

Religion and the Secular State in Australia

I. SOCIAL CONTEXT

Australia is a predominantly Christian country, however, in recent years there has been a strong growth in groups that describe themselves as not having a religion and in religious minorities including Muslims, Hindus and Buddhists. At the 2006 census date, Christians represented 63.9 percent of the population, non-Christian believers represented 6.2 percent (corresponding to over 120 different religious denominations of 250 or more followers), and the remaining 30 percent either stated that they had no religion or declined to state their religion. Forty-four and one-half percent of the Australian population reported that their religion was either Anglican or Catholic, whilst the largest non-Christian religion represented was Buddhism, with 2.1 percent of the population.¹

II. THEORETICAL AND SCHOLARLY CONTEXT

Australia became a federated nation in 1901 with the coming into effect of the Australian Constitution. Since that time (and indeed for most of the period of white colonization), Australia has been a broadly secular State with Christian influences on law and politics. Section 116 of the Constitution (discussed further below) prohibits the Commonwealth level of government from establishing a religion and, despite no equivalent existing in most State constitutions, no State government has an established religion or is likely to do so. Nevertheless, Christianity remains the dominant religion and elements of Australia's Christian heritage can be seen in areas such as the reciting of Christian prayers at the opening of parliament² and the maintenance of Sunday as the most common day of rest.³

Australia is not a particularly religious country compared to many and religion has rarely played a critical role in public life or debates. While religion has played a relatively muted role in Australian public life, several questions have attracted ongoing attention and debate. The first is what role, if any, religious arguments, commitments or values have in public, political life. The second is the extent to which government should contribute financially to religious institutions such as schools, hospitals and welfare agencies and the third is the extent to which those institutions should be exempt from ordinary laws, particularly non-discrimination and human rights laws.⁴ While religious arguments and commitments have never been wholly absent from Australian political and public life, they have rarely played the focal role that they have in some other countries. Catholic-Protestant sectarianism played a divisive role in Australian public life for a period⁵ and traditionally the Australian Labor Party has enjoyed greater support from

CAROLYN EVANS is Deputy Director of the Center for Comparative Constitutional Studies at Melbourne Law School, University of Melbourne. She is also a barrister and solicitor of the Supreme Court of Victoria. In 2010, Prof. Evans was awarded a Fulbright Senior Scholarship as a Visiting Fellow at American and Emory Universities to examine questions of comparative religious freedom. She is a member of the Academic Advisory Board of the International Center for Law and Religion Studies, Brigham Young University (Provo, Utah). She thanks Duncan Kauffman for his considerable research assistance with this paper.

1. Australian Bureau of Statistics, 2006 <http://www.abs.gov.au/websitedbs/D3310114.nsf/Home/census?opendocument#from-banner=GT>. See also David Marr, "What we Believe," *The Age* (Melbourne), 21, 24.

2. Standing Order 38 of the House of Representatives (the lower house of the Australian Federal Parliament) provides that on taking the Chair at the beginning of each sitting, the Speaker shall read two designated prayers including the Lord's Prayer. Senate Standing Order 50 imposes an identical requirement on the President of the Senate (the upper house).

3. Although not strict sabbatical maintenance as compared to earlier periods of Australian history. Public holidays also still include key Christian holy days such as Christmas, Good Friday and Easter but there are no public holidays relating to other religions.

4. This third issue is dealt with in more detail under heading VI below.

5. See, e.g., Clive Bean, "The Forgotten Cleavage? Religion and Politics in Australia" (1999) 32 *Canadian*

Catholics and the conservative Liberal Party has enjoyed greater support from Protestants.⁶ Sectarianism, however, has rapidly declined in Australia and the distinctions between the political parties in religious terms are thus less pronounced.⁷ For several decades, Australian politicians rarely mentioned their own religion in public life or raised religious arguments for or against particular policies or in order to attract votes.

Some shift in the generally secular approach to politics occurred with the coming to power of the conservative Howard government in 1996, which actively sought greater engagement with Christian groups and increased funding to religious groups to carry out public functions (such as education, health provision, welfare). The Howard government more actively drew on religious (particularly Christian) language and arguments in public debates, and even appointed a bishop to the position of Governor-General.

Before the last election, in which the Labor Party was elected to government, Labor leader Kevin Rudd wrote an influential piece on Dietrich Bonhoeffer that drew attention to Rudd's own religious convictions and their importance to his political philosophy.⁸ Since being elected Prime Minister, Mr. Rudd has continued to refer to Christian principles and his own faith from time to time⁹ in a way that has been usual in Australian politics before the Howard government. This approach seeks to demonstrate a connection between progressive politics and Christianity rather than ceding the territory of religious influence to the conservative parties.¹⁰ The role of religion in public life is still relatively muted, however, and has certainly not reached the levels of the "culture wars" in the United States. Many have criticized the increased religiosity in Australian political and public life because they see this as undermining the secularity of the public square in Australia and as having the potential to re-ignite sectarianism¹¹ or (perhaps more plausibly) to increase tensions between people of different religious faiths and those who have no religion.¹² Those critical of the role of religion in public life have also been concerned at the growing government funding given to organizations run by religion.¹³ For example, there have been groups who have argued for a long time that governments should not be involved in funding religious schools,¹⁴ and others who have expressed concern about religious organizations receiving subsidies for running large hospitals.¹⁵ A

Journal of Political Science 551; Ross Fitzgerald, Adam Carr and William Dealy, *The Pope's battalions: Santamaria, Catholicism and the Labor Split* (1st ed., 2003).

6. Matthew Buchanan, "Catholic Politicians Blessed with Rise to Top of Parties," *Sydney Morning Herald* (Sydney), 5 December 2009.

7. Marion Maddox, *God Under Howard: The Rise of the Religious Right in Australian Politics* (1st ed., 2005); Amanda Lohrey, "Voting for Jesus: Christianity and Politics in Australia" (2006) 22 *Quarterly Essay* 1; Anna Crabb, "Invoking Religion in Australian Politics" (2009) 44 *Australian Journal of Political Science* 259; Rodney Smith, "How Would Jesus Vote? The Churches and the Election of the Rudd Government" (2009) 44 *Australian Journal of Political Science* 613; Max Wallace, *The Purple Economy: Supernatural Charities, Tax and the State* (1st ed., 2007); John Warhurst, "The Catholic Lobby: Structures, Policy Styles and Religious Networks" (2008) 67 *Australian Journal of Public Administration* 213.

8. Kevin Rudd, "Faith in Politics" (2006) 17 *The Monthly* 22.

9. See, e.g., Chris Uhlmann, "St Kevin's Halo May Choke Him," *The Australian* (Sydney), 24 October 2009; Janet Albrechtsen, "PM Proves a Convert to The Politics of Faith," *The Australian* (Sydney), 15 July 2009.

10. See, e.g., ABC Television, "Kevin Rudd: The God Factor," *Compass*, 8 May 2005, available at <http://www.abc.net.au/compass/s1362997.htm>; ABC Radio National, "Kevin Rudd: Bonhoeffer and 'the political orchestration of organised Christianity,'" *The Religion Report*, 4 October 2006 available at <http://www.abc.net.au/rn/religionreport/stories/2006/1755084.htm>.

11. See, e.g., Judith Brett, *Australian Liberals and the Moral Middle Class: From Alfred Deakin to John Howard* (1st ed., 2003) 54, referring to Editorial, *The Vigilant* (Melbourne), 25 June 1925; Editorial, "Leave God Alone," *The Australian* (Sydney), 10 November 2009.

12. See, e.g., Atheist Foundation of Australia, "Submission to HREOC Discussion on Freedom of Religion and Belief in the 21st Century in Australia" (20 October 2008), available at http://www.hreoc.gov.au/frb/submissions/Sub032.Atheist_Foundation.doc.

13. CRU; Adele Ferguson, "God's Business," *Business Review Weekly*, 29 June 2006, at <http://blogs.theage.com.au/business/executivestyle/managementline/archives/brw2906p042-046.pdf>; Humanist Society of Queensland, "Submission to HREOC Discussion on Freedom of Religion and Belief in the 21st Century" http://www.hreoc.gov.au/frb/submissions/Sub981.Humanist_Society_of_Queensland.doc.

14. A-G (Vic) ex rel. Black v. Commonwealth (1981) 146 CLR 559.

15. See, e.g., Leslie Cannold, "Women Are Being Failed By Our Hospitals," *The Age* (Melbourne) 3 November 2009; Angela Shanahan, "Sickness That Curbs Religious Freedom," *The Australian* (Sydney) 31

number of people currently argue that institutions run by religious entities that rely on exemptions from discrimination law should not be eligible for government funding.¹⁶ However, governments have continued to fund religious organizations to operate in areas such as schools, hospitals, and welfare agencies as well as allowing many of them exemptions from elements of non-discrimination law.¹⁷

In a rather peculiar turn, religious groups in Australia have received increasing amounts of government funding and have taken a more prominent place in the provision of social welfare and in politics over the last ten years. At the same time the number of Australians who describe themselves as religious has diminished significantly and religion has started to play a less important role in the private lives of most Australians. Most of these changes have played out, however, at the social and political level with little involvement from the courts or the legal system and with little reference to Australia's international obligations to protect religious freedom. This is in part because the formal legal protection of religious freedom in Australia is comparatively weak.

III. CONSTITUTIONAL CONTEXT

A. *The Australian Constitution*

Unlike most modern constitutions, the Australian Constitution does not contain a bill of rights. It does, however, include several provisions that protect particular rights to some degree. One of these is section 116 which reads: "The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth."¹⁸

Section 116 was based on the religion clauses of the United States Constitution,¹⁸ although it modified its wording somewhat with respect to the non-establishment and religious freedom clauses, and added prohibitions on imposing religious observances or religious tests for public offices. While it appears to provide a relative robust protection for religious freedom, the section has a number of limitations. First, it applies only to the Commonwealth parliament and not to State parliaments.¹⁹ As States have responsibility for areas such as education, health, and aspects of welfare, this is a significant limitation. Second, section 116 only prohibits the Commonwealth from making a "law" prohibiting free exercise, establishing a religion, etc. It is not a free standing *right* of an individual, but a *limitation* on the legislative power of the Commonwealth Parliament. Consequently, the right to religious freedom cannot be asserted to protect an individual against actions by private individuals or organizations. Nor does section 116 create a positive obligation on the Commonwealth to take action to protect religious freedom; section 116 simply prohibits the Commonwealth from enacting certain laws.

Finally, the fact that only law-making is prohibited means that executive actions are only imperfectly covered by section 116. When a member of the executive acts under a statutory power in such a way as to establish a religion or to prohibit free exercise then that executive action may be invalid. It is not invalid as directly breaching s 116 (because

October 2009; Senator Lyn Allison, "Does God Have a Place In Government?" (Speech delivered at the Australian National Secular Association, the Council of Australian Humanist Societies, and the Rationalist Society of Australia, Separating Church and State Conference, Melbourne, 17 June 2006), available at http://www.democrats.org.au/speeches/index.htm?speech_id=1861.

16. See, e.g., Margaret Thornton, "Balancing Religion and Rights: The Case against Discrimination," *The Age* (Melbourne), 4 October 2009; ABC Radio National, "Religion and The Law," *The Law Report*, 17 Nov. 2009.

17. Institutions run by religions have reasonably broad exemptions from non-discrimination laws in many Australian jurisdictions. This is discussed in more detail under heading 3.

18. The most comprehensive account of why and how s 116 was included is in Richard Ely, *Unto God and Caesar: Religious Issues in the Emerging Commonwealth 1891–1906* (1976). See also Stephen McLeish, "Making Sense of Religion and the Constitution: A Fresh Start for Section 116" (1992) 18 *Monash University Law Review* 207, 213–21.

19. See, e.g., *Grace Bible Church v. Reedman* (1984) 36 SASR 376, 379 (Zelling J) ("Grace Bible Church Case").

s 116 only deals with laws). Instead, it is invalid because the enabling statute cannot authorize action that is in breach of s 116 in most (although not necessarily all) circumstances.²⁰ However, when executive power is prerogative or common law power, then section 116 may not apply to restrict executive action.

B. State and Territorial Protection of Religious Freedom

There are three States or Territories in Australia in which religious freedom is explicitly protected by law. Since 1934, section 46 of the Tasmanian *Constitution Act 1934* (TAS), has protected “freedom of conscience and the free profession and practice of religion” and prohibits any requirement to take an oath or pass a religious test in order to hold public office. It has never been the subject of litigation.

More recently, both the Australian Capital Territory and Victoria have introduced human rights Acts: the *Human Rights Act 2004* (ACT) (“the ACT Act”) and the *Charter of Human Rights and Responsibilities Act 2006* (VIC) (“the Victorian Charter”). These Acts require courts, where possible, to interpret all legislation consistently with the human rights protected by the Acts.²¹ Where that is not possible, certain courts can make declarations that a provision cannot be interpreted compatibly with human rights.²² This does not invalidate the law (as would a constitutional bill of rights), but it does require an explanation to be given to parliament as to what response the government has to the declaration.²³ In addition, it is unlawful for public authorities to breach rights²⁴ and some remedies are available when they do so.²⁵

Both the Victorian Charter and the ACT Act prohibit discrimination on the basis of religion (among other characteristics) and also set out a right to freedom of religion or belief, subject to the general limitation provision in s 7, which provides that “[a] human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom,” taking into account certain listed factors. To date there have been no court decisions regarding s 14 of the Victorian Charter or s 14 of the ACT Act.²⁶

IV. LEGAL CONTEXT

A. The Definition of Religion under the Constitution

The Australian courts have been relatively generous in defining the scope of religious freedom. In an early Australian case, *Adelaide Company of Jehovah's Witnesses Inc. v. Commonwealth* (“the *Jehovah's Witnesses Case*”), Latham CJ referred to the problems of defining religion when he noted that: “It would be difficult, if not impossible, to devise a definition of religion which would satisfy the adherents of all the many and various

20. *A-G (Vic) ex rel. Black v. Commonwealth* (1981) 146 CLR 559, 580–1 (Barwick CJ) (“the *DOGS Case*”). See also *Kruger v. Commonwealth* (1997) 190 CLR 1, 86 (Toohey J), 131 (Gaudron J) (“*Kruger*”); *Minister for Immigration and Ethnic Affairs v. Lebanese Moslem Association* (1987) 17 FCR 373, 379 (Jackson J).

21. *Human Rights Act 2004* (ACT) s 30: “So far as it is possible to do so consistently with its purpose, a Territory law must be interpreted in a way that is compatible with human rights.” *Charter of Human Rights and Responsibilities Act 2006* (VIC) s 32(1): “So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.”

22. *Human Rights Act 2004* (ACT) s 32; *Charter of Human Rights and Responsibilities Act 2006* (VIC) s 36.

23. *Human Rights Act 2004* (ACT) s 33; *Charter of Human Rights and Responsibilities Act 2006* (VIC) s 37.

24. *Human Rights Act 2004* (ACT) s 40B(1); *Charter of Human Rights and Responsibilities Act 2006* (VIC) s 38(1).

25. *Human Rights Act 2004* (ACT) s 40C(4); *Charter of Human Rights and Responsibilities Act 2006* (VIC) s 39. In both cases, however, it is very difficult to obtain damages for breach of a right protected under the Act.

26. Although s 14 of the Victorian Charter was raised in a disciplinary hearing regarding a dentist who told a patient suffering from a mental illness that she was afflicted by evil spirits and that she should attend his church to be cured. The reliance on s 14 was unsuccessful, in part because the Victorian Charter was not in force at the time the original decision was made. See *Dental Practitioners Board of Victoria v. Gardner (Occupational and Business Regulation)* [2008] VCAT 908 (Unreported, Judge Harbison, Members Dickinson and Keith, 14 May 2008).

religions which exist, or have existed, in the world.”²⁷ His Honor also noted that s 116 “proclaims not only the principle of toleration of all religions, but also the principle of toleration of absence of religion.”²⁸ While no consensus has been reached in the cases over the definition of religion, the definition of religion that has the widest usage is that set out by the Australian High Court in the *Church of the New Faith v. Commissioner of Pay-roll Tax (Vic)* (“the *Scientology Case*”)²⁹ in the context of a legislative provision giving a taxation exemption to “religious institutions.”³⁰

The Church of the New Faith, more commonly known as Scientologists, challenged the decision of the Commissioner of Pay-roll Tax who had held that Scientology was not a religion for the purposes of this exemption. The justices in the case, however, made clear that they intended their discussion of the definition of religion under the legislation to have a broader application, including to the constitutional definition of religion.³¹ In what is generally considered to be the leading judgment, Mason ACJ and Brennan J set out a two-part test. A religion must consist of “first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief.”³² A religion was not to be treated as fraudulent and outside the category of religion simply because there are allegations that the founder set it up as a “sham” if there is evidence of the sincerity of believers.³³ On this basis, the Scientologists were held to be a religion.

B. Free Exercise of Religion

While the courts have defined religion quite broadly, they have been far narrower in defining the type of legislation that would impermissibly violate the free exercise or establishment clauses. The tone for later cases was set in an early High Court case where Griffith CJ and Barton J dealt dismissively with an appellant who refused to attend the training required under the *Defence Act 1903* (Cth) on the basis that his Christian beliefs required him to be a conscientious objector.³⁴ The justices dealt with the case almost contemptuously; with Griffith CJ describing the appellant’s position as “absurd”³⁵ and Barton J declaring that the case was “as thin as anything of the kind that has come before us.”³⁶ At other times, courts used similar reasoning to dismiss a claim by a man who refused, on the basis of religious conviction, to pay the portion of his taxation that would be used to provide for abortions³⁷ and to dismiss a claim that a legal obligation to reveal the contents of a religious confession was a breach of s 116.³⁸

The courts have recognized, however, that the protection of s 116 extends beyond beliefs to encompass some forms of conduct.³⁹ Mason ACJ and Brennan J in the *Scientology Case* recognized that religion was more than a set of theological principles or a belief in the supernatural: “Thus religion encompasses conduct, no less than belief.”⁴⁰

27. (1943) 67 CLR 116, 123.

28. *Id.*

29. (1983) 154 CLR 120.

30. *Pay-roll Tax Act 1971* (VIC) s 10. The factual background to the case is outlined in the *Scientology Case* (1983) 154 CLR 120, 128–9 (Mason ACJ and Brennan J).

31. *Scientology Case* (1983) 154 CLR 120, 130 (Mason ACJ and Brennan J).

32. *Id.* at 136.

33. *Id.* at 141. See also Wilson and Deane JJ at 170, who held that it is irrelevant to the determination of religious status whether members are “gullible or misguided or, indeed, that they be or have been deliberately misled or exploited.”

34. *Defence Act 1903* (Cth) s 143(3).

35. *Krygger v. Williams* (1912) 15 CLR 366, 371.

36. *Id.* at 373.

37. *Daniels v. Deputy Commissioner of Taxation* [2007] SASC 431 (Unreported, DeBelle, Sulan and Vanstone JJ, 7 December 2007) [12] (DeBelle J).

38. *SDW v. Church of Jesus Christ of Latter-day Saints* (2008) 222 FLR 84, 94–5 [69]–[76] (Simpson J). This claim was described by Simpson J (at 95 [76]) as “devoid of merit and entirely misconceived” with little reasoning, despite the potentially serious implications of the decision for certain religious groups.

39. Indeed, given that the phrase “free exercise” is used in s 116, such a conclusion would have been difficult to avoid.

40. *Scientology Case* (1983) 154 CLR 120, 135.

Their Honors described religious action in broad terms, noting that in theistic religions it will normally include some ritual observances but that, more broadly, religious actions are “[w]hat man feels constrained to do or to abstain from doing because of his faith in the supernatural.”⁴¹ In order to prove that the canons of conduct that a person has set for him or herself fall within the immunity granted to religion, the believer must show a “real connection” between the conduct and the belief in the supernatural.⁴²

Despite this recognition, no successful claim has been made under the free exercise clause. Part of the explanation for this is that religious freedom is generally well respected in Australia. In addition, however, a very restrictive test has been adopted by the High Court, that essentially requires that it be the purpose of the legislation to restrict religious freedom and that this purpose be evident on the face of the legislation in most cases. The test set out by the majority in the *Kruger* case, which is broadly consistent with previous case-law, is that only a law with the purpose of “achieving an object which s 116 forbids” falls foul of the constitutional provision.⁴³ It is not enough for a plaintiff to show that the *effect* of the law is to restrict or even seriously undermine their capacity to freely exercise their religion of choice.⁴⁴ It is thus fairly clear that a law that has the effect of prohibiting or restricting free exercise (and perhaps was even motivated in part by this end), but that does not reveal such a purpose on its face, is unlikely to be struck down for inconsistency with s 116.

C. *Limitations on the Right to Free Exercise of Religion*

All of the justices who have considered the issue in Australia have recognized that the right to practice a religion is not absolute. The High Court has held that not every interference with religion is a breach of s 116, but only those that are, in the words of Latham CJ in the *Jehovah’s Witnesses Case*, an “undue infringement of religious freedom.”⁴⁵ The restraints placed on religious freedom have, at times, proved very onerous without a breaching s 116, including the declaration that the *Jehovah’s Witnesses* were a group “prejudicial to the defence of the Commonwealth or the efficient prosecution of the [Second World] war.” This declaration led to an officer of the Commonwealth taking possession of the Kingdom Hall in Adelaide (in which the *Jehovah’s Witnesses* met for religious purposes) and refusing to allow the Adelaide Company of *Jehovah’s Witnesses* to use it. While the court found parts of the regulations to be beyond power for other reasons, it unanimously found that they did not breach section 116.⁴⁶ In general, the courts have been very sympathetic to government claims about the social need to limit religious freedom.

D. *Non-Establishment of Religion*

The non-establishment clause of s 116 played little role in public life until a challenge to the constitutionality of a Commonwealth appropriation for education in the early 1980s.⁴⁷ In *Attorney-General (Vic) ex rel. Black v. Commonwealth*,⁴⁸ there was a challenge to the provision of funds by the Commonwealth to the States for use in subsidizing religious schools. The majority of justices (6:1) rejected the plaintiffs’ argument that Australia should follow the United States case-law on establishment. Rather

41. *Id.*

42. *Id.*

43. *Id.* at 40 (Brennan CJ). See also at 60–1 (Dawson J), 86 (Toohey J), 160–161 (Gummow J).

44. *Id.* at 86.

45. (1943) 67 CLR 116, 131.

46. *Jehovah’s Witnesses Case* (1943) 67 CLR 116, 132–4, 147 (Latham CJ), 149 (Rich J), 155 (Starke J), 156–7 (McTierenan J), 160–1 (Williams J). The Company of *Jehovah’s Witnesses* in Adelaide at the time had only around 200–250 members: at 117.

47. See generally Joshua Puls, “The Wall of Separation: Section 116, the First Amendment and Constitutional Religious Guarantees” (1998) 26 *Federal Law Review* 139, 143–5. See also a very prescient article, P H Lane, “Commonwealth Reimbursements for Fees at Non State Schools” (1964) 38 *Australian Law Journal* 130.

48. (1981) 146 CLR 559.

than perceiving the clause as creating a right that required a broad interpretation, they held that it was a limitation on governmental power⁴⁹ and was therefore not to be construed liberally. Barwick CJ held that the word “for” required that a law must have the objective of establishment “as its express and, as I think, single purpose.” Each of the justices came to slightly different definitions of establishment. Barwick CJ held that it involves “the identification of the religion with the civil authority so as to involve the citizen in a duty to maintain it and the obligation of, in this case the Commonwealth, to patronize, protect and promote the established religion. In other words, establishing a religion involves its adoption as an institution of the Commonwealth.”⁵⁰ Other justices came to similar conclusions.⁵¹ While the details of each definition differ slightly, the majority justices were in no doubt that the indirect (and almost certainly also direct) funding of religious schools fell far short of what was required for establishment. Given the very high threshold set by the Court, it is highly unlikely that the establishment clause will play much further role in regulating church-state relations.⁵²

While the establishment clause of the Constitution and the case-law interpreting it preclude the possibility of a single religion being elevated to the status of a fully established church, the Constitution leaves open a wide range of possible relationships between the Commonwealth and religions. A basic level of secularity is required, but many different varieties of secularism (from a fairly high degree of entanglement with religion to a strict separation) are possible within the parameters of the constitutional requirements.

E. Common Law

Australia is a common law country and thus some protection for rights can be found in case-law, although such protection can always be abolished by an Act of Parliament. While the issue is not completely settled, the common law quite likely does not protect religious freedom. In the *Grace Bible Church Case*,⁵³ the appellant (an unregistered, non-government Christian school) argued that there was “an inalienable right to religious freedom and that that freedom cannot be abridged by any statute of the South Australian Parliament.”⁵⁴ The Full Court of the Supreme Court of South Australia unanimously dismissed the appeal, with Zelling J commenting that such a claim would require “a complete rewriting of history,” given the numerous examples of intersection between law, government and religion in the United Kingdom at the time at which the common law was received in Australia.⁵⁵ White J likewise concluded that “the common law has never contained a fundamental guarantee of the inalienable right of religious freedom and expression.”⁵⁶

More recently, however, the Full Court of the Federal Court described “freedom of religious belief and expression” as an “important freedom generally accepted in Australian society,” reflected in s 116 of the *Australian Constitution* and art 18 of the *International Covenant on Civil and Political Rights*.⁵⁷ This implies that religious freedom has some status in the common law (in the context of this case, as a reasonable basis on which freedom of political communication might be limited) but does not amount to the recognition of religious freedom as a right protected by the common law.⁵⁸

49. *Id.* at 603 (Gibbs J), 605 (Stephen J), 652–3 (Wilson J).

50. *Id.* at 582.

51. *Id.* at 597, 616, 653, 605–6, 635.

52. For a critique of the decision, see Wojciech Sadurski, “Neutrality of Law towards Religion” (1990) 12 *Sydney Law Review* 420, 447–51.

53. (1984) 36 SASR 376.

54. *Id.* at 377.

55. *Id.* at 379.

56. *Id.* at 388.

57. *Evans v. New South Wales* (2008) 168 FCR 576, 596 [79] (French, Branson and Stone JJ).

58. See also *Aboriginal Legal Rights Movement Inc. v. South Australia [No 1]* (1995) 64 SASR 551 for a discussion of these issues.

V. THE STATE AND RELIGIOUS AUTONOMY AND RELIGIOUS AUTONOMY AND THE STATE

In Australia there is a reasonably high degree of formal separation between religious groups and the State. The government does not usually attempt to interfere with the choice of religious leadership, mode of worship, or teachings of religious organizations.⁵⁹ Individuals are free to leave or change their current religion without any notification to or permissions by the government. Australians do not register their religion and the question on the census about religious affiliations is optional.⁶⁰ There are no government departments that are devoted to the regulation of religious affairs, although the Commonwealth and State governments generally have some agencies or bodies that are dedicated to good relationships between people of a variety of religious, cultural, racial and ethnic backgrounds.⁶¹

Similarly, religions play no formal role in government or with respect to issues such as the granting of permission to other religious groups to establish themselves or places of worship and there is no established church or limitations on establishing a new religion. There are some government consultative bodies that include religious representatives⁶² and, as with any other social group, religious groups are able to lobby governments with respect to issues that are important to them. Religious groups have played a prominent role in recent public debates, including the national debate over whether Australia should have a Bill of Rights.⁶³ Whatever their political influence may be, at a formal, legal level they are in no superior or inferior position to any other group of likeminded citizens.

VI. LEGAL REGULATION OF RELIGION AS A SOCIAL PHENOMENON

With respect to the legal regulation of most aspects of religion as a social phenomenon, legal regulation neither places heavier onus on religious institutions as compared to other groups, nor does it give exemptions for religious groups to most laws. For example, in the area of zoning, religious groups are obliged to go through the same planning application process as anyone else. Applications to build a place of worship may be rejected for secular reasons (e.g., lack of car-parking space or noise) but not for religious reasons (e.g., the religion is considered heretical or is an unpopular minority).⁶⁴

There is no general or constitutional exemption from ordinary laws for religions. As

59. However, some of these areas may be impacted by ordinary law, e.g. immigration laws may prevent a religious leader from entering the country or zoning laws may interfere with the building of a place of worship. Accordingly, in these cases, the reason for such a rejection must be in terms of the ordinary law rather than religious teachings or official government approval or disapproval of the religion in question.

60. Australian Bureau of Statistics, *Perspectives on Migrants, 2007* (ABS Statistics Series 3416.0, released 25 February 2008), available at <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/3416.0Main%20Features22007>.

61. At the federal level, the relevant department is the Department of Immigration and Citizenship (“DIAC”; <http://www.immi.gov.au>), which administers the Diverse Australia Program (<http://www.harmony.gov.au>). A second relevant statutory agency is the Australian Human Rights Commission, formerly the Human Rights and Equal Opportunity Commission (available at <http://www.hreoc.gov.au>).

62. For example, following the London bombings, in September 2005 the previous Federal Government created a Muslim Community Reference Group (MCRG) which was given a 12 month term and completed its Final Report in September 2006. See Muslim Community Reference Group (MCRG), *Building on Social Cohesion, Harmony and Security, (2006)* http://www.immi.gov.au/living-in-australia/a-diverse-australia/mcrg_report.pdf. The present Federal Government is considering re-establishing the group. See Richard Kerbaj, “Imams Want Role in Recast Muslim Body,” *The Australian* (Sydney), 12 March 2008, at <http://www.theaustralian.com.au/news/imams-want-role-in-recast-muslim-body/story-e6fig6no-111115774332>.

63. See, e.g., Australian Bahá’í Community, “Submission to National Human Rights Consultation” (June 2009); Anglican Church of Australia General Synod, “Human Rights Consultation: Submission of the General Synod Standing Committee of the Anglican Church of Australia” (14 June 2009); Australia/ Israel & Jewish Affairs Council, “Submission to the National Human Rights Consultation”; Australian Catholic Bishops Conference, “Submission to the National Human Rights Consultation” (June 2009), all available at <http://www.humanrightsconsultation.gov.au/www/nhrcc/submissions.nsf/category>.

64. There is reason, however, to believe that sometimes formally neutral planning decisions hide some degree of religious discrimination. There have been public protests about the building of mosques in several parts of Australia, for example, and while public hostility towards Muslims was not formally taken into account by decision-making bodies, it is not clear what role such hostility may have played in the outcomes in such cases.

Griffith CJ put it in the case of a conscientious objector to military service: To require a man to do a thing which has nothing at all to do with religion is not prohibiting him from a free exercise of religion. It may be that a law requiring a man to do an act which his religion forbids would be objectionable on moral grounds, but it does not come within the prohibition of sec. 116, and the justification for a refusal to obey a law of that kind must be found elsewhere. The constitutional objection entirely fails.⁶⁵ However, while there is no general exemption for religious beliefs or conscientious objection to Australian laws, a number of laws give particular exemptions for religious groups. For example, in the state of New South Wales slaughter in accordance with religious precepts is a defense to animal cruelty legislation.⁶⁶ At a federal level, ministers of religion, theological students and persons whose conscientious beliefs do not allow them to participate in war or war-like operations are exempted from compulsory service in time of war.⁶⁷

The most contentious area of exemptions for religious bodies in Australia in recent years has been with respect to non-discrimination laws. Australia has non-discrimination laws at Commonwealth, State and Territory level. These laws prohibit discrimination on a number of bases including race, ethnicity, sex, sexual orientation, marital status, and pregnancy. Most Australian jurisdictions also prohibit discrimination on the basis of religion, but the main Commonwealth non-discrimination laws do not do so and neither do the laws of New South Wales (the largest Australian State) and South Australia.⁶⁸

Australian non-discrimination laws give certain exemptions for religious bodies to discriminate on at least some bases (including sex, sexual orientation and religion) if they meet certain pre-conditions. It is these exemptions that allow, for example, religious schools to give preference to co-religionists in enrollment or some religious employers to discriminate against same-sex couples in employment. The precise scope of exemptions for religious organizations and individuals from non-discrimination law differs from jurisdiction to jurisdiction.

At the Commonwealth level, for example, under the *Sex Discrimination Act 1984* (Cth) there are a number of religiously based exemptions. For example, in relation to accommodation, discrimination against a person on the basis of that “person’s sex, marital status, pregnancy or potential pregnancy” is unlawful, but an exemption is given for “accommodation provided by a religious body.”⁶⁹ There are also several more general exemptions for religious organizations from many of the prohibitions on discrimination. Thus, the prohibition of discrimination does not apply to the training, ordination or appointment of priests, religious ministers and members of religious orders, or those involved in religious observances.⁷⁰ This is relatively confined. More general, however, is the exemption in s 37(d) for “any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.”⁷¹

There are also particular exemptions for discrimination by a person in the context of “an educational institution that is conducted in accordance with the doctrines, tenets,

65. *Krygger v. Williams* 1912 15 CLR 366, 369 (Griffith CJ). Barton J also held, “the *Defence Act* is not a law prohibiting the free exercise of the appellant’s religion”: at 372.

66. *Prevention of Cruelty to Animals Act 1979* (NSW) s 24(1)(c)(i) provides for a defense to a charge under that Act where the slaughter accords with the precepts of the Jewish religion or any other religion prescribed for the purposes of that section. The defense has not yet been extended to any other religions: *Prevention of Cruelty to Animals (General) Regulation 2006* (NSW).

67. *Defence Act 1903* (Cth) s 61A(1)(d), (e), (f), (g), (h), (i). At present, Australia does not have conscription to the armed forces and thus these exemptions are practically irrelevant. However, under s 60 of the *Defence Act 1903* (Cth) the Governor-General can make a proclamation, with the approval of each House of Parliament, in order to bring a scheme of conscription into effect.

68. New South Wales Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report No 92 (1999). South Australian Attorney-General’s Department, *Discussion Paper: Proposal for a New Law against Religious Discrimination and Vilification* (2002).

69. *Sex Discrimination Act 1984* (Cth) s 23.

70. *Sex Discrimination Act 1984* (Cth) s 37(a)–(c).

71. *Sex Discrimination Act 1984* (Cth) s 37(d).

beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.”⁷² Voluntary organizations are also exempt, both with respect to membership and provision of services.⁷³ Various state laws also give similar exemptions. A recent Victorian parliamentary inquiry into the current exemptions to the non-discrimination laws generated significant controversy and many religious groups made submissions to the inquiry, strongly opposing any reduction in the current exemptions (and in some cases requesting further exemptions). The Attorney-General preempted the results of the inquiry by guaranteeing the continued existence of most of the current exemptions for religious organizations.⁷⁴

VII. STATE FINANCIAL SUPPORT FOR RELIGION

As discussed with respect to the constitutional challenge to government subsidies of religious schools, there is no prohibition on state funding of religious organizations unless this is part of an establishment of a religion (and the threshold for showing that there has been an establishment is very high). Thus, governments subsidize a wide variety of activities operated by religious groups, including schools, hospitals and welfare agencies. Some details of the funding of religious schools appear below and demonstrate the extent of government financial subsidies for religious organizations. In most cases, organizations that accept government funding must comply with certain terms and conditions for doing so, some of which may limit their autonomy. For example, agencies that receive funding for the provision of some forms of welfare are contractually bound to comply fully with discrimination laws and religious schools must reach certain educational standards. In other areas, however, government funding flows to institutions run by religious organizations that use their exemptions from non-discrimination laws and for which other forms of special provision are made (e.g., religious hospitals are not required to provide contraception or terminations of pregnancies if to do so breaches their religious conscience).

The financial benefits provided to religious institutions tend to be provided on a formally non-discriminatory basis as between majority and minority religions, e.g., there are Christian, Muslim and Jewish schools that are funded by government. Given the very small numbers of non-Christian religions, however, most of the funding to religious organizations flows to Christian groups. There has been relatively little public debate about how this funding should flow as between religious groups or whether it is problematic for those from one religion to be forced to pay for services provided by another religion through the tax system.⁷⁵ Taxation law also gives religious institutions substantial benefits. All religions that fulfill the constitutional definition of religion above are entitled to these benefits. The income of religious institutions is exempt from federal income tax,⁷⁶ and fringe benefits provided by religious institutions to religious practitioners are exempt from fringe benefits tax.⁷⁷ Donations to religious organizations are tax deductible.⁷⁸ Land held by a religious body and used for religious purposes is

72. *Sex Discrimination Act 1984* (Cth) s 38.

73. *Sex Discrimination Act 1984* (Cth) s 39.

74. Hon Rob Hulls, Attorney General of Victoria, “Religious Freedom to be Protected under Equal Opportunity Changes” (Press Release, 27 September 2009).

75. As is often the case in Australia, religious schools are something of an exception to this. One of the concerns of those who brought a constitutional challenge to the subsidization of religious schools was the dominance of this sector by Catholic schools (indeed, anti-Catholicism appeared to be one motivating factor for this group). Similarly, there is some public debate about why those whose children attend secular public schools should be forced to subsidize the education of those at religious schools. For now, however, it appears that the public debate has been won by religious groups who claim that they should not be forced to both pay taxes to support the secular state school system and provide the full cost of schooling their children in private religious schools. (While these schools are subsidized, they receive less total government funding per student than religious schools.)

76. *Income Tax Assessment Act 1997* (Cth) s 50–5.

77. *Fringe Benefits Tax Assessment Act 1986* (Cth) ss 57, 58T, 58G(2).

78. *Income Tax Assessment Act 1997* (Cth) s 30–17.

exempt from state land tax in all Australian states.⁷⁹ Finally, services supplied by a religious institution which are integral to the practice of that religion are exempt from goods and services tax (“GST”).⁸⁰

VIII. CIVIL LEGAL EFFECTS OF RELIGIOUS ACTS

A. Marriage

The secular law in Australia gives limited recognition to certain religious acts and legal rulings. For example, the Marriage Act 1961 (Cth) governs the legal recognition of marriage in Australia. Part IV Div 1 of that Act defines three categories of authorized celebrants including Ministers of Religion (subdiv A), persons charged with *registering* marriages in a State (subdiv B) and registered marriage celebrants (subdiv C). A minister of religion is defined in section 5(1) to include “a person recognized by a religious body or a religious organization as having authority to solemnize marriages in accordance with the rites or customs of the body or organization.” In order to be authorized to perform marriages as a minister of religion, the religion must be an “authorised denomination” as declared by the Governor-General. Although a wide variety of religions have been recognized as authorized denominations, there is no right to be recognized as a minister or for any religion to be accepted as an authorized denomination for the purposes of the Act.⁸¹ In addition, while ministers of authorized denominations are usually entitled to registration as a marriage celebrant, they may be denied registration if there are already sufficient numbers of ministers from that religion in a location, they are not a fit and proper person, or they are unlikely to devote sufficient time to religious duties (section 31). While these exceptions could be used in an onerous way, or the power to recognize religions as authorized denominations could be exercised in a discriminatory manner, there are not many disputes over registration or recognition of religions in practice.

B. Religious Courts and Religious Law

While a small number of religious courts (particular Jewish *batei din*) are active in Australia, they are not recognized as formal courts as such, nor are their decisions automatically enforced by Australian secular courts. Rather, such religious courts or other religious bodies applying religious law may be recognized as arbitral or mediation bodies and their decisions enforced in certain circumstances by secular courts. The courts may also, in some circumstances, enforce provisions requiring the use of religious dispute settlement mechanisms. The Supreme Court of Victoria, for example, has held that a clause in an arbitration agreement that required the parties to refer all claims and counterclaims to three rabbis was enforceable, as long as it complied with the relevant Act, in particular, by ensuring that there was no breach of procedural fairness.⁸²

Occasionally, the secular courts may directly apply religious law themselves, for example, where religious law has been incorporated into a contract or other legal document expressly or by implication. Thus, the Full Court of the Supreme Court of South Australia has recognized that the law that governs a contract can be religious law (just as it can be foreign law), but that there must be sufficient certainty as to what that law is and its relevance to the dispute at hand.⁸³ In these circumstances, the Australian courts have been prepared to make determinations about religious doctrine and practices, while expressing some concern at their competence to do so.

79. See, e.g., *Land Tax Assessment Act 2002* (WA) s 32; *Land Tax Management Act 1956* (NSW) s 10(1).

80. *A New Tax System (Goods and Services Tax) Act 1999* (Cth) s 38-220.

81. *Nelson v. Fish* (1990) 21 FCR 430. French J rejected a claim by an individual who claimed to have started his own religion that he was entitled to registration as an authorized celebrant. French J held that having a limited register of those permitted to carry out marriages did not amount to an establishment.

82. *Mond v. Berger* (2004) 10 VR 534.

83. *Engel v. Adelaide Hebrew Congregation Inc.* (2007) 98 SASR 402. The Court also recognized that it would be inappropriate for a court to grant an order for specific performance that would force a congregation to continue with a rabbi when that relationship had broken down. (That did not preclude other remedies.)

Generally, Australian courts are cautious about becoming involved in intra-religious disputes unless it is necessary to do so.⁸⁴ There are cases, however, where intervention by the secular courts in religious disputes is unavoidable. For example, after a schism, a dispute over leadership or an amalgamation of religious groups, there may be disputes over who is entitled to the property or assets owned by the religious body.⁸⁵ Similarly, there may be questions over the employment or termination of employment of people by a religious group, including clergy or other religious leaders.⁸⁶

These types of disputes raise complicated issues for courts about the extent to which they should become involved in intra-religious disputes and what type of approach they should take to such cases. On the one hand, there may be disputes that cannot and have not been resolved by internal religious mechanisms (especially when the validity of such mechanisms may be in question) and which have significant, secular aspects to them (such as the ownership of real property or the commission of a tort) that cannot simply be left unresolved. On the other hand, courts are properly reluctant not to intrude too deeply into the internal practices and doctrines of a religious organization for fear of interfering with its autonomy and taking the court outside its area of competence or jurisdiction.⁸⁷

IX. RELIGIOUS EDUCATION OF THE YOUTH

Religious schools make up a significant portion of the education sector in Australia and receive large amounts of government funding. The 2008 figures produced by the Australia Bureau of Statistics shows that last year there were 2729 non-government schools in Australia, comprising 28.5 per cent of the total schools in Australia. Of these 1705 were Catholic schools and 1024 were independent schools (most of which had religious affiliations).⁸⁸ In the period of 2005-2008 these independent schools received \$489 million in Federal Grants and an additional \$126.6 million in grants for capital works.⁸⁹ In addition, the States spent hundreds of millions more dollars on independent schools.⁹⁰ The fact that such a significant proportion of the education sector and such significant amounts of money are expended on independent schools has long made them socially contentious.⁹¹

While the precise rules differ from State to State, most public schools are permitted, but not required, to provide an optional form of religious education. In the state of Victoria, for example, schools may provide “general religious education,” whereby comparative religion is taught as an academic subject, offering the ability to discuss

84. *Scandrett v. Dowling* (1992) 27 NSWLR 483. This case remains one of the leading cases with respect to the circumstances in which an enforceable legal obligation is created by church rules.

85. See, e.g., *Macedonian Orthodox Community Church St Petka Inc v. Petar* (2008) 249 ALR 250, and the underlying and long running proceedings in the Supreme Court of New South Wales *Petar v. Mitreski; Petros v. Biru* [2006] VSC 383 (Unreported, Morris J, 6 October 2006); aff'd [2007] VSCA 226 (Unreported, Maxwell ACJ, Chernov and Kellam JJA, 7 August 2007); *A-G (Vic) ex rel. Harkianakis v. St John the Prodromos Greek Orthodox Community Inc.* [2000] VSC 12 (Unreported, Mandie J, 12 October 2000).

86. See, e.g., *Ermogenous v. Greek Orthodox Community of SA Inc* (2002) 209 CLR 95; *Engel v. Adelaide Hebrew Congregation Inc* (2007) 98 SASR 402.

87. See, e.g., *Solowij v. Parish of St Michael* (2002) 224 LSJS 5.

88. Australian Bureau of Statistics, *Schools 2008*, ABS Catalogue No 4221.0 (2008) [http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/3D1C059F24BE9E80CA2575AE00273795/\\$File/4221_0_2008.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/3D1C059F24BE9E80CA2575AE00273795/$File/4221_0_2008.pdf). This report also records 1,169,737 students attending non-government schools in Australia.

89. Commonwealth, Department of Education, Employment and Workplace Relations, *Capital Grants Program* (2008) Department of Education, Employment and Workplace Relations <http://www.deewr.gov.au/Schooling/Funding/CapitalGrantsProgram/Documents/CGPFACTSHEET20082.pdf> at 1 September 2009.

90. For example, in Victoria in 2007-2008, the Department of Education provided \$380 million for non-government schools (under the Financial Assistance Model for non-Government Schools), Victoria, Department of Education and Early Childhood Development, *Annual Report 2007-8* (2008) <http://www.eduweb.vic.gov.au/edulibrary/public/govrel/reports/2007decdannualreport-rpt.pdf> 51; in New South Wales, the Department of Education allocated \$833.5 million for 2009/10 financial year to independent schools, New South Wales, Department of Education, *Fast Facts* (2009) Department of Education https://www.det.nsw.edu.au/reports_stats/fastfacts/index.htm at 1 September 2009.

91. See *Attorney-General (Vic.) ex rel. Black v. Commonwealth* (1981) 146 CLR 559 for an example of an attempt to contest the legal validity of funding for religious schools.

religion though in a strictly non-sectarian way.⁹² Further, they may provide “special religious education,” whereby accredited religious representatives come into the classroom and instruct children who have opted in to the classes in the stories and rituals of their faith.⁹³ In the Christian curriculum, for example, children are taught Bible stories, taught how to pray, and taught that God created the world.⁹⁴

In the State of New South Wales, in contrast, all government schools must set aside time for special religious education, though the instruction itself is not compulsory and parents are given an express right to withdraw their child from both general and special religious education classes.⁹⁵ Whereas previously children whose parents removed them from these classes were forbidden from being given any other form of instruction – so as not to disadvantage those in the religious classes – a curriculum developed by the secular Humanist Society of Victoria to deliver “humanist applied ethics” to primary school pupils has been accredited.⁹⁶ In Victoria, only accredited outsiders – not classroom teachers – are permitted to teach this subject,⁹⁷ and such outsiders are typically volunteers.⁹⁸

X. RELIGIOUS SYMBOLS IN PUBLIC PLACES

The wearing or display of religious symbols is not the subject of much regulation in Australia. Students and teachers may wear religious clothes at public schools (although religious schools may have more restrictive uniform requirements) and generally public servants may also do so. While public buildings and government facilities do not routinely display religious symbols, there will not uncommonly be displays at Christmas time and, particularly at local government level, there may also sometimes be displays or celebrations of other religious celebrations. However, the generally secular attitude of Australians means that there tend not to be routine displays of crucifixes or other symbols of the dominant religion in public buildings.

XI. FREEDOM OF EXPRESSION AND OFFENSES AGAINST RELIGION

Australia does not restrict religious speech through laws on blasphemy, heresy, or apostasy. The Commonwealth *Criminal Code* (Cth) contains a sedition-based offense of “urg[ing] a group or groups (whether distinguished by race, *religion*, nationality or political opinion) to use force or violence against another group or groups (as so distinguished)” which would threaten the peace, order and good government of Australia.⁹⁹

The most controversial issue surrounding freedom of speech and religion in Australia has been the enacting of religious vilification or hate speech laws in several States. (There is no such law at Commonwealth level, although the Commonwealth prohibition on racial vilification gives protection to some religious groups.)

The States of Queensland, Tasmania and Victoria are the only Australian jurisdictions which have introduced religious vilification laws. The scope of the prohibition of religious vilification is similar in all three jurisdictions, although there are some important differences on the extent to which the alleged vilification must be public.¹⁰⁰ The Victorian law, the *Racial and Religious Tolerance Act 2001* (VIC), has

92. *Education and Training Reform Act 2006* (VIC) s 2.2.10(2). The corresponding provision in the State of New South Wales is *Education Act 1990* (NSW) s 30.

93. *Education and Training Reform Act 2006* (VIC) s 2.2.11. See also *Education Act 1990* (NSW) s 32.

94. Michael Bachelard and Liza Power, “The God Allusion,” *The Age* (Melbourne), 14 December 2008.

95. *Education Act 1990* (NSW) s 33.

96. Michael Bachelard, “Religion in Schools to Go God-Free,” *The Age* (Melbourne), 14 December 2008.

97. *Education and Training Reform Act 2006* (VIC) s 2.2.10(3).

98. Access Ministries accredits Victoria’s 3500 Christian religious instruction volunteers. See *About Access Ministries* Access Ministries <http://www.accessministries.org.au/index.php?id=5> at 13 January 2010.

99. *Criminal Code* (Cth) s 80.2(5). For a discussion of this offense, see Simon Bronitt, “Hate Speech, Sedition and the War on Terror” in Katharine Gelber and Adrienne Stone (eds), *Hate Speech and Freedom of Speech in Australia* (2007) 129.

100. McNamara, *supra* n. 82 at 147.

given rise to the most extensive criticism and case-law, so its provisions are set out in more detail here, but similar provisions are included in s 124A of the *Anti-Discrimination Act 1991* (QLD)¹⁰¹ and s 19 of the *Anti-Discrimination Act 1998* (TAS).

Section 8(1) of Victoria's *Racial and Religious Tolerance Act* provides: "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."¹⁰²

It is also prohibited to request, instruct, induce, encourage, authorize or assist another person to contravene s 8(1).¹⁰³

The Victorian Act in section 11 also provides that a person does not amount to religious vilification if the "person's conduct was engaged in reasonably and in good faith" and it was in the course of an artistic performance or work, or if it is made for a "genuine academic, artistic, religious or scientific purpose," or if it is for any other purpose in the public interest. Similar provisions exist in the other Acts, but only in Victoria is a genuine religious purpose included as a defense to religious vilification. Under the Act, a religious purpose "includes, but is not limited to, conveying or teaching a religion or proselytizing." This was included after concerns expressed by some religious groups that ordinary preaching or proselytism could be caught under the Act.

Very few cases have been brought under these religious vilification Acts and most that have been brought have been dismissed relatively quickly. However, the most well-known and legally significant of the religious vilification cases is *Islamic Council of Victoria v. Catch the Fire Ministries Inc* (the "Catch the Fire Ministries Case"),¹⁰⁴ which has created national and international controversy. In this case, the Islamic Council of Victoria ("ICV") lodged a representative complaint against the *Catch the Fire Ministries Inc* ("Catch the Fire"), an evangelical Christian church. The church had conducted a seminar, published a newsletter, and published an article on the church's webpage, each of which the ICV claimed attacked the Islamic faith and breached s 8 of the *Racial and Religious Tolerance Act*. Catch the Fire claimed that its statements were accurate, that its actions were reasonable and undertaken in good faith, and that the seminar and publications were conducted and published for a genuine religious purpose and in the public interest. On this basis, it defended the claims of religious vilification.

The Victorian Civil and Administrative Tribunal upheld the ICV's complaint, finding that the cumulative effect of the statements and publications was hostile, demeaning and derogatory to Muslims and their faith, and that they were likely to incite others to religious hatred, contempt and ridicule. Catch the Fire successfully appealed the decision to the Victorian Court of Appeal, which set aside the orders of the Tribunal and remitted the decision to be heard by a different Tribunal member. Ultimately, the matter was settled by the parties out of court, leaving the key question of whether the conduct amounted to vilification unresolved after many years and a lengthy process of litigation.

The key principles for interpreting the *Racial and Religious Tolerance Act* which emerged from this case included that

- incitement includes words and actions that actually incite others, and also those that are calculated to encourage incitement but do not have that effect in practice.¹⁰⁵
- the Act does not "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

101. *Anti-Discrimination Act 1991* (QLD) s 131A also makes it a criminal offense to engage in "serious" religious vilification, i.e. religious vilification in a way that includes threatening physical harm to person or property or inciting others to do so, but the criminal provisions are almost never used because of difficulties with proof and certain procedural hurdles.

102. *Racial and Religious Tolerance Act 2001* (VIC) s 8(2) provides that conduct can be a single instance or multiple instances.

103. *Racial and Religious Tolerance Act 2001* (VIC) s 15. See also *Anti-Discrimination Act 1998* (TAS) s 21; *Anti-Discrimination Act 1991* (QLD) s 122.

104. [2004] VCAT 2510 (Unreported, Member Higgins V-P, 22 December 2004); (2005) EOC ¶93-377 (digest); appeal allowed (2006) 15 VR 207.

105. *Catch the Fire Ministries Case* (2006) 15 VR 207, 211-12 [14] (Nettle JA), 254 [154] (Neave JA).

- persons” – that which incites hatred is distinct from that which is offensive;¹⁰⁶
- courts may take some account of the audience when determining if a particular statement is likely to incite¹⁰⁷ and the effect of the statement on an ordinary member of the audience is the relevant test;¹⁰⁸
 - for the purposes of the “genuine religious purpose” defense: both proselytism and religious comparativism are religious purposes; conduct is genuine if it is really undertaken for one of these purposes; the requirement that it be in good faith is a subjective test; and the requirement that it be reasonable is an objective test, taking into account the standards of an “open and just multicultural society.”¹⁰⁹

There were areas of disagreement between the judges which have still not been resolved. Perhaps the most significant of these is whether ridicule or contempt expressed towards a *religion*, as compared to religious believers, is sufficient for the purposes of the Act. Nettle JA considered that the two were distinct, while recognizing that there may be circumstances in which attacks on a religion might amount to religious vilification. Neave JA put less emphasis on the distinction. Ashley JA did not decide the issue.¹¹⁰

XII. CONCLUSION

The Australian approach to religion in political and legal affairs does not fit neatly into categories of secularity or religiosity. That is probably in part because there are relatively low levels of legal regulation of religious freedom or of religious organizations and practices. While many religious groups in Australia feel threatened by current developments, particularly the move towards a bill of rights and questions over whether they should continue to be granted exemptions from discrimination laws, Australia takes a relatively light touch regulatory approach to religious freedom and religious autonomy. Compromises regarding the role of religion in particular sectors tend to be negotiated through ordinary politics and through the legislative and executive branches of governments rather than through the courts and the approach to regulation of religion can therefore sometimes appear less principled and more ad hoc than in systems where regulation is guided by a constraining set of constitutional principles or guided by a dedicated government department.

106. Id. at 212 [15] (Nettle JA).

107. Id. at 212 [16] (Nettle JA).

108. Id. at 249 [132] (Ashley JA), 254–5 [158]–[159] (Neave JA), though see Nettle JA at 212–13 [16]–[19] that some degree of reasonableness may be assumed for most, although not all, audiences.

109. Id. at 240–2 [90]–[98] (Nettle JA).

110. Id. at 218–19 [32]–[34] (Nettle JA), 249 [132] (Ashley JA), 258 [176] (Neave JA).