THE PRINCIPLE OF LEGALITY AND THE JUDICIAL PROTECTION OF RIGHTS — *EVANS V NEW SOUTH WALES*

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I INTRODUCTION

This note will look at the litigation that arose in the lead-up to World Youth Day held in Sydney in July 2008. In Part II, the events that gave rise to *Evans v New South Wales*[1] will be outlined and the reasons of the Full Court of the Federal Court for its decision briefly explained. The consequences of the Court applying the principle of legality in *Evans* — which lay at the heart of its reasoning and decision — will be explored in Part III. First, I will consider how it impacted upon the argument made by the applicants that the relevant legislation was invalid for infringing the implied freedom of political communication guaranteed by the *Australian Constitution*. And second, I will discuss whether the decision in *Evans* highlights a lacuna in the legal protection of freedom of expression in Australia — as some commentators have suggested — and whether a statutory charter of rights would remedy this. And finally, in Part IV, I will make some observations about the principle of legality and the judicial protection of rights more generally. Taken together, these observations lead me to conclude that the *judicial* role in the protection of rights in Australia may be best served through the application of the principle of legality rather than an interpretive obligation under a statutory charter of rights.

II THE CASE

A Facts and legislation

In the lead-up to World Youth Day — the week long pilgrimage of young Catholics held in Sydney in July 2008 — the New South Wales Government enacted the *World Youth Day Regulation 2008* (NSW) ('*WYD Regulation*'). The *WYD Regulation* was made pursuant to the *World Youth Day Act 2006* (NSW) ('the Act'). The Act, as its long title outlined, was

> to constitute a World Youth Day Co-ordination Authority, to confer certain functions on the Authority and to provide for the co-operation of other government agencies in the

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1 (2008) 168 FCR 576 ('*Evans*').

planning, co-ordination and delivery of government services in relation to World Youth Day 2008 and related events; and for other purposes.

The applicants — the 'No to Pope Coalition' — were an organisation 'of persons and groups … opposed to the teachings of the Catholic Church on sexuality, contraception and reproductive rights.'[2] The Coalition planned to peacefully confront the participants during World Youth Day events to communicate their concerns on these matters. In order to do so, they wanted to provide the pilgrims with 'items including t-shirts, leaflets, flyers, stickers, condoms and coat-hangers. The coat-hangers [were] intended to symbolise the death of women from "backyard" abortions.'[3]

It was the concern of the applicants that the Act and, in particular, the *WYD Regulation,* would prohibit them from distributing these materials and therefore preclude their planned protest. Section 46 of the Act prohibited the selling and distributing of 'prescribed articles' in areas controlled by the World Youth Day Co-ordination Authority[4] and the impugned clauses of the *WYD Regulation* read as follows:

Clause 4

(1) For the purposes of the definition of "prescribed article" in section 46 (10) of the Act, the following classes of articles are prescribed:

(a) items of food and drink,

(b) religious items (for example, rosary beads, candles, candle holders, prayer tokens and prayer cards),

(c) items of apparel, including headwear, (for example, t-shirts, jumpers, jackets, pants, pyjamas, singlets, tank tops, shorts, wet weather jackets, caps, visors and hats),

(d) clothing accessories (for example, scarves, bandannas, socks, shoes and thongs),

(e) jewellery,

(f) giftware (for example, key rings, lapel pins, zipper pulls, magnets, removable tattoos, button badges, wristbands, mobile phone accessories, computer accessories, sunglasses, stickers and photo frames),

(g) hard goods (for example, bottles, mugs, plates, spoons, ceramics and umbrellas),

(h) stationery,

(i) textiles (for example, beach towels and tea towels),

(j) philatelic and numismatic articles (for example, coins, postage stamps, envelopes and first day covers).

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2 Ibid 578.

3 Ibid 579.

4 Section 46(1) defined an *Authority controlled area* as any of the following areas: (a) the area comprising, or comprising and adjacent to, a transport facility or interchange or a World Youth Day venue or facility, being an area that is specified or described in an order of the Minister published in the Gazette, (b) a public place, or any part of a public place, that is within 500 metres of a transport facility or interchange or a World Youth Day venue or facility, being a public place, or part of a public place, that is shown on a map referred to in an order of the Minister published in the Gazette.

Clause 7

(1) An authorised person may direct a person within a World Youth Day declared area to cease engaging in conduct that:

(a) is a risk to the safety of the person or others, or

(b) causes annoyance or inconvenience to participants in a World Youth Day event, or

(c) obstructs a World Youth Day event.

(2) A person must not, without reasonable excuse, fail to comply with a direction given to the person under subclause (1).

Maximum penalty: 50 penalty units.

(3) A person is not guilty of an offence under this clause unless it is established that the authorised person warned the person that a failure to comply with the direction is an offence.

(4) In this clause, "authorised person" means:

(a) a police officer, or

(b) a member of an SES unit (within the meaning of the State Emergency Service Act 1989) or a member of the NSW Rural Fire Service, but only if the member is authorised by the Authority in writing for the purposes of this clause.

The applicants argued that s 46 of the Act and clauses 4 and 7 of the *WYD Regulation* were invalid for infringing the implied freedom of political communication guaranteed by the *Constitution*.[5] In this regard, the High Court has made clear that any legislative or executive action that disproportionately burdens communication necessary for the effective operation of responsible and representative government guaranteed by the *Constitution* is invalid.[6] The applicants further argued that clauses 4 and 7 went beyond the scope of the regulation-making power provided by the Act and were invalid as a consequence.

At the time there was also some urgency regarding the matter. The Coalition filed and served their application in the Federal Court on July 7 with the main World Youth Day events scheduled to commence on July 15 and conclude on July 20. Consequently, '[t]he Acting Chief Justice considered that the matter was of sufficient importance to justify a direction that the original jurisdiction of the Court in the matter be exercised by a Full Court'.[7]

B Decision and reasoning

The decision of the Full Court of the Federal Court (French, Branson and Stone JJ) was delivered per curium on July 15. The Court held as follows:

1 It was within its original jurisdiction to hear and determine the application — as provided by s 39B(1A) of the *Judiciary Act 1903* (Cth) — as it involved a 'matter …arising under the Constitution, or involving its interpretation'. Moreover, the Court noted that the adverse determination of the federal (constitutional) arguments did not preclude them from determining the non-federal claims; that

5 I will refer to it as the 'implied freedom' for the remainder of the note.

6 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

7 *Evans* (2008) 168 FCR 576, 581.

is, the proper construction of the impugned New South Wales Act and Regulation. The federal and non-federal claims involved in the controversy 'are all part of the federal jurisdiction conferred upon the Court. Nor does it matter to the scope of that jurisdiction whether the federal claim is defeated by a question of law or fact. That proposition is supported by a long line of authority.'[8]

2 The list of 'prescribed articles' in cl 4 were authorised by the regulation-making power of the Act. However, the items the applicants wished to provide to the pilgrims were not 'prescribed articles' on a proper construction of s 46 and cl 4 and could, therefore, be lawfully distributed at World Youth Day events. Consequently, no question then arose as to the compatibility or otherwise of s 46 or cl 4 with the implied freedom.

3 Clause 7(1)(b) — 'to the extent that it purports to empower an authorised person to direct a person within a World Youth Day declared area to cease engaging in conduct that causes annoyance to participants in a World Youth Day event'[9] — was not authorised by the regulation-making power of the Act and was therefore invalid. The other elements of cl 7 were so authorised and did not, moreover, infringe the implied freedom 'because they [were] directed not to communication, but to public safety and interference with the rights and freedoms of others.'[10]

In any event, in order to explain the reasoning of the Federal Court on the two substantive limbs of its decision (points 2 and 3 above) it is worth extracting s 58 of the Act which conferred the power to make regulations in the following terms:

> (1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.
>
> (2) In particular, regulations may be made for or with respect to the following:
>
> (a) the fees and charges that may be imposed for the purposes of this Act,
>
> (b) regulating the use by the public of, and the conduct of the public on, World Youth Day venues and facilities,
>
> (c) regulating the provision of services by the Authority,
>
> (d) requiring the payment of fares or other charges for the use of any facility operated or service provided by the Authority or a government agency for the purposes of this Act,
>
> (e) conferring on the Authority any function that may be exercised by a council in relation to a public place,
>
> (f) requiring persons to submit to searches of themselves and their articles, vehicles or vessels (including searches conducted by electronic detection devices) as a condition of entry to any World Youth Day venue or facility,
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> (g) excluding persons who refuse to submit to such searches from World Youth Day venues or facilities,

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8 Ibid citing with approval this passage from *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* (2000) 104 FCR 564, 597 (French J with whom Beaumont and Finkelstein JJ agreed).

9 See *Evans* (2008) 250 ALR 33, 55–6.

10 *Evans* (2008) 168 FCR 576, 580.

(h) the use of Randwick Racecourse for the purpose of one or more World Youth Day events (within the meaning of Part 9A).

(3) The regulations may create an offence punishable by a maximum penalty of 50 penalty units.

1 *The proper construction of section 46 of the Act and clause 4 of the* WYD Regulation

The essence of the first limb of the decision turned on the Court's characterisation of the items that the applicants wished to distribute to the pilgrims at World Youth Day events. However, it had to be first determined whether there was anything in s 46 of the Act that precluded the prescription by regulation of the sorts of articles listed in cl 4. That section defined what constituted an 'Authority controlled area',[11] vested certain powers in 'authorised officers'[12] and most relevantly for present purposes defined what was a 'prescribed article' in order to create a related offence:

(3) A person must not sell or distribute a prescribed article during the sales control period in an Authority controlled area without the approval of the Authority.

Maximum Penalty: $5,000.

(10) In this section: "prescribed article" means an article of a class prescribed by the regulations as a being a prescribed article for the purposes of this section.

The Court held that 'the validity of cl 4 cannot successfully be challenged on the grounds that it is not authorised by s 46(3).'[13]

> We do not accept the applicants' submission that 'there is simply no warrant in the Act to justify the prescription by regulation of articles such as food and drink, candles and stickers and hard goods'. There is nothing in the definition of 'prescribed article' that would exclude such articles from the ambit of regulation under s 46.[14]

It then fell to the Court to consider whether the items the applicants wished to give the pilgrims — condoms, coat-hangers, t-shirts, candles, stickers, button badges and leaflets — were 'prescribed articles' under cl 4. They held that nothing in the listed classes of articles covered condoms[15] or (symbolic) coat-hangers[16] and though leaflets and flyers may once have been 'stationery' they no longer could be so characterised when printed.[17] Of more difficulty was whether the stickers and button badges were 'giftware'. The Court defined 'giftware' as 'articles of merchandise that are used as gifts' and noted that a classification as such 'may depend on context.'[18] So certain kinds of stickers and button badges — for example, those that 'might serve as souvenirs of the event and appropriate gifts for those who have an interest in the event'[19] — may well constitute 'giftware' and therefore be caught by cl 4(1)(f). However, '[t]he same could not be said of the button badges and stickers that the applicants propose to

11 See above n 4.
12 Section 46(10) 'In this section: "authorised officer" means a person authorised in writing by the Authority for the purposes of this section.'
13 *Evans* (2008) 168 FCR 576, 588.
14 Ibid.
15 Ibid 589.
16 Ibid.
17 Ibid 589–90.
18 Ibid 590.
19 Ibid.

distribute.'[20] Presumably this is because with messages such as 'I don't believe Mary was a virgin! Is that annoying?' and 'I don't believe the Pope is infallible! Is that annoying?'[21] they were hardly the sorts of event 'souvenirs' and 'gifts' that s 46 and cl 4 sought to prohibit from being sold and distributed to the pilgrims during the World Youth Day events. A similar interpretive logic was applied to the characterisation of the applicants' t-shirts. Though clearly 'items of apparel' on the face of it — indeed 't-shirts' were noted as one of the relevant examples in cl 4(1)(c) — the slogans which they were to bear placed them outside the class of articles contemplated by the *WYD Regulation* in the Court's view.[22]

In the result, none of the items which the applicants wished to distribute to the pilgrims were 'prescribed articles' under cl 4. It therefore followed that no issue as to the compatibility or otherwise of s 46 and cl 4 with the implied freedom could logically arise, even if the applicants' proposed conduct did amount to constitutionally protected political communication, which I would have thought likely on the facts. In this regard, the High Court in *Lange* said that the implied freedom 'necessarily protect[s] that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors.'[23] Relevantly, in *Evans* the Court noted that the applicants were members of community groups that 'campaign[ed] on issues such as the Federal same-sex marriage ban and civil unions' and sought 'to persuade political parties at both Federal and State level to adopt policy positions that reflect the organisation's views and, where appropriate, to legislate to implement those policy positions.'[24] Their proposed conduct formed part of this political activism and would likely be considered 'political communication' as a consequence, in my view, for its capacity to inform federal voting choices.

2 *The invalidity of clause 7(1)(b) of the* WYD Regulation

As noted, the Court held cl 7(1)(b) of the *WYD Regulation* exceeded the regulation-making power of the Act and was invalid as a consequence. This followed from the application of what is now (judicially) known as the principle of legality. The Court, by way of explanation, cited the following High Court authority:

> The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakeable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.[25]

In the context of s 58(2)(b) of the Act — which provided the power to make regulations for the regulation 'of the public on, World Youth Day venues and facilities' — the Court observed:

> The term 'regulating … the conduct of the public' is capable of a range of constructions from the regulation of any conceivable conduct to the regulation of conduct relevant to the events on World Youth Day. It may encompass acts and some or all forms of speech

20 Ibid.
21 Ibid 589.
22 Ibid 590.
23 (1997) 189 CLR 520, 560.
24 *Evans* (2008) 168 FCR 576, 585.
25 Ibid 593 citing *Coco v The Queen* (1994) 179 CLR 427, 437.

> and communication. There are constructional choices open. It is an important principle that Acts be construed, where constructional choices are open, so as not to encroach upon common law rights and freedoms.[26]

The Court acknowledged that the range of conduct prescribed by cl 7 implicated, at the very least, freedom of speech and said that '[w]hatever debate there may be about particular rights there is little scope … for disputing that personal liberty, including freedom of speech, is regarded as fundamental subject to reasonable regulation for the purposes of an ordered society.'[27] Also pertinent to the proper construction of cl 7 in the context of the World Youth Day events was the significance of freedom of religious belief and expression within Australia's constitutional arrangements and under international law. The Court noted in this regard that 's 116 of the *Constitution* bars the Commonwealth from making any law prohibiting the free exercise of any religion' and that religious 'freedom is recognised in the *Universal Declaration of Human Rights* and in the *International Covenant on Civil and Political Rights*'.[28] It led the Court to conclude:

> No doubt conduct could validly be regulated which involves disruption of, or interference with, the free expression of religious beliefs by participants in WYD events. Clause 7(1)(c) relating to obstruction of WYD events is properly directed to such ends.[29]

However, the power provided to an authorised person by cl 7(1)(b) to direct a person at a World Youth Day event 'to cease from engaging in conduct that causes *annoyance*' to its participants was problematic on freedom of speech grounds and for its textual (and therefore legal) indeterminacy. The indeterminacy was said to arise from the fact that some of the pilgrims may have found the planned protests of the applicants to be 'mildly amusing' whilst others may have been 'annoyed by them' in the relevant sense.[30] 'There [was] no objective criterion to assist the judgment of "an authorised person" in deciding whether to issue a direction under cl 7.'[31] The application by the Court of the principle of legality to this harm threshold ('causes annoyance') proved fatal to its validity.

> In our opinion the conduct regulated by cl 7(1)(b) so far as it relates to 'annoyance' may extend to expressions of opinion which neither disrupt nor interfere with the freedoms of others, nor are objectively offensive in the sense traditionally used in State criminal statutes. Breach of this provision as drafted affects freedom of speech in a way that, in our opinion, is not supported by the statutory power conferred by s 58 properly construed. Moreover there is no intelligible boundary within which the "causes annoyance" limb of s 7 can be read down to save it as a valid expression of the regulating power.[32]

The Court issued a declaration to this effect, notwithstanding the argument made by the State that to do so would involve the improper determination of an abstract or hypothetical legal controversy as 'the precise nature of the conduct in which the

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26 Ibid 592–3.
27 Ibid 594.
28 Ibid 596. On the basis of this discussion in the *Evans* decision, Kevin Boreham has suggested that freedom of religious belief and expression is now a fundamental right recognised by the common law — see 'International Law as an Influence on the Development of the Common Law: *Evans v New South Wales*' (2008) 19 *Public Law Review* 271.
29 *Evans* (2008) 168 FCR 576, 597.
30 Ibid.
31 Ibid.
32 Ibid.

applicants intend[ed] to engage [was] not clear.'[33] There was, in the Court's view, 'a controversy sufficient to constitute a matter for the purposes of Ch III of the *Constitution* and the proper invocation of this Court's jurisdiction.'[34]

III THE APPLICATION OF THE PRINCIPLE OF LEGALITY IN *EVANS*: CONSTITUTIONAL CONSEQUENCES AND RIGHTS PROTECTION

In this part of the note I will outline and critique the central reasoning of the *Evans* decision. I will do so by considering how the interpretive process (including the application of the principle of legality) meant that the question of constitutional validity of the legislative regime fell away in the Court's view. I then turn to assess the extent to which the principle of legality (compared with a statutory bill of rights) can provide meaningful protection of fundamental rights (including freedom of expression) in Australia.

A The constitutional issue: did it fall away or was it avoided?

In *Evans*, the applicants, as noted, argued that s 46(3) of the Act and clauses 4 and 7 of the *WYD Regulation* were invalid for infringing the implied freedom. The Court responded that '[i]f either of the clauses of the Regulation is not valid because it is not authorised by the WYD Act, then the question of constitutional validity falls away.'[35] To this end, as outlined in Part II, the Court held that none of the items the applicants wished to distribute were 'prescribed articles' under s 46(3) and cl 4 taken together and narrowly construed, and that the application of the principle of legality to cl 7 *did* invalidate that part of (1)(b) that sought to regulate conduct that may cause 'annoyance' to the pilgrims. Consequently, 'the question of constitutional validity falls away.'[36] This is the orthodox interpretive approach under Australian law:[37]

> If on its proper construction a statute does not offend against any constitutional limitation or prohibition it is not ordinarily appropriate for the Court to hypothesis a different construction and then test its constitutionality.[38]

So the constitutional issue *in the context of the applicants' proposed conduct* was no longer a live one once the Court found that none of the articles they wished to distribute were 'prescribed' and the application of the principle of legality to cl 7(1)(b) rendered it invalid. It led the Court to conclude:

> Read together with cl 4 of the Regulation for the reasons which we have outlined above, it does not impact on the proposed conduct of the applicants in any way that would constitute a burden on their implied freedom of political communication. That is

33 Ibid 598.

34 Ibid. In this regard the Court noted at 598 that '[t]he wide scope of the Regulation in relation to conduct which causes annoyance is likely to catch at least some of the intended conduct. Moreover, it can be expected to have a chilling effect upon the exercise of their freedom of speech because of the very uncertainty about the degree of its infringement upon that freedom.'

35 Ibid 587.

36 Ibid.

37 See *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 186 (Latham CJ).

38 *Evans* (2008) 168 FCR 576, 587.

> sufficient to dispose of the constitutional challenge to s 46(3) within the framework of the case presented to the Court.[39]

This necessarily follows, as the applicants' proposed conduct was found to be lawful through the interpretive process (and regulation invalidation) just described. There appeared, however, to be suggestions in the Court's judgment that they were not entirely comfortable with the breadth and scope of the legislative regime. For example, as it found that the items that the applicants wished to distribute to pilgrims were not caught by cl 4 then '[t]he question whether the reach of cl 4 may be excessive in other respects [was] not before the Court.'[40] Similarly, on the issue of the legality or otherwise of the applicants' wish to distribute candles the Court said:

> There was little argument and no evidence given on these matters at the hearing. It [was] not possible for us to express an opinion as to which candles would be prohibited as religious items and which would not. The issue could only be resolved in the context of a particular prosecution brought following a failure to comply with regulation.[41]

And there appeared even some ambivalence in the Court's conclusion (quoted above) that the interpretive process undertaken 'is sufficient to dispose of the constitutional challenge to s 46(3) *within the framework of the case presented to the court*.'[42] These observations may of course have been no more than the Court making clear to the applicants that it will only finally determine those legal issues which squarely arise on the facts. But *if* they suggest that aspects of the legislative regime may be constitutionally problematic if considered in a different factual context — that is, regarding (proposed) conduct that is prima facie caught — then such an approach may have a downside from a rights perspective. And, arguably, it is to avoid the constitutional (implied freedom) issue through statutory interpretation rather than it falling away. But before considering whether this approach has a rights downside, I will briefly address the important threshold issue of whether it was even constitutionally permissible for the Court to consider the issue of the implied freedom in *Evans* once they held the applicants (proposed) conduct was lawful.

The issue is whether it is constitutionally permissible for a Court exercising federal judicial power to determine the issue of the implied freedom if the applicants' proposed conduct or manner in which they argue their case does not *in the Court's view* challenge or impugn all those aspects of the legislative scheme that may be constitutionally suspect. That is, would such a determination amount to the resolution of an abstract or hypothetical legal question contrary to the Chapter III of the *Constitution*? In the process of explaining when it may provide for declaratory relief, the Court in *Evans* approved the following passage from the judgment of Lockhart J in *Aussie Airlines Pty Ltd v Australian Airlines Ltd*:

> The applicant for declaratory relief will not have sufficient status if relief is 'claimed in relation to circumstances that [have] not occurred and might never happen' … or if the Court's declaration will produce no foreseeable consequences for the parties.[43]

There is at least an argument that this principle gives a Court, in cases like *Evans,* sufficient scope to fully determine the compatibility or otherwise of a law with the

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39 Ibid 591.
40 Ibid 590.
41 Ibid 590–1.
42 Ibid 591 (emphasis added).
43 (1996) 68 FCR 406, 414 cited in *Evans* (2008) 168 FCR 576, 598.

implied freedom. In *Evans*, for example, the applicants' proposed conduct involved the kind of direct political action in a crowded public space that will always have the capacity to play out in ways not planned but foreseeable that may enliven other parts of the legislative scheme. Moreover, as the Court explained in *Evans*:

> Importantly, the declaration sought is not about the lawfulness of the future conduct of the applicants in which event a degree of precision in the definition of that conduct would be necessary before such relief could be contemplated. *What is sought is a declaration of the invalidity of an aspect of a law of general application*.[44]

Assuming that it was permissible for the Court to more fully consider the constitutionality of the legislative scheme, then choosing not to may have a rights consequence. In the American context, Frederick Schauer argues that this interpretive approach — known as the *Ashwander* principle[45] — does not in fact avoid constitutional issues.[46] If in order to avoid a constitutional question the natural reading of a statute is displaced by a more strained — but nonetheless open on the text — construction then a court is impliedly recognising that without such an approach the statute may be constitutionally suspect. For if a court considers that a constitutional argument has little or no merit then it is unnecessary to give the words of the statute anything other than their ordinary and natural construction. Moreover and relevantly for present purposes, Schauer suggests that '[l]ike the *Ashwander* principle, plain statement rules [the American analogue of the principle of legality] sneak constitutional considerations in the back door, and thus again are instances not of avoiding constitutional questions but of deciding them.'[47]

Consequently, if the rationale of employing statutory interpretation (including the application of the principle of legality) to avoid constitutional issues is to avoid the costs of 'allowing an unelected judiciary unnecessarily to exercise the power to invalidate the acts of coordinate branches of the … government', then it is an interpretive approach that in Schauer's view must at the very least be re-evaluated.

> [I]n interpreting statutes so as to avoid 'unnecessary' constitutional decisions, the Court frequently interprets a statute in ways that its drafters did not anticipate, and, constitutional questions aside, in ways that its drafters may not have preferred. Accordingly, it is by no means clear that a strained interpretation of a … statute that avoids a constitutional question is any less a judicial intrusion than the judicial

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44 *Evans* (2008) 168 FCR 576, 598 (emphasis added).

45 I acknowledge that I have taken this terminology — 'the *Ashwander* principle' — from Frederick Schauer, 'Ashwander Revisited' (1995) *Supreme Court Review* 71, 74.

46 This is also the orthodox interpretive approach in American law — see *Ashwander v Tennessee Valley Authority* 297 US 288, 347–8 (1936) (Brandeis J); *Edward J DeBartolo Corp v Florida Gulf Coast Building and Construction Trades Council* 485 US 568 (1988). In some respects this makes good practical sense as the frequency of the *United States Constitution* (particularly its Bill of Rights) potentially intersecting with State and federal statutes is likely to be far greater than in the Australian constitutional context. It may also be politically and institutionally prudent for American courts to employ this interpretive approach wherever possible considering the robust and ongoing debate about the democratic legitimacy of judicial review.

47 Schauer, above n 45, 87–8 (footnote omitted).

> invalidation on constitutional grounds of a less strained interpretation of the same statute.[48]

However, even if the Court was not engaging in constitutional avoidance in *Evans*, the argument is still worth considering in the context of Australian (constitutional) law more generally. In *Coleman v Power*, for example, Gummow, Hayne and Kirby JJ applied the principle of legality to give a narrow construction to a broad and imprecise public order offence.[49] In doing so they preserved the law's validity and avoided the issue of assessing its compatibility with the implied freedom.[50] But Gummow, Hayne and Kirby JJ made clear that if the public order offence was not (narrowly) construed in this way then it would have infringed the implied freedom.[51]

It might, therefore, be argued that a downside of applying the principle of legality as a method of constitutional avoidance in cases like *Coleman* (and maybe *Evans*) is that, from a rights perspective, it spares broadbrush and amorphous legal rules from rigorous constitutional scrutiny. It leaves on the statute book laws that have a very real capacity to chill freedom of (political) speech[52] and that may, in any event, be found constitutionally suspect in the event of a future prosecution.[53] This is particularly so if it's an approach that 'sneak[s] constitutional considerations in the back door'[54] and into the interpretation process in any event. And to squarely confront the issue of the implied freedom may also better honour the spirit of giving constitutional rights and guarantees a broad construction, an approach that has often (though not always) characterised the contemporary rights jurisprudence of the High Court.[55]

However, for the reasons that I will detail in Part IV below a judge may consider — quite properly in my view — that the principle of legality still ought to be applied in these circumstances. That is, I will argue that in the interests of political responsibility, institutional modesty and constitutional harmony the judicial protection of rights is, on balance, best served by the application of the common law principle of legality where it is interpretively possible.

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48 Ibid 74 (footnote omitted). Schauer also notes at 89 that the upshot of applying the *Ashwander* principle is that constitutional adjudication is in fact undertaken 'without the necessity of the full statement of reasons supporting the constitutional decision.'

49 (2004) 220 CLR 1, 75–7 (Gummow and Hayne JJ), 96–9 (Kirby J).

50 Ibid 74–9 (Gummow and Hayne JJ), 98–9 (Kirby J).

51 Ibid 77–9 (Gummow and Hayne JJ), 99 (Kirby J). In this regard their interpretive approach was 'reinforced' by principles of the implied freedom.

52 However, it must be noted that, notwithstanding the problematic nature and scope of the World Youth Day legislative regime that remained on the statute book after *Evans*, it became a dead issue when the Act (and its accompanying regulations) were automatically repealed on January 1, 2009: *World Youth Day Act 2006* (NSW) s 62.

53 See *Evans* (2008) 168 FCR 576, 590–1.

54 Schauer, above n 45, 87.

55 See for example *Street v Queensland Bar Association* (1989) 168 CLR 461; *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480, 509 (Mason CJ, Brennan, Deane and Gaudron JJ); *Cheng v The Queen* (2000) 203 CLR 248, 277–8 (Gaudron J). But see *Sweedman v Transport Accident Commission* (2006) 226 CLR 362 where the High Court appears to have retreated to the more formal and narrow construction of s 117 of the *Constitution* that was categorically rejected in *Street*.

B The rights protective capacity of the principle of legality (compared with a statutory charter of rights)

In the aftermath of *Evans*, George Williams and Nicola McGarrity lamented the fact that '[t]he court did not strike down the law because it infringed basic rights. It fell over on a technicality that can be easily repaired.'[56] They were referring to the application of the principle of legality to cl 7 of the *WYD Regulation* that resulted in the invalidity of sub-cl (1)(b).

> The Federal Court decision means that regulations outlawing annoying conduct can be made in the future. As the NSW Government argued in court: 'The State Parliament has the power to make these kinds of laws if they wanted to.' There is little doubt that this is correct. The only restriction is that Parliament must make the law clear and wide enough to show it really did intend to restrict freedom of speech.[57]

It is certainly true that clear and unambiguous statutory language will trump the interpretive presumption against the infringement of common law rights and freedoms.[58] However, there must be a serious question as to whether a law that is clear and wide enough to catch annoying conduct would be compatible with the implied freedom. Indeed, as my above analysis suggests, the application of the principle of legality may well have preserved the constitutional validity of cl 7(1)(b). In any event, for Williams and McGarrity the *Evans* decision

> illuminates the fragile nature of freedom of speech in Australia. The right deserves better protection than the legal presumption that Parliament does not intend to breach the right unless it sets this out in clear terms. It is long past time that such an important freedom was safeguarded in a national charter of human rights.[59]

The underlying assumption is, then, that a charter of rights would provide more robust protection of freedom of speech than the application of the principle of legality in cases like *Evans*. However, I think it is far from self-evident that this would be the case assuming the rights charter contemplated by Williams and McGarrity is of the statutory kind operating in the ACT and Victoria.[60] The charters do provide a strong guarantee of the right to freedom of expression.[61] However, rights in a statutory

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56 George Williams and Nicola McGarrity, 'A Victory Only Until the Next Time', *The Sydney Morning Herald* (Sydney), 16 July 2008 <http://www.smh.com.au/articles/2008/07/15/1215887626477.html> at 2 August 2009.

57 Ibid.

58 *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

59 Williams and McGarrity, above n 56.

60 This assumption can reasonably be made considering the strong and consistent case that George Williams has made for the adoption of statutory bills of rights at both the State and federal level — see for example George Williams, *A Charter of Rights for Australia* (3rd ed, 2007); George Williams, 'The Victorian *Charter of Human Rights and Responsibilities*: Origins and Scope' (2006) 30 *Melbourne University Law Review* 880.

61 See for example the freedom of expression right in s 15 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic): (1) Every person has the right to hold an opinion without interference. (2) Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria and whether — (a) orally; or (b) in writing; or (c) in print; or (d) by way of art; or (e) in another medium chosen by him or her. (3) Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary — (a) to respect the rights and reputation of other

charter — such as freedom of expression — are not self-executing or legal trumps as is the case in jurisdictions with constitutional bills of rights. That is, they do not operate to invalidate legislation or executive action held by the courts to infringe rights. Instead they rely mostly on the interpretive obligation found in statutory charters for their efficacy and legal bite. In the Victorian *Charter*, for example, that interpretive obligation reads as follows:[62]

> (1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.
>
> (2) International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.
>
> (3) This section does not affect the validity of—
>
> (a) an Act or provision of an Act that is incompatible with a human right; or
>
> (b) a subordinate instrument or provision of a subordinate instrument that is incompatible with a human right and is empowered to be so by the Act under which it is made.

So in the context of interpreting laws of the kind considered in *Evans* a court must, if possible, give them a construction which is compatible with their underlying purpose and the right to freedom of expression. If it cannot do so for primary legislation (like s 46 of the Act) it may issue a declaration of incompatibility which then places certain legal obligations on the Parliament in respect of the law but does not invalidate it.[63] On the other hand — and in the absence of an express regulation-making power that permits the infringement of charter rights — if delegated legislation (like the *WYD Regulation*) cannot be given a rights compatible interpretation then it *is* invalid. This necessarily follows from the application of the core interpretive obligation to the provision in primary legislation that delegates the power to make regulations. That power can only sustain the making of regulations that are rights compatible as a consequence.[64]

In any event and most relevantly for present purposes, as Chief Justice Spigelman of the New South Wales Supreme Court has recently pointed out, when a 'rights–compliant interpretation provision is made expressly subject to the purposive requirement [as is now the case with the interpretive obligations in both the ACT and Victorian charters], its operation would probably be very similar to the principle of legality.'[65] In other words, the core interpretive obligation when discharged by courts under a statutory rights charter — to construe laws in a manner that is compatible with their purpose and rights if possible — is essentially the same as applying that aspect of the principle of legality that says courts 'decline to impute to Parliament an intention to

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persons; or (b) for the protection of national security, public order, public health or public morality.

62 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32; see also *Human Rights Act 2004* (ACT) ss 30 and 31.

63 See *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 36; see also *Human Rights Act 2004* (ACT) s 32.

64 See generally Carolyn Evans and Simon Evans, *Australian Bills of Rights: The Law of the Victorian Charter and ACT Human Rights Act* (2008) 135–6.

65 Chief Justice James Spigelman, 'The Application of Quasi-Constitutional Laws' in *Statutory Interpretation and Human Rights* (2008) 51, 65.

abrogate or curtail fundamental human rights or freedoms unless such an intention is clearly manifested by unambiguous language'.[66]

Consequently, if *Evans* was decided in a charter jurisdiction in Australia, the court would hold that it was possible to interpret s 46(3) of the Act and cl 4 of the *WYD Regulation* in a manner that was consistent with the purpose of the legislative regime and protected the applicants' freedom of expression.[67] In the Court's view that purpose was 'to prevent risks to public safety, inconvenience to World Youth Day participants and disruption of World Youth Day events.'[68] Whereas that part of cl 7 which sought to regulate conduct that causes annoyance to the World Youth Day pilgrims could not be construed consistently with that purpose and the right to freedom of expression of the applicants as it may catch 'expressions of opinion which neither disrupt nor interfere with the freedoms of others'.[69] It would therefore be invalid as s 58 of the Act — the provision which grants regulation-making power — did not expressly authorise the creation of regulations that infringed freedom of expression.

The upshot is that in jurisdictions with statutory charters of rights the result in *Evans* (and cases like it) would have been the same. This also suggests that — *at least in terms of judicial outcomes*[70] — freedom of expression is not, necessarily, better protected under a statutory rights charter than in a jurisdiction where the principle of legality holds sway.

I do not, however, wish to suggest that the principle of legality affords the same protection to the full panoply of human rights as a statutory rights charter. It clearly doesn't. The scope of rights considered by the common law to be 'fundamental' — and therefore subject to and protected by the principle of legality — is not only contested[71] but is considerably narrower than the rights enshrined in the statutory rights charters operating in the ACT and Victoria.[72] And as Chief Justice Spigelman has suggested, it may well be the case that interpretive obligations in statutory rights charters 'can have some additional force when there is doubt about Parliament's intention in other

66 Chief Justice Murray Gleeson, 'The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights' (2009) 20 *Public Law Review* 26, 33.

67 In doing so, the core interpretive obligation in s 32 of the Victorian *Charter* would be discharged.

68 *Evans* (2008) 168 FCR 576, 579.

69 Ibid 597.

70 Whilst it is true that in cases like *Evans* a statutory bill of rights or the application of the principle of legality would produce the same *judicial* outcome, under the former there are mechanisms that provide for pre-legislative rights scrutiny as well; for example, a rights compatibility statement must be prepared by the relevant member who proposes to introduce a Bill into the Parliament: *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 28; see also *Human Rights Act 2004* (ACT) s 37. This form of additional parliamentary rights scrutiny may well provide for more meaningful protection of charter rights (including freedom of expression) than would otherwise occur under the common law.

71 See *Evans* (2008) 168 FCR 576, 593–5.

72 For example, it is not a fundamental right at common law to be free from discrimination on the grounds of gender, race or religion. However, the right to legal equality is enshrined in the statutory bills of rights operating in the ACT and Victoria: see generally Chief Justice James Spigelman, 'The Common Law Bill of Rights' in *Statutory Interpretation and Human Rights* (2008) 1.

legislation because it is more likely that the judiciary will apply an express parliamentary authority than a common law principle.'[73]

However, I do think that in the context of protecting rights in general, and freedom of expression in particular, that the principle of legality is not merely a 'convoluted legal fiction'.[74] As Gleeson CJ has noted:

> The presumption is not merely a common sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law.[75]

In this regard my analysis above demonstrates the rights protective capacity of the principle of legality and how it would be wrong to dismiss the significance and importance of orthodox principles of statutory interpretation in the protection of human rights in a contemporary context.

IV THE JUDICIAL PROTECTION OF RIGHTS IN AUSTRALIA: SOME OBERVATIONS

In the final part of the note I will make four observations about the principle of legality and judicial protection of rights more generally. The first concerns the fact that the interpretive rights presumption that is the cornerstone of the principle of legality can be displaced by clear and unambiguous statutory language. Whilst the implied freedom may, as noted, have precluded the New South Wales Parliament from doing so in relation to the anti-annoyance regulation invalidated in *Evans*, this interpretive proposition is nevertheless correct. So assuming the law is otherwise constitutional, '[t]he only restriction [imposed by the principle of legality] is that Parliament must make the law clear and wide enough to show it really did intend to restrict freedom of speech.'[76] In the view of McGarrity and Williams, then, the *Evans* 'decision means that a future, properly made anti-annoyance law may have no *legal* remedy.'[77] As a general interpretive proposition this is true enough, though it fails to recognise that such a law may in fact infringe the implied freedom. But more importantly it fails to grasp the underlying rationale of the principle of legality and the nature of the meaningful *political* constraint it places upon the Parliament. As the Court noted in *Evans*, '*[t]he principle of legality means that Parliament must squarely confront what it is doing and accept the political cost*.'[78] This is no small matter and is precisely how it ought to be in a constitutional democracy in my view. A democratically elected Parliament may enact the legislation of its choosing — even when it is *designed* to infringe fundamental rights — knowing that it may pay the ultimate political price of being punished at the ballot box for doing so.

Moreover, it may well be that this political constraint does more to focus the collective mind of Parliament on the rights implications of its legislation than would an after the fact judicial evaluation of its rights incompatibility. As noted, the animating

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73 Ibid 65.
74 Williams and McGarrity, above n 56.
75 *Electrolux Home Products Pty Ltd v Australian Workers Union* (2004) 221 CLR 309, 329.
76 Williams and McGarrity, above n 56.
77 Ibid (emphasis added).
78 *Evans* (2008) 168 FCR 576, 594 quoting Lord Hoffman in *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 131 (emphasis added).

idea of the principle of legality is that it forces Parliament to take *political* responsibility for its legislative actions. A judicial condemnation of legislation on rights grounds on the other hand gives legislators the political opportunity to 'hit back' at the courts for thwarting the democratic will of the people. And the fact that Parliament can still have the final say — and therefore responsibility — on rights issues under statutory charters of rights does not resolve this problem for the courts. Even if the Parliament resolves to amend its legislation to comply with a judicial rights declaration[79] the courts may still be assailed by the other arms of government, the media and the wider citizenry. For example, criticism may be levelled for vindicating the rights of unpopular minorities (a common occurrence under rights charters and during the war on terror) or for 'forcing'[80] the Parliament to amend its legislation to comply with the rights views of 'unelected and unaccountable judges'.[81] In any event, as a consequence the courts may (reasonably or not) take some of the political opprobrium for legislation that the Parliament would and should otherwise have to accept in full.

My second and related observation relates to the common law lineage of the principle of legality. The slow and incremental development of the principle has imbued it with the collective experience and wisdom of centuries of judicial decision-making.[82] This common law pedigree gives the principle of legality its strength, legitimacy and centrality in our system of constitutional government. Indeed it makes clear why this interpretive principle is now often characterised as 'quasi-constitutional'[83] for it 'reflect[s] fundamental assumptions about the relationship between citizen and state.'[84] Similarly important in my view is that it leaves it to Parliament *alone* to strike the (difficult) balance in legislation between the full range of competing rights and interests that inevitably arise in complex issues of social policy. In order to do so it has the procedures for meaningful collective deliberation, the ability to be proactive (not simply reactive to litigation) and, most importantly, has the time and resources to undertake parliamentary and departmental inquiries on these issues and produce detailed and expert accompanying reports. These institutional characteristics and strengths of Parliament make it far better equipped and capable of

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79 This has for example always been the course of action in response to a judicial declaration of rights incompatibility in the United Kingdom — see Francesca Klug and Keir Starmer, 'Standing Back From the *Human Rights Act*: How Effective is it Five Years On?' (2005) *Public Law* 716, 721.

80 Though Parliament cannot be legally forced to amend their legislation under a statutory bill of rights, it has been argued that as a political matter, Parliament has little choice but to amend its legislation to comply with a judicial rights assessment rather than engage in the 'institutional dialogue' said to be a hallmark and strength of statutory bills of rights: see James Allan, 'The Victorian *Charter of Human Rights and Responsibilities*: Exegesis and Criticism' (2006) 30 *Melbourne University Law Review* 906, 912–16.

81 I use here the language of bills of rights critics: see for example Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 *Yale Law Journal* 1346, 1353; James Allan, 'Portia, Bassanio or Dick the Butcher? Constraining Judges in the Twenty-First Century' (2006) 17 *King's College Law Journal* 1.

82 On the rich common law heritage of the principle of legality see Chief Justice James Spigelman, 'Principle of Legality and the Clear Statement Principle' (2005) 79 *Australian Law Journal* 769.

83 See generally Spigelman, above n 65.

84 Ibid 56.

undertaking this sort of complex polycentric decision-making than the courts in my view.[85]

However, the interpretive obligation in statutory rights charters may well compel the courts to do something very similar in most 'rights' cases. The point is not that such an interpretive process is undemocratic — it is Parliament after all that has placed this interpretive obligation on judges[86] — but that the courts lack the same institutional strengths of Parliament needed to address the variety of complex social policy issues that arise in assessing the compatibility or otherwise of legislation with a statutory bill of rights. The courts may well be on a hiding to nothing regarding their interpretive role and decision-making under a statutory rights charter. They lack the institutional resources needed to properly discharge this very difficult role and their rights assessments, no matter how legally sound and well-reasoned given the circumstances, will always be contested considering the intractable nature of most rights disputes. Again, the fact that Parliament can — if it chooses — have the final say on rights issues under statutory charters does not in my view change the problematic nature of this judicial role. The long term risk is that the authority of judicial decision-making more generally may be eroded if the public and the other arms of government consider its rights jurisprudence — a clearly important and high profile part of its judicial work — to be too close to the contested political realm and less worthy of respect as a consequence. It would be most unfortunate if the well-intentioned expectation that the protection of human rights would be better served by an increased judicial role resulted in the legitimacy of the judicial function being increasingly called into question.

My third observation is that the principle of legality — compared with the interpretive obligation under statutory rights charters — provides for the kind of 'institutional interaction'[87] between the courts and Parliament that may better reflect the established and accepted role of the judiciary under the Australian system of constitutional government. That role involves the final and conclusive determination of the legality of legislative and governmental action that is so critical to the maintenance of the rule of law. In doing so, the courts inevitably clash with the legitimate interests and priorities of the other arms of government. This tension is no bad thing. Indeed it is considered a desirable state of affairs in a constitutional democracy like Australia where the separation of powers holds sway.[88] On the other

85 See Tom Campbell, 'Human Rights Strategies: An Australian Alternative' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia* (2006) 319; Janet Hiebert, 'Parliament and Rights' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Human Rights: Instruments and Institutions* (2003) 231; Jeremy Waldron, 'Legislating with Integrity' (2003) 72 *Fordham Law Review* 373.

86 See generally Dan Meagher, 'The Democratic Credentials of Statutory Bills of Rights (and Those of a Self-Styled Majoritarian Democrat)' (2008) 19 *King's Law Journal* 27; *contra* James Allan, 'Meagher's Mischaracterisations of Majoritarianism: A Reply' (2009) 20 *King's Law Journal* 115.

87 I acknowledge here that the phrase 'institutional interaction' is taken from Leighton McDonald, 'Rights, 'Dialogue' and Democratic Objections to Judicial Review' (2004) 32 *Federal Law Review* 1, 26.

88 See Chief Justice Marilyn Warren, 'Unelected Does Not Equate with Undemocratic: Parliamentary Sovereignty and the Role of the Judiciary' (2008) 13(2) *Deakin Law Review* 1; M J C Vile, *Constitutionalism and the Separation of Powers* (1967) ch 1.

hand, the making of (rights) declarations in cases that have no legal effect on the litigating parties or the impugned law — which currently occurs under the charters operating in the ACT and Victoria — is not something that Australian courts traditionally do.[89] For example, under the Victorian *Charter* it is expressly provided that a judicial declaration of the rights incompatibility of legislation does not affect its validity. Moreover, in the event that a public authority infringes the *Charter* rights of a citizen, no damages may be awarded for that breach and no enforceable legal right or civil cause of action is created.[90]

This is not to suggest that courts ought never to be vested with new powers and functions. They, like all institutions of government, must evolve to meet new challenges in order to remain relevant.[91] But consider the High Court's classic statement of what constitutes 'judicial power':

> [It is] the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.[92]

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89 For example, the jurisdiction of the High Court and all other federal courts established under Chapter III of the *Australian Constitution* extends only to the hearing and determination of 'matters'. The High Court has said that 'there can be no matter …unless there is some immediate right, duty or liability to be established by the determination of the Court': *Re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ). On the other hand, State courts can be vested with and exercise both judicial and non-judicial powers so long as the latter do not compromise their independence and institutional integrity as a court: *Fardon v A-G (Qld)* (2004) 223 CLR 575. However, the following passage makes clear the essence of the judicial function in Australia: 'Judges do not set their own agenda. They deal with issues that litigants bring to them for decision. They cannot avoid questions that have to be answered to decide the cases that come to them; and they cannot answer questions that are not brought to them for decision. Australian courts do not give advisory opinions. They resolve concrete issues raised by disputing litigants': Chief Justice Murray Gleeson, *The Rule of Law and the Constitution* (2000) 99.

90 *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 36(5), 39. It is interesting to note that Justice Mark Weinberg of the Victorian Supreme Court has recently suggested that '[t]here is little point in having statutory protection for human rights unless there are consequences for a breach of its provisions': 'The Australian Justice System — What is Right and What is Wrong With it?' (Speech delivered at the National Judicial College of Australia Conference on the Australian Justice System in 2020, Sydney, 25 October 2008) 20 [87] <http://www.supremecourt.vic.gov.au/wps/wcm/connect/Supreme+Court/Find/Publications/SUPREME+-+Speeches+-+Justice+Weinberg> at 2 August 2009.

91 See for example the Federal Justice System Amendment (Efficiency Measures) Bill (No 1) 2008 (Cth) which will allow the Federal Court to refer complex technical questions that arise in a case to an expert referee who will undertake an inquiry and then provide a report to the Court. This mechanism is designed to facilitate quicker and less costly trials, especially of large commercial matters; see generally Chief Justice Murray Gleeson, 'The State of the Judicature' (Speech delivered at the 35th Australian Legal Convention, Sydney, 25 March 2007) <http://www.hcourt.gov.au/publications_05_2.html# MurrayGleeson> at 2 August 2009.

92 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ).

The essence of 'judicial power' is, then, the determination of legal controversies through binding and authoritative decisions. And in my view it is these core qualities that underpin the public's faith in and respect for Australian courts. So we must carefully think through the consequences of asking our courts to perform an interpretive function that in important respects is considerably removed from the heartland of judicial power. The notion of courts making rights declarations that are not binding and authoritative on the litigating parties may make perfect sense to those steeped in the theory and practise of statutory rights charters. But I'm not so sure the citizen as litigant will necessarily see the wisdom of having to expend considerable time and money to litigate a case where the judge is precluded from finally determining the rights controversy that arises and providing the appropriate remedy. I suspect that, like reputation, judicial legitimacy — one of the cornerstones of Australia's system of constitutional government — is hard won but too easily lost.

Finally, as noted, the judicial protection of rights through the principle of legality leaves to the arena of democratic politics the legal determination of rights issues. In this way the contentious rights issues of the day are publicly considered and debated by the citizenry and legislatively resolved through *their* democratic institutions. This constitutional framework may serve to strengthen our democratic institutions by promoting a political and legal culture where the people (not judges) are primarily responsible for settling rights disputes. Moreover, legislative decisions on rights are capable of being revisited. The democratic space remains open, which is entirely appropriate considering the intractable nature of most rights issues. It is true, as noted, that judicial rights decisions under statutory charters are not necessarily final either. But the courts remain an important and high profile forum (and therefore focus) of those seeking legal vindication of their rights; particularly when the other arms of government routinely defer to judicial rights decisions.[93] It is important, then, to fully consider the wisdom of establishing a set of institutional arrangements to protect and promote human rights that may have as an unintended consequence the potential to 'weaken the sinews of … democracy'[94] in Australia.

V CONCLUSION

This note has done three things. First, it outlined the events that occurred in the lead-up to World Youth Day 2008 that were litigated in *Evans v New South Wales* and the reasons for decision of the Full Federal Court in that regard. Second, it explored what the application of the principle of legality in *Evans* meant for the freedom of political communication protected by the *Constitution* and the protection of fundamental rights more generally. And finally, it made four observations about the principle of legality that led to the conclusion that the *judicial* role in the protection of rights in Australia may be best served through this interpretive principle rather than an interpretive obligation under a statutory charter of rights.

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93 This has for example been the experience so far in the UK — see Klug and Starmer, above n 79.

94 Peter Russell, 'Political Purposes of the *Canadian Charter of Rights and Freedoms*' (1983) 61 *Canadian Bar Review* 30, 52 quoted in McDonald, above n 87, 24; see generally Robert Nagel, 'American Judicial Review in Perspective' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia* (2006) 225.