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SESSION 3: Hate Speech - Vilification Laws and Threats to Freedom

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Questions about what can, and cannot, lawfully be said about religious topics, or about other topics from a religious perspective, have continued to be pressing issues in Australia over the last few decades. This paper reviews the current law on "hate speech" in Australia and its impact on religious free speech.

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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*, using the "tongue" as a metaphor for speech:

> There is one whose rash words are like sword thrusts, but the tongue of the wise brings healing. (12:18)
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> 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 some examples of "bad speech", that 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 sometimes 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 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

[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 . Note also the controversy over an online video of an attack on a Christian preacher, as to which government bodies tried to put pressure on social media sites not to carry the video. In *eSafety Commissioner v X Corp* [2024] FCA 499 (13 May 2024) Kennett J in the Federal Court declined to continue an interim injunction against X (formerly Twitter) which had required them to take steps to make the video unavailable to viewers all over the world. Below we consider the specific issues raised by increasing anti-Semitism in Australia and proposals to regulate speech to deal with those issues. See especially J Segal *Special Envoy's Plan to Combat Antisemitism: A policy-oriented framework for government and the Australian community* (Australia's Special Envoy to Combat Anti-Semitism, 10 July 2025) https://www.aseca.gov.au/news/article/special-envoys-plan-combat-antisemitism .

need for nuanced rather than "broad brush" laws which will target specific problems and not "catch up" legitimate comments.

Note that this paper (for reasons of space and time) does not address all the issues around free religious speech in Australia. It focusses on the civil law, as opposed to criminal law dealing with the issues (in general, the criminal laws on the topic are more appropriately targeted and not so concerning as some of the civil prohibitions.) More could be said on the law of blasphemy (still a crime in some jurisdictions, though rarely if ever used)[3], and on laws impacting street preaching and protests, especially around abortion clinics.[4] The focus of the paper is the law where it makes unlawful certain speech which is broadly categorized as "vilification" or "hate speech", based on protected characteristics of the persons who are said to be the subject of the speech.

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.[5]

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.[6] 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.[7]

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 ("ECtHR") 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*,[8] 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:

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[3] For an overview see Reid Mortensen, "Blasphemy in a secular state: A Pardonable sin?", (1994) 17/2 *UNSW Law Journal* 409-31. The Federal Court in *Ogle v Strickland* (1987) 71 ALR 41 assumed the law was still in force where not explicitly abolished. See also s 574 of the *Crimes Act* 1900 (NSW).

[4] There are not many "street preaching" cases in Australia but see *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3, and *Corneloup v Launceston City Council* [2016] FCA 974 (involving the same preachers, who had moved to Tasmania!) On abortion clinic "buffer zones", see *Clubb v Edwards; Preston v Avery* [2019] HCA 11, where the High Court upheld the validity of laws prohibiting communication about abortion within 150m of an abortion clinic.

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

[6] *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).

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

[8] [2005] HCA 29; (2005) 216 ALR 1; (2005) 79 ALJR 1142, at [121].

> 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?[9]

(a) 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.[10] A later paper updated those views.[11]

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.
> "An apostate deserves to be killed and any man may kill him." [12]

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

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[9] For the view that art 18 should usually be preferred as a *lex specialis* (broadly, an over-riding principle defeating other rights) where there is an issue of conflict with other rights, see H. Victor Condé "Human rights and the protection of religious expression: Manifestation of 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. In my opinion, this is not a widely accepted view; the various rights under the ICCPR all need to be recognised to the maximum extent possible.

[10] 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.

[11] 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 .

[12] 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 .

to another faith (that is clearly what is meant by an "apostate"). That is pretty clearly hate speech on religious grounds.[13]

More recently in Australia, we have seen incitement of harm to Jewish people from an Islamic preacher, discussed in the decision of *Wertheim v Haddad* [2025] FCA 720 (1 July 2025, Stewart J). We will come back to this case in more detail below, but note that it was proven that Mr Haddad, in a series of talks broadcast over the internet entitled *The Jews of Al Madina*, linking comments from the Qur'an to current Jewish folk, made a number of comments which were not only derogatory and offensive, but urged violence against Jews: see the following summary provided by Stewart J at [158] point (3)

> There is an eternal conflict between Jews and Muslims for which Jews are responsible and which will only end towards the end of time when Muslims **should** and **will kill Jews** (imputations 3, 15 and 19); (emphasis added)

(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"?[14] For a media commentator to suggest that "gang rape was a rite of passage for Muslim males in France"?[15] The "manifesto" written by the Christchurch shooter also attacked Muslims, though interestingly not on "religious" grounds, but from a "white supremacy" perspective.[16]

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 helpful overviews of the developing law of 'religious vilification' or 'religious hate speech'.[17] Gelber and Stone, for example, offer this definition of the type of law at issue here, using the terminology of "hate speech":

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

[14] 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.

[15] 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).

[16] 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 .

[17] 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.

> 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 …[18]

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. We will consider these laws first, before noting other varieties of vilification law which will impact on religiously-based speech.

(a) Legislation forbidding religious vilification

In Australia, five jurisdictions have introduced what can be seen as specific religious vilification laws: Queensland, Tasmania, Victoria, the ACT, the Northern Territory, and most recently NSW.[19]

(Note- the law of Queensland will change when (or if) Part 2 of the *Respect at Work and Other Matters Amendment Act* 2024 (Act No 47 of 2024) fully commences operation. That Part amends introduces a new Part 4 of Chapter 4 dealing with "vilification" and inserts a new s 124C banning "a public act that a reasonable person would consider hateful towards, reviling, seriously contemptuous of, or seriously ridiculing" someone on a protected ground. In addition, new s 124D will make it unlawful to "in a public act, engage in conduct that is likely to incite hatred towards, serious contempt for, or severe ridicule of, a person." Neither of these new "vilification" proposals contain a specific defence for religiously motivated speech or acts.[20]

Note also that the Victorian legislation referred to below will be repealed and replaced when Part 3 of the *Justice Legislation Amendment (Anti-vilification and Social Cohesion) Act* 2025 (Vic) (No. 11 of 2025) commences operation. Provisions about vilification will be moved into new Part 6A of the *Equal Opportunity Act 2010* (Vic). It seems, however, that these provisions will not commence operation until 30 June 2026.[21] I have provided some comment on the implications of these changes on my blog.[22])

One prominent example of vilification laws is the current Victorian provision, s 8 of the *Racial and Religious Tolerance Act* 2001 (Vic) ("RRTA"):

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[18] Gelber & Stone at xiii.

19 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 (which does not protect religious belief). Since that time the ACT has introduced (in 2016) s 67A(1)(f) of the *Discrimination Act* 1991 (ACT), and the Northern Territory has introduced s 20A into its *Anti-Discrimination Act* 1992 (see the *Anti-Discrimination Amendment Act* 2022 (Act No. 26, 2022)), forbidding an action which is likely to "offend, insult, humiliate or intimidate" another person on grounds which include religious belief. In NSW now s 49ZE prohibits religious vilification (inserted by the *Anti-Discrimination Amendment (Religious Vilification) Act* 2023, commencing on 12 November 2023). For comment see my blog post, "New NSW "Religious Vilification" law" (26 Nov, 2023) https://lawandreligionaustralia.blog/2023/11/26/new-nsw-religious-vilification-law/ .

[20] Note that the amending Act was originally scheduled to commence on 1 July 2025, but that commencement provision was amended as of 19 May 2025 by the *Crime and Corruption (Restoring Reporting Powers) and Other Legislation Amendment Act* 2025 s 53(1) so that the Act will commence on "a day to be fixed by proclamation". The current government has noted that it is still considering whether to commence operation of some of the changes made by the amending Act: see "MEDIA STATEMENT: Crisafulli Government to consult on anti-discrimination laws" (14 March 2025) https://statements.qld.gov.au/statements/102168 .

[21] *Justice Legislation Amendment (Anti-vilification and Social Cohesion) Act* 2025 s 2(4).

[22] See https://lawandreligionaustralia.blog/2025/02/23/hate-speech-and-religious-freedom-recent-developments-in-australia/ (Feb 23, 2025)- though note that these comments were made while the amending Bill was before the Parliament, so the final form of the law should be consulted for the ultimate form of the changes.

> **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.[23]

In *Deen v Lamb*[24] 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.

(b) The "Catch the Fire" case in Victoria

The most controversial application of these laws so far, however, was in the litigation involving the 'Catch the Fire' organisation.[25] 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.[26] A brief summary is appropriate.

The original decision was *Islamic Council of Victoria v Catch the Fire Ministries Inc*.[27] 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

[23] Sub-section (2) was added to the Act in 2006 partly in response to the *Catch the Fire* litigation discussed below.
[24] [2001] QADT 20.
[25] 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.
[26] See McNamara, above n 19 ; 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.
[27] [2004] VCAT 2510.

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*[28] 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'.[29]

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.[30]

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.[31] In general it seems far preferable for debate about religion to be "untrammelled" by fear of legal intervention.

(c) UK law on religious vilification

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*.[32]

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.[33]

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

> **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

[28] [2006] VSCA 284.
[29] See, for example, the summary in Ahdar at 305.
[30] [2006] VSCA 284 at [15]. His Honour, of course, was later elevated to the High Court of Australia, where he served until his retirement on 30 November 2020.
[31] 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.
[32] *Public Order Act* 1986 (UK) ss 29A, 29B.
[33] Neil Addison, *Religious Discrimination and Hatred Law* (London: Routledge-Cavendish, 2007), p 140.

> 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.)

(d) "Ordo Templi Orientis" litigation

One interesting set of religious vilification proceedings[34] involved a dispute between two odd sets of parties. In *Ordo Templi Orientis v Legg*[35] 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*[36] 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.[37] 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.[38] 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.[39]

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 religion. But it may be queried whether the respondents ought to have been put in jail for their

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[34] Noted briefly in M Thornton & T Luker, "The Spectral Ground: Religious Belief Discrimination" (2009) 9 *Macquarie Law Journal* 71-91, at 90.
[35] [2007] VCAT 1484.
[36] [2007] VCAT 2470.
[37] http://www.theage.com.au/news/national/couple-jailed-for-contempt-in-vilification-case/2008/02/20/1203467183354.html .
[38] http://www.theage.com.au/news/national/apology-frees-jailed-couple/2008/02/28/1203788539310.html .
[39] *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/ .

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.[40] 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.[41]

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.)[42] 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."[43] If indeed these persons were sufficiently "identified" as belonging to the group to suffer this harm to their "reputation",[44] 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.[45]

In fact, the "Ordo Templi Orientis" ("OTO") has continued to feature in litigation based on "religious vilification" laws.[46] 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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[40] 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!)

[41] 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?

[42] See Foster (2012), n 10, at 79.

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

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

[45] Thornton & Luker, above n 34, 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."

[46] 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")*[47] 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.[48]

In the later decision of *Bottrill v Sunol (Discrimination) ("Bottrill No 2")*[49] the substantive issues of religious vilification were decided. Both parties were self-represented.[50] 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.[51] 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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[47] [2017] ACAT 81 (9 October 2017).
[48] See *Bottrill No 1*, above n 47 at [61]-[63].
[49] [2018] ACAT 21 (13 March 2018).
[50] 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.
[51] 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."

(e) Racial vilification case discussing religious vilification- Ekermawi

Another vilification case, while not on the facts actionable as "religious vilification", illustrates some of the issues raised by these laws. The action in *Ekermawi v Nine Network Australia Pty Limited* [2019] NSWCATAD 29, based on comments about "Muslims" in general, failed because NSW law at the time contained no civil prohibition on "religious vilification".[52]

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.

[52] 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/ . NSW law now does prohibit religious "vilification"- see above n 19 for details. So the comments made in this case may have a real "bite" under the new law.

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 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![53]

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.

[53] 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).

(f) Racial vilification with religious vilificiation implications- Haddad

This seems an appropriate place to discuss another racial discrimination claim which, unlike *Ekermari*, was successful, and which brings out a number of concerning issues around free speech.

In the recent case of *Wertheim v Haddad* [2025] FCA 720 (1 July 2025), Stewart J in the Federal Court found Mr Haddad, a Muslim preacher, guilty of breaching s 18C of the *Racial Discrimination Act* 1975 (Cth) ("RDA"). As previously mentioned, Mr Haddad delivered (and arranged to be posted online) a series of sermons and interviews on the general topic of *The Jews of Al Madina.* In these he drew links between condemnations of the Jewish community of the time from the Qur'an, and current members of the Jewish community in Australia. Of course he linked some of his comments to the event of the current hostilities in Gaza, and so some of his remarks were found to be directed at the political state of Israel. But on a careful examination of the content, Stewart J ruled that many were intended to refer to Jewish people generally. As noted above, some comments asserted that Jews should be killed; many others were insulting and derogatory about Jewish people on the grounds of their race and religion.

Note that this claim could be brought under legislation relating to *racial* discrimination, because Judaism is accepted as a category which is both racial and religious.[54] But the rulings in the litigation are likely to have some impact on future cases involving specifically religious vilification.

Section 18C(1) of the RDA makes it unlawful to do a non-private act that is "reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people" on the basis of their race. It will be noted that it is not an "incitement" provision, as is s 8 of the RRTA noted above. Instead, the essence of the prohibition is not the effect the comments will have on others, but the effect they produce on the person from the protected class. And on the face of the provision, that effect can be as mild as causing "offence" or insulting.

However, judicial interpretation of s 18C has tended to stress that more than minor annoyance must be caused. Stewart J here commented:

> [183] To be unlawful, the relevant conduct must have "profound and serious effects, not to be likened to mere slights": ***Creek*** *v Cairns Post Pty Ltd* [2001] FCA 1007; 112 FCR 352 at [16] per Kiefel J; *Bropho* at [70]; *Eatock v Bolt* at [268]. While there is "an aspect of gravity or severity inherent in the prohibition" (*Kaplan* at [30]), "the effect need not be at the extreme level of 'racial hatred'" (*Kaplan* at [506]).

In this case it was very clear that the low bar set by s 18C had been well and truly met. His Honour summed up the impact of the comments in this way:

> [197] Taken together, the established imputations in Mr Haddad's lectures are fundamentally racist and antisemitic and devastatingly **offensive and insulting**. They make perverse generalisations against Jewish people as a group. Jewish people in Australia in November 2023 and thereafter would experience them to be **harassing and intimidating**. That is all the more so because they were made at the time of heightened vulnerability and fragility experienced by Jews in Australia, but they would also have been harassing and intimidating had they been made prior to 7 October 2023. That is because of their profound offensiveness and the long history of persecution of Jews associated with the use of such rhetoric. Those effects on Jews in Australia would be profound and serious.

[54] This view has been generally adopted in relation to Sikhs and Jews since the decision of the House of Lord in UK litigation in *Mandla v Dowell Lee* [1983] 2 AC 548 (dealing with Sikhs), and see *Seide v Gillette Industries Ltd* [1980] IRLR 427 (Jews).

I pause to say I agree with Stewart J. Taken together these were a series of horrible remarks which were deeply offensive and insulting to Jewish people. However, in my view an appropriate law in this area would be one which made it unlawful to *incite violence* against members of the Jewish community, rather than being pitched at a level where "offence" alone would be unlawful. If there were such a law in place, the remarks here would have breached that law (see the quote given above: "Muslims **should** and **will kill Jews"**.) But the issue I see is that this justified penalty here, may now be extended to argue for laws based on religion, not on race alone, and which would cause mere "offence".

There are other concerning rulings here which if extended to religious vilification laws would have a seriously detrimental effect on religious freedom. For example, there was a question here as to whether the prohibition applied when members of the Jewish community were not likely to view the initial material. His Honour ruled that once remarks were made other than in private, then it can be assumed that members of the community will become aware of it:

> [168] The correct construction of s 18C(1)(a) is that once it is established that an act was done otherwise than in private (as required by the chapeau), the analysis of reasonable likelihood required by para (a) is undertaken on the assumption that the relevant person or group of people becomes aware of it.

I am not sure that this is correct. I think the better approach is to consider whether, in the individual case, it is *likely* that the remarks will become widely known. His Honour ruled at [172] that, even adopting a more evidence-based approach, in this case the remarks were in fact likely to have come to notice of members of the Jewish community, taking into account their controversial nature and also the fact that there were media monitoring services reporting on anti-Semitism. This seems by far a preferable approach. For example, if comments of a "religiously offensive" nature were made in a sermon in a church (which would arguably not be in private), it seems wrong that such comments should be deemed to have come to the attention of those who might be offended.

Stewart J also noted that, despite claims by Mr Haddad that his comments were based on his views about the political events in Gaza, and directed to the State of Israel, that in fact his remarks did extend beyond the political entity to cover all people of the Jewish faith (and "Jews" generally, whether or not they adhered to the tenets of Judaism.)

> [204] In the present case, I am satisfied that Mr Haddad made the disparaging comments about Jews reflected in the imputations in his lectures **because of Jewish race or ethnic origin**. As already observed, the project of the lectures titled "The Jews of Al Madina", being to link and equate the actions of the modern-day Israeli government and security forces with acts of Jewish tribes in conflict with the Prophet and his followers in the seventh century, was **a racist project about Jews**; it was to say that Jews then and Jews now – all Jews – are the same.

There is then a defence to s 18C, set out in s 18D of the RDA, which required consideration. Without going into all the details, I am concerned about how these defence provisions were applied. The relevant defences relied on were as follows:

> **18D Exemptions**
>
> Section 18C does not render unlawful anything said or done **reasonably and in good faith**:…
>
> (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other **genuine purpose in the public interest**; or

(c) in making or publishing:…

(ii) a **fair comment** on any **event or matter of public interest** if the comment is an expression of a genuine belief held by the person making the comment. (emphasis added).

One of the main issues discussed was what the introductory words of this defence meant, in saying that comments must be made "reasonably and in good faith". While this is a lengthy quote, it is worth setting out his Honour's summary here (as it may have some impact on others in the future.)

> [217] As far as **reasonableness** is concerned, there must be "a rational relationship" between what is said or done and an activity in ss 18D(a)-(c) in the sense that it was said or done "for the purpose" of the activity and "in a manner calculated to advance the purpose": *Bropho* at [79]-[80]; *Clarke* at [119]-[120]. Further, what is said or done must not be "disproportionate to what is necessary to carry it [ie the activity in ss 18D(a)-(c)] out": *Bropho* at [79], [139]-[140]; *Clarke* at [122]; *Eatock v Bolt* at [349], [414], [439]. For example, being "gratuitously insulting or offensive" in relation to "a matter that is irrelevant" to the activity in ss 18D(a)-(c) may be unreasonable: *Bropho* at [81]; *Clarke* at [121].
>
> [218] As always, reasonableness in s 18D is ultimately an **objective question**: *Bropho* at [79]. It is "informed by the normative elements of ss 18C and 18D": *Bropho* at [79]. "[T]here may be more than one way of doing things 'reasonably'" and the question is "not whether it could have been done more reasonably or in a different way more acceptable to the Court": *Bropho* at [79]; *Comcare v Martinez (No 2)* [2013] FCA 439; 212 FCR 272 at [82] per Robertson J.
>
> [219] The requirement of "**good faith**" has an objective and a subjective element: *Clarke* at [133]; *Eatock v Bolt* at [346]-[348]. Subjective good faith requires, at a minimum, "subjective honesty and legitimate purposes": *Bropho* at [96]. Conduct lacks subjective good faith if, for example, the respondent sought "consciously to further an ulterior purpose of racial vilification", "dishonesty or the knowing pursuit of an improper purpose": *Bropho* at [96], [101]. Objective good faith requires "a conscientious approach to the task of honouring the **values asserted by the Act** … assessed objectively": *Bropho* at [96], [101]-[102]. For example, taking a "conscientious approach to advancing the exercising of that freedom in a way that is designed to minimise the offence or insult, humiliation or intimidation suffered by people affected by it" may be objectively in good faith, whereas acting "carelessly disregarding or wilfully blind to its effect upon people who will be hurt by it or in such a way as to enhance that hurt" may lack objective good faith: *Bropho* at [102].

With respect, there are some disturbing implications here. The view that is adopted is that "reasonableness" must be assessed in terms of whether it bears a rational relationship with the purpose of the prohibited activity. That means that the court itself will be judging whether what was said was logically connected with what the speaker intended. This will give the judge (or whoever is making the decision, who may often be a tribunal member or a public servant) priority over the personal views of the speaker.

What is worse, though, is that "good faith" is analysed in terms of whether what was said "honoured the values asserted by the Act". As much as one may support the general values of this particular legislation, it is apparent that s 18D has been placed in the Act to allow members of the community to express views which would **not** always be consistent with the values of this Act as a whole, allowing them to some extent freedom of speech to put their honest opinion.

That is, s 18D is designed to balance out *other* rights and interests, other than the question of racial discrimination.[55] Since that seems to be the case, why should the good faith of the speaker be assessed against the values of the Act? On the face of it, it would be at least possible to view a defence of "good faith" as simply addressing the question whether the speaker is being dishonest or seeking to gain some unfair benefit.

Here, however, discussion of these issues leads to the disturbing spectacle of Stewart J ruling that Mr Haddad's comments cannot have been "reasonable" or in "good faith" because two expert witnesses disagreed with Mr Haddad's views on the teaching of the Qur'an about Jews!

Let's see how this was done. First, we note that the court needs to find that, for the defence in para 18D(1)(b) to operate, there must be an objective "public interest", which in effect means that the judge must make a ruling on this point. It is not sufficient to argue that "freedom of expression" is the relevant public interest.

> [220] Turning specifically to s 18D(b), the provision "assumes that genuine academic, artistic or scientific pursuits are in the public interest and leaves open the possibility of other pursuits being encompassed within its scope, but only if those pursuits are genuine and in the public interest": *Eatock v Bolt* at [430]. In identifying any other genuine purpose, it is necessary that it be a purpose **"in" the public interest and not simply a matter "of" public interest**: *Eatock v Bolt* at [433]. "The examples of purpose given in the provision (academic, artistic or scientific) reinforce the point that an additional pursuit of public benefit, beyond freedom of expression, is contemplated by the provision. What the provision is concerned with is the public interest use to which the freedom of expression is exercised and not merely freedom of expression itself": *Eatock v Bolt* at [434]. It is necessary to make an **objective assessment** of whether the identified purpose is **genuinely in the public interest**: *Eatock v Bolt* at [435]. {emphasis added}

Interestingly, it was accepted at [222] by the applicants (and seemingly by the court) that preaching religious doctrines was genuinely in the public interest, as well as providing comment on recent events from a religious perspective. That, in my view, is encouraging. However, where Mr Haddad failed was in the court's view as to whether what he said was done "reasonably and in good faith".

At this point Stewart J rules that the attacks on Jews generally were not "reasonable", as the views expressed by Mr Haddad were not accepted by religious experts from both sides of the litigation.

> [224] In my assessment, the imputations in the lectures that are disparaging of Jews were not made reasonably or in good faith. Insofar as the **reasonableness** of the imputations is concerned, they were not made in a manner calculated to advance the purpose of the lectures. As already mentioned, the parties adduced the evidence of **experts on Islamic theology**; Professor Reynolds for the applicants and Sheikh Ibrahim for the respondents. The experts agree that neither the Qur'an nor the Hadith teach that Jews have any inherent negative qualities as a people, but rather that the criticism in these texts is against the Jews in one particular historical context being Muhammad's community in seventh century Medina…
> [229] On the evidence before me, Mr Haddad's disparaging generalisations about Jews, including his view that since the words of Allah are eternal the reported strife with the Jews of Medina can be extrapolated to modern Jews, is **not supported by the teachings of Islam**. {emphasis added}

The problem of a judge in a secular court ruling on the "reasonableness" of a particular interpretation of religious doctrine is very clear. I have written previously on this point, arguing

[55] For comment on the role of similar "exceptions" (clauses balancing different rights) in laws dealing with discrimination on other issues, see Neil J Foster, "Freedom of Religion and Balancing Clauses in Discrimination Legislation" (2016) 5 *Oxford Journal of Law and Religion* 385 – 430.

that while it is correct for judges to examine religious doctrines where only private law rights are at stake and the parties have at least impliedly consented to have their rights so determined, it is inappropriate for judges to be making these rulings in the context of discrimination legislation.[56] In that article I note the decision in *Christian Youth Camps v Cobaw* (2014) 50 VR 256, where under discrimination law the majority had to decide whether or not Biblical teaching on sexual morality was part of the "doctrine" of a religious body.[57] In my article I note that consideration of the digniry and religious freedom rights of religious groups mean that in general they should be the final arbiters of the meaning of their religious texts. However, I also note that this does not mean that every action taken on the basis of religion should be lawful. In particular, it seems right to me that our country should prohibit statements inciting violence against others, whether or not such statements are justified on religious grounds.

In this case, having concluded that Mr Haddad's comments were not "reasonable", Stewart J also added briefly that they were not made in "good faith". I think this is correct and provides a good reason why Mr Haddad's comments should have been found to be unlawful. In effect, his comments were made with the specific aim of stirring up controversy, and in the interest of generating publicity for himself.

> [230] I have already recounted Mr Haddad's courting of controversy by disparaging Christians for the notion of Christmas and by disparaging Hindus by tauntingly eating beef. Not only did he make attacks on the Christian and Hindu religions that were **calculated to generate outrage**, **he then revelled in the publicity and notoriety** that that brought him. In that context, I am not persuaded that Mr Haddad said the disparaging things that he said about Jews in good faith; I am not persuaded that he did not do so also for the purpose of stirring controversy…

While I believe that in this case Mr Haddad's remarks were justifiably found not to be in "good faith", I acknowledge this is a somewhat weak ground in relation to such inflammatory speech. It may in fact be preferable, if s 18C is to remain as part of the RDA, for there to be a more specific qualification to the defences in s 18D. I offer this suggestion because it seems to me to be wrong to say that judges should be deciding on the validity of religious teachings. Better to accept that religious groups should offer their own interpretation of religious doctrine (where this is not a "sham"). Instead, perhaps we need to be clear that we will draw the line at any doctrine which would allow incitement of physical violence against others. This would draw on the explicit prohibition of such incitement in art 20 of the ICCPR.

Something like this might be an option:

> **18DA Incitement to violence not exempted**
>
> Section 18D does not render lawful anything said or done that is advocacy of national or racial hatred that constitutes incitement to discrimination, hostility or violence.

However, if such a change is not made, it seems that limits on the defence to not allow incitement to violence on religious grounds will need to be achieved either through the "good faith" requirement or drawing lines as to what could be regarded as "reasonable".

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[56] See Neil James Foster "Respecting the Dignity of Religious Organisations: When is it Appropriate for Courts to Decide Religious Doctrine?" *University of Western Australia Law Review*, Vol. 47, No. 1, 2020, available at SSRN: https://ssrn.com/abstract=3529047.

[57] For a more detailed analysis of the *CYC v Cobaw* decision, see N Foster "*Christian Youth Camps Ltd v Cobaw Community Health Services Ltd*: Balancing Discrimination Rights with the Religious Freedom of Organisations", ch 17 in R Barker, P Babie and N Foster (eds) *Law and Religion in the Commonwealth: The Evolution of Case Law* (Oxford; Hart/Bloomsbury, 2022), pp 265-291.

Another point should be noted from Stewart J's decision, although he himself conceded it was an *obiter* remark and not needed for this decision. His Honour posed the question- what if the source of a remark that was made in "good faith" and incited hatred, was a religious source? Would that excuse the remark?

> [231] Because of the scholarly theological evidence demonstrating that the view of Jews articulated by Mr Haddad in the lectures has **no foundation in Islam**, this case does not call for a decision on **whether religious belief can ever be a justification for propagating racist bigotry and hate**. Noting that there is no express protection of conduct based on religious belief in s 18D and that to hold otherwise would substantially undermine the purpose of Pt IIA, it **may be that propagating such bigotry and hate in the name of religion could never be done reasonably and in good faith**. See *R(E) v Governing Body of JFS* at [35] per Lord Phillips PSC. {emphasis added}[58]

While one is tempted to agree with this remark in relation to racially based comments, the obvious implication is that such a view might be extended to religious views about human sexuality. Any law in relation to religious discrimination would need to account for this view- that there are some religious views that are so "outside the norm" that they could never be judged to have been expressed "reasonably and in good faith". Again, it may be conceded that such views exist (and were, it seems, expressed in this case). But drawing lines to exclude such views needs to be done with care, so as to only carve out views that do deny fundamental rights such as the right to live, and not to exclude views that merely upset or offend.

Finally, Stewart J was met with arguments from the respondent that s 18C was invalid due to clash with the Constitution. One such challenge was that it was inconsistent with the implied right of freedom of political speech. From [235] this argument was fairly briefly rejected, in main because Stewart J had recently dismissed the argument in another s 18C case, *Faruqi v Hanson* [2024] FCA 1264, and his Honour ruled that more recent discussion of the implied freedom by the High Court in *Babet v Commonwealth* [2025] HCA 21did not affect the reasoning in that decision. Reconsideration of this issue must await any appeals in some of those other cases, I think.

However, something of a new argument was then raised, in that it was alleged that s 18C was inconsistent with s 116 of the *Constitution*, which provides that Commonwealth legislation must not unduly impair free exercise of religion. This claim was rejected in a passage worth considering carefully:

> [244] The first and most obvious difficulty for the respondents is that I have found that on the evidence before me the **impugned speech is not religious speech; it has no basis in Islam**; it is little more than bigoted polemic. The result is that the restriction on that speech imposed by Pt IIA does not even prohibit the free exercise of religious *speech*, let alone the free exercise of religion. On that factual basis, the s 116 challenge does not properly arise in this case and must be rejected.
>
> [245] In any event, even if the impugned speech had amounted to Islamic discourse, the challenge would fail. That is because a law is not contrary to s 116 unless it has the **purpose** of achieving an object which the section forbids: *Kruger v Commonwealth* [1997] HCA 27; 190 CLR 1 at 40 per Brennan CJ, 60-61 per Dawson J, 86 per Toohey J, 131-133 per Gaudron J and 160 per Gummow J. There are a number of reasons why I conclude that Pt IIA does not have the purpose of preventing the free exercise of any religion.
>
> [246] First, the purpose of Pt IIA is to deter and eliminate, and thus protect members of the public from, racial hatred and discrimination (*Faruqi v Hanson* at [339]-[345]), not to prohibit

[58] Note that the relevant quote from Lord Phillips PSC is: "A person who discriminates on the ground of race, as defined by the Act, cannot pray in aid the fact that the ground of discrimination is one mandated by his religion."

> the free exercise of religion. The "purpose" of a law is the "public interest sought to be protected and enhanced" by the law: *Alexander v Minister for Home Affairs* [2022] HCA 19; 276 CLR 336 at [102] per Gageler J. The public interest sought to be protected and enhanced by Pt IIA, as identified in *Faruqi v Hanson*, has nothing to do with restricting or prohibiting the free exercise of religion even though it could have the **effect** of restricting religious speech.
>
> [247] The respondents submit that the constraint on the free exercise of religion that Pt IIA may have is not merely an unintended or incidental effect. They submit that it is **inherent in or encompassed by the purpose of prohibiting racially motivated offensive speech without protecting religious speech**. They submit that on that basis a purpose of Pt IIA is to prohibit speech that includes the free exercise of any religion, contrary to s 116 of the *Constitution*. I am not persuaded by that because analysis at such a high level of abstraction is incorrect and would result in the invalidation of any legislation restricting speech in any manner, so long as that speech is capable of being uttered in a religious context. Such an interpretation would give the proscription in s 116 a reach far beyond the narrow range of operation established by the authorities: see, eg, *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* [1943] HCA 12; 67 CLR 116. Although **religious speech that is not reasonable and in good faith is not protected by any exemption in s 18D**, any restriction on religious speech imposed by s 18C is merely incidental to the purpose of Pt IIA. Part IIA is therefore not prohibited by s 116

A number of responses can be made here. First, it seems very odd to say that speech cannot be motivated by religion simply because the judge, relying on experts, has come to believe it is a wrong interpretation of a religious text! This is to take to an extreme the pattern of a secular judge ruling on the content of religious belief. While what was said may be in fact wrong, it seems impossible to deny that the speaker was motivated by his Islamic faith and believed he was correctly reading it.

Second, and the bigger issue, is the meaning to be given to the s 116 "free exercise" clause. This of course would warrant a whole paper on its own, but for present purposes it can just be noted that taking the view that a law breaches s 116 only if the "main purpose" of the law is to restrict free exercise, is by no means the only arguable way that s 116 can be read.[59] Even in one of the cases cited, *Kruger v Commonwealth* [1997] HCA 27; 190 CLR 1, at 131, one of the members of the High Court, Gaudron J, was prepared to say that a law could breach the "free exercise" clause by having a detrimental **impact** on religious freedom, even if that was not the main purpose of the law.

It seems arguable here that, as the respondent put it, a law imposing these sort of restrictions on religiously motivated speech may indeed be an impairment of free exercise of religion. Stewart J himself concedes at [247] that on his reading "religious speech that is not reasonable and in good faith is not protected by any exemption in s 18D".

If indeed s 18C does amount to an undue impairment of religious freedom under s 116, there are a couple of possible implications. One would be for the courts to note that "reasonable" and "good faith" have to be read in ways that protect the freedom to express religiously motivated views. Another option would be for the Parliament to amend s 18C so that it does not prohibit speech which is merely "offensive" (as a wide range of religious views may cause "offence"), but also make it clear that it **is** designed to prevent speech which incites violence against others. A law forbidding incitement to violence against other members of the community would seem to clearly fall within the scope of a law that Parliament would be

[59] See L Beck, "The Case against Improper Purpose as the Touchstone for Invalidity under Section 116 of the Constitution" (2016) 44/3 *Federal Law Review* 505-529; Paul T Babie, "The Ethos Of Protection For Freedom Of Religion Or Belief In Australian Law" (2020) 47 *University of Western Australia Law Review* 64-91; Benjamin B Saunders and Dan Meagher "Taking Seriously the Free Exercise of Religion under the Australian Constitution" (2021) 43(3) *Sydney Law Review* 287; Anthony Gray, "Proportionality in Australian Constitutional Law: Next Stop Section 116?" (2022) 1 *Australian Journal of Law and Religion* 103-105.

authorised to enact, despite s 116, even if it covered religiously motivated incitement. That would seem to follow from the comments of the High Court in *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, where it was noted that the limits of religious freedom would be reached where it was necessary to protect the safety of the country from war.

(g) ACT religious vilification case- Sandilands

A decision under the ACT law is *Farah v Sandilands (Discrimination)* [2021] ACAT 92. Kyle Sandilands, the notorious radio show host, made some grossly offensive remarks about Mary the mother of Jesus on his program, and was being sued by two members of the Maronite Catholic Community who live in the ACT.

The comments were only broadcast "live to air" to Sydney, but as is usual recorded extracts were then made available on various forms of social media, and were heard by the applicants. This case was an application to strike out the claim, mainly on the basis that the ACT law was not meant to be used in relation to material that was broadcast outside the Territory. We noted above that in *Bottrill No 1* a previous tribunal member had ruled that the Act had extra-territorial operation; in this case Senior Member Prof P Spender said that there was no strong argument as to why the earlier decision should not be followed, at least on an interlocutory strike-out action, and allowed the claim to proceed- see [148]. However, a subsequent press item reports that Mr Sandilands issued an apology and settled the claim out of court;[60] so the matter never went to a full hearing.

(h) Victorian religious vilification case- Unthank

An interesting example of discussion of the Victorian provisions was in *Unthank v Watchtower Bible and Tract Society of Australia* [2013] VCAT 1421. Mr Unthank had been a member of the Jehovah's Witnesses faith but left. In his local congregation the leaders read out a statement (which had been published in a general article in the Watchtower magazine) that members ought to "avoid contact" with "apostates", who are "mentally diseased".

It was conceded that this had happened, and that Mr Unthank was called an "apostate" by the leaders. He was suing for damages under s 8 of the RRTA 2001. The case had not been fully heard in these proceedings, but the Tribunal Member declined to dismiss it, saying that it was possible that full evidence might indeed lead to a finding of the sort requested. I think myself that probably a defence under s 11(1)(b)(i) of "genuine religious purpose" should probably apply, but it was interesting that the Tribunal did not agree that it was so obvious that the claim should be immediately dismissed.

The claim was, however, dismissed in a later hearing: see *Unthank v Watchtower Bible and Tract Society of Australia (Human Rights) (No 2)* [2013] VCAT 1810 (23 October 2013). The Tribunal Member rejected the claim on the basis that no evidence had been led to show that the reading of the passage would incite the relevant response from the hearers:

> [24] Whilst s 8 does not necessarily require the presentation of a witness who attests that he or she read the article or heard the discussion and as a result predicted or experienced the emotions envisioned by the section or gives evidence in some professional or relevant category that the material is offensive and thus likely to incite emotions of hatred, contempt, revulsion or ridicule, it does require more than bald assertion of that by the applicant who, after all, bears the burden of proving his case. He has not done so.

[60] See https://www.dailymail.co.uk/tvshowbiz/article-10250295/Kyle-Sandilands-quietly-settles-court-case-Virgin-Mary-comments.html (28 Nov 2021).

I must say I think this is a bit odd. To describe someone in this context as "mentally diseased" does seem to be to incite, to some extent, "contempt" or "ridicule", although admittedly it is a border-line issue. I think it would have been preferable to apply a s 11 defence of "genuine religious purpose", but the Member did not need to discuss this issue, having concluded that there was no *prima facie* vilification.[61]

(i) Vilification of Muslims- Sisalem

The decision of the Victorian Civil and Administrative Tribunal in *Sisalem v The Herald & Weekly Times Ltd* [62] illustrates justified limits on claims that speech about religion should be limited.

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.

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[61] It is also worth noting that the Member, while conceding it was not part of her function to offer interpretation of the Bible, did criticise the phrase "mentally diseased" as an assertion of the Bible's teachings. She noted that the phrase came from the Jehovah's Witness "New World" translation of 1 Tim 6:4, and that the KJV and Good News translations did not use this phrase. On this point I think she was quite correct!

[62] [2016] VCAT 1197.

(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.[63]

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.[64]

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.[65] 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

[63] 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.
[64] Parkinson at 960.
[65] 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.[66]

(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 or violence, though not one that penalises mere offence.

In this area I commend Waldron's book, *The Harm in Hate Speech*.[67] 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.[68]

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.[69] 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.[70]

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.[71] 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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[66] "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).

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

[68] 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.

[69] Waldron (2012) at 35.

[70] 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."

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

this, just as the law of "ordinary" defamation protects other aspects of personal reputation.[72] So Waldron would support laws that prohibit "the publishing of calumnies expressing hatred and contempt for some racial, ethnic or religious group".[73]

There is much in his 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.[74]

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.[75]

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."[76]

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.[77]

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".[78]

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*

[72] Waldron (2012) at 85-86.
[73] Waldron(2012) at 66.
[74] 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".
[75] Waldron (2012), at 126-127.
[76] Waldron (2012) at 129.
[77] Waldron (2012) at 130.
[78] 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.[79]

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"

Without going into all of the details, some important superior court decisions over the last few decades illustrate the importance of not penalising mere "offence". This is such an important issue in the context of "hate speech" laws that it is worth spending some time on these cases.

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.[80]

(a) Canada- the Whatcott case

In Canada, in *Saskatchewan (Human Rights Commission) v Whatcott*,[81] 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*,[82] in the context of racially-based vilification legislation, that "hate" language needed to be particularly strong to be caught

[79] 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.
[80] For more extensive analysis, see Foster (2013), above n 11
[81] 2013 SCC 11 (27 Feb 2013).
[82] [1990] 3 S.C.R. 892.

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]:

> 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".[83]

(b) Australia- the Adelaide Preachers case

In *Attorney-General (SA) v Corporation of the City of Adelaide*[84] ("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,[85] the High Court was split down the middle 3-3 in *Monis v The Queen*[86] 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.[87] 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

[83] 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.
[84] [2013] HCA 3 (27 February 2013).
[85] And, oddly, on the very same day that the Canadian Supreme Court handed down *Whatcott*.
[86] [2013] HCA 4 (27 February 2013),
[87] 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[88]. 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[89].

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[90].

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88 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.

89 *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.

90 *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.[91] 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.[92] 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.

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

[92] 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 ambiguous 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.[93]

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.[94]

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.[95] 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

[93] 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."

[94] 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.

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

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.

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 confined in its operation to the Commonwealth Parliament, and so could not be used as a restraint on State lawmaking.[96]

(c) Australia- Monis

With the decision in ***Monis v The Queen***[97] 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[98] 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.[99]

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.[100] 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.)[101] 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

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[96] 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.

[97] [2013] HCA 4.

[98] In one case a sound recording was said to have been sent.

[99] 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.

[100] 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."

[101] See Bathurst CJ at (2011) 256 FLR 28, at 39 [44].

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![102]

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 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[103]. {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

[102] French CJ at [29].

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

> 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 *injured* another's person or property, including what was long regarded as the separate tort in *Wilkinson v Downton*[104] 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 some proposals to punish "offence" in amendments to discrimination law, 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.[105] 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.[106] 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

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104 [1897] 2 QB 57.

105 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.

106 See paras [333]-[339].

it is generally implemented. These arguments support a very narrow and confined scope for any laws that penalise speech on the subject of religion.[107]

For an article also critiquing the effect of the *Monis* and *Adelaide Preachers* cases, see Head.[108] There was also a very interesting UK decision raising similar questions. In *DPP v McConnell*[109] 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 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.)[110]

(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 finding of illegality 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.

(b) "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

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[107] 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.

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

[109] [2016] NIMag 1 (5 Jan 2016).

[110] 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/ .

wrong.[111] This of course came up in the context of the *Cobaw* case,[112] which didn't involve a direct "speech" component, but also comes up in the speech area.

(i) Cases on homosexual vilification

NSW law, for example, contains 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.

There is however 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.[113]

In an important ruling in *Sunol v Collier (No 2)*[114] 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.

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:

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[111] 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/ .

[112] See *Christian Youth Camps Limited & Ors v Cobaw Community Health Services Limited & Ors* [2014] VSCA 75 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/ . See also N Foster "*Christian Youth Camps Ltd v Cobaw Community Health Services Ltd*: Balancing Discrimination Rights with the Religious Freedom of Organisations", ch 17 in Barker, Babie and Foster *Law and Religion in the Commonwealth: The Evolution of Case Law* (Oxford; Hart/Bloomsbury, 2022), pp 265-291.

[113] It should also be noted that not all other jurisdictions with laws forbidding vilification on grounds of sexual orientation or gender identity, include an exemption for religious speech: see eg the laws in Queensland and Tasmania.

[114] [2012] NSWCA 44.

> 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".[115]

An example of the sort of behaviour that amounts to a breach of this provision is the decision in *Margan v Manias* [2013] NSWADT 177. Mr Margan was putting up posters in Oxford St in Sydney supporting same sex marriage. Mr Manias was following him along the road, and shouting "I am going to eradicate all gays from Oxford Street" and "Do not worry I am doing good work".

He also added: "There are wicked things taking place on Oxford Street". In the circumstances it is probably not surprising that the Tribunal found that his words, shouted out in a very combative way, were liable to "incite hatred" for Mr Margan. It was not suggested, however, that Mr Manias had any religious motive for his actions.

In *Kerslake v Sunol (Discrimination)* [2022] ACAT 40 a number of posts Mr Sunol had made on the internet were found to amount to vilification on sexual orientation grounds (under s 67A of the *Discrimination Act* 1991 (ACT)). The Tribunal (Senior Member R Orr QC) noted that Mr Sunol had claimed that at least some of his remarks were religiously motivated, but still ruled against him:

> 7. In order to come within the exception to vilification for discussion or debate in the public interest under section 67A(2)(c) of the Discrimination Act the publication must be **reasonable, that is objectively rational and proportionate**, and for purposes in the public interest, such as discussion or debate about or presentation of any matter. This can include discussion or debate about religion or politics, including on the nature of homosexuality and the position of homosexual people in society.
> 8. Many of the publications at issue in these proceedings are religious or political statements. For example, Mr Sunol states that homosexuality is wicked and evil, and many similar statements. Mr Sunol argued that because he has freedom of religion and freedom of speech his comments cannot be vilification. I do not agree. If Mr Sunol's statements do incite hatred etc., they must fall within the exception for reasonable discussion or debate in section 67A(2)(c) not to be vilification. **The use of political or religious language does not of itself prevent a statement from inciting hatred** etc. or make it a reasonable discussion or debate.

This comment, of course, shows the need for laws on sexual orientation vilification to allow good faith statements based on religious belief. In this case, a second decision ruled on the remedy for the vilification: *Kerslake v Sunol* (*Discrimination*) [2023] ACAT 18. Posts

[115] 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 .

online were ordered to be removed, a notice put up recording the contravention, and an order made for $4000 in damages as well as the cost of one witness who had been ordered to respond to a subpoena. An appeal against these findings was dismissed: see *Sunol v Kerslake* (*Appeal*) [2024] ACAT 35 (24 May 2024).

The NSW decision of *Passas v Comensoli* [2019] NSWCATAP 298 provides an example of someone who was penalised for "homosexual vilification" as a result of comments concerning same-sex marriage. However, it does provide clarification that merely to express disagreement with the introduction of same sex marriage, as such, does **not** amount to such vilification under NSW law.

Ms Passas and Mr Comensoli were fellow occupants of a block of units in Ashfield. On 15 November 2017 the results of the postal survey on the introduction of same sex marriage were announced, with 61% of respondents to the survey in favour. Mr Comensoli, in celebration of the result, draped a rainbow flag over his balcony. Ms Passas disagreed with the proposed change. What followed was summarised by the Appeal Panel of the NSW Civil and Administrative Tribunal as follows:

> [3] [I]t was found that on 15 November 2017 she made loud verbal demands upon the Respondent to remove the flag because it was "offensive to [her] culture and religion", and that the Respondent should not be afforded the right to marry "until [he] could breastfeed and have children", which could be heard by other residents of the complex and surrounding areas.

There was evidence that Mr Comensoli's housemate, Ms Di Natale, heard the words that were said. No other evidence of anyone else hearing what was said on the occasion seems to have been presented, but it was conceded that others in nearby flats could have heard the words. Later the exchange became much more widely known when publicised by Mr Comensoli on Facebook, but in these proceedings any effect of the later publicity was not regarded as relevant for the purposes of determining Ms Passas' liability or the penalty to be imposed.

It was relevant to note, however, that Ms Passas was a well-known local politician, having served on the local Council for about 11 years, and at the time of the incident being Deputy Mayor of the Inner West Council. This was held by the Panel to be relevant to the effect of her comments (see paras [66]-[67], to be discussed below.)

As we have noted, under the NSW *Anti-Discrimination Act* 1977 ("ADA"), s 49ZT, "homosexual vilification" is unlawful unless it falls within the "defences" provided by that provision.

The Civil and Administrative Tribunal at first instance (D Dinnen, Senior Member; J Newman, Member) found that there had been vilification under s 49ZT in relation to both statements made by Ms Passas, and ordered that she pay damages of $2500 and publish an apology in the Inner West Courier newspaper. The Appeal Panel (Dr R Dubler SC, Senior Member; J McAteer, Senior Member) upheld a finding of vilification in relation to one of the statements, but not the other; amended the wording of the apology to be published; but upheld the award of $2500 in compensation as reflecting what the Panel saw as an appropriate award for the remaining statement that they held amounted to vilification.

The **first** statement that had been made by Ms Passas: that the Applicant should remove the rainbow flag because it was "offensive to my culture and religion", had been held by the Tribunal at first instance to be "objectively offensive, expressed to incite or stimulate hostility"- para [40] at first instance, quoted at para [34] by the Appeal Panel. But the Panel signficantly held that this was wrong as a matter of law. They cited important comments from the NSW Court of Appeal decision in *Sunol v Collier (No 2)* [2012] NSWCA 44, concerning the importance of protecting free speech on political and other issues. There Allsop P had said:

> [59] Thus, one comes to the task of construing s 49ZT recognising the **high value that the common law (and indeed the legislature) places on freedom of expression**: *Brown v Classification Review Board* (1998) 82 FCR 225 at 235 and *Coco v The Queen* [1994] HCA 15; 179 CLR 427 at 437, such that a **conservative approach should be adopted to the construction of statutes that restrict it**. This approach is reinforced by the recognition of the limitation on Commonwealth, State and Territory legislative power by the **implied Constitutional freedom** recognised by the test enunciated in *Lange v Australian Broadcasting Corporation* [1997] HCA 25; 189 CLR 520, *Coleman v Power* [2004] HCA 39; 220 CLR 1, *Aid/Watch Incorporated v Federal Commissioner of Taxation* [2010] HCA 42; 241 CLR 539 at 556 [44]-[45] and by the operation of the *Acts Interpretation Act 1901* (Cth), s 15A and the *Interpretation Act 1987* (NSW), s 31; cf *Wotton v The Queen* [2012] HCA 2 at [32]. (emphasis added)

Hence they ruled that a statement that a person, for whatever reason, disagrees with the concept of same-sex marriage, will not of itself amount to vilification for the purposes of s 49ZT; that is, it will not be something which "incite(s) hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of … homosexuality".

> [38] Merely expressing disagreement with the rainbow flag, as a symbol of same sex marriage, because it was "offensive to my culture and religion", does not in our view, reach the threshold of inciting hatred or serious contempt of such people [presumably, homosexual persons].

The **second** statement that Ms Passas made was, however, upheld by the Panel as vilification. This was her statement that the Applicant should not be afforded the right to marry "until [he] could breastfeed and have children". The Tribunal at first instance at [41] held that: "The objective understanding of this statement is that a person who can't breastfeed or have children should not be afforded an equal right to marry the person of their choosing."

The Appeal Panel upheld this finding on, it seems, two separate grounds. One was that, on this part of the appeal, they only had authority to overturn the Tribunal if there had been an "error of law", and that:

> [41]… irrespective of what may be our impression or view of the effect of the statement, we have concluded that with respect to this second statement it was reasonably open for the Tribunal to hold that the facts of the case fall within the ordinary meaning of the words of the statute so that no error of law arises.

However, they also went on to consider whether they agreed with the Tribunal or not, and concluded that they did. The core reasoning is here:

> [44] The second statement, that the Respondent should not be afforded the right to marry "until [he] could breastfeed and have children", could reasonably be regarded as using derogatory ridicule to belittle homosexual men. In our opinion, it was reasonably open for the Tribunal to conclude that "The objective understanding of this statement is that a person who can't breastfeed or have children should not be afforded an equal right to marry the person of their choosing". Further, in our view it was reasonably open to the tribunal to find that "The statement seeks to legitimise serious contempt or severe ridicule of the homosexual men by identifying matters from which they are biologically excluded as a means of justifying their inequality at law" (emphasis added)

With respect to the Panel, I cannot see this as a reasonable reading of the provision. Of course, what was said was not polite, and no doubt should be condemned as rude and uncaring. But did it amount to actual unlawful incitement to hatred, serious contempt, or severe ridicule? The meaning of what was said was that a person who is not a biological woman should not

marry a man. That is no doubt now a controversial position, but it is a statement of a political view about a social institution. Is it really "derogatory" to say of someone that their biological limitations prevent them from doing something?

Interestingly even in this paragraph at the core of their ruling, the Panel does not explicitly say that the statement itself *amounts to* serious contempt or severe ridicule- the furthest they go is to say that the statement "legitimises" such behaviour. The logic of this statement is that they may pave the way for vilification in the future by others, but they are not directly found to have incited the relevant emotions. On this ground alone the finding seems doubtful.

There was some discussion in the Panel's decision as to the relevance of the **public positions** held by Ms Passas (as Council member and Deputy Mayor). In particular, did the fact that she held a respected public office either make it easier for her to be held to have "incited" the relevant emotions, or did it have some bearing on the harm suffered and hence the penalty (damages award) that should be imposed?

The Appeal Panel's comments on this issue are somewhat unclear. There is no doubt that they considered that the appellant's public office did have a bearing on the size of the penalty that should be imposed:

> [66] It was essentially a finding of fact by the Tribunal that, viewed objectively, the **effect or impact** that the Appellant's conduct had or was likely to have on the audience was amplified by the position and status of the Appellant as a person on the local council and deputy mayor. It was reasonably open to the Tribunal to conclude that this status of the Appellant resulted in there being a **greater effect or impact** on the audience who heard or could have heard the Appellant's comments.
> [67] Where a person's comments have greater impact on an audience by reason of the standing or status of that person, we fail to see how it would be erroneous for the Tribunal to rely upon this circumstance as a question of law… It makes logical sense to conclude that a person's position, such as being on a local council and a deputy mayor, would have an effect on how that person's remarks are received by an audience and in turn be **relevant on the question of penalty and harm** caused to the Respondent.

The status of the appellant, then, could be held to have had an impact on the question of "penalty", once she had been found to have incited the relevant emotions. But did that status also assist the Tribunal in finding that such incitement had *occurred*? It seems that it may have played some part. If vilification is moving others to experience hatred or contempt, or to express ridicule, then it seems possible that comments uttered by public figures might have an effect of this sort, which comments by others may not. But it has to be said the matter is still not clear.

For whatever reason, in defending the claim of vilification Ms Passas and her advisors had not pleaded the "**defences**" in s 49ZT(2). On appeal she attempted to raise them, especially the defence that what she had done was "a public act, done reasonably and in good faith and in the public interest, including discussion or debate about and expositions on any act or matter"- see para [52]. As she had not pleaded this before the first instance hearing, however, the Appeal Panel ruled that it was now too late to rely on the defence.

These defences are quite wide, and the courts have stressed that they should always be taken into account when considering a claim of vilification. It is unfortunate that due to a pleading error at first instance, the Appeal Panel did not consider the nature and scope of the defences. Anyone faced with a claim under s 49ZT should always consider these matters.

As well as the Panel ruling in her favour on statement 1, Ms Passas also had a small victory in achieving a re-wording of the apology she was ordered to publish. The first instance Tribunal had ordered that the apology include the sentence: "That evening, I publicly yelled abuse at Mr Comensoli…" Ms Passas contested the use of the words "yell" and description of

what she said as "abuse", neither of which were specific findings of the Tribunal. The Appeal Panel agreed.

In the end the approved apology was as follows:

> [110]"On 15 November 2017, the day of the historic "Yes vote" publicising the results of the Australian same-sex marriage survey, my neighbour Daniel Comensoli flew a rainbow flag from his balcony. The NSW Civil and Administrative Tribunal has determined that on that occasion I made statements which are in breach of the homosexual vilification provisions of the Anti-Discrimination Act, which made it unlawful for any person, by a public act, to incite hatred towards, serious contempt for, or serious ridicule of a person or group of persons on the ground of homosexuality.
> I offer my apologies for that behaviour."

What was said by the appellant here, to reiterate, was arguably unhelpful, discourteous, and rude. But I have some doubt as to whether it should have been regarded as unlawful. Certainly one misapprehension by the lower Tribunal has been helpfully corrected on appeal: a simple statement opposing same sex marriage does not amount to unlawful homosexual vilification under s 49ZT ADA. The Appeal Panel's view that the other comments were unlawful vilification seem, with respect, to be open to doubt. In particular, the concept that remarks may "legitimise" incitement in the future seems clearly to indicate that the remarks themselves did not rise to the level of incitement on their own.

With the importance of free speech as a fundamental value of Australia law, as noted by the Court of Appeal in *Sunol*, it seems fairly clear that the legislation should not be read so broadly as to penalise comments of the sort made here.

(ii) Cases on transgender vilification

Another area where there have been some significant cases in recent years is that **"transgender" vilification**. It is fairly clear that orthodox Christian teaching is that a person is either male or female depending on their biological reality at birth.[116] To state this teaching may be seen in some contexts as "hate speech". Of course, not all those opposed to "transgender ideology" have religious reasons- some are simply based on biology and a commitment to the rights of women. But these cases illustrate tribunals approaching these issues.

(a) ACT- Clinch case

One such case (although the comments were not made on religious grounds) was *Rep v Clinch* [2021] ACAT 106, which provides significant clarification on what amounts to "transgender hate speech", and what does not, under the law of Australian Capital Territory- and provides a helpful and persuasive set of reasons which may be influential in other jurisdictions.

Is it unlawful to say that "a trans woman is a man"? Not according to the Appeal Tribunal in the *Rep* decision- see [117]. The ACT *Discrimination Act* 1991 s 67A provides relevantly that:

> **Unlawful vilification**
> 67A(1) It is unlawful for a person to incite hatred toward, revulsion of, serious contempt for, or severe ridicule of a person or group of people on the ground of any of the following, other than in private:…

[116] For commentary on these and other issues relating to gender identity, see the excellent overview in P Weerakoon, R Smith and K Weerakoon, *The Gender Revolution: A Biblical, Biological and Compassionate Response* (Sydney: Matthias Media, 2023). See also more recently R Smith, *The Body God Gives: A Biblical Response to Transgender Theory* (Bellingham: Lexham Academic, 2025).

(b) **gender identity**;

(2) However, it is not unlawful to-

(a) make a fair report about an act mentioned in subsection (1); or

(b) communicate, distribute or disseminate any matter consisting of a publication that is subject to a defence of absolute privilege in a proceeding for defamation; or

(c) do an act mentioned in subsection (1) reasonably and honestly, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and presentations of any matter.

This case grew out of a series of interactions between the appellant, Bethanie Rep, a radio news-reader in Canberra, and the respondent, Bridget Clinch, a self-described "trans woman", following events at an International Women's Day event in 2018. An initial complaint about vilification resulted in a negotiated settlement under which the appellant posted an apology on her Facebook page. But this posted apology then saw a number of comments critical of the respondent made by members of the public who followed the page, some of which the appellant "liked" and a number of which were not deleted or removed.

The respondent complained about vilification under s 67A (and also "harassment" under s 68, though as these complaints were not successful in the end, I will leave them out of this discussion.) The initial Tribunal hearings in the ACT Civil and Administrative Tribunal (see the final first instance outcome in *Clinch v Rep (No. 2) (Discrimination)* [2020] ACAT 68) Senior Member B Meagher SC, Presiding) resulted in a finding that the appellant was responsible for 50 Facebook posts (either made by others in response to the initial apology, or made subsequently directly by her) which amounted to unlawful vilification. The appellant was ordered to pay $10,000 in damages and to remove all the posts and similar posts, and refrain from making the posts or similar posts.

The appeal proceedings (heard by a panel of senior members, Acting Presidential Member R Orr QC and Senior Member Prof P Spender sitting as the ACAT Appeal Tribunal) revisited the earlier decision, and concluded that the Original Tribunal had made a number of legal errors in the way that it approached both vilification and harassment findings, and in the width of the initial injunctions that had been issued. It concluded that indeed *some* of the 50 posts amounted to relevant vilification- 9 out of the original 50- but the large majority did not. The appellant was still ordered to pay a reduced amount of compensation ($5000) and to be subject to a narrower prohibition on repetition of "those posts, or posts in substantially the same terms" as the offending comments.

But the importance of the Appeal Tribunal's decision is that it carefully and exhaustively examines each of the allegedly vilifying posts, in a detailed Schedule to the decision, and makes specific rulings about which are, and which are not, unlawful. This is clearly the correct approach. The Original Tribunal decision had offered a sample of comments but did not set out all and made sweeping comments to the effect that the other comments were as bad as the ones they ruled on. The Appeal Tribunal justifiably refused to adopt this approach- see [111]. While it may not be pleasant for people who have been offended or insulted to see those remarks repeated in a published tribunal or court decision, that is what must happen if open justice is to be done and seen to be done.

I will not repeat all the various comments discussed in Schedule 1 here- you may do so by reading the Appeal Tribunal decision above. But in the discussion below I will give some examples, as it seems important for those commenting on these issues to have some idea about what is, and is not, unlawful speech under laws that are similar to the ACT law.

The Appeal Tribunal makes a number of important comments about the general principles applicable to transgender vilification claims from para [52] and on. Briefly, they note the following:

- Vilification law sits in the context of a "broad human rights tradition" which recognises the need to take into account a range of important rights- see [53].
- Vilification law "draws on defamation law. The legal notion of vilification is related to that of defamation, and the 'defences' to vilification, in particular in section 67A(2) of the Discrimination Act, are related to defamation defences. Again, in our view the specific provisions of the Discrimination Act need to be read in light of the terms and concepts it borrows from defamation law"- see [54].
- The question to be decided is an objective issue concerning "incitement", and does not require a finding about the personal feelings of either the speaker or the subject of the comment- [57].
- The comments at para [58] are particularly helpful:

> [58] 'Incite' means to "rouse, to stimulate, to urge, to spur on, to stir up, to animate". (*Young v Cassells* (1914) 33 NZLR 852 at 854, quoted in *Sunol v Collier (No.2)* [2012] NSWCA 44 at [26] (Bathurst CJ)). While this can cover a wide range [of] conduct, it is not enough simply to make insensitive, disrespectful, offensive, or insulting comments, or even just to express hatred, revulsion, contempt or ridicule, inappropriate as this is. The post must be one which could encourage or spur others to hatred, revulsion, serious contempt, or severe ridicule. Such vilification can include words which command, request, propose, advise or encourage hatred etc. But it can also be words which simply incorporate such strong and abusive language about the person or group that it is likely to encourage hatred etc. (emphasis added)

- The specific attitudes or behaviour which must be "incited" - ie "hatred toward, revulsion of, serious contempt for, or severe ridicule of" persons- take their ordinary meaning.
- The comment must take place in a public forum.
- Context needs to be considered, and sometimes there may be difficult issues in identifying the audience of a remark.
- The "ground" of the remarks must be "gender identity".

There are defences built into s 67A, and in this case an important one was that it was not unlawful "do an act mentioned in subsection (1) reasonably and honestly, for … other purposes in the public interest, including discussion or debate about and presentations of any matter". Here the "public interest" in discussion of gender identity issues was an important factor. Another important comment:

> [67] It was argued that the posts were for purposes in the public interest, that is discussion and debate on the nature and position of trans women. We accept that discussion and debate of this issue is in the public interest. But to come within the exception, the act must be done reasonably and honestly.
> [68] This involves a subjective and objective test, at least in relation to reasonableness, that is, the person must believe they are acting reasonably, and they must be actually doing so, objectively assessed. Unreasonable presentation of an argument, objectively assessed, does not fall within the exception.

There are a number of subordinate legal issues discussed in the decision, which I won't touch on here. One was the question of whether the ACT Tribunal had jurisdiction to hear the matter given that the respondent was in Queensland at the time. But these matters were resolved in favour of the respondent, and the Appeal Tribunal held that jurisdiction was established. (As this involved the law of a territory and not a State law being applied by a tribunal, it seems to have been accepted that the prohibition against a State tribunal hearing a matter against a

resident of another State laid down in *Burns v Corbett* [2018] HCA 15, noted below, was not relevant here.)

Applying the above principles about vilification, some of the things that had been which had been held by the Original Tribunal to be unlawful, did not amount to vilification. A few examples may help.

> [99]..we do not agree that the other posts in the tranches are all the same as the examples chosen. To use item 1.16 as an example, it says:
>
> > I apologise that Bridget has been given the impression by this system that his views about himself must be upheld by others at all times. It is evident that under capitalism, 'human rights' means white male rights. It is not Bridget who has been victimised here, but who has manipulated a system already constructed in his favour.
>
> [100] As we discuss below, we think that stating that Ms Clinch is a man who has not been victimised but has manipulated the system is offensive and insulting, but it does not meet the test of inciting hatred etc. This post also raises the issue as to whether it falls within the exception for reasonable and honest discussion of transgender issues. In our view there is a real issue as to whether this is vilification and is "like the others". On our analysis in Schedule 1, it is not vilification.
>
> [101] To mention another, item 18 responds to a post which says:
>
> > Disappointed at @ConversationUK running a vapid piece, that's contrary to lived experiences of transwomen. Oppression is related to gender presentation, not sex, ask any professional who's trans and they'll tell you they either went up or down the privilege scale post transition.
>
> [102] Ms Rep replied:
>
> > 'Oppression is related to gender presentation, not sex.' Thousands of years of oppression and all females had to do was stop wearing dresses apparently, who knew.
>
> [103] The first sentence by Ms Rep is an attempted restatement of the basic position of the post being responded to. In our view it is a reasonable summary. We do not think that it can be vilification. The second sentence is Ms Rep putting forward her contrary position, which we would summarise as being that such oppression is not just related to gender presentation. She states this in in a somewhat flippant or colloquial way, but does address the issue and it is not offensive or insulting. We do not think that this post is inciting hatred etc. to trans women or Ms Clinch. Even if it was, we think that it falls within the exception in section 67A(2)(c) as a statement reasonably and honestly made in discussion or debate in the public interest of transgender issues. We find it is not vilification.

In coming to some of the posts which were found to amount to vilification, the Appeal Tribunal made some important preliminary points. One was that merely to insult someone, as rude and offensive as this may be, does not amount to vilification:

> [114] In our view, in order to amount to vilification it is necessary that there be more than language which is insensitive, disrespectful, offensive, insulting, abusive or even an expression of hatred, revulsion, contempt or ridicule.

At this point it ought to be noted that this will depend to some extent on the wording of the relevant prohibition. The ACT form of words represents the majority formulation in Australia. Sadly, there is a much more repressive provision (as noted below) in s 17 of the Tasmanian *Anti-Discrimination Act* 1998, which does indeed make it unlawful to "offend" or "insult" someone on the basis of "gender identity". But this provision is arguably unconstitutionally broad.

Further, the Appeal Tribunal commented that merely to comment on the sex of a trans person is not itself vilification:

> [117] In particular, many of the posts refer to Ms Clinch as man, or trans women as men. We can understand that such comments are insensitive, disrespectful, offensive and insulting to Ms Clinch and trans women. They are certainly inconsistent with the general principles of the

> Discrimination Act. But without additional aspects, we do not think that such comments are necessarily vilification.

However, of course, context may turn an innocuous remark into something else. So the Appeal Tribunal summed up its discussion on this point by saying:

> [121] Ms Rep seemed to argue that calling a trans woman a man could never be vilification. Ms Clinch seemed to argue it was always vilification. In our view neither position is correct. Calling a trans woman a man will not necessarily be vilification, but it may be.

There are a number of other examples of statements that might be thought offensive or insulting but which did not amount to vilification- in Schedule 1 see paras [239], [244], [249], [253], [255], [257], [259, [263], [265] and [267] (and elsewhere). Overall the Appeal Tribunal summed up its views in this way:

> [163] In particular where the words indicate that because of the protected attribute a person is inherently inferior, a threat or a criminal, the issue of vilification will arise.
> [164] Words directed at the physical attributes of trans women can be vilification, if they meet this test. Generally we do not think that referring to a trans woman as a man will necessarily do so.

One example of actual vilification is as follows:

> [247] Item 1.6 says:
>
> > How ridiculous that u have to lie and pander to these anti women delusional haters. The good thing is that everyone knows that Bridget is a man no matter what he dictates people call him. Even the anti women men and handmaidens know he's a man. We can laugh at how pathetic he is and know he's angry that no-one actually believes his delusions - the only reason he's being supported is because he's helping support men's misogynistic views and desperate attempts to control women.
>
> [248] In our view this statement moves beyond being just offensive and insulting, to strong and abusive language. It refers to Ms Clinch as anti women, delusional, a hater, a man, who dictates to others, is laughable, pathetic, angry, delusional, misogynistic and controlling of women. It does so in the context of the apology, which it undercuts. It directly attacks Ms Clinch. It does so on the basis that she is a man not a woman and is therefore linked to gender identity. This is incitement of, revulsion of, or severe ridicule of, a person and the group of trans women. It is not reasonable, that is a rational or proportionate discussion of transgender issues, especially in the context of the apology. We find this is therefore vilification.

Other examples of what has been found to be vilification can be seen in Schedule 1 at [233], [236], [241], and [251] (and elsewhere). The overall conclusion of the proceedings will not satisfy everyone. Some things that are viewed as insulting or offensive are not prohibited. Some things that others will see as true and a legitimate part of robust debate on the area are seen as vilification. But overall the decision moves the discussion in a helpful direction by noting that the actual words of the prohibition need careful attention, and that where issues are discussed in a rational and moderate way this will not amount to "inciting hatred" etc.

(b) Queensland- Shelton case

In another significant decision, the Queensland Civil and Administrative Tribunal, in *Valkyrie and Hill v Shelton* [2023] QCAT 302 (18 August 2023), dismissed claims of vilification based on sexual orientation or gender identity, made against conservative commentator Lyle Shelton. The careful decision of Member Gordon finds in the end that comments critical of the participation of the complainants in a “drag queen library event for children”, did not amount to the incitement of hatred towards, serious contempt for, or severe ridicule of the complainants on the ground of their sexuality or gender identity in contravention

of section 124A of the *Anti-Discrimination Act* 1991 (Qld). There are a number of points in the decision worth noting.

The comments Mr Shelton made on his blog and elsewhere were critical of an event sponsored by Brisbane City Council, described as follows:

> [191] On Sunday 12 January 2020 there was a children's holiday entertainment event called 'Drag Queen Story Time' organised by the Brisbane City Council and Rainbow Families at the Brisbane City Council Library.
> [192] The complainants were engaged by Rainbow Families to dress as drag queens with the stage names of 'Queeny' (Mr Valkyrie) and 'Diamond' (Mr Hill).
> [193] A group of between 10 and 20 children aged about 2 to 8 years old attended the event. It lasted about 1½ hours. The complainants sang 'Twinkle, Twinkle Little Star' to them and read a story book entitled 'Love Makes a Family' by Sophie Beer. They supervised an art and craft activity where the children drew pictures of their family and some of them cut out paper dolls or made origami.
> [194] The book 'Love Makes a Family' … depicts various ordinary family scenes and says on the back cover:
> Whether you have two mums, two dads, one parent, or one of each, there is one thing that makes a family a family and that's LOVE.
> [195] The performance was advertised by a poster in the lobby of the library and on the Rainbow Families Facebook site.

The event was also the subject of a protest by some university students, and a tragic sequel to the event was that one of the students involved in the protest seems to have committed suicide. Mr Shelton made comments on the event, and was critical of those involved, in online material in 2020.

The judgment recounts the precise comments that were made in detail. One of the general remarks that was made was that "drag queens are dangerous role models for children" (see eg para [251]). Member Gordon summed up the essence of the assertions which it was said were conveyed as follows:

> [272] The complaint is, that the respondent's published material amounted to vilification by asserting directly or by implication that:
> (a) the complainants were child sex offenders and/or the complainants when dressed as drag queens, and drag queens generally (and therefore also transgender persons and persons with homosexual sexual orientation), were a danger to children;
> (b) drag queens were 'advocates' for gender fluidity and the adult entertainment industry in presenting drag queen story time, 'inducting' children 'into the worlds of gender fluidity and sexual expressionism';
> (c) transgender persons are dangerous to children, and Mr Valkyrie however dressed, was dangerous to children because he was a transgender person;
> (d) Mr Hill, however dressed, was dangerous to children because he uses the name 'Diamond Good-Rim' on Facebook, performs to adult audiences as a drag queen, and uses that name when doing so;
> (e) LGBTIQA+ activists are hell bent on trashing the purity and innocence of the next generation.

The relevant provision involved was section 124A of the *Anti-Discrimination Act* 1991 (Qld), mentioned previously, which provides in part:

> 124A VILIFICATION ON GROUNDS OF RACE, RELIGION, SEXUALITY OR GENDER IDENTITY UNLAWFUL
> (1) A person must not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race, religion, **sexuality or gender identity** of the person or members of the group.
> (2) *Subsection (1)* does not make unlawful— …

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

Here the relevant attributes were "sexuality" (what elsewhere is called "sexual orientation") and "gender identity". Member Gordon noted that there were a number of ambiguities in this provision which needed to be resolved. He ruled that, in relation to those which were relevant or potentially relevant here:

- The category "drag queens" is not one that is directly protected under the ADA (nor the general categories of "members of the numerous and diverse LGBTIQ+ community" or "LGBTIQ+ human rights and community advocates"); but insofar as the complainants could be said belong to "sub-groups" of those categories who are homosexual or transgender persons, then they could take an action (see paras [43]-[47]).
- The essence of the provision is "incitement" of strong emotions in the audience for the remarks. But there is some difference of opinion as to how to define the relevant audience. After reviewing the various suggested solutions, Member Gordon said that the Tribunal should consider "the 'natural and ordinary effect' of the public act having regard to the nature of the audience" (see [101]). This would mean that comments made to different audiences, if the audiences were clearly defined, might or might not be unlawful depending on the expected reaction of the audience.
- However, the fact that comments made on the internet may then be followed by more serious vilifying comments made by third parties, would **not** mean that the original commentator would be held liable for the comments of others (see [109]).
- It is "the reaction of the audience [that] needs to be on the ground of the attribute" (see [118]); so in s 124(1), the key issue is not the *motive* of the commentator, but the *effect* that the comment is likely to have on the audience.
- Evidence of the actual reactions of the audience who received the comments is relevant, but is not essential (eg see [141]).
- The standing and reputation of the commentator is relevant to the possible impact of what was said (see [148]).

There were some other comments made on the provision in s 124A(2)(c) for the prohibition not to apply to something said "reasonably and in good faith" for "purposes in the public interest". Some of the comments here will be helpful in future cases where these "defences" are needed. For example, Gordon M said:

> [183] It is clear from this I think, that it is not necessary for the debate to be in the 'public interest' in the sense that it must be 'for the good of the public'. It is sufficient for the debate to be about something which is legitimately the subject matter of public discussion or debate.

However, in this case these defences did not need to be applied.

The reason that the defences did not need to be considered in detail was that the Member ruled that there had been no breach of s 124A(1). However, there were findings made (presumably in case the matter were to be appealed) that Mr Shelton was subjectively acting in "good faith" (that is, he did not have other ulterior motives)- see [268]. It was not necessary to go into detail as to whether the publication of these views (which was accepted to be on matters of "public interest"- see [260]) was "reasonable", as there had been no *prima facie* vilification- see [270].

The reasons for rejecting the claims of vilification are detailed, but some themes that emerge are these:

- The allegation that Mr Shelton had accused the complainants of being child abusers was rejected; he had not made these accusations in what he posted.

- Some of the third-party comments posted in response to his remarks went that far, but it was not accepted that causation was established simply because others responded to what had been said and went much further. Gordon M noted:

> [278] It seems to me that there is a causation issue here which prevents the tinderbox argument from prevailing. Something more than merely providing an opportunity to react adversely is required before I can find that there was a contravention of section 124A. The public act must be the *cause* of the adverse reactions.
> [279] To say otherwise would mean that for example, an uncritical public report of a Mardi Gras parade would amount to vilification because some people would respond with intense hostility. It should not be said that the report would have caused that hostility. Instead, it would have been caused by something else.

Rejection of the claims of vilification often hinged on the fact that even if negative characteristics were being imputed to the complainants, this was not "because of" their protected attributes; rather, it was on the basis of the effect their performance would have on children. For example:

> It seems to me also that any belief of those in the hypothetical audience that when performing drag queen story time the complainants were involved in some sort of child abuse or paedophilia, would **not be on the ground of a relevant attribute,** that is (for Mr Valkyrie) on the ground of his gender identity or sexuality and (for Mr Hill) on the ground of his sexuality. I say that because any such belief would most likely arise because of the **interaction in the drag queen story time event between the children and the complainants as drag queens**. In other words, the people would hold the same belief even if the complainants did not have any such attribute. (emphasis added)

With respect, this seems to clearly be the correct approach. A similar approach can be seen in the following comment:

> It is an overstatement however, to say that therefore the respondent's published material asserted that 'transgender persons are dangerous to children'. The assertion was not that children should have no contact with transgender persons. What was being said was that transgender persons would be a dangerous role model for children if they were inducting the children 'into the worlds of gender fluidity and sexual expressionism'. In other words, transgender persons should not be permitted to educate children about gender fluidity.

Gordon M also added that any comments made about "drag queens" in general were not forbidden by the legislation, as the relevant protected attributes were not co-extensive with the class "drag queens".

> [S]ome drag queens are transgender persons and some are persons with homosexual sexual orientation, but a substantial proportion of drag queens are neither.

In the end, then, vilification on the basis of the legislative protected attributes was not established. Usually the comments were directed to a category not protected by the law, or (and in many cases, and also) the comments were directed at specific behaviour (the staging of drag queen activities for children) rather than being generalised comments based on homosexuality or transgender identity alone.

It should be noted that unfortunately this Tribunal decision is currently under appeal. The three-day appeal hearing concluded on March 19, 2025 and a decision is pending.[117]

[117] For comments by Mr Shelton on the appeal, see https://www.lyleshelton.com.au/i_ve_been_in_court_for_the_past_three_days_charged_with_hate_speech_here_are_my_reflections .

(c) Billboard Chris case

Another decision involving speech on transgender issues (though this time not formally under "vilification" legislation, was the recently concluded case involving "Billboard Chris" (as he has become known), who has been a prominent campaigner against "gender affirming" medical treatment for childen. In *X Corp. and eSafety Commissioner* [2025] ARTA 852 (1 July 2025) the Australian eSafety Commissioner had notified Chris Elston that a comment he had made on "X" (formerly "Twitter") amounted in her view to "cyber-abuse" under the *Online Safety Act 2021* (Cth) ('OLS Act'). The comment was an insulting remark made about a person called Teddy Cook, a biological woman identifying as a man.

The order to X and to Mr Elston was made on the basis that the comment was "cyber-abuse material targeted at an Australian adult". In the end O'Donovan DP ruled that he was not satisfied that the comment met the statutory definition, and reversed the removal order.

To provide context, the remark made was:

> This woman (yes, she's female) is part of a panel of 20 'experts' hired by the @WHO to draft their policy on caring for 'trans people'.
> People who belong in psychiatric wards are writing the guidelines for people who belong in psychiatric wards.

The Deputy President noted two key matters which had to be proven for matter to meet the statutory definition of "cyber-abuse":

> [18] There are two key elements to the concept which must be satisfied before material can be classified as such:
> (a) an ordinary reasonable person would conclude that it is likely that the material was intended to have an effect of causing serious harm to a particular Australian adult ('Intention Element'); and
> (b) an ordinary reasonable person in the position of the Australian adult would regard the material as being, in all the circumstances, menacing, harassing or offensive ('Offense Element').

It was also noted at [19]-[20] that "serious harm" was defined "serious physical harm or serious harm to a person's mental health, whether temporary or permanent", and that there was a separate definition of "serious harm to mental health", which includes:

"(a) serious psychological harm; and
(b) serious distress;

but does not include mere ordinary emotional reactions such as those of only distress, grief, fear or anger."

Without going into all the details of the lengthy review of the law and facts, the conclusion was that the "Intention Element" was not satisfied: Mr Elston was making a political point which did not mean he intended serious harm (in the sense that term is defined) to Teddy Cook.

> [207] The post, although phrased offensively, is consistent with views Mr Elston has expressed elsewhere in circumstances where the expression of the view had no malicious intent. For example, his statement placed on billboards that he is prepared to wear in public 'children are never born in the wrong body' expresses the same idea about the immutability of biology that he expresses, albeit much more provocatively, in the post.
> When the evidence is considered as a whole I am not satisfied that an ordinary reasonable person would conclude that by making the post Mr Elston intended to cause Mr Cook serious harm. In the absence of any evidence that Mr Elston intended that Mr Cook would receive and read the post, and in light of the broader explanation as to why Mr Elston made the post, I am

> satisfied that an ordinary reasonable person would not conclude that that it is likely that the post was intended to have an effect of causing serious harm to Mr Cook.

(ii) Tasmanian experience- s 17 prohibition of "offence"

To further illustrate the problems in this area, we may refer to the interpretation of a Tasmanian provision, s 17 of that State's *Anti-Discrimination Act* 1998 ("ADA 1998"). The provision purports to make unlawful the causing of offence on a wide range of "prohibited grounds" of discrimination. However, it is very telling that the listed grounds for complaint do **not** include religion (this "attribute" is listed as a protected category for discrimination purposes in s 16(o) of the Act, but that paragraph is not among those given this additional protection in s 17.) They do include, though, areas where there are likely to be clashes 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" (anti-incitement) law (and it does include "religious belief" in s 19(d).) 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.

Section 17 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, 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.[118]

In addition, arguably s 17 might 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,[119] 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.[120] While the action was later discontinued, that it could have progressed to the stage it did illustrates the "chilling effect" of s 17 in this area.[121]

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. 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;
- 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*[122] the Tasmanian Anti-Discrimination Tribunal found that a pamphlet containing alleged statistics

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[118] 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/> .

[119] See now the *Corneloup (2016)* decision, above at n 4.

[120] 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 .

[121] 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/ .

[122] [2015] TASADT 4.

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 by the Supreme Court on appeal in these proceedings, in *Durston v Anti-Discrimination Tribunal (No 2)*.[123] 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 Gageler J in *Brown v Tasmania*:[124]

> 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)*[125] 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*[126] 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*.)[127]

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:

> [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.

[123] [2018] TASSC 48 (4 October 2018). Again, at both the Tribunal hearing and on appeal the alleged wrongdoer was unrepresented by legal advisors.
[124] [2017] HCA 43 at [156].
[125] [2012] NSWCA 44.
[126] [2012] QCA 170.
[127] [2006] VSCA 284.

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, s 49ZE(2)(c) of the ADA 1977 (NSW) 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.

It is to be regretted that in more recent times the amended NT legislation, in s 20A(1)(a) ADA 1992 (NT), now also targets conduct on the basis that it causes "offence". New laws which may take effect in Queensland and Victoria move away from using the word "offence" but make speech unlawful if it is "hateful", a standard seems roughly equivalent and also unsatisfactory.

Just to be clear, in my view a law targeting mere "offence" is not needed, and this includes situations where the Christian faith is insulted or attacked by ridicule. One recent

example which is offensive but in my view should not be sanctioned by the law is display of an artwork which seems to equate the story of Jesus with cartoon shows.[128] Believers are free to object or respectfully protest, but this should not be unlawful.

(iv) The impact of *Burns v Corbett*

In recent years an important decision of the High Court has been handed down which does, to some extent, limit the "reach" of vilification laws from one State into another State. *Burns v Corbett*[129] 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.[130] 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*[131] 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.

The NSW Court of Appeal then ruled that NCAT had no jurisdiction to hear claims under NSW law made against residents of other States.[132] 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, Gageler 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.

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[128] See https://www.christianpost.com/news/jesus-looney-tunes-painting-removed-from-exhibit-amid-outcry.html? (July 10, 2024).
[129] [2018] HCA 15, 92 ALJR 423 (18 April 2018).
[130] In *Burns v Gaynor* [2015] NSWCATAD 211 (14 Oct 2015).
[131] [2014] NSWCATAP 42.
[132] *Burns v Corbett; Gaynor v Burns* [2017] NSWCA 3 (3 Feb 2017).

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 many "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*[133] 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*,[134] a 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.[135] It will now be interesting to see how this new system works. It 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.[136]

(c) 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

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[133] [2018] NSWCATAP 45 (14 February 2018).

[134] [2018] NSWCA 254 (6 November 2018).

135 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 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).

[136] Note that a decision of the NSW Court of Appeal on some aspects of these issues, *Wojciechowska v Secretary, Department of Communities and Justice; Wojciechowska v Registrar, Civil and Administrative Tribunal* [2023] NSWCA 191, has been appealed to the High Court and we await the High Court's decision. See *State of New South Wales v Wojciechowska & Ors* [2025] HCATrans 3 (5 February 2025) for the transcript of the appeal.

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.

3. Conclusion

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

(a) 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.[137]

(b) Mere "offence" or "hatefulness" is not sufficient harm for the law to be invoked

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 decisions and events noted above. The decision of the Supreme Court of Canada in *Whatcott* illustrates this, 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.

The apparently emerging new terminology being enacted in Victoria and Queensland, prohibiting "hateful" speech, is no better and should also not be used.

(c) 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

[137] 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.

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.

(d) 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.

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.

(e) 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.[138] It seems clear that this is an issue that will need to be revisited, and eventually considered by the High Court.

Speech, as noted above, can be powerful. Following the terrible events in Christchurch, there were calls to "do something" to prevent such incidents of hateful violence in the future. One suggested course of action was 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."[139]

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

[138] 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.
[139] See above, n 2.

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. Again, recent proposals in response to the dreadful anti-Semitic attacks occurring in Australia, suggesting tougher "speech laws", should be carefully weighed up. Clear evidence is needed that introduction of wide-reaching limits on free speech will actually achieve the goal of reducing racially or religiously motivated violence.

Laws actually forbidding the incitement of violence, however, 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.[140] Proposed new s 93ZAA (to be introduced when the *Crimes Amendment (Inciting Racial Hatred) Act* 2025 (NSW) commences) will prohibit incitement of hatred on the ground of race. Interestingly it does exempt in s 93ZAA(2) "an act that consists only of directly quoting from or otherwise referencing a religious text for the purpose of religious teaching or discussion."

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.

[140] Inserted by the *Crimes Amendment (Publicly Threatening and Inciting Violence) Act* 2018; assented to 27.6.2018; date of commencement, 13.8.2018.