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6 February 2017

Committee Secretary
Joint Standing Committee on Foreign Affairs, Defence and Trade
PO Box 6021
Parliament House
Canberra ACT 2600

**Submission to the Inquiry into the status of the human right to freedom of religion or belief**

Dear Secretary;

I welcome the opportunity to assist the Committee with its inquiry into freedom of religion or belief. As an academic who teaches *Law and Religion* as an elective to upper level law students, a blogger on the topic,[1] and author of some published articles on these issues, I am greatly encouraged that the Parliament of Australia is reviewing this important area.

The terms of reference cover a wide area, which I am not able to address in the limited time available. But I thought it might be helpful to focus on the specific issue of the mechanisms for protection of religious freedom in Australia at the moment.

The terms of reference relevantly provide:

> The Committee shall examine the status of the freedom of religion or belief (as recognised in Article 18 of the International Covenant on Civil and Political Rights) around the world, including in Australia. The Committee shall have particular regard to:…
> 4. Australian efforts, including those of Federal, State and Territory governments and non-government organisations, to protect and promote the freedom of religion or belief in Australia...

I attach to this submission a lengthy document entitled "Religious Freedom in Australia".[2] This was a paper presented in 2015 which reviews the different ways that religious freedom is protected in Australia at the moment. I would like to regard that paper as incorporated into this submission. In short, it outlines the following ways in which freedom of religion is protected in Australia at the moment:

1. Under **s 116** of the Constitution (although this only constrains action by the Commonwealth and, arguably, the Territories, and is not binding on the States);
2. Protection under **international instruments** such as art 18 of the ICCPR (although these obligations are not directly justiciable in Australian courts, they can sometimes provide interpretative guidance where ambiguities may be present);
3. Possible protection under **common law principles** (although the paper notes that this is highly contested, there may be a "developing" common law principle protecting religious freedom);

[1] See "Law and Religion Australia", https://lawandreligionaustralia.blog .
[2] Also available online at https://works.bepress.com/neil_foster/94/ .

4. Protection under **State charters of rights** (which again, while not directly actionable, provide interpretative guidance for State courts);
5. Protection provided by State laws which make **discrimination** on the grounds of religious belief unlawful (not present in all States, and in particular missing from Commonwealth discrimination laws);
6. Protection provided in **"balancing clauses"** inserted into discrimination legislation directed to other matters such as sex or sexual orientation, to balance the human right to religious freedom with the right not to be discriminated against. (I prefer the terminology of "balancing clauses" rather than use of the word "exemptions", which can imply that religious freedom is a lesser and more easily waived right than other human rights.)[3] I note in the paper that while such provisions are often present for the benefit of churches and "religious organisations", there is generally little protection for individual believers who are not clergy or part of these larger groups. I recommend that such protection should be provided.

I would like now simply to note some of the more significant developments in these areas since that paper was delivered in May 2015.

## Recent decision on s 116

Section 116 was considered in some detail in the NSW Court of Appeal decision in ***Hoxton Park Residents Action Group Inc v Liverpool City Council*** [2016] NSWCA 157 (5 July 2016) when discussing the "establishment" clause. The main ground for the decision, upholding as valid Commonwealth provision of funding for an Islamic school, was that the "establishment" clause of s 116 was not breached except by a law that amounted to the setting up of a "national church" of some sort.[4]

The court also, however, made some interesting comments on "free exercise". The appellants had argued that the legislation allowing funding of an Islamic school "prohibited free exercise of religion", contrary to s 116, because students at the school were not free to decline to engage in the religious activities- see [142].

In effect, as with the other cases discussed in the 2015 paper, the argument here failed because the Court held that the "purpose" of the legislation was not impairment of free exercise. However, I still think this matter needs further thought.

In ruling that the law would not fall foul of the s 116 limb on prohibition on the free exercise of religion, the Court of Appeal at [146] referred to *Krygger v Williams* (1912) 15 CLR 366, where as seen there are some blunt words rejecting a "free exercise" claim if a law which has "nothing at all to do with religion" has an incidental impact on religious freedom (there a law for conscription to military service). Similar views expressed by Brennan and Toohey JJ in *Kruger v Commonwealth* (1997) 190 CLR 1 were noted and supported at [147]. The correct view of the matter was said to be that a law would only contravene s 116 if its clear "purpose" were to impair religious freedom.

With respect, I would like to suggest that more discussion of this "free exercise" point was warranted. In particular, the Court of Appeal in *Hoxton Park* does not really discuss what is clearly the major "free exercise" decision in Australia,

[3] See N Foster "Freedom of Religion and Balancing Clauses in Discrimination Legislation" (2016) 5 *Oxford Journal of Law and Religion* 385-430, available through a link at https://works.bepress.com/neil_foster/108/ .

[4] Following, of course, the earlier decision of the High Court in the so-called "DOGS" case, *Attorney-General (Vic); Ex rel Black v Commonwealth* [1981] HCA 2; 146 CLR 559.

*Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116. As seen, in that decision the leading judgment of Latham CJ suggested that a law which amounted to an "undue" infringement of freedom of religion (see p 128) would contravene the free exercise clause.

The view that consideration of the free exercise limb of s 116 involves more than simply looking at the apparent "overall purpose" of legislation can also be supported to some extent from the decision of Gaudron J in *Kruger*. Her Honour's comments in my view provide some grounds for saying that the narrow view of the purpose of legislation adopted in relation to the "establishment" prohibition, may not be appropriate for the other matters s 116 deals with.

In the *Hoxton Park* case itself, however, I would agree with the Court of Appeal that there is no breach of the "free exercise" clause of s 116, even if it were viewed more widely. After all, as Beazley P notes at [154], the affected students are those "whose parents have exercised a choice to send them to a school which engages in such observances".

Basten J makes the same point in his discussion of the "imposition" argument, even assuming it were available, at [281]:

> [C]entral to the concept of "imposition" is the element of religious observance which is non-consensual. With respect to children, the source of any consent must be found in the beliefs and intentions of the parents. There is no suggestion that any parent is under any threat or improper pressure to send their children to a particular non-secular (or secular) school. No doubt such a choice is strongly influenced by the parents' religious beliefs: in that (relevant) sense the **choice is entirely consensual**. Further, whatever may have motivated a parent to send a child to a school which provides religious instruction of a particular kind, the Commonwealth is neutral as to that aspect of the child's education. It was not right to say that the Commonwealth required that the school provide religious instruction and hence imposed religious observance on the children. The fact that the school imposed such a requirement, and obtained funding from the Commonwealth, does not mean the Commonwealth imposed any such requirement. The funding criteria were silent as to this aspect of the school's curriculum.

However, I have to say I found of slight concern an error in terminology, which Basten JA makes in para [280]:

> **Free expression**
> [280] Perhaps curiously, the appellants placed their primary arguments in this Court, not on the establishment clause, but on the prohibition against laws imposing any religious observance and prohibiting the ***free expression*** of any religion. The two clauses may be treated together because the arguments presented were closely related. The manner in which the *Australian Education Act* was said to impose religious observance relied upon the suggestion that a law of the Commonwealth which provided funds to a religious school, which included in its syllabus the undertaking of religious activities, involved the imposition of religious observance. That was said to flow from the finding of the primary judge that "[t]he school obviously requires religious observance by pupils during their hours of attendance, which is presumably one of the reasons why parents enrol their children there."

While no doubt the mistake was no more sinister than a typological error, it is important not to get this terminology wrong. "Free **exercise**" of religion is what the Constitution protects, not free "**expression**" alone. The second idea, which seems to refer to "speaking" about and communicating on the topic of religion, is an important sub-set of overall free exercise, but it does not exhaust the universe of discourse of the wider expression. "Exercise" will include living in accordance with the principles of one's faith generally, not simply speaking. (A similar point may be made about the occasional lapse of politicians in the US in referring to a right of "freedom of worship"- the freedom to join together with other believers is only one part of the "free exercise" generally.)

In short, my view is that the discussion of "free exercise" issues may need to be slightly nuanced. The right to religious freedom is an important human right, protection of which in Australia depends in part on s 116. To confine the prohibition in s 116 to laws the "sole or dominant" purpose of which is explicit interference with religious freedom seems to apply far too narrow a reading. Even a broader reading here, however, would have led to rejection of the challenge to funding, as no-one would be forced against their wishes to send their children to a religious school of any sort. But for the future, protection of religious freedom requires the slightly broader approach authorised by the leading decision of Latham CJ in the *Jehovah's Witness case*, a careful consideration of whether there is an "undue impairment" of religious freedom when weighed up against other compelling community interests. Only then can the true diversity of the Australian community be properly protected.

## Religious freedom under State charters

### (a) *Hoskin v Greater Bendigo*

A significant reference to s 14 of the Victorian Charter was found in the decision of the Victorian Court of Appeal in *Hoskin v Greater Bendigo City Council* [2015] VSCA 350 (16 December 2015), handed down after the 2015 paper was written. This was an appeal from a decision of the Council to allow the construction of an Islamic mosque in Bendigo. The Court of Appeal held that the Council had appropriately considered the relevant "social impacts" in approving the mosque. In the course of the judgment, however, they noted that the Council had been obliged to take into account important human rights provisions, including s 14:

> [22] In support of this case, the permit applicant submits that the P&E Act is to be construed in a manner which gives effect to the *Charter of Human Rights and Responsibilities Act 2006* ('the Charter').
>
> [23] Sections 14 and 19 of the Charter seek to protect the human rights to freedom of culture, religion and belief. Section 14 states:
> (1) *Every person has the right to freedom of thought, conscience, religion and belief, including—*
> (a) the freedom to have or to adopt a religion or belief of his or her choice; and
> (b) *the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private*.
> (2) A person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.[5]
>
> [24] Section 19(1) of the Charter states:
> *All persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy his or her culture, to declare and practise his or her religion and to use his or her language*.[6]
>
> [25] Section 32(1) of the Charter provides:
> *So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights*.[7]
>
> [26] We accept that the provisions of ss 14 and 19(1) of the Charter inform the construction of the objectives of planning as they are stated in s 4 of the P&E Act and the terms of s 60(1)(f) of the Act relating to significant social effects upon which the debate in this matter ultimately focussed….
>
> [31] The Charter is relevant in this case not only to the proper construction of the objectives of planning in Victoria and to the proper understanding of the notion of significant social effects. It also imposed an

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5 Emphasis added.
6 Emphasis added.
7 Emphasis added.

> obligation upon the Council and, on review, the Tribunal to have regard to the human rights of the proposed future users of the mosque when deciding whether or not to grant the permit.

The court also noted similar comments about the need to support religious freedom which had been made by McHugh J in *Canterbury Municipal Council v Moslem Alawy Society Ltd*[8], although those comments were made in the context of general principles rather than a specific statement of human rights. An earlier Tribunal decision involving a mosque application, *Rutherford & Ors v Hume CC* [2014] VCAT 786 (14 July 2014) had also referred to s 14 in stressing that religious freedom rights supported the right to build a place for religious worship.

There is an important recent book by N Villaroman, *Treading on Sacred Grounds: Places of Worship, Local Planning and Religious Freedom in Australia*. (Leiden: Brill, 2015) dealing with these issues.[9]

(b) *Fraser v Walker*

A very interesting and challenging set of facts involving a claim based (in part) on s 14 is to be found in *Fraser v Walker* [2015] VCC 1911 (19 November 2015). A person who was standing outside an abortion clinic in Melbourne was displaying a poster that featured pictures of aborted fetuses. She was charged with, and convicted of, "displaying an obscene figure in a public place" contrary to s 17(1)(b) of the *Summary Offences Act* 1966 (Vic). There were a number of interpretive and human rights issues raised in her defence; the County Court, for example, decided that something could be "obscene" even if it had no sexual connotations, but was simply "offensive or disgusting" – para [21].

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

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

I think there might be more to be said on this point, especially as opposition to "abortion on demand" is a well-known religious stance of the Roman Catholic church. Clearly it is a difficult question, and the court ought to have weighed up the religious freedom rights of the activist here in light of the emotional and other harm that might be caused to those seeking to use the services of the clinic. But I am not so sure that it should have been summarily dismissed as in no way connected with her religion.

This case, which is arguably about free speech as well as freedom of religion, falls into the general area of "freedom of religious speech" which is also under challenge today in Australia. I also attach to this submission a conference paper entitled "Protection of religious free speech in Australia", presented at *The Australasian Christian Legal Convention* (2016).[10] I would also like to present this paper to the Committee for consideration in its deliberations.

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[8] (1985) 1 NSWLR 525.

[9] For a review of the book, see N Foster, "Review of *Treading on Sacred Grounds: Places of Worship, Local Planning and Religious Freedom in Australia* by Noel Villaroman (2015)", (2016) 58 (2) *J of Church and State* 387-389; DOI: https://doi.org/10.1093/jcs/csw013.

[10] Available online at: http://works.bepress.com/neil_foster/106/.

## Tasmanian religious freedom provision

It should be noted also that there is a very little-known provision in the Tasmanian Constitution, s 46 of the *Constitution Act* 1934 (Tas), which "guarantees to every citizen" "free profession and practice of religion… subject to public order and morality". The provision had apparently never been considered by the courts until the decision of the Federal Court in *Corneloup v Launceston City Council* [2016] FCA 974 (19 August 2016) at [38].

In that case Mr Corneloup (who was one of the plaintiffs in the *Adelaide Preachers case*, *AG (SA) v Adelaide City Corpn* (2013) 249 CLR 1 dealing with religious free speech) wanted to preach public in Launceston in Tasmania. He was prevented from doing so by an officer of the Council refusing him a permit, applying what she thought were relevant Guidelines, which regarded "religious spruikers/hawkers" as not able to speak. In fact, when the relevant by-laws were examined the Federal Court (Tracey J) held that the officer had not been authorised to make the decision, and in any event had been unlawfully applying a "blanket prohibition" when the by-laws required a reasoned decision to be made on each occasion. As a result the order refusing a permit was quashed, and the Council directed to apply the law properly.

Mr Corneloup had also challenged the decision on Federal Constitutional grounds (impairment of right to freely communicate on political matters), and on the basis of s 46 of the Tasmanian *Constitution Act*. Since the refusal was being quashed on administrative law grounds Tracey J did not give the constitutional grounds detailed consideration. But he said this about the s 46 arguments:

> [36] Mr Corneloup's other constitutional ground was pressed in reliance on s 46 of the *Constitution Act 1934* (Tas). This section, which was introduced into the State Constitution in 1934, provides that "[f]reedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen."
>
> [37] Again, Mr Corneloup's argument focussed on the Guidelines rather than the Malls By-Law. He claimed that, as a citizen, he was entitled to the "benefit" of s 46. Preaching was one aspect of the practise of his religion. The Guidelines prevented him from preaching in the malls and, as a result, contravened s 46(1) of the Constitution Act.
>
> [38] Given the inapplicability of the Guidelines it is not necessary to pursue this ground in any detail. Had it been necessary to do so Mr Corneloup's argument would have confronted a number of difficulties. The first is that s 46 does not, in terms, confer any personal rights or freedoms on citizens. The qualified "guarantee" has been held to prevent coercion in relation to the practise of religion and to guarantee a freedom to profess and practise a person's religion of choice: see *McGee v Attorney-General* [1973] IESC 2; [1974] IR 284 at 316 – a decision of the Irish Supreme Court on the equivalent provision of the Constitution of Ireland, Article 44(2)(1). There is, however, no authority to which I was referred which determines the practical effect of the "guarantee". In particular, there remains an open question as to whether it could operate to render invalid provisions of other Tasmanian legislation (or subordinate legislation made thereunder), given that the Constitution Act is also an Act of the Tasmanian Parliament and s 46 is not an entrenched provision.

It is submitted that, even if s 46 does not have an "over-riding" role, it might have a part to play as an "interpretive" principle under the doctrine of "legality" mentioned before, so that a court should strive to read any Tasmanian legislation as not interfering with religious freedom to the maximum extent possible. It will be interesting to see if s 46 plays a role in the future.

## Is reform desirable?

Within the time allowed for the Committee's deliberations, it is not possible to provide extensive recommendations for reform. But I would like to suggest that, given the "patchwork" protection for freedom of religion noted above and in the attached papers, it is past time for consideration to be given at the Commonwealth level for protection of religious freedom to be the subject of specific legislation. The Commonwealth has undertaken to provide serious religious freedom protection by acceding to the ICCPR and under art 18 in particular. It would be appropriate that this commitment be translated into law. Apart from other sources of Commonwealth power, it would seem fairly clear that the external affairs power would support implementation of the international human right to free exercise of religion, limited in the specific ways provided under art 18 but not in other ways that currently narrow its scope.

In the past, ironically, religious groups have been some of the strongest voices resisting formal protection of religious freedom through statute.[11] But it seems likely that many of those concerns can be met by adoption of clear guidelines for judicial decision-making (rather than leaving open-ended discretions to judges), by legislating clear and workable "balancing clauses" to ensure that the religious freedoms of different groups are reasonably accommodated, and by fully (not partially) implementing the narrow "limitations" provisions of art 18(3) ICCPR. The challenge of formulating principles for such legislation should be put to a law reform body in the near future.

I thank the Committee for the opportunity to provide these comments, and would be happy to assist with the Committee's deliberations in any other way thought appropriate.

Regards

Neil Foster
Associate Professor in Law

[11] See, eg, Patrick Parkinson, "Christian Concerns with the Charter of Rights" (August 31, 2009), Sydney Law School Research Paper No. 09/72; available at SSRN: https://ssrn.com/abstract=1465125.

May 29, 2015

# Religious Freedom in Australia

Neil J Foster

**2015 Asia Pacific JRCLS Conference**
Sydney Australia

29 May - 31 May 2015, University of Notre Dame Broadway Campus

Keynote Address Conference Session 1 -
**"Religious Freedom in Australia"**

Associate Professor Neil Foster[1]

> Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society. The chief function in the law of a definition of religion is to mark out an area within which a person subject to the law is free to believe and to act in accordance with his belief without legal restraint. Such a definition affects the scope and operation of s. 116 of the Constitution and identifies the subject matters which other laws are presumed not to intend to affect. Religion is thus a concept of fundamental importance to the law. (*Church of the New Faith v Commissioner for Pay-Roll Tax* (1983) 57 ALJR 785 at 787, per Mason ACJ and Brennan J)
>
> Religious faith is a fundamental right because our society tolerates pluralism and diversity and because of the value of religion to a person whose faith is a central tenet of their identity. (*Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VSCA 75 at [560] per Redlich JA)[2]

In this paper I want to discuss how the law protects freedom of religion in Australia. While as is well known there is no overarching "Bill of Rights" in operation across our country, protection of this "fundamental right" takes place, even in a fragmented way, under a number of laws. The paper discusses the protection provided by the Federal Constitution, the impact of international treaties, the effect of the common law, domestic charters in specific States, and the "balancing" provisions of discrimination legislation.

**1. Religious Freedom Protection under the Constitution**

One of the key features of the Australia legal system is that we are a Federation, governed by a written Constitution. The Commonwealth Parliament is given certain specific areas in which it can legislate; the States hold the "residual" powers of legislation, although if the Commonwealth has passed a valid law it can over-ride State law on that topic. This Federal division of powers is an important background to considering how religious freedom is protected.

The Commonwealth Constitution contains a clear restriction on Federal law-making powers, designed to protect religious freedom. This is s 116 of the Constitution:

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[1] Newcastle Law School, University of Newcastle, NSW; contact neil.foster@newcastle.edu.au . See also my blog, "Law and Religion Australia", at https://lawandreligionaustralia.wordpress.com .

[2] Of course, as the paper will note, his Honour was in dissent from the majority decision in this case. But since the purpose of these introductory quotes is to set out principles that will unfold in the paper, rather than to provide an authoritative statement of the law, I maintain that I am at liberty to use this quote at this point!

> **Commonwealth not to legislate in respect of religion**
>
> The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or **for prohibiting the free exercise of any religion**, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

(Of course s 116 also deals with "establishment" issues, whether the Commonwealth can create or support a religious body, and religious tests. But for present purposes we will focus on the "free exercise" clause.)

The provision is similar to, and was enacted in clear knowledge of, similar phrasing in the First Amendment to the Constitution of the United States of America. But it has become clear in later interpretation that the High Court of Australia, in the few cases where the provision has been considered, will not automatically follow the US Supreme Court. There are only a half dozen High Court decisions dealing with the free exercise clause of s 116.

### a. *Krygger v Williams* (1912) 15 CLR 366

The first of the High Court decisions on s 116 is tantalisingly brief. Mr Krygger was a Jehovah's Witness, apparently (see the Blackshield article at 80; I am not sure that it directly emerges in the report.) As such he objected to involvement in, and support for, military operations. The Commonwealth had passed a law requiring all men to report for military training under Part XII of the *Defence Act* 1903.

Mr Krygger was convicted of failing to report for military training, and sentenced to be "committed to the custody of a sergeant-major for 64 hours" (being the amount of time per year he was supposed to report for training). He appealed to the High Court that the law was an interference with his free exercise of his religion.

A feature of the case which is important to understand is that the legislation did contain provisions relating to "conscientious objection" to bearing arms- but those provisions said that while the person who was an objector was only to be given non-combatant roles (such as working behind the lines or in an ambulance), they still had to report for training.

The two judges of the High Court who heard the matter were dismissive and could hardly see the problem. They clearly regarded the matter as resolved by the provision for non-combatant status. But of course for Mr Krygger it seems likely that the more important issue was that his personal involvement as a non-combatant would still be providing support for a war effort to which he fundamentally objected.

Still, there are some very broad statements, which treat freedom of religion very lightly. Griffith CJ said at 369:

> To require a man to do a thing which has nothing at all to do with religion is not prohibiting him from a free exercise of religion. It may be that a law requiring a man to do an act which his religion forbids would be objectionable on moral grounds, but it does not come within the prohibition of sec. 116, and the justification for a refusal to obey a law of that kind must be found elsewhere. The constitutional objection entirely fails.

Barton J was no more sympathetic:

> ..the *Defence Act* is not a law prohibiting the free exercise of the appellant's religion, nor is there any attempt to show anything so absurd as that the appellant could not exercise his religion freely if he did the necessary drill. I think this objection is as thin as anything of the kind that has come before us (at 372-373).

**b. *Judd v McKeon* (1926) 38 CLR 380**

This next decision does not primarily involve s 116, but has some interesting comments by Higgins J on the provision. The case was a prosecution for failing to vote at a Senate election. The legislation said that in order to escape liability the elector had to have a "valid and sufficient reason". The reason he offered was that he was a socialist, and that all the candidates were capitalists, and hence he preferred none of them!

Not the first time in Australia, then, that someone faced this dilemma. But the majority of the High Court said that he just had to vote anyway, "valid and sufficient" reasons being things unconnected with the over-arching obligation to vote, such as family illnesses or natural disasters or the like.

Higgins J, however, disagreed. His Honour thought that a political reason could have been valid. And in particular his Honour thought that if the elector had a *religious* objection to voting, then s 116 would operate to excuse him from doing so (at 387). He then went on to offer some comments about *Krygger*, which one might have thought should have precluded a s 116 argument here if the words used by the judges in that case were meant seriously (since after all one could argue, in the words of Griffiths CJ, that voting "had nothing to do with religion".)

But Higgins J seems to suggest that he would not agree with all that was said in *Krygger*:

> The case of *Krygger v. Williams* under the *Defence Act* may be accepted in its entirety without this case being affected. There a youth was charged under sec. 135 with failing to render the personal service required of him, military service as a senior cadet, "without lawful excuse." The Act did not allow conscientious objection to such military service as a "lawful excuse." Such an excuse was excluded by the law; but the law had made provision for allotment of conscientious objectors to non-combatant duties (sec. 143 (3)). This was the limit of the "lawful excuse," the only excuse allowed by law. There is no such limit here in the words "valid and sufficient reason." The distinction is obvious, whatever view one may take of the fact that the two Judges in that case treated the defendant's conscientious objection to perform military duties—to attend drill, to serve as a cadet—as if it were a mere objection to fight. A man may of course assist the operations of a combatant force as much by doing its fatigue duty as by standing in the firing line. (at 389-390)

The last 2 sentences, of course, suggest that his Honour was not entirely persuaded by the reasoning in *Krygger*.

Provisions on compulsory voting still require a "valid and sufficient" reason for not doing so, but those like Jehovah's Witnesses who have a religious objection to voting are regarded as having a such a reason. On its website the Australian Electoral Commission comments:

> 41. Under s 245(14) of the Electoral Act or s 45(13A) of the Referendum Act the fact that an elector believes it to be a part of his or her religious duty to abstain from voting constitutes a valid and sufficient reason for not voting.[3]

**c. *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116**

The next case is really the major Australian authority on freedom of religion under s 116; and while it seems not to support a broad meaning of the phrase, on closer analysis I think it lays the ground for a sensible view.

[3] See http://www.aec.gov.au/about_aec/Publications/Backgrounders/compulsory-voting.htm (accessed 7 May 2015).

The case involved the Jehovah's Witnesses again, but this time on a much broader scale than in *Krygger,* which was just one member declining military training. Here the denomination as a whole was under threat. The court noted that the theology of the Jeohovah's Witnesses involved the views that all organised political entities (up to and including the British Empire) were "organs of Satan", and that it was the duty of all members of the church to not participate in human wars. In addition they would refuse to take an oath of allegiance to the King.[4]

While these views were unpopular in peacetime, at the height of World War 2 when many Australians were fighting and dying overseas for the British Empire they were pretty explosive. So much so that under a general regulation-making power given by the *National Security Act* 1939 (Cth), regulations called the *National Security (Subversive Associations) Regulations* 1940 had been made, and under those regulations the Governor-General had declared the Jehovah's Witnesses to be a subversive association, and the Commonwealth had taken over its main meeting centre.

The regulations were struck down as invalid. But importantly for our purposes, the reason for their invalidity was not that they breached s 116, but that they went beyond either the regulation-making power, or else beyond the Constitutional power involved, as being too far-reaching. In particular one of the features that struck the judges concerned was that under the Regulations organisations were prohibited from advocating "unlawful doctrines", which was defined to include "any doctrine or principle advocated by a declared body". Since the JW's were within a tradition that honoured the Bible, their doctrine included such subversive tenets as the Ten Commandments! Even Latham CJ, who would have supported most of the regulations, thought this part of the regulations went too far- see 144. But overall 3 out of the 5 judges ruled that the regulations were too broad and were, in effect, a disproportionate response to the danger posed by the JW's.

Hence, as noted above, s 116 was not the reason for invalidity. But in the course of their judgments their Honours made some very interesting comments on the section. Latham CJ, for instance, noted that:

- section 116 is a clear and general prohibition on all laws, and so is an important limit on law-making power (at 123);
- it must be read to operate on a broad definition of "religion", and to include a protection even for those of "no religion" (at 123); this will even include "non-theistic" religions such as some forms of Buddhism (at 124);
- it is an important feature of s 116 that it protects, not just the "majority" or "popular" religion, but provides protection of "minorities, and, in particular, of unpopular minorities" (at 124);
- the provision covers not only opinions but also actions in reliance on religious opinions:

> The section refers in express terms to the *exercise* of religion, and therefore it is intended to protect from the operation of any Commonwealth laws acts which are done in the exercise of religion. Thus the section goes far beyond protecting liberty of opinion. It protects also acts done in pursuance of religious belief as part of religion. (at 124)

- however, not all religions are good or helpful, and free exercise of religion must be balanced with other interests- his Honour cites some US decisions

[4] See the summary at pp 117-118, esp point 9.

and concludes that the test to be applied must be something like, does a law amount to an "undue" infringement of freedom of religion, taking into account other important interests (at 128);

- still, Latham CJ is careful to point out that he does not agree with some of the US cases. In particular he notes that the sort of approach adopted in *Reynolds v United States* 98 US 145 (1879) (allowing a law against polygamy to over-ride then-current LDS beliefs simply because it had a plausible public interest) seems too narrow a view of an important freedom:

> When the suggestion that religious beliefs should be superior to the law of the land is rejected as a matter of course, it may well be asked whether the very object of the constitutional protection of religious freedom is not to prevent the law of the land from interfering with either the holding of religious beliefs, or bona fide conduct in pursuance of such beliefs. (at 129)

- In this case, however, his Honour thought that the freedom of religion of the JW's had to give way to national security considerations- as otherwise this freedom would destroy all other freedoms:

> It is consistent with the maintenance of religious liberty for the State to restrain actions and courses of conduct which are inconsistent with the maintenance of civil government or prejudicial to the continued existence of the community. The Constitution protects religion within a community organized under a Constitution, so that the continuance of such protection necessarily assumes the continuance of the community so organized. (at 131)

In a post-Sept 11, 2001 world, of course, the balancing of religious freedom and national security continues to be an ongoing debate. The issues may come back again as the government considers preventing people from going to explosive areas of the Middle East to join in the "Islamic State" so-called "caliphate". Could it be argued that restriction of movement in this way impacts the freedom of religion of those who think they are obliged to join IS? Even if it were so argued, it seems likely that interests of national security would be held to over-ride freedom of religion in this situation.

Other members of the High Court in the *JW's case* (who were more inclined to strike down the regulations as too broad in any event) gave less time to the s 116 issues, but effectively ruled in a similar way.

**Rich J** at 149 noted that freedom of religion was not absolute, and was subject to the restrictions "essential to the preservation of the community". **Starke J** would have resolved the case without reference to s 116, but agreed with Latham CJ that it was an important protection of "religious liberty or freedom", but again was not absolute and would have to give way to laws which were "reasonably necessary for the protection of the community and in the interests of social order" (at 154-155).

**Williams J** noted also that the right to freedom of religion had to give way in a situation of national defence; but it has to be said that his Honour was not very convincing when he suggested (at 160-161) that the activities of the JW's in disseminating their doctrines would not be protected by s 116 "because in its popular sense such principles and doctrines would not be considered to be religion, but subversive activities carried on under the cloak of religion"! There is no suggestion that the JW's did not really believe these doctrines or hold them long before World War 2 broke out; it seems that these views are contrary to those of the majority, who recognise there is a real issue of interference with religious freedom.

Still, his Honour was prepared to invoke s 116 when considering the broad prohibition on "doctrines" which he and other members of the Court referred to in striking down the regulations as too broad:

> As the religion of Jehovah's Witnesses is a Christian religion, the declaration that the association is an unlawful body has the effect of making the advocacy of the principles and doctrines of the Christian religion unlawful and every church service held by believers in the birth of Christ an unlawful assembly. [Even] apart from s. 116 such a law could not possibly be justified by the exigencies and course of the war. But it is also prohibited by s. 116. (at 165)

Overall, then, while the case is one where s 116 did not operate on its own to protect the religious freedom of the JW's, the court affirms the importance of the section, and that very serious grounds must be provided before religious freedom can be over-ridden. Here of course, in the middle of a desperate and global war, it was judged that the teaching that governments were "tools of Satan" was just too subversive of the war effort. But the very fact that the offensive regulations were struck down on other grounds may indicate that the court was not entirely happy with the overall policy.

**d. *Kruger v Commonwealth (the "Stolen Generations case")* [1997] HCA 27; (1997) 190 CLR 1**

It has to be said that this relatively recent decision of the High Court is one of the most unsatisfactory on s 116. I think this is partly because even the parties concerned saw s 116 as a "subsidiary" argument to others they were making. The action was an attempt to challenge the policies that led to Aboriginal children being removed from their parents, and it involved a number of very complex issues, including an attempt to create "implied rights" under the Constitution of freedom of movement and association, and issues to do with the impact of international law which had not been implemented domestically and how it could be taken into account.

Part of the argument, however, was that removing children from their families had an impact on the practice of their traditional religion, and hence it involved an interference with religious freedom under s 116.

The s 116 claim failed, though the approaches taken by different members of the Court were varied.

**Brennan CJ** gave the argument very short consideration. He took the view that a law would only fall foul of s 116 if that were the law's main intention:

> To attract invalidity under s 116, a law must have the purpose of achieving an object which s 116 forbids.[5] None of the impugned laws has such a purpose. (at 40)

Perhaps the least that can be said about that quote is this: while there may be an argument that this is the appropriate view to take for "establishment" issues (which of course was what the cited *DOGS* case was about), it seems arguable that this is by no means an appropriate approach in free exercise claims. After all, even in Latham CJ's comments in the *JW's* case, it was recognised that this is an important right of citizens that should not be lightly discarded.

**Dawson J** took the view (based on the previous decision in *R v Bernasconi* [1915] HCA 13; (1915) 19 CLR 629 on s 80 of the Constitution) that s 116 is not applicable to

[5] *Attorney-General (Vict); Ex rel Black v The Commonwealth* [1981] HCA 2; (1981) 146 CLR 559 at 579, 615-616, 653. The case was sponsored by an organization called "Defence of Government Schools", and hence often goes by the acronym "DOGS".

laws governing Territories made pursuant to s 122; and hence since all the complaints were about the actions of Territorial laws, s 116 was not relevant (at 60). However, he also said that he would have agreed with Gummow J that if s 116 did apply, it did not impact on the relevant laws (at 60-61).

**Toohey J** at 85-86 thought that s 116 did apply to Territorial laws; but he also thought that the purposes of the law in question needed to be considered.

> The question should therefore be asked: was a purpose of the Ordinance to prohibit the free exercise of the religion of the Aboriginals to whom the Ordinance was directed? It may well be that an effect of the Ordinance was to impair, even prohibit the spiritual beliefs and practices of the Aboriginal people in the Northern Territory, though this is something that could only be demonstrated by evidence. But I am unable to discern in the language of the Ordinance such a purpose. (at 86)

In contrast to Brennan CJ, there is recognition that a law may have a number of "purposes". But again there is a sharp line drawn between "purpose" and "effect", so that an effect (however serious and however disparately felt by people of a particular religion) would not be enough to breach s 116.

**Gaudron J** said that s 122 was clearly subject to s 116 (at 123). Her Honour noted, however, that while s 116 was an important limit on Commonwealth legislative power, it could not be said to create a constitutional "right" which could be sued upon in damages for a citizen, partly because the provision did not govern the States (who are of course free to establish religions or impair religious freedom as they see fit)- see the comments at p 125.

On the question as to whether a law needs to have the "purpose" of impairing freedom of religion, or not, her Honour took a slightly wider view of the matter than some other members of the Court:

> s 116 was intended to extend to laws which **operate to prevent the free exercise** of religion, not merely those which, in terms, ban it. (at 131, emphasis added)

Her Honour also stressed the need to interpret constitutional guarantees broadly, so as not to allow Parliament to circumvent them by laws that appear to have innocent aims. With respect, though, her subsequent analysis of the issue is hard to follow. She stresses that the "purposes" of the legislation are crucial. However, she does distinguish between the remarks cited from *DOGS* about "the purpose" of legislation, relating to "establishment", and points out that laws can have more than one purpose:

> In *Attorney-General (Vict); Ex rel Black*, Barwick CJ expressed the view, in relation to that part of s 116 which protects against laws "for establishing any religion", that for "[a] law to satisfy [that] description [it] must have that objective as its express and ... single purpose." If that is correct, it is because of what is involved in the notion of "establishing [a] religion". Certainly, that notion involves something conceptually different from "imposing ... religious observance", "prohibiting the free exercise of any religion" or requiring religious tests "as a qualification for ... office or public trust under the Commonwealth", they being the other matters against which s 116 protects. Moreover, s 116 is not, in terms, directed to laws the **express and single purpose** of which offends one or other of its proscriptions. Rather, its terms are sufficiently wide to encompass **any law which has a proscribed purpose**. And the principles of construction to which reference has been made require that, save, perhaps, in its application to laws "for establishing [a] religion", s 116 be so interpreted lest it be robbed of its efficacy. (at 133, emphasis added)

It seems that her Honour took the view that one of the purposes of the relevant legislation may indeed have been to interfere with freedom of religion:

> Indeed, in the absence of some overriding social or humanitarian need - and none is asserted - it might well be concluded that one purpose of the power conferred by s 16 of the Ordinance was to remove Aboriginal and half-caste children from their communities and, thus, prevent their participation in community practices. And if those practices included religious practices, **that purpose necessarily extended to prohibiting the free exercise of religion**. (at 133, emphasis added)

But her Honour took the view that the Commonwealth had not provided enough information for the issue to be determined.

**McHugh J** agreed with Dawson J that s 116 was not applicable to laws made under s 122- at 142. **Gummow J** took a fairly narrow "purpose" approach, and concluded that the purpose of the legislation was not to interfere with free exercise- at 160. Interestingly his Honour cited the controversial *Smith* decision from the US as apparently an indication of the approach he preferred- see n 629 at 160.[6]

His Honour did, however, concede that legislation which seemed to be directed to other matters might be a "concealed" attack on religion and in those possible circumstances might be subject to attack under s 116- see 161. His Honour also took the view that s 116 was applicable to laws passed under s 122- see 167.

The upshot of *Kruger*, then seems to be that the majority of the Court took a reasonably narrow, "purposive" view of s 116, requiring a close examination of the purpose of relevant legislation to see if it had the purpose of impairing freedom of religion. Arguably this is something of a retreat from comments made by Latham CJ in the *JW's case*, where his Honour there said that the purpose of legislation was only one factor in determining whether it breached s 116 (see *JW's* at 132, though this passage itself was doubted by Gaudron J in *Kruger* at 132.)[7]

However, some members of the Court at least allowed that legislation could have more than one purpose, and Gaudron J demonstrates how even in this case it could have been concluded that one purpose at least of the relevant legislation was the impairment of free exercise of religion.

On the vexed question of whether s 116 governs the laws of the Territories made pursuant to s 122, Toohey, Gaudron and Gummow JJ are all clear that it does; Dawson and McHugh JJ that it doesn't; and Brennan CJ unfortunately doesn't offer a view (although the fact that his Honour explicitly found that the laws did not breach s 116 suggests that he may have been sympathetic to the view that it applied.) So there is no clear majority on the point, which is presumably why a recent textbook states: "The court has not yet resolved the question whether s 116 applies to laws made under the territories power".[8]

On balance, however, I think that when presented with the issue the court will hold that s 116 applies to the Territories. I am reinforced in this view because in recent

[6] As those interested in religious freedom issues in the US will know, the general approach of the US Courts to religious freedom issues in recent years is to read the right very narrowly, so that if there is a "neutral" (i.e. not clearly anti-religious) reason for a law, it will not breach the First Amendment, following the decision in *Employment Division v Smith* 494 US 872 (1990).

[7] See the comment of Gray (2011) at 316, with which I agree: "The test in Kruger for invalidity pursuant to [s 116], that the law be passed with the purpose of restricting religious freedom, is with respect too narrow",

[8] Clarke, Keyzer & Stellios *Hanks Australian Constitutional Law: Materials and Commentary* (9th ed; Australia, LexisNexis Butterworths, 2013) at 1174, [10.4.6].

years, in *Wurridjal v Commonwealth* (2009) 237 CLR 309, a majority of the court over-ruled past decisions holding that the right to "just terms compensation" under s 51(xxxi) did not apply to the Territories. So there seems to be a definite trend to apply what few constitutional "protections" that there are, equally to the Territories as to other parts of the Commonwealth.

**e. *Cheedy on behalf of the Yindjibarndi People v State of Western Australia* [2010] FCA 690 (2 July 2010); upheld on appeal [2011] FCAFC 100 (12 August 2011)**

This case, not a High Court decision of course but at the appellate level in the Federal Court, raised the question whether provisions of the *Native Title Act* 1992 (Cth) which allowed mining to take place on native title land, in some circumstances without the consent of the local native title holders, were contrary to s 116 because they would impair the exercise of religious obligations under traditional indigenous spiritual views- one of which was that those who come onto land must do so with the consent of the land holders, and others of which obliged free access to the land to carry out certain ceremonies.

The trial judge, McKerracher J, in effect rejected the argument because he adopted the High Court's "purposive" approach in *Kruger*:

> [73] The 'effect' or 'result' of a statute is not the primary test for assessing whether that statute is consistent with s 116. Section 116 directs attention primarily to the purpose of the impugned law, rather than to its 'effect' or 'result'. It may be that the effect of the law, in some circumstances, could assist in construing its purpose but the effect of the law is not the starting point.
>
> [74] There is no indication at all that the purpose of s 38 or s 39 NTA is 'for' prohibiting the free exercise of religion.

His Honour also commented that difficult issues were raised, as the decision being complained of was that of a Tribunal making an order (rather than directly a piece of legislation), and part of the basis for the order was State law:

> [83] A further difficulty with the s 116 argument for the Yindjibarndi is that s 116 is directed at Commonwealth legislation. The complaint of the Yindjibarndi seems not to be against the enactment or content of s 38 or s 39 NTA, but rather against the decision made by the Tribunal. The Yindjibarndi contends that s 116 acts to modify the effect of s 38 and s 39 NTA by limiting the kinds of determinations the Tribunal may make to only those which do not impair religious freedom. Section 116 is directed to the making of Commonwealth laws, not with their administration or with executive acts done pursuant to those laws. Section 116 is not capable of regulating or invalidating the Tribunal's decision. The relevant enquiry is whether the Commonwealth may enact s 38 and s 39 NTA.
>
> [84] A law that authorises administrative acts or decisions which prohibit the free exercise of religion will only be a law *for* 'prohibiting the free exercise of religion' and invalid pursuant to s 116 if the purposive content of the law is established.
>
> [85] Neither s 38 and s 39 NTA, nor the Tribunal's determinations, prohibit religious freedom because they do not prohibit anything. If any act did, it would be the grant of the MLAs the subject of the Tribunal proceedings. That grant is a separate administrative act and subject to separate considerations and controls. Any such grant would be made under the Mining Act which, being State legislation, is not subject to s 116 of the *Constitution*.

On appeal the Full Court of the Federal Court upheld the trial judge's findings:

> [92] Similarly, in the present case, there is nothing on the face of s 38 and s 39 to suggest that they have the **object of prohibiting** the free exercise of religion. Section 38 specifies the kind of determinations which the arbitral body may make. Section 39 sets out the mandatory criteria which must be addressed by the arbitral body in the course of its inquiry. Some of the mandatory considerations such as the freedom to carry out rites, ceremonies, and other activities of cultural significance in accordance with traditions, which appears in s 39(1)(a)(iv), demonstrate a concern by the legislature with the protection of religious freedom.
>
> [93] It follows from the application of the test for invalidity under s 116 of the Constitution explained in *Kruger* that the appellants' challenge to s 38 and s 39 on this basis cannot succeed. The primary judge was correct to so hold. (emphasis added)

They also noted the other problems identified by the judge:

> [96]…[W]e agree with the primary judge that the complaint of the appellants is essentially directed to the determinations of the Tribunal and the consequent grant by the State of the mining leases under State legislation. Section 116 applies to the making of laws by the Commonwealth. It does not apply to the determinations made by the Tribunal, to legislation enacted by State governments, or to actions of the State taken under State legislation. To the extent that the appellants complain about these matters, s 116 has no application.

In addition they noted that the Tribunal had made findings of fact on the proposed impairment of religious freedom, especially those concerning access to particular parts of the land to obtain ochre and other matters needed for religious ceremonies, which were to the effect that the mining companies in question were prepared to allow such access as was needed. So that in effect as a matter of fact there seemed to be no proven impairment of religious freedom.

### f. Some other comments on s 116

The above are the main decisions in which the free exercise clause of s 116 has been considered. But there are some comments on the provision in a couple of other cases worth mentioning.

In ***Minister for Immigration and Ethnic Affairs v Lebanese Moslem Association*** (1987) 17 FCR 373 at 388, Jackson J said:

> Assuming that the "purpose" of ... a law is to be gathered from its "effect" or the "result" which it achieves, and that if the law has the effect proscribed by s 116, it would be impossible to deny that the "purpose" of it was otherwise (that is, to say that it was not a law "for prohibiting the free exercise of any religion"), it is necessary to see what effect the decisions in question have...

This was an interesting case involving a decision to deport a "radical" Muslim cleric, Sheikh El-Hilaly. The claim was made that in doing so the Minister had acted contrary to s 116, presumably by interfering with the free exercise of religion either by the Sheikh or else by those who wished him to be their religious leader. In the end the court concluded that the "purpose" of the Minister's actions was not in any way to inhibit the free exercise of religion of anyone, and hence there was no contravention of s 116.

Jackson J said at 389:

> Accepting, however, that there will be some disruption of worship occasioned by the decisions in question it does not seem to me that there is in terms of s 116 any prohibition of the free exercise of religion. Section 116 states in my view not merely the broad proposition that no religion shall be established, but also that no religion shall be prohibited. The term "prohibiting" in s 116 means what it says and appears to me to mean a proscription of the right to exercise without impediment by or under Commonwealth laws any religion which is the choice of the person in question.

> The Migration Act 1958 itself contains no such proscription. Nor in my view is it possible to regard the refusal of the appellant to permit a particular person who is a minister of a religion to remain in Australia a prohibition of the free exercise of that religion. It may be that circumstances such as repeatedly refusing to allow any overseas ministers of a religion to enter or remain in Australia might in a different case amount to such a prohibition, but this is not the position here.

I must say I think there are some interesting issues here, which are somewhat elided by the judgment. Would it matter, for example, whether the behavior and views of the Imam concerned were solely "religious" in nature or "political"? Can one indeed draw a line there? It seems to me that whatever view one takes of the matter the "free exercise" of the Imam's religion was being interfered with if he was deported based on views expressed in sermons.

In many ways it might have been more honest to recognize this and to address directly the competing interests to be taken into account (such as whether it was against Australia's interests in national security to have someone in leadership in the Muslim community advocating violent jihad, which seems to have been an arguable view of what was being said.)

In ***Halliday v Commonwealth of Australia*** [2000] FCA 950 (14 July 2000) an "ambit" claim was made challenging the constitutional validity of provisions introducing the GST, and a s 116 issue was said to arise because, according to the claim, it was contrary to Islam for a Muslim person to collect tax on behalf of the government- see [16]. The claim was rejected; interestingly the court referred to a similar US decision where an Amish person claimed the right not to pass on collected taxes to the government, and where it was held that the community interest in revenue collection had to take primacy- see *United States v Lee* [1982] USSC 40; 455 US 252 (1982), noted at [20].

Sundberg J commented

> [21] The GST laws (including the withholding provisions) do not prohibit the doing of acts in the practice of religion any more than did the military service law in *Krygger v Williams*. **At most they may require a person to do an act that his religion forbids. But that is not within s 116**. If the matter be approached by asking whether the law is a law "for prohibiting the free exercise of any religion", in the sense that it is **designed** to prohibit or has the purpose of prohibiting that free exercise, the answer must be in the negative. It is plainly a law of general application with respect to taxation. There is no hint of a legislative purpose to interfere with the free exercise of a Muslim's or anyone else's religion. Nor is it a law that has the result or effect of prohibiting the free exercise of any religion. A person professing the Muslim faith can avoid committing the sin of acting as a tax collector by ensuring that he deals only with suppliers who quote an ABN. On the view espoused in *Lee*, the **importance of maintaining a sound tax system is of such a high order** that religious belief in conflict with the withholding of GST tax is not protected by s 116. When Latham CJ asked whether freedom of religion has been *unduly* infringed by a law, he was in my view asking a similar question to that posed by *Lee*. There is no **undue interference** here. Especially is this so when a person can avoid acting as a tax collector by dealing only with suppliers who quote an ABN. I have canvassed the various "tests" that can be distilled from the cases. But the essential point, in my view, is that the withholding tax provisions do not prohibit the doing of any act in the practice of religion. The claim that the GST law offends s 116 has no prospect of success. (emphasis added)

While I don't disagree with his Honour's conclusion, the paragraph contains a "smorgasbord" of propositions, not all of which are consistent in my view with previous law or each other. The "undue" infringement discussion is a reasonable use of Latham CJ's decision in the *JW's case.* But is it really true that s 116 can **never** apply to a law

because it requires someone to do something their religion forbids? (After all, that would have been a quick way of disposing of the issues in the *JW's case*; but it was not the way the court approached it.)

The reference to whether a law is "designed" to prohibit a religion is a reference to the "purposive" test, which is indeed justified under *Kruger*. But then his Honour discussed the "importance" of the interest in tax collections, which is a "balancing" process. And then his Honour concludes that in any event a Muslim person could avoid the "tax collection" aspect altogether, so there is no real s 116 issue anyway!

With respect, there are some important issues, which it would have been better to have dealt with here. Simply being able to avoid the impact of a requirement by changing one's behavior may not resolve the religious freedom issue. To take a more up-to-date example, suppose Federal anti-discrimination law were interpreted to mean that a person who baked wedding cakes, who refused to supply a cake in support of same sex marriage, was guilty of sexual orientation discrimination?[9] Would it be a sufficient answer to a claim that this was an undue interference with religious free exercise, to say that the person can avoid the problem by getting out of the wedding cake business?

See also ***Daniels v Deputy Commissioner of Taxation*** [2007] SASC 431 (7 December 2007), where the plaintiff claimed that the provisions of s 116 allowed him to decline to pay the proportion of his taxes which he calculated went to fund abortion. The court not un-naturally declined to agree. Even apart from the complexities of administering a scheme where members of the public were allowed to take conscientious objection to the way their taxes were spent, it would seem be an unworkable system in principle.

Still, it seems clear that we have some way to go before the courts in Australia are really clear about how free exercise under s 116 should work. Given the limits of s 116 as a protection for religious freedom in Australia, are there other options? I want to flag three that may be possible: international obligations, common law protection, and domestic charters. We will also discuss the important "indirect" protection provided by "balancing clauses" in anti-discrimination laws.

## 2. Protection of religious freedom other than through s 116

### (a) Protection under International Conventions?

There are a number of important international treaties that protect religious freedom. Probably the most important one, which Australia has undertaken to be bound by, is the *International Covenant on Civil and Political Rights* (the ICCPR), s 18 of which provides for a broad right of religious freedom.

But under Australian law international treaties are not "incorporated" into our domestic law automatically; Parliaments need to take a further step and pass

[9] Those interested in these issues will know that such cases have arisen elsewhere. The most recent seems to have been the decision of the Oregon Bureau of Labor and Industries to issue a penalty of $135,000 against a small cake-making business, Sweet Cakes by Melissa, for declining to make a cake celebrating a same sex wedding- see V Richardson, "Oregon panel proposes $135K hit against bakers in gay-wedding cake dispute", *Washington Times*, April 24, 2015. An earlier decision in Colorado to a similar effect is currently being appealed.

implementing laws. Unless the Commonwealth or a State/Territory enacts specific legislation, the most that can be said (and this argument has been run in a couple of cases) is that as a matter of judicial discretion in interpreting ambiguous legislation, the courts should presume that Parliament would intend to comply with international law (see *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.) But so far no statute has been found to be sufficiently unclear in the area of religious freedom for this principle to be applied.

One case, however, where international obligations provided at least one reason for the decision was *Evans v NSW* [2008] FCAFC 130. In this decision a major ground for overturning restrictive NSW regulations that had prohibited the 'annoying' of Catholic World Youth Day participants was that they interfered (without explicit Parliamentary authority) with the fundamental common law right of freedom of speech. Branson & Stone JJ commented:

> 74 Freedom of speech and of the press has long enjoyed **special recognition at common law**. Blackstone described it as 'essential to the nature of a free State': *Commentaries on the Laws of England*, Vol 4 at 151-152. …
>
> 76 In its 1988 decision in *Davis v Commonwealth* (1988) 166 CLR 79, the High Court applied a principle supporting freedom of expression to the process of constitutional characterisation of a Commonwealth law. … In their joint judgment Mason CJ, Deane and Gaudron JJ (Wilson, Dawson and Toohey JJ agreeing) said (at 100):
>
> Here the framework of regulation … reaches far beyond the legitimate objects sought to be achieved and **impinges on freedom of expression** by enabling the Authority to regulate the use of common expressions and by making unauthorised use a criminal offence. Although the statutory regime may be related to a constitutionally legitimate end, the provisions in question reach too far. This extraordinary intrusion into freedom of expression is not reasonably and appropriately adapted to achieve the ends that lie within the limits of constitutional power…
>
> 78 The present case is not about characterisation of a law for the purpose of assessing its validity under the Constitution of the Commonwealth. The judgments in *Davis* 166 CLR 79 however support the general proposition that **freedom of expression in Australia is a powerful consideration fav**ouring restraint in the construction of broad statutory power when the terms in which that power is conferred so allow. [**emphases** added]

The evidence in that case disclosed that Evans and other members of the public were planning to demonstrate against what they perceived to be bad policies and doctrines taught by the Roman Catholic Church. The challenged regulations would have restricted their right to do so by requiring them not to 'annoy' participants. The Federal Court held that these regulations should be struck down on the principle that the head legislation enacted by the NSW Parliament should not be interpreted, in the absence of express words, as allowing regulations to be made which interfered with this fundamental common law right. This principle, known somewhat obscurely as the "principle of legality", was also applied by some members of the High Court in *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3 (27 February 2013) and in a related case concerning freedom of speech, *Monis v The Queen* [2013] HCA 4 (27 February 2013).

The Federal Court in *Evans,* however, also incidentally referred to the value of religious freedom, supporting this by reference to the general terms of s 116 of the *Constitution*, and to Art 18 of the UDHR.

> 79 In the context of World Youth Day it is necessary to acknowledge that another important freedom generally accepted in Australian society is freedom of religious belief and expression. Section 116 of the Constitution bars the Commonwealth from making any law prohibiting the free exercise of any religion. This freedom is recognised in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights which, in Art 18, provides:
>
> 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
>
> 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
>
> 3. Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

Of course international conventions can provide a model to encourage legislation, and as we will see in a moment there is some local legislation that to some extent specifically adopts the ICCPR.

There was an attempt made to develop an argument along these lines in one of the cases noted previously. In *Cheedy on behalf of the Yindjibarndi People v State of Western Australia* [2011] FCAFC 100 (12 August 2011) the applicants argued, in addition to their s 116 point, that the court ought to interpret the native title legislation in accordance with the ICCPR to allow recognition of their freedom of religion. The trial judge and the Full Court rejected this claim. The legislation had no relevant "gaps" that the international obligations could fill. The Full Court said:

> [106] … neither logic nor the judgment in *Teoh* support the use of Australia's international obligations in the interpretation of the provisions under consideration in the absence of any ambiguity in the language of the provisions.
>
> [107] If a provision has a clear meaning then that meaning either reflects Australia's international obligations or it does not. There is no scope for the application of any canon of construction to establish the meaning. But where there is more than one possible meaning of the provision, the canon of construction favouring Australia's international obligations is available to identify the intended meaning. In other words, the canon of construction only has work to do where the provision is open to more than one interpretation. This is the reason for the reference in the judgment in *Teoh* to the use of the canon of construction for the purpose of resolution of ambiguity.
>
> [108] Thus, the primary judge was correct to hold that a statutory provision will be construed so as to conform with Australia's international obligations only in order to resolve ambiguity in the language of the provision.
>
> [109] As explained earlier in these reasons, there is no relevant ambiguity in s 38 and s 39 of the Act, and hence no occasion for resort to the international obligations contained in the ICCPR or the UN Declaration arose. The primary judge was correct to so determine.

A more recent decision where more positive reference was made to international religious freedom principles was *Iliafi v The Church of Jesus Christ of Latter-Day Saints Australia* [2014] FCAFC 26 (19 March 2014), which some of you will no doubt be familiar with.

The circumstances arose out of the fact that a number of congregations ("wards") of the LDS church in the Brisbane area had previously been conducting church meetings

in the Samoan language, for the benefit of members of the Samoan LDS community. A re-organisation of the church resources, including it seems a desire to make the church meetings more accessible to the broader community,[10] led to a decision that the previous Samoan services would from now on be conducted in English, and members of the church were forbidden from speaking at the front of the meetings, praying or singing in any language other than English.

This action was brought as a class action by a number of Samoan-speaking church members, against the leadership of the church, with the aim of restoring some at least of the Samoan meetings. The actions were brought under under s 46PO of the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth), alleging unlawful discrimination by the Church against the applicants as members of the Church. Racial discrimination was alleged, pursuant to s 9 of the *Racial Discrimination Act* 1975 (Cth) ("RDA"). The claim was heard by a Federal Magistrate and failed, and this appeal then ensued to the Full Court of the Federal Court of Australia.

While the claim was one for racial discrimination, freedom of religion was one of the main issues at stake. Under s 9(1) RDA:

> It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of **any human right or fundamental freedom** in the political, economic, social, cultural or any other field of public life. (emphasis added)

The definition of "human right or fundamental freedom" refers to art 5 of the *International Convention on the Elimination of All Forms of Racial Discrimination*, ("the RD Convention") which in turn includes, in para (d)(vii), "The right to freedom of thought, conscience and religion". So the issue came down to whether there had been denial of a religious freedom right on a racially discriminatory basis (although other rights, such a right to "nationality", including use of one's own language, and a right to freedom of expression, were also said to be engaged).

The Full Court noted that at some points the Magistrate had identified the relevant right as a right to have public worship "provided" in the Samoan language, whereas in fact the claim was not simply that it was not "provided" from the front, but also that the congregation members were not able to "join in" with singing and other activities in Samoan. To this extent they ruled that the Magistrate had made an error. The relevant question was best framed as, whether there was a "right to worship publicly as a group in their native language"?[11]

Having identified the question, the Full Court went on to say that there was no such right established by the relevant international instruments. The relevant paragraph of the RD Convention referred to

> (iii) The right to nationality;
>
> …
>
> (vii) The right to freedom of thought, conscience and religion;
>
> (viii) The right to freedom of opinion and expression;

[10] It was also noted, at [19] that "many of the Samoan youth who attended these wards were unable to speak the Samoan language".
[11] See para [50].

…

As the court said, it was not clear exactly how these three rights, or any alleged combination of them, gave rise to a right to public worship in a particular language:

> 54 The appellant did not explain precisely how it was that an alleged "right" to worship publicly as a group in one's native language existed separately and apart from these three nominated rights. The closest the appellant came to an explanation was senior counsel's statement that the asserted "right" was the expression of one or other or all of the three article 5 rights (ie, article 5(d)(iii), (vii) and (viii)). It was unclear precisely how this was put.

For those who are familiar with the popular movie *The Castle*, the argument here sounds suspiciously like "It's the vibe...!"[12] Nevertheless, the Full Court spent some time carefully examining the relevant instruments to see if indeed such a right could be found.

For our purposes there were some important features of this discussion. It was noted that, in accordance with the general principles of interpretation adopted by Australian courts, extrinsic material such as comments by UN bodies and decisions of other courts and tribunals around the world could be taken into account in determining the content of the fundamental rights and freedoms at stake.

In particular, comments on the meaning of rights under the *International Covenant on Civil and Political Rights* (the ICCPR) could be taken into account, where those rights mirrored those referred to in art 5 of the RD Convention- see [62]. As well as art 18 of the ICCPR dealing with religious freedom, art 27 referred to minority rights. In particular, in addition to referring to the UN material, the jurisprudence of the European Court of Human Rights, on the application of analogous rights under the European Convention on Human Rights, was a valuable source of guidance on the issues- see [70].

In the end, however, the claim failed because the various instruments could not be read to find the claimed right; as the court commented:

> 68 It may therefore be accepted that, as elaborated by article 18 of the ICCPR, the right to freedom of religion referred to in article 5(d)(vii) of CERD includes personal freedom, either individually or as a group, to engage in public worship. Article 27 of the ICCPR also recognises, in the case of a linguistic minority, a personal right to use the minority language amongst the minority group, in private and in public. The argument for the appellants at the hearing of the appeal was, in substance, that these rights merged into a right to worship publicly as a group in Samoan within the Church. For the reasons outlined below, this argument fails.

In effect, the ensuing discussion of the freedom of religion area adopted decisions of the ECHR which held that, while religious freedom was an important right, and indeed while it extended as a right to religious organisations acting on behalf of their members, as well as to the individual members,[13] in essence members of a religious body did not enjoy religious freedom rights that could be asserted against their religious body. The court made the point by the citation of a recent ECHR decision:

> 78 …[I]n the case of dissent from Church rulings, an individual's freedom of religion is protected by the right to leave the Church. Thus, in *Sindicatul "Pastorul Cel Bun" v*

[12] See the first minute of the clip at http://www.youtube.com/watch?v=wJuXIq7OazQ .
[13] See para [76], citing Julian Rivers, "Religious Liberty as a Collective Right" (2001) 4 *Law and Religion: Current Legal Issues* 227. For more recent work by Professor Rivers on the rights of religious organisations see *The law of organized religions: between establishment and secularism* (Oxford : Oxford University Press, 2010).

*Romania* (2014) 58 EHHR 10 ("*Sindicatul "Pastorul Cel Bun" v Romania*"), the Grand Chamber, overturning a controversial and earlier decision, reiterated (at [136] to [137]) that:

> The autonomous existence of religious communities is indispensable for pluralism in a democratic society and is an issue at the very heart of the protection which Article 9 affords. It directly concerns not only the organisation of these communities as such but also the effective enjoyment of the right to freedom of religion by all their active members. **Were the organisational life of the community not protected by Article 9, all other aspects of the individual's freedom of religion would become vulnerable** …
>
> In accordance with the principle of autonomy, the State is prohibited from obliging a religious community to admit new members or to exclude existing ones. **Similarly, Article 9 of the Convention does not guarantee any right to dissent within a religious body; in the event of a disagreement over matters of doctrine or organisation between a religious community and one of its members, the individual's freedom of religion is exercised through his [or her] freedom to leave the community** (see *Mirolubovs and Others v Latvia*, no 798/05, § 80, 15 September 2009).

(Emphasis added)

While conceding that in some cases it may be effectively "impossible" for a person to leave a religious community if they disagreed with the leadership, the Court held that there was no evidence that this was the case here. The religious freedom of the Samoan worshippers was protected by their ability to leave the congregations concerned and to gather in other places where they could worship in their own language. In effect, to grant a right to worship in their own language to a group within the churches, contrary to decisions that had been made by church leaders, would interfere with the freedom of the church leadership to lay down principles for the church. As they later commented in also rejecting an argument based on "minority rights" under art 27 of the ICCPR, at [102], it was important to recognise "the protection afforded by article 18 of the Covenant for the religious freedom of the Church on behalf of its adherents".

In the end, then, the court rejected the claims of racial discrimination, on the basis that there had been no interference with the "fundamental human rights" of the Samoan speakers, including no interference with their freedom of religion.

Nevertheless, the case is very important as one of the first occasions where there has been an extended comment by an appellate court on the application of international religious freedom principles to Australian law.

(It should be noted that there was also some comment on the application of international religious freedom principles in the Victorian Court of Appeal decision of *Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VSCA 75 (16 April 2014). I have previously written on this decision and suggested that on the whole the decision was wrong, and the use of international sources not very impressive. The decision is discussed below on other issues.)[14]

**(b) Common law protection for religious freedom?**

If international law does not provide strong religious freedom protection, can it be found in the common law tradition? While the common law has a long tradition of protecting freedoms in general, there is not a strong common law religious freedom tradition. In fact, of course, the common law developed in a country (Great Britain)

[14] See Neil J. Foster (2014) "Christian Youth Camp liable for declining booking from homosexual support group" at: http://works.bepress.com/neil_foster/78 .

where there was an established church, the Church of England, and at various points in history there were legal disabilities imposed on those from other religions.

Ahdar and Leigh in their important discussion of the issues (see their book on the Further Reading list) are generally sceptical about such a common law right. The closest the common law comes, perhaps, is a series of cases where the courts have interpreted private testamentary gifts by testators that were clearly designed to favour a particular religion in such a way that beneficiaries who were not of that religion might be able to take the gift.[15] However, while one could argue that this approach supports the freedom of religion of the beneficiaries, it may be said that at the same time it undermines the freedom of religious choice made by the testator!

In Australia there was one attempt to invoke an implied religious freedom principle, which effectively failed. In *Grace Bible Church Inc v Reedman* (1984) 36 SASR 376 the Grace Bible Church was running a non-Government school but had not received approval from the State educational authorities. They were convicted of an offence and fined. On appeal their argument was that the Church had a religious objection to being required to have their curriculum approved by the State, and that, as Zelling J summarised it at 377:

> there is an inalienable right to religious freedom and that that freedom cannot be abridged by any statute of the South Australian Parliament.

As might perhaps have been expected, their argument did not succeed. The judgments of the Supreme Court are interesting but all conclude that there is no general "inalienable" right of religious freedom, for the sort of reasons we have already noted. Zelling J commented that s 116 clearly only applies to the Commonwealth, not to the States, and there was no general common law right of religious freedom which could be said to have been inherited by SA, referring to the laws concerning heresy and blasphemy. The comment from Rich J in the *JW's case* at 149, where his Honour said "It may be said that religious liberty and religious equality are now complete", was "not true in public law when Rich J wrote those words, nor is it true now" (Zelling J, at 379).

His Honour gave an interesting review of the early history of South Australia, noting that from an early time the State refused to fund religious bodies. But none of this history established a fetter on the power of the State Parliament.

The other members of the Full Court agreed, although Millhouse J said that he had been interested to read the comment of the High Court in the *Church of the New Faith* decision that I have used at the top of this paper.

There was a very interesting later South Australian decision, which touched on some of these issues. In *Aboriginal Legal Rights Movement Inc v State of South Australia and Iris Eliza Stevens* (1995) 64 SASR 551, [1995] SASC 5532 (25 August 1995) there was an attempt to prevent a Commission of Inquiry examining the question whether certain religious beliefs which had been said to be "secret women's business" of the Ngarrindjeri were genuine and long-standing beliefs, or whether, as alleged by some, they had been invented in recent years. (The beliefs had been involved in the question whether a particular bridge should be constructed.)[16]

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[15] See Ahdar & Leigh, 2nd ed at 130.

[16] Those interested in Constitutional issues will note that this was part of the well-known "Hindmarsh Island Bridge" litigation, different aspects of which were considered in *Kartinyeri v Commonwealth* [1998] HCA 22; (1998) 195 CLR 337.

Since the inquiry was set up by the State government s 116 was not directly relevant. An argument was made, however, that "freedom of religion" was an important common law principle, which the court should not allow to be lightly over-turned. In the end the members of the SA Full Court agreed that simply making an inquiry into whether the beliefs were genuinely held, or not, did not of itself amount to an undue infringement of the freedom of religion of those who were said to hold the beliefs. Nevertheless, there were some interesting comments made about the importance of freedom of religion.

Doyle CJ commented:

> I accept that **freedom of religion is one of the fundamental freedoms** which entitles Australians to call our society a free society. **I accept that statutes are presumed not to intend to affect this freedom**, although in the end the question is one of Parliamentary intention. But in my opinion it cannot be said that conduct of the sort in question here (the institution and conduct of a mere inquiry), to the extent that it affects freedom of religion is, as such, unlawful at common law. Nor, in my opinion, does this freedom so limit the powers of the executive government that this inquiry, which it considers appropriate in the public interest, is beyond the power of the executive government if or to the extent that it affects freedom of religion…
>
> For the purpose of these reasons I have assumed, without deciding, that the "women's business" the possible fabrication of which is the subject of inquiry, is an aspect of Aboriginal culture which is protected by the fundamental principle of freedom of religion. I likewise assume, without deciding, that the **inquiry will in fact intrude upon the freedom** of certain Ngarrindjeri people to hold and practise their religion, because of the practical compulsion to submit to scrutiny the substance of their beliefs and to disclose matters which they regard as secret. I stress that I have not decided either of these matters. (at 64 SASR 552-553) (emphasis added)

It seems to have been arguable that the conduct of the inquiry might have infringed upon a religious belief that information had to be kept secret, but even if so the strength of any common law presumption was not sufficient to over-ride the specific power of the executive government to cause the issue to be inquired into.

Debelle J agreed with the Chief Justice, but expanded on some issues:

> For the purposes of this action only, I am prepared to assume that the **freedom of religion is a fundamental freedom in our society**. Freedom of religion, the paradigm freedom of conscience, is the essence of a free society: *Church of the New Faith v The Commission of Payroll Tax (Victoria)* (1983) 154 CLR 120, per Mason ACJ and Brennan J at 130. But the freedom of religion like a number of other fundamental freedoms is **not absolute**. The freedom is not inalienable and may be regulated by statute: *Grace Bible Church v Reedman* (1984) 36 SASR 376. The extent to which this fundamental freedom renders other conduct unlawful at common law is open to serious question. Even if the holding of the Royal Commission constitutes an impairment of the freedom of religion, it is not clear whether as a matter of law it has the consequence that the impairment is unlawful or otherwise gives rise to any right which avails the plaintiff… (at 554-555)
>
> The Royal Commissioner has the power to coerce witnesses: see s11 of the Royal Commissions Act 1917. It may be a grave insult or at least an affront to a person who professes a particular belief to be required under pain of some penalty to attend and answer questions in respect of that belief. Compulsion to attend before a commission of inquiry and answer questions as to one's belief leads to justifiable concerns of a potential to interfere with the freedom to adopt and practise a religion of one's choice. The line between a mere inquiry and a step which impairs freedom of religion may be very fine and at times be very difficult to draw. But that is the kind of task which the courts are not uncommonly called upon to undertake. Having regard to the nature of the inquiry, I do not think there is any impairment of the free exercise of religion.
>
> The inquiry stems from allegations that the women's business is a fabrication. Included in those who allege that the women's business is a fabrication are persons who say they are members of the Ngarrindjeri nation. The inquiry may, therefore, involve an examination of the beliefs of

> Ngarrindjeri women to determine the content of their belief. **That inquiry does not require an examination of the truth or falsity of the belief**. It is not concerned to establish whether the beliefs are consistent with that part of Aboriginal customary law and tradition which constitutes the religious beliefs of the Ngarrindjeri nation. It is not concerned to establish whether the belief is a rank heresy**. Instead, it is concerned with determining whether the asserted women's business has been recently manufactured by a group of Ngarrindjeri women**. One of the reasons for the inquiry is that a group of Ngarrindjeri women deny that the asserted women's business ever formed part of the religious beliefs of the Ngarrindjeri. The inquiry whether the asserted women's business forms part of the beliefs of Ngarrindjeri women will involve, among other things, an examination of the allegations as to fabrication, an examination of how long the belief as to the asserted women's business has existed and, if it is a recent held belief, when and how it came into existence. There may be difficulties in proving these matters, difficulties which are compounded because Aboriginal law and tradition is an oral tradition. But these are matters which are capable of being established by evidence of extrinsic facts. It is the limited nature of this inquiry which prevents it from being an impairment of the freedom of the Ngarrindjeri women to exercise their religious belief.
>
> **It is necessary to maintain a balance between the legitimate interests of those who seek to pursue a course of conduct and those who have a religious belief which seeks to prevent the desired course of conduct**. If it is not possible to inquire whether the tenets of the asserted religious belief require that the conduct cease or to inquire whether the person who proclaims the belief genuinely believes it or to inquire whether it has been fabricated, those who are prevented from pursuing their legitimate interests are adversely affected without a proper opportunity of examining the case against them. As already mentioned, the freedom of religion is the paradigm freedom of conscience. No civilised society would seek to impose an improper restraint upon that freedom. Equally, no civilised society would wish to permit the freedom to be unfairly or improperly used as a means of preventing others from pursuing their legitimate interests. If an inquiry is constituted on the ground that the asserted belief is a fabrication, great care must be undertaken to ensure that there are proper grounds for the inquiry and that allegations of fabrication are not used as a cloak to hide the fact that the intention is to circumscribe the free exercise of that religion. The secret aspects of Aboriginal law and tradition deserve proper respect and care must be taken to ensure that there is no unlawful impairment of the freedom of Aboriginal people to practise their religion. But the nature of this particular inquiry and the manner in which it is being conducted do not impair the freedom of the Ngarrindjeri women to exercise their religious beliefs. (at 555-557) (emphasis added)

The decision is an interesting one, because it at least raises the possibility that a common law protection of free exercise is possible within the bounds of the "principle of legality", although of course it can be over-ridden if Parliament (or, perhaps, the Executive) choose to do so.

To sum up on this question: we have seen it is unlikely that there is a common law freedom of religion principle. If there were, it would not operate as a constitutional constraint on law making by Parliaments, but it could function (as in the recent past the freedom of speech principle has functioned) as a "presumption" which would inform courts when interpreting legislation. The "principle of legality" means that a court, when reading an Act, will assume unless there are clear words to the contrary that Parliament does not intend to infringe a fundamental common law right. So if it could be argued that "freedom of religion" is, or perhaps has now become, a fundamental common law right, as "the essence of a free society", then it may provide guidance for courts interpreting legislation.

### (c) Protection under specific charters of rights

As most people are aware, Australia has no general Federal "Charter of Rights" (unlike the US or even, today, the UK where the European Convention on Human Rights has to some extent been incorporated into local law.) But individual jurisdictions have chosen to implement such charters, and both the State of Victoria (*Charter of Human Rights and Responsibilities Act* 2006 (Vic) s 14) and the Australian Capital Territory (*Human Rights Act* 2004 (ACT) s 14) have enacted general human rights instruments which contain explicit protections for religious freedom.

So far there have been few decisions considering these provisions.

A fascinating attempt to use s 14 of the Victorian Charter was made in *Valentine v Emergency Services Superannuation Board (General)* [2010] VCAT 2130 (29 July 2010), although ultimately unsuccessful. The widow of a former ambulance driver had her pension terminated on re-marriage, some time before 2008 when the Charter commenced. She was later told that the pension would be reinstated if she divorced her current husband or he died! She complained that, in effect, she was being penalised on the basis of her religion, because her religious beliefs meant that she could not in all conscience seek a divorce**.**

The Tribunal ruled against her because all the relevant events had happened before the Charter commenced. But there were interesting comments made at the end of the judgment:

> [102] An argument … may be made, namely the provision of a penalty for Mrs Valentine for living in lawful matrimony with Mr Valentine rather than *'in sin'* is in violation of her religious beliefs based on the right protected by Section 14 of the Charter. The oral argument in this proceeding did not take me to authorities on the scope which this protected right has been accorded in international human rights jurisprudence. In light of the conclusions which I have reached as to the non-operation of Section 32 of the Charter for the purposes of this dispute it is inappropriate therefore for me to say too much, beyond noting that there does seem to be some plausibility to the contention that a legal interpretation which would impose a significant financial penalty upon a citizen who adhered to her religious beliefs relative to matrimony could be regarded as a coercion or a restraint in her freedom to have or adopt a religion or belief in practice.

While it did not directly involve the application of s 14, the decision in *Aitken v The State of Victoria, Department of Education & Early Childhood Development (Anti-Discrimination)* [2012] VCAT 1547 (18 October 2012) mentioned the provision in passing. In this case, parents of children at a State school objected to the fact that Scripture classes (special religious instruction) were offered at the school their children attended, but their children were "singled out" because they had withdrawn them from the class. The Tribunal found that there had been no adverse impact on the children, and hence that there was no breach of the Charter or the legislation on discrimination.

However, the Tribunal commented briefly on the accepted approach to applying the Charter in interpreting Victorian legislation:

> [97] The parties and the Commission submitted, that on current authority, the proper application of the Charter required first, ascertaining the ordinary meaning of the provision applying normal principles of statutory construction. Secondly, if on its ordinary construction the provision limits a right protected by the Charter, in this case those recognized by ss 14(1), 8(2) and (3), the next step is to determine whether the limitation of that right is demonstrably justified as a reasonable limit in accordance with s 7(2) of the Charter. Thirdly, if the limitation is not justifiable, an attempt had to be made to give the provision a meaning that is compatible with

> human rights and that is also consistent with the purpose of the provision. The respondent bore the onus of demonstrating that the limitation on the right was justifiable.

There is an interesting decision of Refshauge J in *R v AM* [2010] ACTSC 149 (15 November 2010) which considers some elements of s 14 of the ACT HRA. I will not go into it in detail, as the claim there related to freedom of "conscience" rather than religion, but it is well consulting to see how his Honour attempts to spell out when something may be a matter of "conscience". He concludes that there needs to be something of a well-thought-out view rather than a mere opinion. In the circumstances the attempt by AM to use a right of "conscience" to avoid the consequences of breaching a domestic violence order failed, partly because there was no clearly articulated "conscience" issue involved.

Section 14 was mentioned, although in the end it was not necessary to apply it, in *Trustees of the Roman Catholic Church for the Archdiocese of Canberra and Goulburn & ACT Heritage Council* (Administrative Review) [2012] ACAT 81 (21 December 2012). There the Roman Catholic Diocese was applying to revoke a heritage declaration over a parish church so that it could undertake a redevelopment. However, 3 members of the parish wanted to apply to be heard on the heritage proceedings because they wanted to support the declaration. The Tribunal noted that arguably their rights under s 14 might be relevant (especially the rights involving "worship… as a community"), but concluded that even without taking s 14 into account the parishioners all had a sufficient "interest" in the matter to be able to be heard.

There appears to have been no other substantive consideration of the ACT s 14, although it was mentioned briefly in passing in *Buzzacott v R* [2005] ACTCA 7 (1 March 2005), where it seems that a possible claim based on freedom of religion was being used an excuse for the theft of a bronze coat-of-arms from Parliament House and its installation at a "tent embassy"- but it was not given any detailed discussion.

There seems little doubt that, as time goes on, these Charter provisions will provide further examples of claims for religious freedom. In general they do not provide "direct" remedies, but they do provide an avenue whereby a court may declare that a breach of a right has occurred, and they certainly provide an "interpretative" framework, which may influence the way legislation is to be read.[17]

Note also that there is a very little-known provision in the Tasmanian Constitution, s 46 of the *Constitution Act* 1934 (Tas), which "guarantees to every citizen" "free profession and practice of religion… subject to public order and morality". The courts have apparently never considered the provision.

**(d) Discrimination laws and "Balancing provisions"**

Finally, freedom of religion is also protected in two different ways under legislation that prohibits discrimination around Australia.

The **first** is that in most jurisdictions (all except NSW and the Commonwealth), one of the grounds of unlawful discrimination is religious belief, so that it would be unlawful to sack someone, or deny them services, on the grounds of their religious belief, where this was irrelevant to their employment or receiving the relevant services.

[17] For further comment on these provisions see ch 5 of the Evans text, and the discussion in Evans & Evans (2008).

The jurisdictions where it is currently unlawful to discriminate against someone on the grounds of their religious commitment are:

- Qld- *ADA* 1991, s 7(i) "religious belief or religious activity";
- Tas- *ADA* 1998, s 16 (o) and (p): (o) "religious belief or affiliation;" (p) "religious activity";
- Vic- *Equal Opportunity Act* 2010, s 6(n) "religious belief or activity";
- WA- *EOA* 1984- Part IV of the Act deals with discrimination on the ground of "religious or political conviction" (see s 53);
- ACT- *Discrimination Act* 1991, s 7(i) "religious or political conviction";
- NT- *ADA* 1992, s 19(1)(m) "religious belief or activity".
- SA- no broad protection, but a specific provision in s85T(1)(f) of the *Equal Opportunity Act* 1984 (SA) which prohibits discrimination in certain defined areas on the basis of "religious appearance or dress."

There are not many decisions on these provisions.[18] There are two that go into the issues in a bit more detail, however.

In *McIntosh, Ahmad v TAFE Tasmania* [2003] TASADT 14 (10 November 2003) a claim for religious discrimination was made against the TAFE for refusing to provide a separate "prayer room" which the Muslim employee could use for prayer. The Tribunal concluded that there was no discrimination, on the basis that any other member of staff who wanted a room set aside for their own purposes would also have been declined! The case notes that some accommodation had been made in rostering to allow the employee to attend a Mosque on Fridays.

The case of *Walsh v St Vincent de Paul Society Queensland (No 2)* [2008] QADT 32 also raised an issue of discrimination on the basis of religion. Here a lady who was in charge of a local St Vincent de Paul branch was told that she had to step down as she was not a Roman Catholic. There was an attempt to apply the provision of the Qld legislation which allowed a "religious body" to be exempt from the Act in terms of appointment of priests and ministers, training of such, and appointment of people to carry out "religious observances".[19]

In the end the Tribunal found that the provision did not apply because the St Vincent de Paul Society was not a "religious body"! This somewhat surprising conclusion was expressed as follows:

> [76] On my reading of the constitution documents, the Society is not a religious body. It is a Society of lay faithful, **closely associated with the Catholic Church**, and one of its objectives (perhaps its **primary objective) is a spiritual one**, involving **members bearing witness to Christ** by helping others on a personal basis and in doing so endeavouring to bring grace to those they help and earn grace themselves for their common salvation. **That is not enough**, in my opinion, to make the Society a religious body within the meaning of the exemption contained in sub-sections 109 (a), (b) or (c).
>
> [77] Likewise, and despite the particulars which have been provided of the functions of the president relied upon, and the religious observances and practices said to be relevant, it does not seem to me that the fact that a conference president performs some functions (such as leading

[18] For comment on some, see C Evans, *Legal Protection of Religious Freedom in Australia* (Sydney: Federation Press, 2012) at 144-147.

[19] The relevant provision was s 109 of the Qld ADA, which was virtually identical to s 37 of the Commonwealth SDA (although since the Commonwealth does not have a prohibition on religious discrimination, s 37 itself is not directly relevant- it relates to sex discrimination.)

> prayers) and has some duties (among a long list of duties), some with spiritual aspects and some with practical aspects, means that what happens at conference meetings, or what the president does in the discharge of his or her duties, involves "religious observance or practice". (emphasis added)

While most people would see "Vinnies" as providing services to the poor rather than religious services, it does seem a bit odd that an organisation which can be described as it is in para [76] is not "religious".[20]

**Second**, and related to this, all jurisdictions whose laws prohibit discrimination on various grounds, have included provisions that are designed to "balance" religious freedom with the right not to be discriminated against. So that, for example, while there is a general prohibition on employment decisions being made on the basis of gender, all jurisdictions allow ***churches or other religious organisations*** to decide only to appoint male clergy, because that is seen by some religious groups as a key part of their teachings.[21] Agree with these teachings or not, the law takes the view that it reasonably preserves the religious freedom of believers in these groups, and the groups as a whole, to allow their religious freedom to be exercised in this way.

Interestingly, as well as these general provisions covering religious bodies, there is one that seems to be unique to Queensland governing access to "sacred sites". Section 48 of the ADA 1991 (Qld) provides:

> **48 Sites of cultural or religious significance**
>
> A person may restrict access to land or a building of cultural or religious significance by people who are not of a particular sex, age, race or religion if the restriction—
>
> (a) is in accordance with the culture concerned or the doctrine of the religion concerned; and
>
> (b) is necessary to avoid offending the cultural or religious sensitivities of people of the culture or religion.

While this provision applies to a "person" generally, presumably it will mostly be used by those in charge of religious groups (an LDS official restricting access to a temple, for example). But one can certainly imagine it being invoked by an elder from an indigenous clan wanting to keep, say, female tourists away from a site sacred to men.

However, in most jurisdictions there is a major "gap" in discrimination legislation "balancing provisions" (as I prefer to call them), which is that few recognize that ***individual members of the public***, as well as religious organisations and what we might call "religious professionals", have religious freedom rights that may be impaired by uniform application of discrimination laws.[22]

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[20] This decision seems similar to, and perhaps something of a precursor to, the later decision in *Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VSCA 75 (16 April 2014), where CYC were held not to be "a body established for religious purposes" under s 75 of the *Equal Opportunity Act* 1995 (Vic). See my note, above n 14, for comment on this issue.

[21] See, eg, s 37 of the *Sex Discrimination Act* 1984 (Cth).

[22] There is a narrow group of organisations outside those formally classified as "religious organisations" which are able to rely on balancing provisions in the religious area, namely "educational institutions" conducting religiously based schools. See eg *Discrimination Act* 1991 (ACT) ss 33, 44 and 46; ADA 1992 (NT), s 30(2); EOA 1984 (SA) s 34(3). In NSW there are a number of broad exceptions under the legislation applying to "private educational authorities", which would seem to generally exempt all non-Government schools, including most religious schools. But since most religious schools would be run by

So, for example, if you run a business and want to apply Christian principles in your business, it may not always be possible to do so, depending on the type of issue that comes up. In NSW, an early decision under the *Anti Discrimination Act* 1977 in *Burke v Tralaggan* [1986] EOC 92-161 held that a Christian couple who refused to allow an unmarried couple to rent a flat they owned, on moral grounds, had unlawfully discriminated on the ground of "marital status" under s 48 of the Act. (The interesting article by Moens comments on this case.)

Suppose, instead of renting out a flat, you offer accommodation in your own house to casual visitors, in a "bed and breakfast" situation. Do you as an individual have the right under the law, on the basis of religious convictions about sexual behaviour, to decline to accept a booking for a double bed from a gay couple, or from an unmarried couple?

An issue of this sort came up in the UK, in *Bull v Hall* [2013] UKSC 73 (27 November 2013). The Bulls ran a boarding house, and had refused, on grounds of their religious views, to give double bed accommodation to a same sex couple. The Supreme Court upheld the decisions of lower courts fining them for breaching a regulation prohibiting discrimination on sexual orientation grounds. There was a slight difference of opinion within the Court- 3 members found that this was "direct" discrimination, whereas 2 members of the court hold that it was "indirect" discrimination (in my view a better opinion, since the ground of their refusal was expressed to be that the couple were not married, not that they were homosexual.) But even those who held it was indirect discrimination took the view that it could not be justified.

However, it is interesting to note that it may *not* be unlawful to do this in NSW. Under s 48 and s 49ZQ of the ADA 1977 (NSW), which deal with provision of accommodation, there is an exemption that applies where the accommodation in question is one in which the provider also resides, and where less than 6 beds are provided. So it seems that the NSW Parliament has explicitly decided not to require someone who offers accommodation in what is in effect their own house, to comply with the discrimination law in this area. Section 23(3)(a) of the Cth *SDA* 1984 contains a similar exemption, although interestingly it only applies where there are no more than **3** beds provided. (Since the Commonwealth provision will over-ride the State one where there is a clash, the "3 bed" rule is the one that will have to be applied, of course.)

There is something of an irony in the fact that, so far as I can discover, the only major provision in anti-discrimination legislation designed to provide protection for religious freedom for general citizens (as opposed to religious organisations or "professionals") is contained in the law of Victoria.[23] The irony lies in the way that the

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groups that most members of the public would call "religious" these provisions may not add very much to the protection for religious organisations.

[23] There is a provision in s 52(d) of the *Anti-Discrimination Act* 1998 (Tas) which allows a "person" to discriminate "on the ground of religious belief or affiliation or religious activity" insofar as it is in relation to an "act that –

(i) is carried out in accordance with the doctrine of a particular religion; and

(ii) is necessary to avoid offending the religious sensitivities of any person of that religion." This provision, then, only applies as an exemption to discrimination on the basis of religion, and so is substantially narrower than the Victorian provision discussed in the text. So far as I am aware there are no reported decisions dealing with the Tasmanian provision.

scope of this provision has been so narrowly interpreted in a recent decision of the Victorian Court of Appeal.

The current provision is s 84 of the *Equal Opportunity Act* 2010 (Vic):

> **Religious beliefs or principles**
>
> 84. Nothing in Part 4 applies to discrimination by a person against another person on the basis of that person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity if the discrimination is reasonably necessary for the first person to comply with the doctrines, beliefs or principles of their religion.

The former Victorian Act contained a similar provision, s 77 of the *Equal Opportunity Act* 1995 (Vic):

> 77. Nothing in Part 3 applies to discrimination by a person against another person if the discrimination is necessary for the first person to comply with the person's genuine religious beliefs or principles.

It was this provision was subject to a very narrow reading in *Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VSCA 75 (16 April 2014). There a Christian camping organization, and its representative Mr Rowe, were sued for sexual orientation discrimination when Mr Rowe indicated that the organization would not accept a booking for a program which would be run for same-sex attracted young people and present homosexuality as a normal and ordinary part of life.

I have discussed the *CYC* decision in some detail in a previous note.[24] But let me briefly summarise the ways in which the Court of Appeal here provided a very narrow reading of the apparently generous provisions of former s 77 of the 1995 Act, which will also impact on future readings of s 84 of the 2010 Act. I will also note the dissenting view of Redlich JA, which may provide guidance in the future should the majority view not remain authoritative. (His Honour's views may also provide guidance in other jurisdictions, where appellate courts at least will need to decide whether or not the *CYC v Cobaw* decision is "clearly wrong" or not, if it is applicable to similar provisions elsewhere.)

On the question of the **necessity** of the relevant action for compliance with beliefs, Maxwell P ruled that Mr Rowe could not rely on s 77, as it was not "necessary" for him to apply sexual standards of morality from his religious beliefs, to other persons. The rule that sex should only be between a heterosexual married couple was a rule of "private morality" and even on its own terms did not have to be applied to others- see [330]. This of course ignored the fact that Mr Rowe was being asked to support a message of the "normality" of homosexual activity with which he fundamentally disagreed.

As Redlich JA in dissent noted:

> [567] … What enlivened the applicants' obligation to refuse Cobaw the use of the facility was the disclosure of a particular proposed use of the facility for the purpose of discussing and encouraging views repugnant to the religious beliefs of the Christian Brethren. The purpose included raising community awareness as to those views. It was the facilitation of purposes antithetical to their beliefs which compelled them to refuse the facility for that purpose. To the applicants, acceptance of the booking would have made them morally complicit in the message that was to be conveyed at the forum and within the community.

[24] See above, n 14.

Neave JA discussed the meaning of the phrase "necessary… to comply" and concluded that, while there was a subjective, honesty, element in the criterion, it also required some objective consideration. She summed up the requirement as "what a reasonable person would consider necessary … to comply with his genuine religious belief", at [425]. This seems to be correct, so long as "reasonable" means "a reasonable person who belongs to the particular religion".

Redlich JA seems to have adopted a similar criterion:

> [520]…the word 'necessary', in its application under s 77 to religiously motivated action, must mean action which a person of faith undertakes in order to maintain consistency with the canons of conduct associated with their religious beliefs and principles.

Does the new wording of s 84, "reasonably necessary… to comply", imply that the previous wording of s 77 was a purely subjective criterion? No, Neave JA concluded at [427]. The implication is that the change in s 84 was simply clarifying something that was already present in s 77. On this question Redlich JA seems to have taken a slightly different view. At [531]-[532] his Honour suggested that the contrast with the later provision supported a more "subjective" interpretation of the earlier one. On the other hand, he went on to comment that even if the provision required a showing of "reasonable necessity":

> [533] This test of necessity still falls short of the more demanding, and narrower, view of the Tribunal.

In other words, the narrow approach of the Tribunal would still be inappropriate under the reformulated s 84.[25]

Another aspect of the question of "necessary to comply" was an issue concerning the content of the religious beliefs. How was this to be determined? And was it sufficient if an action was "motivated" by belief, or did it have to be "required".

Maxwell P again took a narrow view of these questions. He accepted the reasoning of Judge Hampel in the Tribunal, who had adopted the submission of a theological expert that "doctrines" of the Christian faith were to be confined to matters dealt with in the historic Creeds, none of which mentioned sexual relationships- see [276]-[277].

His Honour then further went on to consider what result would have followed were he to accept that views about the exclusivity of sexual relationships to marriage, and the nature of marriage as between a man and a woman, were in fact "doctrines". He noted that these views functioned as moral guidelines for those within the church, and that no doctrine of Scripture required interference with those outside the church who chose to behave otherwise- see [284]. Hence in his Honour's view a refusal of accommodation cannot have been "required" by Christian doctrine. On this point he held that "conforms to" doctrine must mean that there is "no alternative" but to act in this way- [287]. In

[25] There was some discussion of the differences between the 1995 and the 2010 legislation in the application for special leave to appeal to the High Court: see *Christian Youth Camps Limited v Cobaw Community Health Services Limited and Ors* [2014] HCATrans 289 (12 December 2014). Counsel for CYC noted that the provisions were very similar, but in the end the High Court refused leave, and one ground seemed to be the fact that it was a question of the interpretation of the old Act. For a review of the Special Leave application see Neil J Foster, (2014) "High Court of Australia declines leave to appeal CYC v Cobaw", at: http://works.bepress.com/neil_foster/89 .

relation to Mr Rowe his Honour commented at [331]: "The very notion of compliance suggests that there is a rule, or a prohibition, which the religious believer must obey."

Neave J at [435] also distinguished between some behaviour being "motivated by … religious beliefs" and being "necessary".

Redlich JA, in contrast to the majority, ruled that it was not necessary or appropriate for the court to make a decision about the "centrality" or "fundamental" nature of religious beliefs.[26] Nor was it necessary to show that the beliefs "compelled" the believer to do the act in question.[27]

In what **spheres of life** is religion allowed to matter?

In the analysis offered by Neave JA at [429] what was at stake was said to be "protecting the right of individuals to hold religious beliefs and express them in worship *and other related activities* and protecting the rights of other members of a pluralist society to be free from discrimination". I have added the emphasis there to highlight words of some concern. There is an unfortunate tendency in some commentary on religious freedom to see it as merely dealing with what goes on in church meetings. This description of religious freedom as relating to "worship and other related activities", where "worship" is no doubt intended to mean "church meetings", gives a very narrow scope to religious freedom.

That this is indeed what her Honour intended can be seen in the next paragraph, where she purports to rely on European jurisprudence to say:

> [430]….Where the act claimed to be discriminatory arises out of a commercial activity, it is less likely to be regarded as an interference with the right to hold or manifest a religious belief than where the act prevents a person from manifesting their beliefs *in the context of worship or other religious ceremony*. That is because a person engaged in commercial activities can continue to manifest their beliefs in the *religious sphere*. (emphasis added)

As I point out in my previous paper, there were some European and UK decisions which came very close to holding the very harsh view that the right to freedom of religion in the employment context, for example, could be perfectly well protected by the fact that an employee whose religious freedom was impaired could leave and find another job. But those views have now substantially been rejected by the decision of the European Court of Human Rights in *Eweida v The United Kingdom* [2013] ECHR 37 (15 January 2013) at [83] where the court accepted that a person who was sacked for their religious beliefs had indeed experienced a restriction on their religious freedom.

The narrow view, then, that somehow religious freedom protection does not apply in the commercial sphere, or only in a very attenuated way, does not receive support from current European jurisprudence. More importantly, it received no support from the wording of s 77. There were no words excepting "commercial activity" from the requirement to protect an action seen as necessary to comply with religious beliefs.

In effect, as Redlich JA noted in his dissenting judgement on this point in *CYC v Cobaw*, Neave JA was endeavouring to conduct the "balancing" process involved herself. But in fact that balancing process had **already** been conducted by Parliament, which had placed s 77 in its then-applicable form, into the legislation. As Honour noted:

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[26] See [525]: "Neither human rights law nor the terms of the exemption required a secular tribunal to attempt to assess theological propriety."

[27] See [520]. It would be sufficient that it be an action that the person "undertakes in order to maintain consistency with the canons of conduct associated with their religious beliefs and principles".

> [474] The exemptions in ss 75, 76 and 77 of the Act protect aspects of what may be described as the 'right to religious freedom.' Where the legislature, in carving out an exemption from what would otherwise be discriminatory conduct, has struck a balance between two competing human rights, the task for the Court is not then one of determining how the balance should be struck. The Court must faithfully construe and apply the provisions without preconception or predisposition as to their scope so as to give effect to the legislative intent.

And later:

> [515] When, as is so obviously the case with s 77, Parliament adopts a compromise in which it balances the principle objectives of the Act with competing objectives, a court will be left with the text as the only safe guide to the more specific purpose.[28] Ultimately, it is the text, construed according to such principles of interpretation as provide rational assistance in the circumstances of the particular case, that is controlling.[29]

Redlich JA, contrary to the other members of the Court of Appeal, concluded that Mr Rowe *could* make out a defence under s 77. He said that the Tribunal had given an unjustifiably narrow reading of religious freedom, wrongly subordinating the provisions in ss 75 and 77 to "non-discrimination" rights. Instead, Parliament's language had to be read as it stood. There was to be no presumption that religious freedom only applied in a "non-commercial" sphere. Indeed, the other provisions of the 1995 Act showed clearly that the non-discrimination obligations were intended to apply in the workplace and the marketplace. Hence the limits on those obligations drawn by ss 75 and 77 were clearly also operational in those areas.

His Honour concludes a very illuminating discussion on these issues as follows:

> [572] Section 77 excuses an act of discrimination in the marketplace when it is known that to perform the act will facilitate a purpose that is fundamentally inconsistent with the person's belief or principles. The application of the exemption does not depend upon CYC having advertised that it was a religious organisation or provided some means of forewarning that particular uses of their facility would be refused. The absence of such steps could not give rise to the inference that their religious principle or belief did not necessitate the refusal of the request. As adherents to the faith of the Christian Brethren the applicants' beliefs dictated their response upon being informed of the intended use of their facility. Once the applicants were invested with knowledge of the purposes of the WayOut forum and the matters which, as Ms Hackney acknowledged, would inevitably be discussed, the applicants were bound by their principles and beliefs to refuse the use of their facility for that purpose.

It is greatly to be regretted that the majority did not approve these comments. An application for special leave to appeal the decision to the High Court of Australia was refused.[30]

It is perhaps worth noticing at this point the odd fact that the whole *CYC* decision very rarely refers to the fairly similar NSW litigation in *OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSWCA 155 (6 July 2010.)[31] While that case, like *CYC*, involved a "religious organisation", comments also had to be made on the issues concerning the content of doctrine and its relevance to behaviour.

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[28] *Kelly v The Queen* (2004) 218 CLR 216, 235 [48] (Gleeson CJ, Hayne and Heydon JJ).

[29] *Nicholls v The Queen* (2005) 219 CLR 196, 207 [8] (Gleeson CJ).

[30] See above, n 25.

[31] And see the final stage of the litigation in *OW & OV v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293 (10 December 2010). The one and only reference to the litigation in the *Cobaw* appeal is to be found in a very brief footnote, n 141, to the judgment of Maxwell P, on the fairly technical issue of what "established" means.

In particular, one of the issues in that case was whether a belief that marriage between a man and a woman was the ideal way for a child to be raised, could be justified as being a "doctrine" of the Wesley Mission. After an initial Tribunal finding to the contrary, the Court of Appeal directed a new hearing, noting that there was a need to consider "all relevant doctrines" of the body concerned.[32] On referral to the Tribunal, it held that the word 'doctrine' was broad enough to encompass, not just formal doctrinal pronouncements such as the Nicene Creed, but effectively whatever was commonly taught or advocated by a body, and included moral as well as religious principles.[33] It may be that the Victorian Court of Appeal considered that this final decision, being one of an administrative tribunal not a superior court, was not binding; but it seems unusual that it was not even noted. Certainly some comments of the NSW Court of Appeal were relevant, and in accordance with the High Court's directions to intermediate appellate courts in Australia,[34] should have been taken into account unless regarded as "plainly" wrong. This seems to imply that a future appellate court in Australia which is not in either Victoria or NSW will have choose between these two competing readings of similar legislation, and courts in those States will be required to take differing approaches. All that can be said with confidence is that these issues are still matters of some uncertainty.

## 3. The future of religious freedom in Australia

Of course there is a great deal more that could be said about all these areas, but hopefully this will provide a useful overview of religious freedom protection in Australia. On the whole our history has been fairly free from serious religious conflicts, and it is be hoped that we can continue to enjoy the freedom to live in accordance with our fundamental beliefs, while respecting the rights of others.

Nevertheless, it seems clear that religious freedom issues will emerge, especially (if examples from other parts of the Western world are taken into account), in connection with anti-discrimination laws relating to sexual orientation, and the possible recognition of same sex marriage. It would seem to be wise to increase the domestic protection for religious freedom by legislation that recognizes the strength of this important human right. One option would be to improve and clarify the balancing clauses now contained in Federal and State-based discrimination legislation, to better recognize the legitimate religious freedom interests of believers. Another possibility would be more general religious freedom legislation applying across the Commonwealth by enactment of broad protection based on the external affairs power and specific religious freedom treaties.

Of course in the current atmosphere positions supporting increased religious freedom laws are not popular.[35] It will no doubt require continued public support from various actors to demonstrate the case for such changes. Hopefully those lawyers who

[32] See the CA decision, per Allsop P at [9].
[33] *OW & OV v Wesley Mission*, 2010 [ADT], [32]-[33].
[34] See *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; (2007) 81 ALJR 1107 at [135]- while the comment relates directly to "uniform national legislation", it would seem to apply here where legislation in most States, while not completely uniform, usually includes some defence relating to "doctrine".
[35] Compare the popular outcry in the United States when the State of Indiana attempted to introduce a fairly standard version of religious freedom legislation previously adopted by many other States.

themselves are convinced of the importance of religious freedom can have the courage to speak out and lead proposals for reform.

**Further Reading**


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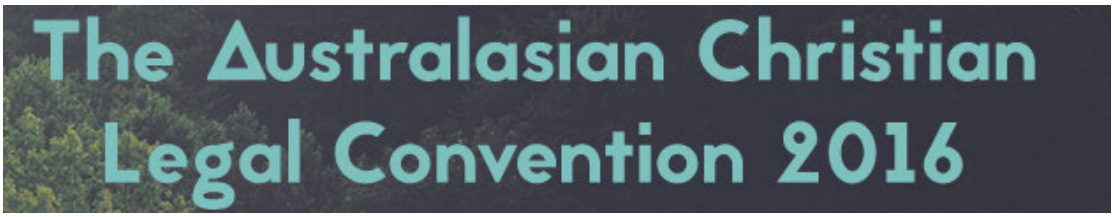
- Moens, G "The Action-Belief Dichotomy and Freedom of Religion" (1989) 12 *Sydney Law Review* 195-217
- Pannam, C L "Travelling s 116 with a US Road Map" (1963) 4 *Melb Uni L Rev* 41 {a classic early discussion of the issues}

September 30, 2016

# Protection of religious free speech in Australia

Neil J Foster




**29 Sept – 1 Oct, 2016**
**Brisbane, Qld, Australia**

# "Protection of Religious Free Speech in Australia"

**Neil Foster**[1]

In this paper I want to look at the intersection of two key human rights, where the right to freedom of religion[2] interacts with the right to freedom of speech in Australia today.

These two rights, of course, are not fundamentally opposed. As Ahdar & Leigh point, for many religions speaking about their religious beliefs is an 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.[3] 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.[4]

Indeed, the freedom to speak to others about one's religion and even to respectfully seek to persuade others of the truth of that religion, has been clearly identified by the European Court of Human Rights as a vital part of the internationally protected right to freedom of religion, and 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* [2005] HCA 29; (2005) 216 ALR 1; (2005) 79 ALJR 1142, at [121], offered clear support for the view put forward by the ECtHR in *Kokkinakis v Greece* (1993) 17 EHRR 397 at 418, where that Court affirmed that religious freedom includes the freedom:

> [T]o manifest one's religion … not only exercisable in community with others, 'in public' and within the circle of those whose faith one shares, but can also be asserted 'alone' and 'in private'; furthermore, it includes in principle the right to try to convince one's neighbour …

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[2] Since the focus of this paper is mainly on the "free speech" issues, I don't devote space here to defending the important topic of religious freedom as a general concept in Australia. For an overview of the area see an earlier paper, "Religious Freedom in Australia" *2015 Asia Pacific JRCLS Conference* (2015), available at: http://works.bepress.com/neil_foster/94/ . See also C Evans, *Legal Protection of Religious Freedom in Australia* (Sydney: Federation Press, 2012).

[3] *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).

[4] Ahdar & Leigh (2nd ed, 2013), at 427 (full citation of the most regularly used sources will be found in the Further Reading list at the end of the paper).

> through 'teaching', failing which … 'freedom to change [one's] religion or belief' … would be likely to remain a dead-letter.

Still, in some circumstances it may be that 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, or more generally.

Where should the law draw the limits here?

We will consider these issues under three broad headings- the law of blasphemy (in Part 1), perhaps the "classic" form of regulation of religious speech; more recent laws governing "religious vilification" (Part 2); and issues raised by religious speech on matters concerning sexuality (Part 3). We will also briefly look some other recent cases raising questions at the intersection of freedom of religion and freedom of speech, in Part 4, before briefly concluding.

## 1. Blasphemy

Blasphemy has been a crime at statute and common law for many years. Mortensen has an excellent review of its early development; he cites what is generally acknowledged as the first common law decision on the matter as *R v Taylor* (1677) 1 Vent 293. Lord Chief Justice Hale commented, in a case involving someone who described Christ as a bastard and a "whoremaster", and religion as a "cheat":

> ..to say, religion is a cheat, is to dissolve all those obligations whereby the civil societies are preserved, and [Lord Hale continued] that Christianity is parcel of the laws of England; and therefore to reproach the Christian religion is to speak in subversion of the law.[5]

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

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

Gradually the emphasis in the prosecutions changed to focus on this "direct" impact on others, and it became accepted that a calm and rational debate about the truth or not of Christian doctrines could not be prosecuted as blasphemy. In *R v Bradlaugh* (1883) 15 Cox CC 217 Coleridge LCJ said that the crime required a "wilful intention to pervert, insult and mislead others" by

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

means of "contumelious abuse applied to sacred objects". Prosecutions became very rare.

However, there was perhaps a surprising successful prosecution in *R v Lemon, R v Gay News* [1979] AC 617, in which an explicit poem describing a centurion's erotic fantasies about the body of Jesus was the subject of the prosecution (instigated as a private prosecution by Mrs Mary Whitehouse, a famous "morals" campaigner in the UK.) Convictions were entered of the magazine and its editor, and the House of Lords upheld these. It was clarified that the issue was whether a publication was likely to arouse shock and resentment among believing Christians, and to be published in way designed to produce such effect. The *mens rea* of the offence, however, was not an intention to shock but simply the intention to publish material that, on objective grounds, was likely to shock or offend.

The anomalies of the law became very apparent when there was an attempted blasphemy prosecution in relation to a publication that was very offensive to some Muslims, Salman Rushdie's *Satanic Verses*. The prosecution in *R v Choudhury* [1990] 3 WLR 986 failed, as it was held that the law of blasphemy effectively only protected the doctrines of Christianity as taught by the established church, the Church of England.

Despite the law being focused only on Christianity, the European Court of Human Rights in *Wingrove v UK* (1997) 24 EHRR 1 held that it was a valid law, not in breach of the European Convention on Human Rights, since it dealt with the manner of expression rather than being purely based on content, and was within the "margin of appreciation" enjoyed by EU states. This view, that the law was still a part of the law of England, was upheld in *Green v The City of Westminster Magistrates' Court* [2007] EWHC (Admin) 2785. In this case a blasphemy prosecution was launched in relation to a theatre production called *Jerry Springer: The Opera*, which while attacking the "genre" of the live TV talk show, included a number of offensive portrayals of God, Jesus and Mary. The court held that, while the offence was still in place, in the circumstances the producers of the show could rely on both a statutory defence covering theatre productions, and also the fact that the magistrate ruled that the production was not sufficiently "offensive".

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

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

In Australia, the situation is more complicated. Criminal law is not uniform throughout the country, and is mostly left to the States to determine. It seems fairly clear that the common law criminal offence of blasphemy is still in force in many jurisdictions. The Federal Court in *Ogle v Strickland* (1987) 71 ALR 41 so assumed.[6] It certainly seems as though the Parliament of NSW believed it was so in 1900, because we have an adjustment, but not an abolition, of the offence in s 574 of the *Crimes Act* 1900 (NSW):

> **574 Prosecutions for blasphemy**

[6] See Mortensen at 416 ff for this general discussion.

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

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

Of course there have been recommendations that the law of blasphemy be repealed in NSW.[7] Indeed, not only law reform bodies but in recent years representatives of the major churches have urged the repeal of the law of blasphemy.[8]

One of the concerns here, which I think is a real danger, is that there will be growing pressure to apply the law of blasphemy in ways that go well beyond the way it has (mostly not!) been applied over the last century or so, but to do so in relation to (ie for the purposes of protecting) Islam. It has to be said that the law of blasphemy in some Muslim countries has been misused to suppress freedom of religious speech and in some cases to simply target minority groups.

The article by Hayee reports the recent history of blasphemy laws in Pakistan, which justifies those concerns. The laws, which punish the offence of insulting the Prophet Mohammad and impose severe penalties (up to and including death) have been the subject of international criticism, but seem almost impossible to remove from the statute books. Hayee notes that:

> On 2 March 2011, Pakistan's Federal Minister for Minority Affairs, Mr Shahbaz Bhatti, a Catholic, was assassinated under reported suspicion of his criticism of blasphemy laws. Earlier, in January 2011, the Governor of Punjab, Mr Salman Taseer [himself a Muslim], was killed by his official guard [after expressing support for reform of the blasphemy laws].[9]

More recently the Governor's assassin was executed for the crime, but had been made a "folk hero" in some quarters in Pakistan.[10]

Hayee goes on to note, as have others, that the law is frequently invoked, though in many cases accused persons have been acquitted at a higher court due to obvious problems with fraudulent evidence. (Indeed, there is much evidence that blasphemy accusations are often used against the minority Christian community as part of threats involved in land and other

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[7] See NSW Law Reform Commission, *Blasphemy* [1994] NSWLRC 74; and note other reports in Australia and the UK referred to by Mortensen at 409 nn 2,3.

[8] See http://geoconger.wordpress.com/2009/02/22/australian-church-calls-for-blasphemy-abolition-cen-22009/ .

[9] Hayee, at 27 n 15.

[10] See "Pakistan Braces for Violence After Execution of Governor's Killer" (29 Feb 2016) http://www.nytimes.com/2016/03/01/world/asia/salmaan-taseer-killer-mumtaz-qadri-executed.html?_r=0 .

unrelated disputes.)[11] However, it is not at all uncommon for someone who is awaiting trial for blasphemy to be the victim of an extra-judicial killing, either by a mob or in prison.[12] In a 1995 case a 13-year-old boy was sentenced to death by the trial judge; on appeal to the Lahore High Court his conviction was quashed, but he had to leave the country to avoid a mob killing, and some months later the judge who had quashed the conviction was murdered in his chambers for having entered the acquittal.[13]

The misuse of blasphemy law to oppress religious minorities is in danger of spreading more broadly, as Pakistan has been one of the main supporters of regular UN resolutions calling for a law prohibiting the "defamation of religions".[14] These resolutions would seem to have the effect of prohibiting the causing of "offence" to believers, and would seem to open up a broad area for the sort of abuses of the law that have been occurring in Pakistan. While the UN General Assembly has adopted the resolutions, they have not been implemented in any binding treaty, and in recent years it has become clear there is no general support for these laws on the Security Council or the major committees.

One of the highly controversial debates that has arisen in recent years, of course, was the reaction of many Muslim people when a Danish newspaper chose to publish a number of satirical cartoons featuring the prophet Mohammed. We don't have time to go into the complexities of the arguments here, but there is a very good review article by Green on the reading list which discusses a number of important recent monographs on the areas of religion and speech (among them Jeremy Waldron's book which I will discuss later), and among the books she reviews is one which examines the "Danish cartoons" controversy.

In the circumstances, though, my view is that while to some extent a law against blasphemy in the West may seem to be simply an archaic "dead letter", it would be preferable if the offence was explicitly removed as soon as possible to avoid any chance of it being re-activated in inappropriate ways.

## 2. 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 noted on the reading list, 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. The second paper on the list updates those views (and I have to say I have changed my mind on some of the issues since writing the earlier paper).

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[11] For a very recent report of this sort of incident (now involving a Facebook post!) see: "Pakistan: Christian boy, 16, arrested for Kaaba 'blasphemy'" (Sep 20, 2016) https://www.worldwatchmonitor.org/2016/09/4638977/ .

[12] Hayee at 48 notes that there is credible evidence of more than 32 people being killed while awaiting trial between1984-2004.

[13] Hayee, at 50.

[14] See Temperman (2008) for a detailed analysis, and his (2011) piece for some updating.

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." [15]

If this was indeed said (and there seems no reason to doubt it) it provides a pretty good example of "hate speech" directed, not perhaps to all those of a non-Muslim faith, but certainly to anyone who has decided to change their faith from Islam to another faith (that is clearly what is meant by an "apostate"). That is pretty clearly hate speech on religious grounds.[16]

Of course there are other 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"?[17] For a media commentator to suggest that "gang rape was a rite of passage for Muslim males in France"?[18]

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"?

**(a) Overview of current Australian law on religious vilification**

There are now a number of important overviews of the developing law of 'religious vilification' or 'religious hate speech', listed on the reading list. Gerber and Stone, for example, offer a good working definition of the type of law at issue here, sometimes referred to as "hate speech":

Hate speech is speech or expression which is capable of instilling or inciting hatred of, or prejudice towards, a person or group of people on a specified ground … [19]

In particular religious vilification laws aim to prohibit certain types of speech, which attack others based on their religion.

In Australia, three jurisdictions have introduced such laws: Queensland, Tasmania and Victoria.[20] Perhaps the most prominent example is

[15] 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 .
[16] And of course it goes without saying that recent announcements by "Islamic State" militants about the lawfulness of killing Christians and others would fall into this category as well.
[17] 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.
[18] 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).
[19] Gerber & Stone at xiii.
[20] See for an overview L McNamara, "Salvation and the State: Religious Vilification Laws and Religious Speech", in Gelber & Stone (eds) 145-168, at 146. The provisions are the *Anti-Discrimination Act* 1991 (Qld) s 124A, the *Anti-Discrimination Act* 1998 (Tas) ss 19 & 55, and s 8 of

the Victorian provision, s 8 of the *Racial and Religious Tolerance Act* 2001 (Vic):

**Religious vilification unlawful**

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

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

**11. Exceptions-public conduct**

(1) A person does not contravene section 7 or 8 if the person establishes that the person's conduct was engaged in reasonably and in good faith-

(a) in the performance, exhibition or distribution of an artistic work; or

(b) in the course of any statement, publication, discussion or debate made or held, or any other conduct engaged in, for-

(i) any genuine academic, artistic, religious or scientific purpose; or

(ii) any purpose that is in the public interest; or

(c) in making or publishing a fair and accurate report of any event or matter of public interest.

(2) For the purpose of subsection (1)(b)(i), a religious purpose includes, but is not limited to, conveying or teaching a religion or proselytising.[21]

In *Deen v Lamb* [2001] QADT 20, 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 that Act as it was done 'in good faith' for political purposes.

The most controversial application of these laws so far, however, was in the litigation involving the 'Catch the Fire' organisation.[22] 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. A brief summary is appropriate.

The original decision was *Islamic Council of Victoria v Catch the Fire Ministries Inc* [2004] VCAT 2510. 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

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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.

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

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

unhelpful statements may have been made in the course of the lengthy seminar (and in some related material published on a website), most of the comments made were sourced from multiple Islamic authors. Initially, the court 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* [2006] VSCA 284 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'.[23]

Nettle JA, as his Honour then was,[24] 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.[25]

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

The UK has also introduced legislation prohibiting religious vilification. There, the *Racial and Religious Hatred Act* 2006 (UK) added Part 3A to the *Public Order Act* 1986 (headed 'Hatred against persons on religious grounds'), which now 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*.[27]

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.[28]

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**

[23] See, for example, the summary in Ahdar at 305.
[24] His Honour has since left the Victorian Court of Appeal and been appointed to the High Court of Australia.
[25] [2006] VSCA 284 at [15].
[26] 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.
[27] *Public Order Act* 1986 (UK) ss 29A, 29B.
[28] Addison, p 140.

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

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

One interesting set of religious vilification proceedings that does not previously seem to have been the subject of detailed comment[29] involved a dispute between two odd sets of parties. In *Ordo Templi Orientis v Legg* [2007] VCAT 1484 (27 July 2007) 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 targetted 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 & Anor v Devine & Anor* [2007] VCAT 2470 (28 November 2007) 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.[30] 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.[31] They continued to pursue a formal appeal against their conviction, which in the end was denied, the court holding that

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

the Tribunal had followed appropriate procedures and that they were well aware of the consequences of their refusal to comply.[32]

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 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.[33] 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.[34]

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.)[35] Might in 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 might 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."[36] If indeed these persons were sufficiently "identified" as belonging to the group to suffer this

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[32] *Devine & Anor v Victorian Civil and Administrative Tribunal & Ors* [2008] VSC 410 (10 October 2008). For contemporary comment on the human rights issues see http://charterblog.wordpress.com/2008/10/12/the-rights-of-difficult-defendants/ .

[33] 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!)

[34] 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?

[35] See Foster (2012), at 79.

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

harm to their "reputation",[37] 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.[38]

**(b) Problems with these laws**

I want to turn now to some problems with these anti-vilification laws. The commentators previously cited have noted many problems. Perhaps 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.[39]

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.[40]

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. But should the law go further and address speech that attacks other's beliefs?

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

[38] Thornton & Luker, above n 29, 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."

[39] 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.

[40] Parkinson at 960.

One could argue 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.[41] 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 underground', and hence that where there are disagreements they will be resolved in less rational ways.[42]

**(c) Arguments in favour of a limited religious vilification law**

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

In this area I have been greatly influenced by the book by Waldron noted on the reading list*, The Harm in Hate Speech*. In that book he makes a careful but impassioned case for the possibility 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.[43]

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.

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[41] 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].

[42] "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).

[43] This view is in part supported by Pringle 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.

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.[44] 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.[45]

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.[46] 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 this, just as the law of "ordinary" defamation protects other aspects of personal reputation.[47] So Waldron would support laws that prohibit "the publishing of calumnies expressing hatred and contempt for some racial, ethnic or religious group".[48]

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

> John Locke's saying that it is absurd for Jews to deny the divine inspiration of the New Testament is one thing; presumably, Mr Osborne's saying that Jews kill Christian babies is another. To punish those who spread a blood libel is one thing; to shut down what Locke called "affectionate endeavours to reduce men from errors" in another.[49]

So 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.[50]

Waldron recognises that discussion of religious questions will sometimes give offence. "Neither in its public expression nor in an

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[44] Waldron (2012) at 35.
[45] 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."
[46] Waldron (2012) at 39-41.
[47] Waldron (2012) at 85-86.
[48] Waldron(2012) at 66.
[49] 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".
[50] Waldron (2012), at 126-127.

individual's grappling aloud with these matters can religion be defanged of this potential for offence."[51]

Yet he argues that we can, and legislators should, recognise that without penalising the giving of mere offence, we can aim to prevent the result of that offence-giving being 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.[52]

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".[53]

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* 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.[54]

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".

**(d) But the law should not prohibit mere "offence"**

A number of developments and important court decisions over the last few years illustrate the points made above about the importance of not penalising mere "offence".

**(i) Australian law penalising "offence"**

No other States beyond those noted above have shown an interest in enacting religious vilification laws in recent years. However, there was an important development in 2012 that showed willingness, at least on the part of some of those involved in the then-Federal Government, to consider extension of the existing laws in some fairly radical ways.

This was shown in the Exposure Draft of a proposed *Human Rights and Anti-Discrimination Bill* 2012, released for public comment in November 2012 by the Commonwealth Attorney-General's Department.[55] The Bill would

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[51] Waldron (2012) at 129.
[52] Waldron (2012) at 130.
[53] See the very important discussion at 131-136.
[54] 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.
[55] See http://www.ag.gov.au/Consultations/Documents/ConsolidationofCommonwealthanti-discriminationlaws/Human%20Rights%20and%20Anti-Discrimination%20Bill%202012%20-%20Exposure%20Draft%20.pdf . For a detailed critique on religious freedom grounds see http://www.freedom4faith.org.au/resources/Work/F4F%20submission%20on%20Human%20Rights%20and%20Equality%20Bill%202012%20Exposure%20Draft_F.pdf .

have extended the currently limited grounds under Commonwealth law on which discrimination is formally unlawful, to include (among others) a "protected attribute" of "religion" (cl 17(1)(o)). In particular, while including a provision on racial vilification (cl 51) which was similar to that currently provided for in the *Racial Discrimination Act* 1975 (Cth) ("RDA") s 18C, the operative provision generally defining discriminatory conduct (cl 19(2)(b)) provided that such conduct included "other conduct that **offends**, insults or intimidates the other person."

A broad reference to "offence" or "insult" clearly covered verbal activity and was very similar to what had traditionally been regarded as a "vilification" law, but with a very low hurdle of mere "offence". There was an unprecedented public outcry about this aspect of the legislation from some very respected and mainstream commentators, including a concession from the President of the Australian Human Rights Commission that this went "too far".[56]

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

In *Eatock v Bolt* [2011] FCA 1103 (28 September 2011) journalist and blogger Andrew Bolt was sued by Pat Eatock and a number of others whom he had named as people who were "fair-skinned Aborigines" who, he claimed, had "traded on" their self-identification as Aboriginal people to profit in different ways from that status (such as receipt of Government benefits or positions.) He was sued under s 18C, noted above, on the basis that his remarks were made "because of the race, ethnic origin or colour of fair-skinned Aboriginal people" (see para [20] of the official case summary). He was found to have breached the Act, and the defence under s 18D of comment in "good faith" was not made out because the articles contained "errors of fact, distortions of the truth and inflammatory and provocative language" (para [23]).

There were, it is submitted, a number of problems with this decision. In particular, it could be argued that Mr Bolt's comments (whether true or not) were not based on the "race" of the people involved, but rather on his claim that they were dishonestly trading on a supposed but false racial identification. However, the scope of the legislation is so wide that if a person's race played *some* role in the relevant behaviour, it could be characterised as racial vilification.[57] (The particular "race" category relied on was unusual, too- it was confined to "fair-skinned persons" who claim or are recognised to be Aboriginal.)

But the claim succeeded partly because of the very low bar that had to be met under s 18C, whereby conduct was rendered unlawful if persons were

[56] Prof G Triggs, "Tweaking the draft bill could preserve core reforms", *The Australian*, Jan 22, 2013, available at http://www.theaustralian.com.au/national-affairs/opinion/tweaking-the-draft-bill-could-preserve-core-reforms/story-e6frgd0x-1226558532996 .
[57] See RDA s 18B, and *Eatock* at para [306].

"offended, insulted, humiliated or intimidated by" it.[58] No scope was given in the provision for the question whether the conduct (if verbal) amounted to an assertion of a true or arguably true fact. As a result, the carefully crafted safeguards that have been developed for many years in the law of defamation were completely side-stepped. Obviously what Mr Bolt had said was defamatory of the individuals named, and they would clearly have been entitled to sue for defamation; but in such an action, Mr Bolt would have been either able to argue that what he had said could be justified as true, or that it was an "honest opinion" that he held, or that it was delivered on an occasion of "qualified privilege".[59]

Of course s 18C RDA is not about "religious vilification". Indeed, as Bromberg J makes clear in his judgment, it is not even about "hate speech". It sets the bar much lower than that, and in that sense is not directly relevant to discussion of "religious vilification" law.[60] But it does illustrate a possible tendency of legislation in this area to move towards a wide control of speech on these topics. It is suggested below that it is likely that this decision, and the draft *Exposure Bill* with its reference to "offence", may have in part led to subsequent comments from some members of the High Court of Australia about the unwisdom, and possible Constitutional invalidity, of laws hinging on the causing of "offence".

The current Coalition Government came to power initially undertaking to repeal s 18C. The Attorney-General undertook a community consultation after producing a draft Bill. Those who are interested can see my comments on the draft Bill online.[61]

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

My views, like those of everyone else who offered comments, received no formal response from the Government. Instead the proposal to amend s 18C was abandoned by the then Prime Minister as part of proposals to introduce stronger anti-terrorism laws.[62] In recent days the question of whether s 18C should be amended has again been raised by a group of Government

[58] Interestingly, even Joseph, who defends the decision as good one, accepts that "offence" is an inappropriately low bar to set: see Sarah Joseph "Free speech, racial intolerance and the right to offend: Bolt before the court" (2011) 36 (4) *Alternative Law Journal* 225-229, at 229.
[59] For brief mention of these defences, see Foster (2012) at 73-74. It is interesting to note that in determining the meaning of the articles in question, Bromberg J deliberately adopted the approach that has previously been taken in defamation proceedings to analysing what "imputations" have been made- see para [19]. The applicability of the law of defamation to these sort of proceedings is quite clear.
[60] See *Eatock* at [206], where the *Catch the Fire* decision is mentioned but distinguished.
[61] Neil J. Foster, "Submission on s 18C reforms" (30 March, 2014) available at http://works.bepress.com/neil_foster/80 .
[62] "Tony Abbott dumps planned changes to section 18C of Racial Discrimination Act" *The Australian*, Aug 5, 2014 http://www.theaustralian.com.au/national-affairs/tony-abbott-dumps-planned-changes-to-section-18c-of-racial-discrimination-act/story-fn59niix-1227014479772 .

back-benchers, although the current Prime Minister has expressed little interest in reviving the debate.[63]

On the reading list Tim Soutphommasane, Race Discrimination Commissioner, offers an eloquent defence of the operation of the provision. You can, however, also read a pointed attack on the provision in the recent monograph by Forrester, Finlay and Zimmerman. (We will see below that legislation in Tasmania also raises these issues.)

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

> In Australia, anti-vilification laws are generally considered compatible with the extant common law protection of freedom of expression, and with the doctrine of an implied constitutional freedom of political communication as developed by the High Court since 1992.[64]

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

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

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

> The difficulties created by the drafting of the current legislation would be reduced by two significant amendments. One would substitute for the current 'to offend, insult, humiliate or intimidate' a more demanding standard such as to 'degrade, intimidate or incite hatred or contempt'. The other would be to replace the references to the subjective responses of groups targeted by hate speech with an objective test for determining whether the hate speech is likely to have the prohibited effect. An objective test would involve reference to the standards of a reasonabl[e] member of the community at large. In practice, as in so many areas of the law, this would involve courts exercising judgment in the light of their assessment of prevailing community standards, taking account of the evidence adduced in the individual case.[65]

While the constitutional validity of s 18C RDA was upheld in the Federal Court in *Toben v Jones* [2003] FCAFC 137; (2003) 129 FCR 515, the provision has not been considered by the High Court itself, and in recent years

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[63] See, for example, this report: "Nick Xenophon rejects renewed push to repeal section 18C" *The Australian*, Aug 8, 2016: http://www.theaustralian.com.au/national-affairs/nick-xenophon-rejects-renewed-push-to-repeal-section-18c/news-story/2f409159241541d4685c20b2a4d84ef4 .

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

[65] The Hon R Sackville AO, "Anti-Semitism, Hate Speech and Part IIA of the Racial Discrimination Act" (2016) *Australian Law Journal* (forthcoming), available at http://blog.thomsonreuters.com.au/2016/08/former-federal-court-judge-proposes-key-reforms-section-18c/draft_anti-semitism-freedom-of-speech-sackville-aja-insider/ , at p 26.

a number of decisions of that Court have laid great emphasis on the importance of the implied freedom of political communication.[66]

Chief Justice Robert French, in a recent extrajudicial address entitled "Giving and Taking Offence",[67] discussed some of these issues, and his Honour concluded by noting "there is no generally accepted human right not to be offended" (at p 14).

We turn now to discuss some of these decisions, and an overseas decision that should also be of some weight in the debate.

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

A Canadian decision, and two important Australian decisions, illustrate the complexities of balancing freedom of speech with other important values. None of the cases are classic "religious vilification" situations, but they all raise this vital issue of balancing freedom of expression with other rights.

### *A. Whatcott- expressing opposition to homosexuality*

In Canada, in *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 (27 Feb 2013) 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 Tribunal found Mr Whatcott liable in relation to all the flyers; on appeal the Saskatchewan Court of Appeal actually overturned all the findings, holding that while the law was constitutionally valid, none of the flyers reached the appropriate level of "hatred" forbidden by the law. The Supreme Court of Canada, in summary, agreed 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.

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

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

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

### (1) Interpreting the "hatred" standard

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*, [1990] 3 S.C.R. 892, in the context of racially-based vilification legislation, that "hate" language needed to be particularly strong to be caught by a provision that impaired the Charter right of freedom of speech. After discussing various options the Court in *Whatcott* concluded as follows, at [57]:

> 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.

If indeed the courts could consistently apply this distinction the law may work effectively. We will come back to the evidence for this when we consider the outcome in *Whatcott* below.

### (2) Charter Protection of Freedom of Speech

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.

### (3) Charter Protection of Freedom of Religion

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.

### (4) Applying the standards to the precise words

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)

#### (5) Evaluating the Whatcott decision overall

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".

(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.)

### *B. Two Australian High Court decisions*

In *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3 (27 February 2013) ("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, the High Court was split down the middle 3-3 in *Monis v The Queen* [2013] HCA 4 (27 February 2013) 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.

### (1) The *Adelaide Preachers case*

In *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3 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.[68] 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 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[69]. 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[70].

Thus the first question to be considered was how the prohibition on "preaching, canvassing and haranguing" should be **interpreted** in light of this

[68] Although, with respect, the dissent of Heydon J on this issue is very persuasive- see below.

[69] 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.

[70] *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.

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 were 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[71].

Landrigan considers this interesting question- whether the implied freedom of political communication applies to some "religious" speech- in more detail in the article on the reading list. 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 (see p 442 near n 88). But he does say that there is still some doubt about the matter:

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71 *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 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.

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

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

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

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

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

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

In other words, these were very broad prohibitions and on their face applied to a large range of speech activities. On that basis his Honour found that the bylaws were invalid.[72]

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.[73]

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.[74]

### (2) *Monis*

With the decision in *Monis v The Queen* [2013] HCA 4 (27 February 2013) we come much closer to the prohibition of "religious hatred" with a decision on the question whether the Commonwealth Parliament can authorise

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[72] And his Honour could not help noting 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."

[73] 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 & Ors v Corporation of the City of Adelaide* [2013] SASC 115 (15 July 2013)**.** However, in *Corneloup v Launceston City Council* [2016] FCA 974 (19 August 2016) one of the claimants here was successful in overturning a preaching ban in Tasmania, on administrative law grounds.

[74] 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.

a law which forbids the use of the postal service for communication of "offensive" speech.

French CJ sums up the facts well:

> [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[75] 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.[76]

### *On the one hand- the law was invalid*

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.[77] 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.)[78] Even if it could, however, the extent of the type of services covered by the provisions (couriers delivering parcels as well as letters) meant that it covered a wide range of speech. The provision was a serious **burden** on free political speech, and it was not **proportionate** to any legitimate ends. It could not even be said that it provided protection to members of the public against instrusion 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![79]

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.

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

[76] Normally the Court has 7 members. I assume that 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.

[77] 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."

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

[79] French CJ at [29].

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[80]. {emphasis added}

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

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

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

[222] The conclusion that eliminating **the giving of offence, even serious offence, is not a legitimate object or end** is supported by reference to the way in which the general law operates and has developed over time. The general law both operates and has developed recognising that human behaviour does not accommodate the regulation, let alone the prohibition, of conduct giving offence. Almost any human interaction carries with it the opportunity for and the risk of giving offence, sometimes serious offence, to another. Sometimes giving offence is deliberate. Often it is thoughtless. Sometimes it is wholly unintended. Any general attempt to preclude one person giving *any* offence to another would be doomed to fail and, by failing, bring the law into disrepute. Because giving and taking offence can happen in so many different ways and in so many different circumstances, it is not evident that any social advantage is gained by attempting to prevent the giving of offence by one person to another unless some other societal value, such as prevention of violence, is implicated.

[223] **The common law has never recognised any general right or interest not to be offended.** The common law developed a much more refined web of doctrines and remedies to control the interactions between members of society than one based on any general proposition that one member of society should not give offence to another. Apart from, and in addition to, the development of the criminal law concerning offences against the person, the common law developed civil actions and remedies available when one member of society *injured* another's person or property, including what was long regarded as the separate tort in *Wilkinson v Downton*[81] 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

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

81 [1897] 2 QB 57.

offended by the words or conduct of another that did not cause injury to person, property or reputation. (emphasis added)

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

### *On the other hand- the law was valid*

In a single joint judgment, however, Crennan, Kiefel and Bell JJ upheld the validity of the law.[82] 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.[83] 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 that the balance of the merits of the arguments lies with the two substantive judgments of those against validity. French CJ and Hayne J argue compellingly for strong protection of freedom of speech, which is unduly impaired by a law penalising the causing of "offence". Even if the nature of the "offence" were interpreted as "serious" or "gross", the fact is that very few members of the public would be aware of this simply by knowing of the law. Such a provision will have a chilling effect on some speech, if it is generally implemented. These arguments support a very narrow and confined scope for any laws that penalise speech on the subject of religion.[84]

For an article also critiquing the effect of the *Monis* and *Adelaide Preachers* cases, see Head. There was also a very interesting UK decision raising similar questions. In *DPP v McConnell* [2016] NIMag 1 (5 Jan 2016), 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

[82] 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.
[83] See paras [333]-[339].
[84] 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.

generalisations concerning Muslim people did not reach the high standard of "grossly" offensive.)[85]

**(e) A balanced law on religious hate speech?**

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

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

**(f) The Tasmanian experience- prohibition of offence**

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

Section 17(1) provides:

**17. Prohibition of certain conduct and sexual harassment**

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

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

**55. Public purpose**

The provisions of section 17(1) and section 19 do not apply if the person's conduct is –

(a) a fair report of a public act; or

(b) a communication or dissemination of a matter that is subject to a defence of absolute privilege in proceedings for defamation; or

(c) a public act done in good faith for –

(i) academic, artistic, scientific or research purposes; or

[85] 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/ .

(ii) any purpose in the public interest.

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

Section 17, then, currently sets the bar for unlawful behavior 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. 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.[86]

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

**46. Religious freedom**

(1) Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.

(2) No person shall be subject to any disability, or be required to take any oath on account of his religion or religious belief and no religious test shall be imposed in respect of the appointment to or holding of any public office.

While the effect of ordinary legislation breaching the *Constitution Act* is not entirely clear,[87] it seems at least plausible to suggest that it should 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

[86] 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/> .

[87] See now the *Corneloup (2016)* decision, discussed below in Part 4 of the paper.

marriage. The prime example here, of course, is the action previously initiated under s 17 against the Roman Catholic Archbishop of Hobart.[88] 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.[89]

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.

The Tasmanian Government has now introduced proposals for amendment, but unfortunately they do not seem to deal properly with the relevant issues noted here.[90]

It is suggested that s 17, to deal with the issues noted here, *ought* to be amended as follows: the phrase "offends, humiliates, intimidates, insults or ridicules" should be removed, and should be replaced by the words recommended by Sackville AJA to be substituted into s 18C of the Federal legislation: "degrade, intimidate or incite hatred or contempt".[91]

This would mean that the opening words of s 17(1) would be:

(1) A person must not engage in any conduct which **degrades, intimidates, or incites hatred or contempt for**, 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)…

However, no direct amendments to s 17 are presently proposed in the Bill. Amendments to sections 64, 71 and 99 will clarify when complaints under s 17 should be dismissed by the Commissioner, or when the Tribunal must dismiss a complaint. But these amendments seem to do little more than clarify that the Commissioner or Tribunal must reject a complaint under s 17(1) where the complaint on its face does not amount to a breach of s 17(1). This seems obvious.

There are also amendments proposed to s 55. Some background seems important first, before noting the amendments.

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

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

[88] 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 .

[89] 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/ .

[90] See the *Anti-Discrimination Amendment Bill* 2016 (54 of 2016), introduced into the Tasmanian House of Assembly on 20 Sept 2016, 2nd reading speech 22 Sept 2016.

[91] See n 65 above.

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

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

- Omission of the word "reasonably" when attached to the "good faith" defence in the other States;
- 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 one other important issue, which concerns the way that "public interest" has been interpreted in Tasmania. In the decision in *Williams v Threewisemonkeys and Durston* [2015] TASADT 4 the Tribunal found that a pamphlet containing alleged statistics relating to homosexual behaviour breached s 19, and refused at para [38] to apply the s 55 defence on the basis that "public interest" must be objectively assessed (the implication being that the Tribunal was not convinced of the truth of the pamphlet.)

Such an approach seems problematic. Surely in general the truth or falsity of statements of this sort ought to be assessed in the wider "marketplace" of public discussion, and if wrong be shown to be such by production of countervailing evidence, rather than discussion on the issues shut down by judicial, or quasi-judicial, fiat. It seems plausible that "public

interest" in all the above provisions ought to be read as covering a situation where the *topic* under discussion is a matter of public interest, rather than restricting the defence to cases where the Tribunal or other decision-maker is in agreement with the precise position being argued for by the person who made the challenged statement. The NSW provision achieves this result by spelling out that "discussion or debate" generally is presumed to be in the "public interest".

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

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

What do the suggested amendments do? The Bill would deal with a number of the issues noted in the comparison above. Under new s 55 the word "reasonable" would be added to the "good faith" criterion in current para 55(1)(c), and the additional ground of a "religious" purpose would be added to sub-para 55(c)(i).

These are sensible amendments. The word "reasonable" has been discussed in the context of the RRHA 2001 (Vic) by Nettle JA in *Catch the Fire* where he noted that this involved:

…an objective analysis of what is reasonable and therefore calls for a determination according to the standards of the hypothetical reasonable person (at [93].)

His Honour also noted, however, that the word "reasonable" appears in legislation and in a social context which is pluralistic, diverse, and committed to the principles of free speech. At [98] he said:

the standards of an open and just multicultural society allow for differences in views about religions. They acknowledge that there will be differences in views about other peoples' religions. To a very considerable extent, therefore, they tolerate criticism by the adherents of one religion of the tenets of another religion; even though to some and perhaps to most in society such criticisms may appear ill-informed or misconceived or ignorant or otherwise hurtful to adherents of the latter faith. It is only when what is said is so ill-informed or misconceived or ignorant and so hurtful as to go beyond the bounds of what tolerance should accommodate that it may be regarded as unreasonable.

His Honour's views about differences in views about religion, are readily also applicable to differences in views about appropriate sexual activity.

The addition of the reference to "religious" purposes, which would include teaching one's own group the views traditionally held on sexual behavior, is not a bad idea. It would be best if the Government in introducing these changes were to make it quite clear that in its view the action of Archbishop Porteous, for example, of issuing a polite and reasoned account of Roman Catholic teaching about sexual activity to be distributed in Roman

Catholic schools, amounted to a public act done reasonably and in good faith for religious purposes.

However, 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. Would a "religious purpose", for example, cover an individual with a strong religiously based conviction about the appropriateness of homosexual activity, expressing their views to others on Facebook or in general conversation? The history of consideration of these matters by courts and tribunals suggests that it could not be guaranteed that it would, there being a tendency to confine the word "religious" to what is done in church (or perhaps a church-run school.) It would seem to be best to broaden the defence, in line with the words used in the NSW provision noted previously, so that the "public interest" includes "discussion or debate about and expositions of any act or matter".

**(g) Conclusions on "religious vilification" laws**

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

**(i) 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.[92]

**(ii) Mere "offence" is not sufficient harm**

The theme that simply causing someone "offence" is not enough to justify serious interference with freedom of speech is one that come through a number of the decision and events noted above. The public outcry against the *Exposure Draft* Commonwealth Bill is one example. The decision of the Supreme Court of Canada in *Whatcott* is another, striking down as inconsistent with the Charter the law there insofar as it would have restricted speech simply causing offence. The decision of the two most senior members of the High Court of Australian in *Monis* is another example. In fact, given that the joint judgment of Crennan, Kiefel and Bell JJ interpreted the word "offence" in most serious possible sense, the decision as a whole is strong

[92] 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.

evidence that the bar for constitutional prohibition of free speech cannot be set too low.

**(iii) The need to avoid "identity politics"**

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

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

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

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

**(v) 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.[93] It seems clear that this is an issue that will need to be revisited.

In present times the "elephant in the room" may be said to be comment about Islam in relation to current threats posed by Islamic extremists in Iraq and Syria, and also closer to home. Laws prohibiting religious vilification are still in place- for example, in Victoria. Yet some may wish to suggest that Islam as a religion is at least in part responsible for the terrorist threats that have been made. Serious issues may arise should an attempt be made to sue for "religious vilification" in such circumstances.

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

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

This specific issue came up in a fairly recent decision of the Victorian Civil and Administrative Tribunal, *Sisalem v The Herald & Weekly Times Ltd* [2016] VCAT 1197 (19 July 2016). This is an important and helpful decision supporting free speech on religiously related issues.

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

[93] 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, of course, is an excellent survey of the area of religious hate speech.

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.

## 3. "Religious Speech" on sexuality

There are a number of other cases that have raised questions to do with the intersection of freedom of religion and freedom of speech. One area that has come up regularly in recent years (touched on in some of the cases previously noted) is the question whether freedom of religion allows someone who holds a Biblical view of sexual morality, to state openly that certain forms of sexual behaviour are wrong.[94] This of course came up in the context of the *Cobaw* case,[95] which didn't involve a direct "speech" component, but also comes up in the speech area.

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

**49ZT Homosexual vilification unlawful**

[94] 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/ .

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

(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 a defence under s 49ZT(2)(c) for:

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

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

In an important ruling in *Sunol v Collier (No 2)* [2012] NSWCA 44 (22 March 2012) 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:

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 I have 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".[96]

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 (7 August 2013).

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

[96] See Neil J Foster, "Freedom of Religion and Balancing Clauses in Discrimination Legislation" *Magna Carta and Freedom of Religion or Belief Conference* (2015), available at: http://works.bepress.com/neil_foster/95/ . A slightly revised version of this paper is forthcoming in the *Oxford Journal of Law and Religion* (2016).

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 that Mr Manias had any religious motive for his actions

The decision in *Corbett v Burns* [2014] NSWCATAP 42 (14 August 2014) raises some of the same issues as the *Whatcott* case previously discussed, although it does not directly address the freedom of religion aspect.

Ms Corbett was a candidate for the conservative Katter Party at an election in Victoria. In the course of being interviewed by her local paper she said:

"I don't want gays, lesbians or paedophiles to be working in my kindergarten.

"If you don't like it, go to another kindergarten."

When asked if she considered homosexuals to be in the same category as paedophiles, Ms Corbett replied "yes".

"Paedophiles will be next in line to be recognised in the same way as gays and lesbians and get rights," she said.

The Sydney Morning Herald in NSW reported these remarks online. Later (see [10] of the appeal):

she had told [the] reporter both that homosexuality was 'against the word of God' and that she was pleased to have 'got the front page' of the Hamilton Spectator. In addition, the article on the Sydney Morning Herald's website (appearing under the byline of the State Political Correspondent for the Age) reported a statement by her to the effect that 'gays and lesbians and paedophiles were "moral issues"'.

It is interesting to note that, despite living in Victoria, it was held that Ms Corbett could be sued under the NSW ADA, as the remarks were read online in NSW (or repeated by a NSW newspaper website).[97]

In discussing whether there had been "vilification" under s 49ZT(1) the Appeal Panel said:

[13] Applying the principles set out by Bathurst CJ in *Sunol v Collier* (No 2) [2013] NSWCA 196, the Tribunal concluded that, with two exceptions, the statements set out at [9] above ([19] of the Tribunal's decision) met the test of "incitement". Those statements, and particularly Ms Corbett's agreement with the proposition that homosexuals are in the same category as paedophiles, "is 'capable of', or has the effect of, 'urging' or 'spurring on' an 'ordinary member of the class to whom it is directed' to treat homosexuals as deserving to be hated or to be regarded with 'serious contempt'."

[14] The two exceptions to this conclusion were that two additional statements, which did not appear in the *Hamilton Spectator* article but which were published on the websites of the *Sydney Morning Herald* and the *Australian*, respectively, do not fall within s 49ZT(1). Those statements were that "gays and lesbians and paedophiles were 'moral issues' and that homosexuality was 'against the word of God'."

The Appeal Panel seems to have agreed with the Tribunal's views. With respect, so do I. It seems true that to allege (even if this were not Ms

[97] Note, however, that in the more recent decision in *Burns v Gaynor* [2015] NSWCATAD 211, the NSW Civil and Administrative Tribunal held that NSW law forbidding "homosexual vilification" was not intended to capture the uploading of material onto a website hosted in Queensland, where the uploading itself occurred in that State, despite the fact that persons in NSW could then read the material- see paras [17]-[18]. There is a difference, of course, between uploading material to a website and publishing material in a newspaper known to be sold interstate. But there is something of a tension between the two decisions.

Corbett's meaning) that homosexual persons and paedophiles are in the "same category" is to incite hatred. On the other hand, it is encouraging that the Tribunal was prepared to find that a simple statement of what the Bible taught was not such an incitement

While Ms Corbett tried to argue on the appeal that she should have been allowed to rely on the s 49ZT(2) defences, she faced an insuperable obstacle- she had simply failed to turn up at the initial hearing. As the Appeal Panel said, since the defence requires proof of "good faith" as a minimum, it was impossible to assess this when she did not give any evidence as to her motives- see conclusion on this point in para [40].

There was some attempt on the appeal to argue that the Tribunal had not properly considered the authorities on the implied freedom of political communication- but as the Appeal Panel found, while *Sunol v Collier (No 2)* remains the law in NSW, there was no point in revisiting that issue- see [41].

The Federal Court has recently handed down a very important decision on related issues of free speech, with connections to religious freedom, in *Gaynor v Chief of the Defence Force (No 3)* [2015] FCA 1370 (4 December 2015). It encouragingly reaffirms the right of Australians, including members of the Defence Force, to be able to speak their minds, even when their views are not popular.

The plaintiff, Major Bernard Gaynor, may be described as a "controversial" figure. He has a distinguished record of service in the Australian Regular Army (including time in Iraq and Afghanistan). In recent years he transferred to the Army Reserve and was promoted to Major in 2013. He has been a political candidate. He is also known for objecting to, among other things, support provided by the ADF to the Gay and Lesbian Mardis Gras, and for strong views on how Australia should deal with the threat of Islamic violent extremism.

The decision he was complaining of was that of the Australian Defence Force (ADF) in December 2013 to terminate his commission and service. This followed directions that had been given to him not to continue to make remarks of the sort he had previously been making. As summarised by Buchanan J at para [11], those remarks expressed:

> antipathy to overt tolerance or support of homosexuality or transgender behaviour as well as statements critical of adherents of Islam.

As Buchanan J put it at para [215], the order that he was charged with disobeying was this:

> The applicant was instructed, generally and specifically, to refrain from public statements contrary to ADF policy while he remained a member of the ADF.

It is important to note that he was not claiming a right to make such remarks while a full-time member of the Regular Army, or while on active service with the Army Reserve- see para [223]. But he claimed that, while speaking in social media and other forums in his personal capacity, he ought to be able to make these remarks, even if those who heard him became aware that he was a member of the ADF.

I should say at this stage that, while sympathetic to many of Major Gaynor's views, I do not personally endorse all of them, or the fairly robust way in which they were expressed. I don't propose to parse all his comments, however, and indicate which I would, and would not, endorse. The more

important issue is whether Australia includes strong protection of both free speech and free exercise of religion, so that Major Gaynor and I (and anyone else who wants to!) can have an open and frank discussion about these matters.

I am pleased to say that the decision in this case supports such protections, at least in relation to free speech.

Buchanan J, in the first part of the judgment, upheld the *prima facie* legality of the orders that had been given to Major Gaynor not to continue public comment on these controversial matters, holding that the orders were supported by the various powers that had apparently been given to his superior officers.

However, from para [220] of the judgment, his Honour turned to consider whether, even if those orders were justified on the face of the relevant laws, those laws might actually be unconstitutional. There were two challenges to the laws on constitutional grounds: one based on the implied right to freedom of political speech, and the other based on the s 116 prohibition on the Parliament authorising undue impairment of the free exercise of religion.

The bulk of the decision deals with the **free speech** issue. As previously noted, the High Court has, over a number of years, identified and explained an implied "freedom of political communication" which is binding on both Commonwealth and State Parliaments.

In an important decision on the scope of the implied freedom, *McCloy v New South Wales* [2015] HCA 34 (7 October 2015), the majority of the High Court, while upholding the validity of the relevant State laws prohibiting donations by property developers, clarified the approach to be adopted in testing laws against this implied freedom.

In Major Gaynor's case Justice Buchanan gives an excellent overview of previous decisions on the implied freedom, from paras [229]-[239], and then applies the *McCloy* framework to this question. At para [240] his Honour provided the following lengthy but important quote from para [2] of *McCloy*:

**[2]** As explained in the reasons that follow, the question whether an impugned law infringes the freedom requires application of the following propositions derived from previous decisions of this Court and particularly *Lange v Australian Broadcasting Corporation* and *Coleman v Power*:

A. The freedom under the *Australian Constitution* is a qualified limitation on legislative power implied in order to ensure that the people of the Commonwealth may "exercise a free and informed choice as electors". It is not an absolute freedom. It may be subject to legislative restrictions serving a legitimate purpose compatible with the system of representative government for which the *Constitution* provides, where the extent of the burden can be justified as suitable, necessary and adequate, having regard to the purpose of those restrictions.

B. The question whether a law exceeds the implied limitation depends upon the answers to the following questions, reflecting those propounded in *Lange* as modified in *Coleman v Power*:

1. Does the law effectively **burden the freedom** in its terms, operation or effect?

If "no", then the law does not exceed the implied limitation and the inquiry as to validity ends.

2. If "yes" to question 1, are the **purpose of the law and the means adopted to achieve that purpose legitimate**, in the sense that they are compatible with the maintenance of the constitutionally prescribed system of representative government? This question reflects what is referred to in these reasons as "compatibility testing".

The answer to that question will be in the affirmative if the purpose of the law and the means adopted are identified and are compatible with the constitutionally prescribed system in the

sense that they do not adversely impinge upon the functioning of the system of representative government.

If the answer to question 2 is "no", then the law exceeds the implied limitation and the inquiry as to validity ends.

3. If "yes" to question 2, is the law **reasonably appropriate and adapted to advance that legitimate object?** This question involves what is referred to in these reasons as "**proportionality** testing" to determine whether the restriction which the provision imposes on the freedom is justified.

The proportionality test involves consideration of the extent of the burden effected by the impugned provision on the freedom. There are three stages to the test – these are the inquiries as to whether the law is justified as suitable, necessary and adequate in its balance in the following senses:

***suitable*** – as having a rational connection to the purpose of the provision;

***necessary*** – in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom;

***adequate in its balance*** – a criterion requiring a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.

If the measure does not meet these criteria of proportionality testing, then the answer to question 3 will be "no" and the measure will exceed the implied limitation on legislative power.

(Emphasis added.) (Footnotes omitted.)

I have included that lengthy quote because it is important to understand the whole of the relevant test to understand how Major Gaynor's case was dealt with. To sum up, Buchanan J found that:

- the matters on which Major Gaynor was told not to speak were relevantly "political" issues- see paras [246]-[248]. Indeed, it seems clear that their controversial political content was the reason for the ADF order that they not be discussed. This was so even though some of the remarks were also personally insulting and offensive; Buchanan J noted that "the fact that statements are offensive or insulting does not take them outside the field of political discourse, which is frequently marked by offence or insult";[98]
- the order not to speak about the relevant matters did, of course, "burden" Major Gaynor's freedom of political communication, especially when followed by the sanction of termination of his commission;
- while not entirely clear, it seems clear that Buchanan J accepted that the purposes which the ADF were attempting to achieve by their orders to Major Gaynor were that of not undermining policies which supported diversity and opposed discrimination against homosexual and transgender persons, and that these were clearly legitimate aims;
- however, in the end, applying the *McCloy* tests, his Honour concluded that the means that had been adopted by the ADF in this case were not "proportional" to achievement of those aims. The means adopted, of terminating the commission, were not "adequate in balance" when

[98] At [247], quoting the High Court decision in *Coleman v Power* [2004] HCA 39; (2004) 220 CLR 1 per McHugh J at [81][82], per Gummow and Hayne JJ at [197], per Kirby J at [239].

taking into consideration the strong value our society places on freedom of speech.

Summing up, his Honour said:

> 287 Membership of the ADF, while on service in one form or another, undoubtedly carries with it obligations of obedience to lawful commands, and all the rigour and restrictions of military service but it does not seem to me that it extinguishes either **freedom of belief** or, **while free from military discipline, freedom of expression**. It may be the case that members of a full time regular service are rarely (if ever) free to publicly express opinions against the policies of the ADF or the decisions of their superiors but the same cannot always be said about members of Reserves. Such persons are often not on duty. They are private citizens, in substance, when not on duty and not in uniform. Military discipline under the Defence Discipline Act does not apply to them. In my view, their freedom of political communication cannot be burdened at those times. (emphasis added)

Hence the court ordered that the decision to terminate Major Gaynor's commission be set aside.

The other ground on which the decision had been challenged was **free exercise of religion, under s 116** of the Constitution. Here I have to say, with respect, that I think Buchanan J was a little too quick to dismiss Major Gaynor's claim, although in the end the free speech claim was stronger.

There are "broader" and "narrower" views that have been taken of the "free exercise" limb of s 116. The narrower view simply asks whether relevant legislation has a "direct" or "apparent" aim of impairing religious freedom. The broader view looks to the overall effect of a law, and asks whether it "unduly impairs" that right. Buchanan J here adopts a fairly narrow view, citing comments from the decision of the High Court in *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* (1983) 154 CLR 120 to the effect that actions based on religion are not "protected" by s 116 if they "offend against the ordinary laws". The implication seemed to be that, since the ADF orders did not prevent Major Gaynor from "going to church", they were not contrary to s 116.

However, it has to be said that, as Buchanan J himself acknowledges, the *Church of the New Faith* case was not about "free exercise"; it was a case dealing with the meaning of the word "religion" in a payroll tax statute. As I have noted in my detailed paper on the issue,[99] arguably the most important decision on "free exercise" in Australian law is still the decision of Latham CJ in *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116. There his Honour was careful to say that even an apparently "neutral" law might "unduly impair" the free exercise of religion.[100]

Here Major Gaynor did say that his views on the relevant issues were related to his Roman Catholic faith- see para [11]. It seems to me that it was at least worthy of discussion whether an order that forbade him from expressing views that his faith motivated him to express, amounted to an undue impairment of his religious faith. Buchanan J however commented at [215] that:

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[99] See above n 2.

[100] And now note also an important academic piece arguing that the "purpose of the law" approach to s 116 is flawed, and that the effect of a provision may be such that it unduly impairs free exercise: Luke Beck, "The Case against Improper Purpose as the Touchstone for Invalidity under Section 116 of the Constitution" (September 4, 2016) *Federal Law Review*, Vol. 44, No. 3, forthcoming; available at SSRN: http://ssrn.com/abstract=2834486 .

> Neither the Termination Decision nor the Redress Decision required of the applicant that he refrain from the exercise of his religion, nor required that to remain a commissioned officer he satisfy a religious test of any kind. The applicant was instructed, generally and specifically, to refrain from public statements contrary to ADF policy while he remained a member of the ADF. I am satisfied that the applicant acted by choice to make the statements which he did. I do not accept that even as a matter of conscience, he felt he had no choice but to defy the instructions and orders given to him.

There a number of odd features of this analysis. There seems to be a dichotomy set up between a "choice" to speak and the matter being one of "conscience". There is no discussion of the factors that might motivate someone, on the basis of religious belief, to speak about homosexuality or Islam. It is strongly arguable that there ought to have been more careful consideration of this issue, which does of course have possibly important consequences for future questions of religious faith being expressed by public officials.

Indeed, while it is not possible here to do justice to the idea, it is possible that, now that the High Court in *McCloy* has set up a careful scheme for balancing the implied freedom of political speech with other important social values, it may well be open to applying the *McCloy* tests, and in particular the questions of "proportionality", to consideration of what is, after all, an *explicit* constitutional freedom in s 116.[101] Such a balancing process, which gives weight to the importance of religious freedom and the need to only over-ride it in very limited circumstances, would in my view be a positive development.

There are a number of important implications of the *Gaynor* decision. In particular, it is very significant that it comes at a time when there is great controversy in the community about what can be said by those who hold to traditional Christian views of sexual morality, about other lifestyles. The decision also has possible ramifications for comments in the public arena about the dangers of violent extremist Islam. It is encouraging that the decision stresses the importance of free speech on controversial matters, even in circumstances where that speech may "offend" or "insult". It provides an important reaffirmation that robust debate is vital, and that diversity of views on controversial matters does not need to be "shut down", even if the person making the comments is a public servant.

It seems that the decision is now being appealed by the Chief of the Defence Force. The latest available report in the proceedings (a decision to continue a stay on the implementation of the orders pending the appeal, in *Chief of the Defence Force v Gaynor* [2016] FCA 311 (30 March 2016)) indicates that the appeal to the Full Court of the Federal Court was to be heard on 5-6 May 2016. It is not of course known when the decision on the appeal will be handed down.

[101] In fact my colleague Dr David Tomkins, in a helpful overview of the *McCloy* decision ("Developers, Election Funding and the Implied Freedom of Political Communication: the HCA weighs in" (Dec 2015) *Law Society Journal* 88-89), has suggested that indeed this is one direction that might be taken in the future.

## 4. Other religious free speech issues- preaching, buffer zones, trespass in churches

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

One case that deals with these issues is the slightly old decision of *Redmond-Bate v Director of Public Prosecutions* [1999] EWHC Admin 733, [2000] HRLR 249. There three "fundamentalist" Christian preachers had provoked some opposition to a crowd, which at one point seemed likely to lead to a violent reaction from some youths. A police officer then arrested, not the youths, but the preachers!

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

Sedley LJ commented:

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

In contrast to this decision, a few years later in *Hammond v DPP* [2004] EWHC 69 (Admin) a Christian preacher who was speaking while holding up a sign reading "Stop Immorality", "Stop Homosexuality" and "Stop Lesbianism" was convicted under a "public order" offence of "insulting" and "causing distress" to the passers-by. His conviction was upheld on appeal.[102]

In *Kirk Session of Sandown Free Presbyterian Church's Application* [2011] NIQB 26, however, a church which had placed an advertisement in a local newspaper headlined "The Word of God Against Sodomy" was held to have had their freedom of expression unduly interfered with when the Advertising Standards Board had ruled that the piece was unlawful. The court held that it was relevant that the context involved an annual "Gay Pride" march where opposing views were clearly being put forward.

We have discussed the *Adelaide Preachers' case* already, but a follow-up case by one of the litigants is worth noting. In *Corneloup v Launceston City Council* [2016] FCA 974 (19 August 2016) the local Council had denied Mr Corneloup a permit to preach in the Launceston Mall.

[102] These and some other "street preaching" cases are noted in Dingemans et al, ch 10.

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

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

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

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

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

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

One example can be seen in in *Fraser v Walker* [2015] VCC 1911 (19 November 2015). A person who was standing outside an abortion clinic in Melbourne was displaying a poster that featured pictures of aborted fetuses. She was charged with, and convicted of, "displaying an obscene figure in a public place" contrary to s 17(1)(b) of the *Summary Offences Act* 1966 (Vic). There were a number of interpretive and human rights issues raised in her defence; the County Court, for example, decided (surprisingly, I think) that

something could be "obscene" even if it had no sexual connotations, but was simply "offensive or disgusting" – para [21].

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

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

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

The Judge also commented:

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

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

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

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

(a) in relation to a person, besetting, harassing, intimidating, interfering with, threatening, hindering, obstructing or impeding that person; or

(b) a protest in relation to terminations that is able to be seen or heard by a person accessing, or attempting to access, premises at which terminations are provided; or

(c) footpath interference in relation to terminations; or

(d) intentionally recording, by any means, a person accessing or attempting to access premises at which terminations are provided without that person's consent; or

(e) any other prescribed behaviour.

This is a very wide prohibition, covering not only violent or abusive behaviour (which of course would already be prohibited by the general law), but also making it unlawful to simply quietly hand out leaflets in a "protest"

which can be said to be "in relation to" terminations, or indeed to wear a "protesting" T-shirt, however mild and inoffensive, while standing on the other side of the road from a clinic.[103]

A recent prosecution under this legislation rejected a number of challenges to the law on free speech and religious freedom grounds. In *Police v Preston* [2016] TASMC (27 July 2016, Mag C J Rheinberger) Mr Graham Preston and two other protestors were charged under s 9 of the Tasmanian law after having been found holding up signs protesting against abortions outside a clinic in Hobart.[104] The Magistrate found that a challenge on the basis of the implied freedom of political communication failed, after making a detailed analysis of the law in accordance with the *McCloy* schema previously noted- see paras [32] and ff. She seemed to accept the defence submission that the prohibition was a "significant" burden on their freedom of speech on a political matter- see [38]. However, when considering the purpose of the legislation, she considered the whole issue of regulation of terminations of pregnancy under Tasmanian law, rather than (as arguably should have been the case) the specific issue of the "buffer zone"- see [41]. On this point her Honour concluded that the law was a proportionate response to a problem perceived by the legislature, and that it did not entirely remove the capacity of Mr Preston and the others to express their opposition to abortion- see eg [53].

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

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

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

Finally, it is worth noting a decision which demonstrates clearly that "free speech" does not over-ride property rights, in a religious context.

In *Gallagher v McClintock* [2014] QCA 224 Mr Gallagher was a disaffected former attender of a Wesleyan Methodist church, although he had

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[103] For further comment on this legislation, along with equivalent ACT and Victorian laws, see my blog post "Abortion "buffer zones", free speech and religious freedom" (Nov 5, 2015) at https://lawandreligionaustralia.wordpress.com/2015/11/05/abortion-buffer-zones-free-speech-and-religious-freedom/ . Since that post the *Public Health and Wellbeing Amendment (Safe Access Zones) Act* 2015 (Vic) (No 66 of 2015) has commenced operation, inserting new Part 9A into the *Public Health and Wellbeing Act* 2009 8 (Vic) as from 2 May 2016, with similar effect to the Tasmanian legislation noted above.

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

never been accepted as a full "member". He disagreed with some of the doctrines now being taught at the church, and so one Sunday, while the service was going on, came into the foyer of the church where there were various pigeonholes for members and left leaflets criticising the pastor and church leaders.

He was evicted after the police were called, and later was banned from coming back. He brought an action claiming that his rights to "freedom of speech" were being infringed. The Queensland Court of Appeal made some interesting points about the right to be on church property. As he was not a "member" he had no contractual right to be on the premises; his "license" to be there could be revoked by the owner of the land – see [23]-[25]. There was also a provision under Queenslandd law which made it an offence to "disquiet or disturb any meeting of persons lawfully assembled for religious worship" (s 207 *Criminal Code* (Qld)), and hence it was an implied term of his license before revoked that be obey this law- [25].

Arguably there was also a common law implied term that he "behave in reasonable conformity with the requirements of the religion"- see [26]. So he had no rights to be present once the church leaders had revoked his license. Any right to freedom of speech did not give him a right to exercise his freedom on someone else's property. In any event, his claim to have "free speech" rights flowing from article 9 of the *Bill of Rights* 1688 (!) was misguided, as that article only related to free speech "in Parliament".

The Court also considered an argument flowing from the (actual) implied right of freedom of communication on government and political matters, and quoted *Monis*. But they concluded that even if his leaflet dealt with political matters, he did not have a right to "express those opinions on land from which he ha[d] been lawfully excluded"- [44].

## 5. Conclusion

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

Some of those issues will be those raised by religious beliefs. It is vital that Australia allow full and open discussion of the merits of various religious positions, so that informed decisions can be made. Religious freedom is a fundamental human right protected not only by international instruments but by the Commonwealth Constitution and other laws. While all human rights must be balanced with competing interests, it is essential that the interest not to be "offended" by someone else's views not be held to outweight the fundamental importance of the right to live out one's religion and to engage in public speech on these important issues. Lawyers in Australia in the 21st century are likely to play a key role in defending these key human interests.

## Further Reading

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