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Freedom of Religion vs Freedom of Expression: Critical Legal Issues

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Legalwise Seminar, 27 Nov 2019**The Legal Conflict Between Equality, Rights and Discrimination**

“Freedom of Religion vs Freedom of Expression: Critical Legal Issues”

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The title of our overall session this morning refers to “conflict”, and my presentation refers to a clash between religious freedom and free speech. Perhaps in other contexts we might want to play down the adversarial element, but I think it is helpful to recognise from the outset that these values, and their associated behaviour, *can* create conflict. Not that that is unique to these two “rights”- any rights claimed by one person are always to some extent in tension with other rights of other persons. But the clash between these two rights, or interests, or desires, can seem to be particularly sharp today. So I think it helpful for those of us who are lawyers to see how these clashes can arise, and the legal mechanisms that exist for resolution of such conflicts, or for at least reducing unnecessary clashes.

We have already heard today from Commissioner Santow about the general avenues by which Australia protects religious freedom. To offer my own brief summary, religious freedom is an important human right which has been recognised as worthy of protection around the common law world in different ways, and in particular is protected under international human rights instruments and the Commonwealth Constitution.² The High Court has commented that:

“Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society...”³

Domestically religious freedom is also protected to some extent by local human rights “charters” in three jurisdictions. But one of the other ways that it is protected is through the operation of discrimination legislation, in two ways: by laws which prohibit unjust discrimination on the basis of religious belief, and through “exemptions” (or what I prefer to call “balancing clauses”) in discrimination laws that focus on other prohibited grounds.⁴

Free speech, of course, is another fundamental and vital right protected by our legal system. The right of freedom of speech 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.⁵

¹ BA/LLB (UNSW), BTh (ACT), DipATh (Moore), LLM (Newc); for comments on Law and Religion issues see my blog, <https://lawandreligionaustralia.blog> . Views expressed in this paper are of course my own, not necessarily those of my institution.

² For a more detailed overview see a paper from 2017: Neil J Foster, "Religious Freedom in Australia overview 2017 update" at: http://works.bepress.com/neil_foster/112/ . Art 18 of the *International Covenant on Civil and Political Rights* provides strong protection for this right, as does art 9 of the *European Convention on Human Rights*. For the view that art 18 should usually be preferred as a *lex specialis* where there is an issue of conflict with other rights, see H. Victor Condé “Human rights and the protection of religious expression: Manifestation of religion as *Lex Specialis* of freedom of expression” in *Religion, pluralism, and reconciling difference*, edited by W. Cole Durham, Jr. & Donlu Thayer (New York, NY : Routledge, 2019) 21-46.

³ *Church of the New Faith v Commissioner for Pay-Roll Tax* (1983) 57 ALJR 785 at 787, per Mason ACJ and Brennan J.

⁴ For comments on the “balancing clauses” analysis see Neil J Foster, "Freedom of Religion and Balancing Clauses in Discrimination Legislation" *Oxford Journal of Law and Religion* Vol. 5 (2016) pp. 385 – 430.

⁵ 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.

These two rights, not coincidentally, are significant enough that they are both protected in different ways under the Commonwealth Constitution.⁶ Section 116 forbids the Commonwealth Parliament from enacting laws which “unduly” interfere with the free exercise of religion.⁷ Hidden between the lines of the Constitution, the High Court has identified what has been called an “implied freedom of political communication”, which has been the subject of detailed refinement and debate in recent years. The Court’s most recent analysis, which also involved to some extent issues of religious freedom, is to be found in *Clubb v Edwards; Preston v Avery*⁸, where the Court wrestled with whether State laws enacting a “buffer zone” preventing any discussion or comment on abortion within a wide physical zone around an abortion clinic, were in breach of the implied freedom. (All Justices held that there was no clash and that the laws were not invalid, but with varying tests being adopted and varying degrees of certainty about the outcome.)

That case itself did not involve a formal clash between the two rights. While each of the appellants were undertaking their activities because of their deep religious commitments, in neither case was a challenge mounted on the grounds of religious freedom. This was no doubt because the prohibition on interfering with “free exercise” of religion in s 116 of the Commonwealth Constitution, does not apply to laws made by States.

But what happens where there *is* a formal clash between these two rights?

1. Religious discrimination and freedom of speech

The two rights, of course, are not always opposed. As Ahdar & Leigh point out, for many religions *speaking* about their religious beliefs is a positive duty, and hence “freedom of religious speech” can be seen as 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.⁹ 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.¹⁰

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 (ECHR) as a vital part of the internationally protected right to freedom of religion. It has also been recognized as such in the High Court of Australia. Kirby J in the High Court, in *NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*,¹¹ offered clear support for the view put forward by the ECHR in *Kokkinakis v Greece*,¹² where that Court affirmed that religious freedom includes the freedom:

⁶ Just as, in the United States of America Constitution, they are both mentioned in the First Amendment to that document.

⁷ For justification for this additional adjective, see the seminal (and so far unequalled) discussion of the “free exercise” clause in *Adelaide Company of Jehovah’s Witnesses Inc v Commonwealth* (1943) 67 CLR 116, especially per Latham CJ at 128.

⁸ [2019] HCA 11 (10 April 2019).

⁹ *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).

¹⁰ R Ahdar & I Leigh, *Religious Freedom in the Liberal State* (2nd ed; Oxford: OUP, 2013), at 427.

¹¹ [2005] HCA 29; (2005) 216 ALR 1; (2005) 79 ALJR 1142, at [121].

¹² (1993) 17 EHRR 397 at 418.

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

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

Where should the law draw the limits on speech here? One issue arises under particular laws prohibiting “**vilification**” on the basis of religious belief or activity, and on the basis of sexual orientation- as it is in these areas that the conflict of interests seems to be arising.

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*. There are also other laws (indeed, these are more common) making unlawful “hate speech” on the basis of *homosexuality*, or “sexual orientation” more generally, or “gender identity”. In the case of religious vilification laws, the clash with religious freedom comes where someone wants to robustly criticise or attack religious beliefs which are viewed as wrong or harmful. In the case of “sexuality vilification” laws, the clash comes because most mainstream religions have historically taught that sexual relations outside a heterosexual marriage are contrary to God's will. The question then arises whether presenting such teaching causes relevant serious harm to those who identify as “same sex attracted” or LGBT.

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

Comments on the difficulty of defining “hate speech” were offered by former Chief Justice of Australia the Hon Robert French AC, in the *Report of the Independent Review of Freedom of Speech in Australian Higher Education Providers*:

Over-broadening the definition can amount to misappropriation of the negative moral connotation associated with the word ‘hate’ in common usage and loss of moral clarity and moral force in rules proscribing such speech. Rules against ‘hate speech’ broadly defined have a correspondingly broad impact on freedom of speech.¹³

There have been a number of important overviews of the developing law of ‘religious vilification’ or ‘religious hate speech’.¹⁴ Gelber and Stone, for example, offer this definition of the type of law at issue here, defining what they mean by “hate speech”:

¹³ (March 2019) at 61; see <https://www.education.gov.au/review-university-freedom-speech> .

¹⁴ K Gelber & A Stone (eds), *Hate Speech and Freedom of Speech in Australia* (Sydney: Federation Press, 2007), esp ch 8, Lawrence McNamara, “Salvation and the State: Religious Vilification Laws and Religious Speech”, at 145-168.

Hate speech is speech or expression which is capable of instilling or inciting hatred of, or prejudice towards, a person or group of people on a specified ground ...¹⁵

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

In Australia, four jurisdictions have introduced such laws: Queensland, Tasmania, Victoria and the ACT.¹⁶ Perhaps the most prominent example is the Victorian provision, s 8 of the *Racial and Religious Tolerance Act* 2001 (Vic):

Religious vilification unlawful

8(1) A person must not, on the ground of the religious belief or activity of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.
Note: **Engage in conduct** includes use of the internet or e-mail to publish or transmit statements or other material.

(2) For the purposes of subsection (1), conduct-

- (a) may be constituted by a single occasion or by a number of occasions over a period of time; and
- (b) may occur in or outside Victoria.

There is also 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.¹⁷

In *Deen v Lamb*¹⁸ 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 equivalent exception in s 124A(2)(c) of the Queensland Act as it was done ‘in good faith’ for political purposes.

The most controversial application of these laws so far, however, was in the litigation involving the ‘Catch the Fire’ organisation.¹⁹ McNamara, Ahdar, Blake and Parkinson all offer cogent critiques of the way that the original decision finding the organisation guilty of

¹⁵ Gelber & Stone at xiii. As will be argued below, the reference to inciting “prejudice” may be setting the bar too low here for regulation of speech.

¹⁶ See for an overview at the time it was written, L McNamara, “Salvation and the State: Religious Vilification Laws and Religious Speech”, in Gelber & Stone (eds) 145-168, at 146. The provisions then in force were the *Anti-Discrimination Act* 1991 (Qld) s 124A, the *Anti-Discrimination Act* 1998 (Tas) ss 19 & 55, and s 8 of the *Racial and Religious Tolerance Act* 2001 (Vic). We will also note below the “anti-offence” provision contained in s 17 of the Tasmanian law. More recently the ACT has introduced (in 2016) s 67A(1)(f) of the *Discrimination Act* 1991 (ACT).

¹⁷ Sub-section (2) was added to the Act in 2006 partly in response to the *Catch the Fire* litigation discussed below.

¹⁸ [2001] QADT 20.

¹⁹ See also the other main case decided under the Victorian provisions, *Fletcher v Salvation Army Australia* [2005] VCAT 1523, discussed in Blake, n 20 below, at 396-397.

vilification was made, and comment on the overturning of the decision by the Victorian Court of Appeal.²⁰ A brief summary is appropriate.

The original tribunal decision was *Islamic Council of Victoria v Catch the Fire Ministries Inc*.²¹ In short, a Christian religious group advertised to a Christian audience that it was proposing to run a seminar that would critique Islam and help its listeners understand how to reach out to Muslims. Representatives of the Islamic Council of Victoria knew the nature of the seminar, chose to attend, and then took action against the group on the basis of statements that were made critiquing Islam. While some untrue and unhelpful statements may have been made in the course of the lengthy seminar (and in some related material published on a website), most of the comments made were sourced from multiple Islamic authors.

Initially, the tribunal found the pastors involved to be guilty of vilification and ordered them to publish retractions. On appeal the Victorian Court of Appeal in *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc*²² 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, 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.²⁴

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.²⁵ In general it seems far preferable for debate about religion to be "untrammelled" by fear of legal intervention.

Apart from this high-profile case, there have not been many cases exploring the details of the religious vilification laws. Two sets of proceedings have involved a little-known religious group, the "Ordo Templi Orientis" ("OTO"), also known as "Thelema", whose adherents are followers of the teachings of notorious "Satanist" Aleister Crowley.²⁶ Over a long period of time allegations have been made on a number of different internet forums that the organisation still supports Satanic ritual child abuse. The OTO adherents, who mostly seem to be educated and fairly well-resourced, have been victorious in a number of cases against self-represented internet commentators, claiming that they have been vilified on account of

²⁰ See McNamara, above n 16 ; R T Ahdar, "Religious Vilification: Confused Policy, Unsound Principle and Unfortunate Law" (2007) 26 *U Q Law Jnl* 293-316; G Blake, "Promoting religious tolerance in a multifaitth society: Religious vilification legislation in Australia and the UK" (2007) 81 *ALJ* 386-405; P Parkinson, "Religious vilification, anti-discrimination laws and religious minorities in Australia: The freedom to be different" (2007) 81 *ALJ* 954-966.

²¹ [2004] VCAT 2510.

²² [2006] VSCA 284.

²³ See, for example, the summary in Ahdar, above n 20, at 305.

²⁴ [2006] VSCA 284 at [15].

²⁵ 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.

²⁶ For some background to "Thelema" from what seems to be a very sympathetic viewpoint, see <http://en.wikipedia.org/wiki/Thelema> . (Wikipedia of course is not 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!)

their religious beliefs.²⁷ It is perhaps somewhat concerning that in none of that vilification litigation was the truth of the various claims made actually addressed by the relevant tribunals.²⁸

Another example of claimed “religious vilification” was dealt with in the decision of the Victorian Civil and Administrative Tribunal in *Sisalem v The Herald & Weekly Times Ltd.*²⁹

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

In the circumstances Mr Sisalem had not presented evidence sufficient to show that persons would be caused to hate etc Muslim persons because of the article- see the summary conclusion at para [67].

Of course, even if s 8 had apparently been breached, the s 11 defences 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.

Another recent vilification case, which as it turned out was not actionable as “religious vilification”, illustrates some of the issues raised by these laws. The action in *Ekermawi v Nine Network Australia Pty Limited*³⁰ based on comments about “Muslims” in general on a morning TV show, failed because NSW law (unlike the other jurisdictions noted above)

²⁷ Under the Victorian legislation, see *Ordo Templi Orientis v Legg* [2007] VCAT 1484, and later proceedings for contempt at [2007] VCAT 2470. A later appeal failed: see *Devine v Victorian Civil and Administrative Tribunal* [2008] VSC 410. For contemporary comment on the human rights issues see Jeremy Gans’ note at <http://charterblog.wordpress.com/2008/10/12/the-rights-of-difficult-defendants/>, where it was suggested that the way that the proceedings had been conducted was probably in breach of the rights of the defendants under the Victorian Charter of Human Rights and Responsibilities. Under the ACT law, see *Bottrill v Sunol (Discrimination)* (“*Bottrill No 1*”) [2017] ACAT 81 (9 October 2017), and *Bottrill v Sunol (Discrimination)* (“*Bottrill No 2*”) [2018] ACAT 21 (13 March 2018).

²⁸ See M Thornton & T Luker, “The Spectral Ground: Religious Belief Discrimination” (2009) 9 *Macquarie Law Journal* 71-91, at 90: “There is no interrogation whatsoever of the religious beliefs associated with the *Ordo Templi Orientis* and its lawfulness is assumed.”

²⁹ [2016] VCAT 1197.

³⁰ [2019] NSWCATAD 29 (15 Feb 2019).

contains no civil prohibition on “religious vilification” (and the Tribunal held that on the available evidence, “Islam” was not a racial category).³¹ However, there were some concerning comments made by the Tribunal members to the effect that a defence under s 20C allowing discussion of matters of “public interest”, so long as the statement was made “reasonably and in good faith”, was not applicable because the comments were not supported by evidence.

The value of free speech is such an important consideration, it seems hard to imagine that in providing this broad exception Parliament intended courts and tribunals to make their own determination as to whether a comment was “correct”, before it could be held to be one made “reasonably and in good faith”. For one thing, the word “reasonably” in s 20C(2) of the *Anti-Discrimination Act 1977* is an *adverb*, applying to the “doing” of the act, not an *adjective* qualifying the content of what was said.

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

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

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

Of course, the comments need not have been *correct*. But it seems quite clear that, agree with them or not, the comments were a good faith attempt to discuss that issue in a way that was logically connected with the issue.

If the remarks are harmful, then the best way to deal with them is to openly point out where the logic is faulty and why the commentator is wrong. But for the law to make it impossible for such issues to be discussed in public, will only convince those who share these views that there must be something to hide, and indeed are likely to make more people come to share those views.³²

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

³¹ For a more detailed analysis, see N Foster “Religious “vilification” not unlawful in NSW” (Feb 15, 2019) <https://lawandreligionaustralia.blog/2019/02/15/religious-vilification-not-unlawful-in-nsw/> . Reference is made below to the *criminal* prohibition in s 93Z of the *Crimes Act 1900* (NSW), creating the offence of “publicly threatening or inciting violence on grounds of race, religion, sexual orientation, gender identity or intersex or HIV/AIDS status”. But the threatening of violence, or incitement of violence, goes well beyond what has been called “vilification” in the civil statutes. For judicial comment that teaching based on the Qur’an that all non-believers should be killed, would amount to the commission of such an offence, see *Fagan J in R v Bayda; R v Namoa (No 8)* [2019] NSWSC 24 (31 January 2019) at [75] (though in that case the relevant actions had taken place before the commencement of s 93Z on 13 August, 2018.)

³² I note below that a similar approach to the issue of “reasonableness” in a related defence in Tasmania was taken in the decision of *Durston v Anti-Discrimination Tribunal (No 2)* [2018] TASSC 48.

disinfectant for the disease will be the light of reason showing why the remarks are wrong, if that is the case.

In particular, there are some significant decisions at the ultimate appellate level in both Australia and Canada emphasising that a law which prohibits the causing of “offence” alone amount to far too stringent an impairment of free speech rights.

In Canada, in *Saskatchewan (Human Rights Commission) v Whatcott*,³³ the Supreme Court of Canada unanimously upheld the decision of a lower tribunal to fine the defendant for distribution of pamphlets opposing homosexuality. But in the course of so doing, they struck out a number of words in the relevant provincial legislation, s 14 of the *Saskatchewan Human Rights Code*. This section provided:

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

“Prohibited grounds” included homosexuality. The Supreme Court held that the prohibition on “exposing someone to hatred” was valid under the Canadian *Charter of Rights and Freedoms*, but ruled that the words “ridicules, belittles or otherwise affronts the dignity of” were invalid and should be struck out:

[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)

In Australia, two important decisions of the High Court of Australia handed down (coincidentally) on the same day as *Whatcott*, also affirmed the importance of laws not penalising the mere causing of offence. In *Attorney-General (SA) v Corporation of the City of Adelaide*³⁴ (“the *Adelaide Preachers case*”) a 5-1 decision 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*³⁵ 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 impact on the giving of “religious offence”, and so this case too implicates issues of interest in the present context.

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. The court upheld the law in question as a reasonable regulation of “traffic issues” in the Adelaide CBD; but a number of the Justices made it clear that if the law had regulated the “content” of the relevant speech it might have been invalid.³⁶ (It seems fairly clear, as accepted in this case, that “religiously inspired” comments may be protected as sufficiently connected with “politics”,

³³ 2013 SCC 11 (27 Feb 2013).

³⁴ [2013] HCA 3 (27 February 2013).

³⁵ [2013] HCA 4 (27 February 2013),

³⁶ See eg French CJ at [46], [68]: “The granting or withholding of permission to engage in such activities cannot validly be based upon approval or disapproval of their content”; Hayne J at [140].

although no doubt there may be room to argue the matter in some future fact scenario.³⁷) The decision also makes it clear, however, that a law may “burden” free speech where it is appropriately adapted to achieve legitimate government ends.³⁸

In *Monis v The Queen*³⁹ the question was whether the Commonwealth Parliament can authorise a law which forbids the use of the postal service for communication of “offensive” speech. While the court in the end was evenly divided, 3-3, on the validity of the law in question,⁴⁰ two Justices, 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”. In particular, 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.⁴¹

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 later noted that “eliminating the giving of offence, even serious offence, is not a legitimate object or end” (at [222]), and that: “The common law has never recognised any general right or interest not to be offended” (at [223]). In the end, however, three members of the court (interpreting the standard required by the law as “particularly serious” offence - see [333]-[339]) upheld the validity of the law.⁴²

The question of whether the law should prohibit the causing of “offence” has come up in discussion over the scope of s 18C of the *Racial Discrimination Act* 1975 (“RDA”).⁴³ Without going into the details of that debate, it is significant to note the comments in the *Australian Law Journal*, from Sackville AJA, a former Federal Court Justice and former Dean of the UNSW Law Faculty. His Honour, writing extrajudicially, 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

³⁷ For discussion see M Landrigan, “Can the Implied Freedom of Political Discourse Apply to Speech by or about Religious Leaders?” (2014) 34 *Adelaide Law Review* 427-457.

³⁸ A further attempt to argue that the Council was acting invalidly in banning preaching was quickly dismissed on the basis of the High Court decision- see *Bickle v Corporation of the City of Adelaide* [2013] SASC 115. However, in *Corneloup v Launceston City Council* [2016] FCA 974 one of the claimants involved in the *Adelaide Preachers case* was successful in overturning a preaching ban in Tasmania, on administrative law grounds.

³⁹ [2013] HCA 4 (27 February 2013).

⁴⁰ Normally, in a major Constitutional decision, the Court would sit with all 7 members. Perhaps as Gummow J was about to retire when this matter was heard, his Honour did not sit. Hence the possibility of the unfortunate even split which eventuated here.

⁴¹ At [88].

⁴² In the case of a split of this sort in an appeal from a superior court, under s 23(2)(a) of the Judiciary Act 1903 (Cth), if the High Court is evenly divided in an appeal then the decision of the court appealed from is affirmed. Accordingly, the appeals from the NSWCCA, which had upheld the validity of the law, were dismissed.

⁴³ See eg *Eatock v Bolt* [2011] FCA 1103.

determining whether the hate speech is likely to have the prohibited effect. An objective test would involve reference to the standards of a reasonable 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.⁴⁴

While the constitutional validity of s 18C RDA was upheld in the Federal Court in *Toben v Jones*,⁴⁵ the provision has not been considered by the High Court itself, and in recent years, as we have seen, a number of decisions of that Court have laid great emphasis on the importance of the implied freedom of political communication.⁴⁶

Former Chief Justice Robert French, in an extrajudicial address entitled “Giving and Taking Offence”,⁴⁷ also 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).

Recently, as noted above, Mr French conducted an inquiry into issues of free speech in Australian Universities.⁴⁸ The Report provides a helpful overview of free speech protections in Australia, noting that free speech is a “paramount value” in the Australian legal system which should not be lightly interfered with.⁴⁹ It also is careful to note that Australian law does not usually provide protection against the causing of “offence”.⁵⁰ In the proposed Model Code for Universities recommended by the Report, the definition of ‘the duty to foster the wellbeing of staff and students’ explicitly says that it “does not extend to a duty to protect any person from feeling offended or shocked or insulted by the lawful speech of another”.⁵¹

Despite these persuasive reasons for not making the causing of mere “offence” unlawful, there is one significant example of a law which does just that, s 17 of Tasmania’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 areas where there are likely to be clashes with traditional religious moral values, such as sexual activity and sexual orientation.⁵²

While s 17, then, is not an example of direct prohibition of speech *about* religion, the list of matters that it does cover is clearly likely to impact on speech *by* religious speakers, who may want to refer to a religious perspective on the matters covered.⁵³

Section 17(1) provides:

17. Prohibition of certain conduct and sexual harassment

⁴⁴ The Hon R Sackville AO, “Anti-Semitism, Hate Speech and Part IIA of the Racial Discrimination Act” (2016) 90 ALJ 631 at 646.

⁴⁵ [2003] FCAFC 137; (2003) 129 FCR 515.

⁴⁶ 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 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. See *Clubb v Edwards*; *Preston v Avery* [2019] HCA 11, noted above, for the latest version of the structured analysis required in such cases.

⁴⁷ Sir Harry Gibbs Memorial Oration, Adelaide, 13 August 2016, <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj13Aug2016.pdf>.

⁴⁸ See above, n 13.

⁴⁹ *Ibid*, ch 9.

⁵⁰ *Ibid*, at 106, quoting a passage from the judgment of Hayne J in *Monis* previously noted above in this paper, at [2013] 249 CLR 92, 175 [223].

⁵¹ *Ibid*, at 232.

⁵² Interestingly, the “prohibited grounds” of “religious belief or affiliation” (s 16(o)) and “religious activity” (s 16(p)) are not themselves included in the list of attributes which can be relied on under s 17.

⁵³ Section 19 of the ADA 1998, by contrast, is on the more common model of an “anti-vilification” law used elsewhere in Australia, and requires incitement of hatred, serious contempt or severe ridicule (and extends to speech on the ground of religion).

(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.

There is also a defence provision, s 55, which provides:

55. Public purpose

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

- (a) a fair report of a public act; or
- (b) a communication or dissemination of a matter that is subject to a defence of absolute privilege in proceedings for defamation; or
- (c) a public act done in good faith for –
 - (i) academic, artistic, scientific or research purposes; or
 - (ii) any purpose in the public interest.

Section 17 as it now stands is, in my view, 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. The possible reach of the provision can be seen in litigation under s 17 which was commenced against the Roman Catholic Archbishop of Hobart, claiming that his distribution of a booklet setting out the Roman Catholic view on sex, to Roman Catholic schools, had caused offence to a same-sex attracted person who was not involved in the schools.⁵⁴

Section 17, then, sets the bar for unlawful behaviour very low. A claim by someone that they have felt any of the negative emotions set out in this list will be very hard to rebut, as most are purely subjective. As we have seen previously, the penalizing of mere offence or insult is on general principle far too strong a restriction on free speech, as a matter of public policy and the policy of the law. 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.⁵⁵

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.

In addition, s 55 (the defence provision) allows a more limited range of defences than equivalent provisions in other jurisdictions. Section 55 contains no “defence” specifically

⁵⁴ For comments on the litigation (which was later discontinued after some time and expense) see a blog post, “First they came for the Catholics...” (Nov 13, 2015) <https://lawandreligionaustralia.blog/2015/11/13/first-they-came-for-the-catholics/>.

⁵⁵ 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/>>.

relating to “religious purposes”, a defence which is present in other State and Territory legislation on these topics.⁵⁶

There is another important issue, which concerns the way that “public interest” as a defence has been interpreted in Tasmania. In the decision in *Williams v Threewisemonkeys and Durston*⁵⁷ the Tasmanian Anti-Discrimination 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.)

A similar approach was taken on appeal in those proceedings to the Supreme Court, in *Durston v Anti-Discrimination Tribunal (No 2)*.⁵⁸ Interestingly Brett J ruled that s 17’s prohibition on “offence” arguably *did* make that provision invalid if viewed on its own (see [69]), but that when the defence provision in s 55 was considered as part of the overall scheme of the Act, this cured the possible problem. In discussing the provision, and in particular what it meant for a comment to be made “in the public interest”, his Honour again adopted what it is submitted is an erroneous interpretation of the phrase, by which it is seen as requiring a court or tribunal to come to its *own* views as to whether a comment is actually in the public interest—see [75].

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 these 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 sensibly achieves this result by spelling out that “discussion or debate” generally is presumed to be in the “public interest”.⁵⁹

Another 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 seems clear that there would be many in Tasmania who would like to discuss issues that might cause controversy but would be discouraged from doing so because of the current law. A broadening of s 55 is clearly needed. Arguably s 17 itself is so deeply flawed that it ought to be simply repealed.

On this question, reference should be made to the proposals put forward by the Federal Government in its Exposure Draft of a *Religious Discrimination Bill* (“RDB”).⁶⁰ The Bill has not yet been formally introduced into Parliament, but it seems worthwhile to note the issues it raises.⁶¹

⁵⁶ See, eg s 49ZT, *Anti-Discrimination Act 1977* (NSW), and s 11, *Racial and Religious Tolerance Act 2001* (Vic).

⁵⁷ [2015] TASADT 4.

⁵⁸ [2018] TASSC 48 (4 October 2018). At both the Tribunal hearing and on appeal the alleged wrongdoer was unrepresented by legal advisors.

⁵⁹ See s 49ZT(2)(c), adding the epexegetical phrase “including discussion or debate about and expositions of any act or matter” after the words “public interest”, to make it clear that discussion or debate satisfies the public interest test, rather than getting the answer that the court considers “correct”.

⁶⁰ See <https://www.ag.gov.au/Consultations/Pages/religious-freedom-bills.aspx>. For my previous comments on the Bill and its related material, see two blog posts: “New Commonwealth Religious Freedom Laws” (Aug 30, 2019) <https://lawandreligionaustralia.blog/2019/08/30/new-commonwealth-religious-freedom-laws/>; and “Legal Reflections on the Religious Discrimination Bill” (Sep 2, 2019) <https://lawandreligionaustralia.blog/2019/09/02/legal-reflections-on-the-religious-discrimination-bill/>.

⁶¹ The Government has indicated its intention to introduce a revised version of the Exposure Draft before the end of the year. It is possible that between the preparation of this paper and its presentation a formal Government Bill

As those interested in this area will be aware, the draft RDB was produced by way of fulfilment of an election promise to implement a number of the recommendations of a Panel of Experts chaired by Phillip Ruddock, which provided its report to the Government in May 2018.⁶² However, the Ruddock Report itself did not make any firm recommendations on the question of “vilification” laws, contenting itself with noting that there was inconsistency between jurisdictions, and recommending that the various levels of government “cooperate to ensure greater consistency and national coverage”.⁶³

The Government has decided to go further than this. Clause 41 of the RDB, which is the only clause in Part 4 of the Bill, provides that “statements of belief” do not, without more, constitute discrimination under any Commonwealth, State or Territory discrimination law. In particular, under cl 41(1)(b), a statement of belief is specifically said not to contravene s 17 of the Tasmanian *Anti-Discrimination Act* 1998, which as we have seen prohibits the causing of “offence” on a number of grounds, including sexual orientation. It seems fairly clear that the example of Archbishop Porteous was in mind when this clause was drafted.

However, the clause, in para 41(2)(b), excludes from its protection speech that “would, or is likely to, harass, vilify or incite hatred or violence against another person or group of persons”. A number of commentators have called for this term “vilify” to be more clearly defined. No-one wants to support speech which incites hatred or violence. But since those things are already mentioned in the paragraph, what else is covered by “vilify”? Fine nuances of language can make an important difference, and it seems quite unsatisfactory to leave this controversial term undefined.

One might argue that the term could be given some content from the way in which it is used in State laws. For example, in NSW s 49ZT of the *Anti-Discrimination Act* 1977 is headed “Homosexual vilification unlawful”. Parliament has not deigned to provide a separate definition of “vilification”, but the content of the provision, in describing the relevant prohibited behaviour, is presumably what the term means:

- (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.

The key phrase seems to be, “incite hatred towards, serious contempt for, or severe ridicule of” a person or group. It is possible that this is the sort of speech that the RDB intends to catch by the word “vilify”. But even if that is so, the further question will arise as to whether the “defences” listed in s 49ZT(2) are “picked up”, so that something which would otherwise be regarded as “vilifying” will not be so if one of these defences apply.

There is a defence under s 49ZT(2)(c), for example, 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. (emphasis added)

All in all, it is quite unsatisfactory to rely on some sort of shared understanding of the word “vilify”, when it clear from a glance at the statute book around Australia that there is no such common meaning.

will have been introduced. If so, I will endeavour to take into account any relevant changes when the paper is presented.

⁶² *Religious Freedom Review: Report of the Expert Panel* (Dec 2018), <https://www.ag.gov.au/RightsAndProtections/HumanRights/Documents/religious-freedom-review-expert-panel-report-2018.pdf>

⁶³ See above, n 62 at paras 1.350-1.351.

Having mentioned s 49ZT, it is worth noting that this provision is an example of the interplay of free speech, religious freedom, and the right of persons not to be harmed by speech in Australian law. It sets up a *prima facie* restriction on free speech in s 49ZT(1) to avoid behaviour viewed as harmful to homosexual persons, but attempts to balance these issues with other interests (including religious freedom) in s 49ZT(2).

In an important ruling in *Sunol v Collier (No 2)*,⁶⁴ 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*⁶⁵ 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 the suggestion I have made previously 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”.⁶⁶

2. Review of religious exemptions in anti-discrimination law: ALRC discussion paper

At this point let me mention briefly the issue of exemptions, or balancing clauses, in anti-discrimination laws, and ways that the law may change in the future. When this seminar was first mooted, it was known that the Australian Law Reform Commission (the ALRC) was conducting an inquiry into this topic, and it was thought that a discussion paper was to be released during the year. Notice that this exercise had been deliberately separated from the process of producing a law aimed at directly preventing *religious* discrimination. The ALRC inquiry was to consider how religious freedom was recognised by balancing clauses inserted into discrimination laws dealing with *other* prohibited grounds. The main such clash was exemplified in the heated political debates at the end of 2018 over provisions in the *Sex Discrimination Act* 1984 (Cth) which, it was claimed, allowed religious schools to expel or refuse to enrol same-sex attracted students, or to not hire teachers who were not willing to

⁶⁴ [2012] NSWCA 44.

⁶⁵ Above, n 22.

⁶⁶ See above, n 4. For an argument that *Sunol* was wrong to find s 49ZT valid, see A. K. Thompson, “Burns v Corbett: What If The High Court Had Decided The Implied Freedom Of Political Communication Issue ?” (2018) 20/1 *The University of Notre Dame Australia Law Review*; available at: <https://researchonline.nd.edu.au/undalr/vol20/iss1/4>.

model religiously acceptable sexual behaviour. The Government (at the time governing as a minority) were narrowly able to resist what would have been sweeping changes in this area by promising that the matter would be considered by the ALRC.⁶⁷

However, the ALRC inquiry timetable changed somewhat dramatically when the Government released its Exposure Draft of the proposed *Religious Discrimination Bill*. On 29 August 2019 the Commission noted in a press release that:

The Attorney-General has now amended the terms of reference narrowing the focus of the inquiry to confine the inquiry to issues not resolved by the Government's Religious Discrimination Bill, and to confine the ALRC's recommendations to legislation other than the Religious Discrimination Bill.⁶⁸

The final Report is now due in December 2020, and it seems that a formal discussion paper will not be released until well into next year. Those who are interested in the preliminary and informal views of the President of the ALRC (Justice Derrington) can find them in some comments made a conference in September 2019.⁶⁹

3. Codes of conduct and contractual law

A specific area of clash between rights which has generated a lot of press and public interest in the last year is that which arises where a term of an employment contract purports to prevent an employee from expressing views which others may be offended by; but the employee's views are based on his or her religious beliefs. The issue arises most sharply when the views are expressed outside working hours and in a context which seems to be "personal" rather than "official".

The primary example, of course, is the Israel Folau case.⁷⁰ In brief, Mr Folau, a well-known footballer who was at the time contracted to the Australian Rugby Union (ARU), made some controversial comments on social media reflecting his religious views.

The text of his "meme" (a picture apparently taken from another website) was: "Warning: Drunks, Homosexuals, Adulterers, Liars, Fornicators, Thieves, Atheists, Idolators: Hell Awaits You- Repent! Only Jesus Saves." To this he added his own personal comment: "Those that are living in Sin will end up in Hell unless you repent. Jesus Christ loves you and is giving you time to turn away from your sin and come to him." (The comment was similar to many other pictures shared on his account, many of which are Bible verses or exhortations to nominal Christians to follow Jesus Christ in deed as well as word.)

Rugby Australia, then announced that it (and the NSW Rugby Union) would terminate his contract unless he could offer some explanation for the comments which they were satisfied with (any "compelling mitigating factors"). They alleged that his comments breached a "code of conduct" which formed part of his contract of employment: "He cannot share material on social media that condemns, vilifies or discriminates against people on the basis of their sexuality." They also alleged that being "disrespectful to people because of their sexuality" would justify disciplinary action. After an internal tribunal finding that he was guilty of a high-level breach of the RA "code of conduct", he was formally dismissed on 17 May 2019.⁷¹

⁶⁷ For a summary of the events at the time, see <https://lawandreligionaustralia.blog/2018/12/05/update-on-amendments-to-sda-in-parliament/> (Dec 5, 2018).

⁶⁸ See https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_media_release_29_augusta.pdf.

⁶⁹ See https://freedomforfaith.org.au/images/uploads/Text_of_speech_-_Of_shields_and_swords.pdf.

⁷⁰ For an excellent recent overview of the facts and the legal issues see Helen Dale, "A Fair Go" <https://www.lawliberty.org/2019/11/13/a-fair-go-israel-folau-rugby-labor-law-religious-liberty/> (Nov 13, 2019).

⁷¹ Interestingly, the day before the electors of Australia voted in a Federal election, the surprising result of which (the unexpected return of a conservative LNP government) was attributed by some commentators, in part, to concerns of religious Australians about the events of the Folau case.

It might have at first been thought that Mr Folau's post was unlawful under NSW law. Under s 49ZT of the *Anti-Discrimination Act 1977* (NSW), as we have seen, it is unlawful 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". But s 49ZT(2)(c) exempts from that prohibition any act "done reasonably and in good faith, for... religious instruction", and the overall theme of Mr Folau's Instagram account could well be said to be "religious instruction".

The fundamental questions concerning the dismissal are these: (1) were the comments "vilifying" or any of the other negative epithets applied in the contractual codes? And (2) was it relevant that these comments were made by way of presenting the teaching of the Bible to an audience who had chosen to voluntarily "follow" Mr Folau in order to find out what he would say? A significant further question is (3) can a private contractual clause over-ride rights given under discrimination laws?

(a) Was there "vilification" under the code of conduct?

On the first point of "**vilification**" under the code of conduct, the question seems to boil down to this: can a statement that "homosexuals" (along with "drunks" and "thieves" and others) are destined for eternal punishment unless they repent, be said to be "hateful" or "vilifying"?

Mr Folau, it seems, shared this message because he wanted to warn those who followed him on Instagram that, from his perspective as someone who takes the Bible seriously, life contains serious choices, and consequences for eternity. In doing so he argued that he did not express any hatred for homosexual persons, or for others caught up in what he (and the Bible) sees as sinful behaviour. He did not express any contempt for them, or ridicule of them. Far from automatically "condemning" them (to use one of the Rugby Australia "code of conduct" words), he said that they were loved by Jesus, could be saved and receive eternal life if they chose to "turn away from your sin and come to him".

Of course, the majority view in our society at the moment is that homosexual activity is a normal and natural part of human life and should be accepted and, indeed, celebrated. So Mr Folau's view (shared by many who take the Bible seriously) is one that is now in the minority. But, to repeat, he does not call for those who choose to disregard God's purposes for humanity to be hated, or stoned, or treated with contempt. He offers the love of Jesus and a way out of eternal judgment.

(b) Use of social media to present religious views

Second, does it make a difference that this was presented on a **personal social media** account? He was presenting his views on the teaching of the Bible to a group of persons (large as that group is- he had at one point some 332,000 "followers" on Instagram) who have voluntarily chosen to find out his views on various issues and to see what photographs he posts. The only reason his post has become more widely known, of course, is because it has been publicised in the wider media.

There is an increasing unease in the community over attempts by employers to protect a "brand" by controlling the activity of employees on social media. A high-profile example with some similarities to the Folau case, was the recent decision of the High Court in *Comcare v Banerji* [2019] HCA 23 (7 August 2019). There a Commonwealth public servant in the Immigration Department had been "tweeting" views critical of the government under an online pseudonym; and when her identity was discovered, she was dismissed. The court stressed that the doctrine of public service "neutrality" on political issues was a central part of our

Westminster system of government, and concluded that protection of this doctrine outweighed the value of free speech in this context.

But the similarities between the two cases are more apparent than real. Ms Banerji was a decision-maker in the Department whose views on various matters would directly affect her decisions. Mr Folau was employed to play rugby; he did not purport to “represent” the organisation in any sense, and his comments had no connection with his ability to do the job he was being paid to do.

Nor is it irrelevant that his views are clearly based on his religious convictions. Agree or disagree with them (and not even all Christians will agree), they are an expression of his religion. He has argued that for him to be summarily dismissed on the basis of his religious beliefs is unlawful under s 772 of the *Fair Work Act 2009* (Cth). That section provides:

An employer must not terminate an employee’s employment for one or more of the following reasons, or for reasons including one or more of the following reasons:...(f)...religion.

Of course, it can be argued that the reason for the dismissal was not merely because Mr Folau was a Christian, but because he chose to *express* his Christian beliefs publicly. (Note of course, though, that it could still be unlawful if “religion” is *one* of the reasons for dismissal.) But if that is the response, then it can be seen what a bad outcome that would be. “Freedom of religion”, under international law (which Australian courts can refer to, especially in the context of s 772, which is explicitly said in s 771 to be implementing various international agreements), is held to include not just a right to “believe” but also a right to “manifest” one’s belief. Article 18 of the *International Covenant on Civil and Political Rights* notes that such manifestation may be seen in “worship, observance, practice and **teaching**”.

In fact there is no right under the current law of NSW for Mr Folau to argue that his proposed dismissal on account of sharing his religious beliefs, was unlawful discrimination on the grounds of religion. But the application of this Commonwealth law may have an impact on the situation.

There is no evidence that Mr Folau was in any way seeking to “impose” his views on others, whether members of the public or other team members. It must be seriously doubted that someone is harmed merely by knowing that there are others in the community who regard their sexual activity as inappropriate. At any rate, this is the point at where much of the debate is focussed: what sort of “harm” cannot be tolerated? Is it so harmful to find out that others disagree with your sexual activity, that expression of such views should be made unlawful?

After a previous episode in 2018 where similar views were expressed, it can have come as no surprise to anyone following Mr Folau on social media that he held these views. Anyone following him on social media did so, presumably, because they wanted to know his views. If they were simply interested in football and did not want to hear about the Bible, they could either have chosen to “unfollow” him when comments from the Bible were posted, or to scroll past them and ignore them. It is arguable that if our society is to be serious about recognising the values of “diversity”, it needs to make place for people to have different views, even on serious moral issues.

In the context of religious freedom, Latham CJ, when discussing the protection of religious freedom under s 116 of our Constitution, said in the important High Court of Australia decision *Adelaide Company of Jehovah’s Witnesses v Commonwealth* that:

The religion of the majority of the people can look after itself. Section 116 is required to protect the religion (or absence of religion) of minorities, and, in particular, of unpopular minorities.⁷²

⁷² See above, n 7, at 124.

Biblical Christianity seems in many quarters to have attained the status of an “unpopular minority”. But for that reason alone, protecting the religious freedom of those who adhere to it, to speak to those who want to listen to them, about the doctrines of the Bible, is all the more important. As a tolerant and diverse multi-cultural community, we cannot shut down the voices of the minority simply because they disagree with the orthodoxy of the majority.

What are Mr Folau’s legal options? Having been dismissed on 17 May 2019, he participated in a mediation process at the Fair Work Commission, which did not resolve the dispute. It is understood that he has filed claims in the Federal Court.

(i) Possible contractual breach by RA

One possibility is that he may sue RA for a breach of their contractual obligations to him. That is, while they claim that his post amounted to a breach of their “code of conduct”, he may argue that what he did, did not amount to a breach of this provision, and that by terminating his employment *they* have breached *their* obligations.

(It is worth noting that, despite claims to the contrary at an early stage of the controversy, Mr Folau’s contract apparently did *not* contain a specific clause forbidding him from social media comments on the topic of homosexuality. He had been engaged in a previous controversy with RA over similar comments in April 2018, but the available public evidence seems to be that this did not result in him agreeing to additional contract clauses over and above the “standard” player contract, incorporating the general code of conduct.)

Whether a claim that RA were in breach would depend, of course, on whether a court concluded that the terms quoted above, referring to “vilification” or “discrimination”, were apt to describe what he said. In my view those terms are not apt to describe his comments.

It is worth noting a somewhat similar case arising in the UK where a court ruled that comments which expressed opposition to same-sex marriage did not fall into the category of punishable “hate speech”. In *Smith v Trafford Housing Trust* [2012] EWHC 3221 (Ch) Mr Smith, a council officer, had expressed some concern on Facebook about same-sex marriage being conducted in churches. A colleague, who had asked him to explain his views further, took offence at what he said. The result was, as the court said at para [5]:

For making those two comments Mr Smith was suspended from work, on full pay, on 17 February, made the subject of a disciplinary investigation and then disciplinary proceedings leading to a hearing on 8 March, at the end of which he was told that he had been guilty of gross misconduct for which he deserved to be dismissed. Due to his long record of loyal service he was told that he was with immediate effect only to be demoted to a non-managerial position with the Trust, with a consequential 40 per cent reduction in his pay, phased over 12 months.

The result of this case was that Justice Briggs found that the Council had breached their contract with Mr Smith by imposing these penalties. Contrary to what had been alleged, he had not “brought the Council into disrepute”, because his Facebook comments were made on his private social media site, where while he was identified as an employee of the Council, it was clear he was not “speaking on behalf of” the Council (paras [57]-[59]). An explicit ban on his “promoting” his beliefs to colleagues was not intended to apply to the sort of remarks he made on his private social media account- see para [79].

The final ground on which the Council had relied was that his contract said that he ought not to engage in “any conduct which may make another person feel uncomfortable, embarrassed or upset”. But here Briggs J ruled that again, in the context, this was mainly intended to apply to direct workplace interactions. As he said at [82]:

The frank but lawful expression of religious or political views may frequently cause a degree of upset, and even offence, to those with deeply held contrary views, even where none is

intended by the speaker. This is a necessary price to be paid for freedom of speech. To construe this provision as having application to every situation outside work where an employee comes into contact with one or more work colleagues would be to impose a fetter on the employee's freedom of speech in circumstances beyond those to which a reasonable reader of the Code and Policy would think they applied. On any view their main application is to circumstances where the employee is working for the Trust.

The circumstances of the two cases, of course, are not identical. Mr Smith did not have thousands of Facebook friends. His comments may be said to be much "milder". But there are similarities, and the case is a reminder that an employer may breach their contractual obligations by penalising an employee unfairly for an alleged breach of "code of conduct" obligations which has not been properly established.

(ii) Possible FWA claim

As well as a possible breach of contract claim, there may be a possible remedy for dismissal under the *Fair Work Act* 2009 (Cth) ("FWA").

It is worth noting some of the complexities and limits around this claim.

One obvious question is whether the termination here has been for the "reason" of Mr Folau's religion. His exhortation was a paraphrase of a Bible verse and accompanied by an encouragement to repent and seek salvation in Jesus Christ. But it might be claimed that the termination was not on the basis of his religion, but rather on the basis of his choosing to express his religion in a way which insulted or offended homosexual persons.

Under the FWA it only needs to be shown that "one" of the reasons for the termination of employment was religion. The question that may need to be resolved is the extent to which a religious employee should be allowed (on their own platform, and on their own time) to make comments motivated by their religious beliefs, without suffering the extreme penalty of termination. Note also that under FWA s 783, once it is alleged that religion was a reason for termination, the onus of proof that it was *not* lies on the employer.

However, it is worth noting some other apparent issues with relying on s 772. One is that, within the same Part of the Act (Part 6) we read:

723 Unlawful termination applications

A person must not make an unlawful termination application in relation to conduct if the person is entitled to make a general protections court application in relation to the conduct.

Section 772, which we have been discussing, is an "unlawful termination" provision. There is a presumption, then, that, if some *other* remedy is available under the FWA, that should be used. One obvious possible "general protections" application would be a claim of adverse action based on personal characteristics (including religion) under s 351 of the Act.

But there is an important qualification to s 351 in sub-section 351(2), which in effect precludes any "adverse action" claim unless it would amount to unlawful discrimination in the State or Territory where the action took place. It would then be futile to require an employee dismissed on account of their religion to make a "general protection" claim under s 351, only for it to be rejected because of s 351(2).

This precise problem arose in the decision of the Fair Work Commission in *McIntyre v Special Broadcasting Services Corporation* [2015] FWC 6768. In this high-profile litigation, an SBS employee had posted a number of social media remarks attacking the celebration of Anzac Day. When dismissed, he claimed that his dismissal was on the basis of his "political opinion", one of the other "prohibited grounds" of termination listed in s 772(1)(g) (along with "religion"). His claim that s 351 had been breached would be rejected on the basis of the lack of such a ground of discrimination in NSW. But the Commission allowed a (late) claim under

s 772 to be made, since in the circumstances Mr McIntyre was precluded from his s 351 claim. The Commissioner commented, interestingly, as follows:

[29] Unfortunately, but not unsurprisingly, those who advised the applicant were unaware that the anti-discrimination law in New South Wales does not make it unlawful to discriminate against a person on the basis of their political opinion. In passing, I note that discrimination on the basis of **religion** may also not be specifically established to be unlawful under the Anti-Discrimination Act 1977 (NSW)... (emphasis added)

The Commissioner's comment here is support for the availability of a s 772 claim in a case like that of Mr Folau, where no action under NSW law would be available, and hence the "general protections" provisions such as s 351 could not be utilised.⁷³

(c) Does contract law always trump religious freedom?

It is worth commenting, finally, on the wider question whether a contractual obligation can "trump" religious freedom rights. It was interesting to see a number of responses to the initial events around Mr Folau's dismissal along the lines of, "this is not a religious freedom issue, it is simply a matter of contract law". The fact is, of course, that both issues can be involved, and on general principles contract law does not always prevail.

There is a broad general principle that a contract which is contrary to public policy may be void. So, for example, in the High Court in *Westfield Management Limited v AMP Capital Property Nominees Limited* [2012] HCA 54 per French CJ, Crennan, Kiefel and Bell JJ:

[46] It is the policy of the law that contractual arrangements will not be enforced where they operate to defeat or circumvent a statutory purpose or policy according to which statutory rights are conferred in the public interest, rather than for the benefit of an individual alone. The courts will treat such arrangements as ineffective or void, even in the absence of a breach of a norm of conduct or other requirement expressed or necessarily implicit in the statutory text.

Later their Honours added:

[50] ... Some statutes may, by their nature and purpose, more readily suggest inconsistency with an individual's liberty to forego statutory rights. Some statutes which have a regulatory and protective purpose may fall into this category.

And earlier, Gleeson CJ and Handley JA in *Qantas Airways Ltd v Gubbins* (1992) 28 NSWLR 26 had said that

It is clear that persons affected by discriminatory practices prohibited by the Act are not free to bargain away in advance their rights to seek relief under the Act. The Act forbids those practices and seeks to eradicate them from the life of the State. The evident policy of the statute is that such practices should cease. Contracting out of the statute in advance would be directly contrary to this policy (at 31)

So simply intoning "the contract, the contract" does not resolve the issue. There is a question whether the contract itself does really forbid this sort of comment on a personal social media site. In light of the above principles, it may be possible that a contract which purported

⁷³ It was later reported that the litigation between Mr McIntyre and SBS was settled on confidential terms- see "Sacked reporter Scott McIntyre and SBS resolve dispute over Anzac Day tweets" *Sydney Morning Herald*, April 11, 2016; <https://www.smh.com.au/business/companies/sacked-reporter-scott-mcintyre-and-sbs-resolve-dispute-over--anzac-day-tweets-20160411-go37vt.html> .

to “bargain away” Mr Folau’s right to free exercise of religion under a 772 would not be enforceable anyway.

Conclusion

Despite its length, this paper has really only skimmed the surface of these important issues. Still, hopefully it provides an overview of some of the important issues that are raised by the potential and actual clash between different rights of speech and belief. Neither should be given an automatic priority over the other, just as in other contexts religious freedom rights will need to be balanced with rights not to be subjected to unjust discrimination, and the interests that a person has in not having their intimate activity criticised by others. Both Parliaments and courts will need to pay careful attention to the interests of all members of the community in living out their deepest and most foundational religious commitments, while allowing others to speak and debate so that true diversity is fostered and preserved.