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

These two rights, of course, are not fundamentally opposed. As Ahdar & Leigh point, for many religions speaking about their religious beliefs is a positive duty, and hence “freedom of religious speech” is an important subset of “free exercise of religion”.

Although religious speech is treated legally as a liberty, in proselytizing religions (Christianity especially) bearing witness to one’s faith—speaking about it to others—is a religious duty, rather than a matter of choice. It is not surprising then that early Christians responded to official requests to keep silent about their faith by arguing that they must obey God rather than men.

Indeed, the freedom to speak to others about one’s religion and even to respectfully seek to persuade others of the truth of that religion, has been clearly identified by the European Court of Human Rights as a vital part of the internationally protected right to freedom of religion, and recognized as such in the High Court of Australia. Kirby J in the High Court, in NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2005] HCA 29; (2005) 216 ALR 1; (2005) 79 ALJR 1142, at [121], offered clear support for the view put forward by the ECtHR in Kokkinakis v Greece (1993) 17 EHRR 397 at 418, where that Court affirmed that religious freedom includes the freedom:

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

Still, in some circumstances it may be that the rights to free speech and freedom of religion may conflict. Free exercise of religious speech by some persons may, if it involves criticism of religious beliefs held by another, generate offence or annoyance or anger. In addition, such speech may generate annoyance, offence or in some cases more serious harm to other members of society whose interests are protected by discrimination laws, or more generally.

Where should the law draw the limits here?

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

1. Blasphemy

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

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

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

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

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

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

Neil Foster
means of “contumelious abuse applied to sacred objects”. Prosecutions became very rare.

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

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

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

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

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

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

\[ 574 \text{ Prosecutions for blasphemy} \]

\(^6\) See Mortensen at 416 ff for this general discussion.
No person shall be liable to prosecution in respect of any publication by him or her orally, or otherwise, of words or matter charged as blasphemous, where the same is by way of argument, or statement, and not for the purpose of scoffing or reviling, nor of violating public decency, nor in any manner tending to a breach of the peace.

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

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

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

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

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

More recently the Governor’s assassin was executed for the crime, but had been made a “folk hero” in some quarters in Pakistan.

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

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7 See NSW Law Reform Commission, Blasphemy [1994] NSWLRC 74; and note other reports in Australia and the UK referred to by Mortensen at 409 nn 2,3.
9 Hayee, at 27 n 15.
10 See “Pakistan Braces for Violence After Execution of Governor’s Killer” (29 Feb 2016) http://www.nytimes.com/2016/03/01/world/asia/salmaan-taseer-killer-muntaz-qadri-executed.html?_r=0
unrelated disputes.)\textsuperscript{11} However, it is not at all uncommon for someone who is awaiting trial for blasphemy to be the victim of an extra-judicial killing, either by a mob or in prison.\textsuperscript{12} In a 1995 case a 13-year-old boy was sentenced to death by the trial judge; on appeal to the Lahore High Court his conviction was quashed, but he had to leave the country to avoid a mob killing, and some months later the judge who had quashed the conviction was murdered in his chambers for having entered the acquittal.\textsuperscript{13}

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

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

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

2. Religious anti-vilification laws

While blasphemy laws are no longer popular in the West, there has been a growing trend to introduce “anti-vilification” laws, in an attempt to deal with the problem of “hate speech” directed at others on the basis of religion.

I wrote a paper on this area a few years noted on the reading list, comparing these laws with defamation laws and suggesting that some consideration should be given to making sure that if these laws are enacted, they contain robust protection for freedom of speech. The second paper on the list updates those views (and I have to say I have changed my mind on some of the issues since writing the earlier paper).

\textsuperscript{11} For a very recent report of this sort of incident (now involving a Facebook post!) see: “Pakistan: Christian boy, 16, arrested for Kaaba ‘blasphemy’” (Sep 20, 2016) https://www.worldwatchmonitor.org/2016/09/4638977/.

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

\textsuperscript{13} Hayee, at 50.

\textsuperscript{14} See Temperman (2008) for a detailed analysis, and his (2011) piece for some updating.

Neil Foster
Perhaps one fairly extreme example will illustrate an aspect of the harm being addressed. A report from 5 July 2013 in the UK entitled “Muslim television channel fined after preacher of hate incited murder live on air” records that on a Muslim TV channel a presenter said the following:

“The matter of insulting the prophet does not fall in the category of terrorism.

“Those who cannot kill such men have no faith.

“It is your duty, the duty of those who recite the holy verse, to kill those who insult Prophet Mohammed.

“Under the guidance from Islamic texts it is evident that if a Muslim apostatises, then it is not right to wait for the authorised courts; anyone may kill him.

“An apostate deserves to be killed and any man may kill him.”

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

Of course there are other examples of hate speech directed against Muslims, which are equally wrong. Should it be acceptable, for example, for a public street to be plastered with posters covered with comments such as “Muslims are all terrorists”?

For a media commentator to suggest that “gang rape was a rite of passage for Muslim males in France”?

Other examples can be imagined: “all Catholic priests are paedophiles”, for example. But the problem arises when asking how one draws the line between these comments, and a remark merely made in criticism of a religion’s beliefs, such as “Jesus Christ was a fraud”?

(a) Overview of current Australian law on religious vilification

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

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

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

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

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16 And of course it goes without saying that recent announcements by “Islamic State” militants about the lawfulness of killing Christians and others would fall into this category as well.

17 See [Norwood v DPP [2003] EWHC 1564](http://www.courtственно.org.uk/judgments/2003.html), a prosecution for “threatening, abusive or insulting” language based on a poster stating “Islam out of Britain” and “Protect the British people” against a background picture of the destruction of the World Trade Centre in New York.


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

**Religious vilification unlawful**

8(1) A person must not, on the ground of the religious belief or activity of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.

Note: *Engage in conduct* includes use of the internet or e-mail to publish or transmit statements or other material.

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

(a) may be constituted by a single occasion or by a number of occasions over a period of time; and

(b) may occur in or outside Victoria.

There is an important ‘defence’ provision in the Victorian legislation:

**11. Exceptions-public conduct**

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

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

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

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

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

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

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

In *Deen v Lamb* [2001] QADT 20, publication of a pamphlet inferring that all Muslims were obliged to disobey the law of Australia, which would otherwise have contravened the section, was said to have been allowable under the exception in s 124A(2)(c) of that Act as it was done ‘in good faith’ for political purposes.

The most controversial application of these laws so far, however, was in the litigation involving the ‘Catch the Fire’ organisation.\(^{22}\) McNamara, Ahdar, Blake and Parkinson all offer cogent critiques of the way that the original decision finding the organisation guilty of vilification was made, and comment on the overturning of the decision by the Victorian Court of Appeal. A brief summary is appropriate.

The original decision was *Islamic Council of Victoria v Catch the Fire Ministries Inc* [2004] VCAT 2510. In short, a Christian religious group advertised to a Christian audience that it was proposing to run a seminar that would critique Islam and help its listeners understand how to reach out to Muslims. Representatives of the Islamic Council of Victoria knew the nature of the seminar, chose to attend, and then took action against the group on the basis of statements that were made critiquing Islam. While some untrue and

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the *Racial and Religious Tolerance Act 2001* (Vic). We will also note below the “anti-offence” provision contained in s 17 of the Tasmanian law.

\(^{21}\) Sub-section (2) was added to the Act in 2006 partly in response to the *Catch the Fire* litigation discussed below.

\(^{22}\) See also the other main case decided under the Victorian provisions, *Fletcher v Salvation Army Australia* [2005] VCAT 1523, discussed in Blake at 396-397.
unhelpful statements may have been made in the course of the lengthy seminar (and in some related material published on a website), most of the comments made were sourced from multiple Islamic authors. Initially, the court found the pastors involved to be guilty of vilification and ordered them to publish retractions. On appeal the Victorian Court of Appeal in *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* [2006] VSCA 284 overturned the Tribunal’s findings of vilification. The matter was referred back to the Tribunal, but the parties entered into a settlement of the proceedings that affirmed their mutual right to ‘criticise the religious beliefs of another, in a free, open and democratic society’. 23

Nettle JA, as his Honour then was, 24 in the Court of Appeal, noted that the Tribunal had failed to distinguish between criticisms of the *doctrines* of Islam and ‘incitement to hatred’ of *persons*:

23 … s.8 does not prohibit statements about religious beliefs per se or even statements which are critical or destructive of religious beliefs. Nor does it prohibit statements concerning the religious beliefs of a person or group of persons simply because they may offend or insult the person or group of persons. The proscription is limited to that which incites hatred or other relevant emotion and s.8 must be applied so as to give it that effect. 25

While to some extent the decision of the Court of Appeal draws an appropriate line, the fact remains that the Victorian legislation seems to have been used in a way unintended by the framers of the legislation. 26 In general it seems far preferable for debate about religion to be “untrammelled” by fear of legal intervention.

The UK has also introduced legislation prohibiting religious vilification. There, the *Racial and Religious Hatred Act 2006* (UK) added Part 3A to the *Public Order Act 1986* (headed ‘Hatred against persons on religious grounds’), which now prohibits what in Australia would be called ‘religious vilification’. Consistently with the comments of Nettle JA above, the UK prohibition on stirring up ‘religious hatred’ can only be breached by acts that stir up hatred against *believers*, rather than by attacks on *beliefs*. 27

Addison, in a very useful study of the UK law, sums up the history of these provisions. He notes that the offences apply to words that are ‘threatening’ (not simply insulting or abusive, as commentators had suggested about a previous version of the legislation), and that the offender has to ‘intend’ to stir up religious hatred. Interestingly, he notes that the Government’s original proposals to make the offences wider were partly defeated in the House of Lords because of concerns that the UK law would end up like the law in Victoria that gave rise to the *Catch the Fire* litigation. 28

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

**29J Protection of freedom of expression**

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23 See, for example, the summary in Ahdar at 305.
24 His Honour has since left the Victorian Court of Appeal and been appointed to the High Court of Australia.
25 [2006] VSCA 284 at [15].
26 And Ahdar, in his perceptive analysis of the judgments in the Court of Appeal, points out how many uncertainties still remain, due not least to failure to agree on some issues among the judges in the Court of Appeal.
27 *Public Order Act 1986* (UK) ss 29A, 29B.
28 Addison, p 140.

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

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

One interesting set of religious vilification proceedings that does not previously seem to have been the subject of detailed comment involved a dispute between two odd sets of parties. In Ordo Templi Orientis v Legg [2007] VCAT 1484 (27 July 2007) a complaint was made under the same Victorian legislation noted above by members of a group who claimed that they followed a religion called “Thelema”. This group had been targetted by comments made on a website run by the respondents Mr Legg and Ms Devine, alleging that the organisation was a “paedophile group” and that it kidnapped, tortured and killed children, impliedly in pursuance of its religious beliefs (which included satanic beliefs).

An unfortunate feature of this case was that, in the initial decision of DP Coghlan that religious vilification was established, there was no appearance at the trial from the respondents. (It seems that the respondents were part of a group that saw vast conspiracies in many places, and so perhaps thought they would get no justice in any event from the court.) In their absence, the Deputy President found that there had been vilification and ordered the remarks removed from the website.

This order was not obeyed, and in later contempt proceedings, Ordo Templi Orientis Inc & Anor v Devine & Anor [2007] VCAT 2470 (28 November 2007) Judge Harbison of the Tribunal found that the respondents were in contempt and order them to serve 9 months imprisonment. Features of the hearing included the fact that the respondents had to be arrested and brought to the court for the first day of hearing; they conceded that they were in contempt and would continue to disobey the order; they were released overnight after the first day and did not appear to the second day. Later press reports revealed that they were then re-arrested in Coffs Harbour in January 2008 and returned to Victoria to begin their sentence. 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. They continued to pursue a formal appeal against their conviction, which in the end was denied, the court holding that


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

The case provides a very good example of the difficulties with religious vilification legislation. That it was not the subject of more high profile media attention no doubt relates to the fact that neither the complainants nor the respondents were members of a mainstream major religion. But it may be queried whether the respondents ought to have been put in jail for their behaviour here. I should make it clear that I had no particular view about “Ordo Templi Orientis” before coming across this case; but it seems that there are some serious questions raised here. The organisation, and the religion “Thelema”, seem to have originated in the teachings of notorious “Satanist” Aleister Crowley.33 I make no comment as to whether there was any truth to the comments on the offending website, but I want to explore the possibility that there may have been.

Suppose that there was indeed a religion that blatantly encouraged its followers to abuse children, and which had amongst its adherents a number of “powerful” and respectable persons who were usually able to keep rumours of this behaviour out of the mainstream media. It would then surely be in the public interest that these facts be ventilated and tested by appropriate authorities. Yet if the remarks making these allegations assert that these are characteristics of a “religious” group, it seems that the decision in this case means that such comments would be stifled.34

Note that one of the problems here is one that has been identified previously: that there is nothing resembling a defence of “truth” under the Victorian legislation (nor indeed in any other such Australian legislation.)35 Might in not be the case that some religious doctrines in fact warrant expression of “hatred… serious contempt or revulsion or severe ridicule”? In some circumstances one could separate a critique of doctrine from a critique of those holding the doctrine- but if a religious doctrine officially supported child abuse, then it would seem that any association of persons with that religion would lead to contempt of the persons.

One might ask, for example, why the representatives of “Thelema” did not take a defamation action against the respondents? For example, part of statement of claim read: “by reason of the breach, Mr Bottrill and Mr Gray have each been held up to serious contempt, revulsion and ridicule, and each has been severely injured in his reputation and feelings, and has thereby suffered and will continue to suffer loss and damage.”36 If indeed these persons were sufficiently “identified” as belonging to the group to suffer this

33 For some background to “Thelema” from what seems to be a very sympathetic viewpoint, see http://en.wikipedia.org/wiki/Thelema. (I don’t of course regard Wikipedia as an academically reliable source for independent research- but it does at least provide evidence of the views of a segment of the public who are interested in the topic!)
34 One may also recall comments made from time to time about Scientology, which in recent years has been accused of a number of improprieties by Senator Nick Xenophon, who due to his position has been able to do so under absolute Parliamentary privilege. But would a newspaper article reporting these matters be able to be suppressed under religious vilification laws?
35 See Foster (2012), at 79.

Neil Foster
harm to their “reputation”, then clearly a defamation action would have been available. Yet in such an action the respondents would have had an opportunity to make out the truth of their claims as a defence; whereas in this religious vilification claim no such issue arose.

(b) Problems with these laws

I want to turn now to some problems with these anti-vilification laws. The commentators previously cited have noted many problems. Perhaps the most obvious and major one is that these provisions amount to a severe restriction on freedom of speech. The right of freedom of speech, of course, is a right protected by international human rights instruments such as the UDHR, Art 19. But it is perhaps not so commonly noticed that, even in a jurisdiction such as Australia where there is currently no formal, broad-reaching protection of freedom of speech, the courts have regularly noted that the common law itself provides such a protection as a fundamental value.

It goes without saying, of course, that these laws also have the potential effect of restricting freedom of religion, because it may in some circumstances be an obligation of one’s religion to point out why, and how, another religion is wrong.

When these factors are coupled with pragmatic considerations concerning the enforcement of such laws, the case against the laws is particularly strong. A law that on its face seems designed to protect freedom of religious choice, may allow abuse of the law to attack others who are seeking to express their religion. Indeed, as Parkinson has pointed out, not only the precise terms of the legislation are important, but also the way that they are perceived:

The law that impacts upon people’s lives is not the law as enacted by parliaments, and not even the law as interpreted by the courts. What matters is the law as people believe it to be. This ‘folk law’ may have only a tenuous connection with the law as enacted or applied in the courts. There is often a distorted effect as the perceived meaning of laws is spread through general communities of people who may not have a copy of the law itself or know the outcomes of cases they have heard are going through the courts.

If speakers think that any public speech criticising other religious views is in danger of being prosecuted, then they will effectively ‘self-censor’, and public debate about important religious issues will shrink. Such debate, in the end, may be ‘forced underground’, where the lack of light being shone from the glare of publicity may end up entrenching prejudice and ignorance.

There are a number of important philosophical questions about laws that impose restrictions on freedom of speech, as any law that prohibits certain types of speech will do. Some speech can clearly be regulated and penalised — classic examples include someone who shouts ‘Fire!’ in a crowded hall or someone who tells a lie that attacks an individual’s reputation. But should the law go further and address speech that attacks other’s beliefs?

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37 For the requirement of “identification”, see Foster (2012), at 75-77.
38 Thornton & Luker, above n 29, comment on this at 90: “There is no interrogation whatsoever of the religious beliefs associated with the Ordo Templi Orientis and its lawfulness is assumed.”
40 Parkinson at 960.
One could argue that it would be best not to have anti-vilification laws based on religion at all. Religion, unlike race or sex, is a matter that is fundamentally based on a person’s acceptance of certain propositions about the universe. (The view that religious matters, being questions of ‘faith’, are beyond rational debate, is clearly wrong.\textsuperscript{41} Anyone who puts forward such a view needs to spend some time in dialogue with representatives of actual religions, which almost all argue that there are good reasons to adopt their position as opposed to others. This is certainly the case with religions such as Christianity and Islam.) In any serious religious debate there will be a challenge to the worldview of the hearers. To penalise speech connected with religion runs the grave risk that rational debate on religious matters will be ‘driven underground’, and hence that where there are disagreements they will be resolved in less rational ways.\textsuperscript{42}

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

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

In this area I have been greatly influenced by the book by Waldron noted on the reading list, The Harm in Hate Speech. In that book he makes a careful but impassioned case for the possibility of “hate speech” laws. His arguments support a workable but carefully limited law prohibiting vilification on religious grounds.

Waldron’s book is explicitly directed to an American audience, where the tradition of strong free speech protection under the First Amendment to the US Constitution is well entrenched. In that context he makes a modest but compelling case for recognition that speech is not “mere” speech; that real harm can be experienced by those who are part of a minority group which is confronted on a regular basis by written and visual reminders that some would exclude them from civil society.\textsuperscript{43}

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

\textsuperscript{41} For an unfortunate judicial adoption of such a view, see the comments of Laws LJ in the English Court of Appeal decision of McFarlane v Relate Avon Ltd [2010] EWCA Civ B1 at [23]-[24].

\textsuperscript{42} “If Western nations do not defend free speech and religious freedom, then the open discourse required for a deliberative democracy will be choked off. As long as full religious freedom is absent, religious groups -- including moderate Muslims -- will face the threat of punishment for what is essentially a prohibition on blasphemy. This creates an atmosphere of fear that is never conducive to open, democratic debate. And if you don't have open, deliberative democracy, you can't peel off and correct the disaffected, i.e., those who turn to the world of the violent Islamists as an alternative”- personal correspondence from Prof Carl H Esbeck, School of Law, University of Missouri (1 Aug 2009).

\textsuperscript{43} This view is in part supported by Pringle at 331: “If the vilification provisions are to do the work of the anti-discrimination laws in which they are usually placed, their formulation should explicitly take cognisance of offence only where it is related to, or is a form of, discrimination that erodes or undermines civil standing”. It would be preferable, however, for reasons noted below, not to penalise “offence” per se at all.
Even in the racial vilification area he makes a number of important points. Relevant laws should prohibit speech that incites hatred in others, not speech that is necessarily based on actual hatred felt by the speaker. 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.

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. He argues that there is, however, a difference between “social” reputation and “personal” reputation. To have a good “social” reputation is to be “a member of society in good standing”, and the law should protect this, just as the law of “ordinary” defamation protects other aspects of personal reputation. So Waldron would support laws that prohibit “the publishing of calumnies expressing hatred and contempt for some racial, ethnic or religious group”.

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

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

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.

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

44 Waldron (2012) at 35.
45 Waldron (2012) at 37-38; and see 45: “the fact that something expressed becomes established as a visible or tangible feature of the environment- part of what people can see and touch in real space (or virtual space) as they look around them.”
47 Waldron (2012) at 85-86.
49 Waldron (2012) at 229; he quotes in a footnote Locke’s words from Letter Concerning Toleration,
46: “Any one may employ as many exhortations and arguments as he pleases, towards the promoting of another man’s salvation. But… [n]othing is to be done imperiously”.
50 Waldron (2012), at 126-127.
individual’s grappling aloud with these matters can religion be defanged of this potential for offence.”

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.

He points out, however, that to enact such laws we cannot allow people to assert that their “identity” is so bound up with their religious beliefs that to attack one, is to attack the other. We must require the law to distinguish between these things, and not allow people to play “identity politics”.

Waldron supports the sort of balance that is represented by the UK Racial and Religious Hatred Act 2006, which on the one hand made it unlawful under s 29A of the Public Order Act 1986 to stir up “hatred against a group of persons defined by reference to religious belief”, but on the other hand added s 29J noted previously.

While stark in its apparent toleration even of “ridicule” and “insult”, the provision seems a very good reminder that what is at stake is not the beliefs, but the dignity of the individuals who hold those beliefs. It would be sensible, if Parliaments elsewhere are considering enacting religious anti-vilification laws in the future, to include a provision of such a nature, even expressed in equally strong terms “for abundant caution”.

(d) But the law should not prohibit mere “offence”

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

(i) Australian law penalising “offence”

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

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

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51 Waldron (2012) at 129.
52 Waldron (2012) at 130.
53 See the very important discussion at 131-136.
54 See Waldron (2012) at 119-120. Section 29JA of the legislation now contains a similar provision ensuring “freedom of expression” in relation to sexual orientation- see R Sandberg, Law and Religion (Cambridge, CUP, 2011) at 144 n 93.

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

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

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

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

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

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


57 See RDA s 18B, and Eatock at para [306].

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

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

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

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

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

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58 Interestingly, even Joseph, who defends the decision as good one, accepts that “offence” is an inappropriately low bar to set: see Sarah Joseph “Free speech, racial intolerance and the right to offend: Bolt before the court” (2011) 36 (4) Alternative Law Journal 225-229, at 229.

59 For brief mention of these defences, see Foster (2012) at 73-74. It is interesting to note that in determining the meaning of the articles in question, Bromberg J deliberately adopted the approach that has previously been taken in defamation proceedings to analysing what “imputations” have been made—see para [19]. The applicability of the law of defamation to these sort of proceedings is quite clear.

60 See EatoCK at [206], where the Catch the Fire decision is mentioned but distinguished.


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

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

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

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

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

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

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

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

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

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

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

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

(ii) Some key court decisions on free speech and “offence”

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

A. Whatcott - expressing opposition to homosexuality

In Canada, in Saskatchewan (Human Rights Commission) v Whatcott, 2013 SCC 11 (27 Feb 2013) the Supreme Court of Canada unanimously upheld the decision of a lower tribunal to fine the defendant for distribution of pamphlets opposing homosexuality.

Mr Whatcott had distributed four flyers in his neighbourhood, identifying himself as a concerned Christian, and expressing strong opposition to proposals to introduce a primary school curriculum endorsing homosexuality. Four people who received the flyers made a complaint about this to the Saskatchewan Human Rights Commission (SHRC), who found that he had been in breach of s 14 of the Saskatchewan Human Rights Code. This section provides:

14. – (1) No person shall publish or display, …, any representation, …:

(b) that exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground.

“Prohibited grounds” included homosexuality.

The Tribunal found Mr Whatcott liable in relation to all the flyers; on appeal the Saskatchewan Court of Appeal actually overturned all the findings, holding that while the law was constitutionally valid, none of the flyers reached the appropriate level of “hatred” forbidden by the law. The Supreme Court of Canada, in summary, agreed that the prohibition on “exposing someone to hatred” was valid under the Canadian Charter of Rights and Freedoms, but ruled that the words “ridicules, belittles or otherwise affronts the dignity of” were invalid and should be struck out. They held that two of the flyers did reach the standard of “hatred”, but two of them did not.

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


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

(1) Interpreting the “hatred” standard
The Court had to decide what standard of behaviour would breach the prohibition on exposing someone to “hatred”. This came up in part because the Supreme Court had ruled in a previous decision, Canada (Human Rights Commission) v Taylor, [1990] 3 S.C.R. 892, in the context of racially-based vilification legislation, that “hate” language needed to be particularly strong to be caught by a provision that impaired the Charter right of freedom of speech. After discussing various options the Court in Whatcott concluded as follows, at [57]:

The legislative term “hatred” or “hatred and contempt” is to be interpreted as being restricted to those extreme manifestations of the emotion described by the words “detestation” and “vilification”. This filters out expression which, while repugnant and offensive, does not incite the level of abhorrence, delegitimization and rejection that risks causing discrimination or other harmful effects…

There was also a welcome affirmation that attacking someone’s ideas alone did not amount to “hate” speech.

[51] The distinction between the expression of repugnant ideas and expression which exposes groups to hatred is crucial to understanding the proper application of hate speech prohibitions. Hate speech legislation is not aimed at discouraging repugnant or offensive ideas. It does not, for example, prohibit expression which debates the merits of reducing the rights of vulnerable groups in society. It only restricts the use of expression exposing them to hatred as a part of that debate.

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

(2) Charter Protection of Freedom of Speech
The Canadian Charter section 2(b) contains a guarantee of freedom of expression. The Court conceded that this law infringed on that freedom. The question then became, could this infringement be justified?
Section 1 of the Charter allows rights to be infringed where doing so can be “demonstrably justified in a free and democratic Society”. The Court needed to determine whether the principles behind the hate speech law protected “concerns that are of sufficient importance” to over-ride the guarantee of free speech. These concerns were identified as the need to avoid marginalisation and humiliation of vulnerable groups. The harm to the group as a whole is key- see para [80].

Interestingly the Court made the point that the legislation is not directly concerned with the hurt feelings of individuals. At [82]:

Instead, the focus must be on the likely effect of the hate speech on how individuals external to the group might reconsider the social standing of the group. Ultimately, it is the need to protect the societal standing of vulnerable groups that is the objective of legislation restricting hate speech.

Related to this point, the Court held that the other words used in the Human Rights Code were too broad, and too great an infringement of the freedom of speech:
[92] Thus, in order to be rationally connected to the legislative objective of eliminating
discrimination and the other societal harms of hate speech, s. 14(1)(b) must only prohibit
expression that is likely to cause those effects through exposure to hatred. I find that the words
“ridicules, belittles or otherwise affronts the dignity of” in s. 14(1)(b) are not rationally
connected to the legislative purpose of addressing systemic discrimination of protected groups.
The manner in which they infringe freedom of expression cannot be justified under s. 1 of the
Charter and, consequently, they are constitutionally invalid. (emphasis added)

This, of course, is an important finding, and seems sensible. However, the
Court rejected other arguments that “hate” speech should either not be
penalised (simply being dealt with in the “marketplace of ideas”), or else only
penalised under the criminal law where threats of violence were involved. The
Court seemed to suggest that either of these would be valid choices for a
Province to make, but concluded that the decision of a Province to introduce
legislation of this sort (limited to serious “hatred”) was within the leeway of
choice allowed to Provincial governments.

In the end, of course, much will depend on the Court’s view of how
language has been used. In this case Mr Whatcott’s pamphlets were read as
suggesting that all homosexuals were paedophiles and child molesters. It could
be disputed whether or not this was in fact what was said. But if this were the
best way of reading the documents, then they crossed the line from discussion
of general issues into engendering hate. The Court said that the issues Mr
Whatcott was concerned about could have been discussed in other ways:

[119]… In the context of this case, Mr. Whatcott can express disapproval of homosexual
conduct and advocate that it should not be discussed in public schools or at university
conferences. Section 14(1)(b) only prohibits his use of hate-inspiring representations against
homosexuals in the course of expressing those views.

No doubt some in the community would object that any advocacy of
such views was “hate-inspiring”. To this extent, these remarks are
encouraging as marking out at least a theoretical space for robust debate on the
issues.

However, the space may be seen to be fairly narrow when the
comments of the Court on the distinction between “behaviour” and
“orientation” are taken into account. Mr Whatcott had argued that his
comments referred to sexual activity, not to the “orientation” of persons. The
Court’s response was as follows:

[124] Courts have thus recognized that there is a strong connection between sexual orientation
and sexual conduct. Where the conduct that is the target of speech is a crucial aspect of the
identity of the vulnerable group, attacks on this conduct stand as a proxy for attacks on the
group itself. If expression targeting certain sexual behaviour is framed in such a way as to
expose persons of an identifiable sexual orientation to what is objectively viewed as detestation
and vilification, it cannot be said that such speech only targets the behaviour. It quite clearly
targets the vulnerable group. {emphasis added}

The Court clearly leaves little room for negative comments on
homosexual behaviour; if such is to be given, it needs to clearly be done in a
way which avoids “detestation and vilification”.

Also of some concern, both in the area of comment about sexual
activity but also particularly for freedom of religion concerns in the future, is
the Court’s insistence that there is no need to provide a defence of “truth”. It
seems that statements about a vulnerable group, even if completely true, may
still be attacked as “hate speech”.

Neil Foster
Truthful statements can be interlaced with harmful ones or otherwise presented in a manner that would meet the definition of hate speech.

The vulnerable group is no less worthy of protection because the publisher has succeeded in turning true statements into a hateful message. In not providing for a defence of truth, the legislature has said that even truthful statements may be expressed in language or context that exposes a vulnerable group to hatred.

Hence a statement, for example, that truthfully recorded that a particular religious group called for the death or subjugation of non-believers, and oppressed its women, might still be characterised as “hate speech”. Would it be protected if presented in a highly clinical and “non-emotional” way? The lack of clarity here will no doubt have a “chilling” effect on what can be said. This is obviously a matter of some concern.

(3) Charter Protection of Freedom of Religion
Section 2(a) of the Canadian Charter protects freedom of religion. The Court rejected arguments that strongly expressed views about homosexuality were not within this protection. They accepted that the terms of s 14, insofar as they prevented Mr Whatcott from expressing his religiously motivated views about homosexuality, were a prima facie interference with his freedom of religion- see [156].

As with the issue of freedom of speech, the Court then turned to whether a legislature could put limits on freedom of religion, and on what basis. The analysis here was fairly brief, suggesting that the reasons offered in relation to speech were also applicable to religion. The Court said that there was still scope for Mr Whatcott to express his religiously-motivated views:

Mr. Whatcott and others are free to preach against same-sex activities, to urge its censorship from the public school curriculum and to seek to convert others to their point of view. Their freedom to express those views is unlimited, except by the narrow requirement that they not be conveyed through hate speech.

(4) Applying the standards to the precise words
In coming to consider the application of these principles to the four flyers that had been distributed, the Supreme Court held that the original Tribunal had been correct to find that two of them incited “hatred”, while agreeing with the Court of Appeal that another two did not quite reach that level. Perhaps the best summary of what the Court found as “hatred” can be seen in the following extract:

Some of the examples of the hate-inspiring representations in flyers D and E are phrases such as: “Now the homosexuals want to share their filth and propaganda with Saskatchewan’s children”; “degenerated into a filthy session where gay and lesbian teachers used dirty language to describe lesbian sex and sodomy to their teenage audience”; “proselytize vulnerable young people”; “ex-Sodomites and other types of sex addicts”; and “Homosexual sex is about risky & addictive behaviour!” . The repeated references to “filth”, “dirty”, “degenerated” and “sex addicts” or “addictive behaviour” emphasize the notion that those of same sex orientation are unclean and possessed with uncontrollable sexual appetites or behaviour. The message which a reasonable person would take from the flyers is that homosexuals, by virtue of their sexual orientation, are inferior, untrustworthy and seek to proselytize and convert our children.

It was also found to be important that one of the flyers alleged that homosexuals were child-abusers- [189]- and indeed explicitly urged that the law should “discriminate” against them- [192].

These are indeed intemperate words, and it is hard to deny that they would have the result that those who believed them would lack respect for
homosexual people, and that in some cases these words would engender hatred.

It is interesting to see how the Supreme Court dealt with one of the pamphlets that it did not find “hate-inducing”. One of them contained an extended quote from a Bible verse, containing Jesus’ warning that judgment awaited those who caused “little ones” to stumble. Indeed, use of a Bible verse was said at one point to be a possible characteristic of “hate speech”, in that such speech “appeals to a respected authority” - see [187]. However, the Supreme Court adopted some remarks in a previous decision about the need to “exercise care in dealing with arguments to the effect that foundational religious writings violate the Code” - [197]. Still, their final remark on the topic does leave open the possibility that in “unusual” cases a placard simply quoting a Bible verse could be found to be “hate speech”:

[199]… While use of the Bible as a credible authority for a hateful proposition has been considered a hallmark of hatred, it would only be unusual circumstances and context that could transform a simple reading or publication of a religion’s holy text into what could objectively be viewed as hate speech. (emphasis added)

(5) Evaluating the Whatcott decision overall

How should one view the overall decision? There are some positive aspects to the decision from the point of view of freedom of religious speech. The Court does affirm the importance of both freedom of speech and freedom of religion, and recognises that only very “extreme” speech falls into the category that is (consistent with these basic rights) able to be penalised. It is encouraging to see a rejection of laws that would penalise mere “offence” or “ridicule”. The Court also acknowledges that there can be criticism of a moral position that does not descend into hate speech.

However, there are some aspects of concern. By refusing to distinguish between comments about sexual behaviour and sexual orientation, the Court privileges any group that “defines itself” by a particular form of sexual behaviour, and comes close to making that behaviour unable to be criticised. Perhaps this cannot quite be the result, as at points the Court allows that “preaching against same-sex activities” is permissible - see [163]; but clearly such preaching would need to be done with the utmost of politeness to avoid charges of “hate speech”.

(For an Australian case raising some of the same issues as Whatcott see the discussion of Corbett v Burns [2014] NSWCATAP 42 (14 August 2014) below.)

B. Two Australian High Court decisions

In Attorney-General (SA) v Corporation of the City of Adelaide [2013] HCA 3 (27 February 2013) (“the Adelaide Preachers case”) a 5-1 decision of the High Court of Australia upheld the validity of a local by-law that prohibited preaching in a public place without a license from the city. On the same day, the High Court was split down the middle 3-3 in Monis v The Queen [2013] HCA 4 (27 February 2013) on the question as to whether a Federal law that prohibited sending “offensive” content through the postal services was invalid due to breaching the implied right to freedom of political communication. The facts of this case did not relate directly to a claim of “freedom of religion”, but a law that prohibits “offense” is clearly likely in
some contexts to give religious offence, and so this case too implicates issues of interest in the present context.

(1) The Adelaide Preachers case

In Attorney-General (SA) v Corporation of the City of Adelaide [2013] HCA 3 the issue of the limits of State control over religious speech was directly raised, though not in the context of “vilification”.

A bylaw of the City of Adelaide, By-Law No 4 made in 2007, prohibited the carrying out of certain activity on roads without permission, including “preaching, canvassing and haranguing” (2.3) and “giving out or distributing to any bystander or passer-by any handbill, book, notice, or other printed matter” (2.8). The Corneloups, father and son, were part of a church that wanted to conduct street preaching. One had been convicted already and fined under the By-Law, and there was an application by the Council for an injunction to prevent further such activities.

At previous stages of the litigation the preachers had won their case, for different reasons. A district court judge found the By-Law invalid as beyond the scope of the rule-making power given to the Council under the legislation. On appeal the Full Court of the South Australian Supreme Court had upheld the validity of the rule as within legislative power, but had held the provisions preventing preaching without permission as invalid, as being too broad and in contravention of the implied right to “freedom of speech on political matters” found under the Constitution.

On appeal, the High Court agreed that the regulation was within legislative power, but differed from the Full Court by holding that it did not contravene any implied principle of freedom of speech under the Constitution. The following will assume that the majority of the Court was correct in its finding that the general regulation-making power under the relevant statutes permitted on its face such a regulation to be made. 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. 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.

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

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68 Although, with respect, the dissent of Heydon J on this issue is very persuasive- see below.
69 Blackstone, Commentaries on the Laws of England, (1769), bk 4 at 151–152; Bonnard v Perryman [1891] 2 Ch 269 at 284 per Lord Coleridge CJ; R v Council of Metropolitan Police; Ex parte Blackburn (No 2) [1968] 2 QB 150 at 155 per Lord Denning MR; Wheeler v Leicester City Council [1985] AC 1054; Attorney-General v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109 at 203 per Dillon LJ.
strong presumption. His Honour ruled that the law should be read to imply the least possible disturbance with freedom of speech. This meant that it would not be a valid exercise of the power given to the Council here to prohibit verbal activity because the officers disagreed with the content of what was said-[46]. It would be relevant, however, if the activity, by the way it were to be conducted, had an impact on matters of “municipal concern” (presumably, as later spelled out, primarily the free flow of traffic along a public road.)

Given this interpretation, then the next logical issue was whether the framing of the regulation had been done in a way which was “reasonable” and “proportionate”, consistent with the regulation-making power. However, the standard that the Court required to be applied by an authority making delegated legislation here was not very high. French CJ cited a number of decisions that showed that the courts would generally defer to the judgment of the legislator except where the law “cannot reasonably be regarded as being within the scope or ambit or purpose of the power” (see [49].)

Here the regulation which had been devised was not so “unreasonable” that it should be struck down as unconnected with the purpose of the legislative power. It was also a “reasonably proportionate” way of achieving legitimate goals- see the discussion concluding at [66].

Was the law, then, even though valid in a general sense as supported by the grant of legislative power, invalid because it breached the Constitutional prohibition on undue impairment of freedom of political communication?

French CJ accepted a two-part test as set out in previous decisions: did the prohibition “burden” free speech on political matters? And then, if it did so, was it nevertheless justified?

It was accepted that the prohibition was a prima facie burden on political speech. Despite the prohibition mostly relating to “religious” speech, this was so:

[67]…[The appellant] accepted that some "religious" speech may also be characterised as "political" communication for the purposes of the freedom. The concession was proper. Plainly enough, preaching, canvassing, haranguing and the distribution of literature are all activities which may be undertaken in order to communicate to members of the public matters which may be directly or indirectly relevant to politics or government at the Commonwealth level. The class of communication protected by the implied freedom in practical terms is wide71.

Landrigan considers this interesting question- whether the implied freedom of political communication applies to some “religious” speech- in more detail in the article on the reading list. In commenting on Adelaide Preachers, Landrigan notes that the parties conceded that the street preaching satisfied the criteria for “political communication” – perhaps because in the particular case apparently some topics of the preaching included debates about introduction of same sex marriage and internet filtering (see p 442 near n 88). But he does say that there is still some doubt about the matter:


Neil Foster
The High Court did not explain how preaching a message about eternal life in Jesus Christ might relate to representative or responsible government in the Commonwealth Parliament (at 442).

To return to the Adelaide Preachers case, French CJ, assuming the speech was protected, was in no doubt that the prohibition was justified.

[68]… [The bylaws were] reasonably appropriate and adapted to serve the legitimate end of the by-law making power. They meet the high threshold proportionality test for reasons which also satisfy the proportionality test applicable to laws which burden the implied freedom of political communication. They are confined in their application to particular places. They are directed to unsolicited communications. The granting or withholding of permission to engage in such activities cannot validly be based upon approval or disapproval of their content.

One would have liked to see a little more discussion of this point, but the comments that are made are still important. To be a justified restriction on political speech, the laws must meet a “high” proportionality test. If they are confined to a limited geographical area, that will help. In particular the very clear comment is made that if, in practice, permission were granted or withheld based on the content of the speech, as opposed to other legitimate matters, then such a practice would be unlawful.

Interestingly, other members of the Court had a slightly different approach to some of these issues. While, as seen above, French CJ moved very quickly from finding that the bylaws where justified by the empowering provisions, to finding that they were acceptable as a breach of the implied freedom of political communication, Hayne J seems to have disagreed. His Honour commented:

[137]…The question which arises in considering whether the by-law made was supported by statutory power is not the same as the question which must be answered in considering its constitutional validity. The former is whether the by-law is so unreasonable that it could not fall within the by-law making power. The latter is whether the by-law is reasonably appropriate and adapted to serve a legitimate object or end in a manner compatible with the constitutionally prescribed system of government and the freedom of political communication which is its indispensable incident.

However, his Honour concluded that, when properly construed, the laws were valid:

[140] It is necessary to construe the power to give consent in a manner that gives due weight to the text, subject-matter and context of the whole of the provision in which it is found. As has already been explained, those matters show unequivocally that the only purpose of the impugned provisions is to prevent obstruction of roads. It follows that the power to grant or withhold consent to engage in the prohibited activities must be administered by reference to that consideration and none other. On the proper construction of the impugned by-law, the concern of those who must decide whether to grant or withhold consent is confined to the practical question of whether the grant of permission will likely create an unacceptable obstruction of the road in question. {emphasis added}

This is an important reinforcement of what had been commented on in passing by French CJ, and provides a significant protection to freedom of speech. If it could be demonstrated, for example, that a speaker on other issues (such as in support of land rights, for example) was allowed a permit when conservative Christian preachers were not, then this would be evidence of unconstitutional application of the law. Crennan and Kiefel JJ agreed at [219]: the discretion must be exercised conformably with the purposes of the By-law.
Their Honours, and Bell J, generally agreed that the regulations were valid as a “reasonable” restraint on political speech for the purposes of traffic control.

As was not uncommon in his Honour’s final year or so on the Court, Heydon J dissented. His Honour was not a supporter of the “implied right of freedom of political communication”, although in this decision he did not address the principle directly. But he gave a very clear, powerful and (with respect) clearly correct account of the “principle of legality” as it applies to the common law support for freedom of speech. On the basis of the common law principle his Honour ruled that the vague and 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. 72

Overall, the decision in the Adelaide Preachers case is important in considering laws forbidding “religious vilification” because it affirms, in very strong terms, the value of freedom of speech as both a common law principle, and also a constitutional constraint on law-making. (It seems fairly clear, as accepted in this case, that “religiously inspired” comments may be protected as sufficiently connected with “politics”, although no doubt there may be room to argue the matter in some future fact scenario.) The decision also makes it clear, however, that a law may “burden” free speech where it is appropriately adapted to achieve legitimate government ends. 73

One final comment on this decision- an American commentator considering this fact situation would no doubt be expecting the High Court to have taken into account the “freedom of religion” of the preachers concerned as a matter to be weighed in the balance. In Australia, of course, the one explicit reference to this in the Federal sphere, s 116 of the Constitution, is confined in its operation to the Commonwealth Parliament, and so could not be used as a restraint on State lawmaking. 74

(2) Monis

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

72 And his Honour could not help noting at [152]: “The common law right of free speech which the principle of legality protects is significantly wider, incidentally, than the constitutional limitation on the power to enact laws burdening communications on government and political matters.”
73 A further attempt to argue that the Council was acting invalidly in banning preaching was quickly dismissed on the basis of the High Court decision- see Bickle & Ors v Corporation of the City of Adelaide [2013] SASC 115 (15 July 2013). However, in Corneloup v Launceston City Council [2016] FCA 974 (19 August 2016) one of the claimants here was successful in overturning a preaching ban in Tasmania, on administrative law grounds.
74 Indeed, the only serious attempt to previously use s 116 in relation to State laws was also a South Australian decision, and the attempt comprehensively failed: see Grace Bible Church v Reedman (1984) 36 SASR 376.
a law which forbids the use of the postal service for communication of “offensive” speech.

French CJ sums up the facts well:

[1] These appeals arise out of charges laid against the appellants, one of whom, Man Haron Monis, is said, in 2007, 2008 and 2009, to have written letters to parents and relatives of soldiers killed on active service in Afghanistan which were critical of Australia’s involvement in that country and reflected upon the part played in it by the deceased soldiers... The appellants were charged under s 471.12 of the Criminal Code (Cth) (“the Code”), which prohibits the use of a postal or similar service in a way that reasonable persons would regard as being, in all the circumstances, “offensive”.

The High Court was split down the middle, 3-3, on the validity of the law in question.

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

Two members of the court, French CJ and Hayne J, held that the law was invalid as it unduly burdened the implied freedom of communication on political matters by acting on speech that merely caused “offence”. (The third member of the Court, Heydon J, effectively held that the implied freedom did not exist, but since binding authority held that it did, then it operated to invalidate the law here. To some extent his Honour’s view may be regarded as an argument reductio ad absurdum against the existence of the freedom. 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.) 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!

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

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

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75 In one case a sound recording was said to have been sent.
76 Normally the Court has 7 members. I assume that as Gummow J was about to retire when this matter was heard, his Honour did not sit. Hence the possibility of the unfortunate even split which eventuated here.
77 See [237]: “That is an outcome so extraordinary as to cast doubt, and perhaps more than doubt, on the fundamental assumption and the chain of reasoning which led to it."
78 See Bathurst CJ at (2011) 256 FLR 28, at 39 [44].
79 French CJ at [29].

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

[213] To hold that a person publishing defamatory matter could be guilty of an offence under s 471.12 but have a defence to an action for defamation is not and cannot be right. The resulting incoherence in the law demonstrates either that the object or end pursued by s 471.12 is not legitimate, or that the section is not reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of government and the freedom of communication that is its indispensable incident. The incoherence is not removed, and its consequences cannot be avoided, by leaving a jury to decide whether reasonable persons would regard the use, in all the circumstances, as offensive. In the case postulated, the user of the service both knows that the communication is, and intends that the communication be, offensive. And there is no basis for the proposition (advanced by the second respondent and Queensland) that a jury would not find an accused guilty of an offence against s 471.12 in circumstances of the kind now under consideration because of the section's reference to "reasonable persons ... in all the circumstances". Statements that are political in nature and reasonable for a defendant to make can and often will still bite in the sense relevant to s 471.12. A statement can still be offensive even if it is true.80 {emphasis added}

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

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

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

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

[223] The common law has never recognised any general right or interest not to be offended. The common law developed a much more refined web of doctrines and remedies to control the interactions between members of society than one based on any general proposition that one member of society should not give offence to another. Apart from, and in addition to, the development of the criminal law concerning offences against the person, the common law developed civil actions and remedies available when one member of society injured another's person or property, including what was long regarded as the separate tort in Wilkinson v Downton81 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

81 [1897] 2 QB 57.  

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

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

On the other hand- the law was valid

In a single joint judgment, however, Crennan, Kiefel and Bell JJ upheld the validity of the law.\(^{82}\) A lengthy judgment can only be briefly summarized here. While accepting the importance of freedom of speech, their Honours concluded that the provision in question could be “read down” so that it did not cover “offence” at large, but only particularly serious offence.\(^{83}\) The comments of Hayne J with respect to defamation were (impliedly, though not directly) responded to as follows:

[351]... And as to common law defences to defamation, such as qualified privilege, where the issue of malice may arise, the requirement of proof for an offence under s 471.12, that the defendant's conduct be intentional or reckless, may leave little room for their operation.

With respect to their Honours, this brief comment does not do justice to the important points made by Hayne J, and in particular does not address the lack of a defence of “truth”, or of the defence of “honest opinion” (where the law regards “malice” as irrelevant.)

It is submitted that the balance of the merits of the arguments lies with the two substantive judgments of those against validity. French CJ and Hayne J argue compellingly for strong protection of freedom of speech, which is unduly impaired by a law penalising the causing of “offence”. Even if the nature of the “offence” were interpreted as “serious” or “gross”, the fact is that very few members of the public would be aware of this simply by knowing of the law. Such a provision will have a chilling effect on some speech, if it is generally implemented. These arguments support a very narrow and confined scope for any laws that penalise speech on the subject of religion.\(^{84}\)

For an article also critiquing the effect of the Monis and Adelaide Preachers cases, see Head. There was also a very interesting UK decision raising similar questions. In DPP v McConnell [2016] NIMag 1 (5 Jan 2016), a preacher who had made strong comments attacking Islam in a sermon later made available on the internet, was found to be not guilty of a charge of causing a “grossly offensive” communication to be made electronically. The charge was dismissed, in part, due to the Magistrate conceding that the rights to freedom of religion and free speech under the European Convention on Human Rights protected the preacher (and, in light of that, that his

\(^{82}\) And as a result, since the High Court was split 3-3, the decision of the NSW Court of Appeal upholding the validity of the law stands. See s 23(2)(a) of the Judiciary Act 1903 (Cth) for this rule governing evenly divided opinions.

\(^{83}\) See paras [333]-[339].

\(^{84}\) It may be noted again that s 116, while applicable to Commonwealth law, did not play any role in the argument in Monis. Perhaps it might have been possible that the accused persons, who were apparently implacably opposed to Australia fighting in Afghanistan, were Muslims and might have wanted to argue that their right to freedom of religion would support the words they said to the families of the deceased soldiers. But this was not an argument that was run. It may indeed be likely that no respectable Muslim cleric could be found to have supported such an argument.

Neil Foster
generalisations concerning Muslim people did not reach the high standard of “grossly” offensive.)

(e) A balanced law on religious hate speech?

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

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

(f) The Tasmanian experience- prohibition of offence

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

Section 17(1) provides:

17. Prohibition of certain conduct and sexual harassment

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

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

55. Public purpose

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

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

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

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

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

For a detailed analysis of the case, and discussion of how it may have played out in Australia, see my blog post “Prohibiting Offensive Sermons” (Jan 11, 2016) at https://lawandreligionaustralia.wordpress.com/2016/01/11/prohibiting-offensive-sermons/.

Neil Foster
(ii) any purpose in the public interest.

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

Section 17, then, currently sets the bar for unlawful behavior very low. A claim by someone that they have felt any of the negative emotions set out in this list will be very hard to rebut, as most are purely subjective. As we have seen previously, the penalizing of mere offence or insult is on general principle far too strong a restriction on free speech, as a matter of public policy and the policy of the law. There can also be legitimate debate as to whether the other relevant emotions (humiliation, intimidation or ridicule) should be broadly protected in this way.

Former Chief Justice of the NSW Supreme Court, James Spigelman, commented in relation to proposals to add this sort of provision to Federal law:

The freedom to offend is an integral component of freedom of speech. There is no right not to be offended. ... When rights conflict, drawing the line too far in favour of one, degrades the other right. Words such as ‘offend’ and ‘insult’, impinge on freedom of speech in a way that words such as ‘humiliate’, ‘denigrate,’ ‘intimidate’, ‘incite hostility’ or ‘hatred’ or ‘contempt’, do not. To go beyond language of the latter character, in my opinion, goes too far.\(^{86}\)

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

### 46. Religious freedom

(1) Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen. (2) No person shall be subject to any disability, or be required to take any oath on account of his religion or religious belief and no religious test shall be imposed in respect of the appointment to or holding of any public office.

While the effect of ordinary legislation breaching the Constitution Act is not entirely clear,\(^{87}\) it seems at least plausible to suggest that it should be presumed that an ordinary Act of the Tasmanian Parliament is not to contradict the Constitution unless it does so with clarity. A provision that penalizes mere “offence”, if linked for example with “sexual orientation” as a protected ground, may be used to try to “shut down” religious speech that presents the traditional view of a number of major religious groups, that homosexuality is not part of God’s plan for humanity, and that sexual intercourse ought to only take place between the parties to a heterosexual

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marriage. The prime example here, of course, is the action previously initiated under s 17 against the Roman Catholic Archbishop of Hobart. 88 While the action was later discontinued, that it could have progressed to the stage it did illustrates the “chilling effect” of s 17 in this area. 89

Hence s 17 may either be invalid in its operation in respect of religious speech, or else again need to be “read down” so as not to interfere with that area. In either case the argument for its amendment is strong.

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

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

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

(1) A person must not engage in any conduct which degrades, intimidates, or incites hatred or contempt for, another person on the basis of an attribute referred to in section 16(e), (a), (b), (c), (d), (ea), (eb) and (k), (f), (fa), (g), (h), (i) or (j)…

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

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

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

Comparison with Tasmanian defences in “anti-vilification” laws in some other jurisdictions

89 For previous detailed comment on these proceedings, see my blog post “First they came for the Catholics…” (Nov 13, 2015) https://lawandreligionaustralia.wordpress.com/2015/11/13/first-they-came-for-the-catholics/.
91 See n 65 above.
Differences between s 55 and these other provisions (where the other States are in agreement) include:

- Omission of the word “reasonably” when attached to the “good faith” defence in the other States;
- No specific reference in Tasmania to “religious” purposes as a defence. (There are other differences where one of the other States includes a defence that neither Tasmania nor the other State refers to.)

Of course it is not necessary that the Tasmanian defences track other jurisdictions, but the consensus of others at least raises the question whether these matters ought to be dealt with.

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

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

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<th>Tasmanian ADA 1998 s 55</th>
<th>NSW ADA 1977 s 49ZT</th>
<th>Vic RRTA 2001 s 11</th>
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<td>55(a) “fair report of a public act”</td>
<td>(2)(a) “fair report of a public act”</td>
<td>11(1)(c) making or publishing a fair and accurate report of any event or matter of public interest</td>
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<td>(2)(b) matter subject to a defence of absolute privilege in defamation</td>
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<tr>
<td>55(c)(i) public act done in good faith [for following purposes]</td>
<td>(c) public act done reasonably and in good faith [for following purposes]</td>
<td>11(1)(b) conduct was engaged in reasonably and in good faith in the course of any statement, publication, discussion or debate made or held, or any other conduct engaged in, [for the following purposes]</td>
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<td>55(c)(ii) “any purpose in the public interest”</td>
<td>for other purposes in the public interest, <em>including discussion or debate about and expositions of any act or matter</em></td>
<td>(1)(b)(ii) any purpose that is in the public interest</td>
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</table>
interest” in all the above provisions ought to be read as covering a situation where the topic under discussion is a matter of public interest, rather than restricting the defence to cases where the Tribunal or other decision-maker is in agreement with the precise position being argued for by the person who made the challenged statement. The NSW provision achieves this result by spelling out that “discussion or debate” generally is presumed to be in the "public interest".

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

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

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

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

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

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

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

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

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

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

(g) Conclusions on “religious vilification” laws
To sum up, there are a number of important themes running through the laws and comments noted here concerning religious vilification laws.

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

On this basis it is vital to preserve the right of persons, in the exercise of their freedom of speech (and freedom of religion), to vigorous critique of other religious beliefs. As Scolnicov puts it in a very helpful study, while there is a “fine line”, it is a crucial one, between Laws that legitimately prevent incitement and laws that themselves contravene religious freedom and freedom of expression by preventing legitimate religious speech.92

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


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

(iii) The need to avoid “identity politics”

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

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

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

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

(v) Are current “religious anti-vilification laws” constitutionally valid?

Finally, the strong comments made in favour a broad view of “political” speech and affirmation of the need to protect freedom of speech in both the Adelaide Preachers case and Monis raise as a serious question whether laws catching the causing of “offence” (or even “serious offence”) on the basis of religious belief are consistent with the implied Constitutional
prohibition on impairing freedom of political speech. It seems clear that this
is an issue that will need to be revisited.

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

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

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

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

Mr Sisalem is a Victorian Muslim who claimed that the Herald and
Weekly Times, publishers of the Herald Sun newspaper, had breached various
provisions of the Racial and Religious Tolerance Act 2001, in particular s 8,
noted previously.

The claimed “conduct” was the publication of an article in the Herald
Sun shortly after the November 2015 Paris terrorist attacks, suggesting that
some fundamental features of Islam needed to change if such incidents were to
be avoided in the future.

The Tribunal Member, J Grainger, rejected the claims made under s 8
(and also other claims made under provisions of the legislation creating a
criminal offence of “serious religious vilification”, which claims in any event
were not able to be heard by VCAT but needed to be brought in an ordinary
criminal court.)

In rejecting the claim that there was liability for a breach of s 8,
Grainger M referred extensively to the decision of the Victorian Court of
Appeal in Catch the Fire.

The section 8 claim was rejected, broadly speaking, because the
Tribunal agreed with comments in the Catch the Fire decision that the issue

93 For previous comment see N Aroney, “The Constitutional (In)Validity of Religious Vilification
Laws: Implications for their Interpretation” (2006) 34 Federal Law Review 287, and the discussion in
CM Evans Legal Protection of Religious Freedom in Australia (Sydney, Federation Press, 2012) at
183-186. The whole of ch 7, of course, is an excellent survey of the area of religious hate speech.

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

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

It is important to remember that, even if s 8 had apparently been breached, there are defences set out in s 11 of the legislation, previously noted, which may well have been applicable.

It could have been seriously argued that the press report was on a matter of “public interest”, and in particular, since it consisted of reporting the expressed views of Members of Parliament, to amount to a “fair and accurate report” of those views. But since the Tribunal held that in any event s 8 had not been breached, Grainger M did not go on to apply the s 11 defences.

The case is an important example of the need to preserve freedom of speech to discuss religious issues, and even to critique the tenets of a particular religion, so long as in doing so there is no attempt to stir up hatred or violence against individuals who adhere to the religion.

3. “Religious Speech” on sexuality

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

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

49ZT Homosexual vilification unlawful

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94 For discussion of issues surrounding comments made on homosexuality from a Muslim perspective, raised following the terrible shooting at Orlando, Florida in a gay nightclub, see my blog post “Homosexuality and “hate speech”” (June 19, 2016) at https://lawandreligionaustralia.wordpress.com/2016/06/19/homosexuality-and-hate-speech/.

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

Neil Foster
(1) It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the homosexuality of the person or members of the group.

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

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

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

In an important ruling in *Sunol v Collier (No 2)* [2012] NSWCA 44 (22 March 2012) the NSW Court of Appeal held that s 49ZT was not constitutionally invalid. It had been alleged that it was an undue infringement of the implied right of political communication under the Commonwealth Constitution.

In upholding the provision as valid, however, the Court pointed out that what was required was not simply an **expression** of hatred or contempt for a homosexual person, but “**incitement**” in the sense that others would be stirred up to such hatred or contempt - see eg Bathurst CJ at [28]; Basten JA at [79]. The defence of “good faith” also had to be interpreted broadly; Bathurst CJ adopted comments from Nettle JA in *Catch the Fire* to the effect that the emphasis of the test was a subjective, rather than objective, one, noting at [37] that there was:

no reason to "load objective criteria into the concept of good faith or otherwise to treat it as involving more than a 'broad subjective assessment' of the defendant's intentions".

Allsop P in addition made the following important comment:

[60] The text of s 49ZT reflects an attempt by Parliament to weigh the policies of preventing vilification and permitting appropriate avenues of free speech. Subsections (1) and (2) should be read together as a coherent provision that makes certain public acts unlawful. Subsection (2) is not a defence; it is a provision which assists in the defining of what is unlawful. It attempts to ensure that certain conduct is not rendered unlawful by the operation of subsection (1).

This is consistent with a suggestion I have made on other occasions that when dealing with discrimination law that it is not helpful to talk of “exemptions”, but rather to recognise that the various parts of the legislation work together to reach an appropriate “balance”. 96

An example of the sort of behaviour that amounts to a breach of this provision is the decision in *Margan v Manias* [2013] NSWADT 177 (7 August 2013).

Mr Margan was putting up posters in Oxford St in Sydney supporting same sex marriage. Mr Manias was following him along the road, and shouting “I am going to eradicate all gays from Oxford Street” and “Do not

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

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

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

"I don't want gays, lesbians or paedophiles to be working in my kindergarten."
"If you don't like it, go to another kindergarten."

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

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

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

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

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

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

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

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

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

97 Note, however, that in the more recent decision in Burns v Gaynor [2015] NSWCATAD 211, the NSW Civil and Administrative Tribunal held that NSW law forbidding “homosexual vilification” was not intended to capture the uploading of material onto a website hosted in Queensland, where the uploading itself occurred in that State, despite the fact that persons in NSW could then read the material- see paras [17]-[18]. There is a difference, of course, between uploading material to a website and publishing material in a newspaper known to be sold interstate. But there is something of a tension between the two decisions.
Corbett’s meaning) that homosexual persons and paedophiles are in the “same category” is to incite hatred. On the other hand, it is encouraging that the Tribunal was prepared to find that a simple statement of what the Bible taught was not such an incitement.

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

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

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

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

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

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

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

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

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

I should say at this stage that, while sympathetic to many of Major Gaynor’s views, I do not personally endorse all of them, or the fairly robust way in which they were expressed. I don’t propose to parse all his comments, however, and indicate which I would, and would not, endorse. The more
important issue is whether Australia includes strong protection of both free speech and free exercise of religion, so that Major Gaynor and I (and anyone else who wants to!) can have an open and frank discussion about these matters.

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

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

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

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

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

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

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

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

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

1. Does the law effectively burden the freedom in its terms, operation or effect? If “no”, then the law does not exceed the implied limitation and the inquiry as to validity ends.

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

The answer to that question will be in the affirmative if the purpose of the law and the means adopted are identified and are compatible with the constitutionally prescribed system in the
If the answer to question 2 is “no”, then the law exceeds the implied limitation and the inquiry as to validity ends.

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

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

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

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

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

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

(Emphasis added.) (Footnotes omitted.)

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

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

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98 At [247], quoting the High Court decision in *Coleman v Power* [2004] HCA 39; (2004) 220 CLR 1 per McHugh J at [81]-[82], per Gummow and Hayne JJ at [197], per Kirby J at [239].
taking into consideration the strong value our society places on freedom of speech.

Summing up, his Honour said:

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

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

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

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

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

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

99 See above n 2.
100 And now note also an important academic piece arguing that the “purpose of the law” approach to s 116 is flawed, and that the effect of a provision may be such that it unduly impairs free exercise: Luke Beck, “The Case against Improper Purpose as the Touchstone for Invalidity under Section 116 of the Constitution” (September 4, 2016) Federal Law Review, Vol. 44, No. 3, forthcoming; available at SSRN: http://ssrn.com/abstract=2834486.
Neither the Termination Decision nor the Redress Decision required of the applicant that he refrain from the exercise of his religion, nor required that to remain a commissioned officer he satisfy a religious test of any kind. The applicant was instructed, generally and specifically, to refrain from public statements contrary to ADF policy while he remained a member of the ADF. I am satisfied that the applicant acted by choice to make the statements which he did. I do not accept that even as a matter of conscience, he felt he had no choice but to defy the instructions and orders given to him.

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

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

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

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

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

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

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

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

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

Sedley LJ commented:

[20]…Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having… From the condemnation of Socrates to the persecution of modern writers and journalists, our world has seen too many examples of State control of unofficial ideas. A central purpose of the European Convention on Human Rights has been to set close limits to any such assumed power...

(21) To proceed, as the Crown Court did, from the fact that the three women were preaching about morality, God and the Bible (the topic not only of sermons preached on every Sunday of the year but of at least one regular daily slot on national radio) to a reasonable apprehension that violence is going to erupt is, with great respect, both illiberal and illogical.

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

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

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

102 These and some other “street preaching” cases are noted in Dingemans et al, ch 10.

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

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

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

36 Mr Corneloup’s other constitutional ground was pressed in reliance on s 46 of the Constitution Act 1934 (Tas). This section, which was introduced into the State Constitution in 1934, provides that “[f]reedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.”

37 Again, Mr Corneloup’s argument focussed on the Guidelines rather than the Malls By-Law. He claimed that, as a citizen, he was entitled to the “benefit” of s 46. Preaching was one aspect of the practise of his religion. The Guidelines prevented him from preaching in the malls and, as a result, contravened s 46(1) of the Constitution Act.

38 Given the inapplicability of the Guidelines it is not necessary to pursue this ground in any detail. Had it been necessary to do so Mr Corneloup’s argument would have confronted a number of difficulties. The first is that s 46 does not, in terms, confer any personal rights or freedoms on citizens. The qualified “guarantee” has been held to prevent coercion in relation to the practise of religion and to guarantee a freedom to profess and practise a person’s religion of choice: see McGee v Attorney-General [1974] IR 284 at 316 – a decision of the Irish Supreme Court on the equivalent provision of the Constitution of Ireland, Article 44(2)(1). There is, however, no authority to which I was referred which determines the practical effect of the “guarantee”. In particular, there remains an open question as to whether it could operate to render invalid provisions of other Tasmanian legislation (or subordinate legislation made thereunder), given that the Constitution Act is also an Act of the Tasmanian Parliament and s 46 is not an entrenched provision.

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

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

One example can be seen in Fraser v Walker [2015] VCC 1911 (19 November 2015). A person who was standing outside an abortion clinic in Melbourne was displaying a poster that featured pictures of aborted fetuses. She was charged with, and convicted of, “displaying an obscene figure in a public place” contrary to s 17(1)(b) of the Summary Offences Act 1966 (Vic). There were a number of interpretive and human rights issues raised in her defence; the County Court, for example, decided (surprisingly, I think) that
something could be “obscene” even if it had no sexual connotations, but was simply “offensive or disgusting” – para [21].

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

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

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

The Judge also commented:

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

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

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

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

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

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

(c) footpath interference in relation to terminations; or

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

(e) any other prescribed behaviour.

This is a very wide prohibition, covering not only violent or abusive behaviour (which of course would already be prohibited by the general law), but also making it unlawful to simply quietly hand out leaflets in a “protest”
which can be said to be “in relation to” terminations, or indeed to wear a
“protesting” T-shirt, however mild and inoffensive, while standing on the
other side of the road from a clinic.103

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

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

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

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

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

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

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

104 The decision does not seem to be available through the usual internet sources. Those who are
interested, however, may download a copy of the report from
https://www.dropbox.com/s/svzvwlihl1ujxfv/Preston%20decision-%20clean%20copy.pdf?dl=0 .
never been accepted as a full “member”. He disagreed with some of the doctrines now being taught at the church, and so one Sunday, while the service was going on, came into the foyer of the church where there were various pigeonholes for members and left leaflets criticising the pastor and church leaders.

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

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

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

5. Conclusion

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

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

Further Reading
• Addison, Neil Religious Discrimination and Hatred Law (London: Routledge-Cavendish, 2007), esp ch 8
• Blake, G “Promoting religious tolerance in a multifaith society: Religious vilification legislation in Australia and the UK” (2007) 81 ALJ 386-405
• Forrester, Finlay and Zimmermann No Offence Intended: Why 18C Is Wrong (Connor Court, 2016)
• Head, Michael “High Court further erodes free speech” (2013) 38 (3) Alternative Law Journal 147-151
• Hare, I “Crosses, Crescents and Sacred Cows: Criminalising Incitement to Religious Hatred” [2006] Public Law 521-538
• Hare, I & J Weinstein (eds), Extreme Speech and Democracy (Oxford: OUP, 2009) esp ch 2 and Part III (chs 15-17)
• Landrigan, M “Can the Implied Freedom of Political Discourse Apply to Speech by or about Religious Leaders?” (2014) 34 Adelaide Law Review 427-457
• Parkinson, P “Religious vilification, anti-discrimination laws and religious minorities in Australia: The freedom to be different” (2007) 81 ALJ 954-966
• Waldron, J The Harm in Hate Speech (Cambridge, Mass; Harvard UP, 2012)