RELIGIOUS VILIFICATION: CONFUSED POLICY, UNSOUND PRINCIPLE AND UNFORTUNATE LAW

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I INTRODUCTION

It would be a very good thing and no doubt society would be better for it, if certain benighted people refrained from insulting or denigrating their fellow citizens because of those citizens' religious beliefs and conduct. Should we then pass a law to prohibit religious vilification?

In this article I argue that a firm 'no' should be the answer. I realise that in some quarters the subject has been thoroughly debated and the opposite answer given. So, the United Kingdom,[1] as well as three states in Australia,[2] have recently enacted laws banning incitement to religious hatred. The question, however, is still a live one for nations such as New Zealand and Canada, as well as the remaining states of Australia. Moreover, even in those jurisdictions saddled with such laws, it is not too late to reconsider and scrap the legislation.

The justifications for the introduction of religious vilification laws have never been persuasive.[3] Whilst I shall briefly traverse these, the best argument against religious vilification is, I believe, the *Catch the Fire* case.[4] This decision, the first major litigation[5] on the subject, bears out the concerns of many that religious

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1 The *Racial and Religious Hatred Act 2006* (UK). This Act inserts new provisions into the *Public Order Act 1986* designed to prohibit incitement to religious hatred. Section 29B(1) of the 1986 now reads: '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.' See generally Kay Goodall, 'Incitement to Religious Hatred: All Talk and No Substance?' (2007) 70 *Modern Law Review* 89.

2 The three states are Queensland, Tasmania and Victoria. See respectively, the *Anti-Discrimination Act 1991* (Qld) s 124A, s 131A (the religious vilification provisions were added in 2001); the *Anti-Discrimination Act 1998* (Tas) s 19, and; the *Racial and Religious Tolerance Act 2001* (Vic) s 8. See generally Garth Blake, 'Promoting Religious Tolerance in a Multifaith Society: Religious Vilification Legislation in Australia and the UK' (2007) 81 *Australian Law Journal* 386, 393-6.

3 See e.g. Patrick Parkinson, 'Enforcing Tolerance: Vilification Laws and Religious Freedom in Australia' (Paper presented at the Eleventh Annual International Law and Religion Symposium, 'Religion in the Public Square: Challenges and Opportunities', Provo, Utah, 3-6 October 2004); Steve Edwards, 'Do We Really Need Religious Vilification Laws?' (2005) 21 *Policy* 30; Ivan Hare, 'Crosses, Crescents and Sacred Cows: Criminalising Incitement to Religious Hatred' [2006] *Public Law* 521.

4 *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* [2006] VSCA 284.

5 Other cases to date have not involved such an exhaustive examination: see *Deen v Lamb* [2001] QADT 20; *Robin Fletcher v The Salvation Army Australia Southern Territory General Work* [2005] VCAT 1523. In *Deen* the Queensland Anti-Discrimination Tribunal found that a pamphlet containing quotations from the Qu'ran presented a distorted view that Muslims were persons prone to disobey the laws of Australia where they perceived a conflict with the Qu'ran, to the extent of being prepared to commit murder. The defendant had incited hatred contempt for Muslims, but the pamphlet was protected since it was made during the course of a Federal election and was covered by the implied freedom of communication on matters relevant to political discussion. The

vilification laws are conceptually unsound and produce results antithetical to the religious tolerance its promoters hope for.

II A POLICY MILIEU

Religious vilification laws endeavour to strike a balance between several policy aims and objectives. There is a broad desire to promote religious tolerance. This in turn commonly derives from a broader policy endorsing multiculturalism. The Preamble to the *Racial and Religious Tolerance Act 2001* in Victoria explains the significance of cultural pluralism:

> The people of Victoria come from diverse ethnic and indigenous backgrounds and observe many different religious beliefs and practices. The majority of Victorians embrace the benefits provided by this cultural diversity and are proud that people of these diverse ethnic, indigenous and religious backgrounds live together harmoniously in Victoria.

A harmonious multicultural society cannot take religious tolerance for granted.[6] So, a policy to combat religious intolerance is required – the protection of people from denigration on the grounds of their religion. Again, this policy connects with multiculturalism – those vilified may feel alienated or marginalised and shrink back from contributing to society and thus 'the benefit that diversity brings to the community'[7] is lost.

Policies promoting religious tolerance and protecting citizens from vilification usually push in one direction insofar as they seek to impose limits on individual or group action. By contrast, policies to promote freedom of expression and freedom of religion typically push in the opposite direction by encouraging personal and collective action. The Preamble of the Victorian legislation duly 'recognises that freedom of expression is an essential component of a democratic society.'[8] One of the espoused objects of the Act is also 'to maintain the right of all Victorians to engage in robust discussion of any matter of public interest.'[9] In a similar vein, the policy of promoting religious freedom recognises that many major world religions seek to publicly proclaim the truth and merits of their faith and attract others to it. Such evangelism or proselytism is an integral part of exercising one's religious liberty.[10] In the Christian faith, it is not just a suggestion but a duty to 'witness' and to preach the Gospel to all nations.[11]

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defendant also satisfied a statutory defence relating to public acts done reasonably and in good faith for a purpose in the public interest. In *Fletcher* the Victorian Civil and Administrative Tribunal summarily dismissed a complaint by a prisoner that an introductory Christian course offered in prison (the Alpha program) that denounced witchcraft incited hatred of Wiccans, occultists and pagans.

6 See House of Lords Committee on Religious Offences in England and Wales, *Religious Offences in England and Wales – First Report* (2002-2003), vol 1, [13] ('*Religious Offences*').

7 Point 3 of the Preamble to the *Racial and Religious Tolerance Act 2001* (Vic).

8 Ibid point 1.

9 *Racial and Religious Tolerance Act 2001* (Vic) s 4(1)(b).

10 See e.g. the European Court of Human Rights in *Kokkinakis v Greece* (1993) 17 EHRR 397, 418: 'Bearing witness in words and deeds is bound up with the existence of religious convictions.' Judge Pettiti, in his partly concurring opinion, similarly observed

It is not clear, or at least it is not explicitly articulated, which of these policies takes precedence. Legislation such as Victoria's *Racial and Religious Tolerance Act* lists the policies but does not rank or prioritise them. The scheme of the Act will, of course, provide some guidance as to how Parliament views the relative significance of the policies.[12] If the threshold for violation is set sufficiently high, such that only the most 'extreme'[13] or egregious verbal or written attacks upon people (because of their faith) are caught, that is an indication of the deference paid to free speech and religious expression. Likewise, if there are defences for 'genuine'[14] religious criticism then this sheds some light as to the importance of those same policies. But this is but broad and inferential guidance. In particular cases it will be left to the tribunal to prioritise the policies when interpreting key words or phrases and deciding whether the particular conduct has exceeded the limits of liberal democratic tolerance.

III JUSTIFICATIONS FOR RELIGIOUS VILIFICATION LAWS

Clearly articulated arguments as to precisely why religious hatred laws are required are difficult to find.[15] There is, of course, a copious (and vigorously contested) literature on the harm from hate speech generally, especially the racial variety.[16] Mari Matsuda, for example, observes that 'tolerance of hate speech is not tolerance borne by the community at large. Rather, it is a psychic tax imposed on those least able to pay.'[17] As for long-term harms, Kent Greenawalt explains:

> Epithets and more elaborate slurs that reflect stereotypes about race, ethnic group, religion, sexual preference, and gender may cause continuing hostility and psychological damage. They may injure the status and prospects of members of groups that are often abused; they may contribute

(at 426): 'Freedom of religion and conscience really implies the acceptance of proselytism, even "improper" proselytism. It is the right of the believer or the agnostic philosopher to express his beliefs, to try to share them and even to try to convert others.' On religious expression generally, see Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (2005) ch 12.

11 See e.g. Matthew 28: 19 ('…go and make disciples of all nations…').

12 See Neave JA in *Catch the Fire* [2006] VSCA 284 [173].

13 Ibid [174].

14 Ibid [174].

15 See Eric Barendt, *Freedom of Speech* (2nd ed, 2005) 192: 'There may be good arguments to justify regulation of speech insulting to religious believers, but the [European Court of Human Rights] has not found them; it is very doubtful whether they exist.'

16 For a recent lucid discussion (containing extensive analysis of the literature) see L W Sumner, *The Hateful and the Obscene: Studies in the Limits of Free Expression* (2004). Sumner (at 184) comments: 'Common sense would … suggest a role for hate speech in supporting or reinforcing social practices of discrimination against minorities, but there is little or no social-scientific evidence to confirm this suggestion.'

17 Mari J Matsuda, 'Public Response to Racist Speech: Considering the Victim's Story' (1989) 87 *Michigan Law Review* 2320, 2323. She observes (at 2339): 'Research in psychosocial and psycholinguistic analysis of racism suggests a related effect of racist hate propaganda: at some level, no matter how much both victims and well-meaning dominant group members resist it, racial inferiority is planted in our minds as an idea that may hold some truth.'

> to structural subordination; they may substantially silence segments of the population; they may undermine the aspiration of equality in diversity.[18]

So far as the harm from vilification, both racial and religious, is concerned, the Preamble to the Victorian Act refers to vilifying conduct as 'contrary to democratic values.' Those denigrated, the Preamble contends, experience a diminution in 'their dignity, sense of self-worth and belonging to the community' which dulls their incentive 'to contribute to, or fully participate in, all social, political, economic and cultural aspects of society as equals, thus reducing the benefit that diversity brings to the community.' Multicultural societies require everyone to play their part and if one group is subjected to vitriolic criticism and shrinks back, the ideal of the harmonious multicultural nation cannot be realised. A British Government MP during the debates on what was to become the Racial and Religious Hatred Act 2006 expounded some other reasons:

> Although the Government does not believe that incitement to religious hatred is commonplace, it does exist and where it exists it has a disproportionate and corrosive effect on communities, creating barriers between different groups and encouraging mistrust and suspicion. At an individual level this can lead to fear and intimidation and a sense of isolation. It can also indirectly lead to discrimination, abuse, harassment and ultimately crimes of violence against members of communities.[19]

The 'fear and intimidation' individuals may experience could lead them to curtail the practice of their faith. As the European Court of Human Rights noted, the manner in which some religious criticism and opposition is expressed may call for state action: 'Indeed, in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them.'[20] The key word here is 'extreme', for earlier in the same paragraph the Court also said:

> Those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith.[21]

It is certainly plausible to believe that vilifying conduct can build up walls of resentment and mistrust and, in certain cases, tempt the believers affected to forego religious activities they might otherwise pursue. Yet, religious vilification laws themselves may also have that same tendency. The presence of such a law may intimidate and dissuade religious persons exercising their faith in terms of public witness. Barriers of resentment are likely to be created between groups prosecuted

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18 Kent Greenawalt, *Fighting Words: Individuals, Communities, and Liberties of Speech* (1995) 59-60.

19 Caroline Flint MP, Parliamentary Under Secretary of State for the Home Office (3 February 2005); quoted in Hare, above n 3, 524-5.

20 *Otto-Preminger Institut v Austria* (1995) 19 EHRR 34 [47].

21 Ibid.

for inciting disharmony and the groups complaining of unjust criticism. Corrosion can cut both ways.

The argument that vilification can indirectly contribute to discrimination, abuse or even violence is a more difficult charge to dismiss.[22] If insulting and contemptuous words or written material feed the animosity of those who might later express that hatred in criminal conduct, then logic does suggest it might be prudent to nip this pernicious process in the bud. But the linkage here is indirect, conjectural and rather diffuse. *Some* sorts of disparaging or inflammatory speech *may* provoke improper conduct in *some* hearers in *some* circumstances. The American experience is instructive here. In refusing to uphold hate speech bans, the US Supreme Court has 'resoundingly repudiated' the so-called 'bad tendency' rationale for suppressing controversial speech.[23]

> To be restricted consistent with the 'clear-and-present-danger' principle, speech must *clearly* pose an *imminent* danger, not just a more speculative, attenuated connection to potential future harm. Allowing speech to be curtailed on the ground that it might indirectly lead to possible harm sometime in the future would inevitably unravel free speech protection. After all, *any* speech might lead to potential danger at some future point. Therefore, if we banned the expression of all ideas that might induce individuals to take action that could endanger important interests, such as public safety, scarcely any idea would be safe, and surely no idea that challenged the status quo would be.[24]

Furthermore, can the state and its courts be confident in accurately identifying which kinds of religious speech in which circumstances are deleterious? We ought to be slow to ban all potentially provocative speech on the chance that some of it may produce anti-social behaviour.

IV ARGUMENTS AGAINST RELIGIOUS VILIFICATION LAWS

A *The Chilling Effect*

Religious hatred laws may have a 'chilling effect' on religious speech.[25] Various forms of teaching, evangelism and proselytism that include robust criticism or denunciation of other faiths become a dangerous exercise. Such forceful speech may now be construed by the secular authorities as nothing less that an illegitimate

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[22] See Anthony Jeremy, 'Practical Implications of the Enactment of the Racial and Religious Hatred Act 2006' (2007) 9 *Ecclesiastical Law Journal* 187, 187: 'History points clearly to the seriousness of the risks. Vilification and incitement to religious hatred preceded the Holocaust in Nazi Germany in the 1930s and was the prime motivation for ethnic cleansing and massacre during the wars of Bosnia and Kosovo between Orthodox Christians, Catholic Christians and Muslims.'

[23] Nadine Strossen, 'Liberty and Equality: Complementary, Not Competing, Constitutional Commitments' in Grant Huscroft and Paul Rishworth (eds), *Litigating Rights: Perspectives from Domestic and International Law* (2002) 149, 166.

[24] Ibid 165 (italics in original). For an insightful discussion of this topic, see Larry Alexander, 'Incitement and Freedom of Speech' in David Kretzmer and Francine Kershman Hazan (eds), *Freedom of Speech and Incitement Against Democracy* (2000) 101.

[25] See Parkinson, above n 3, 10; *Religious Offences*, above n 6, [82].

instance of religious vilification. The prudent course then is to exercise self-censorship: dilute the message or perhaps abandon the speech altogether.

The risk of expensive and protracted litigation is heightened by the vagueness of the law. Precisely at what point do we move from strong, even hostile, criticism of religion to attempts to stir up hatred of believers in that religion? No doubt there is a sort of continuum of religious offensiveness from, at one end, the most mild and irksome upset to others to, at the other extreme, the blatant incitement to violence towards peoples of particular faiths. Precisely at what point along the continuum one violates the law is very difficult to know. In advance it is unknowable and certainly no-one wishes to be the 'guinea pig', so to speak, that sets down the initial marker. Yet even after several cases have been decided, the precedents may still provide scant guidance. Attempts by the legislature to clarify the boundary really just re-state the issue. For example, the UK's *Racial and Religious Hatred Act 2006* contains section 29J, entitled 'Protection of freedom of expression.' It reads:

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

But the question remains: what is 'stirring up religious hatred' and what is merely expressing 'antipathy, dislike, ridicule or insult'?

The prospect of litigation is also heightened by the very public nature of the disseminating speech and the breadth of the audience. Evangelism and proselytism aim to be broad and to reach as many people as possible. The likelihood that some listeners will be grievously offended or that some will be stirred to hatred cannot be discounted. Even religious seminars or publications directed solely or primarily for believers of a particular faith may be taken advantage of by believers of a different religion.[26] The latter again may be seriously offended by material not principally tailored for them. This was the case in *Catch the Fire*. Three attendees at a public seminar run primarily for conservative Christians and held in a church were Muslims who had been prompted to attend by the Islamic Council of Victoria.[27] None had attended the entire seminar but, pursuant to a plan, each had sat in at different times to ensure that the complete event was covered.[28] Each said they were 'very upset'[29] at what they heard. So, even material designed for one's own flock may need to be censored for fear of attracting unwelcome complaint. Exclusivist religions, such as Islam and Christianity, which believe their faith is the unique or best pathway to God and salvation, are in particular danger. Statements that strongly affirm the truth of their faith and, expressly or by implication, point to the falsity of other faiths are prone to prosecution. As one critic of the Victorian legislation wrote:

> 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.

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[26] See Parkinson, above n 3, 10.

[27] *Islamic Council of Victoria v Catch the Fire Ministries Inc* [2004] VCAT 2510 [36], [47], [51].

[28] Ibid [76].

[29] Ibid [77].

> 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 in one faith to passionately argue against or warn against the beliefs of another.[30]

Would a newspaper be in danger under a religious vilification law if it chose as its daily Bible verse the text: 'If anyone does not love the Lord Jesus Christ let him be accursed'? An agnostic reader of the *New Zealand Herald* in 2006 was deeply offended by this particular choice and complained that the newspaper was inciting religious hatred towards non-Christians. The New Zealand Press Council dismissed the complaint[31] but under a religious hatred law the newspaper might think twice about selecting and inserting such potentially offensive texts at all.

It is understandable that a society endorsing multiculturalism and emphasising religious tolerance would prefer religionists to moderate their claims and avoid exclusivist pronouncements that might cause offence to other religionists. But to require its citizens to forgo such claims in the name of tolerance is, I believe, to go too far.

B *Divisiveness*

Ironically, the very legislation designed to foster greater understanding and tolerance may become the vehicle to increase misunderstanding and friction. Patrick Parkinson explains:

> 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 problem is that the legal system just becomes another theatre of conflict which it cannot possibly resolve, because the conflicts are political or religious.[32]

A complaint against one religious group may prompt retaliation by that group in tit-for-tat fashion. It seems that, in the aftermath of the Islamic Council's action against the Catch the Fire Ministries seminar, evangelical Christians were attending Islamic lectures for the purpose of gathering statements that might be used in evidence against Muslim speakers.[33]

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30 Amir Butler, 'Why I've changed my mind on vilification laws', *The Age* (Melbourne), 4 June 2004; quoted in Parkinson, above n 3, 16; Edwards, above n 3, 33-4. Butler was the Executive Director of the Australian Muslim Public Affairs Committee at the time he made this statement.

31 *R T Lawrence against New Zealand Herald*, case no 1065, September 2006 <http://www.presscouncil.org.nz/print_ruling.asp?casenumber=1065> at 1 August 2007. The verse quoted is from 1 Corinthians 16:22.

32 Parkinson, above n 3, 14.

33 Butler, above n 30 (quoted in Edwards, above n 3, 33). See also Dermot Feenan, 'Religious Vilification Laws: Quelling Fires of Hatred?' (2006) 31 *Alternative Law Journal* 153, 157.

C *Unnecessary 'Gap' Filling*

Speech that constitutes an incitement to engage in criminal acts is currently caught by the criminal law and public order offences.[34] Inflammatory words that fall short of amounting to a call to commit criminal acts but which, nonetheless, stir up hatred and contempt for a religious group are not caught. Is this a 'gap' that the law needs to plug? Again, this simply restates the whole question. Whilst speech that prompts violence to persons or property on the grounds of religion ought to be prohibited, is speech that simply contributes to a climate of hostility or hatred worthy of a legal ban? The House of Lords Select Committee on Religious Offences considered the gap between criminal incitement and permissible freedom of expression to be 'narrow'.[35] It thought that there was 'only a limited area in between which seems to deserve attention' which it identified as 'vilification of the foundations of a faith.'[36] It quickly added that 'this is a difficult area.'[37] It is not apparent why the 'foundations' of a religion are any more deserving of protection than peripheral or incidental beliefs or practices. Those who strongly criticise a religion are, moreover, most likely to want to attack core elements of that faith.

Another perceived gap is the uneven protection afforded by racial hatred law.[38] Incitement to racial hatred laws may be availed of by certain religions – those of a common ethnic core – but not by other religions, namely, those commonly comprising many racial or ethnic groups.[39] So it would be unlawful to incite hatred of Jews or Sikhs under racial vilification legislation, but not to incite hatred of Christians or Muslims, religions that are not a mono-ethnic group. Thus, enactment of a religious vilification law is necessary to protect the latter. The argument about uneven protection may be misconceived. As others have noted,[40] it is possible that the offence of incitement to racial hatred could be construed widely enough to catch hatred ostensibly targeted at broad religions such as Muslims, hatred that, in reality, is aimed at a racial grouping, such as Pakistanis or Sudanese or those of Arab ethnicity.

The argument for extending the law prohibiting incitement to racial hatred to religion is often based on an analogy between race and religion, but this has its

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34 In New Zealand, see s 311(2) of the *Crimes Act 1961*, which makes it an offence to incite any person to commit any offence which is not in fact committed. If an offence is committed, the person who incites, counsels or procures the commission of an offence is liable as a secondary party under s 66(1)(d). See Andrew Simester and Warren Brookbanks, *Principles of Criminal Law* (3rd ed, 2007) 270.

35 *Religious Offences*, above n 6, [83].

36 Ibid.

37 Ibid.

38 For New Zealand, see s 131 of the *Human Rights Act 1993* which makes it a summary offence to intend to 'excite hostility or ill-will' against any group of persons on the ground of their colour, race or ethnic or national origins. Section 66 of the same Act, not a criminal prohibition, makes it unlawful to publish material that is threatening, abusive or insulting or likely to excite hostility on racial grounds. See Paul Rishworth, Grant Huscroft, Scott Optican and Richard Mahoney, *The New Zealand Bill of Rights* (2003) 324.

39 See *Religious Offences*, above n 6, [80]; Hare, above n 3, 525; Goodall, above n 1, 93; Peter Cumper, 'Inciting Religious Hatred: Balancing Free Speech and Religious Sensibilities in a Multi-Faith Society' in Nazial Ghanea, Alan Stephens and Raphael Walden (eds) *Does God Believe in Human Rights? Essays in Religion and Human Rights* (2007) 233, 235-7.

40 Goodall, above n 1, 94-7; Hare, above n 3, 532-3.

weaknesses.[41] Race is an immutable characteristic whereas religion is, to some degree at least, a matter of choice. The law should be less ready to protect people from vilification based on the voluntary life choices of its citizens compared to an unchangeable attribute of their birth.[42] That argument itself, however, has its difficulties to the extent that some religionists neither choose their faith (being essentially born into a religious community) nor can they easily leave it.[43] A better reason why greater scope should be given to robust airing of opinions about religious compared to racial matters is that religions, by their very nature, attempt to provide comprehensive answers to the 'big' questions of life in the way race does not: 'religions inevitably make competing and often incompatible claims about the nature of the true god, the origins of the universe, the path to enlightenment and how to live a good life and so on. These sorts of claims are not mirrored in racial discourse.'[44] Religious bodies too may be much better equipped, compared to victims of racial incitement, to engage in the sort of vigorous counter-speech needed to foil ignorant and vituperative attacks.[45]

But perhaps the most powerful rejoinder to the uneven coverage of the vilification ban is provided by Ivan Hare, who contends: 'it is logically as valid to suggest that the appropriate way to deal with any anomaly in the extent of its coverage is to repeal the offence of incitement to racial hatred which is itself extremely problematic and unorthodox in free speech terms.'[46] The existing bans on hate speech are dubious enough without extending the grounds upon which the prohibition presently operates beyond race to other categories. This is not the occasion to revisit the case against hate speech laws generally. This summary by Nadine Strossen, however, captures the core objections:

> Censoring hate speech increases attention to, and sympathy for, bigots. It drives bigoted expression and ideas underground, thus making response more difficult. It is inevitably enforced disproportionately against speech by and on behalf of minority group members themselves. It reinforces paternalistic stereotypes about minority group members, suggesting that they need special protection from offensive speech … An 'anti-hate-speech' policy curbs the candid intergroup dialogue concerning racism and other forms of bias, which is an essential precondition for reducing discrimination.[47]

The better response to hate speech – racial, religious or any other type[48] – is not to censor it, but to expose it and then answer it.[49] Eric Heinze expresses the point admirably:

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41 See Hare, above n 3, 534-5; Cumper, above n 39, 253-4.

42 Hare, above n 3, 534; Cumper, above n 39, 253; Edwards, above n 3, 34.

43 See e.g. *Religious Offences*, above n 6, [100]: '[I]t is of course true that people cannot alter their racial origin, but there are communities in the UK where it is inconceivable that anyone could change their professed religion and continue to live within the community concerned.' See also Barendt, above n 15, 190.

44 Hare, above n 3, 534.

45 Ibid 534.

46 Ibid 533.

47 Strossen, above n 23, 167.

48 The grounds upon which hate speech can be based are numerous – sex, sexual orientation, social class, physical conditions, mental conditions etc – and it is hard to confine the categories worthy of protection in a non-arbitrary fashion: see Eric Heinze, 'Viewpoint Absolutism and Hate Speech' (2006) 69 *Modern Law Review* 543, 565-7.

> Ignorance and intolerance are best kept in check when citizens remain free to make up their own minds about what to say, hear and believe, and to respond through the many means available in an open society – dissent, debate, persuasion, satire, argument, demonstration, protest or boycott. When channels of communication are used to propagate hatred, all citizens in a democratic society must be free to know who the speakers are, where they are, what they preach, and to whom.[50]

D *Legislating Right Emotions and Attitudes*

Victoria's *Racial and Religious Tolerance Act 2001* has the noble aim of promoting religious tolerance. 'But,' as Nettle JA in *Catch the Fire* observed, 'the Act cannot and does not purport to mandate religious tolerance.'[51] It is surely doubtful in the extreme that any Act of Parliament could succeed in ensuring its citizens tolerate the faith or religious scruples of their fellow citizens. Education, public debate and ongoing dialogue between religious communities would seem to be far more effective means to achieve a climate of mutual respect and tolerance.

> Positive intergroup relations will more likely result from education, free discussion, and the airing of misunderstandings and insensitivity, rather than from legal battles; in contrast, 'anti-hate-speech' rules will continue to generate litigation and other forms of controversy that increase intergroup tensions.[52]

More importantly perhaps, pointing believers to authoritative sources within their own religion that urge the faithful to exercise forbearance and tolerance may be most effective strategy of all. Thus, for example, in Christianity, the New Testament writers repeatedly counsel against using aggressive, disparaging words and, instead, urge the utmost courtesy in teaching and persuading others: Christians should always be prepared to give an answer to everyone who asks the reason for the hope they have: 'But do this with gentleness and respect.'[53] Similarly, 'those who oppose [the preacher] he must gently instruct, in the hope that God will grant them repentance leading them to a knowledge of the truth.'[54] In terms of the proper Christian attitude to incurring insult or vitriol from others, Jesus Christ taught:

> Blessed are you when men hate you, when they exclude you and insult you and your name as evil, because of the Son of Man. Rejoice in that day and leap for joy because great is your reward in heaven. For that is how their fathers treated the prophets … Woe to you when all men speak well of you, for that is how their fathers treated the false prophets.[55]

Furthermore, to enlarge the categories of protection from vilification would lead to an dangerous extension of the powers of the state: Edwards, above n 3, 34.

49 Strossen, above n 23, 162.

50 Heinze, above n 48, 554.

51 [2006] VSCA 284 [34].

52 Strossen, above n 23, 167.

53 1 Peter 3: 15.

54 2 Timothy 2: 25.

55 Luke 6: 22-23, 26.

To be vilified because of one's faith is no bad thing in Christianity. Quite the opposite; it ought to be a cause for rejoicing for believers. Consistent with that there is not the slightest suggestion that retaliation is desirable. Rather, Christians are exhorted to 'bless those who curse you,'[56] not to bring legal proceedings against those who slight them. As for the offence to God himself, the creator and sustainer of the universe is surely more than able to withstand such criticism. According to Christian teaching, God does not desire his honour to be vindicated and expressly cautions that vengeance is his, not his followers', concern.[57]

Francis Bennion has railed against the British religious vilification law as a 'newly-invented thought crime.'[58] It is hard not to agree. Is it really the role of the state to criminalise conduct that encourages citizens to simply harbour certain emotions ('hatred', 'contempt', 'revulsion'), to feel and think certain, admittedly regrettable, things, about other members of society? Hatred and revulsion are, of themselves, not necessarily undesirable emotions. The Bible urges believers to 'hate what is evil; cling to what is good.'[59] The founder of Christian faith, Jesus Christ, was severe in his denunciation of certain religious leaders, castigating them as 'blind guides', 'hypocrites', 'whitewashed tombs,' 'snakes' and a 'brood of vipers.'[60] As Garth Blake drolly notes: 'It may be that [Jesus'] command to his followers to love his enemies would have been insufficient to prevent a finding of religious vilification.'[61]

V RELIGIOUS VILIFICATION LAW IN PRACTICE: THE *CATCH THE FIRE* SAGA

The serious drawbacks of a religious hatred law are best illustrated in the *Catch the Fire* case, the most comprehensive decision to test and apply this kind of legislation. At the outset some scholars predicted the legislation would swiftly reveal 'an interpretive and evidential minefield.'[62] This has been proved to be so.

In *Islamic Council of Victoria Inc v Catch the Fire Ministries Inc*,[63] the Victorian Civil and Administrative Tribunal ('Tribunal') ruled that two Pentecostal pastors, and their evangelical organisation, Catch the Fire Ministries, had engaged in religious vilification of Muslims in the statements they had made at a seminar, and in a newsletter and a website article. The statements made at the March 2002 seminar, as well as the two Catch the Fire publications in 2001, contravened s 8 of the *Racial and Religious Tolerance Act 2001*. The seminar, the principal basis for the complaint by the Islamic Council of Victoria,[64] was advertised under the title, 'Insight into Islam: What is holy Jihad?' and the speaker was Pastor Daniel Scot, an Assemblies of God pastor. Pastor Scot had been born and raised in Pakistan and had fled that country when accused under Pakistan's blasphemy law.[65] Ironically, he was

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56 Luke 6: 28.

57 See Romans 12:19 ('Do not take revenge … but leave room for God's wrath, for it is written: "It is mine to avenge; I will repay," says the Lord.')

58 Francis Bennion, 'Gilding the Lily on Religious Hatred' (2005) 14 *Commonwealth Lawyer* 35, 35.

59 Romans 12:19.

60 Matthew 23. See Blake, above n 2, 405.

61 Blake, above n 2, 405.

62 See Parkinson, above n 3, 7.

63 [2004] VCAT 2510.

64 The Council had standing to bring the action in a representative capacity after obtaining the consent of three Muslim attendees at the seminar: see s 19(3) of the Act.

65 See [2004] VCAT 2510 [193].

to become the catalyst for major public controversy over religion in his adopted country. The purpose of the seminar, conducted at the Full Gospel Assembly church, was 'to encourage Christians to testify to Muslim people about the Christian faith, and for that purpose to equip Christians with a knowledge of Muslim beliefs.'

At the seminar, attended by some 200 to 250 people, Pastor Scot gave what the Tribunal Vice President, Judge Higgins, described as an 'unbalanced'[66] discussion of Muslim religious beliefs and conduct. The pastor 'made fun' of Muslim beliefs and practices, presenting them in a way which was 'essentially hostile, demeaning and derogatory of all Muslim people, their god, Allah, the prophet Mohammed and in general Muslim religious beliefs and practices.'[67] Derogatory statements made at the seminar included the following: the Qur'an promotes violence, killing and looting; Muslim scholars misrepresent what the Qur'an says by varying the emphasis depending on the audience; the Qur'an teaches that women are of little value ('woman, dog and donkey are of equal value'); Muslims are demons; Muslims lie for the sake of Islam and that it is 'all right', they have to hide the truth; Muslims intend to take over Australia and declare it an Islamic nation; Muslim people have to fight Christians and Jews until they accept true religion.[68] The Tribunal noted that it was the cumulative effect of the statements, not necessarily any one of the 19 utterances standing alone, that had to be assessed.[69] Statements also made at the seminar about accepting and loving Muslim people did not alter the Tribunal's view about the overall denigratory thrust of the seminar. The newsletter, written by another Assemblies of God pastor, Pastor Daniel Nalliah, referred to Muslims coming to Australia from countries where Christians had been raped, tortured and killed and asked readers: 'What stops the Muslims from doing the same in Australia?'[70] The website article suggested that Islam was an inherently violent religion and it was not possible to separate Islam from terrorist groups. There was no attempt in it to distinguish between moderate and extremist Muslims.[71]

The defence in s 11 of the Act, immunising the speaker if his or her conduct was engaged reasonably and in good faith, was not met here. In the judge's opinion, the seminar 'was a one-sided delivery of a view of the Qur'an and Muslims' beliefs, which were not representative. It was designed to put Muslim people and their beliefs in a bad light.'[72] The newsletter and article also failed to satisfy the defence.

In June 2005 the Tribunal ordered the pastors to publicly apologise in the form a specified statement of apology on the Catch the Fire website and in two prominent newspapers and to refrain from making, publishing or distributing (including via the internet) similar statements in the future.[73] In August 2005, the Tribunal ordered that Catch the Fire Ministries and the two pastors be restrained from making statements similar to those made in the original contravening seminar, after the pastors had refused to comply with the June orders.

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66 Ibid [384], [389].
67 Ibid [383].
68 Ibid [80], [383]. The judge lists the 19 derogatory statements at [80].
69 Ibid [80].
70 Ibid [391].
71 Ibid [394].
72 Ibid [389].
73 The corrective orders were issued at a later hearing (22 June 2005): see *Islamic Council of Victoria Inc v Catch the Fire Ministries Inc* [2005] VCAT 1159. The full text of the apology statement is set out in the Annexure of the Court of Appeal decision: [2006] VSCA 284.

An appeal was lodged and two years after the Tribunal's decision, the Court of Appeal found the Tribunal erred on a number of interpretive points.[74] It allowed Catch the Fire's appeal and remitted the matter back to the Tribunal to be heard before a different judge. The orders requiring a public apology were set aside.

The matter was finally resolved without the need for a rehearing. After mediation between the parties, an agreement was reached to end the long-running five-year battle.[75] On 22 June 2007, the Tribunal issued a joint statement on behalf of the Council, Catch the Fire Ministries and the two pastors affirming the rights of each other and their communities to 'robustly debate' religion, including the right to criticise the religious beliefs of another.[76]

The Court of Appeal's judgment is a detailed and lengthy one. I shall concentrate on those matters that highlight the uncertainty and undesirability of a religious vilification ban.[77]

A *What is the Dividing Line?*

The religious vilification ban is found in s 8 which reads:

> 8. Religious vilification unlawful
> (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.[78]

Religious vilification complaints are dealt with initially by the Equal Opportunity Commission. If conciliation before the Commission proves unfruitful, the matter may proceed to the Tribunal.[79] Where a complaint is proved, the Tribunal

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74 *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* [2006] VSCA 284.

75 See Turnbull, 'Church and Islamic council bury hatchet', *The Australian* (Sydney), 25 June 2007.

76 The Joint Statement records that: 'Notwithstanding their differing views about the merits of the complaint made by the ICV, each of the ICV, Catch the Fire Ministries, Pastor Scot and Pastor Nalliah affirm and recognise: (1) the dignity and worth of every human being, irrespective of their religious faith, or the absence of religious faith; (2) the rights of each other, their communities, and all persons, to adhere to and express their own religious beliefs and to conduct their lives consistently with those beliefs; (3) the rights of each other, their communities and all persons, within the limits provided for by law, to robustly debate religion, including the right to criticise the religious beliefs of another, in a free, open and democratic society; (4) the value of friendship, respect and co-operation between Christians, Muslims and all people of other faiths; and (5) the Racial and Religious Tolerance Act forms part of the law of Victoria to which the rights referred to in paragraph (3) above are subject.' VCAT Media Release, VCAT Ref: A392/2002, 22 June 2007<http://www.vcat.vic.gov.au> at 30 July 2007.

77 I shall not discuss the issue of whether the religious vilification ban infringes the implied freedom of communication on political and governmental matters under the Australian Constitution. Nettle and Neave JAA considered that s 8 of the Victorian Act was constitutionally valid: [2006] VSCA 284 [111]-[113], [198]-[210]. See further Nicholas Aroney, 'The Constitutional (In)Validity of Religious Vilification Laws: Implications for their Interpretation' (2006) 34 *Federal Law Review* 287.

78 To 'engage in conduct' includes using the internet or email to publish or transmit statements or other material: statutory note to s 8.

79 See ss 19 to 23.

has the power to award compensation for losses suffered.[80] The Victorian Act also has the criminal offence of 'serious religious vilification' and this, unlike the civil prohibition, requires intent on the part of the defendant as well as knowledge of the likely consequences.[81]

There is no contravention of s 8 if the conduct was private, that is, the conduct ought not reasonably have been expected to be heard or be seen by someone else.[82]

As for precisely what is allowed, Nettle and Neave JJA explain that it is only religious criticism of an 'extreme' character that is proscribed: 's 8 goes no further in restricting freedom to criticise the religious beliefs of others than to prohibit criticism so extreme as to incite hatred or other relevant emotion of or towards others.'[83] It followed, in Nettle JA's view, that:

> s 8 does not prohibit statements about religious beliefs *per se* or even statements which are *critical* or *destructive* of religious beliefs. Nor does it prohibit statements concerning the religious beliefs of a person or group of persons simply because they may *offend* or *insult* the person or group of persons. The proscription is limited to that which *incites* hatred or other relevant emotion and s 8 must be applied so as to give it that effect.[84]

Neave JA added that the legislation ought not to be interpreted 'so as to make it impossible for people to proselytise for their own faith or to criticise the religious beliefs of others.'[85]

Taking these statements as a whole, the dividing line between acceptable and non-acceptable criticism is not made clearer. Critical and destructive attacks upon religious beliefs are permitted. The fact that believers in the faith being critiqued are offended or even insulted is a price they must pay. It turns out the true focus is not on the offensive nature of the speech or the psychic injury or discomfort to the believers. Rather it is the effect such statements have on *other* persons.[86] These third party hearers must be aroused to hate or revile the *believers* being criticised – it is not enough they might be aroused to 'despise'[87] those persons' religious *beliefs*. Time and effort spent trying to carefully evaluate the severity of the language or its likely impact on the religionists under attack is thus redundant.

The structure of the religious vilification ban may be simplified as follows:

> **I** (inciter) does or says ***x***, which has the effect of stirring up hatred against group **V** (victims) in **A** (third party audience) because of V's religious beliefs or activities.

Contravention is assessed by reference to the effect on the mind of A not V.

Drawing the dividing line proved a difficult task in *Catch the Fire*, as evidenced by the contrary views taken on the true nature of the statements at issue. On the key question whether the 19 statements made by Pastor Scot at the seminar were, taken as a whole, likely to incite the audience to hatred, the appellate court took a different

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80 *Equal Opportunity Act 1995* (Vic) s 136.
81 *Racial and Religious Tolerance Act 2001* (Vic) s 25.
82 Section 12.
83 *Catch the Fire* [2006] VSCA 284 [34].
84 Ibid [15] (emphasis added).
85 Ibid [173].
86 Ibid [141].
87 Ibid [80].

view from the Tribunal. Nettle JA went through each of the 19 statements carefully and laboriously, criticising the majority of the Tribunal's findings.[88] It had consistently misconstrued the real tenor of the pastor's words. So, for instance, when one re-read the transcript more closely, it was clear that Pastor Scot had *not* said that the Qur'an promoted violence and killing, nor that Muslims lie for the sake of Islam, nor that Muslims are demons, nor that Muslims intended to take over Australia. Neave JA concluded:

> Unlike the tribunal … I was unable to perceive from the tape [recording of the seminar] anything in the manner of Pastor Scot's delivery which rendered his statements more likely to incite the audience to hatred or other relevant emotion of or towards Muslims. To the contrary, as it seemed to me, what one hears is a speaker who, although endowed with an admirable command of the English language, speaks it as a second language with all the difficulties which that sometimes entails. I hear a degree of nervousness in delivery, a pattern of speech which is idiomatically incongruous and consequent double entrendre which the speaker sounds not to have intended. Admittedly, his style is given to ridicule at places, and the ridicule results in cynical laughter at places. But on any analysis his plea to love Muslims and to 'minister' to them comes across as sincere enough as do the sounds of his audience's reaction to it.[89]

B *The Meaning of 'On The Ground of Religious Belief or Activity'*

Plainly there must be a causal connection between the hatred, contempt and so on aroused in the minds of audience, A and the religion of the victims, V. The third party audience must revile group V because of that group's religious scruples. In *Catch the Fire* this meant that 's 8 require[d] the Tribunal to consider whether conduct was likely to incite hatred or other relevant emotion in the minds of the audience against Muslims, because of their religious belief in Islam.'[90] Unfortunately, the Tribunal had not seen the section operating this way and had been led into error. It saw the necessary causal connection as that between the religious beliefs of V and I's conduct. In other words, the relevant inquiry for the Tribunal was whether Pastors Scot and Nalliah had been actuated to criticise Muslims because of their (the pastors') beliefs. There was 'no doubt'[91] here that their inciting conduct was moved by their attitudes to Islam. But to focus on the link between the inciter's conduct and the group V is, as the Court of Appeal clarified, to misconstrue

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88 The analysis here is lengthy (see [38]-[62]) and takes the form of Nettle JA beginning 'Pastor Scot did not say *x*' (or 'did say *y*') and then quoting at length what he actually did say – words carrying a far more cryptic, opaque or neutral meaning. In a one paragraph discussion, Neave JA ([194]) in contrast, found that only a *minority* of the Tribunal's 19 findings – specifically, three – were not reasonably open on the facts. These were that the Qur'an promotes violence and killing; that Muslims are demons; and that there was a practice of abrogation, namely, the cancellation of words from the Qur'an and Hadiths solely to fit some particular purpose or personal need. Nine of the Tribunal's findings were open to the interpretation the Tribunal put on them, whilst, in the context of the seminar as a whole, eight of the findings were capable of inciting serious ridicule or contempt of Muslims ([194]).

89 *Catch the Fire* [2006] VSCA 284 [63].

90 Ibid [152] (Neave JA).

91 Ibid.

the prohibition.[92] Section 9(1) of the Act explicitly states that the defendant's motive for engaging in the conduct is irrelevant. It is possible then that s 8 might be contravened by conduct which has the effect of inciting religious hatred even where the inciter had no intention to do so. Whilst this is a hypothetical possibility, 'as a practical matter'[93] such situations of what might be called inadvertent or accidental incitement of religious hatred are seldom, if ever, likely to occur.[94]

C *The Meaning of 'Incites'*

The word 'incite' carries its ordinary meaning of 'urge', 'stir up', 'animate', 'stimulate' to do something.[95] A troublesome question was whether s 8 required hatred to have actually been provoked in the intended audience or was it sufficient that the conduct be likely to incite hatred? The Court of Appeal agreed with the Tribunal that actual incitement is not required. Nettle JA observed:

> incitive conduct is capable of contravening s 8 without necessarily causing hatred or serious contempt or revulsion or serious ridicule. As with the common law criminal offence of incitement, I view s 8 as directed to inchoate or preliminary conduct, whether or not it causes the kind of third party response it is calculated to encourage. In that sense, the section is prophylactic.[96]

Words or conduct that have the 'tendency'[97] to elicit hatred and so on are caught.

D *The Nature of the Audience*

Obviously enough there must be an audience, as there can be no breach to simply 'utter exhortations to religious hatred in the isolation of an empty room.'[98] If a capacity or tendency to incite is sufficient, it becomes important to delineate precisely *who* is likely to be incited. In *Deen v Lamb*, a decision under Queensland's religious vilification law, the Anti-Discrimination Tribunal noted that an objective test was called for, adding that it would be 'necessary to exclude on the one hand those persons who are either over-sensitive to criticism of their race, religion or culture and on the other hand, those who are too thick-skinned to appreciate the nature of an act as one which has the relevant tendency to incite.'[99] In *Catch the Fire*, the Tribunal preferred the following formulation: 'The test is whether an ordinary reasonable reader who is not malevolently inclined or free from susceptibility to prejudice would be inclined to hatred by the publication or conduct.'[100] The Court of Appeal was not altogether satisfied with 'the ordinary reasonable reader' test. Nettle JA preferred to frame it in terms of 'the effect of conduct on a reasonable member of the class of persons to whom the conduct is

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92 See ibid [30], [127], [141].
93 Ibid [152] (Neave JA).
94 Ibid.
95 See ibid [14] (Nettle JA).
96 Ibid. See also ibid [154] (Neave JA).
97 Ibid [160] (Neave JA).
98 Ibid [16] (Nettle JA).
99 [2001] QADT 20.
100 See ibid [8].

directed.'[101] The perception of this hypothetical reasonable member of the target class 'will not always be the same as the perception of the so-called ordinary reasonable reader.'[102] Quite how the two might differ was not clarified. For Nettle JA the test for the purposes of s 8 was 'whether the natural and ordinary effect of the conduct is to incite hatred or other relevant emotion in the circumstances of the case.'[103] Under the rubric of 'the circumstances of the case' a more particular inquiry into the actual nature of the audience may be called for. So, as Nettle JA illustrated, something said during a radio talk-back session might occasion more difficulties than the same utterances made during an intellectual discourse within a theology faculty or seminary.[104] Neave JA concurred with Nettle JA's 'natural and ordinary effect' test[105] but Neave and Ashley JJA took issue with the latter's 'reasonable' member of the class formulation. It was better, they thought, to frame it as the 'ordinary'[106] member of the target class. For Neave JA the circumstances also extended to 'the historical and social context in which words are spoken or conduct occurs.'[107]

Overall, the test is vague and the refinements and qualifications do not assist. Just what is 'the natural and ordinary effect' of inflammatory words on 'reasonable' (or, alternatively, 'ordinary') members of the target audience? What is 'the social context' that informs the evaluative exercise?

Where the audience includes members of the religion being attacked, what relevance, if any, do we place on their feelings? Recall that the structure of the religious vilification prohibition in s 8 is concerned with the stirring up of hatred in a *third party* audience on account of a particular group's religious beliefs. Offence to the religionists being criticised is irrelevant. It is whether the conduct stimulates hatred *toward* that religious group, not to whether it arouses hatred *in* that group. For this reason, the Court of Appeal in *Catch the Fire* criticised the weight the Tribunal placed upon the great upset three recent converts to Islam experienced when they attended the Seminar.[108] Evidence of their feelings throws no light on whether persons who are not Muslims would be prompted to feel contempt and revulsion.[109]

E *Distinguishing Between Hatred of Beliefs and Hatred of Persons*

Section 8 is directed at conduct that vilifies persons or classes of persons. Nettle JA in *Catch the Fire* emphasised that: 'It is essential to keep the distinction between hatred of beliefs and hatred of their adherents steadily in view.'[110] The point had been made earlier by Morris J in the *Fletcher* case who put it succinctly: 'The law recognises that you can hate the idea without hating the person.'[111] Neave JA in *Catch the Fire* was less convinced of the distinction than Nettle JA and

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101 Ibid [18].
102 Ibid.
103 Ibid [19].
104 Ibid [17].
105 Ibid [157].
106 Ibid [132], [157].
107 Ibid [159].
108 See ibid [64]-[68].
109 Ibid [76]: 'The concentration needed to be upon members of the audience who were not Muslims.'
110 Ibid [34].
111 *Robin Fletcher v The Salvation Army Australia Southern Territory General Work* [2005] VCAT 1523.

doubted that the failure to clearly draw the distinction had led the Tribunal into error.[112] Whether statements about religious beliefs cross the line and become statements inciting hatred of persons because of those beliefs is a question of fact.[113] For some commentators the distinction is illusory:

> The distinction appears difficult, if not impossible, to justify in relation to expression. It resonates with the equally fallacious dichotomy that is used to justify homophobia: love the sinner, but not the sin. The religious beliefs or activities of individuals are intimately tied to religion, and vice versa.[114]

The distinction is nevertheless a real one,[115] however hard it may be to draw. It is given more credence in the *Catch the Fire* case as, to take the statements made at the seminar, Pastor Scot repeatedly and sincerely urged his listeners to love Muslims despite what he adjudged to be the falsity of Islamic beliefs. He urged his listeners to 'witness' to Muslims, that is, to affirm the truth of Christian beliefs in the hope they might convert. For Nettle JA the seminar was 'replete'[116] with statements favourable to Muslims as people. The Tribunal had been too quick to dismiss these statements and ignored their ameliorative effect:

> on any objective assessment of the Seminar taken as a whole, it was surely arguable on the basis of Pastor Scot's exhortations to his audience to love and 'witness' to Muslims that the *raison d'etre* of his Seminar was to infuse his audience with an understanding of the Koran (as he perceived it) so that they might effectively convert Muslims to Christianity (as he perceived it). Indeed his peroration was that, despite the inadequacies of Islamic doctrine (as he perceived them), his audience should love Muslims and seek to inculcate in them a Christian understanding of the Deity (as he conceived of it) … the terms of Pastor Scot's exhortations to love and to witness to Muslims, and their likely effect on the non-Muslims present, required a good deal more analysis than peremptory dismissal as 'talk from time to time.'[117]

Neave JA agreed the ameliorative statements ought to have been taken into account, but sounded a note of caution:

> I do not regard the invocation to love Muslims, while attacking their beliefs, as necessarily inconsistent with a breach of s 8. To do so would encourage those who incite hatred or other relevant emotion to combine

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112 [2006] VSCA 284 [176].

113 Ibid [177].

114 Feenan, above n 33, 156. See similarly Edwards, above n 3, 33. Bennion, above n 58, 37, comments that it is 'nonsense' to say that attacking a belief as cruel is not in any way to attack persons who hold and practise that belief: 'To say that a belief is barbarous and cruel must be to attack anyone who holds it.'

115 Harold Berman, *The Interaction of Law and Religion* (1974) 152, fn 19, notes: 'It is a cardinal principle of the Western religious tradition (both in its Christian and Judaic aspects) to "hate the sin, but love the sinner."'

116 [2006] VSCA 284 [77].

117 Ibid [79].

> egregious statements about a particular racial or religious group, with expressions of feigned concern for the targeted group.[118]

Catch the Fire gives some support for the continued validity of the hatred of beliefs versus hatred of persons distinction, but it is not reassuring. The distinction is a question of fact, and, coupled with the prospect that some expressions of respect for persons may be viewed as insincere smokescreens, those tempted to engage in robust denunciation of religious doctrines and conduct would be wise to think twice. Again, there is the chilling effect upon forms of evangelism or proselytism that seek to expose teachings and practices that are, to the evangelist, false, sinful and damaging.

F *The 'Balanced' Presentation*

When portraying another group's religious beliefs and practices, must the speaker or writer give a 'balanced' account? The Tribunal in *Catch the Fire* criticised Pastor Scot's presentation of Islamic beliefs on this basis.[119] In the Court of Appeal, Nettle JA strongly challenged the need-for-balance thesis. The truth of Pastor Scot's statements about Islam was irrelevant:

> Whether his statements about the religious beliefs of Muslims were accurate or inaccurate or balanced or unbalanced was incapable of yielding an answer to the question of whether the statements incited hatred or other relevant emotion. Statements about the religious beliefs of a group of persons could be completely false and utterly unbalanced and yet do nothing to incite hatred of those who adhere to those beliefs. At the same time, statements about the religious beliefs of a group or persons could be wholly true and completely balanced and yet be almost certain to incite hatred of the group because of those beliefs. [120]

It was not, Nettle JA continued, the task 'for a secular tribunal to attempt to assess the theological propriety of what was asserted at the Seminar.'[121] This last observation underscores the point made earlier in this article that a court may just become another theatre – and an ill-suited one at that – for theological or religious controversies to be aired. Unfortunately, Nettle JA's firm stand is derogated from by Neave JA's view. Whilst she agreed that it was unwise for a tribunal to attempt to determine theological truth,[122] she was *not* prepared to hold that a tribunal could not have regard to questions of balance and accuracy. These may well be relevant when considering whether the statements are likely to incite hatred.[123]

It seems odd to cast an evangelist or other religious preacher as a sort of impartial purveyor of information akin to a responsible journalist or as a detached

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118 Ibid [196].
119 [2004] VCAT 2510 [384].
120 [2006] VSCA 284 [36].
121 Ibid.
122 Ibid [178].
123 Ibid [179].

scholar carefully presenting all sides of a controversy.[124] And it is surely not a secular court's role to vet religious presentations to ensure their accuracy or balance.

G *When is Conduct Engaged in 'Reasonably' and in 'Good Faith' for a 'Genuine Religious Purpose'?*

Section 11 of the Act provides a defence where the person:

> establishes that the person's conduct was engaged in reasonably and in good faith –
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> (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

The Tribunal in *Catch the Fire* was not satisfied the defendants had met the requirements of this section. It doubted Pastor Scot's credibility and whether the statements he made at the seminar about the Qur'an truly reflected his real beliefs. According to the Tribunal, his lack of credibility was evidenced by his assertion he had written books about Islam (when he had in fact merely disseminated photocopied writings under a different name at conferences he spoke at) and the manner he deliberately misrepresented certain verses in the Qur'an.[125] He did not then conduct the seminar 'in good faith'. Furthermore, his conduct had not been engaged in 'reasonably' because it was an excessively unbalanced and one-sided delivery of Islamic beliefs designed to put Muslims in a bad light.[126]

On appeal it was contended that the Tribunal's finding of a lack of good faith had been coloured unduly by its view that the seminar presentation was unbalanced.[127] Moreover, the Tribunal, it was said, did not address the question of whether the Seminar had been conducted for a genuine religious purpose.[128] The Court of Appeal was not however persuaded that the Tribunal had erred in its construction of the defence.[129] Should the matter be ultimately remitted to the Tribunal, the Court decided it was nonetheless helpful to clarify the correct approach to s 11.

Truth per se is not a defence. Neave JA clarified that the section 'does not provide that the fact that words are true takes them outside s 8 of the Act.'[130] But, she added, somewhat unhelpfully, that the issue of truth is 'likely to be relevant' in applying the s 11 test.[131]

The first step in determining whether the defence is met is to decide whether the defendant acted for a 'genuine religious purpose.' A religious purpose would include 'comparative religion and proselytism'[132] and, equally plainly, Catch the Fire's purpose for holding the seminar ('To encourage Christians to testify to

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[124] See Joel Harrison, 'Truth, Civility, and Religious Battlegrounds: The Contest Between Religious Vilification Law and Freedom of Expression' (2006) 12 *Auckland University Law Review* 71, 80.

[125] See [2006] VSCA 284 [85].

[126] Ibid [86].

[127] Ibid [87].

[128] Ibid.

[129] Ibid [88].

[130] Ibid [178]. See also Nettle JA's statement quoted earlier, above n 120.

[131] Ibid fn 108.

[132] Ibid [90].

Muslim people about the Christian faith, and for that purpose to equip Christians with a knowledge of Muslim beliefs') was a religious purpose. Whether the purpose was genuine would involve comparing the defendant's alleged purpose with its true purpose.[133]

The second step would be to determine whether the defendant engaged in the conduct 'in good faith.' This is a subjective concept: did the person have a 'subjectively honest belief that [the conduct] was necessary or desirable to achieve the genuine religious purpose.'[134] If Pastor Scot's statements about Islam did not reflect his true beliefs, and were known by him to be untrue, he would fail the test. The issues of genuineness of the purpose and the bona fide character of the conduct obviously overlap here.

Looking back at the Tribunal's evaluation of Pastor Scot's subjective honesty, it is troubling that a preacher's misleading characterisation of works he had authored should somehow lead to the conclusion that his beliefs about a religion were not his real beliefs. Even more disquieting is a secular tribunal's determination that where a religious leader had misconstrued and misrepresented another religion's sacred writings, this also indicated an absence of honest belief. A wrong interpretation of scripture does not necessarily point to dishonest intent and, moreover, a secular body ought not to be trying to rule on what are correct and honest representations of sacred writings.

The third step in the s 11 defence was to decide if the conduct in pursuit of the genuine religious purpose had been engaged 'reasonably.' An objective standard prevailed here, with the assessment being made 'according to the standards of the hypothetical reasonable person.'[135] The reasonable person in twenty-first century society could no longer be the Anglo-Celtic man on the Clapham omnibus of earlier times.[136] Both Nettle and Neave JJA refashion the reasonable person to reflect the fact this person lives in a culturally diverse, religiously pluralistic society. Nettle JA explained:

> But today, as in the United Kingdom, our society is different. It is now a polytopic multicultural society and we recognise, and indeed the Preamble to the Act makes clear, that the standards of reasonable persons are the standards of an open and just multicultural society. Accordingly, where as here the conduct in question consists of the making of statements for a religious purpose, the question of whether it was engaged in *reasonably* for that purpose must be decided according to whether it would be so regarded by reasonable persons in general judged by the standards of an open and just multicultural society.[137]

In a multicultural society there will be a plurality of standards, but Nettle JA surmised that the reasonable members of such a society would be 'inclined to agree on the basics.'[138] What are these 'basics'? A key one is 'tolerance,' for an open and just multicultural society must be assumed to be 'a tolerant society.'[139] Another 'basic' discerned by the court is freedom, and so a reasonable person 'insists upon

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133 Ibid [91].
134 Ibid [92].
135 Ibid [93].
136 Ibid [94].
137 Ibid. See similarly Neave JA, ibid [197].
138 Ibid [95].
139 Ibid [96].

the right of each of its members to seek to persuade others to his or her point of view, even if it is anathema to them.'[140] Freedom, however, has its limits and, broadly speaking, these are set by how much reasonable members of a multicultural society can tolerate. 'Tolerance cuts both ways. Members of a tolerant society are as much entitled to expect tolerance as they are bound to extend it to each other.'[141] When those given the freedom to express their religious views do so in a manner that the hypothetical reasonable and tolerant person considers excessive, the limit has been reached. Unacceptable religious expression is that which the tolerant find intolerable. Open multicultural societies can tolerate much criticism of religion by adherents of one religion of another, 'even though to some and perhaps to most in society such criticisms may appear ill-informed or misconceived or ignorant or otherwise hurtful to adherents of the latter faith.'[142] But tolerance has its bounds: 'It is only when what is said is so ill-informed or misconceived or ignorant or so hurtful as to go beyond the bounds of what tolerance should accommodate that it may be regarded as unreasonable.'[143]

As a practical guide to the operation and scope of the law, these broad statements about the limits of tolerance are no help whatsoever. We might hope to know the limits of religious criticism *after* a tribunal has discerned the reactions of the hypothetical tolerant citizen, but not before then.

VI CONCLUSION

The *Catch the Fire* decision valiantly endeavoured to clarify the law but actually generated new uncertainties. We learn that critical and destructive statements about religious beliefs are acceptable, as are statements that offend or insult believers. It is only 'extreme' statements that incite hatred of religious persons or groups in third persons that matter. We also learn that predicting the outcome of this test is difficult, for the judges themselves could not agree that the statements before them were likely to have incited negative emotions. We now know that religious speech does not actually have to result in an audience feeling hatred or contempt, for it is enough that it is capable of stirring up hatred toward a religious group. If the 'natural and ordinary effect' of the words on 'reasonable' or 'ordinary' members of the target audience would be to stimulate hatred towards the believers in question, prima facie liability follows. Statements attacking beliefs but urging respect for the persons holding those beliefs, may be taken into account for their ameliorative effect, but only if they are genuine and not expressions of 'feigned concern'. We learn that the judges did not agree as to whether 'inaccurate' and 'unbalanced' presentations of religious beliefs and practice count against the religious speaker. To claim the statutory defence of conduct engaged in 'reasonably' and in 'good faith' for a genuine religious purpose we learn that the truth per se of the statements made is no defence. The focus instead is whether the hypothetical reasonable citizen in an open and just multicultural society would consider the speech excessive and beyond the bounds of tolerance. If so, then the speech is unlawful. There are more than enough grey areas here to make any religious speaker or writer think twice before launching into the public domain.

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[140] Ibid.
[141] Ibid.
[142] Ibid [98].
[143] Ibid.

It may be I am making far too much of the difficulties experienced by the courts in applying a religious vilification law. The *Catch the Fire* case may be atypical or it might simply represent the inevitable 'teething troubles' faced by any novel legal prohibition. It might be argued that a viable regime is still possible and a carefully circumscribed religious vilification law could be made to work and achieve some of the laudable aims of its supporters (in terms of fostering greater religious tolerance).[144] Thus, for example, the threshold for breach can be adjusted further and fixed sufficiently high to still permit the maximum degree of religious speech and religious liberty. The defences for genuine criticism might be further clarified to enable robust religious speech to occur. And the legislation could include a procedural filter to screen out the vexatious or frivolous claims. This last check has been incorporated into the law in the United Kingdom and Victoria. The UK's Racial and Religious Hatred Act states that no prosecution of the offence of inciting religious hatred may be commenced without the consent of the Attorney General.[145] Victoria's *Racial and Religious Tolerance Act* similarly requires the Director of Public Prosecutions give written consent prior to any prosecution for the criminal offence of serious religious vilification.[146] In response to concerns about unmeritorious civil claims,[147] the Victorian Act was amended in 2006 to permit the Tribunal to decline to grant leave to hear a complaint where, in its opinion, the complaint is 'frivolous, vexatious, misconceived or lacking in substance' or 'involves subject matter that would be more appropriately dealt with by another tribunal or a court.'[148]

However, reliance upon a procedural filter to limit the potentially acrimonious and broad sweep of the law is unsatisfactory. Attorney General approval, as Bennion argues, 'signals that Parliament is uneasy about creating the offence.'[149] Furthermore, the Attorney General will inevitably come under great pressure from religious groups when apparent public denigration of a group's religion takes place.[150] When the decision not to grant leave is made, such groups' expectations are likely to be dashed, leading in turn to further frustration and disillusionment.[151]

The hurdles to successful prosecution of a criminal suit can be ratcheted sufficiently high to minimise the practical impact of a religious vilification law. Speaking of Britain's law, Kay Goodall comments that the 2006 Act may be 'almost unenforceable' since 'The Lords have pruned this statute so hard they have left it a stump.'[152] If then one is left with an Act that is 'essentially symbolic'[153] one has to question whether the entire exercise has been worthwhile. Some believe so. Anthony Jeremy, for example, referring to the UK law, contends:

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144 Heinze, above n 48, 549-50, argues persuasively that the intractable uncertainty in hate speech bans is not 'essentially penumbral' and involving simply 'occasional hard cases at the periphery'. Rather, 'hate speech bans are not merely dubious at their outer limits. They are shot through to the core with contradictions which, far from expressing moral values, result in contempt for them. Nor can they be re-drafted to avoid that result.'

145 Section 29L.

146 Section 25(4).

147 These were voiced by Tribunal President Morris in *Fletcher v Salvation Army* [2005] VCAT 1523 [18].

148 Section 23A(4).

149 Bennion, above n 58, 36.

150 See Cumper, above n 39, 258.

151 See Ahdar and Leigh, above n 10, 384.

152 Goodall, above n 1, 113.

153 Ibid.

> The legislation serves an important purpose, which is to recognise and give support to groups in society who are afraid for their safety and integrity. Such laws serve to condemn and to denounce bias, prejudice and hatred unambiguously, and send a signal to potential offenders that society will punish such conduct severely. It is to be hoped that the mere existence of these laws will have a deterrent effect …[154]

Yet society can recognise and support religious minorities and express its disapproval of bias and prejudice in ways other than a potentially draconian law that stifles religious expression generally. The mere existence of such laws may indeed have a deterrent effect but it may be the wrong one. Some religionists may now be deterred from robustly arguing the merits of their faith.

Where the religious vilification law has 'bitten', its operation to date has revealed it to be a complex and unwieldy tool. Aside from all the interpretive uncertainties and the expense[155] of the *Catch the Fire* case, it is difficult to believe it has done much to enhance the climate of religious tolerance in Victoria. Relations between the Christian and Muslim communities had been strained for five years whilst the saga played itself out. Following settlement, and at the point of exhaustion and relief, some conciliatory and magnanimous words were uttered about 'goodwill' between the communities and them moving forward.[156] One can only hope so.

Soli Sorabjee, the Attorney-General of India, reflecting upon the experience of criminal hate speech laws in that nation, concluded that they operated to 'encourage intolerance, divisiveness and unreasonable interference with freedom of expression.' His prescription was clear: 'We need not more repressive laws but more free speech to combat bigotry and to promote tolerance.'[157] It may be difficult to identify the things that do work effectively to promote religious harmony and tolerance in society. But the things that clearly do not work are not so difficult to discern, and religious vilification laws fall into this category.

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[154] Jeremy, above n 22, 200.

[155] According to one report, the two pastors spent 'more than $500,000' on the case: 'Pastors settle "Vilifying Islam" Case', *CBN News.com*, 25 June 2007.

[156] Following settlement of the case, Pastor Nalliah stated that the mediation had 'brought two communities to a closer relationship – there was a lot of goodwill and a lot of shaking of hands.' Former Islamic Council President Yasser Soliman said he welcomed the pastor's comments and he stressed the importance of people 'talking directly to each other rather than talking about each other.' Turnbull, 'Church and Islamic council bury hatchet,' *The Australian* (Sydney), 25 June 2007.

[157] Quoted in *Religious Offences*, above n 6, [52]. See similarly Strossen, above n 23, 162 (original emphasis): 'the appropriate response to any speech with which one disagrees in a free society is not censorship but counterspeech – *more* speech, not *less.* Persuasion, not coercion, is the solution. Accordingly, the appropriate response to hate speech is also not to censor it, but to answer it.'