Feels Like Déjà vu:
Religious Freedom under a Proposed Australian Bill of Rights

by

Paul Babie[*] and Neville Rochow[+]

I. Introduction: Haven't We Been Here Before?

Australia's domestic protection of human rights and guarantees of freedom stands in stark contrast to the stance it takes internationally. 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. But while it has ratified several international covenants relating to human rights and freedoms, Australia has implemented few of them as part of its domestic law. It may also be surprising to learn that Australia is one of the few Western countries not to have adopted as a bill of charter of human rights and freedoms.[1] Its federal constitution guarantees few rights and does so on the narrowest of bases.

From the moment of its Federation in 1901, though, a serious debate about whether a bill of rights should be adopted, if so, which rights or freedoms should be the subject of its protection and how those should be enforced has been an ongoing part of the Australian position on the domestic protection of human rights. And that debate, which has never really ended, took on renewed vigour when, on 10 December 2008, the sixtieth anniversary of the Universal Declaration of Human Rights,[2] the Attorney-General of Australia launched the National Human Rights Consultation ('the Consultation'). The result of an election promise in 2007,[3] 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 discussion about whether or not Australia should adopt a national bill of rights.[4]

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,

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[*] BA (Calgary), BThSt (Flinders), LLB (Alberta), LLM (Melbourne), DPhil (Oxford), Associate Dean of Law (Research) and Director, Research Unit for the Study of Society, Law and Religion, University of Adelaide.
[+] SC, LLB (Hons), LLM (Adelaide), LLM (Deakin), Barrister and Research Associate, University of Adelaide Research Unit for the Study of Society, Law and Religion.

[1] The terms 'bill' or 'charter' of human rights and freedoms tend to be used interchangeably in the Australian debate. This paper uses 'bill of rights' or 'bill' in reference to either a bill or a charter of human rights and freedoms.

[2] See http://www.un.org/en/documents/udhr/.

[3] Andrew Byrnes, Hilary Charlesworth, and Gabrielle McKinnon, *Bills of Rights in Australia: history, politics and law* (2009), 146-54.

[4] A Message from the Attorney-General the Hon Robert McClelland MP, http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Who_AMessagefromtheAttorney-GeneraltheHonRobertMcClelland; http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/MediaReleases_2008_FourthQuarter_10December2008-RuddGovernmentAnnouncesNationalHumanRightsConsultation

(ii) whether those human rights are currently sufficiently protected and promoted, and
(iii) how could Australia better protect and promote human rights?[5]

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.[6]

On 30 Sepetmeber 2009, the Committee, having received more than 35,000 submissions and conducted over 65 community roundtables and public hearings in more than 50 urban, regional and remote locations across the country, delivered to the Attorney-General its Report on the issues raised and the options identified for enhancing the protection and promotion of human rights.[7] On 1 October, however, rather than releasing the Report directly to the Australian people or tabling it in Parliament, the Attorney-General announced that the Government would release it along with the Government's formal response in the final months of 2009. While it is expected that the Committee will set out the advantages and disadvantages (including social and economic costs and benefits) and assess the level of community support for each option it identifies, in completing its work the Committee was asked to consider options that would preserve the sovereignty of the Parliament and would not include a constitutionally entrenched bill of rights. As such, at most, the Report will recommend a legislative rather than a constitutional bill of rights.[8]

In establishing the Consultation, perhaps unwittingly, the Australian Government unleashed a torrent of national concern amongst religious communities regarding the protection of religious freedom should a bill of rights be enacted. Many religious groups have made formal submissions to the Committee arguing, for a variety of reasons, against the adoption of a bill.[9] And while some religious groups have argued in support of a bill, in large part, the voices in favour have been lost in the cacophony coming from those opposing such protection. Opposition is deep and broad.

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[5] National Human Rights Consultation Committee, Terms of Reference, http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Terms_of_Reference
[6] Ibid.
[7] National Human Rights Consultation Report, Media Statement, 30 September 2009, http://www.alp.org.au/media/0909/msag300.php; 'Australia Releases National Human Rights Consultation Report', the Gov Monitor: Public Sector News and Information, 1 October 2009, http://thegovmonitor.com/world_news/asia/australia-releases-national-human-rights-consultation-report-7855.html
[8] National Human Rights Consultation, above n 5.
[9] See, eg, Australian Christian Lobby, Submission to the National Human Rights Consultation, June 2009, www.humanrightsconsultation.gov.au/www/nhrcc/submissions.nsf/list/7C16C13B8A6F2E21CA257607001AF3A9/$file/ACL_AGWW-7T28ZS.pdf

Religious concern has, itself, been a significant component of the ongoing Australian debate about a bill or rights. Indeed, today's religious opposition to a bill produces a strong feeling of déjà vu, for the arguments advanced have all been heard before. Since Federation, two themes run through historic and contemporary religious opposition to the entrenchment of human rights protection: a concern with the protection of difference for religious groups, on the one hand, and the concern that a bill or charter would confer powers on the judiciary to override the will of the executive and legislative branches of government that would affect that protection of difference, on the other. To demonstrate these themes, this paper examines some of the reasons given by some of the religious groups, both in support and in opposition, to a bill of rights. The paper aims to be representative in canvassing these views, not exhaustive.

The paper proceeds in four Parts. Because the debate about the protection of religious freedom is not new to Australia, before turning specifically to the current protection of religious freedom and the current debate and proposals about a bill of rights, the paper disposes of two historical matters necessary to set the background to the current feeling of déjà vu. Section 116 of the Australian Constitution protects, so it is argued, religious freedom. Since Federation in 1901, though, there have been other attempts, both constitutional and legislative, to entrench rights and freedoms. Part II, therefore, briefly outlines the operation of Section 116 of the Australian Constitution and previous attempts to entrench the protection of religious freedom, either through constitutional amendment or legislation.

Part III of the paper outlines the current protection for human rights generally, and religious freedom specifically, beyond that found in the Constitution. Part IV examines the models currently proposed for a legislative bill of rights and the protection of religious freedom within such models. The principle concern of some religious groups relates to the notion of 'dialogue' between the legislative and judicial branches of government and the weakening of that dialogue were power to be vested in the courts to police rights violations. For that reason, this Part examines the 'strong' and 'weak' dialogue models proposed in the current debate.

Part V turns directly to the feeling of déjà vu. It assesses the reasons advanced by religious groups both for and against a bill of rights, all of which have been seen before; only the underlying concerns differ. Yet, even those underlying concerns are the same in the sense that the protection of minority difference is the motivation for religious opposition. As one would expect, modern concerns relate to modern social circumstances, although the protection of difference still lies behind those concerns. Thus, while the core argument against involves the general discomfort with the conferral of power on courts, in conjunction with equality rights protections contained in such a bill and the impact that might have on the expression of religious freedom (in other words, the right to be different in a secular society), the specific reasons why that conferral of power could be damaging to religious freedom relates to modern social concerns. These relate primarily to faith-based schools and preferential hiring, evangelisation, and codes of conduct. Those religious groups in favour of a bill, on the other hand, seem to place significant emphasis on the role of equality in mediating difference. Part VI concludes.

II. The Historic Protection of Religious Freedom in Australia: The First Time Around

This section briefly outlines Australian attempts to protect human rights, which can be divided into two types: on the one hand, the Commonwealth Constitution and, on the other, Commonwealth legislative efforts. Attempts have often involved the protection of religious freedom. The experience, with the exception of Section 116 of the Constitution and a limited range of other rights, has been largely one of failure. In examining these efforts, Byrnes, Charlesworth and McKinnon identify two recurrent themes of opposition to a bill. First, that entrenching such rights at the federal level will unacceptably encroach on State legislative powers and consequently undermine the federal system. The battle cry of opponents to all attempts beginning with the Federation Debates in the 1890s and ending with the legislative attempts of the 1980s to the 2000s was 'States' rights'. The second theme involves the compatibility of such instruments with Australian parliamentary democracy. The concern here, in the 1890s, was the impropriety of admitting that such limitations might be needed in a parliamentary democracy, while in the 2000s it has been that the legislatures enjoy a superior capacity, as compared to the judiciary, to protect human rights. The catchcry here is the fundamentally undemocratic nature of bills of rights and their potential to disrupt, perhaps even undermine, the political process.[10]

The Part is divided into two sections. The first outlines the Commonwealth Constitution's protection, and specifically Section 116's protection of religious freedom, and attempts to amend the Constitution to entrench broader protection of human rights. The second describes Commonwealth legislative efforts to achieve this objective.

A. Australian Constitution

1. Guaranteed Rights and Freedoms

The earliest attempts at entrenching human rights in Australia's Constitution came during the Federation Conference held in Melbourne in 1890, and the Constitution Conventions held in 1891 and 1897-1898. The most extensive discussion came during the Melbourne stage of the 1898 Convention, during which rights were ridiculed more than supported, especially as they might apply to the States. Less concern was expressed in relation to limiting the federal Australian Parliament's (the Commonwealth) powers and while this led ultimately to the inclusion in the Constitution at Federation in 1901 of the following rights:

(i) Section 51(xxxi), providing that the Commonwealth acquisition of property must be on just terms;[11]

(ii) Section 80, providing a right to trial by jury on Commonwealth indictment for an offence against Commonwealth law;[12]

(iii) Section 116, providing that the Commonwealth is not to make any law for the establishment of any religion or prohibiting free exercise of any religion;[13] and

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[10] Byrnes, Charlesworth, and McKinnon, above n 3, 35-6.

[11] *Minister of State for the Army* v *Dalziel* (1944) 68 CLR 261; *Bank of New South Wales* v *Commonwealth (Bank Nationalisation Case)* (1948) 76 CLR 1; *Re Director of Public Prosecution; ex parte Lawler* (1994) 179 CLR 270; *Burton* v *Honan* (1952) 86 CLR 169.

[12] *R* v *Brown* (1986) 160 CLR 171; *Cheatle* v *R* (1993) 177 CLR 541. See also *Cheng* v *R* (2000) 203 CLR 287.

[13] *Krygger* v *Williams* (1912) 15 CLR 366 ('*Krygger*'); *Adelaide Company of Jehovah Witnesses Inc* v *Commonwealth* (1943) 67 CLR 116 ('*Jehovah's Witness Case*'); *Attorney General (Victoria); ex rel. Black* v *Commonwealth* (1981) 146 CLR 559; *Church of the New Faith* v *Commissioner for Payroll Tax* (1983) 154 CLR 120. See also *Kruger* v *Commonwealth* (1997) 190 CLR 1 ('*Kruger*'); *Grace Bible Church* v *Reedman* (1984) 36 SASR 376 ('*Grace Bible Church*'); *Harkianakis* v *Skalkos* (1999) 47 NSWLR 302.

(iv) Section 117, which provides that a resident of state may not be subject to any state law that provides for a disability or discrimination.[14]

The Framers included no bill of rights, however, as had been first suggested in Melbourne in 1890.[15]

At its adoption, the lack of specific protection for human rights was viewed as an attribute, clearly demonstrating the democratic character of the Constitution.[16] For an American audience, this may seem odd, but Moffatt explains that at the time of the drafting of the Australian Constitution, there was not, was the case of the context out of which the American Constitution emerged:

> …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.[17]

Thus, while the federal Australian Parliament is empowered by the Constitution to make laws "with respect to … external affairs",[18] enabling it to implement by way of legislation international treaties and covenants, including those that contain human rights norms,[19] the Constitution itself contains only a few entrenched human rights that would correspond with international human rights norms.

Still, each of the limited guarantees of individual human rights that do form part of the Constitution—which operate mainly to limit legislative and executive action by the federal government—are amenable to review by courts established under Chapter III of the Constitution, which includes the High Court of Australia. Moreover, in addition to these limited express rights, the courts have found a number of implied rights, while others have been provided by federal statute:

(i) Freedom of political communication;[20]
(ii) Freedom of political communication as a limitation on the law of defamation;[21]
(iii) Right to due process in the sense of ensuring equality before the law;[22]
(iv) Privilege of communications between a lawyer and client;[23]

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[14] *Street* v *Queensland Bar Association* (1989) 168 CLR 461; *Leeth* v *Commonwealth* (1992) 174 CLR 455 ('*Leeth*').
[15] Byrnes, Charlesworth, and McKinnon, above n 3, 24-5.
[16] Ibid 25-6.
[17] Robert Moffatt, 'Philosophical foundations of the Australian constitutional tradition' (1965) 5 *Sydney Law Review* 59, 85-6.
[18] Constitution, s.51(xxix).
[19] See *Commonwealth* v *Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dams Case*') and *Koowarta* v *Bjelke-Petersen* (1982) 153 CLR 168 ('*Koowarta*').
[20] *Nationwide News Pty Ltd* v *Wills* (1992) 177 CLR 1; *Australian Capital Television* v *Commonwealth* (1992) 177 CLR 106.
[21] *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens* v *West Australian Newspapers Ltd* (1994) 182 CLR 211; *Lange* v *Australian Broadcasting Corporation* (1997) 189 CLR 520.
[22] *Leeth*, above n 14.
[23] See Evidence Act 1995 (Cth), s 121. See also *Daniels Corporation International Pty Ltd* v *ACCC* (2002) 213 CLR 543, [11]: "Legal professional is not merely a rule of substantive law. It is an important common law

(v) Privilege of religious confessions;[24] and
(vi) Privilege against self-incrimination.[25]

2. Section 116 of the Australian Constitution

Section 116, then, is the only express provision that deals with religious freedom.[26] This provision found its way into the Constitution as a result of the reference to God included in the Preamble:

> Whereas the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God….

Reference to God was virtually demanded by Christian Church organisations during the Constitutional Conventions of the 1890s; petitions were circulated which had '…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'.'[27] The essence of the petitions was that the Constitution include reference to the Christian identity of the new nation. Difficult though drafting such reference was, the Framers settled on the Preamble outlined above.[28]

The Preamble's mention of Almighty God, though, reopened the debate about prohibiting religious tests or religious establishment or restrictions on the free exercise of religion.[29] Ultimately, this settled itself in the disclaimer of section 116 which struck a largely happy balance between the two sets of interests and the opposing fears they represented.[30]

Given its lineage, it ought not surprise us that the Australian courts have failed robustly to use Section 116. While American Courts invoke the First Amendment to the United States Constitution to protect the right to freedom of religion, the Australian judiciary treats Section 116, with its remarkably similar wording, as part of a nineteenth century British statute, rendering it a virtual dead letter as far as conferring any substantive rights. Australian Courts rely on the fact that Section 116 remains dislocated from any bill of rights, properly so understood, as a reason for its narrow interpretation. As a result, it has had such little practical impact as a tool for protection of religious freedoms in Australia. In the celebrated *DOGS Case*,[31] 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

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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."

[24] Evidence Act 1995 (Cth), s 127.

[25] Evidence Act 1995 (Cth), s 128.

[26] On the history of this provision see JA La Nauze, *The Making of the Australian Constitution* (1972), 228-9; Helen Irving, *To Constitute a Nation: A Cultural History of Australia's Constitution* (1999), 165-8; John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth,* (1900, repr 1976), 951-3.

[27] Irving, above n 26, 166.

[28] Ibid.

[29] Ibid 167.

[30] Ibid 167-8. See also Richard Ely, *Unto God and Caesar* (1971).

[31] *Attorney-General (Victoria); Ex rel Black v Commonwealth* (1981) 146 CLR 559 ('*DOGS Case*').

> and persuasive force…[when it is recognised that] s 116 is a denial of legislative power to the Commonwealth and no more.[32]

Despite its being the most direct adoption of an American constitutional provision in the Australian Constitution, then, Section 116 has been confined in its operation in ways not contemplated by courts considering its American counterpart,[33] and despite an apparent expectation on the part of some Framers that American jurisprudence might be adopted in its interpretation.[34]

In addition to the restrictive interpretation given it by the courts, Section 116 is further limited by the text of the provision itself, which operates only a constraint only upon the federal legislature.[35] Thus, Section 116 prohibits the Commonwealth, but not the States, from legislating to establish a religion or to limit the free exercise of religion.[36] But the Australian provision goes further than the First Amendment. While both prohibit federal laws 'establishing any religion', the Australian provision also prevents use of law to impose religious observance or to administer a religious test as qualification for public office. This difference has been seized upon to explain why the American provision has been used to provide more extensive protection.[37]

The High Court of Australia has demonstrated consistent reluctance to give any wide operation to section 116 without reference to the difference in wording between the American and Australian Constitutions. Claims that legislation infringes upon the protection apparently granted by section 116 have been rejected by the High Court when it was argued that:

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[32] Ibid 652 (Wilson J).

[33] See Clifford L Pannam, 'Traveling Section 116 with a US Road Map' (1963) 4 *Melbourne University Law Review* 41. And see Frederick Gedicks, *The Rhetoric of Church and State: A Critical Analysis of Religion Clause Jurisprudence* (1995), chapters 1, 5 and 6.

[34] See the discussion of the anticipations expressed in the Constitutional debates on Section 116 by Quick and Garran, above n 26. The authors refer in their historical note to the debates in which the inclusion of section 116 was considered that (at 952):

> The strongest argument, however, for the adoption of the earlier part of sec. 116 was found in the special form of the preamble to the Constitution Act, which recites that the people of the colonies, "humbly relying upon 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, 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 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.

The authors then 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 (at 953) again makes reference to American First Amendment jurisprudence: *Permoli* v *First Municipality*, 3 How 589 (1845); *Ex Parte Garland*, 71 US 4 Wall 333 (1866); *Reynolds* v *United States*, 98 US 145 (1878); *Davis* v *Beason*, 133 US 333 (1890); *Burgess* v *Roberts*, 175 US 291 (1899).

It seems, though, that not all Framers shared the belief 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 cruel or demoralising character or contrary to the law of Commonwealth': *Official Record of the Debates of the Australiasian Federal Convention*, vols I-V, Adelaide, Sydney, Melbourne, 1897-1898 (1986), 657, as cited in Irving,, above n 26, 168.

[35] See *Kruger*, above n 13. See also *Grace Bible Church*, above n 13.

[36] La Nauze, above n 26, 228-9; Irving, above n 26, 165-8.

[37] *DOGS Case*, above n 31, 579 (Barwick CJ). See also *Lemon* v *Kurtzman*, 403 US 602 (1971) and *Everson* v *Board of Education*, 333 US 1 (1947). And see Gedicks, above n 33, chapter 3.

(i) compulsory peace time military training offends the religious convictions of persons who believe that military service is opposed to the will of God;[38]

(ii) the use of the defence power and war time regulations for the dissolution of the Kingdom of Jehovah's Witnesses as a body corporate was prejudicial to the defence of the Commonwealth;[39]

(iii) 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;[40]

(iv) government funding of religious-based schools amounted to an establishment of religion.[41]

In its origins, its text, and in its judicial interpretation, Section 116 fails to provide a robust protection of religious freedom; only a change in jurisprudence could rescue it from irrelevance. Such a change would require either constitutional amendment or the revival of the anticipations 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 will show, have ended in failure disappointment for those hoping for broader protection in this area.[42]

3. Constitutional Amendment

There have been two attempts to amend the Constitution in order to provide greater protection for human rights (including religious freedom).[43] Both failed due, in large measure, to the onerous amending formula for altering the Australian Constitution. This experience goes some way to explaining the reluctance shown by the current Australian Government to countenance a constitutionally entrenched bill of rights. Yet, those earlier attempts at amendment both stimulate the feeling of déjà vu engendered by the current debate about a bill as well as provide the necessary background to understanding the current protection of human rights in Australia. This section, therefore, briefly recounts the failed amendments.

Section 128 provides that amendment to the Australian Constitution requires a national referendum with a double-majority of electors and of states to approve government-proposed alterations.[44] Since 1901, forty-four referenda have been held seeking the approval of the Australian people for Constitutional amendment. As of 2008, only eight have received that consent.[45] 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'.[46]

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[38] *Krygger*, above n 13.
[39] *Jehovah's Witnesses Case*, above n 13.
[40] *Kruger*, above n 13.
[41] *DOGS Case*, above n 31.
[42] See Quick and Garran, above n 34.
[43] See generally Byrnes, Charlesworth, and McKinnon, above n 3.
[44] Australian Constitution, s 128, and see Peter Hanks, *Constitutional Law in Australia* (2nd ed, 1996), 28-32.
[45] Australian Government, *Parliamentary Handbook of the Commonwealth of Australia 2008—31st Edition*, Part 5 Referendums and Plebiscites (2008)
[46] Quoted in JB Paul, 'Political Review' (1974) 46 *The Australian Quarterly* 116, 117.

Two of the forty-four attempts at alteration involved proposals for a charter or bill of rights containing a protection of religious freedom; both failed. 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 characterising the Australian way of life….'[47] It concluded that democratic elections and responsible government were sufficient protections for human rights.[48]

The first attempt came in 1942-1944 when the adequacy of human rights protection emerged in response to the Commonwealth's power to manage post-World War II reconstruction. The then Commonwealth Attorney-General called a Constitutional Convention at which it was 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. Though full power to legislate in relation to these freedoms was placed in the Constitution Alteration (War Aims and Reconstruction) Bill 1942 (Cth), the war prevented the Bill from progressing to a referendum.

In 1944, the Labor government introduced similar referendum legislation—the Constitution Alteration (Post-War Reconstruction and Democratic Rights) Act 1944 (Cth)—to amend the Constitution by giving the Commonwealth power to legislate over fourteen specific areas. The legislation also contained two additional provisions, one preventing State and Commonwealth governments from abridging the freedom of speech in order to protect against the perceived threat of imposed socialism, and the other extending Section 116 to the States. The referendum lost decisively, achieving only a slim majority in South Australia and Western Australia.[49]

Proponents of human rights protection waited forty-one years for the second attempt at amendment. In 1985 the Commonwealth Labor Government established a Constitutional Commission to report 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'). To attempt to capitalise on the bicentenary of European settlement of Australia, and before the Commission had issued its final report, the Commonwealth government proceeded with a referendum in 1988; four groups of amendments were put to the people, including those contained in the Constitutional Alteration (Rights and Freedoms) Act 1988 (Cth) which would have extended the right to trial by jury and, as in 1944, Section 116 to the States. 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.[50]

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[47] Brian Galligan, 'Australia's rejection of a bill of rights' (1990) 28 *Journal of Commonwealth and Comparative Politics* 344, 351.
[48] Ibid 350-2. See also Byrnes, Charlesworth, and McKinnon, above n 3, 27.
[49] Byrnes, Charlesworth, and McKinnon, above n 3, 26-7.
[50] Ibid 32-3.

B. Commonwealth Legislative Efforts

Two phases represent the Commonwealth Government attempts to entrench human rights through legislative means: the 1970s and the 1980s.

1. The 1970s: A Human Rights Bill

Following its 1972 election victory, the Commonwealth Labor Government introduced into Parliament the Human Rights Bill 1973 (Cth), in order to fulfil its obligations under the recently signed ICCPR. In the long term, the Government intended to amend the Constitution to provide for individual liberties and suggested that this Bill would precede such amendment by protecting fundamental rights and freedoms defined in terms similar to those found in the ICCPR.[51] The defined rights included the right contained in Article 18 protecting the right to freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest religion or belief in worship, observance, practice and teaching.

The Bill applied to both the Commonwealth and State governments as well as to private actions.[52] Any Commonwealth laws found by a competent court to be inconsistent with the legislation would be inoperative unless containing an express provision that it was to operate notwithstanding the legislation, while State laws would be invalid by virtue of the Commonwealth law paramountcy clause found in Section 109 of the Constitution. Courts would enjoy the power to grant a range of remedies, including injunctions, compensation, cancelling contracts or setting aside judgments, quashing convictions and directing new trials, and awarding damages. Attacked as unnecessary in a parliamentary democracy and as likely to politicise the judiciary and undermine States' rights, the Human Rights Bill was never enacted.[53]

2. The 1980s: A Human Rights Commission

Both the Liberal-National Coalition and the Labor Governments of the 1980s enacted legislation aimed at protecting human rights. The former, though, eschewed a bill of rights, opting instead to enact the Human Rights Commission Act 1981 (Cth) ('the HRC Act'), which created administrative remedies for breaches of rights recognised in human rights treaties such as the ICCPR and a Human Rights Commission authorised to examine Commonwealth laws and report on its findings to the Commonwealth Parliament in relation to inconsistency with standards set by international human rights standards.

The Labor party denounced the legislation as a 'toothless tiger' and called for replacement by a judicially enforceable bill of rights.[54] When it came to power in 1983, then, it set about devising a bill of rights so as to replace the Human Rights Commission Act 1981 (Cth). The first proposal involved the introduction of a bill of rights as a first step, to be followed by a constitutional amendment. The draft bill was described as a general translation of the ICCPR into Australian law, declaring the 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

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[51] International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49, http://www2.ohchr.org/english/law/ccpr.htm

[52] International Covenant on Civil and Political Rights, Article 18.

[53] Byrnes, Charlesworth, and McKinnon, above n 3, 28-9.

[54] Ibid 30.

power to investigate complaints and resolve those through conciliation, settlement or reporting to Parliament. The only judicial authority under 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 it found to be inconsistent with protected rights repealed or inoperative. The States mounted a strong attack on this proposal, arguing that it would have an adverse effect on their legislative powers. An early federal election 1984 put an end to this proposal.[55]

A Senate initiative opened in 1985 inquired as to the desirability of an Australian bill of rights. While the Senate Standing Committee on Constitutional and Legal Affairs endorsed a statutory bill of rights, its deliberations were overtaken by the introduction of revised draft bill of rights into the Australian Parliament. That Bill, passed by the House of Representatives, failed to win support in the Senate when opposed both by those who thought it ineffectual and by those opposed to bills of rights of rights generally. The Bill was ultimately withdrawn in 1986 and the Commonwealth Parliament instead enacted the Human Rights and Equal Opportunity Commission Act 1986 (Cth) as a replacement for the Human Rights Commission Act 1981, which had expired five years from the date of its enactment.[56] In the result, none of the Commonwealth legislative efforts to effect comprehensive human rights protection ended with full success. Indeed, these attempts, along with the Constitutional experience, is characterised overwhelmingly by failure. Australia, therefore, at best, enjoys only piecemeal protection of these fundamental rights, as the next Part demonstrates.

III. Current Protection of Human Rights in Australia: One More Time

Given the failure of every effort to achieve comprehensive protection of human rights, including religious freedom, either through the Australian Constitution or through the Commonwealth's power to legislate for external affairs, Australia currently protects such rights through a patchwork of international, Commonwealth and State laws, and institutional arrangements.

Because others have done so,[57] this paper offers no comprehensive examination of that protection; rather, this Part presents an overview of those provisions that provide some protection for religious freedom. Again, this haphazard protection provides the background to the current debate and feeling of déjà vu. Significantly, some religious groups rely upon it to argue that freedom of religion is currently protected through this overlapping series of provisions. As such, they argue that the current protection requires no further enhancement. This position will be explored in more detail in Part V. The three sections of this Part outline the tripartite protection achieved by the overlap of International, Commonwealth and State and Territory provisions.

A. International and Commonwealth Protection

At the international level, Australia accepts the procedures which allow UN human rights bodies to provide redress to individuals who claim that their rights have been violated under the International Convention on the Elimination of All Forms of Racial Discrimination 1965

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[55] Ibid 31-2.
[56] Ibid 32.
[57] Ibid 36-41 and 73-138; *Towards an ACT Human Rights Act: Report of the ACT Bill of Rights Consultative Committee* (2003). For some of the history, see Ryszard Piotrowicz and Stuart Kaye, *Human Rights in International and Australian Law* (2000).

(CERD), the Optional Protocol to the ICCPR, and the Convention Against Torture 1984 (CAT).[58] At the Commonwealth level, the Racial Discrimination Act 1975 (Cth) and the Sex Discrimination Act 1984 (Cth) are the primary legislative protections of 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 Commission[59]—and confers upon it a number of functions concerning human rights, including 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.[60]

While the rights protected by the Human Rights Commission are those set out in various human rights instruments appended to or declared under the legislation, such as the ICCPR, reports and recommendations of the Commission have no binding force in law. Indeed, in the past, the Commonwealth Government frequently ignored Commission reports.[61]

B. State and Territory

The States and Territories provide extensive legislative protection against discrimination in a fashion that covers a far wider range of grounds than the Commonwealth legislation reviewed above. Administrative bodies exist in most states similar in function to the Human Rights Commission and 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 Victorian Charter')—has only served to expand the jurisdiction to monitor human rights violations in those jurisdictions with commissions.[62]

This section focuses on the ACT HRA and the Victorian Charter—effectively, statutory bills of rights—both examples of the so-called 'weak dialogue model', a phrase which refers to a legislative means of protecting human rights. Such bills stand in contrast to 'strong dialogue model' bills, which would confer upon the enactment a constitutional status placing it above all other law, either Commonwealth or State, and allow judges to strike down legislation or invalidate executive actions for violations of the bill.[63] We return to these 'dialogue models' in Part IV; the remainder of this Part outlines the operation of the ACT and Victorian legislation, largely as that relates to the protection of religious freedom.

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[58] Byrnes, Charlesworth, and McKinnon, above n 3, 37.

[59] The Disability Discrimination and Other Human Rights Legislation Amendment Act 2009 (Cth) (No. 70, 2009), amended the Human Rights and Equal Opportunity Commission Act 1986 (Cth) by renaming it the Human Rights Commission Act 1986 (Cth) and renaming the Commission the Australian Human Rights Commission: Disability Discrimination and Other Human Rights Legislation Amendment Act 2009 (Cth) (No. 70, 2009), Schedule 3, s 1.

[60] Human Rights Commission Act 1986 (Cth), s 11(e).

[61] Byrnes, Charlesworth, and McKinnon, above n 3, 39-40.

[62] Ibid 40-3.

[63] See Hon Sir Anthony Mason AC KBE, 'Human Rights and the Courts' Address to Launch the Cultural and Religious Freedom under a Bill of Rights Conference, Old Parliament House, Canberra, 13-15 August 2009, paras 11-5. We return to a fuller discussion of the strong and weak dialogue models in Part IV, below.

1. Human Rights Act 2004 (ACT)

The ACT HRA represents Australia's first bill of rights of any kind. A weak dialogue model preserving parliamentary sovereignty by leaving ultimate decisions concerning human rights to the ACT Legislative Assembly, it nonetheless contains a range of mechanisms to ensure the protection of human rights.[64] It includes an obligation on decision-makers to interpret ACT laws (excluding the common law) to be consistent so far as possible with human rights;[65] confers jurisdiction upon 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);[66] imposes a duty on the Attorney-General to present a written statement on the compatibility of each government bill presented to the Legislative Assembly;[67] and creates the office of Human Rights Commissioner, which has the power to review laws for compatibility.[68]

Section 14 of the legislation protects 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. The right to equality before the law,[69] the right to life,[70] the right to privacy,[71] freedom of peaceful assembly and association,[72] expression and the right to take part in public life,[73] and the right to liberty and security of the person,[74] among others, are also protected.

The ACT HRA does, however, contain two significant limitations. First, Section 6 provides that '[o]nly individuals have human rights'.[75] 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 similar in terms to that found in Section 1 of the Canadian Charter of Rights and Freedoms, 1982.[76] The ACT provision provides that '[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 and making such a determination is aided by a list of factors contained in Section 28(2):

> In deciding whether a limit is reasonable, all relevant factors must be considered, including the following:
>
> (a) the nature of the right affected;
> (b) the importance of the purposes of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relationship between the limitation and its purpose;

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[64] See Byrnes, Charlesworth, and McKinnon, above n 3, 74-9, 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: *Towards an ACT Human Rights Act*, above n 60.
[65] ACT HRA, s 30. See Byrnes, Charlesworth, and McKinnon, above n 3, 83-5, for a detailed discussion of the operation of this provision.
[66] ACT HRA, ss 32, 39, and 33.
[67] ACT HRA, s 37.
[68] ACT HRA, s 41. See also ss 38, 43, 44, and Sch 2.
[69] ACT HRA, s 8.
[70] ACT HRA, s 9.
[71] ACT HRA, s 12.
[72] ACT HRA, s 15.
[73] ACT HRA, s 16.
[74] ACT HRA, s 18.
[75] ACT HRA, s 6.
[76] Byrnes, Charlesworth, and McKinnon, above n 3, 82.

(e) any less restrictive means reasonably available to achieve the purposes the limitation seeks to achieve.[77]

Prior to its enactment, critics predicted an increase in litigation; hindsight, however, has proven this concern unfounded. Indeed, some supporters might have hoped for a more vigorous invocation of the Act by the courts. The role of the courts has been cautious, often involving nothing more than superficial consideration of the ACT HRA, usually to bolster decisions reached on other grounds. While several decisions considered the interpretive provision of section 30,[78] and other important issues relating to the application of the ACT HRA,[79] as of 2008, no judicial decision had issued a declaration of incompatibility, and no case had invoked sections 14 and 27, which deal with religious freedom.[80]

The most significant impact of the ACT HRA on the development of human rights protection has come not in the courts, but through its effect on policymaking and legislative processes, largely in the changes wrought to the culture of government—improving the quality of lawmaking in the Territory and, significantly, affecting the debate about bills of rights in other States and Territories, including the Victorian Charter, and at the national level[81]—and the scrutinisation of proposed legislation.[82]

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

The ACT HRA served as an impetus for the 2006 enactment of the Victorian Charter following a wide-ranging community consultation. In addition to being a non-entrenched bill of rights, the Victorian Charter shares many of its characteristics with the ACT HRA. Its parliamentary scrutiny and compatibility processes came into effect on 1 January 2007, while provisions relating to public authorities and the courts—the interpretation of law, declarations of inconsistent interpretation and new obligations on public authorities[83]—commenced on 1 January 2008.[84]

The Victorian Charter applies to Parliament, courts, tribunals, and to public authorities so as to protect human persons.[85] Most of the same human rights found in the ACT HRA are protected by the Victorian Charter, including the right to recognition and equality before the law;[86] the right to life;[87] freedom of thought, conscience, religion and belief;[88] freedom of expression;[89] free assembly and association;[90] and cultural rights (affirming the rights of

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[77] ACT HRA, sub-s 28(2).

[78] Byrnes, Charlesworth, and McKinnon, above n 3, 99-104. See *Commissioner for Housing in the ACT* v *Y* [2007] ACTSC 84; *SI bhnf CC* v *KS bhnf IS* [2005] ACTSC 125.

[79] 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* [2008] ACTCA 9.

[80] Byrnes, Charlesworth, and McKinnon, above n 3, 99.

[81] Ibid 106-7.

[82] Ibid 86-98.

[83] Victorian Charter, Part 3, Divisions 3 and 4.

[84] For the background to the enactment of the Victorian Charter, see Byrnes, Charlesworth, and McKinnon, above n 3, 109-14; Alistair Pound and Kylie Evans, *An Annotated Guide to the Victorian Charter of Human Rights and Responsibilities* (2008); Carolyn Evans and Simon Evans, *Australian Bills of Rights: The law of the Victorian* Charter *and ACT* Human Rights Act (2008); Greg Taylor, *The Constitution of Victoria* (2006), 51-2.

[85] Victorian Charter, ss 6 and 7.

[86] Victorian Charter, s 8.

[87] Victorian Charter, s 9. By virtue of s 48, the Victorian Charter does not affect any law applicable to abortion or child destruction, passed before or after the Charter.

[88] Victorian Charter, s 14.

[89] Victorian Charter, s 15.

members of all cultural, religious, racial or linguistic communities to exercise various rights related to membership in those communities).[91]

As is the case with the ACT HRA, pursuant to s 7, the rights contained in the Victorian Charter are subject to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom. 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.

A number of enforcement provisions are found within the Victorian Charter, which include compatibility statements that must be prepared when legislation is introduced into Parliament;[92] legislation may be overridden for a period of five years;[93] 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 is possible to do so consistently with their purpose and, if it cannot, the court or decision-maker may make a declaration of inconsistent interpretation.[94] Remedies for breaches of obligations of public authorities are limited to those causes of action and grounds for review that exist other than under the Charter.[95]

To date, as with the ACT HRA, the most significant impact of the Victorian Charter has been in the executive and legislative spheres.[96] Use in the courts has been limited primarily to criminal matters.[97]

IV. The Current National Debate: Déjà vu

Given the limited success of efforts to entrench human rights protections either in the constitution or in Commonwealth or State and Territory legislation, one might wonder about the prospects for success of the current National Human Rights Consultation to produce a national bill of rights. Such concern is not unfounded. While the impetus generated by the ACT HRA and the Victorian Charter—enactments seen as contributing to the body of knowledge about how a bill of rights might operate in the broader political landscape, and as breaking through the resistance and suspicion to such protections[98]—led to public consultations in Tasmania in 2006 and Western Australia in 2007, neither process successfully produced a bill of rights in those jurisdictions.[99] And while dialogue continues, this has led more to a diversity of approach than national uniformity. In light of this experience, and the cynicism with which human rights protection tends to be held in Australia, it may be that the hype surrounding the National Human Rights Consultation is just that, and the belief that the Committee will recommend the adoption of a national bill or charter of rights misplaced.

Nonetheless, the belief—or hope—that such a recommendation is forthcoming drives the arguments of those religious groups that oppose a bill of rights. This Part outlines, very

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[90] Victorian Charter, s 16.
[91] Victorian Charter, s 19.
[92] Victorian Charter, ss 28 and 30.
[93] Victorian Charter, s 31. On these grounds, see Byrnes, Charlesworth, and McKinnon, above n 3, 123-33.
[94] Victorian Charter, ss 32, 36, and 37.
[95] Victorian Charter, s 39.
[96] Byrnes, Charlesworth, and McKinnon, above n 3, 123-33.
[97] See eg *R* v *Benbrika (Ruling No 20)* [2008] VSC 80; *R* v *Williams* [2007] VSC 2; *R* v *White* [2007] VSC 142.
[98] Byrnes, Charlesworth, and McKinnon, above n 3, 139-40.
[99] Ibid 141-5.

briefly, the issues surrounding such a proposal before turning, again briefly, to the model that currently dominates discussion, the dialogue model, and more specifically, the weak dialogue model. This model, however, rather than being anything new, elicits a strong feeling of déjà vu. This Part contains three sections: first, before turning directly to the weak dialogue model, it explores a possible middle ground between full constitutional entrenchment and weak dialogue legislation; second, given that it has become the dominant model in the current debate, it examines weak dialogue; and, finally, it concludes with some issues that arise in the implementation of a weak dialogue model.

A. Is 'Weak Dialogue' the Only Way?

The debate in Australia seems to have settled upon the weak dialogue model as the way to deal with each of these issues. This may be regrettable, as it is not clear that either Constitutional amendment or legislative enactment as a weak dialogue model is the only way forward. It might also be possible to entrench such a bill through a middle way, drawing upon workable mechanisms short of constitutional amendment by which a bill could be entrenched but which would take it beyond the political vagaries of the day to which legislation is subject.

That the Commonwealth Parliament possesses the legislative power to enact a bill of rights under the external affairs power by reference to international treaties and covenants to which Australia is a already a party seems beyond doubt.[100] Indeed, Australia has already subscribed to a number of international human rights instruments that would provide the foundation for such an exercise.[101] Once the power is validly invoked, the Commonwealth

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[100] Section 51(xxix). See *Koowarta*, above n 19, and *Tasmanian Dams Case*, above n 19. See also, as examples: *R* v *Burgess; Ex Parte Henry* (1936) 55 CLR 608; *Bradley* v *Commonwealth* (1973) 128 CLR 557; *Minister for Immigration and Ethnic Affairs* v *Teoh* (1995) 187 CLR 416.

[101] See Hilary Charlesworth, M Chiam, D Hovell, and G Williams, *No Country is an Island – Australia and International Law* (2006), chapter 3, especially 68-71; Charlesworth, et al, identify the following treaties, each of which could found an exercise of the external affairs power in respect of human rights:

(i) Convention on the prevention and punishment of the crime of genocide;
(ii) Convention relating to the status of refugees/protocol relating to the status of refugees;
(iii) Convention on the elimination of the racial discrimination;
(iv) International covenant on economic, social and cultural rights;
(v) International covenant on civil and political rights;
(vi) Convention on the elimination of all forms of discrimination against women;
(vii) Convention against torture and other cruel, inhuman or degrading treatment or punishment; and
(viii) Convention on rights of the child.

As the foundation for existing federal human rights legislation, the Human Rights Commission identifies the following human rights as being defined by the Human Rights and Equal Opportunity Act 1986 (Cth), s 5:

(i) International covenant on civil and political rights;
(ii) Convention on the rights of the child;
(iii) Declaration on the rights of the child;
(iv) Declaration on the rights of mentally retarded persons;
(v) Declaration on the rights of disabled persons; and
(vi) Declaration on the elimination of all forms of intolerance and discrimination based on religion or belief.

See also Neville G Rochow, 'Paying for Human Rights Until the Bill Comes', presented at the International Conference Commemorating the 50th Anniversary of the Establishment of The Supreme Court of The Islamic

legislation overrides any State legislation on human rights, giving any such federal law paramountcy pursuant to Section 109 of the Constitution and rendering invalid any inconsistent State law.[102]

The States could also, if in agreement with the federal measures, deny themselves any capacity to legislate on the subject of human rights and the bill of rights by referring all of their legislative powers on the subject to the Commonwealth, simultaneously providing it with further legislative power to support its enactment of the bill.[103] That self-denial of State power would be a mezzanine step to entrenchment. The capping step to entrenchment, short of constitutional amendment, would be for all Australian governments to enter intergovernmental agreements, a mechanism of Australian federalism used to entrench other national legislative schemes—such as uniform companies schemes and the Cross Vesting (Jurisdiction of Courts) Acts and the Competition Code[104]—under which no amendment could be made by any party to legislation in the scheme without the agreement of the other parties after a prescribed period of notice of the intention to amend.

Although entrenchment achieved in this way is not absolute in the sense of the bill becoming a part of the Constitution itself, the legislation is practicably entrenched in that no single government can act alone to change the law. Still, given that, on the one hand, this option has not thus far formed part of the national debate and that, on the other, the weak dialogue model has come to dominate it, the remainder of this Part focuses upon what precisely is meant by dialogue generally and weak dialogue specifically and the issue surrounding the implementation of such a bill.

B. 'Weak Dialogue'[105]

All legislation in some way affects the distribution of power between the three branches of government. In that sense, 'dialogue' or 'institutional interaction'[106] 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,[107] it has always occurred in all Australian jurisdictions between the legislature and the judiciary and, to a lesser extent, the executive. Moreover, it is a feature of many constitutional systems, even those, such as Canada's and the United States', where the judiciary has the power to invalidate legislation and thus seemingly has the last word on human rights issues.[108]

Republic of Pakistan, Islamabad, August 2006, 1-8: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1356382

[102] Section 109 provides that 'When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.'
For an example of the use of both sections 51(xxix) and 109, see *Tasmanian Dams Case*, above n 19.

[103] Section 51(xxxvii).

[104] See Rochow, above n 104, 41-4.

[105] See Byrnes, Charlesworth, and McKinnon, above n 3, 44-72. On the full range of models, see *Towards an ACT Human Rights Act*, above n 60, 43-60.

[106] Leighton McDonald, 'Rights, "dialogue" and democratic objections of judicial review' (seminar paper presented on 27 November 2002 in the ANU's Centre for International and Public Law's Bill of Rights seminar series).

[107] Peter Hogg and Allison Bushell, 'The *Charter* dialogue between courts and legislatures (or perhaps the *Charter of Rights* isn't such a bad thing after all)' (1997) 35 *Osgoode Hall Law Journal* 75

[108] *Towards an ACT Human Rights Act*, above n 60, 61.

Such models of bills of rights encourage 'conversation' between the three branches,[109] allowing the judiciary to comment upon the adequacy of legislation or to be critical of the actions of the executive. The legislature can in turn respond by amending legislation or administrative practices, even leaving open the possibility of explicitly rejecting the judicial decision. Human rights protection in particular, whether it is constitutional or legislative, directs the executive and the judiciary to conduct their business in certain ways. This is generally seen as a desirable outcome of the implementation of a bill of rights.[110]

This dialogue between the branches of government can take 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 non-compliance with the bill or charter. How strong it is ultimately depends on whether the legislature has any recourse to respond once the courts have spoken.

The strong dialogue model has received the most extensive academic scrutiny in Canada, the principal jurisdiction where it is constitutionally entrenched in section 33 of the Charter of Rights and Freedoms 1982.[111] Scrutiny focuses on whether in practice the Charter involves genuine dialogue or whether the courts views of the meaning of Charter rights nonetheless supersede the interpretations of other branches of government.[112] Some ague that rather than true dialogue, the outcome of the process mandated under the Charter is in fact judicial 'monologue' or acts of 'ventriloquism'.[113]

Dialogue may, however, take a 'weak' from, allowing for the judiciary to play a role in the enforcement of human rights short of invalidation of legislation.[114] Weak dialogue, in other words, 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 rather may express its opinion that a law is incompatible with the bill. 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.[115]

The United Kingdom Human Rights Act 1998, the New Zealand Bill of Rights Act 1990, and, as we have seen, the ACT HRA and the Victorian Charter, are all weak dialogue models.[116] These enactments reflect the current trend in national legal systems to move away for the American strong dialogue model, which gives substantial power—or at least the courts have arrogated that power to themselves[117]—to have the final say in matters of human rights protection and towards a model preserving to the legislature its democratic function to

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[109] Byrnes, Charlesworth, and McKinnon, above n 3, 51.
[110] *Towards an ACT Human Rights Act*, above n 60, 61-2.
[111] See Byrnes, Charlesworth, and McKinnon, above n 3, 52.
[112] Peter Hogg, Allison Thornton and Wade Wright, '*Charter* dialogue revisited—or "much ado about metaphors"' (2007) 45 *Osgoode Hall LJ* 1; Special Issue: '*Charter* Dialogue Ten Years Later' (2007) 45 *Osgoode Hall LJ* 1-202.
[113] Christopher Manfredi and James Kelly, 'Six degrees of dialogue: A response to Hogg and Bushell' (1999) 37 *Osgoode Hall LJ* 513, 520-1.
[114] *Towards an ACT Human Rights Act*, above n 60, 61.
[115] Ibid 61-2.
[116] Byrnes, Charlesworth, and McKinnon, above n 3, 52-4.
[117] *Marbury* v *Madison*, 5 U.S. (1 Cranch) 137 (1803).

decide how best to protect human rights.[118] Indeed, both the ACT HRA and the Victorian Charter tip this balance further in favour of the legislature by ensuring against judicial invalidation in favour of judicial declarations of incompatibility, leaving it to the legislature to respond and, if it does nothing, its' policy position and its legislation will stand.[119]

C. Implementation

Byrnes, Charlesworth and McKinnon identify three issues, unique to the Australian national perspective, which would require consideration prior to the implementation of a dialogue model. First, the question of jurisdictional scope arises—would a national bill of rights cover the areas of legislative competence historically exercised by the States under the Constitution? An attempt to enact this form of bill might result in insurmountable political opposition, ultimately producing no bill at all.[120]

Second, what rights should be protected? The ACT HRA and the Victoria Charter have been cautious in the rights adopted, lacking any protection of economic, social and cultural rights. The corollary of this issue, of course, centres on the possible limitations placed upon those rights ultimately adopted. Both the ACT HRA and the Victorian Charter adopted a general limitations clause modelled on the Canadian Charter of Rights and Freedoms, 1982, Section 1 'reasonable limits demonstrably justifiable in a free and democratic society.' But should such a general limitation replace, or add to specific limitations of rights contained in a bill?[121]

Finally, what mechanisms ought a bill or charter to use to protect the rights adopted and limited? We have already seen the types of mechanisms that might be available: compatibility and scrutiny requirements for new legislation; an obligation on courts and others to interpret legislation consistently with human rights; the ability of courts to make declarations of incompatibility; the provision of remedies for breach of human rights by public authorities; and education, auditing and complaints handling by an independent human rights commission or ombudsman.[122]

Notwithstanding the fact that the weak dialogue model appears to be a limited form of human rights protection, religious groups nonetheless have strong reactions, both in support and in opposition, to it. The final Part turns its attention to answering the question 'why?'

V. Religious Reaction: Déjà vu All Over Again[123]

One might be forgiven for believing that religious opposition to a bill or charter of rights in Australia began with the establishment of the National Human Rights Consultation Committee. In fact, as we have seen, throughout the history of the Australian federation, opposition is the rule rather than the exception in debate about a bill of rights. And religious groups have often been at the vanguard of the fight. The current opposition, then, far from being anything new, feels a lot like 'déjà vu all over again'.[124] We have certainly been here and heard that before.

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[118] Byrnes, Charlesworth, and McKinnon, above n 3, 51.
[119] Ibid 52-4.
[120] Ibid 155-6.
[121] Ibid 156-7. See also *Towards an ACT Human Rights Act*, above n 60, 87-109.
[122] Byrnes, Charlesworth, and McKinnon, above n 3, 158-65. See also *Towards an ACT Human Rights Act*, above n 60, 61-85.
[123] To borrow Yogi Berra's famous quote: Yogi Berra, *The Yogi Book* (1998), 30.
[124] Ibid.

This Part sets out the arguments advanced by religious groups, both for and against a bill. It is neither exhaustive nor thoroughly representative. Rather, it canvasses the views presented at the recent Cultural and Religious Freedom under a Bill of Rights Conference held in Canberra on 13-15 August 2009—primarily those of members of the monotheistic traditions of Judaism, Christianity and Islam. But even in relation to those three faith traditions, this paper makes no pretence to cover the range of views, both for and against, a bill. Moreover, the most vocal, both in support and opposed, are the Christian Churches.

The Part begins with a brief overview of those arguments advanced favouring a bill and the reasons for that position. It concludes with a somewhat fuller discussion of religious opposition. This is a pragmatic division and emphasis of the material: the views opposed far outweigh, in their breadth and depth, those that support.

A. Support for a Bill of Rights

Two principal positions emerge from the debate in support of a bill of rights: neutral or conditional support and strong support.

1. Neutral or Conditional

The clearest example of neutrality is found in the agnostic position advanced by the Australian Catholic Bishops Conference ('the ACBC'). The ACBC takes the position that once the government issues concrete proposals in relation to a bill, what it will include and how it will be enforced, it is willing to engage in dialogue on the model proposed.[125] The Anglican Church of Australia offers conditional support dependent upon the inclusion of very strong support for religious freedom consistent with Article 18 of the ICCPR (although the Sydney Diocese strongly dissents from this position).[126]

2. 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). This section focuses on the latter group.

In March 2008, the National Assembly Standing Committee of the Uniting Church in Australia resolved to support a national human rights charter which would (i) implement Australia's commitment to human rights outlined in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the ICCPR; (ii) hold public institutions and officials accountable for upholding and promoting human rights; (iii) take account of Indigenous Australians as the first peoples of this land and the long history of rights being denied to them; and (iv) be supported and policed by properly funded, independent mechanisms. In doing so, the General Assembly committed to

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[125] Australian Catholic Bishops Conference, *Some comments on the discussion paper Freedom of Religion and Belief in the 21st Century*, http://www.hreoc.gov.au/frb/submissions/Sub995.Australian_Catholic_Bishops_Conference.doc; Personal conversation with the President of the Australian Catholic Bishops Conference, the Most Rev Philip Wilson, Archbishop of Adelaide, 27 August 2009.

[126] Patrick Parkinson, 'Christian Concerns with the Charter of Rights', paper presented at the Cultural and Religious Freedom under a bill of rights Conference, 13-15 August 2009, Canberra, ACT, 2, used with permission of the author; Patrick Parkinson, 'Christian views on the idea of the Charter', PowerPoint slide from 'Christian Concerns with the Charter of Rights', paper presented at the Cultural and Religious Freedom under a bill of rights Conference, 13-15 August 2009, Canberra, ACT. Used with permission of the author.

contributing to public policy and international humanitarian affairs by supporting the development of policy and legislation upholding human rights and concluded that support for a bill of rights implementing that ideal was entirely consistent with that commitment.[127]

It is somewhat more difficult to locate community positions on a bill within the other monotheistic traditions, largely as a consequence of the looser governmental structure within those faiths. Nonetheless, leaders of other monotheistic traditions do support a bill. Ameer Ali, Ex-President of the Australian Federation of Islamic Councils, for instance, personally supports the protection of human rights through a bill, arguing that such protection would strengthen rather than weaken the religious freedom on which is built Australia's democratic structure. In so doing, it would act as a bulwark against legislative reactions to terrorism and immigration that may threaten the religious freedom of those who hold the Muslim faith.

Far from damaging religious freedom, Ali argues that a bill would establish the equality of every religion, with no room for vilification by others. This would strengthen the edifice of democracy which protects religious groups from harmful legislation while simultaneously defending against vilification by others. In the final analysis, Ali's position is for a bill, not because it offers an iron-clad guarantee of freedom, but because of its potential for producing a more harmonious, plural society.[128]

The support of a few Christian groups and some Muslim leaders is far outweighed, though, by the myriad voices of opposition. And it is here, in the opposition to a bill, that the position taken by religious groups, largely Christian, that one has the sense that this has all happened before. It is here that one is living a déjà vu moment.

B. Opposition to a Bill of Rights

This section canvasses the religious voices of opposition to a bill or charter or rights of any kind, constitutional or legislative. While largely Christian, opposition can be found among the other monotheistic faiths as well. Still, just as it provided the strongest religious support, the Christian community also displays the strongest opposition. And within that community, the loudest voices are those of the Australian Christian Lobby, the Presbyterian Church (not in union with the Uniting Church of Australia), the Association of Christian Schools, the Sydney Anglican Diocese, the Baptist Union, and the New South Wales Council of Churches.[129]

1 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 organisations,[130] and believe that vague and poorly drafted anti-vilification legislation results in a chilling effect on freedom of religious expression.[131] Against this backdrop, specific

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[127] Uniting Justice Australia, 'An Australian Human Rights Act' http://www.unitingjustice.org.au/issues/upholding-human-rights/hr-act.html. See also Uniting Church in Australia, National Assembly, *Submission to the National Human Rights Consultation* (June 2009), http://www.unitingjustice.org.au/issues/upholding-human-rights/hr-act.html.

[128] Ameer Ali, 'Freedom to Hold, Express and Declare Belief: Cultural/Religious/Community and Theological Perspectives Panel Session', ABC Spirit of Things, 'Freedom of Religion and a Bill of Rights', 23 August 2009, http://www.abc.net.au/rn/spiritofthings/stories/2009/2659582.htm#transcript.

[129] Parkinson, 'Christian Concerns', above n 129, 2-3; Parkinson, 'Christian views', above n 129.

[130] Parkinson, 'Christian Concerns', above n 132, 3-7.

[131] Ibid 3.

grounds of Christian opposition to a bill emerge, such as those of the Australian Christian Lobby, which are broadly representative, as summarised by Patrick Parkinson:

> (i) a bill is simply not needed as rights can, and already are, 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 legislates selfishness, already too much a feature of modern society, propelling individual rights about the rights held in community.

Objections (iii)-(v) are related—simply, these express a concern that courts will use a bill for illegitimate, undemocratic, and anti-majoritarian purposes, to place the judiciary in a paramount position relative to the other branches of government, to 'create' new rights, not unlike the right to privacy is said to have been 'created' by the United States Supreme Court,[132] and that the major consequence of that process will be to weaken community. Again and again, the Christian objections speak of 'interpretations' of a bill[133] 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.[134] In this light, objections (i) and (ii) become another way of asserting the primacy of the legislative and executive branches as against the judicial. As we have seen, 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. It is déjà vu all over again.[135]

2. Specific Concerns and a Potential Solution

Yet, while the grounds are the same, the specific concerns—which stem from stem from anti-discrimination legislation and anti-vilification laws—advanced by Christian groups are those that vex contemporary western society.

(a). Equality and Anti-Discrimination

In relation to anti-discrimination, the Christian worry is that secular liberal (judicial) interpretations of a bill will allow '…anti-discrimination [to]…become the human right that trumps all others.'[136] Christian groups believe this to be the manifestation of 'fundamentalism' about equality and anti-discrimination, in two related beliefs: first, that all limitations on eligibility to apply for particular jobs should be abolished or severely restricted

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[132] *Griswold* v *Connecticut*, 381 U.S. 479 (1965). The background to this decision included *Tileston* v *Ullman*, 318 US 44 (1943) and *Poe* v *Ullman*, 367 US 497 (1961). Subsequent cases citing and extending the right to privacy include *Eisenstadt* v *Baird*, 405 U.S. 438 (1972); *Roe* v *Wade*, 410 US 113 (1973**)**; *Bowers* v *Hardwick*, 478 U.S. 186 (1986); *Lawrence* v *Texas*, 539 U.S. 558 (2003).

[133] For these, see Parkinson, 'Christian Concerns', above n 129, 3-7.

[134] On this, see also Patrick Parkinson, Submission to the 'National Human Rights Consultation', 2009, used with permission of the author.

[135] Berra, above n 126.

[136] Parkinson, 'Christian Concerns', above n 129, 7.

and, second, that the only human rights are individual ones and not group rights.[137] For Christian groups, then, concern about 'fundamentalist' conceptions of equality carry specific implications relating to faith-based schools and hiring practices and to codes of conduct, marital status and sexual practices.[138]

From its earliest history, faith-based schools emphasising a Christian foundation have been a central part of Australian life. And while some of the older schools no longer maintain the Christian ethos upon which they were founded, there are newer schools, typically 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,[139] and desire to maintain this Christian environment for students and their parents through their hiring practices, which are referred to not as discrimination, but as positive selection. For those schools, '[s]election based in part on a characteristic which is relevant to the employment is hardly discriminatory. [It] is a common sense distinction….'[140] It is argued that this right of positive selection in relation to faith-based schools is supported by Article 18 of the ICCPR. Positive selection '…is perhaps the strongest theme running through all the church submissions to the National Human Rights Consultation…and has affected their submission on the Charter of Rights.'[141]

While codes of conduct, marital status and sexual practice also concern those Christian groups opposed to a bill, the underlying concern remains equality and anti-discrimination provisions. From the Christian perspective, belief in the supernatural has consequences for the ways in which adherents lead their lives—in other words, 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 to homosexual practice (as distinct from homosexual orientation).[142] While religious groups recognise that their beliefs are no longer mainstream in relation to these codes of conduct, they nonetheless argue that equality and anti-discrimination principles threaten these codes, especially if such principles become the human right that trumps all other human rights.[143]

(b). Speech and Anti-Vilification

In relation to speech and anti-vilification law, two concerns predominate: rival claims to truth and communicating about the faith.[144] The latter stems from modern secular relativism which, for some religious groups, stands in contrast to their claims to know and teach absolute truth about the nature of humanity and its place within the universe and relationship to the supernatural. This results, in some cases, in disagreement with others; in such cases, one may believe that others are mistaken to the extent that their beliefs are inconsistent. For some, this may involve '…pointing out areas of difference with other world religions and declaring them to be wrong in relation to those matters.'[145]

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[137] Ibid 8-10.
[138] Patrick Parkinson, 'A National Framework for Religious Freedom', 4-6, used with permission of the author.
[139] Parkinson, 'Christian Concerns', above n 129, 10-1.
[140] Ibid 11.
[141] Ibid.
[142] Parkinson, above n 141, 5.
[143] Parkinson, 'Christian Concerns', above n 129, 7; Parkinson, above n 141, 6.
[144] Parkinson, above n 141, 4-6.
[145] Ibid 4.

For some Christians, communicating about the faith, evangelisation, or mission represents the core of practising one's religion. Thus, freedom to do this, to persuade others of the truth or value of what one believes, is the very core of religious expression. Thus, as a matter of anti-vilification laws, the claim of some Christians is 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.[146]

Not all religious groups agree, however. 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 may allow for hate-propaganda directed against those who practise a particular faith. Thus, the Jewish community would want to be assured that a bill contained sufficient protections to prevent against such vilification.[147]

Still, for Christian groups opposed to a bill, the only way in which to overcome these concerns with equality and vilification—if, indeed, from their perspective, they could be overcome at all—is through a proper implementation of Article 18 of the ICCPR.[148] Careful drafting of this protection (or, to put it negatively, limitation of the equality provisions) would protect freedom of thought, conscience or religion, ensure that governments and organisations impose no greater limitations on freedom of religion than is necessary, and ensure that religious freedom is protected throughout the country and that state or territory laws that are inconsistent with religious freedom should be deemed invalid to the extent of that inconsistency.

Clearly, this requires a freedom of religion provision going beyond the general, Canadian Charter of Rights and Freedom, s 1, limitation currently found in the ACT HRA and the Victorian Charter.[149] Christian groups suggest that this could be accomplished through the creation of specific limitations of the equality right taking account of four freedoms, namely: (i) to appoint people of faith to organisations run by faith communities, (ii) to teach and uphold within faith communities a restrained and disciplined sexual ethic, (iii) of conscience to discriminate between right and wrong, and (iv) to evangelise.[150]

Still, as Parkinson notes, for those Christians opposed to a bill, even the proper implementation of Article 18 of the ICCPR and the drafting of precise and specific limitations on equality rights would only mean that they would '…be *less* opposed….'[151] In other words, a proper freedom of religion protection and specific limitations would help to alleviate concerns, but would not eliminate opposition entirely.

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[146] Ibid 5.

[147] Ian Lacey, 'Freedom to Hold, Express and Declare Belief: Cultural/Religious/Community and Theological Perspectives Panel Session', ABC Spirit of Things, 'Freedom of Religion and a Bill of Rights', 23 August 2009, http://www.abc.net.au/rn/spiritofthings/stories/2009/2659582.htm#transcript.

[148] See Parkinson, Submission, above n 137; Parkinson, 'Christian Concerns', above n 129, 7, used with permission of the author; Parkinson, above n 141.

[149] Parkinson, above n 141, 2.

[150] Parkinson, 'Christian Concerns', above n 129, 27-9.

[151] Ibid 29, emphasis added.

VI. Conclusion: We *Have* been Here Before

Australia has a long history of attempting to protect human rights. The late nineteenth century Debates preceding the enactment of the Constitution in 1901 raised the issue, various Commonwealth governments have attempted Constitutional amendment or legislation throughout the twentieth century, and the Commonwealth and the States and Territories continue, at the dawn of the twenty-first century to protect human rights. Sadly, in every era, these efforts have produced more heat than light—there remains, over one hundred years after the Federation of Australia, no comprehensive national protection of such rights. The two State/Territory enactments that have achieved that protection, themselves of very recent origin, are merely 'weak' dialogue models. The consistent theme in this narrative is failure.

Moreover, in every era, the narrative is unchanging: whether in the Constitutional Debates, the attempts at amendment, or the efforts legislatively to enact a bill, the arguments pro and con have been much the same. And embedded within this broader narrative of failure is a narrower one involving religious freedom. The arguments advanced by religious groups who are opposed reveal nothing new in this long story: bills of rights confer undemocratic power on courts to override the will of the executive and legislative branches of government through broad interpretations of equality and anti-discrimination provisions so as to encroach on the ability of religious groups to maintain that which sets them apart from the mainstream of society. The argument in opposition is an argument for difference.

What is intriguing, though, is that in mounting such opposition, religious groups tap into the broader mainstream constitutional/political democratic/majoritarian arguments frequently invoked by secular society in opposition to a bill of rights. The only difference from every previous attempt to protect human rights is the underlying reasons for opposition itself—these, as one would expect, relate to contemporary societal conditions which, as the religious groups themselves note, change over time. Yes, it feels like déjà vu all over again.