

9-1-2009

The Protection of Religious Rights Under Australian Law

Denise Meyerson

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>

 Part of the [Comparative and Foreign Law Commons](#), [Human Rights Law Commons](#), and the [Religion Law Commons](#)

Recommended Citation

Denise Meyerson, *The Protection of Religious Rights Under Australian Law*, 2009 BYU L. Rev. 529 (2009).
Available at: <https://digitalcommons.law.byu.edu/lawreview/vol2009/iss3/3>

This Article is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

The Protection of Religious Rights Under Australian Law

*Denise Meyerson**

I. INTRODUCTION

In 1998, Australia's Human Rights and Equal Opportunity Commission ("HREOC") issued a report in which it stated that the level of protection afforded to the right to freedom of religion and belief in Australia was relatively weak compared to a number of comparable countries.¹ Although there have been a few changes in the intervening ten years, this Article demonstrates that HREOC's statement remains accurate. In this Article, I analyze and evaluate the Australian legal framework governing the right to religious freedom, the right not to be discriminated against on the ground of religion, and the right not to be subjected to religious vilification. I call these "religious rights." Part II deals with federal legislation protective of these rights, Part III with constitutional protections, Part IV with the right to religious freedom at common law, and Part V with State and Territory legislation.

II. FEDERAL LEGISLATIVE PROTECTION

Since the case of *R. v. Burgess; Ex parte Henry*,² it has been accepted that section 51 (xxix) of the Australian Constitution³—the so-called "external affairs" power—authorizes the Australian Parliament to pass legislation giving effect to international obligations incurred by Australia under international treaties and conventions.⁴ Most relevant for the purposes of this Article is Australia's ratification of the International Covenant on Civil and

* Professor, Macquarie Law School, Macquarie University.

1. HUMAN RIGHTS & EQUAL OPPORTUNITY COMM'N, ARTICLE 18: FREEDOM OF RELIGION AND BELIEF 23, 139 (1998), *available at* http://www.hreoc.gov.au/pdf/human_rights/religion/article_18_religious_freedom.pdf.

2. *R. v. Burgess* (1936) 55 C.L.R. 608.

3. COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT § 51.

4. *Burgess*, 55 C.L.R. at 636–45.

Political Rights (“ICCPR”),⁵ as a result of which Parliament can validly legislate, supported by the external affairs power, to protect the right to freedom of religion and belief;⁶ to prohibit discrimination on the ground of religion and belief;⁷ to prohibit the advocacy of religious hatred that constitutes incitement to discrimination, hostility, or violence;⁸ and to protect the right of minorities, in community with the other members of their group, to profess and practice their own religion.⁹

Australia also supported the adoption of the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief (“Religion Declaration”).¹⁰ Although, as a General Assembly Resolution, the Religion Declaration does not impose treaty-like obligations,¹¹ it was declared to be a relevant international instrument for which the Australian Human Rights and Equal Opportunity Commission has responsibility.¹² The effect of this will be explained below.

Australia has also ratified the International Labour Organisation Discrimination (Employment and Occupation) Convention, 1958 (“ILO 111”).¹³ This Convention prohibits discrimination on the

5. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR] (entered into force on Mar. 23, 1976).

6. *Id.* at art. 18.

7. *Id.* at arts. 2, 26.

8. *Id.* at art. 20. State parties are required to prohibit such actions by law. However, Australia lodged a reservation in which it reserved the right not to introduce the legislation. (Ratification, Aug. 13, 1980).

9. *Id.* at art. 27.

10. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, U.N. GAOR, 36th Sess., Supp. No. 51, U.N. Doc. A/RES/36/55 (Nov. 25, 1981) [hereinafter Religion Declaration].

11. Carolyn Evans, *Time for a Treaty? The Legal Sufficiency of the Declaration on the Elimination of All Forms of Intolerance and Discrimination*, 2007 BYU L. REV. 617, 628.

12. HREOC has the power to inquire into breaches of “human rights.” Human Rights and Equal Opportunity Commission Act 1986 (Cth.) § 11(f). The term “human rights” is defined in section 3 of the HREOC Act as “the rights and freedoms recognized in the Covenant, declared by the Declarations or recognised or declared by any relevant international instrument.” *Id.* § 3. The Religion Declaration has been adopted as such an instrument. See NICK O’NEILL, SIMON RICE & ROGER DOUGLAS, *RETREAT FROM INJUSTICE: HUMAN RIGHTS LAW IN AUSTRALIA* 201–02 (Federation Press 2d ed. 2004).

13. International Labour Organisation, Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation, June 25, 1958, 362 U.N.T.S. 31 [hereinafter ILO 111].

ground of religion in employment and occupation except where religion is an inherent requirement of a particular job.¹⁴

Federal domestic legislation has given only limited effect, however, to the obligations imposed on Australia as a party to these instruments. The main sources of protection for religious rights are contained in the Racial Discrimination Act 1975 (Cth) (“RDA”);¹⁵ the Human Rights and Equal Opportunity Commission Act 1986 (Cth) (“HREOC Act”);¹⁶ and the Workplace Relations Act 1996 (Cth) (“WRA”).¹⁷

The RDA makes it unlawful to discriminate on the ground of race, color, descent, or national or ethnic origin in various aspects of public life, including access to places and facilities, housing and accommodation, the provision of goods and services, and employment.¹⁸ The phrase “ethnic origin” is generally understood to open the door to protecting at least some religious groups against discrimination. Courts have consistently held, for instance, that Jews are a group of people with an “ethnic origin” for the purposes of the RDA.¹⁹ Sikhs would also likely be regarded as an ethnic group, but it is less certain whether Muslims would be covered.²⁰

The RDA was subsequently amended by the Racial Hatred Act 1995 (Cth), which inserted a new part into the RDA (codified as Part IIA) dealing with vilification.²¹ Section 18C(1), which is contained in Part IIA, reads:

It is unlawful for a person to do an act, otherwise than in private, if:

- (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and

14. *Id.* at art. 1(2). The job of a pastor at a particular church, for instance, would inherently require certain religious qualifications.

15. Racial Discrimination Act 1975 (Cth.).

16. Human Rights and Equal Opportunity Commission Act 1986 (Cth.).

17. Workplace Relations Act 1996 (Cth.).

18. Racial Discrimination Act 1975 (Cth.), § 9.

19. *See, e.g.*, Jones v. Scully (2002) 120 F.C.R. 243, 271–72; Miller v. Wertheim (2002) F.C.A.F.C. 156, 161.

20. For more detailed discussion of the meaning of “ethnic origin,” see NEIL REES ET AL., AUSTRALIAN ANTI-DISCRIMINATION LAW 179–85 (2008).

21. Racial Hatred Act 1995 (Cth.).

(b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.²²

The reference to “ethnic origin” in section 18C(1)(b) means that a religious group which can also be classified as an ethnic group is protected against vilification in the same way that such a group is protected against discrimination.

Section 18D of the RDA, however, contains a series of defenses to vilification. It reads:

Section 18C does not render unlawful anything said or done 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 for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or

(c) in making or publishing:

(i) a fair and accurate report of any event or matter of public interest; or

(ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.²³

Case law makes clear that the impact of the conduct which is mentioned in section 18C(1) must be assessed from the perspective of a member of the target group.²⁴ However, the terms used by section 18C(1)—especially “offend” and “insult”—are very vague and appear to cover even conduct which is not seriously harmful and merely causes low-level emotional distress. This led to a challenge to Part IIA’s constitutionality in *Toben v. Jones*.²⁵

In *Toben*, the appellant, Fredrick Toben, had published material on the internet that questioned the occurrence of the Holocaust.²⁶

22. Racial Discrimination Act 1975 (Cth.), § 18C(1).

23. *Id.* § 18D.

24. *See, e.g.*, Hagan v. Trs. of the Toowoomba Sports Ground Trust (2000) F.C.A. 1615, ¶¶ 15, 25–26, 31–32.

25. *Toben v. Jones* (2003) 129 F.C.R. 515 (Carr, J.).

26. *Id.* at 520–23.

HREOC determined that this material vilified Jewish people, after which the Federal Court granted an injunction enforcing HREOC's determination.²⁷ On appeal, Toben argued that Part IIA of the RDA was intended to implement Article 4 of the International Convention on the Elimination of all Forms of Racial Discrimination ("ICERD"),²⁸ which provides that parties to the ICERD should criminalize the dissemination of ideas based on "racial hatred."²⁹ He inferred from this that section 18C had to be read down to cover only acts which amount to an expression of racial hatred if it were not to be beyond the constitutional power of the Commonwealth.³⁰

The Full Federal Court rejected this argument. Justice Carr, with whom Justice Kiefel agreed on this matter, wrote that "acts done in public which are objectively likely to offend, insult, humiliate or intimidate and which are done because of race, colour or national or ethnic origin are likely to incite other persons to racial hatred or discrimination or to constitute acts of racial hatred or discrimination."³¹ He thought that the provisions were therefore consistent with the ICERD and constitutionally valid as an exercise of the external affairs power.³² Justice Allsop pointed out that Part IIA was intended to implement not only Article 4 of the ICERD but also the other provisions of the ICERD and the ICCPR that cover the elimination of racial discrimination in all its forms, not only that of racial hatred.³³ He therefore found that Part IIA was reasonably capable of being considered as appropriate and adapted to implement the objectives of the ICERD, and that it was not necessary to read it as the appellant had suggested.³⁴

Another possible constitutional problem with the anti-vilification provisions of the RDA (as well as the state anti-vilification laws which are considered below) is that they may be in conflict with the implied freedom of political communication contained in the Australian Constitution. This freedom was recognized in the cases of

27. *Id.* at 518.

28. International Convention on the Elimination of all Forms of Racial Discrimination, G.A. Res. 2106 (XX), at art. 4, U.N. GAOR, 20th Sess., Supp. No. 14, Annex, U.N. Doc. A/RES/2106(XX)/Annex, (Dec. 21, 1965).

29. *Toben*, 129 F.C.R. at 523–24.

30. *Id.*

31. *Id.* at 524.

32. *Id.* at 524–25.

33. *Id.* at 551 (Allsop, J.).

34. *Id.*

*Nationwide News Proprietary Ltd. v. Wills*³⁵ and *Australian Capital Television Proprietary Ltd. v. Commonwealth*.³⁶

The test for determining whether a law infringes the freedom of communication is explained in the case of *Lange v. Australian Broadcasting Corporation*.³⁷ This test has two prongs. The first concerns whether the law effectively burdens freedom of communication about government or political matters either in its terms, operation, or effect.³⁸ If the answer to this question is “yes,” the law may nevertheless survive challenge if it is

reasonably appropriate and adapted to serve a legitimate end the fulfillment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the Constitution to the informed decision of the people³⁹

Although the High Court has not yet considered whether the anti-vilification provisions of the RDA infringe the freedom of political communication, it is obvious that much will depend on whether the communications in question are “political”⁴⁰ and, if so, whether the anti-vilification provisions unduly impair the freedom. Without going into these issues in any detail, and on the assumption that the communications are political, it is my view that the cumulative effect of the low threshold of harm, the indeterminacy of the terms used, the failure to require that anyone actually be moved by the relevant conduct to harm members of the target group, and the failure to require that any actual person be offended, insulted, humiliated, or intimidated by the defendant’s conduct signal a

35. *Nationwide News Proprietary, Ltd. v. Wills* (1992) 177 C.L.R. 1.

36. *Austl. Capital Television Proprietary, Ltd. v. Commonwealth* (1992) 177 C.L.R. 106.

37. *Lange v. Austl. Broad. Corp.* (1997) 189 C.L.R. 520, 567–68.

38. *Id.* at 567.

39. *Id.*

40. The exact meaning of “political communication” is disputed. *See generally, e.g.*, Michael Chesterman, *When is a Communication “Political”?*, 14(2) LEGIS. STUD. 5 (2000); Dan Meagher, *What is “Political Communication”? The Rationale and Scope of the Implied Freedom of Political Communication*, 28 MELB. U. L. REV. 438, 467 (2004) (arguing that a communication should be considered political “if the *subject matter of the communication is such that it may reasonably be relevant to the federal voting choices of its likely audiences*” and that subject matter alone should “determine whether a communication qualifies for constitutional protection”).

remedial response disproportionate to the potential harm of vilification.

Of course, the exemptions contained in section 18D narrow the reach of section 18C(1)(a), but the question is whether they narrow it sufficiently.⁴¹ In this regard, one troubling aspect of the exemptions is that they are qualified by the requirement that anything said or done—for instance, in the performance of an artistic work—be said or done “reasonably and in good faith.”⁴² In a High Court special-leave application, Chief Justice Gleeson noted the difficulty of applying the concept of reasonableness to art forms such as cartoons, which in their nature are intended to lampoon or ridicule, and he asked how one is to decide what sort of ridicule is reasonable and what sort is unreasonable.⁴³ Moreover, the notions of “genuine purpose”⁴⁴ and “matter of public interest”⁴⁵ are comparably vague and have a potentially chilling effect on freedom of speech.

The only decision to consider the section 18D exemptions in any detail is the Federal Court case of *Bropho v. Human Rights and Equal Opportunity Commission*, which addressed the question of whether a cartoon, published in a Western Australia newspaper and admittedly within the realm of offensive expression prohibited by the RDA, qualified for the RDA’s “artistic works” exemption.⁴⁶ As noted above, such expression must be done “reasonably and in good faith” in order to qualify.⁴⁷ One text sums up the approach of two of the three judges in the case by saying that “[i]t is strongly arguable that both French J and Lee J . . . saw the word ‘reasonably’ as applying to the respondent’s message as well as to the method by which that message was conveyed.”⁴⁸ But if section 18D must be interpreted in this way—that is, the speaker’s message must be reasonable before the defenses can be made out—then there is a strong argument that the exemptions do not sufficiently protect the

41. See Racial Discrimination Act 1975 (Cth.), §§ 18C(1)(a), 18D.

42. *Id.* § 18D.

43. *Bropho v. HREOC* [2005] HCA Trans 9, lines 101–258 (Feb. 4, 2005), available at [http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/HCATrans/2005/9.html?query=title\(Bropho\)](http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/HCATrans/2005/9.html?query=title(Bropho)).

44. Racial Discrimination Act 1975 (Cth.), § 18D(b).

45. *Id.* § 18D(c)(i).

46. *Bropho v. HREOC* (2004) 135 F.C.R. 105.

47. Racial Discrimination Act 1975 (Cth.), § 18D.

48. REES ET AL., *supra* note 20, at 577.

freedom to contribute to robust public discourse on political matters, this freedom being not only central to a democratic society, but also protected by the Australian Constitution.⁴⁹

Under the RDA, unlawful discrimination and vilification are civil wrongs and may be enforced by private civil action only.⁵⁰ There is no regulator charged with the task of pursuing and prosecuting people who break the law.⁵¹ Furthermore, there is no right of direct access to courts.⁵² Rather, a two-stage enforcement model is followed.⁵³ In terms of the HREOC Act, an individual or group must begin by lodging a complaint of unlawful discrimination with HREOC—Australia’s national human rights institution, an independent statutory authority—which must investigate the complaint and attempt to resolve it by alternative dispute resolution measures.⁵⁴ If the complaint is not resolved, the complainant may choose to commence proceedings in a federal court.⁵⁵ The court has broad discretionary power to make such orders as it thinks fit.⁵⁶

In addition to the role it gives HREOC in relation to the anti-discrimination laws, the HREOC Act gives HREOC functions and powers relating to the protection and promotion of human rights.⁵⁷ In particular, HREOC has the power to investigate violations of human rights recognized in certain international instruments where the alleged violator is the Commonwealth or an agent of the Commonwealth or the violation occurs under a Commonwealth enactment.⁵⁸ Because the international instruments include the

49. For further discussion of this issue, see Dan Meagher, *So Far So Good?: A Critical Evaluation of Racial Vilification Laws in Australia*, 32 FED. L. REV. 225 (2004). Nicholas Aroney discusses the compatibility of the State religious-vilification laws described in Part V below with the implied freedom of political communication. Nicholas Aroney, *The Constitutional (In)validity of Religious Vilification Laws: Implications for their Interpretation*, 34 FED. L. REV. 287 (2006).

50. REES ET AL., *supra* note 20, at 7.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* HREOC cannot make enforceable determinations because it cannot exercise judicial power by virtue of the separation of judicial power that is entrenched in the Constitution. *Brandy v. HREOC* (1995) 183 C.L.R. 245, 260.

55. REES ET AL., *supra* note 20, at 687.

56. *Id.*

57. Human Rights and Equal Opportunity Commission Act 1986 (Cth), §§ 10A to 29.

58. Section 11(f) of the Act includes in the functions of the Commission the power to inquire into any “act or practice that may be inconsistent with or contrary to any human right.” *Id.* § 11(f). The terms “act” and “practice” are defined in section 3 to include acts and

ICCPR and the Religion Declaration, HREOC can investigate violations of religious rights.⁵⁹

HREOC can also investigate complaints of employment discrimination based on religion in breach of ILO 111.⁶⁰ Discrimination is defined in section 3 of the HREOC Act, however, so as not to include any distinction, exclusion, or preference:

[I]n respect of a particular job based on the inherent requirements of the job; or in connection with employment as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, being a distinction, exclusion or preference made in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or that creed.⁶¹

Thus, religious organizations, for example, remain free to base their employment decisions on religious factors in certain instances.

The HREOC Act does not provide enforceable remedies against human-rights violations or discrimination in employment. Where the Commission finds that a complaint is substantiated, its powers are limited to attempting to resolve the complaint through conciliation or, failing that, to submit a report to the federal Attorney General for tabling in Parliament.⁶²

The WRA provides an additional source of federal legislative protection by proscribing termination of employment on certain grounds, one of which is religion.⁶³ The WRA also includes exceptions that mirror those found in section 3 of the HREOC Act discussed above.⁶⁴

practices done “by or on behalf of the Commonwealth or an authority of the Commonwealth,” or “under an enactment.” *Id.* § 3.

59. *Id.* § 3 (definitions of “covenant,” “human rights,” and “relevant international instrument”). The ICCPR is expressly identified in the Act and the Religion Declaration was declared a “relevant international instrument” by the Attorney General in accordance with his power under § 47 of the Act. *See* O’NEILL, RICE & DOUGLAS, *supra* note 12, at 201–02.

60. *See* Human Rights and Equal Opportunity Commission Act 1986 (Cth), § 31(b). ILO 111 is also incorporated into the Act at Schedule I. *Id.* Schedule I.

61. *Id.* § 3.

62. *Id.* § 11. For further discussion of HREOC’s powers in relation to human rights complaints, see O’NEILL, RICE & DOUGLAS, *supra* note 12, at 201–03.

63. Workplace Relations Act 1996 (Cth), § 659(2)(f).

64. *Id.* § 659(4) (“Subsection (2) does not prevent a matter referred to in paragraph (2)(f) from being a reason for terminating a person’s employment as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of

III. CONSTITUTIONAL PROTECTIONS

The Commonwealth Constitution contains very few guarantees for rights and freedoms. Notably, it does not contain a guarantee of equality. It follows that there is no constitutional freedom from religious discrimination. Freedom of religion is, however, guaranteed under section 116 of the Constitution, which provides: “The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.”⁶⁵

The wording of section 116 and that of the First Amendment to the U.S. Constitution are substantially similar.⁶⁶ The High Court has, however, emphasized the differences between the Australian and the U.S. guarantees. In the Court’s view, the use of the word “for” implies that the section 116 prohibition applies only to laws the intended purpose of which is to establish religion or impair its free exercise.⁶⁷

The leading Australian case addressing the interpretation of section 116’s “establishment clause” is *Attorney-General (Vict) ex rel. Black v. Commonwealth* (“DOGS Case”).⁶⁸ In this case, the High Court considered a challenge to a Commonwealth grants scheme.⁶⁹ The scheme provided funding to the States on condition that some of the money be directed to private schools, most of which were Catholic schools.⁷⁰ It was argued that state funding of

a particular religion or creed, if the employer terminates the employment in good faith to avoid injury to the religious susceptibilities of adherents of that religion or creed.”).

65. COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT § 116.

66. *Compare* U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”) *with* COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT § 116 (“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.”).

67. *Attorney-General (Vict.) ex rel. Black v. Commonwealth* (1981) 146 C.L.R. 559, 579 (Barwick C.J.); *Kruger v. Commonwealth* (1997) 190 C.L.R. 1, 40 (Brennan, C.J.); *see also* U.S. CONST. amend. I; Commonwealth of Australia Constitution Act § 116.

68. *Attorney-General (Vict.) ex rel. Black*, 146 C.L.R. 559.

69. *Id.* at 560–61.

70. *Id.*

church schools amounted to an establishment of religion.⁷¹ The High Court rejected the challenge, holding that the establishment clause under section 116 is applicable only when the establishment of religion is the purpose behind the making of a law.⁷² Indeed, Chief Justice Barwick said it must be the law's "express and . . . single purpose."⁷³ The Court also interpreted the meaning of "establishment" very narrowly, holding that it refers only to the creation of an official state religion or state church.⁷⁴

The High Court also narrowly interprets the free exercise clause of section 116. The most important free exercise case is *Adelaide Co. of Jehovah's Witnesses, Inc. v. Commonwealth* ("Jehovah's Witnesses Case").⁷⁵ There, the High Court held that the property of the Adelaide Company of Jehovah's Witnesses was legitimately seized under wartime regulations because the Witnesses' refusal to bear arms or take sides in the war prejudiced the defense of the Commonwealth.⁷⁶ Chief Justice Latham remarked, "It is consistent with the maintenance of religious liberty for the State to restrain actions and courses of conduct which are inconsistent with the maintenance of civil government or prejudicial to the continued existence of the community."⁷⁷ The other judges reasoned similarly, showing little recognition of the principle that government must meet stringent standards when it seeks to infringe constitutionally guaranteed rights and freedoms.⁷⁸ Normally, one would expect an inquiry into the importance of the government's purpose and the proportionality of the means it has chosen in its pursuit of that purpose. In this case, however, the Court simply deferred to the government's assessment of the danger posed to the public by the religious conduct of the Jehovah's Witnesses.

The case of *Kruger v. Commonwealth*⁷⁹ provides further evidence of the narrow approach the High Court takes to the Constitution's religious freedom guarantee. In *Kruger*, the plaintiffs challenged the

71. *Id.*

72. *Id.* at 581–83.

73. *Id.* at 579.

74. *Id.* at 582 (Barwick, C.J.), 604 (Gibbs, J.), 616 (Mason, J.), 653 (Wilson, J.).

75. *Adelaide Co. of Jehovah's Witnesses, Inc. v. Commonwealth* (1943) 67 C.L.R. 116.

76. *Id.* at 118–19.

77. *Id.* at 131.

78. *Id.* at 148–50 (Rich, J.); *id.* at 150–56 (Starke, J.); *id.* at 156–57 (McTiernan, J.); *id.* at 158–68 (Williams, J.).

79. *Kruger v. Commonwealth* (1997) 190 C.L.R. 1.

constitutionality of the Aboriginals Ordinance 1918 (N. Terr.), which authorized the removal of Aboriginal children from their parents.⁸⁰ It was argued that the Ordinance invaded the children's freedom of religion by preventing their participation in community religious practices.⁸¹ This argument was, however, rejected once again on the ground that the law did not have as its purpose the prohibition of the free exercise of religion.⁸² Because it is rare to find laws in Western democracies that specifically set out to interfere with religious freedom,⁸³ it appears that section 116 of the Commonwealth Constitution is destined to play only a very minor role in protecting religious freedom in Australia.

Furthermore, section 116 does not restrict the legislative power of the States and Territories. The only State constitution providing for the right to freedom of religion and belief is the Constitution of Tasmania.⁸⁴ However, its guarantee—which has never been the subject of a judicial decision—can be repealed by an ordinary Act of the Tasmanian Parliament without following any special procedures.⁸⁵

IV. PROTECTION AT COMMON LAW

Although the right to freedom of religion is recognized by the common law, it is clear that the right can, in principle, be taken away by the State Parliaments. As Justice White said in *Grace Bible Church Inc. v. Reedman*, “There is nothing in [the] common law which inhibits or is capable of inhibiting the power of the Parliament of the State to make laws for the peace, welfare and good government of this State, including laws that affect the freedom of religious worship and religious expression.”⁸⁶

Yet in an interesting recent case, *Evans v. State of New South Wales*, common-law rights proved more difficult to restrict than one

80. Aboriginals Ordinance 1918 (N. Terr.), §§ 6, 7.

81. *Kruger*, 190 C.L.R. at 2.

82. *Id.* at 40.

83. *But see* *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (finding the city's ordinance regulating ritual animal slaughter to be targeted at the religious practices of a particular religious group).

84. Constitution Act 1934 (Tas), § 46.

85. Some State constitutions contain provisions which cannot be amended or repealed without meeting special “manner and form” requirements, such as a referendum or a special majority. *See, e.g.*, Constitution Act 1975 (Vict.) § 18(h) and Part VII.

86. *Grace Bible Church, Inc. v. Reedman* (1984) 36 S.A. ST. R. 376, 385.

might perhaps have expected in the light of traditional approaches to the common law.⁸⁷ In this case, the right to freedom of speech was at stake.

Evans dealt with a regulation made under the World Youth Day Act 2006 (N.S.W.).⁸⁸ World Youth Day was a large gathering of young members of the Catholic Church held in Sydney in 2008. Clause 7 of the Regulation gave police officers and authorized persons the power to direct people in World Youth Day areas to cease engaging in conduct that caused “annoyance or inconvenience to participants in a World Youth Day event.”⁸⁹ Clause 7 was made under section 58(2)(b) of the Act, which authorized the making of regulations with respect to “the conduct of the public [on] World Youth Day venues and facilities.”⁹⁰ But what did Parliament mean by “conduct”?

In defining what “conduct” meant, the Full Federal Court reasoned that, given the very broad range of acts to which this word might apply, there were “constructional choices open,” and the Court made reference to the well-known principle “that Acts be construed, where constructional choices are open, so as not to encroach upon common law rights and freedoms.”⁹¹ The corollary of this principle is that if Parliament intends to interfere with fundamental rights and freedoms, it must do so in the clearest of language.⁹² The Court then went on to point out that what is annoying to some may not be annoying to others, and that annoying opinions may be those which do not disrupt or interfere with the freedoms of others and are not objectively offensive.⁹³ The Court took the view that, in the absence of clear language indicating otherwise, it could not have been Parliament’s intention that regulations would be made interfering with freedom of speech to this extent.⁹⁴ Section 58 of the World Youth Day Act therefore did

87. *Evans v. State of New South Wales* (2008) 168 F.C.R. 576.

88. *Id.* at 577.

89. *Id.* at 579.

90. World Youth Day Act 2006 (N.S.W.), § 58(2)(b).

91. *Evans*, 168 F.C.R. at 593.

92. *Id.* at 592–94.

93. *Id.* at 597.

94. *Id.*

not support that element of Clause 7 which sought to prevent merely annoying conduct.⁹⁵

The Federal Court's robust approach to common-law rights in *Evans*, which draws on the theory of common-law constitutionalism,⁹⁶ obviously has the potential to assist in the protection of freedom of religion. But even suitably beefed up common-law protection is incapable of dislodging the principle of State parliamentary sovereignty. Although a court intent on maximally protecting the common-law right to freedom of religion might exhibit unusual reluctance to find that Parliament intended to invade the right, the presumption that Parliament does not intend to interfere with common-law rights and freedoms remains rebuttable.⁹⁷ This means that, provided a State or Territory Parliament makes its intention perfectly plain, it is free to establish any religion, impose religious observances, forbid religious beliefs and practices, and require a religious test as a qualification for public office. Even the Tasmanian constitutional guarantee can be repealed at will, as discussed above. Furthermore, efforts to rectify this situation have received little support as exemplified by the failure of a 1988 referendum aimed at amending section 116 of the Commonwealth Constitution so as to confer greater protection against State and Territory legislation infringing the freedom of religion.⁹⁸

V. STATE AND TERRITORY LAWS

Having discussed the extent to which the right to freedom of religion and belief is protected by federal legislation, the Commonwealth and State Constitutions, and the common law, this Article now turns to relevant State and Territory laws, noting that such laws operate concurrently with federal laws if they are consistent with or more beneficial than federal laws.⁹⁹

95. *Id.*

96. I discuss common-law constitutionalism elsewhere. Denise Meyerson, *State and Federal Privative Clauses—Not So Different After All*, 16 PUB. L. REV. 39, 45–50 (2005).

97. *Durham Holdings Proprietary Ltd. v. State of New South Wales* (2001) 205 C.L.R. 399, ¶ 31.

98. See Tony Blackshield, *Religion and Australian Constitutional Law*, in LAW AND RELIGION: GOD, THE STATE AND THE COMMON LAW 81, 102 (Peter Radan, Denise Meyerson & Rosalind F. Croucher eds., 2005).

99. See O'NEILL, RICE & DOUGLAS, *supra* note 12, at 481–82.

The recent enactment of bills of rights in the Australian Capital Territory (Austl. Cap. Terr.) and Victoria significantly added to Australia's legal landscape. The Human Rights Act 2004 (Austl. Cap. Terr.) ("Human Rights Act")¹⁰⁰ and the Charter of Human Rights and Responsibilities Act 2006 (Vict.) ("Charter of Human Rights and Responsibilities")¹⁰¹ incorporate most of the rights in the ICCPR, including rights of relevance to this Article. Specifically, they recognize the right to recognition and equality before the law;¹⁰² the right to freedom of thought, conscience, religion, and belief;¹⁰³ and the rights of minorities or cultural rights.¹⁰⁴ These Acts can be amended or repealed in the ordinary way—that is, without following any special procedures. They are primarily interpretative instruments, requiring those who interpret and apply legislation to do so in a way that is compatible with human rights, to the extent that it is possible to do so, but subject to the proviso that the interpretation must be consistent with the purpose of the legislation. The Human Rights Act also allows the ACT Supreme Court to make a "declaration of incompatibility"¹⁰⁵ and the Charter of Human Rights and Responsibilities allows the Victorian Supreme Court to make a declaration of "inconsistent interpretation."¹⁰⁶ Such declarations are to the effect that challenged legislation is incompatible with human rights or is incapable of being interpreted consistently with human rights. They do not, however, affect the validity or enforceability of the offending legislation. Instead, the ball is returned to the government's court, which may or may not decide to amend the legislation. Finally, public authorities must act compatibly with human rights under the two Acts. So far there have been no challenges to legislation or acts of public authorities on the ground of conflict with the religious rights contained in the Human Rights Act or the Charter of Human Rights and Responsibilities.

100. Human Rights Act 2004 (Austl. Cap. Terr.).

101. Charter of Human Rights and Responsibilities Act 2006 (Vict.).

102. Human Rights Act 2004 (Austl. Cap. Terr.), § 8; Charter of Human Rights and Responsibilities Act 2006 (Vict.), § 8.

103. Human Rights Act 2004 (Austl. Cap. Terr.), § 14; Charter of Human Rights and Responsibilities Act 2006 (Vict.), § 14.

104. Human Rights Act 2004 (Austl. Cap. Terr.), § 27; Charter of Human Rights and Responsibilities Act 2006 (Vict.), § 19.

105. Human Rights Act 2004 (Austl. Cap. Terr.), § 32(2).

106. Charter of Human Rights and Responsibilities Act 2006 (Vict.), §36(2).

Six of the eight states and territories—Western Australia, Queensland, Tasmania, Victoria, the Australian Capital Territory, and the Northern Territory—have legislated to prohibit discrimination in various areas of public life on the ground of religious belief and/or conviction, activity, and affiliation.¹⁰⁷ “Religion” is not defined in any of the legislation, with the exception of the Northern Territory Anti-Discrimination Act, which expressly defines religious belief or activity to include Aboriginal spiritual beliefs or activities.¹⁰⁸ Although New South Wales and South Australia have not legislated in this area, the New South Wales Anti-Discrimination Act 1977 (N.S.W.), which forbids discrimination on the ground of race, defines the term “race” to include both “ethnic origin” and “ethno-religious” origin.¹⁰⁹ It therefore affords protection against discrimination for religious groups which can also be classified as ethnic groups.¹¹⁰

The State and Territory laws prohibiting religious discrimination contain the usual exemptions for the benefit of religious organizations. Employees can, for instance, be required to identify with a particular religion if this is an inherent requirement of the

107. REES ET AL., *supra* note 20, at 374.

108. Anti-Discrimination Act 2007 (N. Terr.), § 4(4). The extent to which Aboriginal spiritual beliefs and activities are protected by Australian law is a large and complex topic which cannot be covered in this Article. Two points are, however, worth noting. First, as Marion Maddox shows in her sensitive discussion of this issue, the religious traditions of indigenous Australians and the role played by sacred sites and land in their spiritual lives are not properly recognized or even fully understood. See MARION MADDOX, *FOR GOD AND COUNTRY: RELIGIOUS DYNAMICS IN AUSTRALIAN FEDERAL POLITICS* ch. 6 (2001). Second, heritage protection and native title legislation provide only limited protections and are subject to difficulties such as the need, under some laws, for Aboriginals to prove the religious significance of their sacred locations. This is particularly problematic given the fact that Aboriginal values and traditions often place great importance on religious secrets. For a detailed discussion, see Ernst Willheim, *Australian Legal Procedures and the Protection of Secret Aboriginal Spiritual Beliefs: A Fundamental Conflict*, in *LAW AND RELIGION IN THEORETICAL AND HISTORICAL CONTEXT* ch. 10 (Peter Cane, Carolyn Evans & Zoë Robinson eds., 2008).

The problem of religious secrets emerged as part of a controversy about the construction of a bridge linking Hindmarsh Island to the mainland. The construction of the bridge had been opposed on Aboriginal heritage grounds and a number of Ngarrindjeri women subsequently approached the responsible Minister, claiming that the island was sacred to them for reasons that could not be revealed because they involved secret “women’s business.” For discussion of the controversy and the cases to which it led, see ANN CURTHOYS, ANN GENOVESE & ALEXANDER REILLY, *RIGHTS AND REDEMPTION: HISTORY, LAW AND INDIGENOUS PEOPLE* ch. 7 (2008).

109. Anti-Discrimination Act 1977 (N.S.W.), § 4.

110. See REES ET AL., *supra* note 20, at 192–94.

job.¹¹¹ Furthermore, in some of the States and Territories—the ACT, the Northern Territory, and Western Australia—employers are under a duty in certain circumstances to accommodate the religious needs of employees.¹¹²

Blasphemy is almost certainly an offence in the majority of Australian jurisdictions. However, charges have not been laid against a person since 1919, and even those were subsequently withdrawn.¹¹³ Three of the States—Victoria, Queensland, and Tasmania—also prohibit vilification on religious grounds, and New South Wales prohibits religious vilification linked to ethnicity.¹¹⁴

The State anti-vilification legislation is in some respects like and in some respects unlike the federal anti-vilification provisions contained in the RDA and discussed in Part II above. The exemptions in the State legislation are broadly similar to those in the RDA. Generally speaking, they cover conduct engaged in reasonably and in good faith for such purposes as academic, artistic, and scientific purposes, or other purposes in the public interest.¹¹⁵ However, insofar as the definition of vilification is concerned, the State provisions set a higher threshold of harm than the provisions contained in the RDA. In particular, the conduct in question must satisfy tests such as inciting hatred towards, or serious contempt for, or severe ridicule of a person or group of persons.¹¹⁶ Furthermore, the impact of the conduct must be assessed from the perspective of the ordinary member of the community, not from the perspective of a member of the target group.¹¹⁷ These differences make it more difficult for an applicant relying on State legislation to succeed than an applicant relying on the RDA.¹¹⁸

Both unlawful discrimination on ground of religion and religious vilification are civil wrongs in terms of the relevant State and Territory laws.¹¹⁹ As with the Commonwealth process, States and

111. *Id.* at 376–77.

112. *Id.* at 378.

113. Lawrence McNamara, *Blasphemy*, in *LAW AND RELIGION*, *supra* note 98, at 197, 197–98.

114. REES ET AL., *supra* note 20, at 593.

115. *Id.* at 588–89.

116. *Id.* at 579.

117. *Id.* at 579–80.

118. *Id.* at 580.

119. *Id.* at 7, 593.

Territories follow a two-stage enforcement model.¹²⁰ Once a complaint is filed with the relevant public agency, investigation and non-binding conciliation follow.¹²¹ If conciliation fails, complainants may demand a hearing. One difference between the State and Commonwealth approaches, however, is that responsibility for the second stage is generally given to tribunals rather than courts.¹²² Generally speaking, the available remedies are findings of a declaratory nature, compensatory damages, and injunctive-style orders.¹²³

In Victoria and Queensland, “serious” religious vilification is also a criminal offense.¹²⁴ To rise to the level of criminal offense, intent must be proved, and, in Queensland, there must be some form of aggravating conduct, such as threatening physical harm to person or property or inciting others to threaten such harm.¹²⁵ In Victoria, aggravating conduct is a requirement only if the likely impact of the conduct is “hatred.”¹²⁶

There have been very few religious vilification cases in Australia and no reports of prosecutions for the criminal offense of religious vilification in Victoria or Queensland.¹²⁷ Perhaps the most controversial case, raising the freedom of Christians to teach about Islam, was brought under section 8(1) of the Racial and Religious Tolerance Act 2001 (Vict.) (“RRTA”) which 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.”¹²⁸

The exemptions under the RRTA are contained in sections 11 and 12. Section 12 contains an exemption for private conduct and section 11(1) provides:

120. *Id.* at 7.

121. *Id.*

122. *Id.* at 610.

123. *Id.* at 687.

124. *Id.* at 598–99.

125. *Id.* at 599.

126. *Id.* at 598–99.

127. *Id.* at 594.

128. Racial and Religious Tolerance Act 2001 (Vict.), § 8(1).

(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.¹²⁹

These provisions were invoked in a case involving Catch the Fire Ministries, which is an evangelical group, part of whose ministry is to convert people from Islam. Highly critical statements about Islam, illustrated by numerous references to Islamic texts, were made by a pastor of the Church during a seminar, by another pastor in a newsletter, and in an article published on the Church's website.¹³⁰ Three converts to Islam—who seemed to have attended the seminar as part of a deliberate plan¹³¹—complained that the ministry and its two pastors had incited hatred against Muslims.¹³² This complaint was upheld by the Victorian Civil and Administrative Tribunal in *Islamic Council of Victoria Inc. v. Catch the Fire Ministries Inc.*¹³³ The Tribunal found that the respondents had breached section 8 of the RRTA and that the “religious purpose” defense had not been made out because the views expressed were unbalanced and therefore the respondents had not acted “reasonably” and “in good faith.”¹³⁴

Catch the Fire Ministries appealed to the Victorian Court of Appeal.¹³⁵ The Court found that the Tribunal had made errors of

129. *Id.* § 11(1).

130. *Islamic Council of Victoria Inc. v. Catch the Fire Ministries Inc.* (2004) V.C.A.T. 2510, ¶¶ [74], [75].

131. *See id.* ¶ [73].

132. *See id.*

133. *Id.*

134. *Id.* ¶ [390].

135. *Catch the Fire Ministries Inc. v. Islamic Council of Victoria Inc.* (2006) 235 A.L.R. 750.

law in its interpretation of section 8.¹³⁶ In setting out the correct interpretation, the Court made a number of points. First, it said that the Tribunal had erred by considering the effect of the words on an “ordinary reasonable” reader or hearer when it should have considered their effect on the particular audience to which they were directed.¹³⁷ Judge Nettle explained that the correct question is “whether the natural and ordinary effect of the conduct is to incite hatred or other relevant emotion in the circumstances of the case,”¹³⁸ which include the characteristics of the audience to which the conduct is directed.¹³⁹ Furthermore, the effect of the conduct must be gauged by reference to the reasonable¹⁴⁰ or ordinary¹⁴¹ member of that audience. There is no requirement, however, that the conduct must actually incite hatred.¹⁴²

A further error, at least according to Judge Nettle, involved failing to distinguish between inciting hatred or other relevant emotion against a religious belief and inciting hatred against the adherents of a religion. His Honor remarked that there are many people who may “despise each other’s faiths and yet bear each other no ill will.”¹⁴³ “The prohibition in s[ection] 8,” he concluded:

[I]s not a prohibition against saying things about the religious beliefs of persons which are offensive to those persons, or even against saying things about the religious beliefs of one group of persons which would cause another group of persons to despise those beliefs. It is against saying things about the religious beliefs and practices of persons which go so far as to incite other persons to hate persons who adhere to those religious beliefs.¹⁴⁴

136. *Id.* ¶ [81].

137. *Id.* ¶ [18].

138. *Id.* ¶ [19].

139. *Id.* ¶¶ [17]–[19].

140. *Id.* ¶ [18] (Nettle, J.A.) (suggesting that “[section] 8 has in view the effect of conduct on a reasonable member of the class of persons to whom the conduct is directed”).

141. *Id.* ¶ [132] (Ashley, J.A.) (“I prefer the formulation that it should be decided by reference to an ‘ordinary’ rather than a ‘reasonable’ member of the audience class.”); *id.* ¶ [158] (Neave, J.A.) (“[I]t may be more appropriate to consider the effect of the words or conduct on an ‘ordinary’ member of the class to which it is directed . . .”).

142. *Id.* ¶¶ [12]–[14] (Nettle, J.A.) (“I . . . allow that incitive conduct is capable of contravening [section] 8 without necessarily causing hatred or serious contempt or revulsion or serious ridicule.”); *id.* ¶¶ [153]–[154] (Neave J.A.).

143. *Id.* ¶ [33] (Nettle, J.A.).

144. *Id.* ¶ [80].

In rejecting the applicability of the “religious purpose” exemption under the Act, the Tribunal, relying on expert evidence concerning the truth and falsity of the claims made about Islam, had emphasized the fact that the views expressed were one-sided and unbalanced.¹⁴⁵ It remarked that the seminar “was not conducted reasonably because it was ‘excessive.’ It was a one-sided delivery of a view of the Qur’an and Muslims’ beliefs, which were not representative. It was designed to put Muslim people and their beliefs in a bad light.”¹⁴⁶ Similar comments were made about the article. The Tribunal wrote: “There is no attempt in the article to distinguish between moderate and extremist Muslims. . . . [A]s with the newsletter, I find that the respondent does not obtain the benefit of the exemption because the person’s conduct could not be regarded as reasonable and in good faith.”¹⁴⁷

These remarks about “balance” concerned Judge Nettle. He wrote that “it was calculated to lead to error for a secular tribunal to attempt to assess the theological propriety of what was asserted at the Seminar.”¹⁴⁸ Judge Neave also expressed reservations about the attempt of the Tribunal to assess the theological accuracy of what was said at the Seminar.¹⁴⁹ However, she thought that questions of balance or accuracy might be relevant at the stage of deciding “whether the statements [are] likely to incite hatred.”¹⁵⁰ Judge Ashley preferred to leave open whether the Tribunal’s consideration of lack of balance in the seminar presentation led it into error.¹⁵¹

In explaining their own view of the meaning of the religious purpose exemption under the RRTA, Judges Nettle and Neave held that when statements are made for a religious purpose, the reasonableness of the conduct must be judged by the standards of “an open and just multicultural society,” which allows for differences in views about religions.¹⁵² Although perhaps an improvement on the idea of “balance,” this is not a particularly illuminating test. It raises more questions than it answers, and it is questionable whether

145. *Islamic Council of Victoria Inc.* V.C.A.T. 2510, ¶ [389].

146. *Id.*

147. *Id.* ¶ [394].

148. *Catch the Fire Ministries Inc.* 235 A.L.R. 750, ¶ [36] (Nettle, J.A.).

149. *Id.* ¶¶ [178]–[179] (Neave, J.A.).

150. *Id.* ¶ [179].

151. *Id.* ¶ [132] (Ashley, J.A.).

152. *Id.* ¶¶ [94]–[98] (Nettle, J.A.); *id.* ¶ [197] (Neave, J.A.).

Judge Nettle shed any extra light on the issue when he added: “It is only when what is said is so ill-informed or misconceived or ignorant and so hurtful as to go beyond the bounds of what tolerance should accommodate that it may be regarded as unreasonable.”¹⁵³

Catch the Fire Ministries highlights the potential conflict between religious vilification legislation and the protection of religiously motivated speech. There is a possible constitutional dimension to this conflict insofar as such legislation may infringe upon the implied freedom of political communication.¹⁵⁴ The freedom-of-political-communication issue was briefly discussed above in Part II, albeit only in relation to the RDA, which is framed more broadly than the RRTA.¹⁵⁵ Insofar as the validity of the RRTA is concerned, the Court in *Catch the Fire Ministries* found that, properly construed, it does not infringe upon the implied freedom.¹⁵⁶ Although there is, in my view, room for dispute about the Court’s conclusion, I shall not pursue this matter further. Instead, I will investigate whether, regardless of the constitutionality of the legislation, its benefits outweigh the costs to religious liberty.

Religious vilification legislation has the obviously desirable aims of promoting religious tolerance and inclusion as well as protecting citizens from being perceived in hateful ways. Its critics, however, wonder whether legislation which opens the door to legal battles over the meaning of religious texts is likely to achieve the goal of promoting tolerance. Rex Ahdar and Ian Leigh, in commenting on the Tribunal decision in *Catch the Fire Ministries*, say:

The conclusion that a person may be found to have vilified another religion by detailed and generally accurate quotation of its sacred texts—a verdict based on the views of expert witnesses that the quotations are unrepresentative—is troubling in the extreme. Overall, it seems likely that, interpreted in this fashion, the law will *encourage* religious disagreement to be played out by the

153. *Id.* ¶ [98] (Nettle, J.A.). For the sake of completeness, it should also be mentioned that in terms of a 2006 amendment to the Act, a “religious purpose” is now defined in section 11(2) as including “conveying or teaching a religion or proselytizing.” Equal Opportunity and Tolerance Legislation (Amendment) Act 2006 (Vict.), § 9.

154. The constitutional right to free exercise has no bearing on the RRTA, however, because that is Victorian legislation and, as noted above, section 116 applies only to Commonwealth laws.

155. *See supra* Part II.

156. *Catch the Fire Ministries Inc.* 235 A.L.R. 750, ¶¶ [111]–[113] (Nettle J.A.); *id.* ¶¶ [203]–[210] (Neave J.A.).

protagonists in the courts and result in increased religious intolerance and disharmony.¹⁵⁷

Another problem, raised by Patrick Parkinson, is the chilling effect of potential litigation on legitimate religious activity.¹⁵⁸ As he points out, the possibility of an expensive lawsuit “may intimidate religious leaders . . . from teaching and expressing what they believe their faith requires”¹⁵⁹ The subjectivity of the tests the courts are required to apply under the RRTA obviously exacerbates the problem to which Parkinson refers. The exemptions provision is the most obvious vehicle for arbitrary judgments, but in *Catch the Fire Ministries* it even proved difficult for the judges to gauge the effect of the conduct on the audience to which it was directed. In particular, they could not agree on whether the application of the “audience” test would have been more or less favorable to the respondents than the test which the Tribunal applied.¹⁶⁰

A further problematic feature of the Act to which Parkinson calls attention is the fact that it provides for civil remedies for vilification. The consequence is that anyone can commence proceedings and that there is no mechanism for filtering out unmeritorious cases.¹⁶¹

Finally, *Catch the Fire Ministries* demonstrates the potential of religious vilification laws to entangle the government in religious matters in a troubling way. The Victorian legislation compels tribunals and courts to investigate matters of religious belief and to evaluate religious practices, such as determining whether a speaker’s religiously motivated speech is in “good faith,” “reasonable” and used for a “genuine” religious purpose.¹⁶² It may lead them to ask, as we have seen, whether the speaker’s views are balanced or theologically accurate. Even the need to gauge the effect of the speaker’s conduct on the audience is a source of potential entanglement in doctrinal issues since, as Lawrence McNamara observes:

157. REX AHDAR & IAN LEIGH, *RELIGIOUS FREEDOM IN THE LIBERAL STATE* 386 (2005).

158. Patrick Parkinson, *Religious Vilification, Anti-Discrimination Laws and Religious Minorities in Australia: The Freedom to be Different*, 81 AUSTL. L.J. 954, 959 (2007).

159. *Id.*

160. *Catch the Fire Ministries Inc.* 235 A.L.R. 750, ¶ [73] (Nettle J.A.); *id.* ¶ [132] (Ashley J.A.); *id.* ¶ [181] (Neave J.A.).

161. Parkinson, *supra* note 158, at 962.

162. *See generally Catch the Fire Ministries Inc.*, 235 A.L.R. 750.

[T]he court must necessarily make judgements about the audience that include judgements about the nature of their faith (for example, whether it is a forgiving one) and the extent to which the religious audience adheres to the tenets of its faith (for example, the faith may be forgiving, but the audience is not).¹⁶³

VI. CONCLUSION

Although Australia is, by and large, a tolerant society, this Article has identified significant gaps in the *de iure* protection afforded religion. Legal protection for religious rights in Australia is not only limited but also affected by arbitrary factors such as where an individual lives and whether the religious group to which he/she belongs can be categorized as an “ethnic” group. I will summarize the legal position to conclude this study.

Insofar as freedom of religion is concerned, first, although there is a constitutional guarantee of non-establishment and free exercise, the guarantee restricts the legislative power of the Commonwealth only and it is relatively toothless. Second, the only other constitutional guarantee for freedom of religion, contained in the Tasmanian Constitution, can be repealed by an ordinary Act of the Tasmanian Parliament. Third, while HREOC has the power to investigate violations of rights contained in the ICCPR and the Religion Declaration, the HREOC Act does not provide enforceable remedies for the violation of these rights. Fourth, bills of rights in the ACT and Victoria protect the right to religious freedom but do not permit invalidation of legislation which is incompatible with this right. Finally, there is no other State or Territory legislation protecting freedom of religion. In short, the formal protections afforded religious freedom under Australian law are relatively weak—particularly when compared to many other liberal democracies.

Insofar as discrimination and vilification on religious grounds are concerned, first, there are no constitutional guarantees of equality in the Commonwealth or State Constitutions. Second, although HREOC can investigate complaints of discrimination in employment based on religion, the HREOC Act does not provide enforceable remedies. Third, the only federal legislation expressly prohibiting discrimination on the ground of religion is in the context of

163. Lawrence McNamara, *Salvation and the State: Religious Vilification Laws and Religious Speech*, in *HATE SPEECH AND FREEDOM OF SPEECH IN AUSTRALIA* 145, 160 (Katharine Gelber & Adrienne Stone eds., 2007).

termination of employment. And, although some religious groups will be indirectly protected against discrimination and vilification under federal racial discrimination law, this protection extends only to those individuals whose religious adherence is associated with ethnicity. Fourth, although discriminatory legislation can be challenged in the ACT and Victoria under their respective bills of rights, such legislation cannot be struck down. Finally, protection against discrimination and vilification on the ground of religion or ethno-religious origin is not available in all of the States.

