"Religious Freedom After Ruddock"
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"Religious Free Speech After Ruddock: Implications for Blasphemy and Religious Vilification Laws"

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Questions about what can, and cannot, lawfully be said about religious topics have continued to be pressing issues in Australia over the last few decades. The Ruddock Report, the *Religious Freedom Review*, made recommendations about the abolition of blasphemy offences and, in the course of its discussion, touched on issues around "religious vilification" laws in Australia, a matter also noted in the official *Government Response* to the Report. This paper reviews the current law on "religious free speech" in Australia, and in that context discusses the recommendations of the Report and their likely implementation.

1. Speech and its power

For something that seems to be just a "puff of air" or "marks on a page", the human word is a powerful force for both good or ill. Consider these insights from the *Book of Proverbs* in the Hebrew Bible, using the "tongue" as a metaphor for speech:

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> There is one whose rash words are like sword thrusts, but the tongue of the wise brings healing. (12:18)
>
> A gentle tongue is a tree of life, but perverseness in it breaks the spirit. (15:4)
>
> Death and life are in the power of the tongue, and those who love it will eat its fruits. (18:21)
>
> With patience a ruler may be persuaded, and a soft tongue will break a bone. (25:15)

And in the New Testament, we find this serious warning in *James* 3:5:

> .. the tongue is a small member, yet it boasts of great things.
> How great a forest is set ablaze by such a small fire!

Speech, then, as we all know, can be a wonderful force for good, providing "healing" and encouragement and nourishment ("a tree of life".) It can be used to change the minds of politicians and rulers ("with patience"). But on the other hand, it can be a force for evil- like a "sword thrust", it may bring discouragement and despair ("breaks the spirit"), and it may set ablaze a "great forest" of bad ideas and actions in its hearers.

The law has always had to respond to the different blessings and dangers of speech. But it seems that in particular, in this age of human history where there is an amazing potential for speech from all of us, to be available all over the world through the internet, these challenges are magnified. On the one hand, we can see speech used to celebrate the victories of people who would not have been noticed, to bring education and learning to millions who would otherwise have struggled. On the other hand we see, in the most recently obvious example of "bad speech", the internet allows those who hate others who are seen as a threat, to magnify that hate by sharing it with others of a similar mind, and in the case of the Christchurch shooter, to broadcast acts of horrible violence over the world, with the aim (it seems) of producing further hate and anger.

We need to respond to the problems of speech in a way which is informed by the current law, and takes into account the crucial principles relating to speech which have informed our society for many years. In particular, the area where I suspect we will find increased calls for regulation in the near future is that of "religious speech"- viewed broadly as both speech *by* people with a formal religious commitment, and also speech *about* religion and its practitioners.[2] Before changes are mooted in a "knee-jerk" reaction, we need to be aware of the current law, the reasons for protection of free speech generally and religious free speech in particular, and the need for nuanced rather than "broad brush" laws which will target specific problems and not "catch up" legitimate comments.

The Ruddock Panel Report, *Religious Freedom Review: Report of the Expert Panel* (Commonwealth of Australia, May 2018) deals with "Vilification, Blasphemy and Social Hostility" in chapter 5. Its recommendations, and the government's announced response to those recommendations, will play a role in shaping the future of Australian law in this area.

[2] See "Leaked video shows Islamic leaders calling on Scott Morrison for protection against hate speech" (*TripleJ Hack*, 21 March 2019), https://www.abc.net.au/triplej/programs/hack/islamic-leaders-scott-morrison-hate-speech-christchurch/10925660 .

In Part 2 I survey the current law, noting the response of the Panel to different issues, in Part 3 I summarize the comments of the Panel overall, and in Part 4 I consider the government response and prospects for the future.

2. Religious free speech and its protection in Australia

The rights to free speech and religious freedom are two of the main rights protected by internationally recognised human rights instruments, and, not incidentally, in the First Amendment to the US Constitution.[3]

These two rights, of course, are not fundamentally opposed. As Ahdar & Leigh point out, for many religions speaking about their religious beliefs is a positive duty, and hence "freedom of religious speech" is an important subset of "free exercise of religion".

> Although religious speech is treated legally as a liberty, in proselytizing religions (Christianity especially) bearing witness to one's faith—speaking about it to others—is a religious duty, rather than a matter of choice.[4] It is not surprising then that early Christians responded to official requests to keep silent about their faith by arguing that they must obey God rather than men.[5]

Indeed, the freedom to speak to others about one's religion and even to respectfully seek to persuade others of the truth of that religion, has been clearly identified by the European Court of Human Rights as a vital part of the internationally protected right to freedom of religion. It has also been recognized as such in the High Court of Australia. Kirby J in the High Court, in *NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*,[6] offered clear support for the view put forward by the ECtHR in *Kokkinakis v Greece* (1993) 17 EHRR 397 at 418, where that Court affirmed that religious freedom includes the freedom:

> T]o manifest one's religion … not only exercisable in community with others, 'in public' and within the circle of those whose faith one shares, but can also be asserted 'alone' and 'in private'; furthermore, it includes in principle the right to try to convince one's neighbour … through 'teaching', failing which … 'freedom to change [one's] religion or belief' … would be likely to remain a dead-letter.

Still, in some circumstances the rights to free speech and freedom of religion may conflict. Free exercise of religious speech by some persons may, if it involves criticism of religious beliefs held by another, generate offence or annoyance or anger. In addition, such speech may generate annoyance, offence or in some cases more serious harm to other members of society whose interests are protected by discrimination laws in ways not consistent with the espoused religious doctrine.

Where should the law draw the limits on speech here?[7]

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[3] See articles 18 (freedom of religion) and 19 (freedom of speech) of the United Nations *Declaration of Human Rights*, and the *International Convenant on Civil and Political Rights* (ICCPR) (same article numbers).

[4] *Matthew* 28:19. See R Minnerath, 'Church–State Relations: Religious Freedom and "Proselytism"' (1998) 50 *Ecumenical Review* 430. For discussion of proselytism in several religious traditions, including Judaism, Islam and Christianity see: J Witte Jr and R C Martin (eds), *Sharing the Book: Religious Perspectives on the Rights and Wrongs of Proselytism* (New York, 1999); P Sigmund (ed), *Religious Freedom and Evangelization in Latin America: The Challenge of Religious Pluralism* (New York, 1999).

[5] R Ahdar & I Leigh, *Religious Freedom in the Liberal State* (2nd ed; Oxford: OUP, 2013), at 427.

[6] [2005] HCA 29; (2005) 216 ALR 1; (2005) 79 ALJR 1142, at [121].

[7] For the view that art 18 should usually be preferred as a *lex specialis* where there is an issue of conflict with other rights, see H. Victor Condé "Human rights and the protection of religious expression: Manifestation of

We will consider these issues under three broad headings- the law of blasphemy, perhaps the "classic" form of regulation of religious speech; more recent laws governing "religious vilification"; and issues raised by religious speech on matters concerning sexuality, also characterized in some cases as "vilification". We will also briefly look some other recent cases raising questions at the intersection of freedom of religion and freedom of speech, such as the issues around "abortion buffer zones".

(a) Blasphemy

Blasphemy has been a crime at statute and common law for many years. Mortensen has an excellent review of its early development;[8] he cites what is generally acknowledged as the first common law decision on the matter as *R v Taylor*.[9] Lord Chief Justice Hale commented, in a case involving someone who described Christ as a bastard and a "whoremaster", and religion as a "cheat":

> ..to say, religion is a cheat, is to dissolve all those obligations whereby the civil societies are preserved, and [Lord Hale continued] Christianity is parcel of the laws of England; and therefore to reproach the Christian religion is to speak in subversion of the law.[10]

The early understanding of blasphemy, in a society where belief in God was almost universal, was that it was a crime because it attacked and impugned the honour of God. (In some discussions this was also linked with the possibility of divine retribution for such comments, although it seems unlikely that this was an accurate representation of Biblical Christianity, at least.)

However, with the comments in *Taylor* above we can see a shift taking place, so that blasphemy is seen, not so much as an attack upon God (who can presumably defend himself without the aid of human laws!) but as speech which disturbs the functioning of civil society, either indirectly (by making it less likely that people will behave morally) or directly (by generating violent disputes and reactions.)

Gradually the emphasis in the prosecutions changed to focus on this "direct" impact on others, and it became accepted that a calm and rational debate about the truth or not of Christian doctrines could not be prosecuted as blasphemy. In *R v Bradlaugh*[11] Coleridge LCJ said that the crime required a "wilful intention to pervert, insult and mislead others" by means of "contumelious abuse applied to sacred objects". Prosecutions became very rare.

However, there was perhaps a surprising successful prosecution in *R v Lemon, R v Gay News*,[12] in which an explicit poem describing a centurion's erotic fantasies about the body of Jesus was the subject of the prosecution (instigated as a private prosecution by Mrs Mary Whitehouse, a famous "morals" campaigner in the UK.) Convictions were entered of the magazine and its editor, and the House of Lords upheld these. It was clarified that the issue was whether a publication was likely to arouse shock and resentment among believing Christians, and to be published in way designed to produce such effect. The *mens rea* of the offence, however, was not an intention to shock but simply the intention to publish material that, on objective grounds, was likely to shock or offend.

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religion as Lex Specialis of freedom of expression" in *Religion, pluralism, and reconciling difference*, edited by W. Cole Durham, Jr., Donlu Thayer (New York, NY : Routledge, 2019) 21-46.

[8] Reid Mortensen, "Blasphemy in a secular state: A Pardonable sin?", (1994) 17/2 *UNSW Law Journal* 409-31.

[9] (1677) 1 Vent 293.

[10] Quoted in Mortensen at 411. There had been other statutes punishing blasphemy previously, but this seems to have been one of the first decisions that it was a crime at common law.

[11] (1883) 15 Cox CC 217.

[12] [1979] AC 617.

The anomalies of the law became very apparent when there was an attempted blasphemy prosecution in relation to a publication that was very offensive to some Muslims, Salman Rushdie's *Satanic Verses*. The prosecution in *R v Choudhury*[13] failed, as it was held that the law of blasphemy effectively only protected the doctrines of Christianity as taught by the established church, the Church of England.

Despite the law being focused only on Christianity, the European Court of Human Rights in *Wingrove v UK*[14] held that it was a valid law, not in breach of the European Convention on Human Rights, since it dealt with the manner of expression rather than being purely based on content, and was within the "margin of appreciation" enjoyed by EU states. This view, that the law was still a part of the law of England, was upheld in *Green v The City of Westminster Magistrates' Court*.[15] In this case a blasphemy prosecution was launched in relation to a theatre production called *Jerry Springer: The Opera*, which while attacking the "genre" of the live TV talk show, included a number of demeaning portrayals of God, Jesus and Mary. The court held that, while the offence was still in place, in the circumstances the producers of the show could rely on both a statutory defence covering theatre productions, and also the fact that the magistrate ruled that the production was not sufficiently "offensive".

It seems partly in response to this attempted prosecution, and of course to a series of academic and political critiques over many years, that the UK took the occasion of a generally unrelated bill to repeal the law. Sandberg and Doe describe the background.[16] In the event s 79 of the *Criminal Justice and Immigration Act* 2008 (UK) simply states:

> The offences of blasphemy and blasphemous libel under the common law of England and Wales are abolished.

In Australia, the situation is more complicated. Criminal law is not uniform throughout the country and is mostly left to the States to determine. It seems fairly clear that the common law criminal offence of blasphemy is still in force in some jurisdictions- the Ruddock Report at para 1-358 identified NSW, Vic, SA and the NT as the relevant places. The Federal Court in *Ogle v Strickland* (1987) 71 ALR 41 so assumed.[17] It certainly seems as though the Parliament of NSW believed it was so in 1900, because we have an adjustment, but not an abolition, of the offence in s 574 of the *Crimes Act* 1900 (NSW):

> **574 Prosecutions for blasphemy**
> No person shall be liable to prosecution in respect of any publication by him or her orally, or otherwise, of words or matter charged as blasphemous, where the same is by way of argument, or statement, and not for the purpose of scoffing or reviling, nor of violating public decency, nor in any manner tending to a breach of the peace.

The adjustment of the law seems to be in line with the common law as it had developed in *Bradlaugh*, and means that a prosecution for blasphemy must still show that it is either (or perhaps all of?) for the purposes of scoffing, violating public decency, and/or tending to a breach of the peace. Nevertheless, if the common law is still in place, presumably it will also be necessary to show that the words or matter attack the doctrines of the Church of England (or perhaps the Anglican Church of Australia?). The prohibition of "establishment" under s 116 of the Constitution of course does not prevent the State of NSW from having an offence limited in this way, that provision only binding the Commonwealth Parliament.

[13] [1990] 3 WLR 986.
[14] (1997) 24 EHRR 1.
[15] [2007] EWHC (Admin) 2785.
[16] Sandberg, R & Doe, N "The Strange Death of Blasphemy" (2008) 71 *Modern Law Review* 971.
[17] See Mortensen at 416 ff for this general discussion.

Of course, there have been recommendations that the law of blasphemy be repealed in NSW.[18] Indeed, not only law reform bodies but in recent years representatives of the major churches have urged the repeal of the law of blasphemy.[19] The Ruddock Report also so recommends, at para 1-367:

> Blasphemy laws are out of step with a modern, tolerant, multicultural society. Religion should be subject to the same questioning and criticism as other areas of public life.

The Report cites mainly general concerns about the need to freely debate religious issues. But others have also expressed a concern that, if not abolished, there will be growing pressure to apply the law of blasphemy in ways that go well beyond the way it has (mostly not!) been applied in the West over the last century or so, but to do so in relation to (ie for the purposes of protecting) Islam. It has to be said that the law of blasphemy in some Muslim countries has been misused to suppress freedom of religious speech and in some cases to simply target minority groups.[20] Abolition by the various Australian jurisdictions where it is still in force seems a good idea.

(b) Religious anti-vilification laws

While blasphemy laws are no longer popular in the West, there has been a growing trend to introduce "anti-vilification" laws, in an attempt to deal with the problem of "hate speech" directed at others on the basis of religion.

I wrote a paper on this area a few years ago, comparing these laws with defamation laws and suggesting that some consideration should be given to making sure that if these laws are enacted, they contain robust protection for freedom of speech.[21] A later paper updated those views (and I have to say I have changed my mind on some of the issues since writing the earlier paper).[22]

Perhaps one fairly extreme example will illustrate an aspect of the harm being addressed. A report from 5 July 2013 in the UK entitled "Muslim television channel fined after preacher of hate incited murder live on air" records that on a Muslim TV channel a presenter said the following:

> "The matter of insulting the prophet does not fall in the category of terrorism.
> "Those who cannot kill such men have no faith.
> "It is your duty, the duty of those who recite the holy verse, to kill those who insult Prophet Mohammed.
> "Under the guidance from Islamic texts it is evident that if a Muslim apostatises, then it is not right to wait for the authorised courts; anyone may kill him.

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[18] See NSW Law Reform Commission, *Blasphemy* [1994] NSWLRC 74; and note other reports in Australia and the UK referred to by Mortensen at 409 nn 2,3.
[19] See http://geoconger.wordpress.com/2009/02/22/australian-church-calls-for-blasphemy-abolition-cen-22009/ .
[20] See Hayee, B "Blasphemy Laws and Pakistan's Human Right Obligations" (2012) 14 *Uni of Notre Dame Australia Law Rev* 25-53. In more recent days see the international concerns about the blasphemy conviction of the lady known as Asia Bibi, now overturned (twice!) by the Pakistan Supreme Court, but who seems still not to have been allowed to depart the country (as will be essential for her safety).
[21] Foster Neil "Defamation and Vilification: Rights to Reputation, Free Speech and Freedom of Religion at Common Law and under Human Rights Laws" *Freedom of Religion under Bills of Rights*. Ed. Babie, P & Rochow, N. (Adelaide: University of Adelaide Press, 2012) at 63-85.
[22] Foster, Neil "Anti-Vilification Laws and Freedom of Religion in Australia - Is Defamation Enough?" Paper presented at *Justice, Mercy and Conviction: Perspectives on Law, Religion and Ethics Conference*, University of Adelaide Law School; 7-9 June, 2013; available at SSRN: http://ssrn.com/abstract=2311891 or http://dx.doi.org/10.2139/ssrn.2311891 .

> "An apostate deserves to be killed and any man may kill him." [23]

This provides a pretty good example of "hate speech" directed, not perhaps to all those of a non-Muslim faith, but certainly to anyone who has decided to change their faith from Islam to another faith (that is clearly what is meant by an "apostate"). That is pretty clearly hate speech on religious grounds.[24]

(A brief excursus: the phrase "hate speech" will be used in this paper. But it is a deeply problematic expression. As I use it here, I mean "speech designed to incite hatred against, and violence towards, people of a defined group". The phrase does not in itself refer to any emotion held by the utterer, but to the effect the speech is designed to produce in the hearers. Nor do I think it is at all helpful to use "hate speech" to refer to criticism of the *doctrines* of a religion, as opposed to the adherents. Some of these points will become clearer as the paper goes on. But I remain concerned that the generic category "hate speech" is far too broad to cover all of the different speech acts that are often lumped together.)

Of course, there are examples of hate speech directed *against* Muslims, which are equally wrong. Should it be acceptable, for example, for a public street to be plastered with posters covered with comments such as "Muslims are all terrorists"?[25] For a media commentator to suggest that "gang rape was a rite of passage for Muslim males in France"?[26] The "manifesto" written by the Christchurch shooter also attacked Muslims, though interestingly not on "religious" grounds, but from a "white supremacy" perspective.[27]

Other examples can be imagined: "all Catholic priests are paedophiles", for example. But the problem arises when asking how one draws the line between these comments, and a remark merely made in criticism of a religion's beliefs, such as "Jesus Christ was a fraud"?

(i) Overview of current Australian law on religious vilification

There are a number of important overviews of the developing law of 'religious vilification' or 'religious hate speech'.[28] Gelber and Stone, for example, offer this definition of the type of law at issue here, sometimes referred to as "hate speech":

> Hate speech is speech or expression which is capable of instilling or inciting hatred of, or prejudice towards, a person or group of people on a specified ground …[29]

As will become apparent, I think that the reference to inciting "prejudice" may be setting the bar too low here for regulation of speech. In particular **religious** vilification laws aim to prohibit certain types of speech, which attack others based on their religion.

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[23] See http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/10162099/Muslim-television-channel-fined-after-preacher-of-hate-incited-murder-live-on-air.html .

[24] And of course it goes without saying that recent announcements by "Islamic State" militants about the lawfulness of killing Christians and others would fall into this category as well.

[25] See *Norwood v DPP* [2003] EWHC 1564, a prosecution for "threatening, abusive or insulting" language based on a poster stating "Islam out of Britain" and "Protect the British people" against a background picture of the destruction of the World Trade Centre in New York.

[26] See D Thampapillai, "Hate speech laws should protect Muslims", (23 Aug 2011), comment on *The Drum* blog, at http://www.abc.net.au/unleashed/2851876.html (accessed 9 Oct 2013).

[27] See Greg Sheridan, "A manifesto for a dark age" (*The Australian*, 23 March 2019) https://www.theaustralian.com.au/news/inquirer/a-manifesto-for-a-dark-age/news-story/355ac7bde16bdb93793ea7f1a2c1a814 .

[28] K Gelber & A Stone (eds), *Hate Speech and Freedom of Speech in Australia* (Sydney: Federation Press, 2007), esp ch 8, Lawrence McNamara, "Salvation and the State: Religious Vilification Laws and Religious Speech", at 145-168.

[29] Gelber & Stone at xiii.

In Australia, four jurisdictions have introduced such laws: Queensland, Tasmania, Victoria and the ACT.[30] Perhaps the most prominent example is the Victorian provision, s 8 of the *Racial and Religious Tolerance Act* 2001 (Vic):

> **Religious vilification unlawful**
> 8(1) A person must not, on the ground of the religious belief or activity of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.
> Note: **Engage in conduct** includes use of the internet or e-mail to publish or transmit statements or other material.
> (2) For the purposes of subsection (1), conduct-
> (a) may be constituted by a single occasion or by a number of occasions over a period of time; and
> (b) may occur in or outside Victoria.

There is an important 'defence' provision in the Victorian legislation:

> **11. Exceptions-public conduct**
> (1) A person does not contravene section 7 or 8 if the person establishes that the person's conduct was engaged in reasonably and in good faith-
> (a) in the performance, exhibition or distribution of an artistic work; or
> (b) in the course of any statement, publication, discussion or debate made or held, or any other conduct engaged in, for-
> (i) any genuine academic, artistic, religious or scientific purpose; or
> (ii) any purpose that is in the public interest; or
> (c) in making or publishing a fair and accurate report of any event or matter of public interest.
> (2) For the purpose of subsection (1)(b)(i), a religious purpose includes, but is not limited to, conveying or teaching a religion or proselytising.[31]

In *Deen v Lamb*[32] publication of a pamphlet inferring that all Muslims were obliged to disobey the law of Australia, which would otherwise have contravened the section, was said to have been allowable under the exception in s 124A(2)(c) of the Queensland Act as it was done 'in good faith' for political purposes.

The most controversial application of these laws so far, however, was in the litigation involving the 'Catch the Fire' organisation.[33] McNamara, Ahdar, Blake and Parkinson all offer cogent critiques of the way that the original decision finding the organisation guilty of vilification was made, and comment on the overturning of the decision by the Victorian Court of Appeal.[34] A brief summary is appropriate.

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30 See for an overview at the time it was written, L McNamara, "Salvation and the State: Religious Vilification Laws and Religious Speech", in Gelber & Stone (eds) 145-168, at 146. The provisions then in force were the *Anti-Discrimination Act* 1991 (Qld) s 124A, the *Anti-Discrimination Act* 1998 (Tas) ss 19 & 55, and s 8 of the *Racial and Religious Tolerance Act* 2001 (Vic). We will also note below the "anti-offence" provision contained in s 17 of the Tasmanian law. Since that time the ACT has introduced (in 2016) s 67A(1)(f) of the *Discrimination Act* 1991 (ACT).

31 Sub-section (2) was added to the Act in 2006 partly in response to the *Catch the Fire* litigation discussed below.

32 [2001] QADT 20.

33 See also the other main case decided under the Victorian provisions, *Fletcher v Salvation Army Australia* [2005] VCAT 1523, discussed in Blake, n 34 below, at 396-397.

34 See McNamara, above n 30 ; R T Ahdar, "Religious Vilification: Confused Policy, Unsound Principle and Unfortunate Law" (2007) 26 *U Q Law Jnl* 293-316; G Blake, "Promoting religious tolerance in a multifaith society: Religious vilification legislation in Australia and the UK" (2007) 81 *ALJ* 386-405; P Parkinson, "Religious vilification, anti-discrimination laws and religious minorities in Australia: The freedom to be different" (2007) 81 *ALJ* 954-966.

The original decision was *Islamic Council of Victoria v Catch the Fire Ministries Inc*.[35] In short, a Christian religious group advertised to a Christian audience that it was proposing to run a seminar that would critique Islam and help its listeners understand how to reach out to Muslims. Representatives of the Islamic Council of Victoria knew the nature of the seminar, chose to attend, and then took action against the group on the basis of statements that were made critiquing Islam. While some untrue and unhelpful statements may have been made in the course of the lengthy seminar (and in some related material published on a website), most of the comments made were sourced from multiple Islamic authors.

Initially, the tribunal found the pastors involved to be guilty of vilification and ordered them to publish retractions. On appeal the Victorian Court of Appeal in *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc*[36] overturned the Tribunal's findings of vilification. The matter was referred back to the Tribunal, but the parties entered into a settlement of the proceedings that affirmed their mutual right to 'criticise the religious beliefs of another, in a free, open and democratic society'.[37]

Nettle JA, as his Honour then was, in the Court of Appeal, noted that the Tribunal had failed to distinguish between criticisms of the *doctrines* of Islam and 'incitement to hatred' of *persons*:

> [15] … s.8 does not prohibit statements about religious beliefs per se or even statements which are critical or destructive of religious beliefs. Nor does it prohibit statements concerning the religious beliefs of a person or group of persons simply because they may offend or insult the person or group of persons. The proscription is limited to that which incites hatred or other relevant emotion and s.8 must be applied so as to give it that effect.[38]

While to some extent the decision of the Court of Appeal draws an appropriate line, the fact remains that the Victorian legislation seems to have been used in a way unintended by the framers of the legislation.[39] In general it seems far preferable for debate about religion to be "untrammelled" by fear of legal intervention.

The UK has also introduced legislation prohibiting religious vilification. There, the *Racial and Religious Hatred Act* 2006 (UK) added Part 3A to the *Public Order Act* 1986 (headed 'Hatred against persons on religious grounds'), which prohibits what in Australia would be called "religious vilification". Consistently with the comments of Nettle JA above, the UK prohibition on stirring up 'religious hatred' can only be breached by acts that stir up hatred against *believers*, rather than by attacks on *beliefs*.[40]

Addison, in a very useful study of the UK law, sums up the history of these provisions. He notes that the offences apply to words that are 'threatening' (not simply insulting or abusive, as commentators had suggested about a previous version of the legislation), and that the offender has to 'intend' to stir up religious hatred. Interestingly, he notes that the Government's original proposals to make the offences wider were partly defeated in the House of Lords because of concerns that the UK law would end up like the law in Victoria that gave rise to the *Catch the Fire* litigation.[41]

In addition, there is a general provision protecting freedom of speech in s 29J of the *Public Order Act* 1986:

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[35] [2004] VCAT 2510.
[36] [2006] VSCA 284.
[37] See, for example, the summary in Ahdar at 305.
[38] [2006] VSCA 284 at [15].
[39] And Ahdar, in his perceptive analysis of the judgments in the Court of Appeal, points out how many uncertainties still remain, due not least to failure to agree on some issues among the judges in the Court of Appeal.
[40] *Public Order Act* 1986 (UK) ss 29A, 29B.
[41] Addison, p 140.

> **29J Protection of freedom of expression**
> Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.

This is a vital safeguard if this sort of legislation is to be introduced. It recognises among other things the importance of freedom of speech and freedom of religion, and the right noted under Art 18 of the Universal Declaration of Human Rights (UDHR), 'freedom to change his religion or belief' (as freedom to change clearly involves the freedom to hear the arguments for change.)

One interesting set of religious vilification proceedings[42] involved a dispute between two odd sets of parties. In *Ordo Templi Orientis v Legg*[43] a complaint was made under the same Victorian legislation noted above by members of a group who claimed that they followed a religion called "Thelema". This group had been targeted by comments made on a website run by the respondents Mr Legg and Ms Devine, alleging that the organisation was a "paedophile group" and that it kidnapped, tortured and killed children, impliedly in pursuance of its religious beliefs (which included satanic beliefs).

An unfortunate feature of this case was that, in the initial decision of DP Coghlan that religious vilification was established, there was no appearance at the trial from the respondents. (It seems that the respondents were part of a group that saw vast conspiracies in many places, and so perhaps thought they would get no justice in any event from the court.) In their absence, the Deputy President found that there had been vilification and ordered the remarks removed from the website.

This order was not obeyed, and in later contempt proceedings, *Ordo Templi Orientis Inc v Devine*[44] Judge Harbison of the Tribunal found that the respondents were in contempt and order them to serve 9 months' imprisonment. Features of the hearing included the fact that the respondents had to be arrested and brought to the court for the first day of hearing; they conceded that they were in contempt and would continue to disobey the order; they were released overnight after the first day and did not appear to the second day. Later press reports revealed that they were then re-arrested in Coffs Harbour in January 2008 and returned to Victoria to begin their sentence.[45] However, having now accepted legal representation, it seems that they decided to take the advice of their solicitors, and on 28 February 2008 they formally apologised to the Tribunal and were released.[46] They continued to pursue a formal appeal against their conviction, which in the end was denied, the court holding that the Tribunal had followed appropriate procedures and that they were well aware of the consequences of their refusal to comply.[47]

The case provides a very good example of the difficulties with religious vilification legislation. That it was not the subject of more high-profile media attention no doubt relates to the fact that neither the complainants nor the respondents were members of a mainstream major

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[42] Noted briefly in M Thornton & T Luker, "The Spectral Ground: Religious Belief Discrimination" (2009) 9 *Macquarie Law Journal* 71-91, at 90.
[43] [2007] VCAT 1484.
[44] [2007] VCAT 2470.
[45] http://www.theage.com.au/news/national/couple-jailed-for-contempt-in-vilification-case/2008/02/20/1203467183354.html .
[46] http://www.theage.com.au/news/national/apology-frees-jailed-couple/2008/02/28/1203788539310.html .
[47] *Devine & Anor v Victorian Civil and Administrative Tribunal & Ors* [2008] VSC 410. For contemporary comment on the human rights issues see http://charterblog.wordpress.com/2008/10/12/the-rights-of-difficult-defendants/ .

religion. But it may be queried whether the respondents ought to have been put in jail for their behaviour here. I should make it clear that I had no particular view about "Ordo Templi Orientis" before coming across this case; but it seems that there are some serious questions raised here. The organisation, and the religion "Thelema", seem to have originated in the teachings of notorious "Satanist" Aleister Crowley.[48] I make no comment as to whether there was any truth to the comments on the offending website, but I want to explore the possibility that there may have been.

Suppose that there was indeed a religion that blatantly encouraged its followers to abuse children, and which had amongst its adherents a number of "powerful" and respectable persons who were usually able to keep rumours of this behaviour out of the mainstream media. It would then surely be in the public interest that these facts be ventilated and tested by appropriate authorities. Yet if the remarks making these allegations assert that these are characteristics of a "religious" group, it seems that the decision in this case means that such comments would be stifled.[49]

Note that one of the problems here is one that has been identified previously: that there is nothing resembling a defence of "truth" under the Victorian legislation (nor indeed in any other such Australian legislation.)[50] Might it not be the case that some religious *doctrines* in fact **warrant** expression of "hatred… serious contempt or revulsion or severe ridicule"? In some circumstances one could separate a critique of doctrine from a critique of those holding the doctrine- but if a religious doctrine officially supported child abuse, then it would seem that any association of persons with that religion would lead to contempt of the persons.

One could ask, for example, why the representatives of "Thelema" did not take a defamation action against the respondents? For example, part of statement of claim read: "by reason of the breach, Mr Bottrill and Mr Gray have each been held up to serious contempt, revulsion and ridicule, and each has been severely injured in his reputation and feelings, and has thereby suffered and will continue to suffer loss and damage."[51] If indeed these persons were sufficiently "identified" as belonging to the group to suffer this harm to their "reputation",[52] then clearly a defamation action would have been available. Yet in such an action the respondents would have had an opportunity to make out the truth of their claims as a defence; whereas in this religious vilification claim no such issue arose.[53]

In fact, the "Ordo Templi Orientis" ("OTO") has continued to feature in litigation based on "religious vilification" laws.[54] Two separate hearings under the ACT law have addressed issues under s 67A of the *Discrimination Act* 1991 (ACT). Both involved a Mr Bottrill, an ACT resident who was closely connected with OTO, and comments made about paedophilia and other wrongs committed by the OTO, made on a blog by Mr John Sunol, a resident of NSW.

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[48] For some background to "Thelema" from what seems to be a very sympathetic viewpoint, see http://en.wikipedia.org/wiki/Thelema . (I don't of course regard Wikipedia as an academically reliable source for independent research- but it does at least provide evidence of the views of a segment of the public who are interested in the topic!)

[49] One may also recall comments made from time to time about Scientology, which in recent years has been accused of a number of improprieties by Senator Nick Xenophon, who due to his position has been able to do so under absolute Parliamentary privilege. But would a newspaper article reporting these matters be able to be suppressed under religious vilification laws?

[50] See Foster (2012), n 21, at 79.

[51] At para [26] of the initial judgment, [2007] VCAT 1484.

[52] For the requirement of "identification", see Foster (2012), at 75-77.

[53] Thornton & Luker, above n 42, comment on this at 90: "There is no interrogation whatsoever of the religious beliefs associated with the *Ordo Templi Orientis* and its lawfulness is assumed."

[54] There have also been some other proceedings. *Bottrill v Cristian (Civil Dispute)* [2016] ACAT 7 (10 February 2016) was a defamation action where Mr Bottrill succeeded in being awarded damages for similar comments on another website. But I will focus here on the vilification claim.

In *Bottrill v Sunol (Discrimination) ("Bottrill No 1")*[55] the ACT Tribunal had to rule on the issue as to whether the ACT legislation was intended to penalise communications made online which had been posted in another jurisdiction. The Act itself was not clear on the point, but in the end the Tribunal member ruled that it was intended to have extra-territorial operation, at least where the downloading of a comment had taken place in the ACT. This question of the extra-territorial operation of religious vilification laws is very important, as we will see below.

On this issue, the Tribunal held:

> [76] It follows that, in my opinion, given that the clear purpose of the *Discrimination Act* is to protect ACT residents with the attributes identified, section 67A must be construed to proscribe, among other things, a non-private act that vilifies an ACT resident where the vilifying material is read in the ACT or is available to be read here. There is thus a clear intention to operate to proscribe conduct that vilifies an ACT resident even though the non-private act of the respondent is in NSW, so long as the material is read or arguably is capable of being read, in the ACT.

The other issue in this first case was whether there was any bar on the Tribunal hearing the proceedings, because the Tribunal was not a federal court. We will see below that this feature of vilification proceedings between residents of different States has led to a decision of the High Court that such matters may not be heard in bodies that are not judicial bodies. But in this *Bottrill* case, the Tribunal ruled that the relevant constitutional prohibition did not apply in actions between a resident of a Territory and a resident of a State.[56]

In the later decision of *Bottrill v Sunol (Discrimination) ("Bottrill No 2")*[57] the substantive issues of religious vilification were decided. Both parties were self-represented.[58] It was noted that very serious allegations were made against OTO: "the writer is conveying to his readers that the applicant as a member of the OTO is a person who engages in criminal acts such as murder, rape and child molestation" (at [6]).

The Tribunal accepted the evidence that had been provided in a previous case from an academic, Professor Ezzy.[59] The evidence was broadly to the effect that reference to "child sacrifice" and sexual activity in the writings of Aleister Crowley were intended to be "metaphorical" and did not represent an encouragement to these activities. The Tribunal member did comment at [54] that: "If the crimes attributed to the applicant and OTO in the blog complained of were true, it would be likely that it would not be regarded as a religion". With respect, this would seem to be a problematic approach. Better to accept that even a "religion" may teach horrific doctrines, and then apply the law to that religion. Under the ACT s 67A(2)(c), for example (as noted in para [55]), what would otherwise be unlawful vilification is lawful if done "for other purposes in the public interest". In this litigation, however, the Tribunal accepted the evidence that OTO did not engage in the alleged practices, and found Mr Sunol liable for vilification, ordering him to remove the comments from his blog.

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[55] [2017] ACAT 81 (9 October 2017).
[56] See *Bottrill No 1*, above n 55 at [61]-[63].
[57] [2018] ACAT 21 (13 March 2018).
[58] It has to be noted, however, that while on the evidence Mr Bottrill seems a well-educated and articulate person, Mr Sunol seems to have a number of mental health issues and is bankrupt. He may have benefited from legal representation.
[59] See [38], quoting the previous case: "Professor Douglas Ezzy, Professor of Sociology and previously Head of the School of Sociology and Social Work at the University of Tasmania. He is the current president of the Australian Association for the Study of Religion, which is the main academic association for the study of religion in Australia. He is also a member of the Contemporary Pagan Studies Group, the American Academy of Religion and on their steering committee and the editor of the Journal for the Academic Study of Religion, the main Australian based journal that publishes religious studies and academic work."

Another recent vilification case, while not on the facts actionable as "religious vilification", illustrates some of the issues raised by these laws. The action in in *Ekermawi v Nine Network Australia Pty Limited* [2019] NSWCATAD 29 (15 Feb 2019), based on comments about "Muslims" in general, failed because NSW law (unlike some other jurisdictions) contains no civil prohibition on "religious vilification".[60]

Ms Kruger, the commentator in question, had put the question whether there was "a correlation between the number of people who… are Muslim in a country and the number of terrorist attacks". While ruling that this was not actionable as "racial vilification" under s 20C of the *Anti-Discrimination Act* 1977 (NSW) (because Islam is not a race), the tribunal members went on to comment on whether, if there had been a law against religious vilification, this would have been unlawful. This involved asking: if Islam had been a "race", were Ms Kruger's comments such as to "incite hatred towards, serious contempt for, or severe ridicule of" Muslims? The Tribunal noted at [124] that:

> Ms Kruger's tone was calm and measured. She did use the term "fanatics" and made it clear she did not think every Muslim in Australia or overseas was a fanatic. She did say some of her best friends were peace-loving Muslims.

However, despite the generally calm tone of the comments, the Tribunal concluded that the implications of what was said were that some members of the community were a threat. They noted at [126] that:

> some ordinary members of the Australian population already harbour feelings of hatred towards, or serious contempt for, Australian Muslims as a whole by reason of the assumption that they are potential terrorists or sympathisers of terrorism.

They said at [127] that "such feelings or emotions would be encouraged or incited amongst ordinary members of the Australian population by Ms Kruger's remarks". Hence, they concluded at [128] that Ms Kruger's comments "would likely encourage hatred towards, or serious contempt for, Australian Muslims by ordinary members of the Australian population".

The second paragraph of s 20C contains "exceptions to the general prohibition contained in s.20C(1)" – para [129]. The one given most consideration was the exception contained in para 20C(2), allowing discussion of matters of "public interest", but which is qualified by the requirement that the statement be made "reasonably and in good faith".

The Tribunal conceded that the matter was one of public interest, and that Ms Kruger was not shown to have borne particular malice or ill-will to the Muslim community, and hence that her statement was in "good faith"- see [147]. But it found that it was not "reasonable". They said that her comments that the sheer size of the Muslim population alone created a threat, were not logical. They said at [152]:

> In our view, Ms Kruger could have expressed her comments in a more measured manner to avoid a finding of vilification. For example, she could have referred to the need for Australia to engage in greater security checking of people wishing to migrate to Australia who may happen to be Muslims and the need to prevent a drift towards radicalisation amongst Muslims currently in Australia, rather than simply stating that 500,000 Muslims represents an unacceptable safety risk which justifies stopping all Muslim migration.

In other words, because Ms Kruger's remarks were not, as the Tribunal saw it, correct or soundly reasoned, they were "unreasonable". Ms Kruger's words "amounted to a

[60] For a more detailed analysis, see N Foster "Religious "vilification" not unlawful in NSW" (Feb 15, 2019) https://lawandreligionaustralia.blog/2019/02/15/religious-vilification-not-unlawful-in-nsw/ .

stereotypical attack on all Muslims in Australia". They made it clear that they would have found against her and Channel Nine were it not for the fact that Islam was not a "race".

This reasoning is a matter for some concern. Even accepting that a statement that a number of members of the Muslim community are guilty of terrorism is sufficient to incite hatred or serious contempt, it seems that the Tribunal's approach to the word "reasonable" in the exception provision in para 20C(2)(c) is misguided. (And worthy of note, since similar provisions are present in other laws around Australia which do prohibit religious vilification.)

The value of free speech is such an important consideration, it seems hard to imagine that in providing this broad exception Parliament intended courts and tribunals to make their own determination as to whether a comment was "correct", before it could be held to be one made "reasonably and in good faith". For one thing, the word "reasonably" in that expression is an *adverb*, applying to the "doing" of the act, not an *adjective* qualifying the content of what was said.

The Tribunal itself cited important earlier authority on the point at [145]:

> In *Sunol v Collier,* Bathurst CJ at [41] said that for a public act to be reasonable within the meaning of this exception it must bear a **rational relationship to the protected activity and not be disproportionate to what is necessary to carry it out**. To be done in good faith, the public act must be engaged in bona fide and for the protected purpose. His Honour added that reasonableness is to be assessed objectively (at [35]); while good faith involves no more than a broad subjective assessment of the defendant's intentions (at [37]). (emphasis added)

Again, the statement that what has been done must have a "rational relationship" to the protected activity, seems to point merely to the need to be able to identify an *aim* that the speaker was trying to achieve, and that what was said was directed at that aim, rather than being completely random or gratuitously insulting. Where it was conceded that what was underway was a discussion on a topic of broad public interest (terrorism), then a comment that a group of persons in the community were creating a risk was, it seems to me, rationally related to discussion of that topic.

I stress that the comment ***need not have been correct***. Indeed, if it is relevant, my own view is that a policy of restricting Muslim immigration to Australia would be a bad one and should not be implemented. But it seems quite clear that, agree with them or not, Ms Kruger's remarks were a good faith attempt to discuss that issue in a way that was logically connected with the issue.

If her remarks are harmful, then the best way to deal with them is to openly point out where her logic is faulty and why she is wrong, as indeed Ms Kruger's fellow panel members attempted to do. But for the law to make it impossible for such issues to be discussed in public, will only convince those who share her views that there must be something to hide, and indeed are likely to make more people come to share those views![61]

It is not argued that all hateful comments should always be permitted. A gratuitously insulting remark designed to inspire deep hatred or violence should legitimately be restricted by the law. But it seems that the legislation here should, and does in fact, allow a comment made in good faith on a matter of wide public interest, where there is a logical connection with that topic, to be expressed and debated, even if it will offend or upset. In such cases the best disinfectant for the disease will be the light of reason showing why the remarks are wrong, if that is the case.

[61] I note below that a similar approach to the issue of "reasonableness" in a related defence in Tasmania was taken in the decision of *Durston v Anti-Discrimination Tribunal (No 2)* [2018] TASSC 48 (4 October 2018).

(ii) Problems with these laws

I want to turn now to some general problems with these religious anti-vilification laws. The commentators previously cited have noted many problems. The most obvious and major one is that these provisions amount to a severe restriction on freedom of speech. The right of freedom of speech, of course, is a right protected by international human rights instruments such as the UDHR, Art 19. But it is perhaps not so commonly noticed that, even in a jurisdiction such as Australia where there is currently no formal, broad-reaching protection of freedom of speech, the courts have regularly noted that the common law itself provides such a protection as a fundamental value.[62]

It goes without saying, of course, that these laws also have the potential effect of restricting freedom of religion, because it may in some circumstances be an obligation of one's religion to point out why, and how, another religion is wrong.

When these factors are coupled with pragmatic considerations concerning the enforcement of such laws, the case against the laws is particularly strong. A law that on its face seems designed to protect freedom of religious choice, may allow abuse of the law to attack others who are seeking to express their religion. Indeed, as Parkinson has pointed out, not only the precise terms of the legislation are important, but also the way that they are perceived:

> The law that impacts upon people's lives is not the law as enacted by parliaments, and not even the law as interpreted by the courts. What matters is the law as people believe it to be. This 'folklaw' may have only a tenuous connection with the law as enacted or applied in the courts. There is often a distorted effect as the perceived meaning of laws is spread through general communities of people who may not have a copy of the law itself or know the outcomes of cases they have heard are going through the courts.[63]

If speakers think that any public speech criticising other religious views is in danger of being prosecuted, then they will effectively 'self-censor', and public debate about important religious issues will shrink. Such debate, in the end, may be 'forced underground', where the lack of light being shone from the glare of publicity may end up entrenching prejudice and ignorance.

There are a number of important philosophical questions about laws that impose restrictions on freedom of speech, as any law that prohibits certain types of speech will do. Some speech can clearly be regulated and penalised — classic examples include someone who shouts 'Fire!' in a crowded hall or someone who tells a lie that attacks an individual's reputation. It seems right that a direct incitement to violence against a group of persons should be unlawful. But should the law go further and address speech that attacks other's beliefs?

It could be argued that it would be best not to have anti-vilification laws based on religion at all. Religion, unlike race or sex, is a matter that is fundamentally based on a person's acceptance of certain *propositions* about the universe. (The view that religious matters, being questions of 'faith', are beyond rational debate, is clearly wrong.[64] Anyone who puts forward such a view needs to spend some time in dialogue with representatives of actual religions, which almost all argue that there are good *reasons* to adopt their position as opposed to others. This is certainly the case with religions such as Christianity and Islam.) In any serious religious debate, there will be a challenge to the worldview of the hearers. To penalise speech connected with religion runs the grave risk that rational debate on religious matters will be 'driven

[62] See *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 at [30]; and *Evans v NSW* [2008] FCAFC 130, striking down legislation prohibiting the "annoying" of World Youth Day attendees.
[63] Parkinson at 960.
[64] For an unfortunate judicial adoption of such a view, see the comments of Laws LJ in the English Court of Appeal decision of *McFarlane v Relate Avon Ltd* [2010] EWCA Civ B1 at [23]-[24].

underground', and hence that where there are disagreements they will be resolved in less rational ways.[65]

(iii) Arguments in favour of a limited religious vilification law

Having said that there are many problems with religious vilification laws, I think a good case can be made for a **limited** law, which deals with the serious issues of speech that engenders hatred, though not one that penalises mere offence.

In this area I have been greatly influenced by Waldron's book, *The Harm in Hate Speech*.[66] There he makes a careful but impassioned case for the possibility of some types of "hate speech" laws. His arguments support a workable but carefully limited law prohibiting vilification on religious grounds.

Waldron's book is explicitly directed to an American audience, where the tradition of strong free speech protection under the First Amendment to the US Constitution is well entrenched. In that context he makes a modest but compelling case for recognition that speech is not "mere" speech; that real harm can be experienced by those who are part of a minority group which is confronted on a regular basis by written and visual reminders that some would exclude them from civil society.[67]

Waldron, then, supports the legitimacy of laws that aim to protect the basic human dignity and membership of society of those who may be subject to regular vilification and hatred. Most of his book is directed to support for laws prohibiting racial vilification, but he also supports religious anti-vilification laws- though with important qualifications to be noted below.

Even in the racial vilification area he makes a number of important points. Relevant laws should prohibit speech that incites hatred in others, not speech that is necessarily based on actual hatred felt by the speaker.[68] While he does not exclude passing verbal comments from his discussion, he stresses that the most important thing the law ought to target is "enduring" speech- internet posts, wall posters and the like. These are the things that become part of the "environment" of a society that can undermine the feeling of "belonging" that all citizens ought to share.[69]

Interestingly, the model that Waldron supports in general is what he calls "group defamation", a term he points out has a long history in European law.[70] He argues that there is, however, a difference between "social" reputation and "personal" reputation. To have a good "social" reputation is to be "a member of society in good standing", and the law should protect

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[65] "If Western nations do not defend free speech and religious freedom, then the open discourse required for a deliberative democracy will be choked off. As long as full religious freedom is absent, religious groups -- including moderate Muslims -- will face the threat of punishment for what is essentially a prohibition on blasphemy. This creates an atmosphere of fear that is never conducive to open, democratic debate. And if you don't have open, deliberative democracy, you can't peel off and correct the disaffected, i.e., those who turn to the world of the violent Islamists as an alternative"- personal correspondence from Prof Carl H Esbeck, School of Law, University of Missouri (1 Aug 2009).

[66] Waldron, J *The Harm in Hate Speech* (Cambridge, Mass; Harvard UP, 2012).

[67] This view is in part supported by Helen Pringle, "Regulating Offence to the Godly: Blasphemy and the Future of Religious Vilification Laws" [2011] UNSWLawJl 14; (2011) 34(1) *University of New South Wales Law Journal* 316, at 331: "If the vilification provisions are to do the work of the anti-discrimination laws in which they are usually placed, their formulation should explicitly take cognisance of offence only where it is related to, or is a form of, discrimination that erodes or undermines civil standing". It would be preferable, however, for reasons noted below, not to penalise "offence" per se at all.

[68] Waldron (2012) at 35.

[69] Waldron (2012) at 37-38; and see 45: "the fact that something expressed becomes established as a visible or tangible feature of the environment- part of what people can see and touch in real space (or virtual space) as they look around them."

[70] Waldron (2012) at 39-41.

this, just as the law of "ordinary" defamation protects other aspects of personal reputation.[71] So Waldron would support laws that prohibit "the publishing of calumnies expressing hatred and contempt for some racial, ethnic or religious group".[72]

There is much in his excellent book that repays careful attention. But as persuasive as his case is for laws aimed at preventing incitement to hatred based on race or religion, he is careful to point out the need for limits to such laws. In a chapter discussing the views of John Locke, he points out that we may "distinguish between some of the things that may be said or published in pursuance of the tolerator's *beliefs* and other things that may be said or published in pursuance of [*those whom we tolerate*]" (emphasis added.) He goes on:

> John Locke's saying that it is absurd for Jews to deny the divine inspiration of the New Testament is one thing; presumably, Mr Osborne's saying that Jews kill Christian babies is another. To punish those who spread a blood libel is one thing; to shut down what Locke called "affectionate endeavours to reduce men from errors" in another.[73]

Waldron is well aware of the vital difference between inciting hate towards a *person* on the basis of their faith, and simply attacking their *views* on a matter. Indeed, in an important passage bearing on issues that are vital in the Australian context, he says this:

> The position I am defending combines sensitivity to assault's on people's dignity with an insistence that people should not seek social protection against what I am describing as offence. I commend this sensitivity on the matter of dignity to the attention of our legislators, even as I try to steer them away from undertaking any legal prohibition on the giving of offence.[74]

Waldron recognises that discussion of religious questions will sometimes give offence. "Neither in its public expression nor in an individual's grappling aloud with these matters can religion be defanged of this potential for offence."[75]

He argues that we must not legislate so that those who hold "offensive" religious views are excluded from civil society.

> Religious freedom means nothing if it is not freedom to offend: that is clear. But, equally, religious freedom means nothing if it does not mean that those who offend others are to be recognised nevertheless as fellow citizens and secured in that status, if need be, by laws that prohibit the mobilisation of social forces to exclude them.[76]

He points out, however, that to enact such laws we cannot allow people to assert that their "identity" is so bound up with their religious beliefs that to attack one, is to attack the other. We must require the law to distinguish between these things, and not allow people to play "identity politics".[77]

Waldron supports the sort of balance that is represented by the UK *Racial and Religious Hatred Act* 2006, which on the one hand made it unlawful under s 29A of the *Public Order Act*

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[71] Waldron (2012) at 85-86.
[72] Waldron(2012) at 66.
[73] Waldron (2012) at 229; he quotes in a footnote Locke's words from *Letter Concerning Toleration*, 46: "Any one may employ as many exhortations and arguments as he pleases, towards the promoting of another man's salvation. But… [n]othing is to be done imperiously".
[74] Waldron (2012), at 126-127.
[75] Waldron (2012) at 129.
[76] Waldron (2012) at 130.
[77] See the very important discussion at 131-136.

1986 to stir up "hatred against a group of persons defined by reference to religious belief", but on the other hand added s 29J noted previously.[78]

While stark in its apparent toleration even of "ridicule" and "insult", the provision seems a very good reminder that what is at stake is not the beliefs, but the dignity of the individuals who hold those beliefs. It would be sensible, if Parliaments elsewhere are considering enacting religious anti-vilification laws in the future, to include a provision of such a nature, even expressed in equally strong terms "for abundant caution".

(iv) But the law should not prohibit mere "offence"

A number of developments and important court decisions over the last few years illustrate the importance, however, of not penalising mere "offence".

(1) Australian law penalising "offence"

So far, with the exception of the ACT, jurisdictions around Australia who do not have religious anti-vilification laws have not shown much interest in enacting such laws. However, there was an important development in 2012 that showed willingness, at least on the part of some of those involved in the then-Federal Government, to consider extension of the existing laws in some fairly radical ways.

This was shown in the Exposure Draft of a proposed *Human Rights and Anti-Discrimination Bill* 2012, released for public comment in November 2012 by the Commonwealth Attorney-General's Department.[79] The Bill would have extended the currently limited grounds under Commonwealth law on which discrimination is formally unlawful, to include (among others) a "protected attribute" of "religion" (cl 17(1)(o)). In particular, while including a provision on racial vilification (cl 51) which was similar to that currently provided for in the *Racial Discrimination Act* 1975 (Cth) ("RDA") s 18C, the operative provision generally defining discriminatory conduct (cl 19(2)(b)) provided that such conduct included "other conduct that **offends**, insults or intimidates the other person."

A broad reference to "offence" or "insult" clearly covered verbal activity and was very similar to what had traditionally been regarded as a "vilification" law, but with a very low hurdle of mere "offence". There was an unprecedented public outcry about this aspect of the legislation from some very respected and mainstream commentators, including a concession from the President of the Australian Human Rights Commission that this went "too far".[80]

In her comment Professor Triggs noted that some of the concerns about this aspect of the Bill were heightened in light of concerns that had arisen in a case under the racial vilification provisions involving Andrew Bolt. It seems sensible to note this case briefly, as it will no doubt inform future thinking about any law that makes "vilification" or "offence" unlawful.

In *Eatock v Bolt*[81] journalist and blogger Andrew Bolt was sued by Pat Eatock and a number of others whom he had named as people who were "fair-skinned Aborigines" who, he

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[78] See Waldron (2012) at 119-120. Section 29JA of the legislation now contains a similar provision ensuring "freedom of expression" in relation to sexual orientation- see R Sandberg, *Law and Religion* (Cambridge, CUP, 2011) at 144 n 93.

[79] See http://www.ag.gov.au/Consultations/Documents/ConsolidationofCommonwealthanti-discriminationlaws/Human%20Rights%20and%20Anti-Discrimination%20Bill%202012%20-%20Exposure%20Draft%20.pdf . For a detailed critique on religious freedom grounds see http://www.freedom4faith.org.au/resources/Work/F4F%20submission%20on%20Human%20Rights%20and%20Equality%20Bill%202012%20Exposure%20Draft_F.pdf .

[80] Prof G Triggs, "Tweaking the draft bill could preserve core reforms", *The Australian*, Jan 22, 2013, available at http://www.theaustralian.com.au/national-affairs/opinion/tweaking-the-draft-bill-could-preserve-core-reforms/story-e6frgd0x-1226558532996 .

[81] [2011] FCA 1103.

claimed, had "traded on" their self-identification as Aboriginal people to profit in different ways from that status (such as receipt of Government benefits or positions.) He was sued under s 18C, noted above, on the basis that his remarks were made "because of the race, ethnic origin or colour of fair-skinned Aboriginal people" (see para [20] of the official case summary). He was found to have breached the Act, and the defence under s 18D of comment in "good faith" was not made out because the articles contained "errors of fact, distortions of the truth and inflammatory and provocative language" (para [23]).

There were, it is submitted, a number of problems with this decision. In particular, it could be argued that Mr Bolt's comments (whether true or not) were not based on the "race" of the people involved, but rather on his claim that they were dishonestly trading on a supposed but false racial identification. However, the scope of the legislation is so wide that if a person's race played *some* role in the relevant behaviour, it could be characterised as racial vilification.[82] (The particular "race" category relied on was unusual, too- it was confined to "fair-skinned persons" who claim or are recognised to be Aboriginal.)

But the claim succeeded partly because of the very low bar that had to be met under s 18C, whereby conduct was rendered unlawful if persons were "offended, insulted, humiliated or intimidated by" it.[83] No scope was given in the provision for the question whether the conduct (if verbal) amounted to an assertion of a true or arguably true fact. As a result, the carefully crafted safeguards that have been developed for many years in the law of defamation were completely side-stepped. Obviously what Mr Bolt had said was defamatory of the individuals named, and they would clearly have been entitled to sue for defamation; but in such an action, Mr Bolt would have been either able to argue that what he had said could be justified as true, or that it was an "honest opinion" that he held, or that it was delivered on an occasion of "qualified privilege".[84]

Of course, s 18C RDA is not about "religious vilification". Indeed, as Bromberg J makes clear in his judgment, it is not even about "hate speech". It sets the bar much lower than that, and in that sense is not directly relevant to discussion of "religious vilification" law.[85] But it does illustrate a possible tendency of legislation in this area to move towards a wide control of speech on these topics. It is suggested below that it is likely that this decision, and the draft *Exposure Bill* with its reference to "offence", may have in part led to subsequent comments from some members of the High Court of Australia about the unwisdom, and possible Constitutional invalidity, of laws hinging on the causing of "offence".

The current Coalition Government came to power initially undertaking to repeal s 18C. The Attorney-General undertook a community consultation after producing a draft Bill. Those who are interested can see my comments on the draft Bill online.[86]

In short, I supported the removal of the provisions dealing with "offence" from the law but supported the retention of a law prohibiting "vilification" (incitement of hatred) and "intimidation" (producing fear of physical harm). But I thought that the defence provision put up by the Attorney-General was far too broad, and I argued instead for defences that parallel those available in the law of defamation.

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[82] See RDA s 18B, and *Eatock* at para [306].

[83] Interestingly, even Joseph, who defends the decision as good one, accepts that "offence" is an inappropriately low bar to set: see Sarah Joseph "Free speech, racial intolerance and the right to offend: Bolt before the court" (2011) 36 (4) *Alternative Law Journal* 225-229, at 229.

[84] For brief mention of these defences, see Foster (2012), above n21, at 73-74. It is interesting to note that in determining the meaning of the articles in question, Bromberg J deliberately adopted the approach that has previously been taken in defamation proceedings to analysing what "imputations" have been made- see para [19]. The applicability of the law of defamation to this sort of proceedings is quite clear.

[85] See *Eatock* at [206], where the *Catch the Fire* decision is mentioned but distinguished.

[86] Neil J. Foster, "Submission on s 18C reforms" (30 March, 2014) available at http://works.bepress.com/neil_foster/80 .

My views, like those of everyone else who offered comments, received no formal response from the Government. Instead the proposal to amend s 18C was abandoned by the then Prime Minister as part of proposals to introduce stronger anti-terrorism laws.[87] Later the question of whether s 18C should be amended was again raised by a group of Government back-benchers, although the then Prime Minister expressed little interest in reviving the debate.[88]

Clearly one of the major questions about anti-vilification laws, then, is whether they achieve the right balance when taking into account the important value of freedom of speech. Gelber comments:

> In Australia, anti-vilification laws are generally considered compatible with the extant common law protection of freedom of expression, and with the doctrine of an implied constitutional freedom of political communication as developed by the High Court since 1992.[89]

As we will see below, it is arguable whether this comment is correct.

In *Eatock* Bromberg J said that the word "offence" had to be read in context of that Act as something with "profound and serious effects, not to be likened to mere slights"- see para [268]. However, on the surface the word is broad enough to cover quite trivial annoyances, and it is a serious problem where a word in ordinary usage has to be the subject of detailed judicial interpretation before it can be properly understood. This will of course have quite significant "chilling" effects on free and open debate, even if a court action should ultimately fail.

In an article in the *Australian Law Journal*, the highly respected Acting Justice of Appeal from NSW, Sackville AJA, a former Federal Court Justice and former Dean of the UNSW Law Faculty, argues that s 18C goes too far in restricting free speech in its use of the word "offence", and suggests that the provision be amended in two areas:

> The difficulties created by the drafting of the current legislation would be reduced by two significant amendments. One would substitute for the current 'to offend, insult, humiliate or intimidate' a more demanding standard such as to 'degrade, intimidate or incite hatred or contempt'. The other would be to replace the references to the subjective responses of groups targeted by hate speech with an objective test for determining whether the hate speech is likely to have the prohibited effect. An objective test would involve reference to the standards of a reasonabl[e] member of the community at large. In practice, as in so many areas of the law, this would involve courts exercising judgment in the light of their assessment of prevailing community standards, taking account of the evidence adduced in the individual case.[90]

While the constitutional validity of s 18C RDA was upheld in the Federal Court in *Toben v Jones*,[91] the provision has not been considered by the High Court itself, and in recent

[87] "Tony Abbott dumps planned changes to section 18C of Racial Discrimination Act" *The Australian*, Aug 5, 2014 http://www.theaustralian.com.au/national-affairs/tony-abbott-dumps-planned-changes-to-section-18c-of-racial-discrimination-act/story-fn59niix-1227014479772 .

[88] See, for example, this report: "Nick Xenophon rejects renewed push to repeal section 18C" *The Australian*, Aug 8, 2016: http://www.theaustralian.com.au/national-affairs/nick-xenophon-rejects-renewed-push-to-repeal-section-18c/news-story/2f409159241541d4685c20b2a4d84ef4 . For a detailed critique of the law, see Forrester, Finlay and Zimmermann *No Offence Intended: Why 18C Is Wrong* (Connor Court, 2016).

[89] K Gelber, "Religion and freedom of speech in Australia", in N Hosen & R Mohr (eds) *Law and Religion in Public Life: The contemporary debate* (Oxford, Routledge, 2011), 95-111 at 96.

[90] The Hon R Sackville AO, "Anti-Semitism, Hate Speech and Part IIA of the Racial Discrimination Act" (2016) 90 ALJ 631 at 646.

[91] [2003] FCAFC 137; (2003) 129 FCR 515.

years a number of decisions of that Court have laid great emphasis on the importance of the implied freedom of political communication.[92]

Former Chief Justice of the High Court of Australia Robert French, in an extrajudicial address entitled "Giving and Taking Offence",[93] discussed some of these issues, and his Honour concluded by noting "there is no generally accepted human right not to be offended" (at p 14).

We turn now to briefly note some important appellate decisions giving weight to free speech and religious freedom.

(2) Some key court decisions on free speech and "offence"

A Canadian decision, and two important Australian decisions, illustrate the complexities of balancing freedom of speech with other important values. None of the cases are classic "religious vilification" situations, but they all raise this vital issue of balancing freedom of expression with other rights. In this context they can only receive a brief treatment.[94]

In Canada, in *Saskatchewan (Human Rights Commission) v Whatcott*,[95] the Supreme Court of Canada unanimously upheld the decision of a lower tribunal to fine the defendant for distribution of pamphlets opposing homosexuality.

Mr Whatcott had distributed four flyers in his neighbourhood, identifying himself as a concerned Christian, and expressing strong opposition to proposals to introduce a primary school curriculum endorsing homosexuality. Four people who received the flyers made a complaint about this to the Saskatchewan Human Rights Commission (SHRC), who found that he had been in breach of s 14 of the *Saskatchewan Human Rights Code*. This section provides:

> **14. –** (1) No person shall publish or display, …, any representation, …:
> (*b*) that exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground.

"Prohibited grounds" included homosexuality.

The Supreme Court of Canada, in summary, held that the prohibition on "exposing someone to hatred" was valid under the Canadian *Charter of Rights and Freedoms*, but ruled that the words "ridicules, belittles or otherwise affronts the dignity of" were invalid and should be struck out. They held that two of the flyers did reach the standard of "hatred", but two of them did not.

There were a number of important issues that came up in the course of the decision.

The Court had to decide what standard of behaviour would breach the prohibition on exposing someone to "hatred". This came up in part because the Supreme Court had ruled in a previous decision, *Canada (Human Rights Commission) v Taylor*,[96] in the context of racially-based vilification legislation, that "hate" language needed to be particularly strong to be caught by a provision that impaired the Charter right of freedom of speech. After discussing various options, the Court in *Whatcott* concluded as follows, at [57]:

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[92] See Nicholas Aroney "The Constitutional (In)validity of Religious Vilification Laws: Implications for their Interpretation" [2006] *FedLawRw* 10; (2006) 34(2) *Federal Law Review* 287; and also the recent monograph on s 18C, Forrester, Finlay and Zimmermann *No Offence Intended:Why 18C Is Wrong* (Connor Court, 2016) noting the probability that it is unconstitutional as not actually implementing Australia's international obligations on the topic, and unduly impairing the implied freedom of political communication.

[93] Sir Harry Gibbs Memorial Oration, Adelaide, 13 August 2016, http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj13Aug2016.pdf .

[94] For more extensive analysis, see Foster (2013), above n 22

[95] 2013 SCC 11 (27 Feb 2013).

[96] [1990] 3 S.C.R. 892.

> The legislative term "hatred" or "hatred and contempt" is to be interpreted as being restricted to those extreme manifestations of the emotion described by the words "detestation" and "vilification". This filters out expression which, while repugnant and offensive, does not incite the level of abhorrence, delegitimization and rejection that risks causing discrimination or other harmful effects…

There was also a welcome affirmation that attacking someone's ideas alone did not amount to "hate" speech.

> [51] The distinction between the expression of repugnant ideas and expression which exposes groups to hatred is crucial to understanding the proper application of hate speech prohibitions. Hate speech legislation is not aimed at discouraging repugnant or offensive ideas. It does not, for example, prohibit expression which debates the merits of reducing the rights of vulnerable groups in society. It only restricts the use of expression exposing them to hatred as a part of that debate.

The Canadian Charter section 2(b) contains a guarantee of freedom of expression. The Court conceded that this law infringed on that freedom. The question then became, could this infringement be justified?

Section 1 of the Charter allows rights to be infringed where doing so can be "demonstrably justified in a free and democratic Society". The Court needed to determine whether the principles behind the hate speech law protected "concerns that are of sufficient importance" to over-ride the guarantee of free speech. These concerns were identified as the need to avoid marginalisation and humiliation of vulnerable groups. The harm to the group as a whole is key- see para [80].

Interestingly the Court made the point that the legislation is not directly concerned with the hurt feelings of individuals. At [82]:

> Instead, the focus must be on the likely effect of the hate speech on how individuals external to the group might reconsider the social standing of the group. Ultimately, it is the need to protect the societal standing of vulnerable groups that is the objective of legislation restricting hate speech.

Related to this point, the Court held that the other words used in the Human Rights Code were too broad, and too great an infringement of the freedom of speech:

> [92] Thus, in order to be rationally connected to the legislative objective of eliminating discrimination and the other societal harms of hate speech, s. 14(1)(b) must only prohibit expression that is likely to cause those effects through exposure to hatred. I find that the words "**ridicules, belittles or otherwise affronts the dignity of**" in s. 14(1)(b) are not rationally connected to the legislative purpose of addressing systemic discrimination of protected groups. The manner in which they infringe freedom of expression cannot be justified under s. 1 of the Charter and, consequently, they are **constitutionally invalid**. (emphasis added)

This, of course, is an important finding, and seems sensible. However, the Court rejected other arguments that "hate" speech should either not be penalised (simply being dealt with in the "marketplace of ideas"), or else only penalised under the criminal law where threats of violence were involved. The Court seemed to suggest that either of these would be valid choices for a Province to make but concluded that the decision of a Province to introduce legislation of this sort (limited to serious "hatred") was within the leeway of choice allowed to Provincial governments.

In the end, of course, much will depend on the Court's view of how language has been used. In this case Mr Whatcott's pamphlets were read as suggesting that all homosexuals were

paedophiles and child molesters. It could be disputed whether or not this was in fact what was said. But if this were the best way of reading the documents, then they crossed the line from discussion of general issues into engendering hate. The Court said that the issues Mr Whatcott was concerned about could have been discussed in other ways:

> [119]… In the context of this case, Mr. Whatcott can express disapproval of homosexual conduct and advocate that it should not be discussed in public schools or at university conferences. Section 14(1)(b) only prohibits his use of hate-inspiring representations against homosexuals in the course of expressing those views.

No doubt some in the community would object that *any* advocacy of such views was "hate-inspiring". To this extent, these remarks are encouraging as marking out at least a theoretical space for robust debate on the issues.

However, the space may be seen to be fairly narrow when the comments of the Court on the distinction between "behaviour" and "orientation" are taken into account. Mr Whatcott had argued that his comments referred to sexual activity, not to the "orientation" of persons. The Court's response was as follows:

> [124] Courts have thus recognized that there is a strong connection between sexual orientation and sexual conduct. Where the conduct that is the target of speech is a **crucial aspect of the identity** of the vulnerable group, attacks on this conduct stand as a proxy for attacks on the group itself. If expression targeting certain sexual behaviour is framed in such a way as to expose persons of an identifiable sexual orientation to what is objectively viewed as detestation and vilification, it cannot be said that such speech only targets the behaviour. It quite clearly targets the vulnerable group. {emphasis added}

The Court clearly leaves little room for negative comments on homosexual behaviour; if such is to be given, it needs to clearly be done in a way which avoids "detestation and vilification".

Also of some concern, both in the area of comment about sexual activity but also particularly for freedom of religion concerns in the future, is the Court's insistence that there is no need to provide a defence of "truth". It seems that statements about a vulnerable group, even if completely true, may still be attacked as "hate speech".

> [140]…Truthful statements can be interlaced with harmful ones or otherwise presented in a manner that would meet the definition of hate speech.
> [141]…The vulnerable group is no less worthy of protection because the publisher has succeeded in turning true statements into a hateful message. In not providing for a defence of truth, the legislature has said that even truthful statements may be expressed in language or context that exposes a vulnerable group to hatred.

Hence a statement, for example, that truthfully recorded that a particular religious group called for the death or subjugation of non-believers, and oppressed its women, might still be characterised as "hate speech". Would it be protected if presented in a highly clinical and "non-emotional" way? The lack of clarity here will no doubt have a "chilling" effect on what can be said. This is obviously a matter of some concern.

Section 2(a) of the Canadian *Charter* protects freedom of religion. The Court rejected arguments that strongly expressed views about homosexuality were not within this protection. They accepted that the terms of s 14, insofar as they prevented Mr Whatcott from expressing his religiously motivated views about homosexuality, were a *prima facie* interference with his freedom of religion- see [156].

As with the issue of freedom of speech, the Court then turned to whether a legislature could put limits on freedom of religion, and on what basis. The analysis here was fairly brief,

suggesting that the reasons offered in relation to speech were also applicable to religion. The Court said that there was still scope for Mr Whatcott to express his religiously-motivated views:

> [163]…. Mr. Whatcott and others are free to preach against same-sex activities, to urge its censorship from the public school curriculum and to seek to convert others to their point of view. Their freedom to express those views is unlimited, except by the narrow requirement that they not be conveyed through hate speech.

In coming to consider the application of these principles to the four flyers that had been distributed, the Supreme Court held that the original Tribunal had been correct to find that two of them incited "hatred", while agreeing with the Court of Appeal that another two did not quite reach that level. Perhaps the best summary of what the Court found as "hatred" can be seen in the following extract:

> [188] Some of the examples of the hate-inspiring representations in flyers D and E are phrases such as: "Now the homosexuals want to share their filth and propaganda with Saskatchewan's children"; "degenerated into a filthy session where gay and lesbian teachers used dirty language to describe lesbian sex and sodomy to their teenage audience"; "proselytize vulnerable young people"; "ex-Sodomites and other types of sex addicts"; and "Homosexual sex is about risky & addictive behaviour!". The repeated references to "filth", "dirty", "degenerated" and "sex addicts" or "addictive behaviour" emphasize the notion that those of same sex orientation are unclean and possessed with uncontrollable sexual appetites or behaviour. The message which a reasonable person would take from the flyers is that homosexuals, by virtue of their sexual orientation, are inferior, untrustworthy and seek to proselytize and convert our children.

It was also found to be important that one of the flyers alleged that homosexuals were child-abusers- [189]- and indeed explicitly urged that the law should "discriminate" against them- [192].

These are indeed intemperate words, and it is hard to deny that they would have the result that those who believed them would lack respect for homosexual people, and that in some cases these words would engender hatred.

It is interesting to see how the Supreme Court dealt with one of the pamphlets that it did not find "hate-inducing". One of them contained an extended quote from a Bible verse, containing Jesus' warning that judgment awaited those who caused "little ones" to stumble. Indeed, use of a Bible verse was said at one point to be a possible characteristic of "hate speech", in that such speech "appeals to a respected authority"- see [187].

However, the Supreme Court adopted some remarks in a previous decision about the need to "exercise care in dealing with arguments to the effect that foundational religious writings violate the *Code"*- [197]. Still, their final remark on the topic does leave open the possibility that in "unusual" cases a placard simply quoting a Bible verse could be found to be "hate speech":

> [199]… While use of the Bible as a credible authority for a hateful proposition has been considered a hallmark of hatred, it would only be **unusual circumstances and context** that could transform a simple reading or publication of a religion's holy text into what could objectively be viewed as hate speech. (emphasis added)

How should one view the overall decision? There are some positive aspects to the decision from the point of view of freedom of religious speech. The Court does affirm the importance of both freedom of speech and freedom of religion and recognises that only very "extreme" speech falls into the category that is (consistent with these basic rights) able to be penalised. It is encouraging to see a rejection of laws that would penalise mere "offence" or

"ridicule". The Court also acknowledges that there can be criticism of a moral position that does not descend into hate speech.

However, there are some aspects of concern. By refusing to distinguish between comments about sexual *behaviour* and sexual *orientation*, the Court privileges any group that "defines itself" by a particular form of sexual behaviour and comes close to making that behaviour unable to be criticised. Perhaps this cannot quite be the result, as at points the Court allows that "preach[ing] against same-sex activities" is permissible- see [163]; but clearly such preaching would need to be done with the utmost of politeness to avoid charges of "hate speech".[97]

In *Attorney-General (SA) v Corporation of the City of Adelaide*[98] ("the *Adelaide Preachers case"*) a 5-1 decision of the **High Court of Australia** upheld the validity of a local by-law that prohibited preaching in a public place without a license from the city. On the same day,[99] the High Court was split down the middle 3-3 in *Monis v The Queen*[100] on the question as to whether a Federal law that prohibited sending "offensive" content through the postal services was invalid due to breaching the implied right to freedom of political communication. The facts of this case did not relate directly to a claim of "freedom of religion", but a law that prohibits "offense" is clearly likely in some contexts to give religious offence, and so this case too implicates issues of interest in the present context.

In the ***Adelaide Preachers case,*** the issue of the limits of State control over religious speech was directly raised, though not in the context of "vilification".

A bylaw of the City of Adelaide, *By-Law No 4* made in 2007, prohibited the carrying out of certain activity on roads without permission, including "preaching, canvassing and haranguing" (2.3) and "giving out or distributing to any bystander or passer-by any handbill, book, notice, or other printed matter" (2.8). The Corneloups, father and son, were part of a church that wanted to conduct street preaching. One had been convicted already and fined under the By-Law, and there was an application by the Council for an injunction to prevent further such activities.

At previous stages of the litigation the preachers had won their case, for different reasons. A district court judge found the By-Law invalid as beyond the scope of the rule-making power given to the Council under the legislation. On appeal the Full Court of the South Australian Supreme Court had upheld the validity of the rule as within legislative power, but had held the provisions preventing preaching without permission as invalid, as being too broad and in contravention of the implied right to "freedom of speech on political matters" found under the Constitution.

On appeal, the High Court agreed that the regulation was within legislative power but differed from the Full Court by holding that it did not contravene any implied principle of freedom of speech under the Constitution. The following will assume that the majority of the Court was correct in its finding that the general regulation-making power under the relevant statutes permitted on its face such a regulation to be made.[101] But the discussion on freedom of speech issues is very important.

French CJ gave a very clear and helpful judgment. His Honour started by noting that, in interpreting legislation, under what has become known as the "principle of legality", a court

[97] For an Australian case raising some of the same issues as *Whatcott* see the discussion of *Corbett v Burns* [2014] NSWCATAP 42 (14 August 2014) below.
[98] [2013] HCA 3 (27 February 2013).
[99] And, oddly, on the very same day that the Canadian Supreme Court handed down *Whatcott*.
[100] [2013] HCA 4 (27 February 2013),
[101] Although, with respect, the dissent of Heydon J on this issue is very persuasive- see below.

will strive to read an Act so that it does not involve an interference with fundamental common law rights. One of those rights is clearly "freedom of speech". As his Honour said at [43]:

> the construction of [the relevant legislation] is informed by the principle of legality in its application to freedom of speech. Freedom of speech is a long-established common law freedom[102]. It has been linked to the proper functioning of representative democracies and on that basis has informed the application of public interest considerations to claimed restraints upon publication of information[103].

Thus, the first question to be considered was how the prohibition on "preaching, canvassing and haranguing" should be **interpreted** in light of this strong presumption. His Honour ruled that the law should be read to imply the least possible disturbance with freedom of speech. This meant that it would not be a valid exercise of the power given to the Council here to prohibit verbal activity because the officers disagreed with the *content* of what was said- [46]. It would be relevant, however, if the activity, by the way it was to be conducted, had an impact on matters of "municipal concern" (presumably, as later spelled out, primarily the free flow of traffic along a public road.)

Given this interpretation, then the next logical issue was whether the framing of the regulation had been done in a way which was "reasonable" and "proportionate", consistent with the regulation-making power. However, the standard that the Court required to be applied by an authority making delegated legislation here was not very high. French CJ cited a number of decisions that showed that the courts would generally defer to the judgment of the legislator except where the law "cannot reasonably be regarded as being within the scope or ambit or purpose of the power" (see [49].)

Here the regulation which had been devised was not so "unreasonable" that it should be struck down as unconnected with the purpose of the legislative power. It was also a "reasonably proportionate" way of achieving legitimate goals- see the discussion concluding at [66].

Was the law, then, even though valid in a general sense as supported by the grant of legislative power, invalid because it breached the **Constitutional prohibition** on undue impairment of freedom of political communication?

French CJ accepted a two-part test as set out in previous decisions: did the prohibition "burden" free speech on political matters? And then, if it did so, was it nevertheless justified?

It was accepted that the prohibition was a *prima facie* burden on political speech. Despite the prohibition mostly relating to "religious" speech, this was so:

> [67]…[The appellant] accepted that some "religious" speech may also be characterised as "political" communication for the purposes of the freedom. The concession was proper. Plainly enough, preaching, canvassing, haranguing and the distribution of literature are all activities which may be undertaken in order to communicate to members of the public matters which may be directly or indirectly relevant to politics or government at the Commonwealth level. The class of communication protected by the implied freedom in practical terms is wide[104].

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102 Blackstone, *Commentaries on the Laws of England*, (1769), bk 4 at 151–152; *Bonnard v Perryman* [1891] 2 Ch 269 at 284 per Lord Coleridge CJ; *R v Council of Metropolitan Police; Ex parte Blackburn (No 2)* [1968] 2 QB 150 at 155 per Lord Denning MR; *Wheeler v Leicester City Council* [1985] AC 1054; *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 203 per Dillon LJ.

103 *The Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 52 per Mason J; [1980] HCA 44; *Attorney-General v Times Newspapers Ltd* [1974] AC 273 at 315 per Lord Simon of Glaisdale; *Hector v Attorney-General of Antigua* [1990] 2 AC 312 at 318.

104 *Hogan v Hinch* (2011) 243 CLR 506 at 543–544 [49] per French CJ; [2011] HCA 4; see also *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 123–125 per Mason CJ, Toohey and Gaudron JJ; [1994] HCA 46; *Levy v Victoria* (1997) 189 CLR 579 at 594–595 per Brennan CJ, 613–614 per

Landrigan considers this interesting question- whether the implied freedom of political communication applies to some "religious" speech- in more detail.[105] In commenting on *Adelaide Preachers*, Landrigan notes that the parties conceded that the street preaching satisfied the criteria for "political communication" – perhaps because in the particular case apparently some topics of the preaching included debates about introduction of same sex marriage and internet filtering.[106] But he does say that there is still some doubt about the matter:

> The High Court did not explain how preaching a message about eternal life in Jesus Christ might relate to representative or responsible government in the Commonwealth Parliament (at 442).

To return to the *Adelaide Preachers* case, French CJ, assuming the speech was protected, was in no doubt that the prohibition was justified.

> [68]… [The bylaws were] reasonably appropriate and adapted to serve the legitimate end of the by-law making power. They meet the high threshold proportionality test for reasons which also satisfy the proportionality test applicable to laws which burden the implied freedom of political communication. They are confined in their application to particular places. They are directed to unsolicited communications. The granting or withholding of permission to engage in such activities cannot validly be based upon approval or disapproval of their content.

One would have liked to see a little more discussion of this point, but the comments that are made are still important. To be a justified restriction on political speech, the laws must meet a "high" proportionality test. If they are confined to a limited geographical area, that will help. In particular the very clear comment is made that if, in practice, permission were to be granted or withheld based on the **content** of the speech, as opposed to other legitimate matters, then such a practice would be unlawful.

Interestingly, other members of the Court had a slightly different approach to some of these issues. While, as seen above, French CJ moved very quickly from finding that the bylaws where justified by the empowering provisions, to finding that they were acceptable as a breach of the implied freedom of political communication, Hayne J seems to have disagreed. His Honour commented:

> [137]…The question which arises in considering whether the by-law made was supported by statutory power is not the same as the question which must be answered in considering its constitutional validity. The former is whether the by-law is so unreasonable that it could not fall within the by-law making power. The latter is whether the by-law is reasonably appropriate and adapted to serve a legitimate object or end in a manner compatible with the constitutionally prescribed system of government and the freedom of political communication which is its indispensable incident.

However, his Honour concluded that, when properly construed, the laws were valid:

> [140] It is necessary to construe the power to give consent in a manner that gives due weight to the text, subject-matter and context of the whole of the provision in which it is found. As has already been explained, those matters show unequivocally that **the *only* purpose of the impugned provisions is to prevent obstruction of roads.** It follows that the

Toohey and Gummow JJ, 622–624 per McHugh J, 638–642 per Kirby J; [1997] HCA 31; cf *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 351 [28]–[29] per Gleeson CJ and Heydon J; [2005] HCA 44.

[105] Landrigan, M "Can the Implied Freedom of Political Discourse Apply to Speech by or about Religious Leaders?" (2014) 34 *Adelaide Law Review* 427-457.

[106] Ibid, see p 442 near n 88.

> power to grant or withhold consent to engage in the prohibited activities must be administered by reference to that consideration and none other. On the proper construction of the impugned by-law, the concern of those who must decide whether to grant or withhold consent is confined to the practical question of whether the grant of permission will likely create an unacceptable obstruction of the road in question. {emphasis added}

This is an important reinforcement of what had been commented on in passing by French CJ and provides a significant protection to freedom of speech. If it could be demonstrated, for example, that a speaker on other issues (such as in support of land rights, for example) was allowed a permit when conservative Christian preachers were not, then this would be evidence of unconstitutional application of the law. Crennan and Kiefel JJ agreed at [219]:

> the discretion must be exercised conformably with the purposes of the By-law.

Their Honours, and Bell J, generally agreed that the regulations were valid as a "reasonable" restraint on political speech for the purposes of traffic control.

As was not uncommon in his Honour's final year or so on the Court, Heydon J dissented. His Honour was not a supporter of the "implied right of freedom of political communication", although in this decision he did not address the principle directly. But he gave a very clear, powerful and (with respect) clearly correct account of the "principle of legality" as it applies to the common law support for freedom of speech. On the basis of the common law principle his Honour ruled that the vague and ambigious provisions authorising the making of bylaws were not sufficient to authorise a dramatic impairment of the freedom of speech. He noted, at [146], that

> the proscriptions in the challenged clauses were applicable to the whole of the Adelaide central business district; were not directed to any particular level of noise, time or place; and were not limited to offensive communications.

In other words, these were very broad prohibitions and, on their face, applied to a large range of speech activities. On that basis his Honour found that the bylaws were invalid.[107]

Overall, the decision in the *Adelaide Preachers* case is important in considering laws forbidding "religious vilification" because it affirms, in very strong terms, the value of freedom of speech as both a common law principle, and also a constitutional constraint on law-making. (It seems fairly clear, as accepted in this case, that "religiously inspired" comments may be protected as sufficiently connected with "politics", although no doubt there may be room to argue the matter in some future fact scenario.) The decision also makes it clear, however, that a law may "burden" free speech where it is appropriately adapted to achieve legitimate government ends.[108]

One final comment on this decision- an American commentator considering this fact situation would no doubt be expecting the High Court to have taken into account the "freedom of religion" of the preachers concerned as a matter to be weighed in the balance. In Australia, of course, the one explicit reference to this in the Federal sphere, s 116 of the Constitution, is

[107] And his Honour added at [152]: "The common law right of free speech which the principle of legality protects is significantly wider, incidentally, than the constitutional limitation on the power to enact laws burdening communications on government and political matters."

[108] A further attempt to argue that the Council was acting invalidly in banning preaching was quickly dismissed on the basis of the High Court decision- see *Bickle v Corporation of the City of Adelaide* [2013] SASC 115. However, in *Corneloup v Launceston City Council* [2016] FCA 974 one of the claimants here was successful in overturning a preaching ban in Tasmania, on administrative law grounds.

confined in its operation to the Commonwealth Parliament, and so could not be used as a restraint on State lawmaking.[109]

With the decision in ***Monis v The Queen***[110] we come much closer to the prohibition of "religious hatred" with a decision on the question whether the Commonwealth Parliament can authorise a law which forbids the use of the postal service for communication of "offensive" speech.

French CJ sums up the facts:

> [1] These appeals arise out of charges laid against the appellants, one of whom, Man Haron Monis, is said, in 2007, 2008 and 2009, to have written letters[111] to parents and relatives of soldiers killed on active service in Afghanistan which were critical of Australia's involvement in that country and reflected upon the part played in it by the deceased soldiers... The appellants were charged under s 471.12 of the *Criminal Code* (Cth) ("the Code"), which prohibits the use of a postal or similar service in a way that reasonable persons would regard as being, in all the circumstances, "offensive".

The High Court was split down the middle, 3-3, on the validity of the law in question.[112]

Two members of the court, French CJ and Hayne J, held that the ***law was invalid*** as it unduly burdened the implied freedom of communication on political matters by acting on speech that merely caused "offence". (The third member of the Court, Heydon J, effectively held that the implied freedom did not exist, but since binding authority held that it did, then it operated to invalidate the law here. To some extent his Honour's view may be regarded as an argument *reductio ad absurdum* against the existence of the freedom.[113] But his vote counts against the validity of the law.)

Hayne J in particular gives a lengthy and detailed review of the issues. But, in brief, both of their Honours conclude that the law cannot be **interpreted** to only apply to "grossly" or "seriously" offensive material (as the NSW Court of Appeal had tried to do.)[114] Even if it could, however, the extent of the type of services covered by the provisions (couriers delivering parcels as well as letters) meant that it covered a wide range of speech. The provision was a serious **burden** on free political speech, and it was not **proportionate** to any legitimate ends. It could not even be said that it provided protection to members of the public against intrusion into their homes, since arguably it would outlaw the sending of "offensive" material of all sorts (such as racist propaganda) through the mail to a member the public who had asked for it to be sent![115]

One of the problems identified by Hayne J (connected with comments made above about the lack of a "truth" defence) was that material that was "offensive" could not be sent, even if true:

> [88]…More particularly, s 471.12 makes it a crime to send by a postal or similar service an offensive communication about a political matter even if what is said is true. It makes it a crime to send by a postal or similar service an offensive communication about a political

[109] Indeed, the only serious attempt to previously use s 116 in relation to State laws was also a South Australian decision, and the attempt comprehensively failed: see *Grace Bible Church v Reedman* (1984) 36 SASR 376.
[110] [2013] HCA 4 (27 February 2013).
[111] In one case a sound recording was said to have been sent.
[112] Normally the Court has 7 members. Perhaps as Gummow J was about to retire when this matter was heard, his Honour did not sit. Hence the possibility of the unfortunate even split which eventuated here.
[113] See [237]: "That is an outcome so extraordinary as to cast doubt, and perhaps more than doubt, on the fundamental assumption and the chain of reasoning which led to it."
[114] See Bathurst CJ at (2011) 256 FLR 28, at 39 [44].
[115] French CJ at [29].

> matter that is not only offensive but defamatory, even when, applying *Lange*, the publisher would have a defence of qualified privilege to a claim for defamation.

Later his Honour elaborated on this view, suggesting that the clash with the law of defamation was a reason to find that the legislation did not serve a "legitimate" end:

> [213] To hold that a person publishing defamatory matter could be guilty of an offence under s 471.12 but have a defence to an action for defamation is not and cannot be right. The resulting **incoherence in the law** demonstrates either that the object or end pursued by s 471.12 is not legitimate, or that the section is not reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of government and the freedom of communication that is its indispensable incident. The incoherence is not removed, and its consequences cannot be avoided, by leaving a jury to decide whether reasonable persons would regard the use, in all the circumstances, as offensive. In the case postulated, the user of the service both *knows* that the communication is, and *intends* that the communication be, offensive. And there is no basis for the proposition (advanced by the second respondent and Queensland) that a jury would not find an accused guilty of an offence against s 471.12 in circumstances of the kind now under consideration because of the section's reference to "reasonable persons ... in all the circumstances". Statements that are political in nature and reasonable for a defendant to make can and often will still bite in the sense relevant to s 471.12. A statement can still be offensive even if it is true[116]. {emphasis added}

Further to matters being discussed here, his Honour went on to say:

> [122]…The very purpose of the freedom is to permit the expression of unpopular or minority points of view. Adoption of some quantitative test inevitably leads to reference to the "mainstream" of political discourse. This in turn rapidly merges into, and becomes indistinguishable from, the identification of what is an "orthodox" view held by the "right-thinking" members of society. And if the quantity or even permitted nature of political discourse is identified by reference to what most, or most "right-thinking", members of society would consider appropriate, **the voice of the minority will soon be stilled**. This is not and cannot be right. (emphasis added)

His Honour's words about the unwisdom of penalising the giving of offence are very clear:

> [222] The conclusion that eliminating **the giving of offence, even serious offence, is not a legitimate object or end** is supported by reference to the way in which the general law operates and has developed over time. The general law both operates and has developed recognising that human behaviour does not accommodate the regulation, let alone the prohibition, of conduct giving offence. Almost any human interaction carries with it the opportunity for and the risk of giving offence, sometimes serious offence, to another. Sometimes giving offence is deliberate. Often it is thoughtless. Sometimes it is wholly unintended. Any general attempt to preclude one person giving *any* offence to another would be doomed to fail and, by failing, bring the law into disrepute. Because giving and taking offence can happen in so many different ways and in so many different circumstances, it is not evident that any social advantage is gained by attempting to prevent the giving of offence by one person to another unless some other societal value, such as prevention of violence, is implicated.
>
> [223] **The common law has never recognised any general right or interest not to be offended.** The common law developed a much more refined web of doctrines and remedies to control the interactions between members of society than one based on any general proposition that one member of society should not give offence to another. Apart from, and in addition to, the development of the criminal law concerning offences against the person, the common law developed civil actions and remedies available when one member of society

116 cf *Patrick v Cobain* [1993] 1 VR 290 at 294.

> *injured* another's person or property, including what was long regarded as the separate tort in *Wilkinson v Downton*[117] for deliberate infliction of "nervous shock". (Whether or to what extent such a separate tort is still to be recognised need not be examined.) And the common law developed the law of defamation to compensate for injury to reputation worked by the publication of oral or written words. But the common law did not provide a cause of action for the person who was offended by the words or conduct of another that did not cause injury to person, property or reputation. (emphasis added)

It seems that these words bear not a little of their inspiration in the then-current drafting of the *Exposure Bill* noted above and constitute a warning from Hayne J that a provision which made it unlawful to "cause offence" would normally not be valid.

In a single joint judgment, however, Crennan, Kiefel and Bell JJ ***upheld the validity*** of the law.[118] A lengthy judgment can only be briefly summarized here. While accepting the importance of freedom of speech, their Honours concluded that the provision in question could be "read down" so that it did not cover "offence" at large, but only particularly serious offence.[119] The comments of Hayne J with respect to defamation were (impliedly, though not directly) responded to as follows:

> [351]…And as to common law defences to defamation, such as qualified privilege, where the issue of malice may arise, the requirement of proof for an offence under s 471.12, that the defendant's conduct be intentional or reckless, may leave little room for their operation.

With respect to their Honours, this brief comment does not do justice to the important points made by Hayne J, and in particular does not address the lack of a defence of "truth", or of the defence of "honest opinion" (where the law regards "malice" as irrelevant.)

It is submitted, with respect, that the balance of the merits of the arguments lies with the two substantive judgments of those against validity. French CJ and Hayne J argue compellingly for strong protection of freedom of speech, which is unduly impaired by a law penalising the causing of "offence". Even if the nature of the "offence" were interpreted as "serious" or "gross", the fact is that very few members of the public would be aware of this simply by knowing of the law. Such a provision will have a chilling effect on some speech, if it is generally implemented. These arguments support a very narrow and confined scope for any laws that penalise speech on the subject of religion.[120]

For an article also critiquing the effect of the *Monis* and *Adelaide Preachers* cases, see Head.[121] There was also a very interesting UK decision raising similar questions. In *DPP v McConnell*[122] a preacher who had made strong comments attacking Islam in a sermon later made available on the internet, was found to be not guilty of a charge of causing a "grossly offensive" communication to be made electronically. The charge was dismissed, in part, due to the Magistrate conceding that the rights to freedom of religion and free speech under the

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117 [1897] 2 QB 57.

118 And as a result, since the High Court was split 3-3, the decision of the NSW Court of Appeal upholding the validity of the law stands. See s 23(2)(a) of the *Judiciary Act* 1903 (Cth) for this rule governing evenly divided opinions.

119 See paras [333]-[339].

120 It may be noted again that s 116, while applicable to Commonwealth law, did not play any role in the argument in *Monis*. Perhaps it might have been possible that the accused persons, who were apparently implacably opposed to Australia fighting in Afghanistan, were Muslims and might have wanted to argue that their right to freedom of religion would support the words they said to the families of the deceased soldiers. But this was not an argument that was run. It may indeed be likely that no respectable Muslim cleric could be found to have supported such an argument. The appellant here, of course, was later involved in the notorious "Lindt Café" terrorism shooting in Sydney, but this fact does not impact on the decision in this earlier case.

121 Head, Michael "High Court further erodes free speech" (2013) 38 (3) *Alternative Law Journal* 147-151.

122 [2016] NIMag 1 (5 Jan 2016).

European Convention on Human Rights protected the preacher (and, in light of that, that his generalisations concerning Muslim people did not reach the high standard of "grossly" offensive.)[123]

(v) A balanced law on religious hate speech?

So, is there scope for *any* religious hate speech law law? As noted previously, it seems that Waldron and others can make a reasonable case for a law that prevents wide-spread publication of material designed to incite hatred and violence on the basis of religion. But Waldron argues for one that is careful not to penalise mere "offence" and is set clearly at a level that does not stifle expression of opinions about the truth or validity of another person's opinions, even sincerely held opinions.

In the end, though, there is a lingering doubt as to whether such a provision could be properly framed and implemented. Not all who read or interpret the law are as wise and sensible and balanced as Jeremy Waldron. One of the main dangers of broadly worded religious anti-vilification laws lies in their "chilling" effect. Despite the course of events in the *Catch the Fire* litigation, with the initial "conviction" being overturned by the Victorian Court of Appeal, who can doubt that any church would think long and hard in Victoria today before running an information session on Islam? There needs to be a serious and careful debate before laws of this sort are introduced.

(vi) The Tasmanian experience- prohibition of "offence"

To further illustrate the problems in this area, we may refer to the interpretation of an unusual Tasmanian provision, s 17 of that State's *Anti-Discrimination Act* 1998 ("ADA 1998"). The provision is unusual because it purports to make unlawful the causing of offence on a wide range of "prohibited grounds" of discrimination, including religion, but also including other areas where there are likely to be clashed with traditional religious moral values, such as sexual activity and sexual orientation.

Section 17(1) provides:

> **17. Prohibition of certain conduct and sexual harassment**
> (1) A person must not engage in any conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of an attribute referred to in section 16(e), (a), (b), (c), (d), (ea), (eb) and (k), (f), (fa), (g), (h), (i) or (j) in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed.

Section 19 of the ADA 1998, noted previously, is on the more common model of an "anti-vilification" law. There is also an important defence provision, s 55, which provides:

> **55. Public purpose**
> The provisions of section 17(1) and section 19 do not apply if the person's conduct is –
> (a) a fair report of a public act; or
> (b) a communication or dissemination of a matter that is subject to a defence of absolute privilege in proceedings for defamation; or
> (c) a public act done in good faith for –
> (i) academic, artistic, scientific or research purposes; or
> (ii) any purpose in the public interest.

[123] For a detailed analysis of the case, and discussion of how it may have played out in Australia, see my blog post "Prohibiting Offensive Sermons" (Jan 11, 2016) at https://lawandreligionaustralia.wordpress.com/2016/01/11/prohibiting-offensive-sermons/ .

Section 17 as it now stands is highly problematic as enacting unwarranted restrictions on freedom of speech and freedom of religion. The provision makes it unlawful to engage in conduct which "offends, humiliates, intimidates, insults or ridicules another person" on the basis of a protected attribute. The only qualification to this is that this must have been done "in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that" the other person would have the relevant response.

Section 17, then, currently sets the bar for unlawful behaviour very low. A claim by someone that they have felt any of the negative emotions set out in this list will be very hard to rebut, as most are purely subjective. As we have seen previously, the penalizing of mere offence or insult is on general principle far too strong a restriction on free speech, as a matter of public policy and the policy of the law (and this view is supported by comments from the Supreme Court of Canada and members of the High Court of Australia). There can also be legitimate debate as to whether the other relevant emotions (humiliation, intimidation or ridicule) should be broadly protected in this way.

Former Chief Justice of the NSW Supreme Court, James Spigelman, commented in relation to proposals to add this sort of provision to Federal law:

> The freedom to offend is an integral component of freedom of speech. There is no right not to be offended. ... When rights conflict, drawing the line too far in favour of one, degrades the other right. Words such as 'offend' and 'insult', impinge on freedom of speech in a way that words such as 'humiliate', 'denigrate,' 'intimidate', 'incite hostility' or 'hatred' or 'contempt', do not. To go beyond language of the latter character, in my opinion, goes too far.[124]

In addition, arguably s 17 may also be found to be invalid as an undue impairment of the free exercise of religion provided for in s 46 of the Tasmanian *Constitution Act* 1934:

> **46. Religious freedom**
>
> (1) Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.
>
> (2) No person shall be subject to any disability, or be required to take any oath on account of his religion or religious belief and no religious test shall be imposed in respect of the appointment to or holding of any public office.

While the effect of ordinary legislation breaching the *Constitution Act* is not entirely clear,[125] it seems at least plausible to suggest that it should at least be presumed that an ordinary Act of the Tasmanian Parliament is not to contradict the Constitution unless it does so with clarity. A provision that penalizes mere "offence", if linked for example with "sexual orientation" as a protected ground, may be used to try to "shut down" religious speech that presents the traditional view of a number of major religious groups, that homosexuality is not part of God's plan for humanity, and that sexual intercourse ought to only take place between the parties to a heterosexual marriage. The prime example here is the action initiated under s 17 against the Roman Catholic Archbishop of Hobart, based on the distribution of a document outlining the Roman Catholic view of marriage, to Roman Catholic students.[126] While the

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[124] James Spigelman, '2012 Human Rights Day Oration' (Speech delivered at the Australian Human Rights Commission's 25th Human Rights Award Ceremony, Sydney, 10 December 2012.) <http://about.abc.net.au/speeches/ hate-speech-and-free-speech-drawing-the-line/> .

[125] See now the *Corneloup (2016)* decision, discussed below.

[126] See "Catholic bishops called to answer in anti-discrimination test case" *The Australian*, 13 Nov 2015; http://www.theaustralian.com.au/national-affairs/state-politics/catholic-bishops-called-to-answer-in-antidiscrimination-test-case/news-story/b98439693f2f4aa17aca9b46c7bda776?sv=768b957e64abb57756bfa7e67f9f01eb .

action was later discontinued, that it could have progressed to the stage it did illustrates the "chilling effect" of s 17 in this area.[127]

Hence s 17 may either be invalid in its operation in respect of religious speech, or else again need to be "read down" so as not to interfere with that area. In either case the argument for its amendment is strong.

Section 55 (the defence provision) allows a more limited range of defences than equivalent provisions in other jurisdictions. To take two other jurisdictions, NSW and Victoria, a comparison can be seen in the following table. (Note that, while there are a number of "anti-vilification" provisions in the NSW *Anti-Discrimination Act* 1977, I have used s 49ZT, the prohibition on "homosexual vilification", as the one which raises the issues most sharply. In Victoria there is no general prohibition of "vilification" under the *Equal Opportunity Act* 2010, so I have drawn a comparison with that State's separate *Racial and Religious Tolerance Act* 2001, s 11.)

Comparison with Tasmanian defences in "anti-vilification" laws in some other jurisdictions

Tasmanian ADA 1998 s 55	NSW ADA 1977 s 49ZT	Vic RRTA 2001 s 11
55(a) "fair report of a public act"	(2)(a) "fair report of a public act"	11(1)(c) making or publishing a fair **and accurate** report of any event **or matter of public interest**
55(b) matter subject to a defence of absolute privilege in defamation	(2)(b) matter subject to a defence of absolute privilege in defamation	**N/A**
		11(1)(a) in the performance, exhibition or distribution of an artistic work
55(c)(i) public act done in good faith [for following purposes]	(c) public act done ***reasonably*** and in good faith [for following purposes]	11(1)(b) conduct was engaged in **reasonably** and in good faith in the **course of any statement, publication, discussion or debate made or held, or any other conduct engaged in, [for** the following purposes]
..academic	academic,	(1)(b)(i) academic..
..artistic	artistic,	artistic
..scientific	scientific	scientific
..research	research	**N/A**
	religious instruction	**Religious (see (2) –"includes, but is not limited to, conveying or teaching a religion or proselytising")**
55(c)(ii) "any purpose in the public interest"	for other purposes in the public interest, ***including discussion or debate about and expositions of any act or matter***	(1)(b)(ii) any purpose that is in the public interest

Differences between s 55 and these other provisions (where the other States are in agreement) include:

- Omission of the word "reasonably" when attached to the "good faith" defence in the other States;

[127] For previous detailed comment on these proceedings, see my blog post "First they came for the Catholics…" (Nov 13, 2015) https://lawandreligionaustralia.wordpress.com/2015/11/13/first-they-came-for-the-catholics/ .

- No specific reference in Tasmania to "religious" purposes as a defence.

(There are other differences where one of the other States includes a defence that neither Tasmania nor the other State refers to.)

Of course, it is not necessary that the Tasmanian defences track other jurisdictions, but the consensus of others at least raises the question whether these matters ought to be dealt with.

There is another important issue, which concerns the way that "public interest" has been interpreted in Tasmania. In the decision in *Williams v Threewisemonkeys and Durston*[128] the Tasmanian Anti-DiscriminationTribunal found that a pamphlet containing alleged statistics relating to homosexual behaviour breached s 19, and refused at para [38] to apply the s 55 defence on the basis that "public interest" must be objectively assessed (the implication being that the Tribunal was not convinced of the truth of the pamphlet.)

Sadly, a similar approach was taken on appeal in these proceedings, in *Durston v Anti-Discrimination Tribunal (No 2)*.[129] Arguments similar to those noted previously were raised. It was ruled that negative comments about homosexual activity could not be distinguished from attacks on person of a homosexual orientation- see [13]-[14]. Brett J considered the question as to whether s 19 could be said to be invalid as impairing the right to political communication. He adopted, at [25], the test for this implied restriction on legislation set out by Gagelar J in *Brown v Tasmania*:[130]

> 1 Does the law effectively burden freedom of political communication?
> 2. Is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of government?
> 3. Is the law reasonably appropriate and adapted to advance that purpose in a manner compatible with the maintenance of the constitutionally prescribed system of government?
> If the first question is answered 'yes', and if either the second question or the third question is answered 'no', the law is invalid.

Brett J noted the difference of opinion that had emerged in State appellate decisions concerned whether laws that were similar to s 19 of the Tasmanian Act (on "vilification") could be said to satisfy the first limb of this test by "burdening" freedom of political communication. In *Sunol v Collier (No 2)*[131] a majority of the NSW Court of Appeal held that the relevant NSW law did put a burden on speech; but in *Owen v Menzies; Bruce v Owen; Menzies v Owen*[132] the Queensland Court of Appeal thought that speech which incited hatred was so far outside the bounds of political speech that it was not protected. (A similar argument had been accepted by the Victorian Court of Appeal in *Catch the Fire Ministries Inc v Islamic Counciil of Victoria Inc*.)[133]

Brett J then ruled that the preponderance of authority favoured the view that there was no burden on speech from s 19. But he then went on to say that even if there was a burden, that s 19 served a legitimate purpose in preventing serious hate speech and did so in a "proportionate" way. He ruled that s 19 was valid.

However, his Honour then considered s 17, with its prohibition on causing "offence", and concluded (taking into account, among other things, the views expressed in *Monis* noted above), that on its own it was likely to be invalid:

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[128] [2015] TASADT 4.
[129] [2018] TASSC 48 (4 October 2018). Again, at both the Tribunal hearing and on appeal the alleged wrongdoer was unrepresented by legal advisors.
[130] [2017] HCA 43 at [156].
[131] [2012] NSWCA 44.
[132] [2012] QCA 170.
[133] [2006] VSCA 284.

> [69] In my view, the dominant feature of the operation of s 17(1) is the potential effect on debate and discussion of topics that might be the subject of political or governmental interest. A person engaging in robust debate would find it necessary to consider and predict whether somebody may be inadvertently or incidentally offended, humiliated, intimidated, insulted or ridiculed on the basis of a prescribed attribute, in respect of everything said in that debate. This has the **potential to place an impossible burden on the type of political discourse** and discussion envisaged by the system of representative democracy established by the Constitution.

However, his Honour said that the defence provision in s 55 could be considered as a part of the overall scheme of the Act. In discussing the provision, and in particular what it meant for a comment to be made "in the public interest", his Honour again adopted what I regard as an erroneous interpretation of the phrase, by which it is seen as requiring a court or tribunal to come to its own views as to whether a comment is actually in the public interest.

> [75] These observations suggest that it is necessary for a court or tribunal to make a **discretionary value judgment about the perceived purpose of the communication**. This is consistent with the view taken by the majority in *O'Sullivan v Farrer* [1989] HCA 61; (1989) 168 CLR 210 at 216. I do not think that it is either necessary or desirable for me to be any more prescriptive about the meaning or application of s 55. It is sufficient to observe that the application of the section in any particular case will depend upon the circumstances of that case. Ultimately, the concepts of "good faith" and "for a purpose in the public interest" will be **matters for judgment by the court or tribunal in question**. A broad interpretation is appropriate, and many cases will turn on factual questions. For example, a verbal attack on a person or group of persons on the basis of a prescribed attribute which is ostensibly in the public interest, but in reality has as its dominant purpose the causation of insult and offence to persons sharing that attribute, will be unlikely to satisfy either requirement. On the other hand, legitimate debate about the same subject-matter, conducted with a conscientious attempt to avoid the effects to which s 17 refers, and conducted solely for the purpose of putting a view, at least perceived by the maker to be for the benefit of the public, will be likely to fall within the exception. (emphasis added)

Such an approach seems highly problematic. Surely in general the truth or falsity of statements of this sort ought to be assessed in the wider "marketplace" of public discussion, and if wrong be shown to be such by production of countervailing evidence, rather than discussion on the issues shut down by judicial, or quasi-judicial, fiat. It seems plausible that "public interest" in all the above provisions ought to be read as covering a situation where the *topic* under discussion is a matter of public interest, rather than restricting the defence to cases where the Tribunal or other decision-maker is in agreement with the precise position being argued for by the person who made the challenged statement. The NSW provision achieves this result by spelling out that "discussion or debate" generally is presumed to be in the "public interest".

A general problem with all laws similar to s 55, however, is that they fail to provide a clear defence of "truth". Nor, as Hayne J noted in the *Monis* decision, do laws of this sort provide the full range of other defences provided under the ordinary law of defamation. It is arguable that the defences under s 55 *should* be expanded so that it is a defence to an action under sections 17 if the act in question is (for example):

> "(d) publication of comments which would not be actionable if the defences available under the law of defamation were applicable."

In addition, as noted previously, there is no defence in the Tasmanian law for discussion conducted for "religious purposes". It seems clear that there would be many in Tasmania who

would like to discuss issues that might cause controversy but would not be doing so in a formally "religious" context. A broadening of s 55 is clearly needed.

(vii) Conclusions on "religious vilification" laws at the moment

To sum up, there are a number of important themes running through the laws and comments noted here concerning religious vilification laws.

(1) The high value to be given to freedom of speech

The US courts, of course, have made freedom of speech a key plank of American law for many years. But it is encouraging to see other courts, particularly the High Court of Australia now, stressing the importance of the right, both at common law and here under the implied freedom of political speech (and giving "politics" a very broad reading.) All the members of the Court in the *Adelaide Preachers* case, for example, affirmed that control over speech in public places could not be validly exercised on the basis of the *content* of the speech, as opposed to "traffic" considerations.

On this basis it is vital to preserve the right of persons, in the exercise of their freedom of speech (and freedom of religion), to vigorous critique of other religious beliefs. As Scolnicov puts it in a very helpful study, while there is a "fine line", it is a crucial one, between

> Laws that legitimately prevent incitement and laws that themselves contravene religious freedom and freedom of expression by preventing legitimate religious speech.[134]

(2) Mere "offence" is not sufficient harm

The theme that simply causing someone "offence" is not enough to justify serious interference with freedom of speech is one that come through a number of the decision and events noted above. The public outcry against the *Exposure Draft* Commonwealth Bill is one example. The decision of the Supreme Court of Canada in *Whatcott* is another, striking down as inconsistent with the Charter the law there insofar as it would have restricted speech simply causing offence. The decision of the two most senior members of the High Court of Australian in *Monis* is another example. In fact, given that the joint judgment of Crennan, Kiefel and Bell JJ interpreted the word "offence" in most serious possible sense, the decision as a whole is strong evidence that the bar for constitutional prohibition of free speech cannot be set too low. But leaving the height of the bar to be "inferred" by the courts is unsatisfactory- the law should be clear.

(3) The need to avoid "identity politics"

Waldron's comments on the need to avoid "identity politics" are apt. They are interesting when compared with the comments of the Supreme Court of Canada in the *Whatcott* decision at [124], noted above, that an attack on sexual "behaviour" can be an attack on persons of a particular "orientation" where such behaviour is a "crucial aspect of the identity of the vulnerable group". There are clearly complex and difficult issues here, some of which involve the question to what extent "sexual orientation", or "religious belief", are matters of personal choice, or are more deeply rooted in "identity". In my view the law may need to seriously address these issues and not just assume currently popular answers.

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[134] A Scolnicov, *The Right to Religious Freedom in International Law: Between group rights and individual rights* (London, Routledge, 2011) at 208; see the whole of ch 6, "Religious freedom as a right of free speech" for a careful and helpful discussion.

(4) Connections between the law of defamation and laws on vilification

As an area where further work seems warranted, important connections are made in many of the above sources between the "ordinary" law of defamation and laws prohibiting vilification. It seems that while the interests protected by the two types of laws can arguably be distinguished- see Waldron's comments, which refer to the interest in "social" reputation, as an accepted member of civil society, and "personal" reputation- they are not dissimilar. The very fact that, as Waldron notes, laws that are characterised as "anti-vilification" laws in Australia are labelled as "group libel" or similar in other parts of the world brings this out.

The links between the two areas of law can even be seen in *Eatock v Bolt*,[135] where Bromberg J applied principles from the law of defamation to identify the content of "imputations" for the purposes of s 18C of the RDA. These links, then, make it all the more urgent for legislators to consider whether or not serious attention should be paid to ensuring that the carefully nuanced defences developed over many years in the law of defamation, ought to be paralleled in the law of religious vilification. Why, for example, should there not be a defence of "truth" in such a law? If in fact it can be shown to an appropriate standard of proof that an organisation that defines itself as a religion, endorses and encourages child abuse- why should not that be a defence to a "vilification" claim? While the Supreme Court of Canada in *Whatcott* seemed willing to accept that something could be unlawful even if true, it is submitted that this may be another important line to draw on the side of free speech. Indeed, if there is general value in a law prohibiting the incitement of hatred against persons on the ground of their religion, then it may be that limiting that law by this and similar defences will disarm many of the strongest critics of that sort of law.

(5) Are current "religious anti-vilification laws" constitutionally valid?

Finally, the strong comments made in favour a broad view of "political" speech and affirmation of the need to protect freedom of speech in both the *Adelaide Preachers case* and *Monis* raise as a serious question whether laws catching the causing of "offence" (or even "serious offence") on the basis of religious belief are consistent with the implied Constitutional prohibition on impairing freedom of political speech.[136] It seems clear that this is an issue that will need to be revisited.

Landrigan concludes in his article that there are indeed some comments made in "religious" contexts that would be protected by the implied freedom of political speech.[137] He uses at pp 453-456 remarks made by the former Dean of St Andrew's Cathedral, the Rev Philip Jensen, discussing a controversial episode involving a Muslim Sheikh, as an illustration of how this can be so. Landrigan argues that comments made by the Sheikh in a sermon in a mosque, to the effect that "women who do not wear a hijab are like 'uncovered meat'", would not have been protected as not sufficiently connected to "political" debates. But later comments by Rev Jensen, pointing out the irony of those who regularly argue for a strong separation of church and state calling for the Sheikh's deportation, were probably sufficiently "political" as they involved critique of politicians.

In short, it seems that even under current law robust debate is possible. But it still seems to be the case that laws that prohibit mere "offence" may come close to "chilling" important discussions.

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[135] Above, n 81.

[136] For previous comment see N Aroney, "The Constitutional (In)Validity of Religious Vilification Laws: Implications for their Interpretation" (2006) 34 *Federal Law Review* 287, and the discussion in C M Evans *Legal Protection of Religious Freedom in Australia* (Sydney, Federation Press, 2012) at 183-186. The whole of ch 7 in that work is an excellent survey of the area of religious hate speech.

[137] Above, n 105.

This specific issue came up in the decision of the Victorian Civil and Administrative Tribunal in *Sisalem v The Herald & Weekly Times Ltd* .[138]

Mr Sisalem is a Victorian Muslim who claimed that the Herald and Weekly Times, publishers of the *Herald Sun* newspaper, had breached various provisions of the *Racial and Religious Tolerance Act* 2001, in particular s 8, noted previously. The claimed "conduct" was the publication of an article in the *Herald Sun* shortly after the November 2015 Paris terrorist attacks, suggesting that some fundamental features of Islam needed to change if such incidents were to be avoided in the future.

The Tribunal Member, J Grainger, rejected the claims made under s 8 (and also other claims made under provisions of the legislation creating a criminal offence of "serious religious vilification", which claims in any event were not able to be heard by VCAT but needed to be brought in an ordinary criminal court.)

In rejecting the claim that there was liability for a breach of s 8, Grainger M referred extensively to the decision of the Victorian Court of Appeal in *Catch the Fire*. The section 8 claim was rejected, broadly speaking, because the Tribunal agreed with comments in the *Catch the Fire* decision that the issue was not whether individual Muslims were offended and upset by what was said about their faith, or indeed whether the commentary was balanced or not, but simply whether the comments had the effect of inciting the relevant emotions of hatred, contempt for, revulsion of or severe ridicule of, Muslim persons because of their faith. The issue, as put clearly by Nettle JA in the *Catch the Fire* decision, was not whether the tenets of the faith were attacked, but whether the comments concerned would lead to the **persons** of that faith being subject to the proscribed emotions. His Honour's words at para [80] in the previous case, previously noted, are repeated at [49] in the *Sisalem* decision.

In the circumstances Mr Sisalem had not presented evidence sufficient to show that persons would be caused to hate etc Muslim persons because of the article- see the summary conclusion at para [67]. It is important to remember that, even if s 8 had apparently been breached, there are defences set out in s 11 of the legislation, previously noted, which may well have been applicable.

It could have been seriously argued that the press report was on a matter of "public interest", and in particular, since it consisted of reporting the expressed views of Members of Parliament, to amount to a "fair and accurate report" of those views. But since the Tribunal held that in any event s 8 had not been breached, Grainger M did not go on to apply the s 11 defences.

The case is an important example of the need to preserve freedom of speech to discuss religious issues, and even to critique the tenets of a particular religion, so long as in doing so there is no attempt to stir up hatred or violence against individuals who adhere to the religion.

(viii) The Ruddock Report on "vilification"

The Report comments on vilification issues in ch 5, from para 1.335. In 1.344 it defines vilification as follows:

> Vilification is concerned with advocacy of hatred that incites discrimination, hostility or violence.

While noting some of the issues discussed above, the Panel in the end makes no significant proposal for reform:

[138] [2016] VCAT 1197.

> 1.351 Accordingly, while not making a recommendation on the matter, the Panel encourages the Commonwealth, State and Territory Attorneys-General to cooperate to ensure greater consistency and national coverage with respect to anti-vilification provisions.

With respect, a proposal that seeks "consistency" offers little guidance. One response that should be resisted is to "lower the bar" across the whole nation to penalise "offence" as is done in Tasmania. Instead, if consistency is required, the best model should be chosen, which is the least restrictive of general free speech while targeting specific speech deliberately inciting hatred and violence.

(c) "Religious Speech" on sexuality

Another area where religious free speech may be under threat is the proliferation of "vilification" laws based on sexual behaviour and identity, classical areas where religious views may be at odds with the current moral orthodoxy.

So the question may arise, whether freedom of religion allows someone who holds a Biblical view of sexual morality, to state openly that certain forms of sexual behaviour are wrong.[139] This of course came up in the context of the *Cobaw* case,[140] which didn't involve a direct "speech" component, but also comes up in the speech area.

NSW law, for example, involves a "homosexual vilification" provision: the ADA 1977 provides as follows:

> **49ZT Homosexual vilification unlawful**
> (1) It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the homosexuality of the person or members of the group.

As noted above, there is a defence under s 49ZT(2)(c) for:

> (c) a public act, done **reasonably and in good faith**, for academic, artistic, **religious instruction**, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter.

It seems fairly clear that a calm and reasoned explanation of the Bible's teaching in a church service or school scripture class would probably fall well and truly within this exception. In addition, of course, such a discussion should not even arguably fall foul in any event of the main provision, as one would hope that in most circumstances a discussion of Biblical morality would not amount to the "incitement of hatred or serious contempt or severe ridicule". But drawing the lines here may be problematic.

In an important ruling in *Sunol v Collier (No 2)*,[141] mentioned previously, the NSW Court of Appeal held that s 49ZT was not constitutionally invalid. It had been alleged that it was an undue infringement of the implied right of political communication under the Commonwealth Constitution.

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[139] For discussion of issues surrounding comments made on homosexuality from a Muslim perspective, raised following the terrible shooting at Orlando, Florida in a gay nightclub, see my blog post "Homosexuality and "hate speech"" (June 19, 2016) at https://lawandreligionaustralia.wordpress.com/2016/06/19/homosexuality-and-hate-speech/ .

[140] See *Christian Youth Camps Limited & Ors v Cobaw Community Health Services Limited & Ors* [2014] VSCA 75 (16 April 2014) where a Christian youth camp was fined for not being willing to host a seminar teaching that homosexuality was a normal and natural part of life. For comment on the case in detail see Neil J Foster, "Christian Youth Camp liable for declining booking from homosexual support group" (2014) at: http://works.bepress.com/neil_foster/78/ and "High Court of Australia declines leave to appeal CYC v Cobaw" (2014) at: http://works.bepress.com/neil_foster/89/ .

[141] [2012] NSWCA 44.

In upholding the provision as valid, however, the Court pointed out that what was required was not simply an **expression** of hatred or contempt for a homosexual person, but "**incitement**" in the sense that others would be stirred up to such hatred or contempt- see eg Bathurst CJ at [28]; Basten JA at [79]. The defence of "good faith" also had to be interpreted broadly; Bathurst CJ adopted comments from Nettle JA in *Catch the Fire* to the effect that the emphasis of the test was a subjective, rather than objective, one, noting at [37] that there was:

> no reason to "load objective criteria into the concept of good faith or otherwise to treat it as involving more than a 'broad subjective assessment' of the defendant's intentions".

Allsop P in addition made the following important comment:

> [60] The text of s 49ZT reflects an attempt by Parliament to weigh the policies of preventing vilification and permitting appropriate avenues of free speech. Subsections (1) and (2) should be read together as a coherent provision that makes certain public acts unlawful. Subsection (2) is not a defence; it is a provision which assists in the defining of what is unlawful. It attempts to ensure that certain conduct is not rendered unlawful by the operation of subsection (1).

This is consistent with a suggestion made on other occasions that when dealing with discrimination law that it is not helpful to talk of "exemptions", but rather to recognise that the various parts of the legislation work together to reach an appropriate "balance".[142]

There has been an important recent development which will, for the moment at least, limit the "reach" of vilification laws from one State into another. This has come with the recent decision of the High Court in *Burns v Corbett*.[143] The case was a combined appeal from two separate claims for homosexual vilification, under s 49ZT of the *Anti-Discrimination Act* 1977 (NSW). In each case the complainant, Mr Burns, a resident of NSW, had commenced proceedings in the NSW Civil and Administrative Tribunal (NCAT) against persons who were resident in other States (Ms Corbett was a resident of Victoria, Mr Gaynor was resident in Queensland.)

Mr Gaynor was alleged to have committed "homosexual vilification" of Mr Burns through material published on a computer in Queensland. Mr Burns was not specifically named by Mr Gaynor but was making a claim simply as someone of a homosexual orientation. The NSW Civil and Administrative Tribunal held that a person who posted material on a computer in Queensland could not be held liable for a "public act" under NSW discrimination law.[144] However, costs were awarded against Mr Gaynor in relation to part of the proceedings, and it was this order which he was appealing.

Ms Corbett was a politician standing for election in Victoria when she was quoted as making some remarks about homosexual persons which were considered insulting. In *Corbett v Burns*[145] the Appeal Panel of the Tribunal accepted at para [63] that it was arguable the republication on the internet of a report written in Victoria might amount to a "public act" in NSW, and hence be actionable under the NSW law dealing with homosexual vilification noted above. This finding against her was later sought to be enforced by an action for contempt of court.

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[142] See Neil J Foster, "Freedom of Religion and Balancing Clauses in Discrimination Legislation" (2016) 5 *Oxford Journal of Law and Religion* 385 - 430. For an argument that *Sunol* was wrong to find s 49ZT valid, see A. K. Thompson, "Burns v Corbett: What If The High Court Had Decided The Implied Freedom Of Political Communication Issue ?" (2018) 20/1 *The University of Notre Dame Australia Law Review*; available at: https://researchonline.nd.edu.au/undalr/vol20/iss1/4 .

[143] [2018] HCA 15, 92 ALJR 423 (18 April 2018).

[144] In *Burns v Gaynor* [2015] NSWCATAD 211 (14 Oct 2015).

[145] [2014] NSWCATAP 42.

The NSW Court of Appeal then ruled that NCAT had no jurisdiction to hear claims under NSW law made against residents of other States.[146] The High Court, though on slightly different grounds, agreed with this ruling.

All members of the court agreed that a State Parliament cannot vest the jurisdiction to decide disputes between residents of different States, in a tribunal which is not a court. To quote the court's formal summary:

> The High Court held that ss 28(2)(a) and (c), 29(1) and 32 of the *Civil and Administrative Tribunal Act* 2013 (NSW) were invalid to the extent that they purported to confer jurisdiction upon the Civil and Administrative Tribunal of New South Wales ("NCAT") in relation to matters between residents of different States.

The members of the Court reached this conclusion in two different ways, however. The majority of the Court (Kiefel CJ, Bell and Keane JJ in a joint decision, Gagelar J concurring generally) held that there was an implied prohibition arising from Chapter III of the Constitution that diversity jurisdiction could not be conferred on non-judicial State tribunals. "Diversity jurisdiction" here refers to the power to determine disputes arising between residents of different States, and such power is given under s 75(iv) of the Constitution to the High Court of Australia and other federal courts.

The other members of the Court (Nettle, Gordon and Edelman JJ in separate opinions) held that no such implication arose from the Constitution itself, but rather that the relevant prohibition arose because of the enactment of s 39 of the *Judiciary Act* 1903 (Cth).

The effect of this ruling is that no lower-level "tribunals" can hear matters arising between residents of different States. In the area we are considering, this is important, as most "vilification" issues are heard and determined at a tribunal level.

There was a further uncertainty remaining even after the High Court ruling, however. It had been accepted that NCAT was not a "court" by all parties, but that issue had not been the subject of a formal decision. In *Johnson v Dibbin; Gatsby v Gatsby*[147] the NCAT Appeal Panel was dealing with a number of claims relating to residential tenancy arrangements involving parties from different Australian jurisdictions. The Panel there held that it *was* able to hear the matters (even after the decision of the NSW Court of Appeal in *Burns*), because on its view it was a "court of the State" for the purposes of Chapter III of the Federal Constitution, and hence was able to have federal diversity jurisdiction conferred upon it (see the summary of reasons at paras [3]-[5].)

However, on appeal from that decision, in *Attorney General for New South Wales v Gatsby*,[148] a strong 5-member bench of the Court of Appeal (Bathurst CJ , Beazley P, McColl, Basten and Leeming JJA) held that NCAT was not a "court of the State" for the purposes of the Constitution, and hence could not exercise judicial power in determining disputes between residents of different States.

The NSW Parliament, prior to the High Court's decision in *Burns*, enacted provisions allowing a matter which would be in the "diversity" jurisdiction to be heard in a court instead of a tribunal- see Part 3A of the *Civil and Administrative Tribunal Act* 2013, which commenced on 1 Dec 2017. This Part was later amended to extend its operation beyond "diversity" matters to any matter of federal law.[149] It will now be interesting to see how this new system works. It

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[146] *Burns v Corbett; Gaynor v Burns* [2017] NSWCA 3 (3 Feb 2017).
[147] [2018] NSWCATAP 45 (14 February 2018).
[148] [2018] NSWCA 254 (6 November 2018).
149 In *Murphy v Trustees of Catholic Aged Care Sydney* [2018] NSWCATAP 275 (22 November 2018) the NCAT Appeal Panel held that, since NCAT is not a "court", it cannot exercise jurisdiction on any matter involving the application of federal law. In that case a claim by a resident of an aged care home that he should be entitled to keep his dog as an "assistance dog" for the purposes of federal disability discrimination law was

will obviously add to the workload of those courts. But it may be that the application of the traditional techniques of judging will provide fairer outcomes in these tricky disputes the long term.

In another series of cases involving Mr Gaynor, the Full Court of the Federal Court ruled (after Mr Gaynor had some initial success at the trial level), in *Chief of the Defence Force v Gaynor*[150] that a reserve member of the Armed Forces cannot make controversial, religiously motivated, political comments on a private website contrary to Defence Force policy, without having their service terminated.

In that earlier decision, *Gaynor v Chief of the Defence Force (No 3)*,[151] Buchanan J ruled that Major Gaynor's termination was unlawful, because in applying the relevant regulations the Chief of the Defence Force had breached the implied "freedom of political communication" under the Commonwealth Constitution. The Full Court of the Federal Court (Perram, Mortimer & Gleeson JJ) then overturned that previous decision and upheld the termination. The decision and the way that the "freedom of political communication" is dealt with have disturbing possible consequences for free speech in Australia on controversial political and moral topics. There is a more extensive discussion of the decision elsewhere,[152] but, in brief, concerns that I have about the ruling include the ambiguity of the Full Court's views on the question whether a member of the Defence Force is entitled without penalty to discuss "political" matters.

The Full Court said at [108]:

> The assessment of suitability, and capacity, required by reg 85 had **little to do**, directly or indirectly, with the holding, expressing and communicating of political opinions. Indeed, as all the policy material and instructions in evidence before the primary judge demonstrated, the ADF in its contemporary form **pursues and encourages diversity in all senses, including diversity of opinions**. However it **also insists on respect and tolerance, without which diversity cannot flourish**. Regulation 85, in particular reg 85(1)(d), read in context, directed attention to the conduct and behaviour of an officer, measured against her or his suitability – in all respects – to remain as an officer in the service of the ADF. It did not authorise a focus on the holding, expression and communication of a **political opinion, in and of itself**, as the criterion for determining whether it was in the interests of the ADF for an officer to remain in service. Its focus was on the suitability of an individual to remain as an officer. (emphasis added)

We are told that "diversity in all senses" is encouraged, including diversity of opinion. But then we learn that along with this there must be "respect and tolerance". These things are clearly not inconsistent if the classic definition of "tolerance" is adopted: that is, agreeing to allow someone to express a view one actually disagrees with. But if the more modern version of "tolerance" is on view- that *any* disagreement on issues which may cause offence, such as sexuality or religion, is "intolerant"- then the view is more problematic.

There is a suggestion, though, that it is not just the opinions expressed but the "manner and tone" in which those opinions are expressed which is important. At [110] the Full Court says:

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held to be a federal matter and hence beyond the jurisdiction of NCAT. The amendment to Part 3A to allow matter of this sort to be referred to a court was made by the *Justice Legislation Amendment Act* (No 3) 2018, assented to 28.11.2018, date of commencement of Sch 1.6, 1.12.2018, sec 2 (3).

[150] [2017] FCAFC 41 (8 March 2017).

[151] [2015] FCA 1370 (4 December 2015).

[152] See N Foster "Religious Free Speech in Australia: CDF v Gaynor" (March 11, 2017) https://lawandreligionaustralia.blog/2017/03/11/religious-free-speech-in-australia-cdf-v-gaynor/ .

> [I]t is **not so much** the subject matter of the communication (homosexual and transgender members of the ADF, the ADF's attitude to the Sydney Mardi Gras, the perceived risks to the Australian soldiers operating in Islamic countries) which is likely to trigger the exercise of power but rather the **tone and attributes of the communication**, together with the way it is linked to the ADF and to any contraventions of instruction, policies or practices of the ADF. Those are the matters that go to the suitability of the officer, and the interests of the ADF. (emphasis added)

So, if the Court is correct here, then there would be no problem with Major Gaynor expressing his views on these matters in a "polite and respectful" tone? One may, with respect, doubt that this is the case. In paras [10]-[12] of the decision the Full Court summarises the "offending" publications. True, one set of exchanges is described as "intemperate, vitriolic and personally offensive" (though the other party is also said to have behaved in these ways.) But other comments are described as follows, at [12]:

> The respondent's statements covered a number of topics, including expressing views that he would not let homosexual people teach his children; that it was wrong for the appellant to have granted permission for members of the ADF to march in uniform at the Sydney Mardi Gras; and a number of criticisms of the ADF's support of transgender ADF members. The respondent also expressed views critical of government and ADF policy about the conflict in Afghanistan, linking the practice of Islam, historically and currently, with a culture of violence, which the respondent asserted posed a threat to Australia.

No mention is made here of "tone". It seems to be assumed in recounting these views that they are intrinsically "offensive". I am not to be taken as agreeing with all of Major Gaynor's views. But they are matters of some import which at least warrant discussion, and it seems wrong to "censor" such discussion rather than responding to it in a rational way.

The broad question of whether a public servant may engage in speech not approved by their employer is (at the time of writing) before the High Court of Australia in the case of *Comcare v Banerji*, a case which was removed directly from a proposed hearing in the Federal Court into the High Court under s 40 of the *Judiciary Act* 1903 (Cth). Ms Banerji was a public servant in the Immigration Department and was also anonymously "tweeting" comments critical of federal Immigration policy; when she was subsequently dismissed by the Department the question was raised whether her dismissal was "reasonable", and this was interpreted by the tribunal hearing the matter as whether what had been done to her was a breach of the implied freedom of political communication.[153] The case has now been heard by a full bench of the court over two days and judgment is reserved.[154]

The "popular" support for a "whistleblower" like Ms Banerji is fairly clear; there is a stark contrast with the "unpopular" views put by Major Gaynor. It will be interesting to see how the High Court deals with the matters.

(d) Other religious free speech issues- preaching, buffer zones

Another set of issues in this area concern **"street preachers"-** is someone allowed to proclaim their views in the street when people may violently disagree with those views? Such objection, more often than not, is grounded not on the religious views of the hearer, but on views about sexuality, or simply a desire not to be "disturbed".

One case that deals with these issues is the slightly old decision of *Redmond-Bate v Director of Public Prosecutions*.[155] There three "fundamentalist" Christian preachers had

[153] See *Banerji and Comcare (Compensation)* [2018] AATA 892 (16 April 2018).
[154] See *Comcare v Banerji* [2019] HCATrans 50 (20 March 2019), [2019] HCATrans 51 (21 March 2019). For the various pleadings filed in the appeal, see http://www.hcourt.gov.au/cases/case_c12-2018 .
[155] [1999] EWHC Admin 733, [2000] HRLR 249.

provoked some opposition from a crowd, which at one point seemed likely to lead to a violent reaction from some youths. A police officer then arrested, not the youths, but the preachers!

The Divisional Court (Sedley LJ and Collins J) held that this was unlawful: that where the preachers themselves were not aiming to provoke violence, that the officer should have instead dealt with the members of the crowd. In doing so the court referred to arts 9 (religious freedom) and 10 (free speech) of the ECHR- even though at the time they were not directly "binding" they were provisions that should inform the court's decision.

Sedley LJ commented:

> [20]…Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having… From the condemnation of Socrates to the persecution of modern writers and journalists, our world has seen too many examples of State control of unofficial ideas. A central purpose of the European Convention on Human Rights has been to set close limits to any such assumed power...
> [21] To proceed, as the Crown Court did, from the fact that the three women were preaching about morality, God and the Bible (the topic not only of sermons preached on every Sunday of the year but of at least one regular daily slot on national radio) to a reasonable apprehension that violence is going to erupt is, with great respect, both illiberal and illogical.

In contrast to this decision, a few years later in *Hammond v DPP (Admin)*[156] a Christian preacher who was speaking while holding up a sign reading "Stop Immorality", "Stop Homosexuality" and "Stop Lesbianism" was convicted under a "public order" offence of "insulting" and "causing distress" to the passers-by. His conviction was upheld on appeal.[157]

In *Kirk Session of Sandown Free Presbyterian Church's Application*,[158] however, a church which had placed an advertisement in a local newspaper headlined "The Word of God Against Sodomy" was held to have had their freedom of expression unduly interfered with when the Advertising Standards Board had ruled that the piece was unlawful. The court held that it was relevant that the context involved an annual "Gay Pride" march where opposing views were clearly being put forward.

We have discussed the *Adelaide Preachers' case* already, but a follow-up case by one of the litigants is worth noting. In *Corneloup v Launceston City Council*[159] the local Council had denied Mr Corneloup a permit to preach in the Launceston Mall.

Mr Corneloup's case was heard in the Federal Court, as he claimed that the regulation forbidding him from preaching was a breach of his implied freedom of political speech (a Constitutional issue and hence within the Federal Court's jurisdiction). But along with that claim he invoked the Court's "pendant or accrued jurisdiction" (see [3]) to deal with a challenge to the decision on administrative law grounds, on the grounds that he was discriminated against on the basis of his religion, and on the basis of a breach of s 46 of the Tasmanian *Constitution Act* 1934.

His claim was successful on the administrative law grounds that the decision to deny his permit had been made by an officer who was not authorized to make that decision, and that in any event the officer had applied either the wrong guidelines, or an inflexible policy when she should have considered the matter on an individual basis- see paras [30]-[32].

Since the decision was being struck down on other grounds, Tracey J did not reach the Constitutional issues based on the implied freedom of political speech. Nor was it necessary to discuss the Tasmanian Constitutional provision, although he made the following comments:

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[156] [2004] EWHC 69.
[157] These and some other "street preaching" cases are noted in Dingemens et al *The Protection for Religious Rights: Law and Practice* (Oxford: OUP, 2103), ch 10.
[158] [2011] NIQB 26.
[159] [2016] FCA 974.

> 36 Mr Corneloup's other constitutional ground was pressed in reliance on s 46 of the *Constitution Act 1934* (Tas). This section, which was introduced into the State Constitution in 1934, provides that "[f]reedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen."
> 37 Again, Mr Corneloup's argument focussed on the Guidelines rather than the Malls By-Law. He claimed that, as a citizen, he was entitled to the "benefit" of s 46. Preaching was one aspect of the practise of his religion. The Guidelines prevented him from preaching in the malls and, as a result, contravened s 46(1) of the Constitution Act.
> 38 Given the inapplicability of the Guidelines it is not necessary to pursue this ground in any detail. Had it been necessary to do so Mr Corneloup's argument would have confronted a number of difficulties. The first is that s 46 does not, in terms, confer any personal rights or freedoms on citizens. The qualified "guarantee" has been held to prevent coercion in relation to the practise of religion and to guarantee a freedom to profess and practise a person's religion of choice: see *McGee v Attorney-General* [1974] IR 284 at 316 – a decision of the Irish Supreme Court on the equivalent provision of the Constitution of Ireland, Article 44(2)(1). There is, however, no authority to which I was referred which determines the practical effect of the "guarantee". In particular, there remains an open question as to whether it could operate to render invalid provisions of other Tasmanian legislation (or subordinate legislation made thereunder), given that the Constitution Act is also an Act of the Tasmanian Parliament and s 46 is not an entrenched provision.

The discrimination claim was also not addressed in detail, though his Honour queried whether a permit to speak was the provision of a "service" for the purposes of the legislation.

It is also worth noting that, among the statements which might be made by believers, but which cause offence to others, are statements **opposing the practice of abortion**. Free speech on this issue has come under increasing challenge in recent years.

One example can be seen in in *Fraser v Walker*.[160] A person who was standing outside an abortion clinic in Melbourne was displaying a poster that featured pictures of aborted fetuses. She was charged with, and convicted of, "displaying an obscene figure in a public place" contrary to s 17(1)(b) of the *Summary Offences Act* 1966 (Vic). There were a number of interpretive and human rights issues raised in her defence; the County Court, for example, decided (surprisingly, I think) that something could be "obscene" even if it had no sexual connotations, but was simply "offensive or disgusting" – para [21].

But one of the grounds of defence was that display of the poster was part of her "right to freedom of conscience and religion"- [38]. This, along with other human rights defences, was rejected.

Judge Lacava rejected the argument that the law contravened the implied freedom of political communication:

> 48 I am not satisfied on the facts of this case that what the appellant was displaying could properly be characterised as political communication. That which was displayed by the appellant was not directed at government or those charged with legislative responsibility. In my view, it was nothing more than a communication directed squarely at those who operate the clinic in Wellington Street and those who attended as patients. Section 17 of the Act exists for the purpose of ensuring, where possible, good order in public places such as the footpath in Wellington Street. In the circumstances here, proper application of the provision does not, in my view, burden in an inappropriate way the appellant's right to political communication and is thus enforceable.

The Judge also commented:

[160] [2015] VCC 1911.

> 49 I accept Miss Ruddle's submission that the appellant's right to religious freedom does not provide a legal immunity permitting her to breach the provision of the Act in question. Assuming the appellant's stance on abortion comes from her religious belief, the display of obscene figures is not part of religion nor can it be said the display is done in furtherance of religion.

There is clearly much more to be said on these points, especially as opposition to "abortion on demand" is a well-known religious stance of the Roman Catholic church. Indeed, viewed as an "issue" the question of the limits of abortion law is clearly a "political" one. It is a difficult question, and the weighing up of the free speech and religious freedom rights of the activist here had to be done in light of the emotional and other harm that might be caused to those seeking to use the services of the clinic. But I am not so sure that it should have been summarily dismissed as in no way connected with her religion, or unconnected with political issues.

There has also been a recent trend for Australian jurisdictions to introduce "buffer zones" around abortion clinics, in which opposition to abortion may not even be expressed in polite and respectful ways.

Tasmania, for example, has introduced such legislation, in the *Reproductive Health (Access to Terminations) Act* 2013 (Tas), s 9. An "access zone" under that law is 150 metres around a clinic, and within that area "prohibited behaviour" is defined as follows:

> (a) in relation to a person, besetting, harassing, intimidating, interfering with, threatening, hindering, obstructing or impeding that person; or
> (b) a protest in relation to terminations that is able to be seen or heard by a person accessing, or attempting to access, premises at which terminations are provided; or
> (c) footpath interference in relation to terminations; or
> (d) intentionally recording, by any means, a person accessing or attempting to access premises at which terminations are provided without that person's consent; or
> (e) any other prescribed behaviour.

This is a very wide prohibition, covering not only violent or abusive behaviour (which of course would already be prohibited by the general law), but also making it unlawful to simply quietly hand out leaflets in a "protest" which can be said to be "in relation to" terminations, or indeed to wear a "protesting" T-shirt, however mild and inoffensive, while standing on the other side of the road from a clinic.[161]

A prosecution under this legislation rejected a number of challenges to the law on free speech and religious freedom grounds. In *Police v Preston*[162] Mr Graham Preston and two other protestors were charged under s 9 of the Tasmanian law after having been found holding up signs protesting against abortions outside a clinic in Hobart.[163] The Magistrate found that a challenge on the basis of the implied freedom of political communication failed, after making a detailed analysis of the law in accordance with the *McCloy* schema previously noted- see

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[161] For further comment on this legislation, along with equivalent ACT and Victorian laws, see my blog post "Abortion "buffer zones", free speech and religious freedom" (Nov 5, 2015) at https://lawandreligionaustralia.wordpress.com/2015/11/05/abortion-buffer-zones-free-speech-and-religious-freedom/ . See also the *Public Health and Wellbeing Amendment (Safe Access Zones) Act* 2015 (Vic) (No 66 of 2015) inserting new Part 9A into the *Public Health and Wellbeing Act* 2009 8 (Vic) as from 2 May 2016, with similar effect to the Tasmanian legislation noted above. See now the *Public Health Act* 2010 (NSW) Part 6A (effective 15 June 2018); *Termination of Pregnancy Act* 2018 (Qld), Part 4 (effective 3 Dec 2018); *Health* Act 1993 (ACT), Part 6, Div 6.2 (effective 22 March 2016); *Termination of Pregnancy Law Reform Act* 2017 (NT) (effective 2 July 2017).

[162] [2016] TASMC (Mag C J Rheinberger).

[163] The decision does not seem to be available through the usual internet sources. Those who are interested, however, may download a copy of the report from https://www.dropbox.com/s/svzvwlilh1ujxfv/Preston%20decision-%20clean%20copy.pdf?dl=0 .

paras [32] and ff. She seemed to accept the defence submission that the prohibition was a "significant" burden on their freedom of speech on a political matter- see [38]. However, when considering the purpose of the legislation, she considered the whole issue of regulation of terminations of pregnancy under Tasmanian law, rather than (as arguably should have been the case) the specific issue of the "buffer zone"- see [41]. On this point her Honour concluded that the law was a proportionate response to a problem perceived by the legislature, and that it did not entirely remove the capacity of Mr Preston and the others to express their opposition to abortion- see eg [53].

There was also a challenge on the basis of the Tasmanian religious freedom provision previously noted in s 46 of the *Constitution Act* 1934 (Tas). The Magistrate sensibly accepted that the motives of the protestors were indeed their religious beliefs about the sanctity of unborn life- see eg [76]-[77]. But applying the "caveat" to s 46 concerning "public order", her Honour held that the law was a reasonable law aimed at avoiding the risk of clashes between protestors and members of the public outside clinics, and also at protecting the privacy of those attending. At para [84] her Honour said:

> [84] …[T]he protest activity which is prohibited by s 9(2) of the Act clearly has the capacity to result in a disturbance to public order. Such conduct interferes with the privacy, indeed the medical privacy, of patients attending the premises at which terminations of pregnancies are conducted. The conduct has the potential to lead to some form of public disturbance…

The religious freedom defence was also rejected. It seems likely that laws of this sort will become more common, and striking the right balance of competing interests will be important (for example, is a zone of 150 metres really necessary?)

The High Court of Australia has taken on an appeal from the *Preston* case, and in the factually similar case of *Clubb v Edwards* arising under the Victorian "buffer zone" law. Again, the issue is the scope of the implied freedom of political communication. At the time of writing the appeals had been heard[164] but no decision handed down.

(e) Summary of Current Law

As we have seen, Australian courts continue to wrestle with the right balance between free speech, religious freedom, and other competing rights. The more detailed attention given to the implied right to freedom of political speech in recent years has given some greater clarity in that area. Free speech remains a crucial right which must be protected to allow frank interchange on the merits of various important issues.

Some of those issues will be those raised by religious beliefs. It is vital that Australia allow full and open discussion of the merits of various religious positions, so that informed decisions can be made. Religious freedom is a fundamental human right protected not only by international instruments but by the Commonwealth Constitution and other laws. While all human rights must be balanced with competing interests, it is essential that the interest not to be "offended" by someone else's views not be held to outweigh the fundamental importance of the right to live out one's religion and to engage in public speech on these important issues.

[164] See *Clubb v Edwards & Anor; Preston v Avery & Anor* [2018] HCATrans 206 (9 October 2018), [2018] HCATrans 208 (10 October 2018), [2018] HCATrans 210 (11 October 2018).

3. The *Religious Freedom Review* recommendations

We have seen in discussing these issues that the Ruddock Review has recommended the abolition of the criminal offence of blasphemy, where needed, and the removal of some mentions of this offence from Commonwealth law. These are sensible proposals.

The Panel seems to have found it harder to come to a clear view on "vilification" laws, which like blasphemy laws also have the danger of suppressing free speech about religion.

4. Government response and the future of religious free speech

The official Government response to the Panel on these matters is interesting.[165]

It supports the recommendation on blasphemy (at p 13):

> Blasphemy is not an offence under Commonwealth law. However, as stated below in response to recommendation 14, the Australian Government will amend the Commonwealth *Shipping Registration Regulations 1981* in line with the Panel's recommendation so that references to blasphemy in those Regulations are removed.
> Currently, as noted in the Religious Freedom Review, some blasphemy laws may continue to exist in New South Wales, Victoria, South Australia, the Northern Territory and the Australian Capital Territory.
> While there have been no prosecutions under these laws in Australia since Federation, the Government considers that State and Territory laws specifically prohibiting blasphemy place too great a burden on freedom of expression and infringe upon people's enjoyment of other fundamental rights. Therefore, the Attorney-General will correspond with State and Territory Attorneys-General seeking their agreement to abolish statutory or common law offences of blasphemy.

While there was no official recommendation of the Panel on vilification issues, the Government has chosen to clarify its response to this area in the context of the proposed introduction of a *Religious Discrimination Act*. It says:

> However, it is not the intention of the Government to include in such a Bill a provision regarding offensive, humiliating or insulting behaviour, such as that contained in section 18C of the *Racial Discrimination Act* because, as the Expert Panel has noted, the entrenchment of laws regarding blasphemy would be a retrograde step which the Government considers would place **too great a burden on freedom of expression** in Australia.
> Relatedly, the Government will consult with the States and Territories on the terms of a potential reference to the ALRC to give further consideration to how best to amend current Commonwealth anti-discrimination legislation to prohibit the commencement of any legal or administrative action, pursuant to State-based anti-discrimination legislation analogous to section 18C of the *Racial Discrimination Act*, that seeks to claim **offence, insult or humiliation because a person or body expresses a view of marriage** as it was defined in the *Marriage Act* before being amended in 2017.

First, the Government indicates that is has no intention to extend the provisions of the *Racial Discrimination Act* 1975, s 18C, forbidding comments which *inter alia* "offend" on the basis of race, to situations involving religion. It draws the link with the views of the Panel on blasphemy as representing a burden on freedom of expression.

Second, it indicates a concern at an issue which may arise under State law. In effect it seems that this second comment is directly aimed at s 17 of the Tasmanian ADA 1998, as that seems at present to be the main provision which is "State-based anti-discrimination legislation analogous to section 18C of the *Racial Discrimination Act*." Indeed, the proposal seems

[165] See *Australian Government response to the Religious Freedom Review* (Dec 2018) at https://www.ag.gov.au/RightsAndProtections/HumanRights/Documents/Response-religious-freedom-2018.pdf .

designed to clearly exclude actions in the future like the one previously brought against Archbishop Porteous, claiming that distribution of a booklet giving the Roman Catholic view of marriage had caused "offence" to a homosexual person. Whether a provision of Commonwealth law could validly limit an action of this sort under State law seems a complex question. On one view, however, the "marriage" power, or else a law based on the "external affairs" power implementing art 19 of the ICCPR, might support a law stating that views on marriage cannot be the basis for a vilification claim based on mere "offence". Alternatively, the Government may be satisfied if the ALRC or some other advisory body were to confirm that a law prohibiting the mere causing of "offence" is unlawful, as breaching the implied prohibition on laws impairing freedom of political communication.

5. Conclusion

Speech, as noted above, can be powerful. Following the terrible events in Christchurch, there have been calls to "do something" to prevent such incidents of hateful violence in the future. One suggested course of action is to strengthen laws forbidding "hate speech". Comments attributed to Muslim leaders include:

> "The tragedy in New Zealand yesterday - it wasn't something overnight, it's been something that's been a build-up over the last few years because of the incitement of hatred, bigotry, and discrimination against groups like the Islamic community," he said.
> "We need to look into the causation of what makes such a tragedy that took place yesterday and it all comes down to the hate speech... that takes place."[166]

The desire to do something is laudable, but in light of the matters considered in this paper it seems that a knee-jerk reaction of widening laws on "religious hate speech" would not be justified. The causes of the shooting are complex, and the fact that the shooter did not identify as particularly religious, nor claim that he was upset by Islamic doctrine, should give pause before laws forbidding "vilification" on the grounds of religion are proposed as a solution.

Laws forbidding the incitement of violence seem sensible, and there may be a need to extend these to online contexts. However, such laws are already in place. In NSW, for example, s 93Z of the *Crimes Act* 1900 makes it a criminal offence to publicly threaten or incite violence on the grounds of religion.[167] But to go further and enact laws making it a civil wrong to "offend" on the basis of religion would unduly restrict legitimate debate about this important area, and run the risk that those who are frustrated because they cannot speak about their concerns, will in fact resort more easily to violence.

In the end the best way of exposing the darkness of those who commit religiously-motivated harm against others, would seem to be to bring into play the strong light of full and frank dialogue, so that those views can be clearly challenged and exposed. Preserving free religious speech on these and other issues is vitally important.

[166] See above, n 2.
[167] Inserted by the *Crimes Amendment (Publicly Threatening and Inciting Violence) Act* 2018; assented to 27.6.2018; date of commencement, 13.8.2018.