

## REGULATING OFFENCE TO THE GODLY: BLASPHEMY AND THE FUTURE OF RELIGIOUS VILIFICATION LAWS

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Rab Judah also said in Samuel's name: One must rend his clothes only on hearing the Shem hameyuhad blasphemed, but not for an attribute of the Divine Name. Now both of these statements conflict with R Hiyya's views. For R Hiyya said: He who hears the Divine Name blasphemed nowadays need not rend his garments, for otherwise one's garments would be reduced to tatters.<sup>1</sup>

### I INTRODUCTION

This article concerns the appropriateness of protecting religion, religious believers and/or beliefs in modern liberal societies, and how we might justify such measures, if at all. The law of blasphemy has traditionally been employed in order to perform that service, but the seeming desuetude of blasphemy law in Australia, and its abolition in England and Wales in 2008, have been accompanied by the promulgation of legal provisions against religious vilification, which seek to protect the religious along similar lines as racial vilification measures. The rationale and assessment of such religious vilification provisions is often related to the question of the sensibilities of Muslims, at issue for example in the 'Danish cartoons' controversy. Here I attempt to outline a limited defence of such laws against religious vilification, although I do not seek to provide a response to every criticism that might be made of them.

I begin by setting the scene of the demise of blasphemy, noting how the idea of blasphemy as a wrong against God has been lost in a legal and cultural focus on its offensiveness. I note the present situation in regard to blasphemy in Australia, and how the category of religious insult has been 'neutralised' in its incorporation into general provisions against obscenity and offensive behaviour. One of the most striking problems with blasphemy law is its limitation to Christian beliefs, and I suggest in the third section of the article that it therefore would be in any case a poor choice as a basis on which to provide equal protection and redress forms of discrimination, as vilification

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1 *Talmud* (Soncino trans) Sanhedrin 60a.

laws aim to do. I then take up arguments that *religious* vilification laws are vulnerable to certain criticisms to which racial vilification laws are immune, but I suggest that there is no compelling reason for this asymmetry to be maintained or defended. So while blasphemy laws do not appear to have any contemporary justification, religious vilification laws have as much (or as little) validity as racial vilification laws. This still leaves open the question of the weakness of anti-vilification law per se, particularly in regard to a possible collision of rights with freedom of speech or expression. My article does not address in any detail this important question, but I conclude by suggesting that the appropriate criterion by which to navigate its complexities is that of discrimination, rather than offensiveness.

## II NEUTRALISING RELIGIOUS INSULT: BLASPHEMY AND OBSCENITY

Rabbi Hiyya's 3<sup>rd</sup> century lament, quoted above, sounds very modern in its wry expression of the futility of responding to blasphemy, given its ubiquity. The contemporaries of Rabbi Hiyya seem nevertheless to have retained an understanding of the meaning and magnitude of the wrong of blaspheming God's name or attributes that is all but lost in modern Australia, where many people seem to lack a sense even of its distinctiveness as a moral or legal wrong. To take an example: in June 2008, a Gold Coast teenager was charged under Queensland's *Summary Offences Act 2005* (Qld) with public nuisance. The young man was wearing a t-shirt captioned 'Vestal Masturbation', which depicted a nun, naked except for a veil and masturbating with a crucifix. The t-shirt advertises a metal band called Cradle of Filth, whose name appears in gothic letters on its front.<sup>2</sup> The back of the t-shirt reads, in large block letters, 'Jesus is a Cunt'. Senior Sergeant Arron Ottaway said that the arresting officer saw the young man walking along the road in suburban Biggera Waters. Ottaway offered, 'I'm not religious but that's just offensive'.<sup>3</sup> Section 6 of the *Summary Offences Act 2005* (Qld) catches 'offensive, obscene, indecent or abusive language', and it is not clear that the religious themes of the t-shirt constituted its offensiveness to the arresting officer or to Sergeant Ottaway, as distinct from the obscene word on the back.

The Cradle of Filth t-shirt made its first appearance in the world around 1997, and has figured in various prosecutions since that time. In 2001, Glasgow's Lord

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2 A picture of the sensibility of the band's followers is given in *State v Stensrud*, 134 Wash 1031 (Ct App, 2006). The t-shirt image recalls the film *Visions of Ecstasy* (Directed by Nigel Wingrove, Axel Films, 1989), which was considered by the European Court of Human Rights in regard to the refusal of a classification certificate on the grounds of blasphemy: *Wingrove v United Kingdom* [1997] XXIV Eur Court HR 1.

3 Ben Dillaway, 'Lawyer Says Arrest Brings the Law into Disrepute: Teen Gets Nabbed For "Dirty" T-Shirt', *Gold Coast Bulletin* (Gold Coast), 25 June 2008, 6; see also Ken Vernon, 'Nothing to Swear About', *Gold Coast Bulletin* (Gold Coast), 27 June 2008, 35.

Provost asked stores to remove the t-shirts from sale, explaining, '[f]or this to happen at any time would be deeply offensive to most people. But to happen at Christmas is abominable.'<sup>4</sup> Other arrests in Queensland in regard to wearing the t-shirt have been made under the charge of 'exhibiting an obscene publication'. In January 2003, for example, Matthew John Bowdler was fined, and forfeited the t-shirt, after the cyclist was pulled over by police for not wearing a helmet (which he threw against a fence, and was fined a further \$100). When police approached the young man, Bowdler admitted that the t-shirt was 'a bit rude'.<sup>5</sup>

A striking feature of all the Queensland Cradle of Filth cases is an apparent indifference by most critics and arresting officers alike to the religious themes of the t-shirt. Newspaper reports of the cases uniformly cite the word on the back of the t-shirt as the problem, rather than the image on its front. And there seems to be a broader confusion about what exact charge, if any, should be laid against the wearer. In a similar case in New Zealand, for example, the Papamoa Senior Sergeant said that there was in fact no real charge that could be laid, and added that his officers were looking for a Cradle of Filth t-shirt wearer in order 'to "have words" about his fashion sense'.<sup>6</sup>

That is, the main question at issue in the cases appears to be not whether the t-shirt is blasphemous, in either a religious or a legal sense, but whether the word 'cunt' is offensive. Given that the word is permitted to be aired, at least after 9:30 pm, on free-to-air television,<sup>7</sup> and that it has been reported in parliamentary records,<sup>8</sup> the question is actually probably better phrased as whether the word is any longer 'offensive to most people'. There is certainly considerable doubt as to whether, absent unwitting hearers, the public use of the specific word constitutes offensive language in Australia.<sup>9</sup>

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- 4 Paul Drury, 'Police Swoop to Clear Store of "Offensive" T-Shirts', *Sunday Herald* (Glasgow), 7 January 2001, 5. See also Stephen Naysmith, 'Record Store Defies Ban on Jesus T-Shirt', *Sunday Herald* (Glasgow), 14 January 2001, 9.
  - 5 Jasmin Lill, 'Man Wears Fine For Crude Shirt', *Courier Mail* (Brisbane), 21 January 2003, 2. The similar case of Sonia Brennan is noted in Bettina Giardina, 'How Dare She: Woman Wore Offensive Shirt in Shopping Mall', *Townsville Bulletin* (Townsville), 4 May 2001, 1.
  - 6 Anna Bowden, 'Offensive Religious T-Shirt Angers', *Bay of Plenty Times* (New Zealand), 28 February 2006, 3. The New Zealand Office of Film and Literature Classification subsequently took action against the t-shirt: Jonathan Marshall, Kim Knight and Adam Dudding, 'Nice Pens, a Rude T-Shirt and Sausages', *Sunday Star Times* (New Zealand), 8 August 2010, 8.
  - 7 Jackie Dent, 'Hear No Evil in C-word, Says Nine', *Sydney Morning Herald* (Sydney), 24 September 1999, 3. See also Frank Devine, 'Positively Profane', *The Weekend Australian* (Sydney), 17–18 February 2001, R11, on the broadcast of Shane Warne's use of the term 'fucking arsey cunt' to a Zimbabwean player.
  - 8 See Commonwealth, *Parliamentary Debates*, House of Representatives, 15 May 2002, 2228 (Mark Latham); Censorship of Video Material, Discussion of Matter of Public Importance: Commonwealth, *Parliamentary Debates*, Senate, 4 October 1984, 1216–40; Evidence to Senate Legal and Constitutional References Committee on Sexuality Discrimination, Parliament of Australia, Canberra, 1 October 1996, <[http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Fcomm sen%2Frcomw961001a\\_slc.out%2F0003%22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Fcomm sen%2Frcomw961001a_slc.out%2F0003%22)>. Also see the possibly apocryphal story told by Gough Whitlam, 'The Light on the Hill and Frolics in the Foothills', *Sydney Morning Herald* (Sydney), 24 May 2001, 12.
  - 9 In regard to NSW, see the discussion in *Jolly v The Queen* [2009] 9 DCLR 225, 228 [16], 229 [20], distinguishing *Stutsel v Reid* (1990) 20 NSWLR 661, *Police v Butler* [2003] NSWLC 2 (14 June 2003).

At any rate, I have located only one case, in Scotland, where the religious dimension of the Cradle of Filth t-shirt has explicitly formed part of the charges; in November 2007, a prosecution of an Edinburgh shop owner selling the t-shirt involved a charge of ‘religious prejudice’.<sup>10</sup> Even the possibility of a charge of blasphemy has not been raised in any public media discussion of the t-shirt’s offensiveness in Australia.

This is not surprising given that there has been no successful prosecution of blasphemy in Australia since the conviction of William Lorando Jones in 1871.<sup>11</sup> A hundred years later, when Wendy Bacon wore a nun’s costume with references to Teresa of Ávila, similar to the ‘Vestal Masturbation’ theme of the t-shirt, she was charged with obscenity-related offences, not blasphemy.<sup>12</sup> The last action for blasphemy in Australia was in 1998, when then Archbishop of Melbourne George Pell sought an injunction to restrain the National Gallery of Victoria from showing an artwork by Andres Serrano entitled *Piss Christ*, a photograph of a plastic crucifix immersed in the artist’s urine. In that case, Harper J expressed doubt as to the continued vitality of the offence of blasphemy, although his refusal to grant the injunction was made on other grounds.<sup>13</sup>

Although most modern commentators on blasphemy share Justice Harper’s doubt, statutory and common law notices of the offence of blasphemy or blasphemous libel have not been explicitly abolished throughout Australia, as was accomplished in England and Wales by section 79 of the *Criminal Justice and Immigration Act 2008* (UK) c 4.<sup>14</sup> Attempts in Australia to abolish the offence of blasphemy date back to 1871, following William Lorando Jones’ conviction at the Parramatta Quarter Sessions, which Peter Coleman has called ‘the first (and only) case of its kind in Australian history’.<sup>15</sup> The case provoked Mr Forster’s introduction into the New South Wales (‘NSW’) Legislative Assembly of the ‘Religious Opinions Bill, or Bill to Amend the Law Relating to

10 ‘T-shirt Row Trial Axed’, *The Sun* (Scotland), 9 November 2007, 25. Although *The Sun* report is not illuminating, this would appear to be a charge under the *Criminal Justice (Scotland) Act 2003*, asp 7, s 74.

11 See the report in *The Sydney Morning Herald* (Sydney), 20 February 1871, 3 <<http://trove.nla.gov.au/ndp/del/page/1457865>>.

12 Peter Coleman, *Obscenity, Blasphemy, Sedition: 100 Years of Censorship in Australia* (Angus and Robertson, revised ed, 1974) 62–4; Email from Wendy Bacon, former editor of *Tharunka*, to Helen Pringle, 15 March 2011.

13 *Pell v The Council of Trustees of the National Gallery of Victoria* [1998] 2 VR 391 (Harper J). The case is discussed in Bede Harris, ‘Pell v Council of the Trustees of the National Gallery of Victoria: Should Blasphemy Be a Crime? The “Piss Christ” Case and Freedom of Expression’ (1998) 22 *Melbourne University Law Review* 217.

14 See the very useful archives on the introduction of the Act at Ministry of Justice (UK), *Criminal Justice and Immigration Act 2008* (22 March 2010) National Archives <<http://www.justice.gov.uk/publications/criminal-justice-bill.htm>>; UK Parliament, *Bills & Legislation: Criminal Justice and Immigration Bill 2006–07 to 2007–08* (8 May 2008) <<http://services.parliament.uk/bills/2007-08/criminaljusticeandimmigration.html>>. The Bill was enacted in line with the recommendations of the report by the House of Lords Select Committee on Religious Offences in England and Wales, Parliament of the United Kingdom, *Volume 1 – Report*, (2003).

15 Coleman, above n 12, 66–72.

Blasphemy', with the object of precluding any further prosecutions for blasphemy. Forster's proposal was defeated.<sup>16</sup>

There were no further successful prosecutions, in spite of the best efforts of the *Liberator* magazine and the Australian Secular Association in Victoria in particular,<sup>17</sup> but nor have any proposals to abolish the offence reached the stage of parliamentary debate since Forster's proposal. In 1992, the Australian Law Reform Commission ('ALRC') recommended that 'all references to blasphemy in federal legislation should be removed ... [and] offences that protect personal and religious sensibilities should be recast in terms of "offensive material"'.<sup>18</sup> The NSW Law Reform Commission also recommended the abolition of the offence in 1994.<sup>19</sup> Neither recommendation was taken further.

In the Australian Capital Territory ('ACT') the offence was abolished in 1996 by statutory reform directed specifically at various forms of libel.<sup>20</sup> Statutory provisions against blasphemy remain in Tasmania.<sup>21</sup> On the basis of legislative references in NSW, Victoria and South Australia, it is assumed that common law provisions against blasphemy continue in those states.<sup>22</sup> In Queensland and Western Australia, the failure to incorporate provisions against blasphemy in the Criminal Codes, in 1899 and 1913 respectively, abolished the offence.<sup>23</sup> However, even in Western Australia, a reference to the offence remains in the *Jetties Regulations 1940* (WA).<sup>24</sup> Commonwealth shipping

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- 16 See especially NSW Legislative Assembly Reports, *The Sydney Morning Herald* (Sydney), 9 March 1871, 2; 15 March 1871, 5; Reports, *The Sydney Morning Herald* (Sydney), 6 May 1871, 4.
- 17 Some instances of Customs seizures of British magazines on the grounds of blasphemy are recorded, as well as withdrawal of postal services under the *Post and Telegraph Act 1974* (Cth), notably against Robert Ross: see Coleman, above n 12, 68–72.
- 18 Australian Law Reform Commission, *Multiculturalism and the Law*, Report No 57 (1992) [7.51]–[7.59].
- 19 It is beyond the scope of this article to give a detailed history of blasphemy in Australia or elsewhere, but for a useful (if now slightly dated) summary of the Australian context see NSW Law Reform Commission, *Blasphemy*, Discussion Paper 24 (1992); NSW Law Reform Commission, *Blasphemy*, Report No 74 (1994) chs 2–3; Reid Mortensen, 'Blasphemy in a Secular State: A Pardonable Sin?' (1994) 17 *University of New South Wales Law Journal* 409. See more generally Lawrence McNamara, 'Blasphemy' in Peter Radan, Denise Meyerson and Rosalind F Croucher (eds), *Law and Religion: God, the State and the Common Law* (Routledge, 2005) 182, 197–9; Garth Blake, 'Promoting Religious Tolerance in a Multifaith Society: Religious Vilification Legislation in Australia and the UK' (2007) 81 *Australian Law Journal* 386, 389–91; Helen Pringle, 'Are We Capable of Offending God? Taking Blasphemy Seriously' in Elizabeth Burns Coleman and Kevin White (eds), *Negotiating the Sacred: Blasphemy and Sacrilege in a Multicultural Society* (ANU E Press, 2006) 31.
- 20 *Law Reform (Abolitions & Repeals) Act 1996* (ACT) s 4 abolished the common law misdemeanours of criminal, blasphemous, seditious and obscene libel.
- 21 *Criminal Code Act 1924* (Tas) sch 1 s 119 ('Criminal Code'); *Police Offences Act 1935* (Tas) s 12(c).
- 22 Respectively, *Crimes Act 1900* (NSW) s 574 limits the grounds of prosecutions for blasphemy; *Crimes Act 1958* (Vic) s 469AA specifies the consequences of a conviction for blasphemous (and seditious) libel; *Classification of Theatrical Performances Act 1978* (SA) s 19 relates inter alia to blasphemy in theatrical performances.
- 23 On Queensland, see the account of R S O'Regan, 'Two Curiosities of Sir Samuel Griffith's Criminal Code' (1992) 16 *Criminal Law Journal* 209, 212–5.
- 24 See *Jetties Regulations 1940* (WA) reg 45(b): 'No person shall behave in a violent or offensive manner to the annoyance of others, or write or use any insulting, indecent, obscene, blasphemous, or abusive words, or wilfully interfere with the comfort of any person in or upon any jetty, shed, vehicle, or premises of the Department.'

regulations also make reference to the offence.<sup>25</sup> The related question of sacrilege is subject to various forms of legal regulation in Australia.<sup>26</sup>

To summarise here, some forms of ‘blasphemous’ utterances and actions remain unlawful throughout Australia. However, it is unlikely that any criminal action would be taken with regard to the provisions I have briefly outlined above, and it is arguable that one of the reasons for this unlikelihood is that most Australians are simply unaware, precisely because of their long disuse, that such provisions have not been abolished and still exist. Where ostensibly blasphemous acts<sup>27</sup> are the subject of prosecution in Australia, they are charged not as blasphemy but instead as offensive conduct or language. That is, in both legal and cultural terms, blasphemy has generally been absorbed into the category of obscenity or offensiveness. An example of this process is the evolution of broadcasting law. Section 118 of the *Broadcasting Act 1942* (Cth) formerly prohibited the broadcasting of ‘blasphemous, indecent or obscene’ matter.<sup>28</sup> The broadcasting legislation now in force recommends the adoption of codes of practice to regulate ‘the portrayal in programs of matter that is likely to incite or perpetuate hatred against, or vilifies, any person or group on the basis of ethnicity, nationality, race, gender, sexual preference, age, *religion* or physical or mental disability.’<sup>29</sup> Religion is thereby caught in the broadcasting legislation as simply one ground on which people might be vilified. Similarly, in the execution of legislation such as Queensland’s *Summary Offences Act 2005* (Qld), the generic category of ‘offensive, obscene, indecent or abusive language’ catches any utterance that might be experienced by some as blasphemous of God’s name or attributes, thereby ‘neutralising’ the utterance as simply offensive and as putatively offensive to *any* hearer.

Indeed, it is often considered desirable in liberal democracies to address religious insult or outrage not as *sui generis* but in terms of such neighbouring categories as offensiveness and obscenity. However, this modern liberal tendency to absorb blasphemy as part of a ‘facially neutral’ category of offensive language or behaviour, means that blasphemy is then drained of its very meaning in law, given that a substantial number of people are simply not offended by, say, the utterance, ‘Jesus is an imposter’,<sup>30</sup> in the way that they might still be by the utterance, ‘Jesus is a cunt’.

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25 See *Shipping Registration Regulations 1981* (Cth) reg 21(2)(d): ‘For the purposes of subsection 27(3) of the Act, the following classes of names are prescribed [sic] classes of names: ... (d) names that are blasphemous or likely to be offensive to members of the public.’

26 This subject is beyond my present scope, but a useful summary is provided by Australian Law Reform Commission, *Multiculturalism and the Law*, above n 19, [7.54].

27 I use the term ‘blasphemous acts’ to include speech-acts and expression as well as behaviour generally. This usage is consistent with my concluding discussion of freedom of expression below.

28 See Australian Law Reform Commission, *Multiculturalism and the Law*, above n 19, [7.8].

29 *Broadcasting Services Act 1992* (Cth) s 123(3)(e) (emphasis added).

30 Cf the blasphemy of Thomas Aikenhead: ‘Proceedings against Thomas Aikenhead, for Blasphemy, 8 William III AD 1696’, in W Cobbett et al (eds), *A Complete Collection of State Trials* (R Bagshaw, 1809–1828) vol 13, cols 917–40; Hugo Arnot (ed), *A Collection and Abridgement of Celebrated Criminal Trials in Scotland* (1785) 324–7; see also discussion in Pringle, above n 19, 32–5.

This displacement of blasphemy laws by generic or ‘facially neutral’ laws of offensiveness entails the disappearance of *specific* protections for godly persons in the law of injury. In the context of this article, by godly persons, I simply mean those to whom the phrase ‘Jesus is a cunt’ appears distinctively different in its offence from a phrase such as ‘Joe Blow is a cunt’. However, the problem of how to address the sense of offence or injury to godly persons in recent times has focussed primarily, if not entirely, on the sensibilities of godly Muslims, instanced in the controversy around the publication of the ‘Danish cartoons’.<sup>31</sup> In today’s context, for example, substituting the name of the Prophet for that of Jesus on the Cradle of Filth t-shirt would no doubt be viewed as something more than ‘a bit rude’ *even* by its wearer – perhaps, *especially* by its wearer. Such a t-shirt would in fact be unlikely to be worn except as a provocation.

In this context, I would note that much of the support for the retention of the offence of blasphemy in England before 2008 came from adherents of non-Christian religions, and in particular Islam. It is notorious that the law of blasphemy in England only protected Christian beliefs, and possibly only certain sections of Christianity, whether because of prejudice or the historical connection of the English state to the Anglican Church, or latterly, in an attempt to narrow the scope of the offence as much as possible. The limit of the offence to Christian beliefs is also assumed to apply in Australia, even in the absence of an established church as in England.<sup>32</sup> However, this limit has not been specifically tested at law in Australia.

### III THE AFTERLIFE OF BLASPHEMY: EQUAL PROTECTION AGAINST RELIGIOUS INSULT

In England, the limit of the law to Christianity was a central concern in the debate on the abolition of blasphemy, which followed the *Gay News* case of 1979. Mrs Mary Whitehouse had launched a private prosecution against *Gay News* and its editor Denis Lemon, in regard to the publication of James Kirkup’s poem entitled ‘The Love that Dares to Speak Its Name’, together with a lurid illustration by Tony Reeves.<sup>33</sup> In that case, Lord Scarman famously identified the religious limit of blasphemy in noting that the ‘true test’ of blasphemy is ‘whether the words are calculated to outrage and insult the Christian’s religious feelings’.<sup>34</sup> On that basis, he argued:

In an increasingly plural society such as that of modern Britain it is necessary not only to respect the differing religious beliefs, feelings and practices of all but also

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31 See generally on the background and aftermath of the cartoon controversy, Jytte Klausen, *The Cartoons That Shook the World* (Yale University Press, 2009). Note that this book was itself a subject of controversy in regard to the cartoons.

32 See *Pell v The Council of Trustees of the National Gallery of Victoria* [1998] 2 VR 391.

33 *Whitehouse v Gay News* [1979] AC 617 (‘*Gay News*’); see also *Gay News Ltd v United Kingdom* (1982) 5 Eur Comm HR 123.

34 *Gay News* [1979] AC 617, 662.

to protect them from scurrility, vilification, ridicule and contempt. ... My criticism of the common law offence of blasphemy is not that it exists but that it is not sufficiently comprehensive. It is shackled by the chains of history.<sup>35</sup>

Lord Scarman was reiterating, but with generosity, the articulation of the principle of blasphemy in the 1838 case of *Gathercole*: 'A person may, without being liable to prosecution for it, attack Judaism, or Mahomedanism, or even any sect of the Christian Religion (save the established religion of the country); and the only reason why the latter is in a different situation from the others is, because it is the form established by law, and is therefore a part of the constitution of the country.'<sup>36</sup> This limit on the scope of blasphemy was the specific issue in contention in the 1991 *Choudhury* case, an action concerning Salman Rushdie's *Satanic Verses*.<sup>37</sup>

The question of whether and how to protect the religious beliefs and feelings of non-Christians is central to the afterlife of blasphemy in 'increasingly plural' western societies. In England, an attempt has been made to remedy the lack of protection of those religious beliefs from 'scurrility, vilification, ridicule and contempt' through extending the scope of vilification laws so as to make religion a comparable ground to race. Hence, in 2006, the *Racial and Religious Hatred Act 2006* (UK) c 1 inserted the following provision into the *Public Order Act 1986* (UK) c 64: 'A person who uses threatening words or behaviour, or displays any written material which is threatening, is guilty of an offence if he intends thereby to stir up religious hatred.'<sup>38</sup>

In Australia, religion is not a universally accepted ground in jurisdictions with laws against vilification or hate speech. The Commonwealth, all states and the ACT (but not the Northern Territory) have enacted broadly similar laws against racial vilification,<sup>39</sup> but only three states also expressly outlaw religious vilification: Queensland, Tasmania and Victoria. For example, section 8(1) of the Victorian *Racial and Religious Tolerance Act 2001* (Vic) ('*RARTA*') provides that '[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,

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35 Ibid 658.

36 *Gathercole's Case* (1838) 2 Lew 237, 254; 168 ER 1140, 1145.

37 *R v Chief Metropolitan Stipendiary Magistrate; Ex Parte Choudhury* [1991] 1 QB 429 ('*Choudhury*'). See also *Choudhury v United Kingdom* (1991) 12 HRLJ 172. A useful collection of articles on the case is provided by Dan Cohn-Sherbok (ed), *The Salman Rushdie Controversy in Inter-Religious Perspective* (Edwin Mellen Press, 1990).

38 *Public Order Act 1986* (UK) c 64, s 29B(1).

39 A comprehensive exploration of the development of these laws can be found in Luke McNamara, *Regulating Racism: Racial Vilification Laws in Australia* (Federation Press, 2002); see also Dan Meagher, 'So Far So Good? A Critical Evaluation of Racial Vilification Laws in Australia' (2004) 32 *Federal Law Review* 225.



serious contempt for, or revulsion or severe ridicule of, that other person or class of persons'.<sup>40</sup>

In fact, the difficult history of the *RARTA* is widely cited as the background of a retreat by other Australian states from implementing any similar legislation on religious vilification. Plans to legislate in this area were shelved in South Australia in 2002–3,<sup>41</sup> and in Western Australia in 2004.<sup>42</sup> In NSW, the Independent Peter Breen proposed the Anti-Discrimination Amendment (Religious Tolerance) Bill in the Legislative Council as a private member's bill in September 2005,<sup>43</sup> but was decisively voted down on 1 March 2006. In June 2005, the then NSW Premier Bob Carr had argued that such laws 'can be highly counterproductive', and cited 'the Victorian experience' as the basis of his misgivings. Premier Carr pointed in particular to the case of *Fletcher*<sup>44</sup> as exemplifying the danger and misuse of such legislation. Premier Carr asserted:

Religious vilification laws are difficult because just about anyone can have resort to them and because determining what is or is not a religious belief is difficult. It can be defined as just about anything. It is subjective. It is a personal question. As they are used in practice religious vilification laws can undermine the very freedom they seek to protect – freedom of thought, conscience and belief ... It has been suggested the right to offend is far more important than any right not to be offended.<sup>45</sup>

Much of what Premier Carr said of religious vilification laws can be argued in rather more intellectually compelling terms:<sup>46</sup> the problem pointed to is that

40 The two most notable cases under this section of the Act are discussed in Part IV below: *Islamic Council of Victoria Inc v Catch the Fire Ministries Inc* [2003] VCAT 1753 (21 October 2003) ('*Catch the Fire*'), which was initiated in 2003 and reached a final resolution in mid-2007, and *Fletcher v Salvation Army Australia (Anti Discrimination)* [2005] VCAT 1523 (1 August 2005) ('*Fletcher*'). Other complaints under the Act are noted by Dermot Feenan, 'Religious Vilification Laws: Quelling Fires of Hatred?' (2006) 31 *Alternative Law Journal* 153, 154 n 16.

41 See Attorney-General's Department (SA), *Proposal for a New Law against Religious Discrimination and Vilification* (Discussion Paper, 2002).

42 See Equal Opportunity Commission (WA), *Racial and Religious Vilification* (Consultation Paper, 2004) <<http://www.omi.wa.gov.au/resources/publications/Racism/vilification.pdf>>.

43 See Gareth Griffith, 'Sedition, Incitement and Vilification: Issues in the Current Debate' (Briefing Paper No 1/2006, Parliamentary Library, Parliament of New South Wales, 2006) app A, 68–72.

44 *Fletcher* [2005] VCAT 1523 (1 August 2005); see also *Fletcher v The Salvation Army (Costs) (Anti Discrimination)* [2006] VCAT 740 (4 May 2006).

45 New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 June 2005, 17085 (Bob Carr). See the pointed critique by Simon Rice, 'On Religious Vilification and the Law', *New Matilda* (online), 27 July 2005 <<http://newmatilda.com/2005/07/27/religious-vilification-and-law>>.

46 The literature includes: Kay Goodall, 'Incitement to Religious Hatred: All Talk and No Substance?' (2007) 70 *Modern Law Review* 89; Garth Blake, 'Promoting Religious Tolerance in a Multifaith Society: Religious Vilification Legislation in Australia and the UK' (2007) 81 *Australian Law Journal* 386; Ivan Hare, 'Crosses, Crescents and Sacred Cows: Criminalising Incitement to Religious Hatred' [2006] *Public Law* 521; Ivan Hare and James Weinstein (eds), *Extreme Speech and Democracy* (Oxford University Press, 2009) see especially pt III; Rex T Ahdar, 'Religious Vilification: Confused Policy, Unsound Principle and Unfortunate Law' (2007) 26 *University of Queensland Law Journal* 293; Peter Cumper, 'Inciting Religious Hatred: Balancing Free Speech and Religious Sensibilities in a Multi-Faith Society' in Nazila Ghanea, Alan Stephens and Raphael Walden (eds), *Does God Believe in Human Rights? Studies in Religion, Secular Beliefs and Human Rights* (Martinus Nijhoff Publishers, 2007) vol 5; Nicholas Aroney, 'The Constitutional (In)Validity of Religious Vilification Laws: Implications for their Interpretation' (2006) 34 *Federal Law Review* 287.

the *RARTA* restricts the free expression and discussion of specifically *religious* ideas, placing certain *theological* questions outside the ambit of permissible debate.<sup>47</sup> In other words, the *RARTA* and other laws against religious vilification are characterised as doing the work of a law against blasphemy, if under the name of redressing discrimination, thereby becoming subject to many of the criticisms made against blasphemy law, primarily the inappropriate adjudication by a secular forum of matters and disputes around theological orthodoxy.<sup>48</sup>

That is, criticism of laws against religious vilification takes a similar form to criticism of laws against blasphemy: that it is not the role of law in a modern secular state to adjudicate as to the truth or falsity of (religious) ideas. Such a role would involve the state's taking on what Reid Mortensen, in discussing blasphemy, has called 'state sponsorship of religion' by defining the boundaries of religiously permissible expression.<sup>49</sup> Although religious vilification laws are of course not deliberately framed as attempts to uphold a theological truth, the criticism is that the adjudication of disputes under such laws will inevitably involve making judgments as to theological truth and falsity. Especially where the conceptualisation of the wrong of vilification is in terms of disturbance of communal harmony, as in the *RARTA*,<sup>50</sup> it is extremely difficult to avoid consideration of the question of religious orthodoxy; an assertion of heterodoxy will be often, if not always, understood (by the relevant set of believers) as an attack on their identity, and not just on their beliefs – and hence as an incitement to hatred with subsequent effects on communal harmony.<sup>51</sup>

In this context, an important consideration is that the law of blasphemy has evolved in such a way as to focus primarily on the way in which the ideas at issue are expressed. That is, as long as criticism of Christianity was temperate (or

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47 See Joel Harrison, 'Truth, Civility, and Religious Battlegrounds: The Contest between Religious Vilification Laws and Freedom of Expression' (2006) 12 *Auckland University Law Review* 71, 94–6.

48 As noted above, I do not address in detail the question as to whether the Act (or the law of blasphemy) infringes the freedom of speech, which involves important but separate considerations. In this context, Mark Hill and Russell Sandberg make the valuable observation that before 2008, UK provisions against blasphemy were repeatedly found to be compliant with the European Convention on Human Rights, including Article 10 (freedom of expression), indicating that it is possible for blasphemy provisions to survive a bill or charter of rights: Mark Hill and Russell Sandberg, 'Blasphemy and Human Rights: An English Experience in a European Context' (2009) 4 *Derecho y Religión (Law and Religion)* 145, 152–7.

49 Mortensen, above n 19, 410.

50 The Act's Preamble sets out the reasons for the desirability of the Parliament's enacting 'law for the people of Victoria that supports racial and religious tolerance'. The purpose of the Act is set out in *RARTA* s 1(a) as being 'to promote racial and religious tolerance by prohibiting certain conduct involving the vilification of persons on the ground of race or religious belief or activity'. In the Commonwealth and in other states, in contrast, the provisions directed against vilification or racial hatred do not stand alone but find a place in anti-discrimination or equal opportunity laws; the requirement of discrimination by less favourable treatment or disparate impact is thus implied in the vilification provisions even where it is not explicitly stated. The implied overall object of such provisions is the redress of discrimination, along the lines set out in the long titles of the framing Acts. I have explored in much greater detail the significance of this difference in framing: Helen Pringle, 'Legislation against Religious Hatred: Addressing Blasphemy or Discrimination?' in Darvesh Gopal and Alan Mayne (eds), *Re-Imagining Australia and India: Culture and Identity* (Shipra Publications, 2011).

51 See Deepali A Fernandes, 'Protection of Religious Communities by Blasphemy and Religious Hatred Laws: A Comparison of English and Indian Laws' (2003) 45 *Journal of Church and State* 669, 673–4.

‘balanced’), and did not upset the pillars of public order, it would escape the reach of blasphemy law. As Lord Scarman noted succinctly in *Gay News*:

Every publication is said to be blasphemous which contains any contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ, or the Bible, or the formularies of the Church of England as by law established. It is not blasphemous to speak or publish opinions hostile to the Christian religion, or to deny the existence of God, if the publication is couched in decent and temperate language. The test to be applied is as to the manner in which the doctrines are advocated and not as to the substance of the doctrines themselves.<sup>52</sup>

Such a formulation does not address the problem that such expression, understood by its ‘targets’ as hostile to the truth of their beliefs, is unlikely to be considered as decent, temperate – or ‘balanced’. And in such cases, expression understood as intemperate or unbalanced in regard to *beliefs* is very likely also to be considered as an attack on *believers*.

#### IV BELIEFS AND BELIEVERS: THE ASYMMETRY OF RACE AND RELIGION?

It is often pointed out that such a problem about beliefs and believers does not arise in regard to *racial* vilification. As noted above, laws against racial vilification have been enacted throughout Australia, and the ground of race forms the archetype of vilification or hate speech provisions. However, many of those who *do* support laws against vilification on the ground of race do not favour their extension to cover the ground of religion. Such perspectives draw attention to what is seen as an asymmetry between religious and racial vilification, in terms of the (alleged) indelibility of race, and not merely of its historical intractability as a ground of enmity and injury. When the extension of vilification laws to religion is proposed, one of the chief arguments against that extension is the non-indelibility of religion, as if religion were a matter of beliefs or feelings that can be set apart from the identity of the believer. Indeed, the apparent ability of religious beliefs to ‘shift’ in response to reason is sometimes taken to illustrate the difference between race and religion as a ground of anti-discrimination laws more broadly.

It should be noted here that racial vilification laws have been interpreted to also cover some forms of religious vilification, in particular through the use of the category of ‘ethno-religious origin’. For example, since amendments made in 1994, the definition of ‘race’ in NSW discrimination law includes ‘colour, nationality, descent and ethnic, ethno-religious or national origin’.<sup>53</sup> In proposing the amendments, the then Attorney-General John Hannaford argued that the effect was ‘to clarify that ethno-religious groups, such as Jews, Muslims and

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52 *Gay News* [1979] AC 617, 665, quoting L F Sturge, *Stephen’s Digest of the Criminal Law* (Sweet & Maxwell, 9<sup>th</sup> edition, 1950) art 214; see also Pringle, above n 19.

53 *Anti-Discrimination Act 1977* (NSW) s 4 (definition of ‘race’); *Anti-Discrimination Act 1998* (Tas) s 3 includes a similar understanding of ‘race’.

Sikhs have access to the racial vilification and discrimination provisions of the Act'.<sup>54</sup> It has been argued that it was unnecessary to *explicitly* include 'ethno-religious ... origin' in the Act';<sup>55</sup> Mr Hannaford himself conceded such a point in noting, '[t]he amendment is in line with existing judicial authority from both New South Wales and overseas which indicates that ethno-religious background is included in the legal concept of race'.<sup>56</sup> At any rate, it follows that racial vilification laws may also provide some protection against religious vilification in cases where religious belief is aligned with ethnic identity.

However, concerns have been expressed that the use of the category of 'ethno-religious origin' might import 'religion', by stealth, as a ground of discrimination. This concern was raised, for example, in consideration of a complaint by a Jewish father that Christian rituals and celebrations at his children's state school in NSW amounted to racial discrimination. The complaint was dismissed on the basis that specifically religious aspects of Judaism do not fall in the category of 'race' where defined in terms of 'ethno-religious origin'.<sup>57</sup> It was noted on appeal that: '[i]t is not a legitimate construction of the [Anti-Discrimination] Act to import, by the back door, a prohibition on religious discrimination by including the practice of the religion generally associated with or observed by a particular ethno-religious group within the concept of "a characteristic that appertains generally to persons of that race"'.<sup>58</sup>

The limit placed on the significance and scope of 'ethno-religious origin' by discrimination tribunals reflects a reluctance to treat religion and race as comparable grounds of discrimination, particularly in regard to vilification. I would argue however that this alleged asymmetry of race and religion is misconceived. It rests at least in part on a seemingly unrelated misconception as to the 'true test' of blasphemy. As I noted above, Lord Scarman made the point in *Gay News* that the 'true test' of blasphemy is 'whether the words are calculated to outrage and insult the Christian's religious feelings'. Lord Scarman's point is often quoted to illustrate the limitation of blasphemy law to Christianity. However, it is perhaps even more significant in its explicit formulation of the wrong of blasphemy as what outrages and insults *feelings*. This is a distinctly modern formulation of the wrong, and would have seemed very odd to Rabbi Hiyya and his contemporaries. The focus of the modern law against blasphemy on 'feelings' marks a dramatic difference of emphasis in the

54 New South Wales, *Parliamentary Debates*, Legislative Council, 4 May 1994, 1827 (John Hannaford).

55 NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977*, Report No 92 (1999) [5.12]–[5.15].

56 New South Wales, *Parliamentary Debates*, Legislative Council, 4 May 1994, 1827–8 (John Hannaford).

57 *A obo V and A v NSW Department of School Education* [1999] NSWADT 120 (12 November 1999).

58 *A obo V and A v NSW Department of School Education* [2000] NSWADTAP 14 (1 September 2000) [20]. The meaning of 'ethno-religious' was considered in some detail in *Khan v Commissioner, Department of Corrective Services* [2002] NSWADT 131 (31 July 2002), in regard to the provision of Halal food to Muslim prisoners. Specifically in regard to vilification, see also *Trad v Jones* [2008] NSWADT 272 (3 October 2008); *Trad v Jones [No 3]* [2009] NSWADT 318 (21 December 2009); *Ekeramawi v Harbour Radio Pty Ltd* [2010] NSWADT 145 (10 June 2010); *Ekeramawi v Harbour Radio Pty Ltd [No 2]* [2010] NSWADT 198 (4 August 2010).

law: away from the protection of God's name, and to the protection of religious sensibilities, beliefs or feelings of believers.<sup>59</sup> The gradual accomplishment of that change in focus, in my view, has contributed to the way in which religion is now usually seen as 'disembodied' beliefs and feelings, rather than as a mode of being in the world and of being in communion with God.<sup>60</sup>

Grasping this modern understanding of the character of religion as located in 'detachable' beliefs clarifies how it is that religion has come to be taken as asymmetrical with race as a ground of discrimination, and of vilification in particular. Indeed, it may be that some of the difficult history of the *RARTA* stems precisely from confusion about the relation of believers to religion, as exemplified in some aspects of the two major cases under that Act.

Since the *RARTA* became law on 1 January 2002, very few complaints have reached the level of judicial or quasi-judicial determination<sup>61</sup> by the Victorian Civil and Administrative Tribunal ('VCAT'), with most being conciliated or resolved. The case attracting the most detailed, and protracted, deliberation is known as *Catch the Fire*. At issue was a large seminar organised in Melbourne on 9 March 2002 by Pastor Daniel Nalliah of Catch the Fire Ministries ('CFM'), with Pastor Daniel Scot as the main speaker. The topics covered were 'Jihad from the *Qur'an*', 'The *Qur'an* and the Bible', and 'Witnessing to Muslims'.<sup>62</sup> The Islamic Council of Victoria encouraged three Muslim converts to attend the seminar, and subsequently filed a complaint with the Equal Opportunity Commission of Victoria, alleging inter alia that CFM and Pastors Nalliah and Scot had committed unlawful acts in contravention of the *RARTA*, through making statements that incited scorn, fear and hatred of Muslims. The Islamic Council in its representative capacity sought an apology, a retraction of the comments, and compensatory remedy.<sup>63</sup>

A final resolution of the case was reached in 2006, after the appeal by Pastors Scot and Nalliah of unfavourable judgments was upheld in the Victorian Supreme Court. In brief, it was found that the initial VCAT decision by Judge\*

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59 On a related cautionary note about the use of the language of 'feelings' in this context, see David Nash, 'Legal Definitions of Religion in Historical Context: Toleration versus Freedom? – Some Lessons from Blasphemy' (2003) 8 *Journal of Civil Liberties* 131, 149.

60 My argument here owes much to my reading of the work of Michael Sandel. See especially Michael J Sandel, *Liberalism and the Limits of Justice* (Cambridge University Press, 2<sup>nd</sup> ed, 1998); Michael J Sandel, 'The Procedural Republic and the Unencumbered Self' (1984) 12 *Political Theory* 81.

61 I hesitate in using the adjective 'judicial' to refer to what is perhaps more correctly characterised as an 'adjudicative' determination by the VCAT. As no point in contention in this article rests on the distinction, I simply note my cognisance of the discussion around related points in *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 257–9; *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146; *Commonwealth v Wood* (2006) 148 FCR 276.

62 Pastor Daniel Scot, 'Jihad From the *Qur'an*' (Speech delivered at Full Gospel Assembly, Surrey Hills, Victoria, 9 March 2002) <<http://www.religionlaw.co.uk/interausae.pdf>>. See also Catch the Fire Ministries Inc, Daniel Nalliah and Daniel Scot, 'Witness Statement of Mark John Durie' Submission in *Islamic Council of Victoria Inc v Catch the Fire Ministries Inc*, No A392/2002, 3 October 2003; Hanifa Deen, *The Jihād Seminar: A True Story of Religious Vilification and the Law* (University of Western Australia Press, 2008).

63 *Islamic Council of Victoria Inc v Catch the Fire Ministries Inc* [2003] VCAT 1753 (21 October 2003).

Higgins had made two errors of law in the construction of the *RARTA*.<sup>64</sup> However, the nub of my argument here rests on some further remarks made, in particular by Nettle J, which set out that the focus of the Act is not on religious *beliefs*, but on *believers*. In making these remarks, Nettle J was trying to distinguish the object of the Act as unconcerned with the enforcement of theological orthodoxy. Justice Nettle argued that part of the problem with Judge Higgins' initial ruling was a failure properly to distinguish between inciting hatred of *beliefs* and inciting hatred of *believers*, with only the latter properly falling under judicial suspicion or scrutiny.<sup>65</sup>

This question about whether the target of the Act is beliefs or believers was further at issue in the second major case under the *RARTA*, that of *Fletcher*. Robin Fletcher was a notorious child molester who was gaoled for ten years in 1998 after pleading guilty to multiple counts of child sexual assault and prostitution, and attempting to pervert the course of public justice. Fletcher's complaint to the VCAT concerned a prison course conducted by the Salvation Army, which he asserted involved the making of inflammatory remarks and the causing of hatred towards Wiccans, astrologers and occultists. Fletcher professed to be a follower of Wicca, and indeed had committed his crimes in his capacity (he said) as a witch.<sup>66</sup>

The VCAT summarily dismissed Fletcher's claim as 'preposterous'. While noting that there was some community concern about the potential problems of the *RARTA* in regard to free speech, Morris J stressed that the Act 'is reserved for extreme situations: such as where a person engages in conduct that inflames others to hate a person or persons because they adhere to an idea or practice or are of a particular race'.<sup>67</sup> Justice Morris explained that this does not mean that people are prohibited from evangelising and proselytising, but that they must do so without inciting (as distinct from causing) hatred of those who follow different religions. Again, the point is that the Act provides protection for persons, not for ideas as such.

Although there is likely to be scant sympathy for Robin Fletcher, I would argue that his case was dismissed without sufficient consideration of its implications for the *RARTA*. Justice Morris noted for example:

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64 First, the Tribunal had interpreted the words 'on the grounds of religious belief' as pertaining to the ground on which the alleged inciter was actuated, rather than the ground on which the audience was incited to hatred. Second, the Tribunal had considered the effect of the seminar on an ordinary reasonable person rather than on the actual audience. See *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* [2006] VSCA 284 (14 December 2006), [94]–[98], [141]. The matter was successfully mediated after a request by the Islamic Council, with the Tribunal's *Annual Report* for 2006–07 heralding the settlement as bringing to bear 'the intelligence, wisdom and generosity of the parties and their legal teams': John Bowman and Samantha Ludolf, VCAT, *2006–07 Annual Report* (30 September 2007) 42 <[www.vcat.vic.gov.au/CA256902000FE154/Lookup/annual\\_report\\_vcat/\\$file/2006-07\\_complete\\_annual\\_report.pdf](http://www.vcat.vic.gov.au/CA256902000FE154/Lookup/annual_report_vcat/$file/2006-07_complete_annual_report.pdf)>.

65 *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* [2006] VSCA 284 (14 December 2006), [32]–[34] (Nettle JA), cf [175]–[177] (Neave J).

66 *Fletcher* [2005] VCAT 1523 (1 August 2005).

67 *Ibid* [1].

Mr Fletcher's first identifiable complaint is that the Alpha program implies that witches are 'Satanists'. But, assuming that this factual allegation can be made good, it cannot amount to a breach of the Act. No ordinary person could possibly be 'incited' to hate those practising Wicca as a result of such an implication. To most people the question of whether witches are Satanists not only involves a concept which is nebulous, but also is an arid and irrelevant theological debate. It is not a vilification issue.<sup>68</sup>

It is difficult to draw a distinction *in principle* between the case presented by Robin Fletcher and that presented by the Islamic Council: that few people care about Fletcher's beliefs does not make those beliefs, or his person, any less capable of forming a target of hatred, ridicule or contempt by those who do.

In both *Catch the Fire* and *Fletcher*, as in considerations of religious vilification more broadly, it is frequently remarked that public policy and law are not concerned with adjudicating questions of the truth of beliefs, but with hatred and contempt of *believers* who 'hold' those beliefs.<sup>69</sup>

Although this distinction between believers and beliefs is often invoked in other contexts, and is widely accepted as a reasonable understanding of the relation of people to their beliefs, it in fact provides little assistance in thinking about questions on the incitement of religious hatred. Making such a distinction rests on the assumption that religious beliefs are matters of voluntary choice, or at least that they can be held at 'arm's length', rather than being constitutive of the believer, that is, a part of his or her identity that is as fixed, unchosen and indelible as race is often portrayed as being.<sup>70</sup> Religious bearing, even of reprobate characters like Robin Fletcher, is not necessarily so different from racial identity as to merit completely asymmetrical treatment in discrimination law, or those aspects of it concerned with vilification. The godliness of the godly, such as it is, is not always located in their 'beliefs', as in a t-shirt that can be put on or taken off with ease.

My view is that religious vilification laws are *necessarily* vulnerable to criticisms made of blasphemy. I think that it is fair to say that the law, and regulations, against blasphemy have no future, at least in terms of being put to work in regulating religious insult. And that is so even where such provisions remain 'on the books' as in Australia. However, I would argue that the case for laws against religious vilification in a modern plural society has merit (or not) along the same lines as the case for laws against racial vilification.

## V CONCLUSION

This article is limited to drawing a qualified defence of religious vilification laws. I have not broached the question in detail here of whether

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68 Ibid [12].

69 *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* [2006] VSCA 284 (14 December 2006), [32] (Nettle J). See also the discussion of this point in Reid Mortensen, 'The Unfinished Experiment: A Report on Religious Freedom in Australia' (2007) 21 *Emory International Law Review* 167, 199–200.

70 For discussion of this point, see Ahdar above n 46, 309–11.

anti-vilification laws *per se* collide with rights in regard to the freedom of speech or expression. Many writers and policy makers do not think that *religious* vilification laws even make it to the same 'bar' as racial vilification laws, arguing that even before freedom of speech comes into consideration, religious vilification laws falter on the grounds of the supposed mutability of religious belief and allegiance, such that religion is not as stable a ground of identity as race. The argument continues that religious vilification laws hence fail, in the same way as blasphemy law does, to capture an indelible aspect of identity, with the result that the state becomes involved in the regulation and policing of permissible *beliefs*, and thereby in the adjudication of theological orthodoxy.

I have suggested here that race and religion are by no means as asymmetrical as they are often portrayed. However, if race and religion are symmetrical as grounds of vilification law, the question of compatibility with freedom of speech remains open, as can be seen vividly in the recent case brought against Andrew Bolt.

However, it is worth noting here that vilification laws (like blasphemy laws) do not solely target speech. The anti-vilification provisions in the *Anti-Discrimination Act 1977* (NSW), for example, target 'public acts', defined as including both communication and conduct.<sup>71</sup> And hence, vilification provisions do not solely burden the freedom of speech. The implication I am drawing here is that the interpretation of vilification provisions (and the formulation of any amendments that might be proposed in the future) could usefully be undertaken in more explicit accordance with the framework of discrimination that regulates forms of *conduct* included in the Acts within which such provisions are almost always placed. My point here is that the test of unlawful vilification should not be capacity to offend, as with the Cradle of Filth prosecutions, but rather capacity to discriminate. A quick example of how this would work is in the treatment of verbal harassment in the workplace, where the actionable harm of such expression is tied to its discriminatory effects.

If we think of the problem of vilification in terms of the harm of discrimination, it also enables us to understand that the demise of blasphemy is to be welcomed not only in ending involvement of the state in theological orthodoxy, but in enabling a rethinking of the proper grounds on which to regulate offence and insult to the godly. The law of blasphemy had evolved to focus on beliefs, and on *offence* to those beliefs as its test. If the vilification provisions are to do the work of the anti-discrimination laws in which they are usually placed, their formulation should explicitly take cognisance of offence only where it is related to, or is a form of, discrimination that erodes or undermines civil standing. These brief concluding remarks suggest the

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71 *Anti-Discrimination Act 1977* (NSW) pt 2 div 3A. Similar wording is found in the Act's provisions against vilification on the grounds of homosexuality (pt 4C), HIV/AIDS status (pt 4F) and transgender (pt 3A).



importance of shifting the debate about vilification laws, whether their ground is religion or race, to consideration on the ground of addressing disadvantage and discrimination in civil society.