Cultural and Religious Freedom under a Bill of Rights Conference

Old Parliament House, Canberra – 13-15 August 2009

Address by the Hon Sir Anthony Mason AC KBE

HUMAN RIGHTS AND THE COURTS

Introduction

1. My pleasure in speaking to you this evening is diluted by the indeterminacy of the topic on which I am asked to speak. But as any experienced lawyer knows the indeterminacy of a legal subject is simply an open-ended invitation to a judge to say what he thinks about anything related to the subject. So I shall discuss some aspects of the debate on whether Australia should adopt a federal Bill of Rights and with particular emphasis on constitutional considerations in the absence of an Australian guarantee of freedom of religion and religious expression and with a view to correcting, from a legal perspective, some of the misrepresentations and misunderstandings that have bedevilled the debate so far.

The Australian Constitution

2. As most of you know, the Australian Constitution contains no guarantee of freedom of religion or freedom of conscience. Indeed, it contains very few provisions dealing with rights – in essence it is a Constitution which confines itself mainly to prescribing a framework for federal government, setting out the various powers of government and limiting them as between federal and state governments and the three branches of government without attempting to define the rights of citizens except in minor respects.

3. Section 116 of the Constitution merits mention not only because it has been wrongly said, during the course of debate, that properly understood it guarantees freedom of religion. Properly understood, it does no such thing. It prohibits the Commonwealth from

- Establishing any religion;

- Imposing any religious observance;
- Prohibiting the free exercise of any religion; and
- Requiring any religious test as a qualification for any office or public trust under the Commonwealth.

Because s.116 does not apply to state laws, it provides no protection against state laws interfering with religion. Further, the High Court of Australia has interpreted the provision narrowly. While it is distinctly possible that the High Court could revise its view that s.116 is *not* infringed by a Commonwealth law whose *effect*, as distinct from its *purpose*, is to establish or prohibit a religion or impose a religious observance, there is nothing at this time to support the view that the other shortcomings of the section can or will be overcome.

4. The major criticism of the High Court's principal decision on s.116[1] is that the decision wrongly held that Commonwealth financial aid to Church schools was not prohibited by the section. There is no sign that the Court will revise this decision which is of vital importance to religious schools in Australia.

5. The significance of the absence of a guarantee of religious freedom, except for that contained in the Victorian Charter of Rights and Responsibilities 2006 (the "Victorian Charter"), is that state and territory (save the ACT) laws can interfere with freedom of religion. This is not an academic question. State laws prohibiting vilification of religion and religious beliefs would seem to interfere with freedom of religious expression unless it is otherwise protected. Overseas decisions indicate that such laws would have this effect. A guarantee of freedom of religion (including freedom of religious expression) would inhibit such laws from having this effect.

6. Section 8 of the Racial and Religious Tolerance Act 2000 (Vict.) is an example. It prohibits a person from engaging in conduct that incites hatred against, serious contempt for, or revulsion for, or severe ridicule of another or a class of persons on the ground of their religious beliefs or activities. Section 11 of that Act provides a defence when the conduct is engaged in reasonably and in good faith. The presence of a guarantee of freedom of religious expression would strengthen a defendant's prospects of

[1] *Attorney-General(Vic.) Ex rel Black v Commonwealth (DOGS Case)*(1981) 146 CLR 559.

making out this defence[2] or alternatively, provide a basis for interpreting the offence so as to raise the bar as to what constitutes the prohibited conduct[3].

7. It follows that the adoption by a federal law of art. 18 of the ICCPR would not only guarantee freedom of religion, it would also strengthen the position of a person exercising his freedom of religious expression from the impact of vilification laws. Article 18 (3) of the ICCPR provides that the freedom may be subject only to "such limitations as prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others". There is much to be said for the view that art. 18(3) maintains a correct balance.

The history of the Australian Bill of rights debate

8. Whether Australia should have a national Bill of Rights has been a controversial issue for quite some time. This is despite the fact that Australia has acceded to the International Covenant on Civil and Political Rights (the ICCPR), as well as the First Optional Protocol to the ICCPR, thereby accepting an international obligation to bring Australian law into line with the ICCPR, an obligation which Australia has not discharged. Australia is the only country in the western world without a national Bill of Rights[4].

9. There has always been strong opposition to an Australian Bill of Rights on the part of persons in authority. They include politicians, retired politicians, political commentators, judges, including retired judges, and religious leaders. They mainly represent the voice of authority. In essence they say that a Bill of Rights will weaken the democratic process and transfer power to unelected judges. It may well be, however, that their real concern is that a Bill of Rights will expose the exercise of power to greater scrutiny and lead to a possible erosion of authority. They also say that rights adjudication will involve judges in deciding issues which are political in character, thereby eroding parliamentary sovereignty and politicising judges. These and other arguments led to three unsuccessful

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[2] *Hammond v DPP* [2004] EWHC 69.

[3] See, for example, *Brooker v Police* [2007] 3 NZLR 91.

[4] There are statutory Bills of Rights in the Australian Capital Territory (Human Rights Act 2004) and the State of Victoria (Charter of Human Rights & Responsibilities Act 2006) ("the Charter).

attempts to introduce a federal statutory bill of rights, each initiated when the Australian Labour Party was in government.

10. There has also been strong opposition from the Australian media, notably the Murdoch press (which has a dominating presence in Australia). The Australian media has concurrently been waging a self-serving campaign for increased recognition of freedom of expression and freedom of information and, at the same time, opposing recognition of a right of privacy.

The dialogue model of a Bill of Rights

11. It is therefore not surprising that the present federal government has ruled out a constitutionally entrenched Bill of Rights. It would require a constitutional amendment under s.128 of the Australian Constitution which requires approval by a majority of electors and a majority of electors in a majority of States. This is a high hurdle which has only been surmounted in the case of eight amendment proposals out of forty four submitted to the people.

12. Nor is it surprising that the statutory model which may have the most support is the so-called weak "dialogue model" confined to civil and political rights. The dialogue model based on civil and political rights has been enacted in New Zealand[5], the Australian Capital Territory[6] and the State of Victoria[7]. The United Kingdom Human Rights Act 1998 ("the HRA") is a stronger example of the dialogue model. It is based on the European Convention on Human Rights and Fundamental Freedoms (the European Convention) rather than provisions of the ICCPR on which the New Zealand, ACT and Victorian legislation is based. The HRA is backed by the European Convention.

13. The dialogue model is a weak Bill of Rights model because it is interpretive only, requiring the courts to interpret legislation consistently with the Bill of Rights as far as they can do so legitimately. The dialogue model does not enable the courts to strike down legislation which is found to be inconsistent with the Bill, as courts in other jurisdictions, such as Hong Kong, can do, under stronger models. The dialogue model respects the

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5 Bill of Rights Act 1990.
6 Human Rights Act 2004.
7 Charter of Human Rights & Responsibilities Act 2006 ("the Victorian Charter").

doctrine of parliamentary sovereignty because it accords full force and effect to the legislation and leaves Parliament free to amend it as it chooses.

The argument about parliamentary sovereignty

14. There has been constant repetition of the argument that the dialogue model will frustrate the democratic will by transferring power to unelected judges from elected politicians, an argument which might have force when applied to constitutionally entrenched model but has no application when applied to the weak dialogue model. A mutant of this argument was the suggestion that the debate was about "who is the master?" The suggestion seems to have been inspired by a mis-reading of "Alice's Adventures in Wonderland" or "Through the Looking Glass and what Alice Found There". The suggestion, so extreme that one might well think it was the brainchild of Humpty Dumpty or the Mad Hatter, was that the debate is whether the judges or Parliament is to exercise power. How this imagined struggle for mastery can be reconciled with the Australian Constitution defies any attempt at rational explanation.

15. Underlying the democratic deficit argument as applied to the weak dialogue model is the assumption that Parliament will not override a judicial interpretation of legislation that renders it Bill of Rights-compliant, even if it is in the public interest to do so. Why not? If an override has public support why would the politicians not support an override? Surely not out of respect for the judges. Even if there is some doubt about public support, what about the capacity of our politicians to lead and persuade the electorate? And if the courts make a finding of inconsistency, it has no legal impact on the legislation; it remains of full force and effect. The democratic deficit argument is without a foundation.

The argument about politicising the judges

16. There has been a resurrection of the old argument that a Bill of Rights will politicise the judges, an argument contradicted by the United Kingdom, New Zealand and Hong Kong experiences. I mention Hong Kong specifically because, if there was any substance at all in this argument, you might have expected it to arise frequently in Hong Kong. Yet I can say that,

in my 12 years' experience as a Non-Permanent Judge of the Hong Kong Court of Final Appeal, this is not the position. There was the occasion in 1999 when the Standing Committee of the National People's Congress overruled the Court's decisions in the two rights of abode cases under art.158 of Hong Kong's Basic Law, as the Standing Committee was entitled to do. No such event has occurred since, despite the fact that the Court of Final Appeal has upheld human rights and fundamental freedoms in many cases, including the right of the Falun Gong (an organization banned in Mainland China) to protest outside the Liaison Office in Hong Kong of the Mainland Government[8].

17. The risk of judges being politicised by the dialogue model of a Bill of Rights is far less than the risk that has always existed, and still exists, under the Australian Constitution when the High Court of Australia is called upon to decide politically divisive constitutional disputes about the extent of Commonwealth and State powers. These disputes go to the very heart of the powers of government in this country and they have generated both calls for changes in the mode of appointment of Justices of the High Court of Australia and media branding in the past of particular Justices as "centralists", "States righters", "Neanderthalers" or "troglodytes" as the case may be. And who will forget the politically inspired ferocious attacks on the High Court over its decisions recognising indigenous title to land in the *Mabo*[9] and *Wik*[10] decisions which did no more –indeed not as much – than bring the common law relating to indigenous land rights in Australia approximately into line with the common law in North America and New Zealand? With its emphasis on individual rights rather than the existence or absence of government power, the weak dialogue model will not subject the judges to the level of controversy to which High Court Justices are already exposed.

The "floodgates" and the "villains' charter" arguments

18. The notion that the dialogue model will open the floodgates to a deluge of "rights" litigation – "government by litigation" was the shrill shriek of one critic – has been refuted by reports made after surveys in the

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[8] *Ng Ka Ling and Chan Kam Nga v. Director of Immigration* (1999) 2 HKCFAR 82; and *Yeung May Wan v. HKSAR* (2005) 8 HKSAR 137.

[9] *Mabo v Queensland (No.2)* (1992) 175 CLRI.

[10] *Wik Peoples v Queensland* (1996) 187 CLRI.

United Kingdom and the Australian Capital Territory of the legislative regimes in operation in those jurisdictions[11]. Likewise, the emotive description "villains' charter", is inaccurate. Criminal cases represent a substantial proportion of cases in which Charter issues arise and there are, of course, cases in which a defendant in a criminal case successfully relies on a Bill of Rights defence, just as there are instances of such a defendant successfully relying on a common law or statutory defence. But to suggest that, in some way or other, the criminal class is the real beneficiary of such a regime is a frolic in fantasyland.

A considered perspective of the United Kingdom experience

19. What is striking about the debate has been the absence in the mainstream media of any discussion of the important contribution to the Australian debate made by Lord Bingham of Cornhill, until very recently England's senior judge and one of the world's great jurists, in his address "*Dignity, fairness and good governance: the role of a Human Rights Act*"[12]. What his Lordship says about the operation of the Human Rights Act 1998 in the United Kingdom and his response to media criticism made of that Act (similar to the criticisms made here) is a convincing answer to the arguments voiced recently in Australia.

20. After reviewing the main criticisms directed at the Human Rights Act and the European Convention, Lord Bingham said

> "[A]s will be obvious, they do not, in my opinion, amount to very much. They do not begin to outweigh the very real benefit which the Act confers by empowering the courts to uphold certain very basic safeguards even – indeed, particularly – for those members of society who are most disadvantaged, most vulnerable and least well-represented in any democratic representative assembly"[13].

21. He went on to say

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[11] Public Law Project, *The Impact of the Human Rights Act on Judicial Review – a Empirical Study* (June 2003), p.31; Department of Justice and Community Safety (ACT), *Twelve Months Review of the Human Rights Act* 2004 (June 2006), pp.11-13.

[12] Delivered in Sydney on 11 December 2008, published in *Bar News*, the Journal of the NSW Bar Association, Winter 2009, p.42.

[13] Ibid, p.47.

> "Decisions have undoubtedly been made in the UK which have, in my view, been beneficial and which would not – in some cases could not – have been made without the mandate given by the Act."[14]

After giving examples of such decisions, he said of them

> "These examples - - - could be multiplied. I do not for my part doubt that such decisions enhance the fairness, decency and cohesiveness of the society in which we live in the United Kingdom."[15]

The case for a Bill of Rights

22. The first point to be made in favour of a national Bill of Rights (protecting civil and political rights) is that it would substantially enhance our democratic system of government (and respect for the rights and dignity of the individual) rather than weaken it by promoting a culture of respect for human rights and human dignity. To insist that the protection of human rights is best left to our politicians rather than judges is not only to forget the lessons of history but also to ignore the contemporary disenchantment with the political process which prevails in countries such as Australia and the United Kingdom to-day. There is a popular perception that politicians are disconnected from the concerns of the people, that politics is all about gaining and maintaining power at all costs and that the political process is exploited by powerful lobby groups and stakeholders in their own interests. In addition, there is perceived to be an unhealthy relationship between the media and politics, a relationship in which politicians vie with each other for media attention and the media sensationalises and trivialises politics[16]. In such a climate, there is little or no incentive for politicians to take action to protect the disadvantaged minority or the individual, unless to do so offers the prospect of political mileage. Unfortunately, very often that may be no more than a remote prospect.

23. John Lloyd, in an opinion piece, published in the "Financial Times"[17] following the recent British MP's expenses claim scandal, quoted the views of well-known political scientists on the condition of modern

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14 Ibid.

15 Ibid at p.48.

16 The sorry saga of the recent so-called "Ozcar affair" is just one of many examples that might be given.

17 "Politicians must listen, learn and level with citizens", 3-4 July 2009,p.7.

democracy. The views were disturbing. Colin Crouch, who wrote the book "Post Democracy" in 2004 argued that politics was "increasingly slipping back into the control of privileged elites, in the manner of characteristic of pre-democratic times" and that "the consumer has triumphed over the citizen". John Keane who published "The Life and Death of Democracy" two months ago wrote that there is a "sense that official politics" [are] irrelevant or at least they poorly represented the interests of the citizens".

24. Margit van Wessel, the Dutch political scientist, who tested a small sample of Dutch voters to find out what they thought of parliamentary democracy, was reported by Lloyd as concluding

> "Many saw parliamentarians as self-interested, prone to compromise, unable to connect with citizens' concerns, immured in their own world".

This view, strikingly captured in that phrase "immured in their own world", resonates widely, not least in Australia, where Mr Tony Fitzgerald QC only two weeks ago called our attention to the soggy side of the Queensland political world, with donations paving the way to access to government ministers and very large "success fees" paid to former ministers who act as unregulated lobbyists. It would be a big mistake to think that these activities are confined to Queensland.

25. This is not to say that democracy is not supported. Disenchantment with its present condition shows no present sign of citizens deserting democracy for some other form of government. Rather disenchantment leads citizens to hope that democracy can be reformed so that it will achieve the lofty aspirations claimed for it by politicians. And one way of contributing to that goal is to focus more attention on the protection of human rights and fundamental freedoms.

26. A dispassionate view of the political process in Australia does not reveal a landscape dedicated to the protection of human rights. One only has to look at the situation of our indigenous peoples, ethnic minorities, disabled persons, those who are mentally ill, the abuse of children and the aged, the incarcerated boat people, asylum seekers and, most recently, the situation of Indian and Asian students in Australia who have been the victims of assaults, robbery and reported educational exploitation. The way

in which David Hicks[18] and Dr Haneef were dealt with by the Australian Government has highlighted the inadequacies of human rights protection in Australia. There has been a systemic failure to protect human rights and human dignity, due to lack of public consensus and political inertia.

27. Another concern is the fact that over many years there has been a steady increase in the growth of executive power, authorised by legislation, to the detriment of individual rights and interests. Subject only to such oversight as the Senate is from time to time capable of providing, the Parliamentary process is dominated by the executive. The inroads made into the traditional principles of due process, initially justified as necessary in order to deal with the threat of terrorism, are now being repeated in other situations, ostensibly to protect criminal information and to enable us to deal with bikie gangs. Why is it that the traditional principles now need to be discarded when for so long in the past they were a defining point of our claim to be a just, fair and ordered society?

The political process is an inadequate safeguard

28. The argument that judicial enforcement of a Bill of Rights is on its own an antidote to our problems is not compelling. What we need to bring about is a dramatic change in the political and bureaucratic culture, in particular by reform of the parliamentary process, modelled on the United Kingdom system of parliamentary reviews. But on its own it will not be a sufficient protection of civil and political human rights in Australia. This was the view taken in the United Kingdom itself and New Zealand, where the enhanced parliamentary system of review sits alongside the Human Rights Act 1998 (UK) and the Bill of Rights Act 1990 (NZ).

29. In this respect, if one thing is abundantly clear it is that political review of human rights, unaccompanied by a statutory Bill of Rights interpreted and applied by judges, will not adequately protect civil and political human rights. The political process has failed to deliver in the past. What reason now is there to think that, left to its own devices, it will deliver in the future? Although the parliamentary system of review certainly offers

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[18] The Australian Government did not object to his detention for more than 3 years in Guantanamo Bay and his trial by a military commission despite a statement by five independent UN Special Ropporteurs calling on the United States Government to bring all detainees before an independent and competent tribunal or release them.

advantages in relation to economic and social rights, it is not a sufficient on its own as a safeguard for civil and political rights, though, in combination with a statutory Bill of Rights interpreted and applied by judges, it will mark a significant step forward. In time – and it may take quite a long time – the combination of the two should bring about a change in our political and bureaucratic culture.

30. An illustration of what can be achieved by a Bill of Rights in Australia is the decision in *Kracke v. Mental Health Review Board*[19] where a mentally ill man was required to take psychotropic medication without his consent. The drugs had adverse side effects. He tried without success to persuade the medical authorities to let him stop taking the drugs. The Mental Health Act 1986 (Vict) allows the making of treatment orders without consent calling for the administration of drugs. But the Act requires periodic reviews by the Board within stipulated time limits. These limits were not observed. The failure was substantial and systemic. The declaration under the Victorian Charter that Mr Kracke's human rights were violated and the judgment setting out the circumstances of the case drew attention to an injustice suffered by a minority group, an injustice which the political process failed to remedy.

Other advantages of a Bill of Rights

31. In the United Kingdom, the Human Rights Act 1998 is leading to a reformation of English administrative law. Thomas Poole of the London School of Economics and Political Science has pointed out that the core concerns of traditional English administrative law were, as they currently are in Australia, the examination of powers and procedures of authorities, according to the notion that the community should be protected from abuses of public power, a notion more suited to a collectivist age than an individualist age. The individual and his interest, whatever it might be, were not the focal point of the legal analysis[20].

32. The old administrative law is giving way to a new approach in which the rights of the individual are becoming the focal point of the legal analysis, accompanied by an application of the proportionality principle as a

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19 [2009] VCAT 646 (23 April 2009).

20 "The Reformation of English Administrative Law" [2009] 68 Cambridge Law Journal 142-143.

standard by which administrative decisions are judged. This development leads to a stronger element of substance based judicial review of administrative decisions[21]. In turn this exposes the decision-making processes of government to publicity and review, enhancing modern democratic governance in two ways. First, it throws a spotlight on the decision-making process of government. Secondly, it enables the public to form a judgment on the question whether the executive government is respecting human rights in its decision-making processes.

33. In time the new approach to administrative law will have an impact on the political and bureaucratic culture by way of encouraging a greater respect for human rights. An Australian Bill of Rights would, hopefully, have a similar impact here. What is happening in the United Kingdom, however, has been influenced by the European Convention and the jurisprudence of the European Court of Human Rights which, practically speaking, binds the courts of the United Kingdom.

34. Neither a Bill of Rights nor a Parliamentary review of legislation would set to right all the existing shortcomings of the political process. But the two together would be a step in the right direction. It would encourage our politicians to think about the people rather than the preservation of their power and the pursuit of party and personal interests and to focus on how they can protect the rights and freedoms of individuals, the rights and freedoms on which our very society depends.

35. One very disturbing illustration of a continuing trend in modern politics is the increasing marginalisation of the rule of law and of respect for the traditional principles of due process. The emergence of the so-called "War on Terror" marked the beginning of a movement to dispense with the requirements which the law imposed before detention and punishment could be justified in law. In the long saga in which David Hicks was involved, he was detained for more than four years before a conviction was recorded against him – and even then by consent – and for most of that time no charge was preferred against him. He was imprisoned because he was a suspected terrorist. Dr Haneef was detained in circumstances in which, as it transpired, there was no evidence to support the proposition that he was linked to terrorism or a terrorist organisation.

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[21] Ibid at 143-145.

Other objections to the dialogue model

36. Another possible objection to the dialogue model or, indeed, any model based on the ICCPR, is that it would involve the courts in deciding whether particular permitted restrictions on protected rights and freedoms are "necessary". I take as an example the limitations permitted by art. 22(2) of the ICCPR on freedom of association, namely,

> " . . . restrictions which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order . . . , the protection of public health or morals or the protection of the rights and freedoms of others . . ."

37. The determination of the legitimacy of such a restriction under this formulation, according to the criterion "necessary in a democratic society in the interests of …", is a formulation interpreted and applied by courts in various parts of the world, including the United Kingdom, European and other courts, pursuant to international and regional conventions. Qualifications of this kind, applied by the courts, are essential if we are to protect the rule of law and due process from the exercise of arbitrary power by an executive government under the cover of statutory authority.

38. Perhaps the strongest objection to the dialogue model – an argument which has so far attracted little attention – is that the dialogue model may not perhaps add much to the existing common law principle of legality. According to this principle of statutory interpretation, a court will not interpret a statute in such a way that it abrogates or curtails rights recognised by the common law and, arguably, human rights and fundamental freedoms, unless the statute exhibits an unambiguous intention to do so[22].

39. The interpretive provision in the dialogue model seeks to achieve a stronger pro-rights interpretation than the common law principle of legality would achieve. There is a question as to how effective the dialogue model will be in this respect[23]. The common law principle of

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[22] See *Coco v The* Queen (1984) 179 CLR 427.

[23] See *RJE V The Secretary to the Department of* Justice [2008] VSCA 265 at [117-119], per Nettle J.A. (where his Honour applied the interpretive provision to an expression which was capable of two

legality has its shortcomings. One is that there is uncertainty about the rights to which it applies. A Bill of Rights would remove that uncertainty by identifying all the rights and freedoms which are to be protected by the Bill. Another shortcoming is that the common law principle of legality is just one of many common law principles of statutory interpretation. It has no special focus on human rights. The absence of that focus is one reason why some Australian lawyers are opposed to any kind of Bill of Rights. They are accustomed to think in terms of common law rules based on precedents; they are not attuned to thinking about the law in terms of the substance of its impact upon human rights and human dignity. That is the central thrust of a Bill of Rights. Its objective is to provide a new focus and induce all of us, including judges, politicians and administrators, to think positively about human rights and human dignity, as it is doing in the United Kingdom[24].

40. Although I support the dialogue model, I think that some issues such as abortion and euthanasia are better left to the political process and should be carved out. For my part, I do not think that compelling answers to these questions can be judicially articulated from "the right to life".

The constitutional argument

41. Opponents of a Bill of Rights continue to refer to a constitutional objection to a federal Bill of Rights. The argument was that a judicial declaration of incompatibility would be unconstitutional because it does not amount to an exercise of federal judicial power. The argument was unanimously rejected at a round-table of constitutional experts convened by the Australian Human Rights Commission. The round-table pointed out that a Bill which provided for a "finding of inconsistency" in the event that a particular statute was inconsistent with the Bill was no more than a conclusion reached on an issue that arises in a case brought by or against a litigant who relies on a right or freedom protected by the Bill[25].

42. Despite this the Attorney-General for Western Australia has been reported as saying

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interpretations, although on ordinary principles of interpretation he would have favoured the alternative meaning).

[24] See paras 28-30 above.

[25] Australian Human Rights Commission, "*Constitutional validity of an Australian Human Rights Act*" 22 April 2009.

> "I personally would have no hesitation in advocating to my cabinet a challenge to any declaratory bill of rights".[26]

What he meant by the words "any declaratory bill of rights" is by no means clear. According to the report, the Attorney-General acknowledged that he did not "claim to be a constitutional lawyer" and went on to say that he had not yet sought legal advice on the issue. You might wonder how, in these circumstances, a Law Officer could contemplate giving advice to his Cabinet along the lines he proposed. The answer is that, in Australia, it is thought by politicians that governments are reluctant to initiate proposals for reform if they are likely to sink into a Serbonian bog of constitutional litigation. So the tactic here is to "talk up" a supposed constitutional problem in order to discourage government from proceeding with any proposal.

Future prospects

43. For the federal government, a Bill of Rights may well present a challenge it could do without, as the next federal election approaches. A recommendation by the Committee that only a parliamentary system of review be introduced might well suit the government's interests. A decision to that effect, whether supported by the Committee or not, would win the support of the Murdoch press or perhaps that of the media generally.

44. On the other hand, such a decision might not enhance the federal government's campaign to win a seat on the UN Security Council. The failure to implement the ICCPR, the suggestions that Australia is a laggard in the protection of human rights and the recent concerns expressed by Indian and Asian students about alleged racist violence in Australia, concerns vigorously denied by governments in Australia, might induce the federal government to take a more pro-Bill of Rights stance.

45. Much depends on the Committee's view of how much public support there is for a Bill. The future, even the immediate future, holds the key. If a federal Bill of Rights is not supported now, it will remain in limbo for some time to come. In the meantime, it is to be hoped that the introduction of a national Bill of Rights will be assessed on its merits.

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[26] "*WA to challenge bill of rights*", The Australian Financial Review, 26 June 2009, p.54.