Enforcing Tolerance: Vilification Laws and Religious Freedom in Australia

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1. Australia as a Multicultural Society

Australia in the 21st century is a complex, multicultural society. Apart from its indigenous community, which is only about 2.4% of the population,[1] Australia is a nation of migrants. White settlement of Australia began in 1788 with the arrival of the First Fleet of convicts and settlers were from the British Isles, there has been a long history of people migrating to Australia from other parts of the world also. Chinese came to Australia in large numbers during the Gold Rush period of the 1850s, and continued to arrive thereafter. Since the end of World War II the population of Australia has increased rapidly due to migration. The proportion of the population who were born overseas increased from 10% in 1947 to 24% in 2000.[2] A further 27% of persons born in Australia had at least one overseas-born parent, according to the 1996 Census.[3] Thus a substantial proportion of all Australian residents are either first or second generation Australians. With this wave of immigration, the Australian population has become more and more diverse.[4]

Given this diversity, multiculturalism is an important feature of Government policy in Australia. The Federal Government has recognised this in its official policy on multiculturalism. That policy has been altered over the years since its introduction, with governments of different persuasions. However, the differences between the

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

2 Australian Bureau of Statistics, http://www.abs.gov.au, International Migration, 2002. Currently, the Australian population has a net gain of one international migrant every 4 minutes. See population clock at http://www.abs.gov.au.

3 Ibid.

4 The numbers of immigrants from Britain, expressed as a percentage of the total migrant intake each year, has declined substantially. In the period 1966- 1970, migrants from the United Kingdom and Ireland represented 46% of the total migrant intake. In 2002-3, the figure was 13%. Australian Bureau of Statistics, http://www.abs.gov.au, Australian Bureau of Statistics, Migration Australia (2004). Now the proportion of the Australian population born in Asia is exactly the same as the proportion born in the United Kingdom. The percentage for both is 5.7%: Australian Bureau of Statistics, Migration Australia (2004).

major political parties are more on matters of detail than the principle.[5] A commitment to multiculturalism is firmly enshrined in Government policy.

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

Enforcing Tolerance

Enforcing tolerance is more difficult. Whereas education can change hearts and minds, the most that can be achieved through legal regulation to enforce tolerance is that people's behaviour changes; but changing behaviour is a good in itself even if compliance is achieved without changing hearts and minds. Legislation prohibiting discrimination in employment or in other aspects of the life of a shared community, is a primary strategy for enforcing tolerance. Anti-discrimination legislation in Australia dates back to the 1970s, and exists in all States and Territories,[6] as well as at the federal level.[7] To a great extent, Australian laws which prohibit discrimination represent shared values and beliefs in the Australian community. The principle of giving people a "fair go" irrespective of race, religion, political belief, gender or sexual orientation is a widely held moral value. The principle of non-discrimination is also enshrined in various international human rights treaties.[8]

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5 The Howard Government's policy on multiculturalism is expressed in *A New Agenda for Multicultural Australia* (Commonwealth of Australia, 1999). This replaced the National Agenda for a Multicultural Australia promulgated in 1989 by the previous Labor government. As an election has been called for October 9th, the Howard Government is currently in caretaker mode.

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

6 *Anti-Discrimination Act* 1977 (NSW); *Anti-Discrimination Act* 1991 (Qld); *Equal Opportunity Act* 1984 (SA); *Anti-Discrimination Act* 1998 (Tas) s 19; *Equal Opportunity Act* 1995 (Vic); *Equal Opportunity Act* 1984 (WA); *Discrimination Act* 1991 (ACT); *Anti-Discrimination Act* 1992 (NT).

7 *Racial Discrimination Act* 1975 (Cth); *Sex Discrimination Act* 1984 (Cth).

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

Another strategy, which emerged in Australia in the 1990s, is vilification legislation. Legislation of this kind now exists in most States and Territories,[9] and at the Federal level,[10] although the laws vary both in their nature and in the kinds of vilification they prohibit. Vilification laws may create criminal offences, civil remedies or both. The first target of vilification laws in Australia was racial vilification, but vilification laws have since been extended to protect people with a range of other characteristics. Queensland offers an example of a law of wide scope, covering race, religion, sexuality and gender identity.[11] Tasmania's legislation goes wider still, covering race, disability, sexual orientation, lawful sexual activity and religious belief.[12] What is prohibited in these jurisdictions is not merely the incitement of hatred but also serious contempt and severe ridicule.

Vilification laws have their origins in the United States. Every jurisdiction in the US now has legislation making hate speech of one kind or another a crime. Other jurisdictions have followed suit. In England, the Public Order Act 1986 has a hate speech law expressed in very wide terms.

Australia's vilification laws are an example of copycat legislation. Copycat legislation is legislation enacted mainly for the reason that other jurisdictions have enacted such laws, rather than because of an identified social need and a belief that the laws concerned represent an appropriate response to that need. In contrast to the USA, with its continuous history of severe racial tensions lasting into the present, or Britain which has experienced serious race riots in its inner cities, Australia has witnessed very little racial tension erupting into violence in recent years. Its debates about immigration policy became vigorous with the brief emergence of One Nation as a major political force; but those debates were conducted peacefully and in accordance with the norms of a democratic society.

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

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

11 The *Anti-Discrimination Act* 1991 (Qld) s 124A (1) provides:
"A person must not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race, religion, sexuality or gender identity of the person or members of the group.
(2) Subsection (1) does not make unlawful--
(a) the publication of a fair report of a public act mentioned in subsection (1); or
(b) the publication of material in circumstances in which the publication would be subject to a defence of absolute privilege in proceedings for defamation; or
(c) a public act, done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including public discussion or debate about, and expositions of, any act or matter."

12 The *Anti-Discrimination Act* 1998 (Tas) s 19A provides:
"A person, by a public act, must not incite hatred towards, serious contempt for, or severe ridicule of, a person or a group of persons on the ground of –
(a) the race of the person or any member of the group; or
(b) any disability of the person or any member of the group; or
(c) the sexual orientation or lawful sexual activity of the person or any member of the group; or
(d) the religious belief or affiliation or religious activity of the person or any member of the group."

Nor is there any reason to think that vilification laws were enacted in Australia to deal with a pressing social problem in relation to any other protected group. Incidents of violence against homosexuals are, regrettably, not at all unknown, but it is difficult to identify any examples of demagogues stirring up violence against homosexuals. Nor has religious tension leading to violence been much of a feature of Australian life. While in the past, Australian society had its Catholic and Protestant tribes, these religious differences have largely disappeared from view as Australian society has become more secularised. Christians live alongside Jews, Muslims, Hindus, Buddhists and devotees of New Age philosophies, as well as other religions, without interfaith disagreements becoming front page public news. And why the Tasmanian Parliament considered that Tasmanians with disabilities needed protection from vilification is difficult to imagine.

This is not to say that Australia is a Garden of Eden of cultural tolerance and harmony. Far from it. One Nation's brief electoral success demonstrated the latent concern over Australia's ethnic mix in some parts of the electorate, and the debates about the detention of refugees who arrive unlawfully, especially those who arrive by boat, can be understood in racial terms. Nonetheless, overall, Australia's multiculturalism seems fairly relaxed in comparison, for example to the fractured and fractious state of the USA, deeply divided as it is along lines of race, gender, sexual orientation, religious belief, political affiliation, and attitudes to abortion, to name just the major fault lines.

However, recent laws passed in Victoria,[13] Queensland and Tasmania on religious vilification threaten that shared consensus, and are causing great division. At the heart of the debate about these laws is religious freedom: not the freedom to be intolerant, and certainly not the freedom to vilify – neither of these are legitimate expressions of religious freedom. Rather, at issue is the freedom to express views about truth and falsehood, right and wrong, good and evil, which may offend others who have a different view on these matters. Religious vilification laws in practice, if not in theory, pose a grave danger to this freedom because of the collateral damage that can be caused by a legislative strategy to enforce tolerance.

3. Religious vilification laws in Australia

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

The Racial and Religious Tolerance Act 2001 (Victoria)

The *Racial and Religious Tolerance Act* 2001 was passed after a period of community consultation on earlier proposals made by the Victorian Government.[14] Section 8 of the Act defines what is meant by religious vilification.[15] It provides:

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

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

15 The definition of religious vilification in the Act is narrower than originally proposed in the model Bill appended to the Discussion Paper. Proposed section 5 of the model Bill provided: "A person must not on the ground of the religious belief or activity of another person or a class of persons engage in any conduct (whether on a single occasion or on a series of

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

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

(2) For the purposes of sub-section (1), conduct-

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

(b) may occur in or outside Victoria.

Section 9 of the Act provides that a person's motive for engaging in the proscribed conduct is irrelevant.[16] Section 11 provides for exceptions where:

The person's conduct was engaged in reasonably and in good faith-

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

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

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

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

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

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

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

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

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occasions over a period of time) that a reasonable observer would believe is likely in all the circumstances –
(a) to incite hatred against the person or class of persons by means that include threatening physical harm towards or inciting others to threaten physical harm towards –
(i) the person or class of persons; or
(ii) the property of the person or class of persons; or
(b) to incite revulsion of, or serious contempt for, the person or class of persons; or
(c) to portray the person or class of persons as not having, or not deserving to have, the right to participate fully in society; or
(e) to threaten or intimidate the person or class of persons; or
(f) to threaten the property of the person or class of persons."
Discussion Paper, above n.20, p.20.

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

Complaints of religious vilification are dealt with in the first instance by conciliation. If that is unsuccessful, then the matter will proceed to the Victorian Civil and Administrative Tribunal in accordance with processes laid down in Part VII of the Equal Opportunity Act 1995 (Vic.).[17] The Tribunal has limited powers in response to proven vilification, but one power it has is to award compensation for losses suffered.[18] The Act also creates a criminal offence of serious religious vilification, which is intent based.[19]

Problems of interpretation of the Victorian law

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

How does one prove that a person has incited hatred or revulsion? Three ways in which this might be demonstrated are:

i. that he or she intended to incite hatred or revulsion
ii. that whether or not he or she intended to incite hatred or revulsion, this was the likely effect of the words or conduct

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17 *Racial and Religious Tolerance Act* 2001 (Vic) s. 23.

18 Section 136 of the *Equal Opportunity Act* 1995 (Vic.) provides:
"After hearing the evidence and representations that the parties to a complaint desire to adduce or make, the Tribunal may-
(a) find the complaint or any part of it proven and make any one or more of the following orders-
(i) an order that the respondent refrain from committing any further contravention of this Act in relation to the complainant;
(ii) an order that the respondent pay to the complainant within a specified period an amount the Tribunal thinks fit to compensate the complainant for loss, damage or injury suffered in consequence of the contravention;
(iii) an order that the respondent do anything specified in the order with a view to redressing any loss, damage or injury suffered by the complainant as a result of the contravention; or
(b) find the complaint or any part of it proven but decline to take any further action in the matter; or
(c) find the complaint or any part of it not proven and make an order that the complaint or part be dismissed."

19 Section 25 provides:
(1) "A person (the offender) must not, on the ground of the religious belief or activity of another person or class of persons, intentionally engage in conduct that the offender knows is likely-
(a) to incite hatred against that other person or class of persons; and
(b) to threaten, or incite others to threaten, physical harm towards that other person or class of persons or the property of that other person or class of persons."
(2) A person must not, on the ground of the religious belief or activity of another person or class of persons, knowingly engage in conduct with the intention of inciting serious contempt for, or revulsion or severe ridicule of, that other person or class of persons."
It appears that what is severe contempt or ridicule in subsection (2) is a matter of degree which leaves a great deal of room for prosecutorial discretion and judicial value judgments.

iii. that this was in fact the effect of the words or conduct.

The curious feature of the Victorian law is that it excludes the first and is not drafted to include the second, with the logical consequence that the only way in which the incitement can be proven is to show that in fact, people were incited towards hatred and revulsion by the conduct about which complaint has been made.

As to the first, motivation is relevant only as an *exception* to the wrong identified. Section 11 makes it an exception that the communication is made "in good faith" for one or more of the purposes given in that section. In circumstances to which s.11 is not applicable, section 9 makes it clear that motive is expressly excluded from consideration.

As to the second, the test of religious vilification is not expressed in terms of likely effect. If the law was drafted in terms of conduct 'likely to incite hatred against, serious contempt for, or revulsion or severe ridicule of a person or class of person', then the court could examine the likely effect of the conduct on an audience – not perhaps an audience of reasonable people, but at least an audience of average people who are prone to prejudice or unreasonableness. However, there is no reference in the Act to the likely effect of the conduct on listeners, in contrast to vilification legislation in other jurisdictions,[20] and in contrast also to the criminal offence of serious racial vilification in the Victorian Act which refers both to intent and to likely effect.[21]

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

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

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[20] Compare the Racial Discrimination Act 1975 (Cth) s.18C:
"(1) It is unlawful for a person to do an act, otherwise than in private, if:
(a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
(b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group."

[21] See above, n. 20.

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

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

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

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

> "In my view, the section is directed to the conduct itself and not to the nature of the reactions to it. The conduct must be capable itself of giving rise to these reactions. In this context "incite" has its ordinary dictionary meaning of encourage, urge, stir up, instigate or prompt. (As to this, see the Oxford English Dictionary and the Macquarie Dictionary.)
> The test of whether conduct is capable of doing this must be that of the reasonable recipient or target of the conduct. If the conduct is a physical act, the recipient will be the person against whom the conduct is directed. If the conduct is a communication, the recipient will be the person to whom the communication is made…
> The test must be that of a reasonable and objective recipient. That recipient must, in my view, be assumed to have reasonable knowledge of the surrounding context and circumstances in which the conduct occurs. The recipient should not be assumed to be of a particular race, either the race of the person who engages in the conduct or the race of the person against whom the strongest feelings of antipathy are alleged to have been encouraged. Nor should the person be assumed to be overly sensitive or overly insensitive in respect of what is said or done.

It is of course, rather difficult to construct in law the reasonably prejudiced man or woman on the Clapham Omnibus, for the very nature of racial or religious prejudice is that it has no reasonable basis. However, Deputy President McKenzie thought that the law could be interpreted by reference to the likely effect of the words on a reasonable and objective person who is of average sensitivity and who is neither of the race of the vilifier or the vilified.

Deputy President McKenzie's interpretation of the law is as sensible a gloss on the section as can probably be offered, but this level of judicial rewriting tends to be struck down by appellate courts. It remains to be seen what the fate of this creative interpretation will be once a suitable case is taken on appeal.

Islamic Council of Victoria Inc v Catch the Fire Ministries Inc

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

The complaint in this case arose from a seminar on Islam presented by Pastor Daniel Scot in March 2002 in Melbourne. The seminar was organised by Catch the Fire Ministries. Three converts to Islam attended parts of the seminar and then lodged a complaint, claiming that it incited hatred against Muslims in Australia. The Islamic Council of Victoria also became involved in the case. A conciliation session was held by the Equal Opportunity Commission but this was unsuccessful. The case eventually went to a hearing at the Victorian Civil and Administrative Appeals Tribunal.

According to Saltshakers, a Christian organisation following the case, the seminar presented information on Jihad and the Qur'an, compared the Bible and the Qur'an and talked about how to reach out to Muslims in love.[22] The Islamic Council of Victoria obviously had a different interpretation of the seminar, and of some other material about which complaint was made. The complaint and the defence were summarised by the judge hearing the case as follows, in a judgment on a preliminary matter.[23] Judge Higgins said:

> "The complaint…details very serious allegations alleged to have been made by the co-respondents, these include
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> a) Islam and Muslims endorsed the killing and enslavement of whole groups of people based upon their religion.
>
> b) Characterise the Prophet as a paedophile.
>
> c) Describe the Quran as calling for atrocities on civilisation.
>
> d) Allegations that the Muslim people have a plan for Australia to declare it an Islamic nation.
>
> e) Various other matters which it is not necessary to detail.
>
> By its defence the co-respondents allege:
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> a) That the seminar concerned religious faith and constituted a bona fide religious activity.
>
> b) That such religious activity was not only bona fide but to the extent that it included matters of opinion they were reasonably held.
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> c) That there was teaching proceeding in certain Islamic training centres and that creating these centres had been known to produce terrorists and which have been linked to terrorists acts.

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22 Saltshakers has provided extensive information about the case on its website: http://www.saltshakers.org.au.

23 *Islamic Council of Victoria Inc v Catch the Fire Ministries Inc* [2003] VCAT 1753 (Unreported, Vice President Higgins, 21 October 2003) available at http://www.austlii.edu.au.

> d) That there was a radicalisation of Islamic youth encouraging them to enter this stream of Islam which has been widely reported in the media.
>
> e) That there was documentation confirming that the Islamic religion intended to conquer other religions and convert them to Islam.
>
> f) The methods include giving up children for martyr or martyrdom such as suicide bombings.
>
> Without repeating the other allegations, the substance of the defence was that the matters which are set out in the documentation allege to have vilified the Islamic religion were opinions that were justified and held in good faith and constituted a bona fide religious activity."

That summary explains what is contested in the case. It is not my purpose to comment on the substance of the complaint or of the defence. The hearing has now concluded. In due course, the judge will deliver his judgment on whether the Act was breached and, if so, why.

4. The collateral damage from vilification laws

Whatever the outcome of this case, the *Catch the Fire Ministries* illustrates the way such laws can operate in practice when they are applied through courts and tribunals and operationalised in the life of organisations, to cause collateral damage to religious freedom.

The chilling effect of litigation

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

The hearings in the *Catch the Fire Ministries* case lasted for weeks. The cost of defending such cases, employing an appropriately qualified legal team, can run into the hundreds of thousands of dollars – far beyond the capacity of small religious communities or organisations. In Australia, the normal rule in civil litigation is that the loser pays the winner's costs; but the position is much more complex than this. Under court rules developed to encourage settlements, the normal costs rule can be partially displaced if the winning party has earlier refused an offer of settlement better than the result obtained through the trial.[24] In any event, the costs which are allowed to a successful litigant are known as party and party costs, and the actual amount paid to the legal team may be greatly in excess of these recoverable costs. This is because party and party costs are usually based on a set scale of charges for different kinds of work done. Where the successful litigant has not been charged the scale fees by her or his lawyer, but has been charged higher fees (usually on an hourly rate), then the difference between the scale amount and the actual fees charged must be met by that litigant. These actual fees are known as the solicitor-client costs. Even if the court or tribunal does award substantial costs, this does not mean that the losing party will be

[24] See e.g. Supreme Court Rules (NSW).

able to pay them. Beyond the financial cost, the emotional cost and time commitment involved in litigation is considerable. Such cases may well settle with concessions having to be made that are not warranted in law, in order to get rid of the litigation.

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

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

The concentric circle effect of statutory interpretation

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

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

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

meaning of words gradually expands like ripples spreading from the centre of a pond. This is the concentric circle effect of statutory interpretation. The evolutionary nature of legal development through case by case decision-making may gradually expand the scope of legislation over time out from its central concerns to reach less obviously egregious behaviour. Law, in other words, has a tendency to take on a life of its own. Like a new vessel launched onto the open seas,[25] legislation once implemented no longer remains moored to its origins and confined to the motivating circumstances of its enactment.

The collateral damage from folklaw and risk-averse management

Another source of collateral damage is from the difference between what the law actually is and what people think it requires. The law that impacts upon people's lives is not the law as enacted by parliaments, and not even the law as interpreted by the courts. What matters is the law as people believe it to be. This folklaw may have only a tenuous connection with the law as enacted or applied in the courts. There is often a Chinese whispers effect as the perceived meaning of laws is spread through general communities of people who may not have a copy of the law itself.

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

This occurs because the best way to avoid crossing a boundary is to go nowhere near it. Lawyers are interested in defining carefully the boundaries of laws, in order to determine the scope of their application. Managers in organisations are not nearly so interested in boundaries. The question is not where the boundary lies, but what guidance can be given to members of organisations to ensure as far as possible that members do not stray near the boundary. The consequence is that narrowly drafted laws on the statute books can be given an expansionary scope in employment manuals, organisational guidelines and policy documents. This can be seen in other areas of law that impact upon organisations. At its extreme, risk-averse management converts sexual harassment laws into no-dating rules in the workplace, and child protection concerns into rules that teachers and others working with children should not even touch them.[26] Risk averse management can turn laws which properly aim to protect the vulnerable into organisational rules which oppress everyone.

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

The absence of a human rights framework

A fourth reason why religious vilification laws can cause collateral damage to religious freedom is that, in Australia at least, they do not operate within the context of a constitutional human rights framework. Rights often exist in tension with one

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

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

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

The interpretation of anti-discrimination laws and anti-vilification laws in Australia does not occur against the background of human rights' guarantees which protect different interests. Statutes must be interpreted according to their language and intent without necessarily a legitimate competing interest being given the same legal protection. No law in Australia protects freedom of speech or association, beyond freedom of political communication, which has been found to be an implied right in the Federal Constitution.[27] There is also a limited guarantee of religious freedom in the Federal Constitution, but it only applies to Commonwealth legislation.[28] Thus the balancing exercise often required when freedom of speech competes with other legitimate interests and concerns, is not an explicit part of the process of legal reasoning in Australia in the way it is in other jurisdictions.

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

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

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

The religious vilification provisions in Queensland and Tasmania have no such objects clause to encourage a balancing exercise in the interpretation of the

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27 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

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

legislation. Even the Victorian objects clause is of limited efficacy. An objects clause is not the same as a protected or entrenched right.

5. The Divisiveness of Vilification Legislation

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

This was certainly the view of Peter Costello, the Treasurer in the Federal Coalition government. Commenting in general terms on the wider issues raised by the Catch the Fire Ministries litigation, he had this to say about Victoria's religious vilification law:[29]

> "I do not think that we should resolve differences about religious views in our community with lawsuits between the different religions. Nor do I think that the object of religious harmony will be promoted by organising witnesses to go along to the meetings of other religions to collect evidence for the purpose of later litigation.
> I think religious leaders should be free to express their doctrines and their comparative view of other doctrines. It is different if a religious leader wants to advocate violence or terrorism. That should be an offence - the offence of inciting violence, or an offence under our terrorism laws. That should be investigated by the law enforcement authorities who are trained to collect evidence and bring proceedings.
> But differing views on religion should not be resolved through civil law suits…
> The proceedings which have been taken, the time, the cost, the extent of the proceedings, the remedies that are available all illustrate, in my view, that this is a bad law."

Vilification legislation in Australia has certainly been invoked in circumstances which to a reasonable person might not appear to be obvious forms of hate speech. In *Judeh v Jewish National Fund of Australia Inc,*[30] complaint was made about an advertisement which appeared in the Australian Jewish News. The advertisement was headed, "Remember the Future." It stated:

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

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

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

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

> "a map showing an area in outline and shaded. The map does not specify what the area is, what are its geographic features, what are the locations of its cities, towns or villages, or what groups of people live there.
> It is not disputed that the map delineates an area which includes what is called Israel and also areas sometimes called semi-autonomous areas under the control of the Palestinian authority."

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

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

In another case, a member of the Orthodox Jewish community complained about a farewell speech given by the retiring President of the NSW Jewish Board of Deputies.[31] The speech was reported in a Jewish newspaper. In the speech, the retiring President criticised a "small part of the Orthodox community" who wanted to make out that the Board of Deputies was not representative of Orthodox Jewish interests. Again, the claim (of racial vilification) was summarily dismissed, and this was upheld on appeal, but it is interesting to speculate whether the claim would still have been summarily dismissed if there had been a ground of religious vilification available to the NSW applicant.

It remains to be seen whether the experience of inter-faith conflict generated by vilification laws will cause a rethink of the use of this legislation to promote tolerance. The power to bring a complaint to a state body, albeit one which proceeds first by means of conciliation, can exacerbate conflict by giving it a forum in which a battle can be fought out. A complaint only has to be plausibly within the Act to be accepted. Once a full analysis has occurred, it may become evident to an adjudicator

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

that there is no substance to that complaint. But that is often established only after a full inquiry.

Religious Vilification and Truth

The collateral damage from religious vilification laws to important societal interests is much wider than for any other form of vilification law, because the chilling effect of such laws is on people's right to communicate their understanding of truth. The protection of truth-telling is an important justification for the right of freedom of speech, if not the only one.[32] As Justice Oliver Wendell Holmes once wrote: "The best test of truth is the power of the thought to get itself accepted in the competition of the market."[33]

The secular post-modernist, or the religious leader who believes that all the major world religions are merely different paths up the same mountain, may be sceptical of all absolute truth claims, but for many devout religious believers it is the very truth claims of the religion which give them inspiration and hope. This point is well-expressed by Amir Butler, the Executive Director of the Australian Muslim Public Affairs Committee, who published an article in Melbourne's Age newspaper, critical of Victoria's religious vilification law. He wrote:[34]

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

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

Religious Vilification and Respect for the Law

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

Law has its most powerful impact if it is believed in.[35] If it reflects a morality which people endorse, requires behaviours which people accept are right (whether or not

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

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

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

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

they always comply) or represents a consensus of values in a community, law can buttress voluntary compliance. As the late Professor Tay has written:[36]

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

When law buttresses shared morals and values, it is wisely used and can complement educational and other positive strategies to promote acceptable behaviour. Where, however, governments impose standards of behaviour through law on a reluctant population, they risk more than they gain. Compliance is coerced rather than voluntary and the legislation undermines belief in a shared community of interest between governors and governed. In some cases, legislation may be nothing more than lawful force to achieve an outcome, and governments which rely on force as a central tool of achieving compliance are only as effective as their weapons.[37] Legislation defines legality and illegality, but legitimacy is something different. Legitimacy is conferred by the assent of the people. It is the legitimacy of law, and not its constitutional legality, which matter most for stable and harmonious societies.

Conclusion

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

Religious vilification laws have proven to be controversial and divisive. There has been much opposition to them from people of faith and integrity[38] who are law-abiding citizens. There is a real question as to whom they are designed to protect, and

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

37 As Prof. Harold Berman wrote :
"Law itself, in all societies, encourages the belief in its own sanctity. It puts forward its claim to obedience in ways that appeal not only to the material, impersonal, finite, rational interests of the people who are asked to observe it but also to their faith in a truth, a justice, that transcends social utility ... Even Joseph Stalin had to reintroduce into Soviet law elements which would make his people believe in its inherent rightness-emotional elements, sacred elements; for otherwise the persuasiveness of law would have totally vanished, and even Stalin could not rule solely by threat of force."
Berman H, The Interaction of Law and Religion (SCM Press, London, 1974), p 29.

38 For an account of opposition to the Victorian law, see Saltshakers' website, above n. 19.

whether the benefits outweigh the costs. Other laws protect people of faith from threats and falsehoods, including the criminal law and defamation laws. The collateral damage to religious freedom from vilification laws is considerable. It is time for a rethink.