

**Cultural and Religious Freedom Under a Bill of Rights
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“Defamation and Vilification: Rights to Reputation, Free Speech and Freedom of
Religion at Common Law and under Human Rights laws”

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Abstract

For many years the common law of defamation, and statutory amendments to it, have protected a person’s reputation in the community, in the sense of the right not be denigrated in the eyes of others. While this involves a restriction on another powerful common law principle of “freedom of speech” (see the discussion in the High Court of Australia decision in *Australian Broadcasting Corporation v O’Neill* (2006) 227 CLR 57), a complex set of checks and balances have been developed to cope with this clash.

The issues as to whether a person has a right not to be “vilified” (and what this means, ranging from “being the subject of death threats” to “humiliated” or “annoyed”) on the basis of their religious beliefs, have a number of connections with the issues dealt with by the law of defamation. In this paper I will explore some of these connections and examine whether a specific law on “religious vilification” is justified, or whether the protection provided by the law of defamation would be adequate for most purposes.

Laws prohibiting religious vilification (or religious “hate speech”) are controversial and often criticised. On the one hand it seems obviously wrong that someone should be insulted and humiliated on the basis of their religious commitments. But how far should the law go in putting controls on freedom of speech? Critics charge that religious vilification laws amount to an undue restriction of freedom of speech, and in fact may generate, rather than reduce, acrimonious religious debate in multicultural and multi-faith societies.

This paper is sympathetic to those critiques. But the particular angle it addresses is this- are religious vilification laws really necessary? The common law has dealt with verbal attacks on others for many years through the law of the tort of defamation. It is suggested here that many of the aims of those who propose religious vilification laws can be met by noting the remedies that are available under the ordinary law of defamation. In addition it is suggested that some of the concerns raised by opponents of the laws are seen to be met by the various defences and qualifications that have developed in the defamation area.

At this stage the paper is only a preliminary study, but it is hoped that it may at least open the way for further research on a topic which will become increasingly contentious. At the very least it is hoped that the paper illustrates that the adoption of further protection for human rights in Australia, including for freedom of religion, does

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not assume the adoption of religious vilification laws, and indeed, may be a further reason not to introduce such laws.²

Overview of Laws on Religious Vilification

There are now a number of important overviews of the developing law of “religious vilification” or “religious hate speech”, to which this paper is indebted.³ In this section it is only necessary to offer a brief summary.

Gerber & Stone offer a good working definition of the type of law that is at issue here, sometimes referred to as “hate speech”.

Hate speech is speech or expression which is capable of instilling or inciting hatred of, or prejudice towards, a person or group of people on a specified ground...⁴

In particular religious vilification laws aim to prohibit certain types of speech, which attack others based on their religion.

In Australia three jurisdictions have introduced such laws: Queensland, Tasmania and Victoria.⁵ It is worth noting the precise terms of these provisions, as they differ in some respects. The *Anti-Discrimination Act 1991* (Qld) s 124A provides:

124A Vilification on grounds of race, religion, sexuality or gender identity unlawful

(1) A person must not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race, religion, sexuality or gender identity of the person or members of the group.

(2) Subsection (1) does not make unlawful--

(a) the publication of a fair report of a public act mentioned in subsection (1); or

(b) the publication of material in circumstances in which the publication would be subject to a defence of absolute privilege in proceedings for defamation; or

² See the remarks by Professor Brennan, “Vilification laws fuel disharmony” (May 11, 2009): “It is very doubtful that the broad Victorian religious vilification law... would be passed by a Parliament constrained by a legislative human rights act”- from <http://www.eurekastreet.com.au/article.aspx?aeid=13572> .

³ See K Gelber & A Stone (eds), *Hate Speech and Freedom of Speech in Australia* (Sydney: Federation Press, 2007), esp ch 8, Lawrence McNamara, “Salvation and the State: Religious Vilification Laws and Religious Speech”, at 145-168; N Aroney, “The Constitutional (In)Validity of Religious Vilification Laws: Implications for their Interpretation” (2006) 34 *Fed L Rev* 287-318; I Hare “Crosses, Crescents and Sacred Cows: Criminalising Incitement to Religious Hatred” [2006] *Public Law* 521-538; G Holland, “Drawing the Line- Balancing Religious Vilification Laws and Freedom of Speech” (2006) 8 *UTS Law Review* 9-20; R T Ahdar “Religious Vilification: Confused Policy, Unsound Principle and Unfortunate Law” (2007) 26 *U Q Law Jnl* 293-316; G Blake, “Promoting religious tolerance in a multifaith society: Religious vilification legislation in Australia and the UK” (2007) 81 *ALJ* 386-405; P Parkinson, “Religious vilification, anti-discrimination laws and religious minorities in Australia: The freedom to be different” (2007) 81 *ALJ* 954-966; I Hare & J Weinstein (eds), *Extreme Speech and Democracy* (Oxford: OUP, 2009) esp ch 2 and Part III (chs 15-17). In a related context, see J Temperman, “Blasphemy, Defamation of Religions and Human Rights Law” (2008) 26 *Netherlands Quarterly of Human Rights* 517-545, and S Parmar, “The Challenge of ‘Defamation of Religions’ to Freedom of Expression and International Human Rights” (2009) 3 *Eur Human Rights Law Rev* 353-375, warning of the dangers to freedom of speech rights occasioned by repeated calls for an international convention prohibiting so-called “defamation of religion”. This paper will not address the international law issues in any detail.

⁴ Gerber & Stone, above n 3, at xiii.

⁵ See for an overview McNamara, above n 3, at 146.

(c) a public act, done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including public discussion or debate about, and expositions of, any act or matter.

The Tasmanian provision is contained in the *Anti-Discrimination Act 1998* (Tas) ss 19, 55. The relevant provisions are:

19. Inciting hatred

A person, by a public act, must not incite hatred towards, serious contempt for, or severe ridicule of, a person or a group of persons on the ground of –...

(d) the religious belief or affiliation or religious activity of the person or any member of the group.

55. Public purpose

The provisions of section 19 do not apply if the person's conduct is –

(a) a fair report of a public act; or

(b) a communication or dissemination of a matter that is subject to a defence of absolute privilege in proceedings for defamation; or

(c) a public act done in good faith for –

(i) academic, artistic, scientific or research purposes; or

(ii) any purpose in the public interest.

Victoria's provision is contained in a separate statute, s 8 of the *Racial and Religious Tolerance Act 2001* (Vic):

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.

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

(2) For the purposes of subsection (1), conduct-

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

(b) may occur in or outside Victoria.

There is an important "defence" provision in the Victorian legislation:

11. Exceptions-public conduct

(1) A person does not contravene section 7 or 8 if the person establishes that the person's conduct was engaged in reasonably and in good faith-

- (a) in the performance, exhibition or distribution of an artistic work; or
- (b) in the course of any statement, publication, discussion or debate made or held, or any other conduct engaged in, for-
- (i) any genuine academic, artistic, religious or scientific purpose; or
- (ii) any purpose that is in the public interest; or
- (c) in making or publishing a fair and accurate report of any event or matter of public interest.
- (2) For the purpose of subsection (1)(b)(i), a religious purpose includes, but is not limited to, conveying or teaching a religion or proselytising.⁶

In *Deen v Lamb* [2001] QADT 20 publication of a pamphlet inferring that all Muslims were obliged to disobey the law of Australia, which would otherwise have contravened the section, was said to have been allowable under the exception in s 124A(2)(c) as it was done “in good faith” for political purposes.

The most controversial application of these laws so far, however, was in the litigation involving the “Catch the Fire” organisation.⁷ McNamara, Ahdar, Blake and Parkinson all offer cogent critiques of the way that the original decision finding the organisation guilty of vilification was made, and comment on the overturning of the decision by the Victorian Court of Appeal.⁸ A brief summary, however, may be appropriate.

The original decision was *Islamic Council of Victoria v Catch the Fire Ministries Inc* [2004] VCAT 2510. In short, a Christian religious group advertised to a Christian audience that it was proposing to run a seminar that would critique Islam and help its listeners understand how to reach out to Muslims. Representatives of the Islamic Council of Victoria knew the nature of the seminar, chose to attend, and then took action against the group on the basis of statements that were made critiquing Islam. While it may be conceded that some untrue and unhelpful statements were made in the course of the lengthy seminar (and in some related material published on a website), most of the comments made were sourced from multiple Islamic authors. Initially the pastors involved were found to have been guilty of vilification and ordered to publish retractions. On appeal the Victorian Court of Appeal in *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* [2006] VSCA 284 overturned the Tribunal’s findings of vilification. The matter was referred back to the Tribunal, but the parties entered into a settlement of the proceedings which affirmed their mutual right to “criticise the religious beliefs of another, in a free, open and democratic society”.⁹

Nettle JA in particular in the Court of Appeal noted that the Tribunal had failed to distinguish between criticisms of the *doctrines* of Islam, and “incitement to hatred” of *persons*.

15... 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

⁶ Sub-section (2) was added to the Act in 2006 partly in response to the *Catch the Fire* litigation discussed below.

⁷ See also the other main case decided under the Victorian provisions, *Fletcher v Salvation Army Australia* [2005] VCAT 1523, discussed in Blake, above n 3, at 396-397.

⁸ See the articles noted above at n 3.

⁹ See eg the summary in Ahdar, above n 3, at 305.

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.

While to some extent the decision of the Court of Appeal draws an appropriate line, the fact remains that the Victorian legislation seems to have been used in a way it that was not intended.¹⁰ In general it seems far preferable for debate about religion to be “untrammelled” by fear of legal intervention.

Legislation prohibiting religious vilification has also been introduced in the UK. There the *Racial and Religious Hatred Act 2006* (UK) added Part 3A to the *Public Order Act 1986* (headed “Hatred against persons on religious grounds”), which now prohibits what in Australia would be called “religious vilification”. Consistently with the comments of Nettle JA above, the UK prohibition on stirring up “religious hatred” can only be breached by acts that stir up hatred against *believers*, rather than by attacks on *beliefs*:

29A Meaning of “religious hatred”

In this Part “religious hatred” means hatred against a group of persons defined by reference to religious belief or lack of religious belief.

29B Use of words or behaviour or display of written material

(1) 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.

Addison, in a very useful study of the UK law, sums up the history of these provisions.¹¹ He notes that the offences apply to words that are “threatening” (not simply insulting or abusive, as was suggested at a previous stage of the legislation), and that the offender has to “intend” to stir up religious hatred. Interestingly he notes that the Government’s original proposals to make the offences wider were partly defeated in the House of Lords because of concerns that the UK law would end up like the law in Victoria which had given rise to the *Catch the Fire* litigation.¹²

In addition there is a general provision protecting freedom of speech in s 29J of the *Public Order Act 1986*:

29J Protection of freedom of expression

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 of 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.

This is a vital safeguard if this sort of legislation is to be introduced. It recognises among other things the importance of freedom of speech and freedom of religion, and the

¹⁰ And Ahdar, n 3 above, in his perceptive analysis of the judgments in the Court of Appeal, points out how many uncertainties still remain, due not least to failure to agree on some issues among the judges in the Court of Appeal.

¹¹ Neil Addison, *Religious Discrimination and Hatred Law* (London: Routledge-Cavendish, 2007), esp ch 8.

¹² Addison, above n 11 p 140.

right noted under Art 18 of the Universal Declaration of Human Rights (UDHR), “freedom to change his religion or belief” (as freedom to change clearly involves the freedom to hear the arguments for change.)

Problems with Religious Vilification Laws

The commentators previously referred to have also noted the problems with such laws. They may be briefly summarised here.

Perhaps the most obvious and major problem is that these provisions amount to a severe restriction on freedom of speech. The right of freedom of speech, of course, is a right protected by international human rights instruments such as the UDHR, Art 19.

But it is perhaps not so commonly noticed that, even in a jurisdiction such as Australia where there is currently no formal, broad-reaching protection of freedom of speech, the courts have regularly noted that the common law itself provides such a protection as a fundamental value.

In the High Court of Australia decision in *Australian Broadcasting Corporation v O’Neill* (2006) 227 CLR 57 the Court was wrestling with, among other things, the right of a person who was a convicted prisoner to prevent the broadcast of allegations that he had committed other crimes. In refusing to authorise the “prior restraint” of publication, the majority in the High Court referred to, among other things, the “public interest in free communication of information and opinion” (Gleeson CJ & Crennan J at [30]).

Another example of the strength of the common law protection of freedom of speech can be found in the litigation generated by the “World Youth Day” event in Sydney in 2008. In *Evans v NSW* [2008] FCAFC 130 a major ground for overturning restrictive regulations which had prohibited the “annoying” of WYD participants was that they interfered (without explicit Parliamentary authority) with the fundamental common law right of freedom of speech.

It is worth quoting at length from the important discussion of these issues by the Full Court (French, Branson & Stone JJ):

74 Freedom of speech and of the press has long enjoyed **special recognition at common law**. Blackstone described it as “essential to the nature of a free State”: *Commentaries on the Laws of England*, Vol 4 at 151-152. In 1891 Lord Coleridge said:

The right of free speech is one which it is for the public interest that individuals should possess, and indeed that they should exercise without impediment, so long as no wrongful act is done.

Bonnard v Perryman [1891] 2 Ch 269 at 284; see also *R v Commissioner of Metropolitan Police; Ex parte Blackburn (No 2)* [1982] 2 QB 150 at 155; *Wheeler v Leicester City Council* [1985] AC 1054; *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 203...

76 In its 1988 decision in *Davis v Commonwealth* (1988) 166 CLR 79, the High Court applied a principle supporting freedom of expression to the process of constitutional characterisation of a Commonwealth law. The *Australian Bicentennial Act* 1980 (Cth) reserved to the Australian Bicentennial Authority the right to use or licence words such as “bicentenary”, “bicentennial”, “200 years”, “Australia”, “Sydney”, “Melbourne”, “founding”, “First Settlement”, and others in conjunction with the figures “1788, 1988 or 88”. Articles or goods which bore any of those combinations without the consent of the Authority would be forfeited to the Commonwealth. Some aspects of these provisions were struck down. In their joint judgment Mason CJ, Deane and Gaudron JJ (Wilson, Dawson and Toohey JJ agreeing) said (at 100):

Here the framework of regulation ... reaches far beyond the legitimate objects sought to be achieved and **impinges on freedom of expression** by enabling the Authority to regulate the use of common expressions and by making unauthorised use a criminal offence. Although the statutory regime may be related to a constitutionally legitimate end, the provisions in question reach too far. This extraordinary intrusion into freedom of expression is not reasonably and appropriately adapted to achieve the ends that lie within the limits of constitutional power...

78 The present case is not about characterisation of a law for the purpose of assessing its validity under the Constitution of the Commonwealth. The judgments in *Davis* 166 CLR 79 however support the general proposition that **freedom of expression in Australia is a powerful consideration favouring restraint** in the construction of broad statutory power when the terms in which that power is conferred so allow. {emphasis added}

Evans itself provides an interesting example where it might have been claimed that there was possible “religious vilification”. The evidence disclosed that Evans and other members of the public were planning to demonstrate against what they perceived to be bad policies and doctrines taught by the Roman Catholic Church. The challenged regulations would have restricted their right to do so by requiring them not to “annoy” participants. The Federal Court held that these regulations should be struck down on the principle that the head legislation enacted by the NSW Parliament should not be interpreted, in the absence of express words, as allowing regulations to be made with interfered with this fundamental common law right.

The Court also incidentally referred to the fact that “another important freedom generally accepted in Australian society is freedom of religious belief and expression” (at [79]), supporting this by reference to the general terms of s 116 of the *Constitution*, and to Art 18 of the UDHR. This is a reminder that another problem with laws prohibiting religious vilification is that, where there is a danger that they may be interpreted as hampering the liberty to say that one’s own religion is right, and that others are wrong, then they also constitute impairment of the speaker’s freedom of religion.

When these factors are coupled with pragmatic considerations concerning the enforcement of such laws, the case against the laws is seen to be particularly strong. A law which on its face seems designed to protect freedom of religious choice, is seen to allow abuse of the law to attack others who are seeking to express their religion. Indeed, as Parkinson has pointed out, not only the precise terms of the legislation are important, but also the way that they are perceived.

The law that impacts upon people’s lives is not the law as enacted by parliaments, and not even the law as interpreted by the courts. What matters is the law as people believe it to be. This “folklaw” may have only a tenuous connection with the law as enacted or applied in the courts. There is often a distorted effect as the perceived meaning of laws is spread through general communities of people who may not have a copy of the law itself or know the outcomes of cases they have heard are going through the courts.¹³

If speakers think that any public speech criticising other religious views is in danger of being prosecuted, then they will effectively “self-censor”, and public debate about important religious issues will shrink. Such debate, in the end, may be “forced underground”, where the lack of light being shone from the glare of publicity may end up entrenching prejudice and ignorance.

There are of course a number of important philosophical questions about laws that impose restrictions on freedom of speech, as any law that prohibits certain types of

¹³ Parkinson, above n 3, at 960.

speech will do. Some speech can clearly be regulated and penalised- classic examples include someone who shouts “Fire!” in a crowded hall, or someone who tells a lie that attacks an individual’s reputation. But should the law go further and address speech that attacks other’s beliefs?

The arguments of those who state that it would be best not to have anti-vilification laws based on religion at all are persuasive. Religion, unlike race or sex, is a matter that is fundamentally based on a person’s acceptance of certain *propositions* about the universe. (The view that religious matters, being questions of “faith”, are beyond rational debate, is clearly wrong. Anyone who puts forward such a view needs to spend some time in dialogue with representatives of actual religions, which almost all argue that there are good *reasons* to adopt their position as opposed to others. This is certainly the case with religions such as Christianity and Islam.) In any serious religious debate there will be a challenge to the world-view of the hearers. To penalise speech connected with religion runs the grave risk that rational debate on religious matters will be “driven underground”, and hence that where there are disagreements they will be resolved in less rational ways.¹⁴

But is there any way of preventing those who would insult and verbally attack others on the basis of their religion? One possibility not often considered in the literature on this area is the tort of defamation.

Overview of the Law of Defamation

The law of defamation protects a person’s reputation- in short, the interest which a person has in the views which others have of him or her. It has a long and chequered history, and has been the subject of lengthy development at common law, as well as various attempts over the years to codify or modify it by statute.¹⁵

Currently, after a long period of debate, Australia has something resembling a uniform law of defamation after agreement by the various States. This (mostly) uniform legislation has generally been in operation since the beginning of 2006.¹⁶ In these comments reference will mainly be made to the NSW version, the *Defamation Act 2005* (NSW).¹⁷

¹⁴ “If Western nations do not defend free speech and religious freedom, then the open discourse required for a deliberative democracy will be choked off. As long as full religious freedom is absent, religious groups -- including moderate Muslims -- will face the threat of punishment for what is essentially a prohibition on blasphemy. This creates an atmosphere of fear that is never conducive to open, democratic debate. And if you don't have open, deliberative democracy, you can't peel off and correct the disaffected, i.e., those who turn to the world of the violent Islamists as an alternative”- personal correspondence from Prof Carl H Esbeck, School of Law, University of Missouri (1 Aug 2009).

¹⁵ For an overview of the history of the action in England and Australia, see P George *Defamation Law in Australia* (Sydney: LexisNexis Butterworths, 2006) chs 2 and 3. There is also much helpful material in RP Balkin & JLR Davis, *Law of Torts* (4th ed; Sydney: LexisNexis Butterworths, 2009) chs 17-19, with a brief historical overview at pp 519-522. For a more extensive historical study see P Mitchell *The making of the modern law of defamation* (Oxford ; Portland, Oregon : Hart Publishing, 2005).

¹⁶ For a brief overview of the changes made by the uniform legislation see Richard Potter, “Defamation law goes national” (2006) 44 (1) (February) *Law Society Journal* 70-72.

¹⁷ Note however that the Act is not a complete “code”; a number of areas are left to be decided under principles developed by the courts at common law. These include, for example, what amounts to “publication”; whether a meaning is conveyed by that publication; what constitutes defamatory character in a meaning. In addition, some defences available at common law may be relied upon by a defendant, although some are supplemented by provisions of the legislation, and the common law in relation to damages also remains largely applicable.

The law of defamation is complex and controversial; it seeks to strike a balance between interests that are often competing: freedom of speech and protection of reputation.

International human rights instruments recognise the importance of reputation and privacy, and of freedom of expression. For example, Articles 17 and 19 of the *International Covenant on Civil and Political Rights* (ICCPR) state:

[17.1] No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

[19.2] Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds...

The tort of defamation, then, gives people a right of action when their reputation has been diminished; but some of the defences to the tort support freedom of speech, for those defences can override the plaintiff's claim of diminished reputation. The appropriate balance between these competing interests is not easy to achieve:

If the balance is tilted too far in favour of protecting personal reputation, the danger is that the dissemination of information and public discourse will be stifled to an unhealthy degree. Conversely, if it is tilted too far in favour of freedom of expression there will be little to constrain people from lying, or exaggerating and distorting facts, and causing irreparable harm to the reputations of individuals. (Standing Committee of Attorneys-General, Discussion Paper)

Interestingly Gillooly argues that there is a "third man" involved in cases where the defendant has made a statement to someone else about the plaintiff, whose interests *also* need to be considered: the recipient or potential recipient of the alleged defamatory statement.¹⁸ He suggests to subsume the interests of recipients into the overall heading of "public interest" is confusing, as the specifically intended recipient may have interests that weigh more than the "general public".

The tort of defamation, like other tort actions, is defined by certain elements that need to be made out by the plaintiff to show a *prima facie* claim. In common with other actions, the law also provides a number of specific defences, the onus of establishing which lie on the defendant. Unlike many other torts, however, in defamation actions the defences are often the main point of dispute in the case.

This is because the **elements** of a *prima facie* case in defamation are in many cases not difficult to make out. Essentially there are usually acknowledged to be three elements in a claim:

- (1) That the plaintiff has been **defamed**, in the sense that their reputation has been attacked;
- (2) That the plaintiff was **identified** clearly as the target of the attack; and
- (3) That the defamatory material was **published** by the defendant, in the sense of it having been made available to someone else other than the plaintiff.

Many of these areas raise complex issues that this paper cannot address. But it is worth noting what makes a statement "defamatory" at common law.¹⁹ Many members of the community are familiar with the test developed in *Parmiter v Coupland* (1840) 6

¹⁸ M Gillooly *The Third Man: Reform of the Australasian Defamation Defences* (Sydney: Federation Press, 2004).

¹⁹ For a recent detailed analysis of the notion of "reputation" in defamation law, see L McNamara *Reputation and Defamation* (Oxford: OUP, 2007).

M&W 105 at 108; 151 ER 340 at 342 that published matter is defamatory if it exposes the plaintiff to “hatred, contempt or ridicule”.

More recently, however, it is common to refer to a statement made by Jordan CJ in *Consolidated Trust Co Ltd v Browne* (1948) 49 SR (NSW) 86 at 88:

In NSW as a general rule it is illegal, under the law of defamation, to publish about a person anything which is likely to cause ordinary decent folk in the community, taken in general, to think the less of him.

Beaumont J in the still more recent decision of *Random House Australia Pty Ltd v Abbott* [1999] FCA 1538, (1999) 94 FCR 296 at para [22] said:

The test for what may be defamatory at common law is well established. A publication, without justification or lawful excuse, exposing a person to hatred, contempt or ridicule, calculated to injure that person's reputation, is a libel.²⁰ But this is not to be taken as an exhaustive statement. A person may be defamed by an imputation of a disability in the performance of the functions of his or her office, although the imputation does not expose him or her to hatred, contempt or ridicule. A false statement about a person to his or her discredit is defamatory. Thus to attribute to a person a want of capacity as the holder of an office will be defamatory. The mere imputation of a lack of ability to discharge the duties of that office is sufficient. It is not necessary that there should be an imputation of immoral or disgraceful conduct (per Brennan J in *John Fairfax v Punch* (1980) 31 ALR 624 at 632 - 633 citing Lord Herschell in *Alexander v Jenkins* [1892] 1 QB 797 at 800).

The common law test which has evolved now provides greater protection for people when disparaging statements are made about them; it is clearly easier to prove that published matter causes ordinary reasonable people to think less of the plaintiff, or to shun or avoid him or her,²¹ than it is to prove that the plaintiff is the victim of hatred, contempt or ridicule.

It is not entirely clear whether simply exposing someone to “ridicule” is defamatory or not.²² One principle often cited is that normally words that are simply “vulgar abuse” will not normally be defamatory. To make outrageously insulting remarks which no-one listening to would take seriously, will usually not be defamatory, however much they may hurt someone's feelings.²³

In the UK in the case of *Berkoff v Burchill and anor* [1997] EMLR 139 it was held to be defamatory to state that an actor was “horrendously ugly”; but there has been much debate about whether this decision was correct or not. However, some cases in Australia have suggested that exposing someone to ridicule (for example, by publishing an embarrassing photograph of them)²⁴ may be defamatory, so the question may still be open.

²⁰ His Honour is using this term to mean “defamatory”. Note that while the law used to distinguish between “libel” (defamation in writing) and “slander” (defamation in verbal form), it does so no longer. The two are treated identically- see s 7 of the NSW Act.

²¹ Old cases establish that the “shunning” effect may be relevant even if no-one would cast personal blame on the subject of the statement- eg *Youssouf v Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 TLR 581 where it was defamatory to say that the plaintiff had been raped, as at that stage it would have led to her being “shunned” by others.

²² For a detailed analysis see McNamara, above n 19, ch 7.

²³ See *Munday v Askin* [1982] 2 NSWLR 369, where the plaintiffs were called “vermin”, and comments on the issue of “vulgar abuse” in *Bennette v Cohen* (2005) 64 NSWLR 81 by Bryson JA at paras [46]-[56]. As noted there, words “might injure a man's pride without injuring his reputation”.

²⁴ See *Ettingshausen v Australian Consolidated Press* (1991) 23 NSWLR 443, where the court accepted that a photograph of the plaintiff football player which showed him naked could be regarded as defamatory

If the above three elements of the tort have been made out, it is then up to the defendant to make out one of the defences that are provided by the law. In broad terms, and simplifying somewhat, the main **defences** that can be relied on today under the uniform legislation are

- (1) **Truth**- that the matter which was published is either wholly or substantially true;²⁵
- (2) **Honest opinion**- that the matter was the honest expression of opinion by the defendant, not a statement of fact;²⁶
- (3) **Privilege**- that the matter was published either in a forum where the law provides complete protection of free speech (under **absolute privilege**, such as in Parliament or a court room), or was published in circumstances where the law recognises what is called a **“qualified” privilege**. Such a privilege arises either where the defendant had a duty to make a statement for some reason, and the recipients had a duty or interest to hear it; or under statutory provisions, where the recipients had an “interest” in receiving the communication, and it was published “reasonably”.²⁷ In addition under Australian law these days there is a further situation where “qualified privilege” arises, where the communication is on a matter of political interest.²⁸
- (4) **Triviality**- that the matter in the context in which it was published is not likely to have caused any harm (where, for example, it was a statement made in a private social context to a small group of people).²⁹

In addition to these formal defences, the legislation now contains a provision whereby a defendant may avoid liability by an appropriately speedy “offer to make amends”, which will usually include some sort of published correction or apology.³⁰

Defamation on the Basis of Religion

The above is only a very superficial overview of the law of defamation. But it may be appreciated that it deals with a number of issues that are mentioned by the vilification provisions referred to previously. The similarities and differences between the provisions are worth noting.

Defamation and Religious Vilification Compared

Areas of *similarity* between the two are that both are concerned with words that “inspire hatred or contempt”. The classic definition of “defamation”, as noted above, refers to “hatred, contempt or ridicule”. The Australian legislative provisions refer to “hatred towards, serious contempt for, or severe ridicule of” persons (the Victorian

on the basis that it had exposed him to ridicule; the case was followed in *Obermann v ACP Publishing Pty Limited* [2001] NSWSC 1022.

²⁵ See s 25 of the NSW Act. There is also a related defence of “contextual truth” in s 26, where statements which are made on the same occasion as those complained of are true, and given their truth the statements that are complained of do no further harm to the plaintiff’s reputation.

²⁶ See s 31 of the NSW Act. The defence was previously called “fair comment”. It will be defeated if the statement in context would be understood as a statement of fact, rather than an expression of opinion; if it is not on a matter of “public interest”; if it is not based on “proper material”; or if it is shown not to be an opinion honestly held by the defendant.

²⁷ See s 30 of the NSW Act.

²⁸ Implementing the implied freedom of political communication spelled out by the High Court in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

²⁹ See s 33 of the NSW Act.

³⁰ See Part 3, Div 1 of the NSW Act.

provisions adds “revulsion”, which seems not to be very different from the other concepts.)

In fact the law of civil defamation sets a lower barrier than the vilification provisions. Requiring more recently that a statement simply cause “cause ordinary decent folk in the community, taken in general, to think the less of” the plaintiff allows a wider range of speech acts to be taken into account. The addition of words like “serious” and “severe” in the legislation seems to clearly signal that it will be harder to make out a case of vilification than it will be to succeed in a defamation action.

Another similarity, perhaps too obvious to be immediately apparent, is that both the common law of defamation and the statutory provisions about religious vilification provide a civil legal remedy to someone who is the subject of remarks by a defendant. A civil remedy allows the award of damages. The amount of damages, and the basis on which damages are assessed, may not be the same, but usually some amount can be ordered by the court, an order which will not only provide some material compensation for the harm suffered, but which will also mark the community’s disapproval of the defendant’s behaviour.

There are, however, a number of important *differences* between the action for defamation and an action for religious vilification. One that has been noted already is that an action for defamation will be available in relation to a range of what might be called “less offensive” speech than the vilification action.

But the most obvious difference is that, in an action for defamation, the plaintiff must be able to demonstrate they he or she, *in particular*, was identified as the subject of the defamatory statement. By contrast, an action for religious vilification seems to be available to anyone who belongs to a particular “class of persons” or “group of persons”. Each of these aspects of the two actions warrants further examination.

In Australia the High Court laid down the following some years ago about a statement which does not specifically name someone, in *David Syme & Co v Canavan* (1918) 25 CLR 234 at 238

The test of whether words that do not specifically name the respondent refer to him or not is this: Are they such as reasonably in the circumstances would lead persons acquainted with the plaintiff to believe he was the person referred to?

The decision of the House of Lords in *Knupffer v London Express Newspaper, Ltd* [1944] AC 116 held that a plaintiff who was a member of a “Young Russia” group could not sue for defamation in relation to a newspaper article which referred generally to the group around the world. Viscount Simon LC noted at 119 that

Where the plaintiff is not named, the test which decides whether the words used refer to him is the question whether the words are such as would reasonably lead persons acquainted with the plaintiff to believe that he was the person referred to. There are cases in which the language used in reference to a limited class may be reasonably understood to refer to every member of the class, in which case every member may have a cause of action.

But in this case the class was large enough that it was not possible for the particular plaintiff to claim that he personally had been defamed. However, the House of Lords was careful to say that there was no general rule about “defamation of a class”- it was a question in each case, as Lord Atkin in particular emphasised, whether “the defamatory words must be understood to be published of and concerning the plaintiff”(at 121). If the words were spoken “of a large or indeterminate number of persons described by some general name”, then it will usually be difficult to show that they refer to the plaintiff (at 122). But there may be cases where even words spoken of a large number

might sufficiently identify the plaintiff. There is a fascinating aside by Lord Porter near the end of his judgment, at 124:

In deciding this question the size of the class, the generality of the charge and the extravagance of the accusation may all be elements to be taken into consideration, but none of them is conclusive. Each case must be considered according to its own circumstances. I can imagine it being said that each member of a body, however large, was defamed where the libel consisted in the assertion that no one of the members of a community was elected as a member unless he had committed a murder.

It is interesting to speculate on what makes the difference in this last example. Is it the seriousness of the allegation? No further guidance is given in the judgment.

Other cases based on defamation of a large group have failed for this reason of failing to “identify” the specific plaintiff. In *Mann v Medicine Group Pty Ltd* (1992) 38 FCR 400 an attack on “all bulk-billing doctors” was found not to be specific enough to be sued on by one doctor. The case is interesting for its careful discussion of the principles relating to defamation of a group, and for the strong dissent in the Full Court of the Federal Court by Miles J. But it illustrates that the principles spelled out in *Knupffer* are still applied in Australia.

In *Gauthier v. Toronto Star Daily Newspapers Ltd* (2004) 245 D.L.R. (4th) 169 the Ontario Court of Appeal upheld a trial judge’s striking out of a defamation action brought by members of the Toronto Police Force in response to newspaper articles referring to “Toronto police” as “racist”. The articles were general in nature and could not be read as referring to any individual member of the force.

But in other cases actions by un-named group members have succeeded. In *Jackson v TCN Channel 9* [2001] NSWCA 108 a statement which referred to “outlaw motorcycle gangs” was held to be actionable at the instance of a member of the “Rebels” motorcycle club, where it was broadcast on TV accompanied by a picture of the plaintiff. This seems to be a clear example of the principle that a plaintiff may sue where specifically identified. But it is interesting to note the further comments of Handley JA, on the common example given in the cases that the statement “all lawyers are thieves” would not be actionable by any one lawyer:

23 While “all lawyers” are members of the same profession, they are not members of a cohesive and disciplined group with a command structure such as a gang. The statement about “all lawyers” is an obvious over-generalisation which no reasonable reader or listener would understand applied or was intended to apply literally to every single member of the group.

24 On the other hand outlaw bikie gangs of the type described in the programme would only attract and retain members who accepted and were willing to conform to the prevailing culture and ethos of the gang. In my judgment the statements made in this programme are akin to statements about organised groups such as the SS, the Klu Klux Klan or the Mafia, rather than statements such as: “all lawyers are thieves”. It would be well open to a jury to conclude that general statements made about groups such as those applied, and would be understood to apply, to every member of those groups. In *Knupffer* Lord Atkin said at 122:

“There can be no law that a defamatory statement made of a firm, or trustees, or the tenants of a particular building is not actionable if the words would reasonably be understood as published of each member of the firm or each trustee or each tenant. The reason why a libel published of a large or indeterminate number of persons described by some general name generally fails to be actionable is the difficulty of establishing that the plaintiff was, in fact, included in the defamatory statement, for the habit of making unfounded generalisations is ingrained ... [and] the words are occasionally intended to be a facetious exaggeration”.

The question, in other words, may be resolved in favour of a member of a group being able to sue if the nature of the group is such that one would expect all members to strictly conform to some standard said to apply to the group as a whole. It must be said, however, that these views were not specifically adopted by other members of the Court.

The application of the above general principles to members of a religious group can be seen in the Canadian decision of *Bai v. Sing Tao Daily Ltd.* (2003) 226 D.L.R. (4th) 477. In that case a defamation action brought by a number of members of the “Falun Gong” religious group failed, where the newspaper articles in question did not refer to them individually. McMurty CJO in the Ontario Court of Appeal commented:

14 There is nothing to distinguish the appellants from the class of all Falun Gong practitioners throughout the world. In this context, I am of the view that, the succinct endorsement of Justice Zuber in *Sun Tanner's Image v. White* (September 12, 2000), Doc. Windsor 00-GD-4893 (Ont. S.C.J.), affirmed at (Ont. C.A.), provides a helpful approach:

“It is necessary that the plaintiffs show that they are identified or singled out. The words clearly do not identify the plaintiffs. Further it is not pleaded that the class is so small that the plaintiffs are necessarily identified and would lead one to believe that the plaintiffs are the target of the words. As a result this action must fail and the claim is dismissed.”

15 I agree with the respondent that where a matter is allegedly libelous of a substantially large and indeterminate group of persons, it does not give rise to a cause of action for any specific member of that group or class unless it can be shown that the libel complained of points to a particular member or particular members of the group.

This may be seen, then, as an example of a “gap” in the law which the law of religious vilification may fill. But the fundamental question is whether there is indeed such a gap.

When an individual’s reputation is attacked, then it seems perfectly fair that they should have an action to defend themselves, and to seek damages. But where an attack is made on a wide group, then the “sting” of the attack is dissipated across that group. The question that needs to be asked is whether, given that there are strong competing values of freedom of speech involved, the harm that is occasioned in such a weakened form is one that the law should provide a remedy for?

The ancient Romans used to attack Christians on the basis that they committed incest (as they said that they “loved” those they called “brother” and “sister”), or that they were guilty of cannibalism (in that they participated in meetings where Jesus’ words about “eating my body” and “drinking my blood” were repeated.)³¹ If such an attack were made today, should a Christian have a remedy?

I would support a criminal remedy where a speaker got up in a public square and said “Neilus Fosterius is a follower of the Nazarene, is a cannibal and we should go to his house and kill him now!” That under Australian law would be an unlawful incitement to violence. I would support the availability of an action for defamation where the speaker simply said, “Neilus Fosterius is a follower of the Nazarene, and is a cannibal”, because I could demonstrate that the allegation of cannibalism (which would be untrue) would lead my Roman neighbours to “think less of me” at the very least, and because the attack is targeted at me alone.

But if a speaker in a public square said “All followers of the Nazarene are cannibals”, I do not think I ought to have a *legal* remedy. I will then be able to go into

³¹ See Minucius Felix, *Octavius*, R. E. Wallis, trans. in *The Ante-Nicene Fathers* (Buffalo, N. Y.: The Christian Literature Publishing Co., 1887), Vol. 4, pp. 177-178, available at <http://www.fordham.edu/halsall/ancient/christian-cannibals.html> .

the same public square and argue against him; I will have the support of my fellow believers; the opportunity for dialogue will hopefully provide an opportunity for proclamation of the gospel about Jesus.

The only qualification one might want to add is that it would perhaps be best if there were a legal remedy when the religious group was very small, with very little opportunity or resources to respond to insult or denigration. But it is interesting to note that in the cases on “defamation of a group” the courts continue to assert that there is no “bright line” rule, and that the size of a group is one of the relevant factors. The principle is simply that there is a defamatory statement about the plaintiff where the words are “published of and concerning the plaintiff” (*Knupffer*), and where there are only a few members of a group, and the plaintiff is known to be one of the members, then an allegation (particularly a highly damaging application) concerning the whole group, could not unreasonably be seen specifically to apply to the plaintiff.

It is also interesting to compare the *defences* which are available in the two causes of action. Perhaps the most glaring difference, and the most objectionable, is that there is no defence of “truth” available under the vilification legislation. Neave JA commented in the *Catch the Fire* appeal at [178] that:

Section 11 of the Racial and Religious Tolerance Act ... does not provide that the fact that words are true takes them outside s.8 of the Act.

Under the vilification legislation, the available defences (which differ between the States) may be summarised as “fair report”, “absolute privilege”, “public interest discussion”, or “artistic exhibition”:

- “publication of a fair report of a public act” (Qld, s 124A(2)(a)); “fair report of a public act” (Tas, s 55(a)); something done “reasonably and in good faith”, “in making or publishing a fair and accurate report of any event or matter of public interest” (Vic, s 11(1)(c));
- “publication of material in circumstances in which the publication would be subject to a defence of absolute privilege in proceedings for defamation” (Qld, s 124A(2)(b)); “a communication or dissemination of a matter that is subject to a defence of absolute privilege in proceedings for defamation” (Tas, s 55(b));
- A “public act, done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including public discussion or debate about, and expositions of, any act or matter” (Qld, s 124A(2)(c)); “a public act done in good faith for –(i) academic, artistic, scientific or research purposes; or (ii) any purpose in the public interest” (Tas, s 55(c)); something done “reasonably and in good faith”, “in the course of any statement, publication, discussion or debate made or held, or any other conduct engaged in, for- (i) any genuine academic, artistic, religious or scientific purpose; or (ii) any purpose that is in the public interest” (Vic, s 11(1)(b));
- Something done “reasonably and in good faith”, “in the performance, exhibition or distribution of an artistic work” (Vic, s 11(1)(a).)

Note the obvious point that at least some of these defences are merely a repetition of those available under the law of defamation- those relating to occasions of “absolute privilege”, for example (where statements are made in Parliament, or before certain

courts and tribunals.) The defence of “fair report” also parallels very closely the defence available under the uniform defamation legislation which allows a defence of a “fair report of proceedings of public concern”.³² (The vilification defence is actually wider than that available under the defamation laws; the “public act” which can be the subject of a “fair report” in Qld and Tas seems to be the act which itself incites hatred, etc. So it seems, though there are no cases on the matter, that a speaker at a rally who says vilificatory words can be sued, but the newspaper or TV station which repeats those words the next day cannot be sued. Indeed, it would seem that another speaker who prefaced their remarks by “this is what was said yesterday”, could also avoid liability.)

Victoria also has a specific defence relating to artistic works. It seems likely that this reflects the sensitivities involved by the exhibition of a controversial exhibition in Victoria, and action that was taken to stop the exhibition.³³ The result, however, is an interesting illustration of what is seen to be the weighing of public values by the Victorian Parliament. A believer may with impunity have hatred, serious contempt, revulsion or ridicule incited against them or their group, so long as it is done in the name of “Art”. For some reason freedom of speech applies to artists, but not to authors, preachers, or public speakers.

The final broad category of defence in all the jurisdictions almost defies summary. Common themes are that the purposes which are seen as legitimate include academic, scientific, “research” generally; but they extend to “other purposes in the public interest”, or “public discussion or debate about, and expositions of, any act or matter”. The Queensland provision in particular is so broad that it seems hard to find any occasion for speech or writing that will not fall within the defence. For this reason the important operative words in all the provisions seem to be “reasonably and in good faith”.

But the *Catch the Fire* litigation illustrates the difficulty with such a broad discretion being left to the courts. Is it acting “reasonably and in good faith” for a religious speaker, when urging the truth of their own beliefs, to present an “unbalanced” account of another faith? Does a speaker depart from this standard when in some other context they have exaggerated their own qualifications or the extent of their publications? As Ahdar notes, these were matters that counted against the pastor in that case and led the original tribunal to find that the comments made in the seminar were not made “in good faith”. He comments:

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.³⁴

In short, this defence and others like it are so unclear, and so difficult to interpret in advance of litigation, that they will have the effect of “chilling” religious speech in many cases.

³² See, eg, s 29 of the NSW *Defamation Act* 2005.

³³ See *Pell v Council of Trustees of the National Gallery of Victoria* [1997] VSC 52.

³⁴ Ahdar, above n 3, at 313.

Examples of Defamation and Religion cases

It is perhaps worth noting briefly before concluding that the law of defamation is already used in the context of religious bodies and persons. Where a plaintiff has been clearly identified and attacked in a way which causes other persons to think less of them, then they have a chance to sue for damages. In response, the defendant has an opportunity to argue that what they said was true, or that it was legitimate expression of an honest opinion, or that it was made on an occasion where free speech should be encouraged because there is a duty to speak, or that one of the other available defences is applicable. Just by way of illustration, and without any necessary comment on whether or not these decisions are correct, three recent cases can be cited.

Plenty & Anor v Dickson & Anor [2009] SASC 9 (19 January 2009) was part of the most recent stage of long-lasting litigation generated by the “disfellowshipping” of Mr and Mrs Plenty from their Seventh Day Adventist congregation in 1979. These proceedings were the conclusion of defamation proceedings, where the Plentys had been awarded \$10,000 in damages based on a letter published in a newspaper referring to the events. The letter referred to “continuing attitudes and actions which were felt contrary to church standards of behaviour”. The judge concluded that this was defamatory.

Members of the church are committed to a strict code of behaviour and the plaintiffs were disfellowshipped for an alleged failure to abide by that code. However, Mr Dickson’s letter has to be judged from the position of the average reasonable reader. To such a reader, the phrase “continuing attitudes and actions which were felt contrary to church standards of behaviour” could well imply conduct more serious than the allegations which led to the disfellowshipping. It is relevant to take into account the circulation of the newspaper and the effect which the publication appears to have had on the plaintiffs.³⁵

The Court of Appeal rejected appeals against the amount of damages made by the Plentys, holding that the amount of damages awarded was reasonable.

In *Ayan v Islamic Co-ordinating Council of Victoria Pty Ltd and ors* [2009] VSC 119 (3 April 2009) the ICCV were involved in “halal” certification of abattoirs (that animals had been killed in accordance with Islamic law), and were in dispute with the plaintiff. They published a letter to various abattoirs alleging that Mr Ayan was claiming to be authorised by the Australian Quarantine Service to provide Halal certificates. In fact the plaintiff was authorised to carry out various procedures but did not claim to be authorised by AQIS.

The Court ruled that the letters were defamatory, that no defence of truth was available, and that no defence of qualified privilege was available. “Qualified privilege” was claimed partly on the basis that the aim of the defendants was to communicate the results of an independent report into the Halal industry; but in fact the report did not support the claims in the letter, and Beach J at [42] commented that:

It is well settled that an occasion of qualified privilege must not be used for some purpose or motive foreign to the interest that protects the making of the statement. Further, there must be a significant connection between the defamatory material and the privileged occasion.³⁶ Whilst there is material in the report that might (subject also to considerations of malice) have been published to relevant abattoirs and boning rooms on the basis of qualified privilege, the material concerning the plaintiff’s need for AQIS certification and his claim that he had AQIS certification was not such material. These topics (the plaintiff’s need for

³⁵ Quoted at para [8] of the appeal judgement cited above.

³⁶ See generally *Andreyevich v Kosovich and Publicity Press (1938) Pty Ltd* (1947) 47 SR(NSW) 357, *Roberts v Bass* (2002) 212 CLR 1, *Bashford v Information Australia (Newsletter) Pty Ltd* (2004) 218 CLR 366 and *Bennette v Cohen* [2009] NSWCA 60.

AQIS certification and his claim that he had AQIS certification) were not contained in, nor the subject of, the report.

Perhaps the issues being discussed here are raised most sharply in *Trad v Harbour Radio Pty Ltd* [2009] NSWSC 750. The plaintiff, who had been seen as a spokesman for the Muslim community in Sydney at some stages, sued the proprietors of radio station 2GB for comments made about him on a talk-back radio show. The comments arose out of a “peace rally” which the plaintiff had addressed following the infamous “Cronulla riots” which, as McClellan CJ noted at [6], “were perceived by many people as a confrontation between adherents to the Muslim faith and persons of Caucasian heritage”. Part of the thrust of the remarks made by the plaintiff was an attack on 2GB as in part responsible for stirring up ill feeling against Muslims and contributing to the violence. The comments being sued on were made in response to that general attack, and partly in response to the fact that when a 2GB reporter was present at the rally, there was what seemed a very direct attempt to incite the crowd to ill feeling against 2GB.

The judgement is lengthy and raises a number of important issues. Briefly, a jury had been impanelled under the then-applicable procedure in NSW,³⁷ and had found that the comments of the announcer had contained imputations that the plaintiff was guilty of a number of things (including “inciting people to acts of violence” and “inciting people to have racist attitudes”), and also that “the plaintiff is a dangerous individual” and “a disgraceful individual”.

The defence of truth used by the defendant meant that the court had to assess the truth or otherwise of the comment that the plaintiff was “disgraceful”. McClellan CJ noted at [13] that this raised issues of “some complexity”. His Honour ruled that this required him to apply “general community standards” to the proved behaviour of the plaintiff- see [16]-[17]. However, he also noted at [20] that he could take into account legislation prohibiting discrimination and racism in determining the content of those community standards.

His Honour then referred to a number of matters that had been brought forward by the defendant to support their allegation that the plaintiff was “disgraceful” by community standards. Many of those matters were not related to the specific words that had been uttered at the rally, but were drawn from statements made by the plaintiff on other occasions in the past, and in particular from statements made by Sheikh Taj el-Din al-Hilali who had held the position of “Mufti of Australia”, and whose spokesman the plaintiff had been for some years. In effect a number of highly controversial statements made by Sheikh Hilali were noted, and the fact that the plaintiff had associated himself with, or not dissociated himself from, those statements was taken into account. Statements made by the Sheikh of this sort included comments associating unveiled women with “cat’s meat” (and implying that some women bear responsibility for their own rape)- see [27]-[42]; statements arguably expressing support for the stoning of a woman for adultery in Nigeria- see [43]-[51]; and statements made in a sermon at a mosque in Lebanon arguably supporting the September 11 2001 attacks and the use of children as martyrs in the cause of Islam- see [52]-[58]. Other examples were also given. Material either referred to with approval on the plaintiff’s website, or directly written by him, was also used by the court. In the end the court ruled that most of the imputations

³⁷ Section 7A of the *Defamation Act* 1974 (NSW), applicable because the events occurred before the commencement of the uniform legislation. While this specific procedure is no longer applicable, on the whole the law as to what amounts to defamation, and the relevant defences, has not changed from that being considered by the judge.

made against the plaintiff by 2GB, including that of being a “disgraceful” and “dangerous” individual, were proven to be true.

Some of the imputations made were found not to be true (such as the specific claim that “the plaintiff stirred up hatred against a 2GB reporter” or “the plaintiff is widely perceived as a pest”). But the court found that the defence of “contextual truth” applied, so that even though these remarks were not true, given that they were made in a context where much more serious allegations were made out, they did not further harm the plaintiff’s reputation.³⁸

While not necessary given the success of the other defences, the court also held that the defendant would have been able to make out a defence of “qualified privilege” which applies when someone is responding to a prior attack which has been made by the plaintiff.³⁹

The case will no doubt generate much discussion, and it may be anticipated that the decision will be appealed. But it does illustrate the common law courts are able, when required, to enter the arena of robust comment which has implications for religion! None of the issues in the case precisely raise the question of vilification on the grounds of religion- indeed, the radio commentator was very careful to say that Mr Trad in his view was not representative of the Muslim community and was responsible for “misinformation about the Islamic community”. But the court was able to deal with, and make reasoned judgements on, specific claims about someone who spoke on religious issues.

Conclusion and Suggestions for Further Work

This paper has only been able to raise the issues here in a limited way. It would be worthwhile, for example, to conduct further research on other situations which are analogous to religious vilification which have come before courts in defamation actions in the past.

But it is hoped that it has at least raised the possibility that what is seen as a “gap” in the legal protection of rights may not be as broad as some have suggested. Where speech is aimed at producing violence it ought to be punished by the criminal law. Where speech attacks the reputation of individuals and can be shown to do so falsely and without the protection provided by the law of defamation for free speech, then an action should lie. But it is suggested that further protection of “religious sensibilities” by the enactment of general “religious vilification” laws is not only unnecessary, but may positively impair both freedom of speech and freedom of religion.

³⁸ See the discussion at [125]-[130]. The defence of contextual truth is also available under s 26 of the current NSW Act.

³⁹ See paras [132]-[147], also holding that the defence was not defeated by any allegation of “malice”. A further defence of “fair comment” was upheld but with more hesitation.