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# Religious Anti-Vilification Laws: Gatekeeping Freedom of Religion and Freedom of Speech in Australia

Neil J Foster



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## The Australasian Law Teachers Association Annual Conference 2013: Law Teachers as Gatekeepers

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“Religious Anti-Vilification Laws: Gatekeeping Freedom of Religion and Freedom of Speech in Australia”

Neil Foster<sup>1</sup>

Freedom of religion and freedom of speech, two fundamental human rights, intersect and may clash when the law prohibits “vilification” of others on the basis of their religion, especially if the word is defined broadly enough to include mere offence or annoyance. The paper addresses the current state of religious “anti-vilification” laws in Australia, and recent important appellate decisions on freedom of speech, to discuss whether current laws adequately provide an appropriate balance in this important area of public life.

During 2013, Australia was shocked by some examples of racist abuse of a major sportsman.<sup>2</sup> The debate raised again the significant issue of how to balance the right of people not to be insulted and attacked on the basis of their status, with the right of free speech. No-one would support an untrammelled right to offer racially based insults. But there are many complexities about laws which penalise “vilification”, particularly when those laws focus on religion as the prohibited characteristic, rather than race. This paper addresses the present status of religious anti-vilification laws in Australia, and raises the question whether they may present an over-broad impairment of important rights of free speech, especially when viewed in the context of freedom of religion.

This paper is not intended to be a major contribution on the “racial vilification” debate- there are some clear distinctions between racial and religious vilification laws which mean the two cannot be equated.<sup>3</sup> But it will be necessary to comment on the operation of those laws as part of the background.

Previous works have offered a critique of religious “anti-vilification” laws on the basis of freedom of speech and freedom of religion concerns.<sup>4</sup> The aim of this paper is to consider the policy behind such laws, to suggest circumstances

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<sup>2</sup> See eg <http://www.heraldsun.com.au/sport/afl/gutted-adam-goodes-still-feeling-bad-after-week-of-racial-vilification-says-brother/story-e6frf9jf-1226654068191>.

<sup>3</sup> For an interesting article arguing that the “racial vilification” provision in s 18C of the *Racial Discrimination Act* 1975 may be constitutionally invalid, see A Gray, “Racial Vilification and Freedom of Speech in Australia and Elsewhere” (2012) 41 *Common Law World Law Review* 167-195. Indeed, it may well be that since the *Monis* decision noted below, the prospect of such a challenge succeeding has become more likely.

<sup>4</sup> N Foster, “Defamation and Vilification: Rights to Reputation, Free Speech and Freedom of Religion at Common Law and under Human Rights Laws” in *Freedom of Religion under Bills of Rights* edited by Paul Babie and Neville Rochow (University of Adelaide Press, 2012), pp 63-85, summarising comments by others and suggesting that the law of defamation will often meet some of the major concerns in this area.

and conditions under which these laws are justified and valid, but to offer some caveats about the reach of the laws in the light of some recent important high level decisions dealing with freedom of speech.

## 1. The Reasons for Religious “Hate Speech” laws

In an important recent monograph, *The Harm in Hate Speech* (Cambridge, Mass; Harvard UP, 2012) Jeremy Waldron 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.<sup>5</sup>

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

Even in the racial vilification area he makes a number of important points. Relevant laws should prohibit speech that incites hatred in others, not speech that is necessarily based on actual hatred felt by the speaker.<sup>6</sup> 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.<sup>7</sup>

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.<sup>8</sup> 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 this should be protected by the law just as other

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<sup>5</sup> This view is in part supported by, eg, Helen Pringle, “Regulating offence to the godly : blasphemy and the future of religious vilification laws.” (2011) 34 (1) *University of New South Wales Law Journal* 316-332, 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.

<sup>6</sup> Waldron (2012) at 35.

<sup>7</sup> 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.”

<sup>8</sup> Waldron (2012) at 39-41.

aspects of personal reputation are protected by the law of “ordinary” defamation.<sup>9</sup> So Waldron would support laws which prohibit “the publishing of calumnies expressing hatred and contempt for some racial, ethnic or religious group”.<sup>10</sup>

There is much in his excellent book which 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.<sup>11</sup>

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.<sup>12</sup>

Waldron recognises that discussion of religious questions will sometimes give offence. “Neither in its public expression nor in an individual’s grappling aloud with these matters can religion be defanged of this potential for offence.”<sup>13</sup>

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.<sup>14</sup>

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

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<sup>9</sup> Waldron (2012) at 85-86.

<sup>10</sup> Waldron(2012) at 66.

<sup>11</sup> 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”.

<sup>12</sup> Waldron (2012), at 126-127.

<sup>13</sup> Waldron (2012) at 129.

<sup>14</sup> Waldron (2012) at 130.

one, is to attack the other. We must require the law to distinguish between these things, and not allow people to play “identity politics”.<sup>15</sup>

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 which said:

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.<sup>16</sup>

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”.

## 2. Anti-Vilification Laws in Australia

How, then, does Australia deal with the issue of religious vilification at the moment? Three States, Queensland, Tasmania and Victoria, have laws that make unlawful speech that, on religious grounds, incites hatred against, or offence to, others. We may take as perhaps the most prominent example 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.<sup>17</sup>

The operation of those provisions was discussed in some detail in a previous paper.<sup>18</sup> Perhaps the most famous litigation under the laws has been that involving a Victorian religious organisation, Catch the Fire Ministries. The group ran a seminar in which aspects of Islam were critiqued, and in *Islamic Council of Victoria v Catch the Fire Ministries Inc* [2004] VCAT 2510 was found to have

<sup>15</sup> See the very important discussion at 131-136.

<sup>16</sup> 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.

<sup>17</sup> The provisions in the other States are the *Anti-Discrimination Act* 1991 (Qld) s 124A, and the *Anti-Discrimination Act* 1998 (Tas) ss 19 and 55.

<sup>18</sup> See Foster, above n 4.

breached the provision and ordered to pay a fine and publish retractions. On appeal, in *Catch the Fire Ministries Inc v Islamic Council of Victoria* [2006] VSCA 284 the previous decision was over-turned, and a subsequent settlement reached between the parties in which they issued a statement affirming their mutual right to “criticise the religious beliefs of another”.

One set of religious vilification proceedings which does not previously seem to have been the subject of detailed comment<sup>19</sup> involved a dispute between what seem to be 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.<sup>20</sup> 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.<sup>21</sup> They continued to pursue a formal appeal against their conviction, which in the end was denied, the court holding that the Tribunal had followed appropriate procedures and that they were well aware of the consequences of their refusal to comply.<sup>22</sup>

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<sup>19</sup> Noted in M Thornton & T Luker, “The Spectral Ground: Religious Belief Discrimination” (2009) 9 *Macquarie Law Journal* 71-91, at 90.

<sup>20</sup> <http://www.theage.com.au/news/national/couple-jailed-for-contempt-in-vilification-case/2008/02/20/1203467183354.html> .

<sup>21</sup> <http://www.theage.com.au/news/national/apology-frees-jailed-couple/2008/02/28/1203788539310.html> .

<sup>22</sup> *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/> .

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.<sup>23</sup> 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.<sup>24</sup>

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.)<sup>25</sup> Might it not be the case that some religious *doctrines* in fact warrant expression of “hatred... serious contempt or revulsion or severe ridicule”? In some circumstances one could separate a critique of doctrine from a critique of those holding the doctrine- but if a religious doctrine officially supported child abuse, then it would seem that any association of persons with that religion would lead to contempt of the persons.

One 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.”<sup>26</sup> If indeed these persons were sufficiently “identified” as belonging to the group to suffer this harm to their “reputation”,<sup>27</sup> 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

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<sup>23</sup> For some background to “Thelema” from what seems to be a very sympathetic viewpoint, see <http://en.wikipedia.org/wiki/Thelema> .

<sup>24</sup> 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?

<sup>25</sup> See Foster, above n 4, at 79.

<sup>26</sup> At para [26] of the initial judgment, [2007] VCAT 1484.

<sup>27</sup> For the requirement of “identification”, see Foster, above n 4, at 75-77.

claims as a defence; whereas in this religious vilification claim no such issue arose.<sup>28</sup>

No other States have shown an interest in enacting religious vilification laws in recent years. However, there was an important development in the last year which shows a 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.<sup>29</sup> The Bill would have extended the currently limited grounds under Commonwealth law on which discrimination is formally unlawful, including 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 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".<sup>30</sup>

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, as it will no doubt inform future thinking about any law that makes "vilification" 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

<sup>28</sup> Thornton & Luker, above n 19, 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."

<sup>29</sup> 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](http://www.freedom4faith.org.au/resources/Work/F4F%20submission%20on%20Human%20Rights%20and%20Equality%20Bill%202012%20Exposure%20Draft_F.pdf) .

<sup>30</sup> 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> .

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.<sup>31</sup> (The particular “race” category relied on was unusual, too- it was confined to “fair-skinned persons” who claim or are recognised to be Aboriginal.)

But the claim succeeded partly because of the very low bar that had to be met under s 18C, whereby conduct was rendered unlawful if persons were “offended, insulted, humiliated or intimidated by” it.<sup>32</sup> 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 which 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”.<sup>33</sup>

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.<sup>34</sup> 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 recent 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”.

### 3. Recent decisions on freedom of speech

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

<sup>31</sup> See RDA s 18B, and *Eatock* at para [306].

<sup>32</sup> 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.

<sup>33</sup> For brief mention of these defences, see Foster, above n 4 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.

<sup>34</sup> See *Eatock* at [206], where the *Catch the Fire* decision is mentioned but distinguished.

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.<sup>35</sup>

A recent 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.

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

### (i) **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

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<sup>35</sup> 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.

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.

#### **(ii) 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.

This, of course, is an interesting 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.

### (iii) 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.

### (iv) 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 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)

#### (iv) 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”.

#### (b) Two Australian decisions

In *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3 (27 February 2013) 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.

##### (i) 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.<sup>36</sup> 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<sup>37</sup>. 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<sup>38</sup>.

Thus the first question to be considered was how the prohibition on “preaching, canvassing and haranguing” should be **interpreted** in light of this strong presumption. His Honour ruled that the law should be read to imply the least possible disturbance with freedom of speech. This meant that it would not be a valid exercise of the power given to the Council here to prohibit verbal activity because the officers disagreed with the *content* of what was said- [46]. It would be relevant, however, if the activity, by the way it 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.)

<sup>36</sup> Although, with respect, the dissent of Heydon J on this issue is very persuasive- see below.

<sup>37</sup> 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.

<sup>38</sup> *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.

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”. However, the standard which the Court required to be applied by an authority making delegated legislation here was not very high. French CJ cited a number of decisions which 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 followed 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<sup>39</sup>.

However, his Honour 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.

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<sup>39</sup> *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.

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

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

In other words, these were very broad prohibitions and on their face applied to a large range of speech activities. On that basis his Honour found that the bylaws were invalid.<sup>40</sup>

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.<sup>41</sup>

One final comment- 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.<sup>42</sup> It may be suggested, however, that just as Heydon J (and indeed French CJ) were able to affirm “freedom of speech” as a common law value, there may be some scope in the future to argue that there is something resembling a “freedom of religion” principle at work in the common law. But this will have to await further work.<sup>43</sup>

## (ii) *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 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<sup>44</sup> 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*

<sup>40</sup> 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.”

<sup>41</sup> 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).

<sup>42</sup> 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.

<sup>43</sup> And it has to be said that the *Grace Bible Church* decision noted above offers little hope for analysis of the history of the common law in this way. But perhaps an argument could be made that common law principles can develop and change.

<sup>44</sup> In one case a sound recording was said to have been sent.

(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.<sup>45</sup>

### **(1) On the one hand- the law was invalid**

Two members of the majority, 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 which 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.<sup>46</sup> 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.)<sup>47</sup> Even if it could, however, the extent of the type of services covered by the provisions (couriers delivering parcels as well as letters) meant that it covered a wide range of speech. The provision was a serious **burden** on free political speech, and it was not **proportionate** to any legitimate ends. It could not even be said that it provided protection to members of the public against intrusion into their homes, since arguably it would outlaw the sending of "offensive" material of all sorts (such as racist propaganda) through the mail to a member the public who had asked for it to be sent!<sup>48</sup>

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

[88]...More particularly, s 471.12 makes it a crime to send by a postal or similar service an offensive communication about a political matter even if what is said is true. It makes it a crime to send by a postal or similar service an offensive communication about a political matter that is not only offensive but defamatory, even when, applying *Lange*, the publisher would have a defence of qualified privilege to a claim for defamation.

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

[213] To hold that a person publishing defamatory matter could be guilty of an offence under s 471.12 but have a defence to an action for defamation is not and cannot be right. The resulting **incoherence in the law** demonstrates either that the object or end

<sup>45</sup> 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.

<sup>46</sup> 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."

<sup>47</sup> See Bathurst CJ at (2011) 256 FLR 28, at 39 [44].

<sup>48</sup> French CJ at [29].

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<sup>49</sup>. {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 stifled. This is not and cannot be right.

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*<sup>50</sup> for deliberate infliction of "nervous shock". (Whether or to what extent such a separate tort is still to be recognised need not be examined.) And the common law developed the law of defamation to compensate for injury to reputation worked by the publication of oral or written words. But the common law did not provide a cause of action for the person who was offended

<sup>49</sup> cf *Patrick v Cobain* [1993] 1 VR 290 at 294.

<sup>50</sup> [1897] 2 QB 57.

by the words or conduct of another that did not cause injury to person, property or reputation.

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.

## **(2) On the other hand- the law was valid**

In a single joint judgment, Crennan, Kiefel and Bell JJ upheld the validity of the law.<sup>51</sup> Again, a lengthy judgment can only be summarised. 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.<sup>52</sup> 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 arguments lies with the two substantive judgments of the majority. 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.<sup>53</sup>

## **4. A balanced law on religious hate speech?**

So is there scope for *any* such law? As noted previously, it seems that Waldron and others can make a reasonable case for a law that prevents wide-

<sup>51</sup> 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.

<sup>52</sup> See paras [333]-[339].

<sup>53</sup> 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.

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 which 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.

## Conclusions

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

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

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

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

Laws that legitimately prevent incitement and laws that themselves contravene religious freedom and freedom of expression by preventing legitimate religious speech.<sup>54</sup>

### (2) Mere “offence” is not sufficient harm

The theme that simply causing someone “offence” is not enough to justify serious interference with freedom of speech is one that come through a number of the decision and events noted above. The public outcry against the *Exposure Draft* Commonwealth Bill is one example. The decision of the Supreme Court of Canada in *Whatcott* is another, striking down as inconsistent with the Charter the

<sup>54</sup> 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.

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 Australia in *Monis* is another example. In fact, given that the joint judgment of Crennan, Kiefel and Bell JJ interpreted the word “offence” in most serious possible sense, the decision as a whole is strong evidence that the bar for constitutional prohibition of free speech cannot be set too low.

### **(3) 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 simply 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.

### **(4) There are important 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 as noted above 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 which defines itself as a religion, endorses and encourages child abuse- why should not that be a defence to a “vilification” claim? While the Supreme Court of Canada in *Whatcott* seemed willing to accept that something could be unlawful even if true, it is submitted that this may be another important line to draw on the side of free speech. Indeed, if there is general value in a law prohibiting the incitement of hatred against persons on the ground of their religion, then it may be that limiting that law by this and similar defences will disarm many of the strongest critics of that sort of law.

### (5) Are current “religious antivilification 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 are consistent with the implied Constitutional prohibition on impairing freedom of political speech.<sup>55</sup> It seems clear that this is an issue which will need to be revisited.

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<sup>55</sup> 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 is an excellent survey of the area of religious hate speech.