Rights,' presented at the Cultural and Religious Freedom under a Bill of Rights Conference, August 13–15, 2009, Canberra, Austl. Cap. Terr.) (on file with Professor Parkinson at the University of Sydney Law School) [hereinafter Parkinson, Christian Views].

take account of Indigenous Australians; and (iv) be supported and policed by properly funded, independent mechanisms.¹³⁰

Largely as a consequence of their loose governmental structures, it is somewhat more difficult to locate community positions within the Judaic and Islamic traditions. Still, one can identify strong support for a bill of rights among senior members of these traditions. Ameer Ali, former President of the Australian Federation of Islamic Councils, for instance, supports the protection of human rights through a bill, arguing that such protection would strengthen rather than weaken Australia's democratic structure. Far from damaging religious freedom, Ali argues that a bill would establish the equality of every religion, thus bolstering the democratic structure which protects religious groups from harmful legislation—particularly in relation to terrorism and immigration—while simultaneously defending against vilification by others. In the final analysis, Ali argues, a bill has the potential to produce a more harmonious, plural society.¹³¹

Whatever support—conditional or strong—exists amongst religious groups, it is far outweighed by the myriad voices of opposition. And it is here, in the opposition to a bill, that one begins to feel this has all happened before.

2. *Opposition*

Just as it provides the strongest religious support, the Christian community also displays the strongest opposition—the loudest voices are those of the Australian Christian Lobby, the Presbyterian Church (not in union with the Uniting Church), the Association of Christian Schools, the Sydney Anglican Diocese, the Baptist Union, and the New South Wales Council of Churches.¹³² This part is divided into the underlying grounds of opposition—which are

130. Uniting Justice Australia, An Australian Human Rights Act, <http://www.unitingjustice.org.au/issues/upholding-human-rights/hr-act.html> (last visited Aug. 27, 2010); *see also* Uniting Church in Australia, National Assembly, SUBMISSION TO THE NATIONAL HUMAN RIGHTS CONSULTATION (2009), *available at* www.hrlrc.org.au/files/nationalhumanrightsconsultation_ucanationalassembly_0609-2.pdf.

131. *Freedom of Religion and a Bill of Rights*, ABC SPIRIT OF THINGS (Aug. 23, 2009), *available at* <http://www.abc.net.au/rn/spiritofthings/stories/2009/2659582.htm#transcript>.

132. Parkinson, *Christian Concerns*, *supra* note 129, at 2–3; Parkinson, *Christian Views*, *supra* note 129.

common to secular opposition to a bill of rights—and the specific concerns of religious groups for that opposition.

a. *Grounds.* Christian groups opposed to a bill of rights both perceive an antipathy among many Australians towards exemptions under anti-discrimination legislation for faith-based organizations,¹³³ and believe that vague and poorly drafted anti-vilification legislation results in a chilling effect on freedom of religious expression.¹³⁴ Against this backdrop, specific grounds of opposition emerge, as summarised by Parkinson:

- (i) a bill is simply not needed as rights are already protected in clear legislation;
- (ii) a bill does not of itself protect against the abuse of state power or protect the interests of the vulnerable;
- (iii) a bill would transfer power to make final determinations over issues of policy from elected parliaments to courts, leading to political and bureaucratic uncertainty and the weakening of judicial independence;
- (iv) a bill can too easily be used to provide leverage for unrepresentative activists to win contestable rights that could never have been achieved through democratic processes; and
- (v) a bill would effectively legislate selfishness, already too much a feature of modern society, propelling individual rights above the rights held in community.¹³⁵

Objections (iii)-(v) express a general concern that courts will use a bill of rights for illegitimate, undemocratic, and anti-majoritarian purposes. This, it is argued, places the judiciary in a paramount position relative to the other branches of government, allowing that branch to “create” new rights, not unlike the right to privacy in the United States,¹³⁶ the major consequence of which will be to weaken community.

133. Parkinson, *Christian Concerns*, *supra* note 129, at 3–7.

134. *Id.* at 3.

135. These are summarized by Parkinson, *Christian Concerns*, *supra* note 129, at 2; Parkinson, *Christian Views*, *supra* note 129.

136. *Griswold v. Connecticut*, 381 U.S. 479 (1965). The background to this decision included *Tileston v. Ullman*, 318 U.S. 44 (1943) and *Poe v. Ullman*, 367 U.S. 497 (1961). Subsequent cases citing and extending the right to privacy include *Eisenstadt v. Baird*, 405

The Christian objections frequently speak of “interpretations” of a bill,¹³⁷ which, in the context of the five objections summarised by Parkinson and given what we know about concerns with the weak dialogue model, can only mean interpretations issued by courts.¹³⁸ In this light, objections (i) and (ii) become another way of asserting the primacy of the legislative and executive branches as against the judicial. And as we have seen in Part I, in every attempt to amend the Australian Constitution in order to entrench rights, and in every case of legislative enactments seeking to protect human rights, these same arguments have been made.

b. Specific concerns. Resting upon the grounds of opposition advanced by Christian groups are two specific concerns with a bill of rights: (1) that anti-discrimination legislation generally, and the protection of equality under a bill of rights specifically, will result in judicial encroachments upon religious freedom, and (2) that when used in conjunction with a bill of rights, anti-vilification laws will be used as weapons in the hands of some groups to prevent religious groups from discussing their faith in the public forum.

(1) *Equality and anti-discrimination.* In relation to anti-discrimination, the Christian worry is that judicial interpretations of a bill of rights will allow “anti-discrimination [to] . . . become the human right that trumps all others.”¹³⁹ In two related concerns, Christian groups believe this to be the manifestation of “fundamentalism” about equality and anti-discrimination. First, they believe that all limitations on eligibility to apply for particular jobs should be abolished or severely restricted and, second, that human rights belong to individuals, rather than groups.¹⁴⁰ For some Christian groups, this concern has specific implications relating to hiring practices in faith-based schools, codes of conduct, marital status, and to sexual practices.¹⁴¹

U.S. 438 (1972), *Roe v. Wade*, 410 U.S. 113 (1973), *Bowers v. Hardwick*, 478 U.S. 186 (1986), and *Lawrence v. Texas*, 539 U.S. 558 (2003).

137. For these, see Parkinson, Christian Concerns, *supra* note 129, at 3–7.

138. See Patrick Parkinson, *Submission to the National Human Rights Consultation* (2009).

139. Parkinson, Christian Concerns, *supra* note 129, at 7.

140. *Id.* at 8–10.

141. Patrick Parkinson, A National Framework for Religious Freedom 4–6 (unpublished manuscript on file with Professor Parkinson in the University of Sydney Law School) (2009).

From its earliest history, faith-based schools emphasizing a Christian foundation have been a central part of Australian life. Recently, there are many such schools, typically those within the evangelical tradition and which take a strong view of the Bible as central to life, which seek to provide an explicitly Christian environment for children and young people. Some of these schools require adherence to the Christian faith from all staff, including administrators and maintenance personnel.¹⁴² These schools desire to maintain this Christian environment for students and their parents by means of their hiring practices, which are referred to not as discrimination, but as “positive selection.” For these schools, “[s]election based in part on a characteristic which is relevant to the employment is hardly discriminatory. [It] is a common sense distinction”¹⁴³ These groups argue that the right of positive selection in relation to faith-based schools is supported by Article 18 of the ICCPR. In fact, positive selection “[was] perhaps the strongest theme running through all the church submissions to the National Human Rights Consultation . . . and [this] affected their submission on the [bill of rights].”¹⁴⁴

From the Christian perspective, codes of conduct, marital status, sexual practice, and belief in the supernatural have consequences for the way in which adherents lead their lives. In other words, for those who take this view, a religion imposes a code of conduct, the most significant dimension of which involves marriage and the family and beliefs concerning sexual relations before or outside of marriage, and about homosexual practice (as distinct from homosexual orientation).¹⁴⁵ While religious groups claim to recognize that their beliefs are no longer mainstream in relation to these codes of conduct, they nonetheless argue that equality and anti-discrimination principles threaten their codes of conduct, especially if, as they argue, such principles become the human right that trumps all other human rights.¹⁴⁶

142. Parkinson, *Christian Concerns*, *supra* note 129, at 10–11.

143. *Id.* at 11.

144. *Id.*

145. Parkinson, *supra* note 141, at 5.

146. Parkinson, *Christian Concerns*, *supra* note 129, at 7; Parkinson, *supra* note 141, at 6.

(2) *Speech and anti-vilification.* In relation to speech and anti-vilification law, two interrelated concerns predominate: communicating about the faith and rival claims to truth.¹⁴⁷ For some religious groups, contemporary moral relativism stands in contrast to their claims to know and teach absolute truth about the nature of humanity, its place within the universe, and relationship to the supernatural. For groups taking that position, this can produce disagreement with others—one may believe that others are mistaken because their beliefs are inconsistent. From the perspective of those religious groups, this may require that one “point[] out areas of difference with other world religions and declar[e] them to be wrong in relation to those matters.”¹⁴⁸

Rival claims to truth can cause problems within the context of anti-vilification or religious defamation laws. Communicating about the faith, evangelization, or mission can often represent the core of practicing one’s religion. Thus, freedom to practice and persuade others of the truth or value of what one believes is the very core of religious expression. Yet anti-vilification laws can, and have, been used in Australia as weapons by groups who feel that their own faith has been impugned by those who claim to be evangelizing.¹⁴⁹ As such, some Christian groups argue that the

liberty to make rival claims in the free market of ideas is what makes for a free society. Religions do not need protection from competing claims to the truth. The freedom of one person to say that another is wrong is mirrored by the freedom of the other to say that the first person is mistaken.¹⁵⁰

However, not all religious groups agree. Ian Lacey, Councillor of the Executive Council of Australian Jewry, argues that while a specific limitation for freedom of religion might protect those of one religious tradition, any freedom of speech provision might allow hate-propaganda directed against those who practise a particular faith. Thus, the Jewish community would want to be assured that a

147. Parkinson, *supra* note 141, at 4–6.

148. *Id.* at 4.

149. *Catch the Fire Ministries Inc. & Ors v. Islamic Council of Victoria Inc.* (2006) Vict. Sup. Ct. 284.

150. Parkinson, *supra* note 141, at 5.

bill contained sufficient protections to prevent against such vilification.¹⁵¹

C. The Consultation Report

For religious groups opposed to a bill, the only way in which to overcome concerns with equality and vilification—if, indeed, from their perspective, they could be overcome at all—would have been through a proper implementation of Article 18 of the ICCPR.¹⁵² Careful drafting of this protection (or, to put it negatively, limitation of the equality provisions) would protect freedom of thought, conscience or religion, and ensure that governments and organizations impose no greater limitations on freedom of religion than is necessary. It could also ensure that religious freedom is protected throughout the country. Additionally, state or territory laws might be deemed partially invalid when they are inconsistent with religious freedom.¹⁵³ Christian groups suggested that such a protection could be achieved by taking account of freedoms to: (i) appoint people of faith to organizations run by faith communities, (ii) teach and uphold a restrained and disciplined sexual ethic within faith communities, (iii) distinguish between right and wrong, and (iv) evangelize.¹⁵⁴

The Consultation Report recommended the inclusion of a non-derogable freedom from coercion or restraint in relation to religion and belief. The Committee recommended that under this right no person could be coerced or impaired in their freedom to have or to adopt a religion or belief of their choice. While free to adopt a religion or belief, however, the Consultation Report also included a list of enumerated derogable rights, including the freedom of thought, conscience, and belief, the freedom to manifest one's religion or beliefs, and the freedom of expression. Thus, while protecting the right to choose a religion, the Consultation Committee's recommendations would allow limitations to be placed on the practice of that religion. In fact, the Consultation Report

151. *Freedom of Religion and a Bill of Rights*, ABC SPIRIT OF THINGS (Aug. 23, 2009), available at <http://www.abc.net.au/rn/spiritofthings/stories/2009/2659582.htm#transcript>.

152. See Parkinson, *supra* note 138; Parkinson, Christian Concerns, *supra* note 129, at 7; Parkinson, *supra* note 141.

153. Parkinson, *supra* note 141, at 2.

154. Parkinson, Christian Concerns, *supra* note 129, at 27–29.

lacks anything like the strong limitations of potential equality rights sought by Christian groups. On the contrary, it is the freedom of religion that may be subject to limitations.¹⁵⁵ It is interesting to note, though, that the religious groups that opposed a bill of rights, while arguing that their concerns might have been alleviated by strong limitations placed around equality, nonetheless frankly admitted that this would not have eliminated their opposition.¹⁵⁶

V. CONCLUSION: FAILURE, OR, DÉJÀ VU ALL OVER AGAIN¹⁵⁷

And so we come to the end—at least for now. The story of Australia's failure to protect human rights in a national, comprehensive way continues to unfold just as it has since the federation of Australia over 100 years ago. The Consultation Committee delivered its Report on September 30, 2009. The following day, the Attorney-General issued a press release announcing that the government intended to withhold public release of the Committee's recommendations until the final months of 2009 when it would also issue its formal response.¹⁵⁸ This was perhaps telling, for what followed is nothing less than the latest chapter of failure in this long story.

The Attorney-General issued a response in October 2009,¹⁵⁹ notable for how little it said about the prospects for a bill of rights. While lauding Australia's human rights record and the government's commitment to human rights, the Attorney-General stopped short of endorsing the enactment of a bill of rights.¹⁶⁰ The response contained a general commitment to respecting the human rights that underpin Australian society and a safe and inclusive democracy. The statement also suggested that more be done to ensure that fundamental human rights are considered by the government. Yet, it suggested that there are other ways in which to protect human rights

155. CONSULTATION REPORT, *supra* note 11, at 343–48, 366–70, 372.

156. Parkinson, Christian Concerns, *supra* note 129, at 29 (emphasis added).

157. BERRA, *supra* note 127.

158. See *Australia Receives National Human Rights Consultation Report*, GOV. MONITOR, Oct. 1, 2009, available at http://thegovmonitor.com/world_news/asia/australia-releases-national-human-rights-consultation-report-7855.html.

159. Hon Robert McClelland, *The Protection and Promotion of Human Rights in Australia* (Oct. 2009), available at http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_NationalHumanRightsConsultationReport.

160. *Id.* at 1–3.

short of enacting a bill of rights, including fostering a culture where the fundamental human rights of all people are respected and protected, and ensuring that a range of mechanisms are made available to promote and protect those rights.¹⁶¹ The response even qualified this minimal commitment by reiterating the terms of reference to the Consultation Committee that any change to enhance the protection and promotion of human rights and responsibilities must preserve the sovereignty of Parliament.¹⁶² In conclusion, the Attorney-General indicated that the government would outline its response to the Consultation Report in the early months of 2010.¹⁶³ No such response has yet been issued.

In fact, by early 2010, it was increasingly apparent that this latest comprehensive Australian attempt to protect human rights was unravelling. The mainstream media published negative editorials indicating significant unease about a bill of rights. In February, one commentator argued that a weak-dialogue bill of rights giving the legislative branch the final say about human rights would allow lobbyists and the interest groups they represent to affect the way government does business, resulting in the legislative fashioning of narrow, interest-group-specific rights.¹⁶⁴ Another took the view that as the push for a comprehensive national bill had collapsed, the ACT HRA and the Victorian Charter were pushing those jurisdictions and their legal structures towards isolation, leaving them at odds with mainstream jurisprudence in the rest of the country. This commentator even went so far as to suggest that, as a consequence, judges from those jurisdictions would no longer be fit candidates for higher federal judicial office (especially the High Court).¹⁶⁵

Although Fr. Frank Brennan, Chair of the National Human Rights Consultation, even entered the fray to urge churches to back

161. *Id.* at 3.

162. *Id.*

163. *Id.*

164. Elise Parham, *Rights Charter Would Empower Only Lobbyists*, AUSTRALIAN, Feb. 4, 2010, available at <http://www.theaustralian.com.au/news/opinion/rights-charter-would-empower-only-lobbyists/story-e6frg6zo-1225826508311>.

165. Chris Merritt, *State Charter Sets Lawyers on Path to Isolation*, AUSTRALIAN, Feb. 19, 2010, available at <http://www.theaustralian.com.au/business/legal-affairs/state-charter-sets-lawyers-on-path-to-isolation/story-e6frg97x-1225831948234>.

a bill of rights,¹⁶⁶ the negative pressure exerted by the media seemed to work. As members of Parliament returned to Canberra in late February for the 2010 sitting, reports emerged of widespread opposition to a bill of rights within federal cabinet.¹⁶⁷ Opposition took the now familiar mantra that a bill would place too much power in the hands of unelected judges.¹⁶⁸ The Attorney-General was said to be considering two options which, while falling far short of a bill of rights, would offer some human rights protection: (i) a Senate committee that would be given a test of compatibility with human rights against which it could measure proposed legislation, and (ii) an education awareness campaign about human rights.¹⁶⁹ As of March 2010, the Prime Minister's ongoing silence on the government's official response, however, only fueled the fire of speculation that a bill of rights of any kind was a non-starter.¹⁷⁰

But even if the government were to adopt the Consultation Report and enact a bill of rights in precisely those terms, what would that mean for Australia? As we have seen, the Committee recommended a weak-dialogue model bill of rights, providing that only the High Court could issue declarations of incompatibility. This would result in far less than the comprehensive protection of human rights enjoyed by those in other nations with either constitutional or legislative bills of rights. Rather than dialogue, the recommended bill would ignore the federal structure of Australia and provide for a wish list of rights to which Parliament aspires but which it is by no means bound to implement. This would be nothing less than a legislative human rights monologue, or even an elaborate ventriloquist act (to reverse the argument advanced by Hogg and Bushell in relation to the judiciary under the Canadian Charter of Rights and Freedoms), allowing the legislative branch to put words in the mouths of the judiciary concerning the protection of human rights. This would do

166. Susanna Dunkerley, *Churches Urged to Back Charter of Rights*, SYDNEY MORNING HERALD, Feb. 8, 2010, available at <http://news.smh.com.au/breaking-news-national/churches-urged-to-back-charter-of-rights-20100208-nn5g.html>.

167. James Allan, *Kevin Rudd's Good Job on Opposing Rights Bill*, AUSTRALIAN, Feb. 19, 2010, available at <http://www.theaustralian.com.au/business/legal-affairs/kevin-rudds-good-job-on-opposing-rights-bill/story-e6frg97x-1225831948151>.

168. *Rudd Govt Mum on Rights Charter Report*, WA TODAY, Feb. 18, 2010, <http://www.watoday.com.au/breaking-news-national/rudd-govt-mum-on-rights-charter-report-20100218-og0n.html>.

169. Allan, *supra* note 167.

170. *Rudd Govt Mum*, *supra* note 168.

no more than entrench the *status quo ante*, placing confidence in the democratic process, which—while having obvious strength as a form of government—cannot provide a robust system for the protection of the individual against the prejudices and whims of the majority. In other words, the recommended bill could result in a protection of human rights depending not upon the merits of the claim, but upon the popularity of the cause.

This is purely a hypothetical exercise, of course, for while the debate continues unabated about how one might affect Australian society,¹⁷¹ it now seems clear that there is little likelihood of the enactment of a bill of rights of any kind. Does it feel like we have been here before? Australia has a long history of attempting to protect human rights. It has an equally long record of failure. Remember 1901 and federation. Remember 1942–1944 and the first failed attempt to place human rights in the constitution; and 1959, the second attempt, which fell short even of a referendum; and 1985, the third failure (and second at a referendum). Remember the 1970s and 1980s and the largely unsuccessful Commonwealth efforts at legislative protection. Remember the early 2000s when the ACT and Victoria achieved legislative bills of rights, but failed to convince other States and Territories to follow suit.¹⁷² In every era, these efforts have produced more heat than light. There remains, more than one hundred years after federation, no comprehensive national protection of human rights. The consistent theme in this narrative is failure. We can add 2009–2010 as the latest chapter in this long story of failure. There is nothing new here; rather, it feels very much like *déjà vu* all over again.

So where to leave the story for now, until the next time? Perhaps with some speculation about the root cause of the failure itself. The attitude towards an Australian bill of rights has in the past been marked by an intractable political apathy borne of unbridled optimism. That optimism is a national affliction. Using the

171. See, e.g., Francine Johnson & Edward Santow, *How Would an Australian Human Rights Act Impact Business?* 38 AUSTL. BUS. L. REV. 7 (2010).

172. Although Tasmania recently announced its intention to enact a Charter of Human Rights and Responsibilities along the line of the ACT HRA and the Victorian Charter. See *Euthanasia Reform and Human Rights Charter Set for Tas*, LAWYERS WEEKLY, June 22, 2010, http://www.lawyersweekly.com.au/blogs/top_stories/archive/2010/06/22/euthanasia-reform-and-a-human-rights-charter-set-for-tas.aspx.

Australian vernacular, it may be summarised as “she’ll be right, mate.” The logic of this optimism seems to run this way:

Nothing *bad* could happen in Australia.

If it *did*, it wouldn’t be *too* bad.

If it *was* too bad, it wouldn’t happen for *very* long.

If it *did* happen for very long, it would happen to somebody *else*.

This is merely the latest chapter in this long story. How the story will end and what effect it will have no one can really say. But whatever the outcome, the reaction will almost certainly be that we should not worry because she’ll be right, mate.

