

Enforcing Tolerance: Religious Vilification Laws in Australia

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1. Australia as a Multicultural Society

Australia as a migrant nation

Australia in the 21st century is a complex, multicultural society. Apart from its indigenous community, which is only about 2.4% of the population,¹ Australia is a nation of migrants. White settlement of Australia began in 1788 with the arrival of the First Fleet of convicts to establish a new penal colony. They were followed by some 163,000 others, before transportation finally ceased in 1868.² Many free settlers also came out from the British Isles in the first 50 years of the existence of the Australian colonies, and some military personnel stayed on to make a new life for themselves in the colony as well.

While most of the new settlers were from the British Isles, there has been a long history of people migrating to Australia from other parts of the world. Chinese came to Australia in large numbers during the Gold Rush period of the 1850s, and continued to arrive thereafter. Since the end of World War II the population of Australia has increased rapidly due to migration. The proportion of the population who were born overseas increased from 10% in 1947 to 24% in 2000.³ A further 27% of persons born in Australia had at least one overseas-born parent, according to the 1996 Census.⁴ Currently, the Australian population has a net gain of one international migrant every 4 minutes.⁵ Thus a substantial proportion of all Australian residents are either first or second generation Australians. With this wave of immigration, the Australian population has become more and more diverse.⁶ Now the proportion of the Australian population born in Asia is exactly the same as the proportion born in the United Kingdom.⁷

The diversity of the Australian population at the beginning of the 21st century is recognised by Government policy. The Federal Government has a Department of Immigration and

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¹ Australian Bureau of Statistics estimate in 2001, available at <http://www.abs.gov.au/>, Population Distribution, Indigenous Australians.

² Castles A C, *An Australian Legal History* (Law Book Co, Sydney, 1982), p 32.

³ Australian Bureau of Statistics, <http://www.abs.gov.au>, International Migration, 2002.

⁴ Ibid.

⁵ See population clock at <http://www.abs.gov.au>.

⁶ The numbers of immigrants from Britain, expressed as a percentage of the total migrant intake each year, has declined substantially. In the period 1966- 1970, migrants from the United Kingdom and Ireland represented 46% of the total migrant intake. In 2002-3, the figure was 13%. Australian Bureau of Statistics, <http://www.abs.gov.au>, Australian Bureau of Statistics, Migration Australia (2004).

⁷ The percentage for both is 5.7%: Australian Bureau of Statistics, Migration Australia (2004).

Multicultural Affairs, and an official policy on promoting multiculturalism. That policy has been altered over the years since its introduction, with governments of different persuasions. However, the differences between the major political parties is more on the detail than the principle.⁸ A commitment to multiculturalism is firmly enshrined in Government policy.

2. Promoting and Enforcing Tolerance

One of the ways in which governments support multiculturalism is by promoting tolerance and respect for other cultures and beliefs. These can be promoted in a variety of ways - through education, especially in schools, through television programming which promotes positive images and role models for a tolerant society, and through celebration of the rich diversity of the nation. All of these are positive strategies to reduce the strangeness of the “other”, and to promote a sense of mutual belonging despite the diversity of cultures and beliefs.

Another strategy, which emerged in Australia in the 1990s, is vilification legislation. Legislation of this kind now exists in most States and Territories.⁹ The Federal Government also has such legislation.¹⁰ The laws vary both in their nature and in the kinds of vilification they prohibit. Vilification laws may create criminal offences, civil remedies or both.

The first target of vilification laws in Australia was racial vilification, but vilification laws have since been extended to protect people with a range of other characteristics. Queensland offers an example of a law of wide scope, covering race, religion, sexuality and gender identity.¹¹ Tasmania’s legislation goes wider still, covering race, disability, sexual

⁸ The present Government’s policy on multiculturalism is expressed in *A New Agenda for Multicultural Australia* (Commonwealth of Australia, 1999). This replaced the National Agenda for a Multicultural Australia promulgated in 1989 by the previous Labor government.

The *New Agenda for Multicultural Australia* provides that multicultural policies and programs should be built on the foundation of the democratic system, using the following principles. First, civic duty, which obliges all Australians to support those basic structures and principles of Australian society which guarantee freedom and equality and enable diversity in society to flourish. Secondly, cultural respect, which, subject to the law, gives all Australians the right to express their own culture and beliefs and obliges them to accept the right of others to do the same. Thirdly, social equity, which entitles all Australians to equality of treatment and opportunity so that they are able to contribute to the social, political and economic life of Australia, free from discrimination, including on the grounds of race, culture, religion, language, location, gender or place of birth. Fourthly, productive diversity, which maximises for all Australians the significant cultural, social and economic dividends arising from the diversity of the Australian population.

⁹ *Anti-Discrimination Act 1977* (NSW) Part 2 Division 3A, Part 3A Division 5, Part 4C Division 4 & Part 4F; *Anti-Discrimination Act 1991* (Qld) s 124A; *Racial Vilification Act 1996* (SA); *Anti-Discrimination Act 1998* (Tas) s 19; *Racial and Religious Tolerance Act 2001* (Vic); *Discrimination Act 1991* (ACT) Part 6.

¹⁰ *Racial Discrimination Act 1975* (Cth) Part IIA.

¹¹ The *Anti-Discrimination Act 1991* (Qld) s 124A (1) provides:

“A person must not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race, religion, sexuality or gender identity of the person or members of the group.

(2) Subsection (1) does not make unlawful--

(a) the publication of a fair report of a public act mentioned in subsection (1); or

(b) the publication of material in circumstances in which the publication would be subject to a defence of absolute privilege in proceedings for defamation; or

orientation, lawful sexual activity and religious belief.¹² What is prohibited in these jurisdictions is not merely the incitement of hatred but also serious contempt and severe ridicule.

To a great extent, Australian laws which prohibit discrimination and vilification represent shared values and beliefs in the Australian community. The principle of treating people equally irrespective of race, religion, political belief, gender or sexual orientation is a widely held moral value. The principle of non-discrimination is also enshrined in various international human rights treaties.¹³ However, recent laws passed in Victoria,¹⁴ Queensland¹⁵ and Tasmania¹⁶ on religious vilification threaten that shared consensus, and are causing great division.

At the heart of the debate about these laws is religious freedom: not the freedom to be intolerant, and certainly not the freedom to vilify – neither of these are legitimate expressions of religious freedom. Rather, at issue is the freedom to express views about truth and falsehood, right and wrong, good and evil, which may offend others who have a different view on these matters. Religious vilification laws in practice, if not in theory, pose a grave danger to this freedom because of the collateral damage that can be caused by a legislative strategy to enforce tolerance.

The issues may be explored through an analysis of the controversies in Victoria, which passed a religious vilification statute in 2001.

3. The Racial and Religious Tolerance Act 2001 (Victoria)

The *Racial and Religious Tolerance Act 2001* was passed after a period of community consultation on earlier proposals made by the Victorian Government.¹⁷

Section 8 of the Act defines what is meant by religious vilification. It provides:

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

¹² The *Anti-Discrimination Act 1998* (Tas) s 19A provides:

“A person, by a public act, must not incite hatred towards, serious contempt for, or severe ridicule of, a person or a group of persons on the ground of –

(a) the race of the person or any member of the group; or

(b) any disability of the person or any member of the group; or

(c) the sexual orientation or lawful sexual activity of the person or any member of the group; or

(d) the religious belief or affiliation or religious activity of the person or any member of the group.”

¹³ For example, Article 26 of the International Covenant on Civil and Political Rights prohibits discrimination on the grounds of race and national origin, as does the Convention on the Elimination of All Forms of Racial Discrimination. Australia’s international obligations are given effect in domestic law, inter alia, by the Racial Discrimination Act 1975 (Cth) as well as State and Territory anti-discrimination laws.

¹⁴ *Racial and Religious Tolerance Act 2001* (Vic) (discussed below).

¹⁵ Supra note 11.

¹⁶ Supra note 12.

¹⁷ Victorian Office of Multicultural Affairs, Department of Premier and Cabinet, *Racial and Religious Tolerance Bill Discussion Paper*, (Government of Victoria, 2000).

(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 sub-section (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.

Section 9 of the Act provides that a person's motive for engaging in the proscribed conduct is irrelevant.¹⁸ Section 11 provides for exceptions where:

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.

There is a further exception for private conduct, defined in section 12. It is a defence:

if the person establishes that the person engaged in the conduct in circumstances that may reasonably be taken to indicate that the parties to the conduct desire it to be heard or seen only by themselves.

This exception does not apply in relation to "conduct in any circumstances in which the parties to the conduct ought reasonably to expect that it may be heard or seen by someone else" (s. 12(2)).

The definition of religious vilification in the Act is narrower than originally proposed in the model Bill appended to the Discussion Paper.¹⁹

¹⁸ Section 9(1) provides: "In determining whether a person has contravened section 7 or 8, the person's motive in engaging in any conduct is irrelevant".

¹⁹ Proposed section 5 of the model Bill provided:

"A person must not on the ground of the religious belief or activity of another person or a class of persons engage in any conduct (whether on a single occasion or on a series of occasions over a period of time) that a reasonable observer would believe is likely in all the circumstances –

(a) to incite hatred against the person or class of persons by means that include threatening physical harm towards or inciting others to threaten physical harm towards –

(i) the person or class of persons; or

(ii) the property of the person or class of persons; or

(b) to incite revulsion of, or serious contempt for, the person or class of persons; or

(c) to portray the person or class of persons as not having, or not deserving to have, the right to participate fully in society; or

(e) to threaten or intimidate the person or class of persons; or

(f) to threaten the property of the person or class of persons."

Discussion Paper, above n17, p.20.

4. Problems of interpretation of the Victorian law

The *Racial and Religious Tolerance Act* 2001 gives rise to some difficult problems of interpretation. First, how is religious vilification proven? The law is breached if the conduct complained of “incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.” This is different from *expressing* hatred. The focus is on the effects of the conduct on those who hear what is said or otherwise have experience of that conduct.

The test of religious vilification is also not expressed in terms either of motivation or likely effect. If the law was drafted in terms of conduct ‘intended to or likely to incite hatred against, serious contempt for, or revulsion or severe ridicule of a person or class of person’, then the court could examine either the motivation for the conduct or the likely effect of the conduct on an audience – not perhaps an audience of reasonable people, but at least an audience of average people who are prone to prejudice or unreasonableness. However, motive is relevant only as an *exception* to the wrong identified. Section 11 makes it an exception that the communication is made “in good faith” for one or more of the purposes given in that section. In circumstances to which section 11 is not applicable, section 9 makes it clear that motive is expressly excluded from consideration. There is also no reference in the Act to the likely effect of the conduct on listeners, in contrast to vilification legislation in other jurisdictions.²⁰

If the Court cannot examine intention or likely effect, how then is incitement to hatred, contempt, revulsion or ridicule to be proven? Suppose that the conduct complained of is a lecture to a group of 300 people. What if three people express negative sentiments towards people of another faith after attending the seminar while 297 others who were present sign affidavits saying that it did not incite hatred or revulsion at all? Suppose that it is sufficient for the purposes of the law that two or three people can be shown to have expressed negative views about the people or class of people protected by the legislation. Is it necessary for the complainant to prove also that those individuals did not hold those views before the lecture, or did not hold those views as strongly as they did subsequently? Beneath the simple definition of religious vilification in the Victorian *Racial and Religious Tolerance Act* 2001 there is an interpretive and evidential minefield.

The interpretative difficulties of this section have been resolved, for the time being, by Deputy President McKenzie in her judgment in *Judeh v Jewish National Fund of Australia Inc* [2003] VCAT 1254. She adopted a purposive interpretation in the context of a complaint of racial vilification. She first of all distinguished between a ‘moving factor’ and a motivation. She wrote that:

“When the section requires the conduct to be on a substantial ground, among other things, of race, it means that the race of the other person or class of persons must be an actuating or moving factor in the mind of the person who engages in the conduct, whatever their motive might have been.”

²⁰

Compare the Racial Discrimination Act 1975 (Cth) s.18C:

(1) It is unlawful for a person to do an act, otherwise than in private, if:

(a) the act is *reasonably likely*, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and

(b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

This seems to suggest that the race (or in the context of religious vilification, the religious belief) of the complainants or group on whose behalf the complaint is made, should have been in the mind of the person allegedly vilifying them, rather than some other aspect of their identity or conduct. She then argued that the law does not require proof that people were in fact incited by the conduct to feel antipathy to the protected group. She wrote:

“What the conduct must incite are not feelings of a mild or trivial kind. It must incite the strongest feelings of antipathy: hatred, serious contempt, revulsion, serious ridicule. The conduct itself must incite these feelings. Whether the conduct incites these feelings should not, in my view, be judged on the reactions to it of particular individuals, whatever their race. If it were otherwise, the effect of this section would be left to the vagaries of individual sensibilities. It would have to be established after the event that someone had experienced these strong feelings because of the conduct. This would deprive the section of much of its force.”

She then imported an objective test of whether the conduct complained of was capable of giving rise to reactions of antipathy, to be tested by the reaction of a reasonable recipient:

“In my view, the section is directed to the conduct itself and not to the nature of the reactions to it. The conduct must be capable itself of giving rise to these reactions. In this context "incite" has its ordinary dictionary meaning of encourage, urge, stir up, instigate or prompt. (As to this, see the Oxford English Dictionary and the Macquarie Dictionary.) The test of whether conduct is capable of doing this must be that of the reasonable recipient or target of the conduct. If the conduct is a physical act, the recipient will be the person against whom the conduct is directed. If the conduct is a communication, the recipient will be the person to whom the communication is made...

The test must be that of a reasonable and objective recipient. That recipient must, in my view, be assumed to have reasonable knowledge of the surrounding context and circumstances in which the conduct occurs. The recipient should not be assumed to be of a particular race, either the race of the person who engages in the conduct or the race of the person against whom the strongest feelings of antipathy are alleged to have been encouraged. Nor should the person be assumed to be overly sensitive or overly insensitive in respect of what is said or done.

An objective test has also been adopted in New South Wales, in interpreting its racial vilification legislation. In *John Fairfax Publications Ltd v Kazak*,²¹ the test which was adopted was as follows:

“...in the context of vilification provisions, the question is, could the ordinary reasonable reader understand from the public act that he/she is being incited to hatred towards or serious contempt for or serious ridicule of a person on the grounds of race?”

It remains to be seen whether an appeal court will uphold the interpretation of the legislation offered by Deputy President McKenzie. The objective test, of what a reasonable person might believe about the conduct, is difficult to reconcile with the clear wording of the legislation, that in order to constitute a breach of the law, the conduct must have the effect of inciting hatred.

²¹ [2002] NSW AD TAP 35.

5. Islamic Council of Victoria Inc v Catch the Fire Ministries Inc

Issues of religious freedom and expression have already arisen under this legislation - in particular, the freedom of Christians to teach about Islam.

The original complaint in this case arose from a seminar on Islam presented by Pastor Daniel Scot in March 2002 in Melbourne. The seminar was organised by Catch the Fire Ministries, and advertised as dedicating sections of the day to discussing Jihad and the Qur'an, among other topics. Three converts to Islam attended parts of the seminar and then lodged a complaint, claiming that it incited hatred against Muslims in Australia. The Islamic Council of Victoria also became involved in the case. A conciliation session was held by the Equal Opportunity Commission but this was unsuccessful.

The case proceeded to a hearing before the Victorian Civil and Administrative Tribunal. The Islamic Council of Victoria claimed that statements made during the seminar as well as an article published on the Catch the Fire website, constituted a breach of section 8 of the Racial and Religious Tolerance Act (2001). The respondents Daniel Nalliah and Daniel Scot asserted that the statements complained of did not amount to religious vilification, and in any event, were protected by section 11 of the Act.²²

In December 2004, the Victorian Civil and Administrative Tribunal handed down judgment in the case.²³ The Tribunal found that Pastor Daniel Scot "made fun of Muslim beliefs and conduct...not in the context of a serious discussion of Muslims' religious beliefs [but] presented in a way which is essentially hostile, demeaning and derogatory of all Muslim people, their god, Allah, the prophet Mohammed and in general Muslim religious beliefs and practices."²⁴

Consequently, Pastor Scot's conduct and statements during the seminar were found to constitute religious vilification in breach of section 8 of the legislation. The judge applied the objective test laid down in the case of *John Fairfax Publications Ltd v Kazak*.²⁵ Having stated that section 11 of the act should be construed broadly to protect conduct engaged in reasonably and in good faith, the judge went on to specify that the section does not mean that anything may be said under the guise of a genuine religious purpose or any purpose that is in the public interest.²⁶

The tribunal also found that a Newsletter written by Pastor Daniel Nalliah and an article on Islam, both posted on the Catch the Fire website, constituted breaches of section 8 and did not attract the protection afforded by section 11.²⁷

The remedy for the breach was considered subsequently. The respondents were ordered to publish a statement of public apology,²⁸ and to provide undertakings to the Tribunal that they

²² Ibid para 39

²³ Islamic Council of Victoria v Catch the Fire Ministries Inc (Final) [2004] VCAT 2510 (22 December 2004)

²⁴ Ibid para 383.

²⁵ Above n.21.

²⁶ *Islamic Council of Victoria v Catch the Fire Ministries Inc* above n.23, paras 388-389.

²⁷ Ibid paras 391-396.

²⁸ *Islamic Council of Australia v Catch the Fire Ministries Inc (Anti Discrimination Remedy)* [2005] VCAT 1159 (22 June 2005). The respondents were required to publish a statement set out in the annexure to the remedy on their website, and in two prominent Victorian newspapers. Para 10.

would not make publish or distribute in Victoria or any other state (including internet), any statements, information, suggestions or implications to the same or similar effect as those found to have breached the law.

The Court of Appeal of the Supreme Court of Victoria has granted pastors Danny Nalliah and Daniel Scot leave to appeal against the decision of the judge.²⁹ The appeal is expected to be heard within the next 12 months. The Court granted a stay of the remedy that an apology be placed in newspapers and on the Ministry's website setting out the Tribunal's findings. The fact that leave to appeal has been granted is an indication that the interpretation of the Victorian legislation needs to be clarified.

It may well be that the views expressed by Pastor Scot and Pastor Nalliah would be regarded by many other Christians as extreme views on Islam and the interpretation of the Qur'an. The judge concluded that Pastor Scot made fun of Muslim beliefs and that the presentation was derogatory of Muslim religious beliefs and practices. This article is not written in defence of the pastors concerned. Nonetheless, the case of *Islamic Council v Catch the Fire Ministries* is a useful starting point for exploring the issues of religious liberty involved with an enactment of this kind. Whatever the outcome of the appeal, the *Catch the Fire Ministries* case illustrates the way such laws can operate in practice when they are applied through courts and tribunals.

6. The collateral damage from vilification laws

The major problem with religious vilification laws is how they are operationalised in the life of organisations, to cause collateral damage to religious freedom.

The chilling effect of litigation

One danger from religious vilification laws arises from the chilling effect they will have on legitimate religious activity, even where the outcome of a complaint is to declare the religious expression to have been lawful. The punishment imposed by religious vilification laws does not lie in the penalties imposed by courts or tribunals for breaches of the law, but in the necessity to defend oneself from plausible claims that the law has been breached.

The hearings in the *Catch the Fire Ministries* case lasted for weeks. The cost of defending such cases, employing an appropriately qualified legal team, can run into the hundreds of thousands of dollars – far beyond the capacity of small religious communities or organisations. In Australia, the normal rule in civil litigation is that the loser pays the winner's costs; but the position is much more complex than this. Under court rules developed to encourage settlements, the normal costs rule can be partially displaced if the winning party has earlier refused an offer of settlement better than the result obtained through the trial.³⁰ In any event, the costs which are allowed to a successful litigant are known as party and party costs, but the actual amount paid to the legal team may be greatly in excess of these recoverable costs. This is because party and party costs are usually based on a set scale of charges for different kinds of work done. Where the successful litigant has not been charged

²⁹ Friday 19 August 2005. "Pastors can appeal over vilification claims" Barney Zwartz, Religion Editor, The Age August 20, 2005.

³⁰ See e.g. Supreme Court Rules (NSW).

the scale fees by her or his lawyer, but has been charged higher fees (usually on an hourly rate), then the difference between the scale amount and the actual fees charged must be met by that litigant. These actual fees are known as the solicitor-client costs. Even if the court or tribunal does award substantial costs, this does not mean that the losing party will be able to pay them. Beyond the financial cost, the emotional cost and time commitment involved in litigation is considerable. Such cases may well settle with concessions having to be made that are not warranted in law, in order to get rid of the litigation.

One of the significant features of the *Catch the Fire Ministries* case is that it demonstrates the potential reach of the Victorian law to include teaching given at Christian seminars and conferences. There can be no doubt that such seminars are public rather than private within the meaning of the Victorian legislation. They are typically advertised, at least within church congregations, and anyone is welcome to attend. However, no-one need attend a seminar of this kind, and it is to be expected that the audience for such a seminar would be Bible-believing Christians who choose to attend a seminar about another faith from a Christian perspective. This does not prevent a complaint being made by people of other faiths who choose to attend such a seminar without sharing the worldview of its organisers.

The fact that a religious leader could be sued for communicating religious beliefs at a meeting intended for adherents of his or her faith because what is taught might cause grave offence to someone of another faith who happens to be, or indeed chooses to be in the audience, is troubling. The possibility of a lawsuit may intimidate religious leaders, of whatever faith, from teaching and expressing what they believe their faith requires or from expressing a point of view which might offend others. Because of the costs associated with litigation, and its stress and unpredictability, the threat of litigation is a dangerous weapon even if it is unlikely to be successful. A gun does not have to be loaded to be terrifying. It is enough that a person towards whom the gun is pointed believes that it is loaded, or fears that it might well be.

The concentric circle effect of statutory interpretation

The second source of collateral damage to religious freedom arises from the concentric circle effect of statutory interpretation. The nature of litigation is that over time, expansionary pressures are placed upon definitions. Because litigation is adversarial, it will often be in the interests of a claimant to argue for a wide definition or an expansive interpretation of the law. The parties may indeed have vested interests in giving different interpretations of the provision, motivated not by a desire to determine what the rule maker meant, but to advance the interpretation which is most beneficial to their case.

Furthermore, whatever words a parliamentary draftsman uses, there is likely to be a penumbra of uncertainty surrounding their application. The parliamentarian in proposing or voting for a Bill, may have in mind the prohibition of the most appalling and indefensible conduct. However, it is not only the most appalling forms of conduct which end up before civil courts. Judges and other decision-makers will, over the course of time, receive evidence of conduct which clearly is prohibited on any interpretation of the definition, conduct which is probably within the definition, conduct which may or may not be within the definition, and conduct which is probably not within the definition.

The process of adversarial litigation over time forces courts and tribunals to define the boundaries of the meaning of words. As a consequence, while legislators may be focussed on

the epicentre of a word, judges have to explore its penumbra. The meaning of words gradually expands like ripples spreading from the centre of a pond. This is the concentric circle effect of statutory interpretation. The evolutionary nature of legal development through case by case decision-making may gradually expand the scope of legislation over time out from its central concerns to reach less obviously egregious behaviour. Law, in other words, has a tendency to take on a life of its own. Like a new vessel launched onto the open seas,³¹ legislation once implemented no longer remains moored to its origins and confined to the motivating circumstances of its enactment.

The collateral damage from folklaw and risk-averse management

Another source of collateral damage is from the difference between what the law actually is and what people think it requires. The law that impacts upon people's lives is not the law as enacted by parliaments, and not even the law as interpreted by the courts. What matters is the law as people believe it to be. This folklaw may have only a tenuous connection with the law as enacted or applied in the courts.

Another reason why the law on the books is given an altogether different meaning in practice is because the fear of lawsuits, whether soundly based or not, leads to risk-minimising behaviour in organisations. This in turn leads to an expansionary interpretation of laws in the affected communities.

This occurs because the best way to avoid crossing a boundary is to go nowhere near it. Lawyers are interested in defining carefully the boundaries of laws, in order to determine the scope of their application. Managers in organisations are not nearly so interested in boundaries. The question is not where the boundary lies, but what guidance can be given to members of organisations to ensure as far as possible that members do not stray near the boundary. The consequence is that narrowly drafted laws on the statute books can be given an expansionary scope in employment manuals, organisational guidelines and policy documents. This can be seen in other areas of law that impact upon organisations. At its extreme, risk-averse management converts sexual harassment laws into no-dating rules in the workplace, and child protection concerns into rules that teachers and others working with children should not even touch them.³² Risk averse management can turn laws which properly aim to protect the vulnerable into organisational rules which oppress everyone.

In similar ways, a law which is not intended to inhibit religious expression, but which prohibit certain kinds of speech, may have the effect of constraining speech far beyond what was intended.

The absence of a human rights framework

A fourth reason why religious vilification laws can cause collateral damage to religious freedom is that, in Australia at least, they do not operate within the context of a constitutional human rights framework. Rights often exist in tension with one another. In jurisdictions outside Australia, when constitutions or human rights' laws enumerate a variety of different rights, and require courts to evaluate legislation or government action in the light of them, courts have to balance different rights and interests, all of which are protected by legislation.

³¹ Bennion F, *Statutory Interpretation: A Code* (3rd ed, Butterworths, London, 1997), p 687.

³² I have discussed this issue of what I call 'unhealthy prevention' in Parkinson, P, *Child Sexual Abuse and the Churches*, (2nd ed, Aquila Press, Sydney, 2003) pp 308-313.

Tests of proportionality are utilised to work out the balance between different interests. An example of such a balancing is to be found in the International Covenant on Civil and Political Rights. Article 27 provides that in states which have ethnic, religious or linguistic minorities, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, and to use their own language. This is subject to the qualification, contained in Article 18(3), that states are entitled to impose such limitations on the exercise of people's freedom to manifest their religion or beliefs as are necessary in the interests of public safety, order, health or morals, or for the protection of the fundamental rights and freedoms of others.

The interpretation of anti-discrimination laws and anti-vilification laws in Australia does not occur against the background of human rights' guarantees which protect different interests. Statutes must be interpreted according to their language and intent without necessarily a legitimate competing interest being given the same legal protection. No law in Australia protects freedom of speech or association, beyond freedom of political communication, which has been found to be an implied right in the Federal Constitution.³³ There is also a limited guarantee of religious freedom in the Federal Constitution, but it only applies to Commonwealth legislation.³⁴ Thus the balancing exercise often required when freedom of speech competes with other legitimate interests and concerns, is not an explicit part of the process of legal reasoning in Australia in the way it is in other jurisdictions.

The Racial and Religious Tolerance Act 2001 in Victoria does at least attempt to encourage an assessment of proportionality. Section 4(1)(b) provides that one of the objects of the legislation is:

“to maintain the right of all Victorians to engage in robust discussion of any matter of public interest or to engage in, or comment on, any form of artistic expression, discussion of religious issues or academic debate where such discussion, expression, debate or comment does not vilify or marginalise any person or class of persons”.

Subsection (2) provides that “It is the intention of the Parliament that the provisions of this Act are interpreted so as to further the objects set out in sub-section (1)”.

The religious vilification provisions in Queensland and Tasmania have no such objects clause to encourage a balancing exercise in the interpretation of the legislation. Even the Victorian objects clause is of limited efficacy. An objects clause is not the same as a protected or entrenched right.

³³ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. For the application of this principle to religious vilification laws, see *Deen v Lamb* [2001] QADT 20.

³⁴ Section 116 of the Constitution provides that the "Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion." Despite the similarity between the wording of this section and the words of the First Amendment in the American Constitution, it has not been interpreted in the strict way it has been in the United States to require a separation between all churches and the state. See *Attorney-General for Victoria (ex rel Black) v Commonwealth* (1981) 146 CLR 559.

7. The divisiveness of vilification legislation

One of the dangers of vilification legislation is that it may be seen as a new means of pursuing a long-existing conflict before a neutral arbitrator. The issue here is not that vexatious claims are brought, for often the claimant will have a passionate sense of grievance. Rather, the problem is that the legal system becomes another theatre for the playing out of a conflict which it cannot possibly resolve, because that conflict is political or religious.

This was certainly the view of Peter Costello, the Treasurer in the Federal Coalition government. Commenting in general terms on the wider issues raised by the *Catch the Fire Ministries* litigation, he had this to say about Victoria's religious vilification law:³⁵

"I do not think that we should resolve differences about religious views in our community with lawsuits between the different religions. Nor do I think that the object of religious harmony will be promoted by organising witnesses to go along to the meetings of other religions to collect evidence for the purpose of later litigation.

I think religious leaders should be free to express their doctrines and their comparative view of other doctrines. It is different if a religious leader wants to advocate violence or terrorism. That should be an offence - the offence of inciting violence, or an offence under our terrorism laws. That should be investigated by the law enforcement authorities who are trained to collect evidence and bring proceedings.

But differing views on religion should not be resolved through civil law suits...

The proceedings which have been taken, the time, the cost, the extent of the proceedings, the remedies that are available all illustrate, in my view, that this is a bad law."

Vilification legislation in Australia has certainly been invoked in circumstances which might not appear to a reasonable person to be obvious forms of hate speech. In *Judeh v Jewish National Fund of Australia Inc*,³⁶ complaint was made about an advertisement which appeared in the Australian Jewish News. The advertisement was headed, "Remember the Future." It stated:

"Every man and woman should make a will. Every Jewish person should include in it a legacy, however modest, to Israel. Israel will benefit if you make a will through the Jewish National Fund and so will you. Your name will be remembered forever in the continuing development of Israel through a living project of your choice. We can arrange for your will to be drawn up professionally, free of charge."

Accompanying the advertisement was the Jewish National Fund's logo. That logo was described by Deputy President McKenzie as:

"a map showing an area in outline and shaded. The map does not specify what the area is, what are its geographic features, what are the locations of its cities, towns or villages, or what groups of people live there.

It is not disputed that the map delineates an area which includes what is called Israel and also areas sometimes called semi-autonomous areas under the control of the Palestinian authority."

³⁵ Peter Costello, MP, Treasurer, Address to National Day of Thanksgiving Commemoration, Scots Church, Melbourne, 29 May 2004, at <http://www.treasurer.gov.au/tsr/content/speeches/2004/007.asp>.

³⁶ *Judeh v Jewish National Fund of Australia Inc* [2003] VCAT 1254 (Unreported, Deputy President McKenzie, 13 March 2003).

The plaintiff's argument was that by placing this advertisement, and including the map, the defendant organisation had, on the ground of the race of Arab Palestinians in which the plaintiff was included, engaged in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that group. The reason for this, it was argued, is that the map effectively denies the existence of Palestine. The complaint was summarily dismissed, but the Deputy President expressly stated that she did not regard the complaint as an abuse of process or vexatious. She also noted that the complainant made three other complaints against other organisations and these complaints were withdrawn.

The problem with a case of this kind is that whatever the court or tribunal decides, it cannot resolve the conflict between its citizens. For the heart of the conflict is not an advertisement but the Israeli-Palestinian disputes about a homeland for the Palestinian people. The result of a vilification case brought in faraway Melbourne could never have achieved more than to require a Jewish organisation to change its logo. However, the danger for the courts is that if vilification laws are invoked in such cases, then courts and tribunals will be dragged into great political and religious controversies, with victory in a given case seen as a tactical win for one side or the other. In such cases, the danger is that the domestic legal system will provide another theatre of war without its involvement doing anything constructive to resolve the underlying conflict.

In another case, a member of the Orthodox Jewish community complained about a farewell speech given by the retiring President of the NSW Jewish Board of Deputies.³⁷ The speech was reported in a Jewish newspaper. In the speech, the retiring President criticised a "small part of the Orthodox community" who wanted to make out that the Board of Deputies was not representative of Orthodox Jewish interests. Again, the claim (of racial vilification) was summarily dismissed, and this was upheld on appeal, but it is interesting to speculate whether the claim would still have been summarily dismissed if there had been a ground of religious vilification available to the applicant in New South Wales.

It remains to be seen whether the experience of inter-faith conflict generated by vilification laws will cause a rethink of the use of this legislation to promote tolerance. The power to bring a complaint to a state body, albeit one which proceeds first by means of conciliation, can exacerbate conflict by giving it a forum in which a battle can be fought out. A complaint only has to be plausibly within the Act to be accepted. Once a full analysis has occurred, it may become evident to an adjudicator that there is no substance to that complaint; but that is often established only after a full inquiry.

8. Religious vilification and truth

The collateral damage from religious vilification laws to important societal interests is much wider than for any other form of vilification law, because the chilling effect of such laws is on people's right to communicate their understanding of truth. The protection of truth-telling is an important justification for the right of freedom of speech, if not the only one.³⁸ As Justice Oliver Wendell Holmes once wrote: "The best test of truth is the power of the thought to get itself accepted in the competition of the market."³⁹

³⁷ *Miller v Wertheim* [2002] FCAFC 156 (Unreported, Heerey, Lindgren and Merkel JJ, 27 May 2002).

³⁸ Wojciech Sadurski, *Freedom of Speech and its Limits* (Kluwer, Dordrecht, 1999), Ch. 1.

³⁹ *Abrams v United States*, 250 US 616, 630 (1919) (dissenting).

The secular post-modernist, or the religious leader who believes that all the major world religions are merely different paths up the same mountain, may be sceptical of all absolute truth claims, but for many devout religious believers it is the very truth claims of the religion which give them inspiration and hope. This point is well-expressed by Amir Butler, the Executive Director of the Australian Muslim Public Affairs Committee, who published an article in Melbourne's Age newspaper, critical of Victoria's religious vilification law. He wrote:⁴⁰

"The problem is that as long as religions articulate a sense of what is right, they cannot avoid also defining - whether explicitly or implicitly - what is wrong. If we love God, then it requires us to hate idolatry. If we believe there is such a thing as goodness, then we must also recognise the presence of evil. If we believe our religion is the only way to Heaven, then we must also affirm that all other paths lead to Hell. If we believe our religion is true, then it requires us to believe others are false. Yet, this is exactly what this law serves to outlaw and curtail: the right of believers of one faith to passionately argue against or warn against the beliefs of another."

The vigorous proclamation of truth need not lead to disharmony in the community. One can respect a person with whom one disagrees - and the more so because they express deeply-held beliefs rather than being tossed around by every whim and fashion. In democracies, there is a long tradition of people holding, expressing and passionately debating their views of what is true and right. To risk curbing truth-telling because it offends others is to risk our way of life.

9. Religious vilification and respect for the law

The final concern about religious vilification laws is that they can undermine the authority of law.

Law has its most powerful impact if it is believed in.⁴¹ If it reflects a morality which people endorse, requires behaviours which people accept are right (whether or not they always comply) or represents a consensus of values in a community, law can buttress voluntary compliance. As the late Professor Tay has written:⁴²

"In all societies, it is often forgotten, law is not merely the utterance of power; it both represents and produces a significant degree of social consensus. Without that, law would lose its distinctive character, its legitimacy as promoting and safeguarding the normal capacity of human beings to live together, to respect each others' humanity. Law thus stands halfway between violence and education, and partakes of both."

When law buttresses shared morals and values, it is wisely used and can complement educational and other positive strategies to promote acceptable behaviour. Where, however, governments impose standards of behaviour through law on a reluctant population, they risk more than they gain. Compliance is coerced rather than voluntary and the legislation

⁴⁰ The Age, June 4th 2004, republished <http://www.onlineopinion.com.au/view.asp?article=2274>.

⁴¹ Belief in the law is a fundamental characteristic of the western legal tradition. See further, Parkinson, P., *Tradition and Change in Australian Law*, 2nd ed, 2001, Ch 2.

⁴² Tay A, "The Role of Law in the 20th Century: From Law to Laws to Social Science" (1991) 13 Syd LR 247 at 251-252.

undermines belief in a shared community of interest between governors and governed. In some cases, legislation may be nothing more than lawful force to achieve an outcome, and governments which rely on force as a central tool of achieving compliance are only as effective as their weapons.⁴³ Legislation defines legality and illegality, but legitimacy is something different. Legitimacy is conferred by the assent of the people. It is the legitimacy of law, and not its constitutional legality, which matter most for stable and harmonious societies.

10. Conclusion

The collateral damage caused by religious vilification laws raises issues that do not arise to the same extent in relation to other groups protected from vilification. Religious freedom is an important human rights concern, guaranteed by international law. For example, there is no similar important interest to protect if vilification laws have a chilling effect on racial speech that falls short of vilification. It is difficult to see what important societal interest there is to protect on the other side of the boundary line from racial vilification, other than an abstract right to freedom of speech - however ill-informed, prejudiced or insulting. There may be more of a societal interest in lawful communication concerning homosexuality. While all discrimination and public vilification are properly the subject of legislative prohibition, people do nonetheless have a right to their own moral views on sexuality, and to the extent that those moral views are informed by religious beliefs, to hold and express those beliefs.

Religious vilification laws have proven to be controversial and divisive. There has been much opposition to them from people of faith and integrity⁴⁴ who are law-abiding citizens. There is a real question as to whom they are designed to protect, and whether the benefits outweigh the costs. Other laws protect people of faith from threats and falsehoods, including the criminal law and defamation laws. The collateral damage to religious freedom from vilification laws is considerable. It is time for a rethink.

⁴³ As Prof. Harold Berman wrote :

"Law itself, in all societies, encourages the belief in its own sanctity. It puts forward its claim to obedience in ways that appeal not only to the material, impersonal, finite, rational interests of the people who are asked to observe it but also to their faith in a truth, a justice, that transcends social utility ... Even Joseph Stalin had to reintroduce into Soviet law elements which would make his people believe in its inherent rightness-emotional elements, sacred elements; for otherwise the persuasiveness of law would have totally vanished, and even Stalin could not rule solely by threat of force."

Berman H, *The Interaction of Law and Religion* (SCM Press, London, 1974), p 29.

⁴⁴ For an account of opposition to the Victorian law, see the Saltshakers' website, <http://www.saltshakers.org.au>. Saltshakers is a Christian organisation that has reported extensively on the case.