

RELIGIOUS VILIFICATION LAWS

Quelling fires of hatred?

DERMOT FEENAN

The appeal to the Supreme Court of Victoria in a controversial case decided under the state's religious vilification laws provides an opportunity to reflect on the legislation and the issues in the case, with reference to policy and human rights, and comparative developments in the United Kingdom.

Religious vilification laws in Australia

In Australia, there is no Commonwealth law specifically addressing religious vilification, despite recommendations for such laws¹ and general policies emphasising the need for respecting diversity within a multicultural society. Only the states of Victoria, Queensland² and Tasmania³ have religious vilification laws. In New South Wales, the *Anti-Discrimination Act 1977* was amended in 1994 to include 'ethno-religion' which includes Jews, Muslims and Sikhs. Proposals for similar legislation in Western Australia⁴ and South Australia⁵ were rejected.

Victoria

Key provisions

The *Racial and Religious Tolerance Act 2001* (Vic) ('the Act') creates a number of offences of religious (and racial) vilification. Most salient to this article is the offence of engaging in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, another person or class of persons on the ground of religious belief or activity. The person's motive in engaging in such conduct is irrelevant, and covers conduct in or outside Victoria. No offence is committed, however, if a person proves that their conduct was engaged in 'reasonably and in good faith' for any of the following reasons: performance, exhibition or distribution of an artistic work; genuine academic, artistic, religious or scientific purpose; the public interest; or publishing a fair and accurate report of any event or matter of public interest.⁶ The Act was justified in the context, partly, of policies of inclusion and tolerance.⁷ Though it received clear support,⁸ it also encountered widespread criticism.⁹

The Act covers what might broadly be regarded as 'public' conduct, though the word 'public' is not used. No offence is committed if the conduct may reasonably be taken to indicate that the parties to the conduct desire it to be heard or seen only by themselves. It is irrelevant for the purpose of the offence whether or not the person made an incorrect assumption about the religious belief or class of persons.¹⁰

The Act also creates two additional offences of serious religious vilification, which adds an element of intention to the minor offence. The first additional offence requires that the conduct be intentional and that the person knows that it is likely to incite such hatred and to threaten, or incite others to threaten, physical harm towards another or class of persons. The second additional offence requires that the person knowingly engages in conduct with the intention of inciting serious contempt for, or revulsion or severe ridicule of, that other person or class of persons. There are no justifications for offences of serious religious vilification. Both are punishable by up to six months imprisonment.¹¹

The minor offence of religious vilification is addressed, not through criminal sanction, but by way of complaint to the Equal Opportunity Commission Victoria ('the Commission'). The complaint may be made by a person who claims that another person has contravened the offence in relation to the former. A complaint may also be made by a representative body on behalf of a named person or persons if the body has sufficient interest in the complaint and each person entitled to complain has consented.¹²

Amendments to the Act

Concern among religious leaders about the potential adverse effect of the Act on evangelism and proselytising, and comments by one judge in a case¹³ decided under the Act, led to some minor reform of the Act by way of the *Equal Opportunity and Tolerance Legislation (Amendment) Act 2006* (Vic) ('the Amending Act'). Section 9 of the Act provides that 'religious purpose' in s 11 of the Amending Act 'includes, but is not limited to, conveying or teaching a religion or proselytising'. Section 11 of the Amending Act introduces a new s 23A into the Act, by which the Victorian Civil and Administrative Tribunal ('The Tribunal') may consider, inter alia, whether in its opinion the complaint is 'frivolous, vexatious, misconceived or lacking in substance' or 'involves a subject matter that would be more appropriately dealt with by another tribunal or a court'.¹⁴ Previously, the Commission was required to refer complaints to the Tribunal on the request of the person making the complaint. Whether the amendment will reduce the number of such unmeritorious complaints, as is claimed by the Commission,¹⁵ remains to be seen, and will certainly require effective public education.

REFERENCES

- Human Rights and Equal Opportunity Commission, *Article 18: Freedom of Religion and Belief* (1998); Racial and Religious Hatred Bill 2003 [No 2] (Cth).
- Anti-Discrimination Amendment Act 2001* (Qld) ss 124A, 131A.
- Anti-Discrimination Act 1998* (Tas) s 19(d).
- Equal Opportunity Commission of Western Australia, *Racial and Religious Vilification Consultation Paper* (2004).
- Attorney-General's Department of South Australia, *Discussion Paper: Proposal for a New Law Against Religious Discrimination and Vilification* (2002); Equal Opportunity Commission of South Australia, *Urgent Government Action Needed to Counter Racial and Religious Vilification in the Wake of the War in Iraq* (2003). See references to South Australian discussion in Raymond Chow, 'Inciting Hatred or Merely Engaging in Religious Debate? The Need for Religious Vilification Laws' (2005) 30(3) *Alternative Law Journal* 120, 122.
- Racial and Religious Tolerance Act 2001* (Vic) ss 8(1), 8(2)(b), 9(1), 11.
- Victorian Office of Multicultural Affairs, *Valuing Cultural Diversity* (October 2002).
- See, eg, Chow, above n 5; Katie Ellison, 'Exercising Permissible Limits on Free Speech' (2005) 43(3) *Law Society Journal* 43; See also Equal Opportunity Commission of Victoria, *Understanding the Racial and Religious Tolerance Act* (2005) which reports that 80% of a sample of 650 people conducted before the introduction of the Act backed the law because it promoted tolerance.
- See, eg, Robert Forsyth, *Dangerous Protections: How Some Ways of Protecting Religious Freedom May Actually Diminish the Freedom of Religion* (21 November 2001) Acton Lectures <<http://www.cis.org.au/Events/acton/acton01.htm>> at 8 May 2006. Further references available from the author.
- Racial and Religious Tolerance Act 2001* (Vic) ss 12(1), 10.
- Racial and Religious Tolerance Act 2001* (Vic) ss 25(1), 25(2), 25.
- Racial and Religious Tolerance Act 2001* (Vic) s 19(3).

Cases under the Act

Three decisions have been made pursuant to the Act.¹⁶ The second case, *Islamic Council of Victoria v Catch the Fire Ministries*,¹⁷ which has been appealed, perhaps gives rise to the greatest controversy, and is one that best illuminates tensions between respect for religious belief and freedom of expression. In this case, the complainant represented three individuals who were exposed to conduct by the Christian evangelical Catch the Fire Ministries which, the Tribunal decided, amounted to religious vilification. The individuals attended a public seminar organised by Catch the Fire Ministries, and viewed an article and a newsletter provided by Catch the Fire Ministries. At the seminar, a pastor from Catch the Fire Ministries stated, amongst other things, that the Qur'an promotes violence, killing and looting; that Muslims are liars and demons; that Muslims plan to overrun Western democracy by the use of violence and terror and replace those democracies with oppressive regimes; and that Muslims intend to take over Australia and declare it an Islamic nation.

The Tribunal found that the article suggested that Islam is an inherently violent religion and that it was not possible to separate Islam from terrorist groups. The article also suggested that the prophet Mohammed is a paedophile, and that the Qur'an teaches hate not love. The newsletter referred to Muslims leaving countries where Christians were being raped, tortured and killed and asked, 'what stops the Muslims from doing the same in Australia?' The newsletter referred to Muslims increasing in number while 'Aussies are on the decline'. These statements, the Tribunal ruled, 'are likely to incite a feeling of hatred towards Muslims. They seek first of all to create fear in those who read the article of being harmed by Muslims.'¹⁸

The Tribunal concluded that together these expressions in the seminar, article and newsletter amounted to vilification in that, amongst other grounds, they incited hatred of Muslims to become or remain terrorists and to take over Australia by immigration and birth rates; incited contempt for Muslims by saying that there is a commitment to violence to impose Islam on other people; severely ridiculed Muslims by belittling the notion of martyrdom and implying that the Qur'an urges Muslims to go to war; amounted to revulsion of Muslims in terms of encouraging listeners to view Muslims as practising a religion that glorifies violence and killing, and sanctions domestic violence.

The Tribunal rejected the respondents' reliance on s 11 of the Act to the effect that the seminar, newsletter and article were engaged in reasonably and in good faith. The Tribunal also rejected the respondents' argument that the making of the statements was done for a 'genuine religious purpose'. In particular, it ruled that the seminar was 'presented in a way which [was] essentially hostile, demeaning and derogatory of all Muslim people, their god, Allah, the prophet Mohammed and in general Muslim religious beliefs and practices'.¹⁹

No doubt, a number of statements, such as those describing Muslims as liars or intending to overrun Western democracy with violence and fear are deeply

offensive and could tend to consolidate existing discriminatory and harmful attitudes or behaviour towards Muslims. But perhaps what is most troubling about the Tribunal's judgement is the absence of reasoning based on the right to freedom of expression, at the very least in the limited sense in which that right has been acknowledged at appellate level in Australia²⁰ or within the broader right as recognised in international human rights law. While Morris J in *Fletcher* acknowledged that 'free speech' is a 'human right', this was placed against what he termed 'religious tolerance' as a human right, though the word 'tolerance' does not feature as a fundamental right in any human rights instrument.²¹

Human rights considerations

Chief among the problems with the Act and cases decided under it, and the equivalent legislation in Queensland,²² is the lack of a human rights analysis. Central to the recent debates within the British Parliament on similar legislation was the relevance of the human right to freedom of expression within art 10 of the *European Convention on Human Rights*.

Freedom of expression

Internationally, the right is found in the *International Covenant on Civil and Political Rights (ICCPR)*. Article 19(1) provides that everyone 'shall have the right to hold opinions without interference' and 'the right to freedom of expression ... shall include freedom to seek, receive and impart information and ideas of all kinds'. Article 19(3) provides, in common with other qualified human rights, that the exercise of these rights 'carries with it special duties and responsibilities', but that any restrictions shall only be 'such as are provided by law and are necessary: (a) [f]or respect of the rights or reputations of others; (b) [f]or the protection of national security or of public order ...' While cases decided by the European Court of Human Rights under the equivalent provision in the European Convention on Human Rights have arguably granted too much discretion to member states of the Council of Europe, without sufficient critique of the laws protecting against offence to religious belief, these cases at least seek to balance the fundamental right against the prescribed derogations.²³

Accordingly, the approach in each of the international and regional human rights instruments mentioned is that the fundamental right may be violated only if it meets the recognised derogations. These are, broadly, that the measures are: (a) adopted in pursuit of a legitimate objective, and (b) necessary for the achievement of that purpose, that is, they must be rationally connected to the achievement of the objective, proportionate, and calculated to interfere as little as possible with fundamental human rights, subject to adequate safeguards to avoid any abuse of the powers granted.²⁴ In *Faurisson v France*,²⁵ the Human Rights Committee, which rules on the *ICCPR*, found that a conviction under French legislation for Holocaust denial did not violate art 19(1).²⁶ It found that the restriction was 'provided by law'. The

13. *Fletcher v Salvation Army* [2005] VCAT 1523.

14. *Racial and Religious Tolerance Act 2001* (Vic) s 25(2).

15. Dr Helen Szoke, 'Inciting Hatred Needs More than a Jibe', *The Age* (Melbourne), 8 June 2006.

16. *Judeh v Jewish National Fund of Australia Inc* [2003] VCAT 1254 (complaint of racial vilification dismissed). *Islamic Council of Victoria Inc v Catch the Fire Ministries Inc* [2004] VCAT 2510; *Fletcher v Salvation Army* [2005] VCAT 1523. A separate complaint alleging vilification of Muslims on an internet site that was not password protected was settled. See Mark Tamblane, *Davie Oldfield Sued Over Terrorism Website* (16 August 2003) ABC online <<http://www.abc.net.au/am/content/2003/s925911.htm>> at 17 May 2006.

17. [2004] VCAT 2510.

18. *Islamic Council of Victoria Inc v Catch the Fire Ministries Inc* [2004] VCAT 2510, [392].

19. *Ibid* [383].

20. For extracts and discussion of key cases, see Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (4th ed, 2006); Hoong Phun Lee, 'The Implied Freedom of Political Communication' in Hoong Phun Lee and George Winterton (eds), *Australian Constitutional Landmarks* (2003) 383. For critique of the High Court's insistence that the freedom of political communication is limited to the 'text and structure' of the Australian Constitution, see Adrienne Stone, 'The Limits of Constitutional Text and Structure Revisited' (2005) 28(3) *University of New South Wales Law Journal* 842.

21. *Fletcher v Salvation Army* [2005] VCAT 1523, [8].

22. *Anti-Discrimination Act 1991* (Qld), considered in *Deen v Lamb* [2001] QADT 20.

23. *Otto-Preminger Institut v Austria* (1994) 19 EHRR 34; *Wingrove v UK* (1997) 24 EHRR 1.

Chief among the problems with the Act and cases decided under it, and the equivalent legislation in Queensland, is the lack of a human rights analysis.

Committee reiterated, as it did in General Comment 10,²⁷ that 'respect of the rights or reputations of others' in art 19(3) 'may relate to the interests of other persons or to those of the community as a whole'. The restriction 'served the respect of the Jewish community to live free from an atmosphere of anti-semitism'. The Committee concluded that the restriction was necessary because it 'was intended to serve the struggle against racism and anti-semitism' and, also, because Holocaust denial was 'the principal vehicle for anti-semitism'. The specific context of anti-semitism and Holocaust denial in Europe suggests that the reasoning in *Faurisson* may not save the restrictions on expressions of 'serious contempt for, or revulsion or severe ridicule' in the Victorian Act.

Though the Human Rights Committee has not explicated what is required by the word 'necessary', it is arguable that it should mean something more than 'useful', 'reasonable' or 'desirable', following the persuasive reasoning of the Inter-American Commission on Human Rights in interpreting the word 'necessary' in the equivalent art 13(2) of the *American Convention on Human Rights*.²⁸ Similarly, the European Court of Human Rights insists that for the restriction to be deemed 'necessary', it must meet a 'pressing social need'. There can be no doubt that religious vilification is a social problem, and that there has been a recent increase particularly in Islamophobia,²⁹ but this is not the same as establishing that there is a pressing social need for aspects of the Victorian legislation.

While Australian courts have recently adopted in relation to the nascent right of political communication the attenuated test of whether a restriction is 'reasonably appropriate and adapted',³⁰ the lack of a human rights infrastructure and jurisprudence in Australia severely hinders adequate balancing of the claimed right to freedom of expression with the rights and responsibilities inherent in the religious vilification laws.

Balancing human rights

A thorough human rights analysis involves a complex balancing of competing rights. Recall that art 19(3) of the *ICCPR* allows derogation from violation of art 19(1) to protect '... the rights or reputations of others'. Certainly, these include other 'human rights'. For instance, art 18(1) of the *ICCPR*, provides:

Everyone shall have the right to freedom of thought, conscience and religion. This freedom shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others

and in public or private, to manifest his religion or belief, worship, observance, practice and teaching.

Article 20(2) provides: '[a]ny advocacy of ... religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'. The Human Rights Committee has upheld state restriction on advocacy of religious hatred.³¹ The Act refers not merely to 'conduct that incites hatred', which fits art 20(2), but includes 'serious contempt for, or revulsion or severe ridicule', which does not. If the state were to argue that the latter words are permissible, it might argue, as opined by several members of the Human Rights Committee in *Faurisson v France*, that:

[t]his is a case where, in a particular social and historical context, statements ... constitute part of a pattern of incitement against a given racial, religious or national group, or where those interested in spreading hostility and hatred adopt sophisticated forms of speech that are not punishable under the law against ... incitement, even though their effect may be as pernicious as explicit incitement, if not more so.³²

However, in *Faurisson*, the members of the Committee noted that the 'notion that in the conditions of present-day France, Holocaust denial may constitute a form of incitement to anti-semitism cannot be dismissed.' It may be harder to justify a restriction on expressions where the scope of the restriction is much broader and the potential effects of the offensive speech less severe.

The jurisprudence of the European Court of Human Rights emphasises the importance of the right to freedom of expression as being:

one of the essential foundations of a democratic society. [It] is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic' society.³³

The European Court of Human Rights has also ruled equally, however, that:

tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society ... [and] ... it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance), provided that any 'formalities', 'conditions', 'restrictions' or 'penalties' imposed are proportionate to the legitimate aim pursued.³⁴

24. Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2000); Clare Ovey and Robin C A White, *Jacobs & White, The European Convention on Human Rights* (4th ed, 2006).

25. Communication No. 550/1993, U.N. Doc. CCPR/C/58/D/550/1993 (1996).

26. For similar reasoning by the European Court of Human Rights, see *Garaudy v France* (App. 65831/01), admissibility decision of 24 June 2003.

27. GC 10(19), adopted at Human Rights Committee 461st mtg, Doc. A/38/40, 109 (27 July 1983).

28. Report on the Incompatibility of 'Descato' Laws with the American Convention on Human Rights: Inter-American Commission on Human Rights, *Annual Report of the Inter-American Commission on Human Rights 1994*, OEA/Ser. L/V/II.99, doc.9 rev. (17 February 1995).

29. Human Rights and Equal Opportunity Commission, *Living with Racism: The Experience and Reporting by Arab Muslim Australians of Discrimination, Abuse and Violence Since September 11 2001* (2004); Human Rights and Equal Opportunity Commission, *Isma-Listen: National Consultations on Eliminating Prejudice Against Arab and Muslim Australians* (2004) ch 2.1, reporting that one-third of people had experienced hostility 'a lot more' and one-third 'a bit more'.

30. For discussion, see Hoong Phun Lee, 'The "Reasonably Appropriate and Adapted" Test and the Implied Freedom of Political Communication', in Matthew Groves (ed), *Law and Government in Australia* (2005) 59.

31. *JRT and the WG Party v Canada*, Communication No 104/1981 (18 July 1981), UN Doc Supp No 40 (A/38/40) at 231 (1983).

32. *Faurisson v France*, Communication No 550/1993, UN Doc. CCPR/C/58/D/550/1993 (1996) Human Rights Committee, separate opinion of Mrs Evatt and Mr Kretzmer, co-signed by Mr Klein.

33. *Handyside v UK* (1979-80) I EHR 737, [48].

34. *Gündüz v Turkey* (2005) 41 EHR 59, [40].

The Court will also have regard to the context in which such expression is made, and will consider the manner in which the expression is prepared, its content, and its purpose.³⁵

Scope of vilification

It is arguable that aspects of the Act and cases decided under the legislation fail on a human rights analysis. While the objects of the legislation are adopted in pursuit of a legitimate objective, the scope of the offence suffers from over-breadth. The European Court of Human Rights is rightly concerned with expressions that advocate religious 'hatred', but the Victorian legislation includes not only 'hatred' but 'serious contempt for, or revulsion or severe ridicule'. Moreover, judicial interpretation serves to fuel concern that the Act may be invoked for a lower threshold of harm than is proportionate to the violation of the right to free expression. Thus, Morris J's translation of 'inciting hatred' in terms of whether it would 'incite strong negative passions' takes the threshold for offence too low.³⁶

The danger in framing religious vilification as a wrong lies partly in the fact that it may capture views which represent legitimate disagreements about the appropriateness of different religious beliefs or practices. Arguably, the inclusion in the Act of the words 'serious contempt for, or revulsion or severe ridicule' of another person or class of persons on the ground of religious belief or activity may be infringed by the trenchant condemnation of beliefs or practices on which people may reasonably take opposing views. Take, for example, the parodying of Christian fundamentalist reliance on scripture to condemn homosexuality or some feminists' serious contempt for practices that harm women when those practices are justified with reference to Hinduism, Christianity or Islam.

Aspects of the offence therefore capture a range of expressions that should be protected within, and indeed may be essential to, a democracy. Severe contempt of an oppressive religiously biased government may be necessary to promote impartial governance. It would be of little or no comfort to the dissident that the authorities point to the fact that no action will be taken if expression is later deemed to have been made reasonably and in good faith. Sometimes there is a need for subversive, deeply disturbing expressions or conduct against oppressive orthodoxies.

Equally, in certain circumstances, serious contempt for or revulsion of religious beliefs or activities may be indicated or, at least, should not be subject to penalty. Take, for example, the arguable failure of the Catholic Church in certain European countries during the rise of the Nazi party in the 1930s and 1940s to oppose more forcefully Nazi abuse of Jews. That such criticism may face threats of prosecution under religious hatred laws is real. For instance, in May 2006, a politician in Victoria who referred to Turkey's genocide of Pontic Greeks, including Armenians, between 1916 and 1923, was criticised for a 'racially and religiously motivated

attack',³⁷ despite that fact that people may reasonably disagree on the interpretation of these events. Though s 11 of the Act allows conduct 'engaged in reasonably and in good faith ... [for] ... any purpose that is in the public interest; or ... in making ... a fair and accurate report of any event or matter of public interest', the burden falls on the person engaging in such conduct to 'establish' this fact. The European Court of Human Rights has relied on the 'chilling effect' of restrictions to find them to be in violation of art 10.³⁸ The Victorian legislation may have a disproportionate chilling effect on expression, greater than if the threshold offence was instead set higher. It is clear from the comments of the Victorian politician, referred to above, that the legislation was indirectly called in aid to sanction the expression of the person involved.

One may take for granted the comfort of a relatively stable society now, but one should never be lulled to give up fundamental freedoms that may be vital when government or dominant groups seek to rob these from citizens.

Difficulty in separating belief from believers

An associated difficulty in religious vilification laws lies in seeking to separate protection of religious believers from religious belief. Such laws are often justified on the basis that they address vilification of individuals or groups on the grounds of religious belief or activity, but that they do not target religious belief. This was the view taken of the Act by Morris J where he states that '[t]he law recognises that you can hate the idea without hating the person'.³⁹ The distinction appears difficult, if not impossible, to justify in relation to expression. It resonates with that equally fallacious dichotomy that is used to justify homophobia: love the sinner, but not the sin. The religious beliefs or activities of individuals are intimately tied to religion, and vice versa.

Courts are ill-equipped to resolve the intractable dichotomy between targeting individuals or group adherents of religion and targeting religious belief. Occasionally, they do so badly — as evident in Morris J's cursory treatment of Wicca in one of the cases decided under the Act.⁴⁰ His statement that '[t]o most people the question of whether witches are Satanists not only invokes a concept which is nebulous, but also is an arid and irrelevant theological debate'.⁴¹ Yet, much respectable literature addresses witchcraft⁴² and Satanism in relation to other theological and spiritual belief systems.⁴³ Moreover, the attribution of Satanism to Wiccans may have profoundly adverse effects, including vilification. Certainly, cases involving other non-theistic religions exercise a number of jurisdictions.⁴⁴ Moreover, the Act's allowance for insult 'reasonably and in good faith' runs up against the difficulty in applying the Tribunal's definition in *Catch the Fire Ministries* of 'agreeable to reason; not irrational, absurd or ridiculous, not going beyond the limit assigned by reason, not extravagant or excessive; moderate'.⁴⁵ Some core theological beliefs are not 'agreeable to reason', but are based on faith. While the state is obliged to protect against advocacy of

35. *Jersild v Denmark* (1994) 19 EHRR 1.

36. *Fletcher v Salvation Army* [2005] VCAT 1523, [10].

37. Mathew Murphy and Paul Austin, 'MP's "hate speech" exposes Labour's ethnic rifts', *The Age* (Melbourne), 16 May 2006, 1.

38. See, eg, *Steur v The Netherlands* (2004) 39 EHRR 706.

39. *Fletcher v Salvation Army* [2005] VCAT 1523.

40. *Ibid.*

41. *Ibid.* [12].

42. Sir James Frazer, *The Golden Bough: A Study in Magic and Religion* (1911–15); Lynne Hume, *Witchcraft and Paganism in Australia* (1997).

43. Nevill Drury, *Magic and Witchcraft: From Shamanism to the Technopagans* (2003); James R Lewis and Jesper Aagaard Petersen, *Controversial New Religions* (2005).

44. See, eg, in England and Wales the case of Druids at Stonehenge, *Pendragon v UK* (1998, App 31416/96) 27 EHRR CD 179.

45. *Islamic Council of Victoria Inc v Catch the Fire Ministries Inc* [2004] VCAT 2510, [388].

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incitement to religious hatred, equally it must take extreme care to distinguish protection of the religious believer to avoid privileging any religion or trenching on freedom of expression.

Counter-productive law?

In addition to these fundamental human rights concerns, there is some evidence that the legislation in Victoria has been exploited to undermine the purposes of promoting religious tolerance. Amir Butler, the Executive Director of the Australian Muslim Public Affairs Committee, reports in relation to the Act that ‘small groups of evangelical Christians’ are now attending Islamic lectures for the purpose of ‘jotting down any comment that might be used as evidence’ in court.⁴⁶ Also, in the *Catch the Fire Ministries* case the three individuals who complained were Muslim, attended a seminar that was advertised in part on terms of ‘How to witness effectively to a Muslim’, and took notes throughout which were later transcribed at the complainant’s premises. In the eyes of the Tribunal, there was, in all probability, a plan to ensure that each of the individuals attended at staggered times during the seminar.

Developments in the United Kingdom

England and Wales only recently introduced the offence of using threatening words or behaviour, or displaying, publishing or distributing written material which is threatening, if the person intends thereby to stir up religious hatred.⁴⁷ This is much narrower than the Victorian legislation, by requiring intention, excluding likelihood, and limiting the scope to ‘threatening’ words or behaviour, due principally to long-standing human rights concerns. The government’s words ‘abusive or insulting’ were dropped. No proceedings may be instituted except with the consent of the Attorney General. The UK Act provides that ‘[n]othing 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 proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system’.⁴⁸

Similar legislation in Northern Ireland, rushed through in 1970 to address the eruption of violent sectarian conflict, has arguably had little effect. But this need not necessarily provide any lessons for Australia. While the proof of intention and the requirement

of the Attorney General’s consent militate against prosecution, it is also possible that distinctive factors to Northern Ireland limited enforcement. The Catholic nationalist and republican communities, on the whole, historically have had little confidence in the police, perceived by many as a Protestant force serving the interests of unionists. It might also be the case that many people were cynical of prosecutions doing anything more than aggravating existing entrenched religious–political conflicts.⁴⁹ Much sectarian hate-speech is a function of broader constitutional conflict about the status of Northern Ireland.

Conclusion

Legislation such as the *Racial and Religious Tolerance Act 2001* in Victoria and the *Racial and Religious Hatred Act 2006* in the UK represent a move away from treating abusive, threatening or insulting words as general public order offences towards protecting against religious vilification per se. This is consistent with the trend towards particularising protections against abuse on other grounds, such as race or gender, and a shift in modern liberal multicultural societies towards equality and respecting diversity. No doubt some of the opposition to religious vilification law represents a backlash from those fearful that dominant orthodoxies will be challenged, as was the case with sexual harassment or racial vilification laws. Nor should it be forgotten that assumed equality of free speech when vulnerable groups are not equally placed to express their views, simply replicates inequality and allows harmful expression.⁵⁰

Nonetheless, such legislation is limited unless located within a broader social justice approach that addresses the intersection of religion, difference and material disadvantages. Economic marginalisation and social exclusion experienced by some religious minorities, whose ethnicity or racial identity is different from the dominant population/s, can be more pressing than the real or perceived harms of religious vilification. Legislation can play a part here by requiring public bodies to promote equality of opportunity and good relations between different religious groups.⁵¹

Australia is obliged under international law to protect against advocacy of incitement to religious hatred, but aspects of the *Racial and Religious Tolerance Act 2001* are arguably incompatible with the countervailing right to freedom of expression. It is possible that the price of imposed tolerance is a chilling in expression. That the alternatives to such legislation are many should give

46. Amir Butler, ‘Why I’ve Changed My Mind on Vilification Laws’, *The Age* (Melbourne), 4 June 2004.

47. *Racial and Religious Hatred Act 2006* (UK) c 1, Schedule (inserting ss 29B and 29C into the *Public Order Act 1986* (UK)) (‘UK Act’).

48. *Racial and Religious Hatred Act 2006* (UK) c 1, Schedule (inserting s 29J into the *Public Order Act 1986* (UK)).

49. Select Committee on Religious Offences in England and Wales, *Religious Offences in England and Wales — First Report*, House of Lords Paper No 95–1, Session 2002–03 (2003) Volume 1, Appendix 5, [4].

50. Mari J Matsuda et al, *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (1993); Laura Beth Nielsen, *License to Harass* (2004).

51. See, eg, *Northern Ireland Act 1998* (UK), c 47, ss 75, 76, though note that these are highly dependent on political will, see Sandra Fredman, ‘Changing the Norm: Positive Duties in Equal Treatment Legislation’ (2005) 12 *Maastricht Journal of European and Comparative Law* 369.

one cause to reflect on whether the fundamental right to freedom of expression should be abridged so easily.

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LEGAL STUDIES

Religious vilification — a question of rights



The article 'Religious Vilification Law — Quelling Fires of Hatred?' by Dermot Feenan (p 153) discusses the conflict between religious vilification laws and the right to freedom of expression. To what extent should the law limit the right to freedom of expression to reflect community values of tolerance of diversity in a multicultural society? The following activities will assist you to identify the key issues discussed in this article.

Complete the following table to summarise the extent to which religious vilification laws exist in Australia. Place a tick in the appropriate column.

Religious Vilification Laws in Australia

Legislation	Yes	No
Commonwealth		
New South Wales		
Queensland		
South Australia		
Tasmania		
Victoria		
Western Australia		

Working in pairs, carefully read the section of the article on Victoria. Using the information in the article, design a tolerance poster. Your poster should:

- explain the term 'religious vilification'
- outline three actions that may be considered a 'religious vilification'.

Working in small groups, discuss the following questions:

1. Carefully read the section in the article under the heading 'Cases under the Act'.

- Outline the facts of the *Islamic Council of Victoria v Catch the Fire Ministries* case.

- What decision did the Victorian Civil and Administrative Tribunal make in this case?
- Why do you think this decision was controversial?

2. What do you think the term 'freedom of expression' means?

3. Read the sections of the article under the headings: 'Human rights considerations', 'Freedom of expression' and 'Balancing human rights'. What do the following international human rights documents say about the right to freedom of expression?

- European Convention on Human Rights
- International Covenant on Civil and Political Rights
- Human Rights Committee
- European Court of Human Rights.

4. Using dot points, summarise the conditions under which the right to freedom of expression may be violated.

5. Draw up a table to list the arguments for and against religious vilification laws.

- What arguments for and against religious vilification laws are presented in the article?
- Using media reports and the Internet, undertake further research into the arguments for and against religious vilification laws. Are there any other arguments that you can add to your list?

4. Working individually, prepare a written response to the following question:

'Australia is obliged under international law to protect against statements that incite religious hatred; however laws enforcing religious tolerance are arguably incompatible with the right to freedom of expression.' Discuss.

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