The Constitutional (In)Validity of Religious Vilification Laws: Implications for Their Interpretation

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Research Paper No. 07-05

2006

THE CONSTITUTIONAL (IN)VALIDITY OF RELIGIOUS VILIFICATION LAWS: IMPLICATIONS FOR THEIR INTERPRETATION

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I INTRODUCTION

In this article, I address the question whether religious vilification laws are contrary to the implied freedom of political communication affirmed in the High Court's decision in *Lange v Australian Broadcasting Corporation*.[1] I will focus on three key issues. First, can the implied freedom extend, in principle, to religious speech, meaning speech that is motivated by religious belief as well as speech that simply deals with religion or religious topics? Secondly, do religious vilification laws place a relevant burden upon communication about political or governmental matters? Thirdly, are religious vilification laws reasonably appropriate and adapted to achieving some legitimate objective in a manner which is compatible with the constitutionally prescribed system of representative government? The latter two questions derive directly from the test formulated by the High Court in *Lange* for determining whether a law is contrary to the implied freedom of political communication. The first question is concerned, primarily, with the issue of whether s 116 of the *Constitution*, in prohibiting the establishment of religion, renders religious speech irrelevant to federal politics and therefore by definition beyond the scope of the implied freedom of political communication.

Hate speech laws, including laws that make it illegal to vilify on various grounds, such as race, religion and sexual orientation, have been enacted by the Commonwealth, and by the six Australian States and the Australian Capital Territory.[2] Each set of laws is different, and some of the differences are significant. Only Victoria,

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1 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 ('*Lange*').

2 For a survey of Australian hate speech laws, see Jenni Whelan and Christine Fougere, 'Proscription of Hate Speech in Australia', in Gabriel Moens and Rodolphe Biffot (eds), *The Convergence of Legal Systems in the 21st Century: An Australian Approach* (2002). See *Racial Discrimination Act 1975* (Cth) ss 18B–18F; *Crimes Act 1914* (Cth) s 30A(3); *Criminal Code Act 1995* (Cth) s 80.2(5); *Anti-Discrimination Act 1977* (NSW) ss 20C–20D; *Racial and Religious Tolerance Act 2001* (Vic) s 8; *Anti-Discrimination Act 1991* (Qld) ss 124A, 131A; *Racial Vilification Act 1996* (SA) ss 4, 6; *Wrongs Act 1936* (SA) s 37; *Discrimination Act 1991* (ACT) ss 65–67; *Criminal Code 1913* (WA) ss 76–80; *Anti-Discrimination Act 1998* (Tas) ss 17, 19.

Queensland and Tasmania, for example, have enacted religious vilification laws.[3] The question of the constitutionality of racial vilification laws has been addressed in a number of cases[4] and by numerous commentators.[5] Religious vilification laws are newer on the Australian scene, and have received much less scholarly attention.[6] Moreover, compared to racial vilification laws,[7] religious vilification laws raise distinct issues, both as to their substantive merits,[8] and in terms of their constitutionality.[9]

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3 *Racial and Religious Tolerance Act 2001* (Vic) s 8; *Anti-Discrimination Act 1991* (Qld) ss 124A, 131A; *Anti-Discrimination Act 1998* (Tas) ss 17, 19. See also the prohibition of racial vilification in the *Anti-Discrimination Act 1977* (NSW) s 20C, which, when read with s 4, includes vilification on the ground of 'ethno-religious … origin', as well as the prohibition in the *Racial Discrimination Act 1975* (Cth) ss 18C–18D, which may also extend to acts done because of a person's or group's 'ethno-religious' background: *King-Ansell v Police* [1979] 2 NZLR 531.

4 See, eg, *Bryl and Kovacevic v Nowra and Melbourne Theatre Company* [1999] HREOCA 11 (Unreported, Commissioner Johnston, 21 June 1999) [4.3]; *Walsh v Hanson* (Unreported, HREOC, Commissioner Nader, 2 March 2000); *Hellenic Council of NSW v Apoleski* [1997] NSWEOT 9-11 (Unreported, Judicial Member Biddulph, Members Alt and Mooney, 25 September 1997); *Kazak v John Fairfax Publications Ltd* [2000] NSWADT 77 (Unreported, Hennessy DP, Members Farmer and Jowett, 22 June 2000) [93]–[97] ('*Kazak*'); *Jones v Scully* (2002) 120 FCR 243, 304–6; *Toben v Jones* (2003) 129 FCR 515, 551–2.

5 Maurice Byers, 'Free Speech a Certain Casualty of Race Law', *The Australian* (Sydney), 21 November 1994, 11. Cf Kate Eastman, 'Drafting Vilification Laws: Legal and Policy Issues' (1994) 1 *Australian Journal of Human Rights* 285; Tamsin Solomon, 'Problems in Drafting Legislation Against Racist Activities' (1994) 1 *Australian Journal of Human Rights* 265; Anne Flahvin, 'Can Legislation Prohibiting Hate Speech be Justified in Light of Free Speech Principles?' (1995) 18 *University of New South Wales Law Journal* 327; Saku Akmeemana and Melinda Jones, 'Fighting Racial Hatred', in Commonwealth Race Discrimination Commissioner, *The Racial Discrimination Act: A Review* (1995) 156–62; Luke McNamara and Tamsin Solomon, 'The Commonwealth *Racial Hatred Act 1995*: Achievement or Disappointment?' (1996) 18 *Adelaide Law Review* 259, 278–83; Wojciech Sadurski, *Freedom of Speech and its Limits* (1999) ch 6; Michael Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant* (2000) 238–43; Dan Meagher, 'What is "Political Communication"? The Rationale and Scope of the Implied Freedom of Political Communication' (2004) 28 *Melbourne University Law Review* 438; Dan Meagher, 'The Protection of Political Communication under the Australian Constitution' (2005) 28 *University of New South Wales Law Journal* 30.

6 See Meagher, 'What is "Political Communication"?', above n 5, 460; *Deen v Lamb* [2001] QADT 20 (Unreported, Commissioner Sofronoff, 8 November 2001) 5–7; *Islamic Council of Victoria v Catch the Fire Ministries Inc* [2003] VCAT 1753 (Unreported, Higgins V-P, 21 October 2003) [8]–[17] ('*Catch the Fire Ministries*'); *Fletcher v Salvation Army* [2005] VCAT 1523 (Unreported, Morris P, 1 August 2005) [1], [4]–[10] ('*Fletcher*').

7 On which, see Wojciech Sadurski, 'Offending with Impunity: Racial Vilification and Freedom of Speech' (1992) 14 *Sydney Law Review* 163; Kathleen Mahony, 'Hate Vilification Legislation and Freedom of Expression: Where is the Balance?' (1994) 1 *Australian Journal of Human Rights* 353; Luke McNamara, 'The Merits of Racial Hatred Laws: Beyond Free Speech' (1995) 4 *Griffith Law Review* 29; Lawrence Maher, 'Free Speech and its Postmodern Adversaries' (2001) 8(2) *Murdoch University Electronic Journal of Law*; Dan Meagher, 'So Far So Good?: A Critical Evaluation of Racial Vilification Laws in Australia' (2004) 32 *Federal Law Review* 225.

8 Patrick Parkinson, 'Enforcing Tolerance: Vilification Laws and Religious Freedom in Australia' (Paper delivered at the Eleventh Annual International Law and Religion

The religious vilification laws of Victoria, Queensland and Tasmania are sufficiently similar that the considerations relevant to their constitutionality are substantially the same. The *Racial and Religious Tolerance Act 2001* (Vic) may be taken as representative. Section 8(1) of that Act provides:

> A person must not, on the ground of the religious belief or activity of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.

Section 9 explains that:

> (1) In determining whether a person has contravened section 7 or 8, the person's motive in engaging in any conduct is irrelevant.
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> (2) In determining whether a person has contravened section 7 or 8, it is irrelevant whether or not the race or religious belief or activity of another person or class of persons is the only or dominant ground for the conduct, so long as it is a substantial ground.

Section 11(1) then provides:

> 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 —
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> (a) in the performance, exhibition or distribution of an artistic work; or
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> (b) in the course of any statement, publication, discussion or debate made or held, or any other conduct engaged in, for —
>
> (i) any genuine academic, artistic, religious or scientific purpose; or
>
> (ii) any purpose that is in the public interest; or
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> (c) in making or publishing a fair and accurate report of any event or matter of public interest.

Symposium — Religion in the Public Square: Challenges and Opportunities, Provo, Utah, 3–6 October 2004); Steve Edwards, 'Do We Really Need Religious Vilification Laws?' (2005) 21 *Policy* 30; Amir Butler, 'Why I've Changed My Mind on Vilification Laws', *The Age* (Melbourne), 4 June 2004. See also Reid Mortensen, 'Blasphemy in a Secular State: A Pardonable Sin?' (1994) 17 *University of New South Wales Law Journal* 409. For a contrary view, see Waleed Aly, 'Freedom to Inform, Not Inflame', *The Herald-Sun* (Melbourne), 21 December 2004.

9 For a contrary assumption, see the decision of the Canadian Supreme Court in *R v Keegstra* [1990] 3 SCR 697. The case involved s 319(2) of the *Criminal Code,* RSC 1985, c C-46, which prohibited the willful promotion of hatred, other than in private conversation, towards any section of the public distinguished by colour, race, religion or ethnic origin. In upholding the law as justified under s 1 of the *Canadian Charter of Rights and Freedoms*, the Court drew no distinction between hate speech based on race and hate speech based on religion. Notably, the case concerned hate speech directed against Jewish people, a group identifiable on grounds of both ethnic and religious identity and thus did not raise the need to distinguish between the two grounds. On hate speech in Canada, see also *R v Zundel* [1992] 2 SCR 731. In this article, I shall restrict the discussion to the Australian case law. For the position in the United States, see *Chaplinsky v New Hampshire*, 315 US 568 (1942); *Beauharnais v Illinois*, 343 US 250 (1952); *Brandenburg v Ohio*, 396 US 444 (1969); *Cohen v California*, 403 US 15 (1971); *Gooding v Wilson*, 405 US 518 (1971); *Skokie v National Socialist Party*, 373 NE 2d 21 (1978); *RAV v City of St Paul*, 505 US 377 (1992); *Virginia v Black*, 538 US 343 (2003).

Finally, s 12 states:

> (1) A person does not contravene section 7 or 8 if the person establishes that the person engaged in the conduct in circumstances that may reasonably be taken to indicate that the parties to the conduct desire it to be heard or seen only by themselves.
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> (2) Sub-section (1) does not apply in relation to conduct in any circumstances in which the parties to the conduct ought reasonably to expect that it may be heard or seen by someone else.

The Queensland and Tasmanian religious vilification laws are very similar in language and scope.[10] The only significant points of difference are that they positively require that the incitement must be by a 'public act',[11] they do not refer specifically to the incitement of 'revulsion', and they define the various exceptions differently. The 'fair report' exception under the Queensland Act, for example, is limited to the reporting of a prohibited act of religious vilification.[12] Moreover, the Queensland and Tasmanian Acts provide an exception in respect of acts done for 'academic, artistic, scientific or research purposes' or for other purposes 'in the public interest' — 'religious' purposes are not specifically mentioned.[13] Like the Victorian legislation, the Queensland Act requires that such acts must be done 'reasonably and in good faith', but the Tasmanian Act only requires them to be done 'in good faith'.[14] The Queensland and Tasmanian Acts also explicitly provide an exception where an act involves 'the publication of material in circumstances in which the publication would be subject to a defence of absolute privilege in proceedings for defamation'.[15]

In this article, I will particularly be concerned with the constitutionality of what might be called 'ordinary' religious vilification, as represented by the Victorian, Tasmanian and Queensland civil regimes. The Victorian and Queensland Acts also create a separate criminal offence of 'serious religious vilification', which involves 'intending' to incite 'serious contempt … revulsion or severe ridicule',[16] or 'knowingly' inciting hatred in a way that includes threats of physical harm or harm to property,[17] and is punishable by fines and imprisonment. The criminal penalties, the element of intent and, in particular, the element of inciting threats of harm, distinguish serious religious vilification from ordinary religious vilification.

In respect of civil religious vilification, I will make four distinct claims. In Part II, I survey the law relating to the implied freedom of political communication and point out that that the ambiguities in this area of law make it difficult to assess whether religious vilification laws are contrary to the implied freedom. In Part III, I argue against the view that s 116 of the *Constitution*, appropriately interpreted, excludes

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10 *Anti-Discrimination Act 1991* (Qld) s 124A; *Anti-Discrimination Act 1998* (Tas) ss 19, 55.

11 A 'public act' is defined to include 'any form of communication to the public', 'any conduct that is observable by the public' and, in Tasmania, 'the distribution or dissemination of any matter to the public': *Anti-Discrimination Act 1991* (Qld) s 4A; *Anti-Discrimination Act 1998* (Tas) s 3.

12 *Anti-Discrimination Act 1991* (Qld) s 124A(1).

13 Also, the Queensland Act in this connection specifically refers to 'public discussion or debate': *Anti-Discrimination Act 1991* (Qld) s 124A(2).

14 *Anti-Discrimination Act 1991* (Qld) s 124A(2)(c); *Anti-Discrimination Act 1998* (Tas) s 55.

15 *Anti-Discrimination Act 1991* (Qld) s 124A(2)(b); *Anti-Discrimination Act 1998* (Tas) s 55.

16 *Racial and Religious Tolerance Act 2001* (Vic) s 25(2).

17 *Racial and Religious Tolerance Act 2001* (Vic) s 25(1); *Anti-Discrimination Act 1991* (Qld) s 131A(1).

religiously motivated arguments from federal politics. Then, in Part IV, I argue that, although the question is not without doubt, there is good reason to believe that religious vilification laws, even though they deal with religious matters, do in fact place a burden upon political communication, so that the first limb of the test the High Court established in *Lange* is satisfied. Finally, in Part V, I argue that, properly interpreted and applied, religious vilification laws are reasonably appropriate and adapted to achieving a legitimate objective in a manner which is compatible with the constitutionally prescribed system of representative government, so that the second limb of the *Lange* test is satisfied. My conclusion is that the laws ought therefore to be upheld — but only if they are construed so as to require a high threshold to be reached before conduct is found to vilify someone unlawfully, and also, only if the exceptions laid down in the legislation are interpreted widely, so as to protect a wide range of forms of communication on political and other matters.[18]

II FREEDOM OF POLITICAL COMMUNICATION

A The scope of the freedom — the *Lange* test

Despite the growing number of cases that have considered the meaning and scope of the implied freedom of political communication, many ambiguities concerning its scope and application remain. Any conclusion about the constitutionality of legislation must bear in mind the developing nature of the law in this area, as well as the wide scope for disagreement about its proper application to any particular case. The many closely divided judgments of the High Court — notwithstanding the unanimity of the decision in *Lange* — are eloquent testimony to this fact.

In *Lange*, the High Court unanimously adopted a test to determine whether a law is contrary to the implied freedom. The Court stated:[19]

> First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment 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 people … ?

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18 In this article, I put aside the objections to the implied freedom which, in my view, cast significant doubts on its constitutional legitimacy. See Nicholas Aroney, *Freedom of Speech in the Constitution* (1998). Despite misgivings that have been expressed by recently appointed members of the High Court, the implied freedom has been applied by more than a dozen High Court decisions and the number of lower court decisions multiplies each year. See Dyson Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) 47(1) *Quadrant* 9, 17; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 330–2 (Callinan J).

19 *Lange* (1997) 189 CLR 520, 567–8 (citations omitted). See, further, at 561–2, where the Court explained that: 'The first condition is that the object of the law is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government or the procedure for submitting a proposed amendment to the Constitution to the informed decision of the people which the Constitution prescribes. The second is that the law is reasonably appropriate and adapted to achieving that legitimate object or end.'

In *Coleman v Power*,[20] McHugh J clarified the meaning of the *Lange* test in a manner with which Gummow, Hayne and Kirby JJ expressed agreement.[21] Under the *Lange* test, as explained in *Coleman*, for a law to be found inconsistent with the implied freedom it appears necessary to ask the following questions:

1. Does the law impose a burden on freedom communication about government or political matters either in its terms, operation or effect?
2. Are the objectives of the law, as well as the means adopted to achieve those objectives, compatible with the constitutionally prescribed system of representative government?
3. Are the legislative means chosen reasonably appropriate and adapted to achieve those objectives?

Embedded in these deceptively simple questions, however, a number of ambiguities remain. In short, the uncertainties are as follows.

As to the first question, it is not exactly clear what it means for a communication to be relevantly political or governmental in character.[22] For example, what about speech which is primarily commercial or religious in nature? Can such communications also be characterised as being relevantly political? What does political or governmental mean in these circumstances? Moreover, s 116 of the Australian *Constitution* prevents the Commonwealth from making any law for the establishment of any religion. Does this mean that the Commonwealth is not permitted to make laws that are religiously based? If so, does this in turn mean that religious speech cannot form a constitutionally legitimate part of political communication? And does this imply, by definition, that religious speech is not protected by the implied freedom? Furthermore, there is uncertainty as to what it means for a law to impose a burden on freedom of political communication. Is it sufficient if a law places a burden on a particular communication that happens to contain relevantly political content? Or must the law place a burden on the freedom itself, conceived as a general immunity or right enjoyed by citizens?

As to the second and third questions, there are more ambiguities. Some judges have adopted a restrained approach, in which legislatures are given a relatively wide margin of appreciation in determining whether a law that happens to place a burden on free speech is nonetheless justified.[23] Others, however, have been much more willing to question the justifiability of legislation, to the point of substituting their own assessment of where the balance should be struck for the assessment made by the

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20 (2004) 220 CLR 1 ('*Coleman*').

21 *Coleman* (2004) 220 CLR 1, 48–50 (McHugh J), 77–9 (Gummow and Hayne JJ), 82, 88–9 (Kirby J). See also *APLA Limited v Legal Services Commissioner (NSW)* (2005) 219 ALR 403, 420 (McHugh J), 456 (Gummow J) ('*APLA*'). For a discussion, see Nicholas Aroney, 'Justice McHugh, Representative Government and the Elimination of Balancing' (2006) 28 *Sydney Law Review* 505.

22 See Chesterman, above n 5, 44–63; Michael Chesterman, 'When is a Communication "Political"?' (2000) 14(2) *Legislative Studies* 5.

23 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 159 (Brennan J) ('*ACTV*'); *Levy v Victoria* (1997) 189 CLR 579, 596–8 (Brennan CJ) ('*Levy*'); *Coleman* (2004) 220 CLR 1, 52 (McHugh J); *Mulholland v Australian Electoral Commission* (2003) 128 FCR 523, 533–4 (Black CJ, Weinberg and Selway JJ). Cf *ACTV* (1992) 177 CLR 106, 217–8 (Gaudron J); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 95 (Gaudron J) ('*Nationwide News*').

relevant legislature.[24] Likewise, a number of judges — but not all[25] — have held that a distinction should be drawn between laws that impose restrictions on the content of communications and those that merely impose form or manner restrictions, and have held that the former kinds of laws must undergo a process of strict scrutiny according to which the law must be necessary to secure some 'overriding public purpose'.[26] Further, while the *Lange* test asks whether a law is 'reasonably appropriate and adapted' to securing its objectives, some judges have preferred to ask whether the law is 'reasonably proportionate'.[27] What do these expressions mean?[28] Is it sufficient if the law merely achieves its objectives, even though it has a number of unrelated, incidental effects that go well beyond those objectives? Or must the law be 'narrowly tailored' so as to achieve the legitimate objectives of the law and nothing more? If a more appropriate means to achieve the objective can be identified by a court, should the court strike down the law, thereby substituting its own judgment about the best means to achieve the stated objective? In this connection, while some judges have certainly been prepared to weigh or balance the interest to be secured by the law against the interest in free speech, others have rejected the idea that the Court has any such balancing role.[29]

When assessing whether religious vilification laws are consistent with the implied freedom, it is important to recognise the fundamental uncertainty of the law in this area. While I shall have occasion to return to a number of these problems in what follows, I will for this reason generally place the emphasis on the reasoning and outcomes in specific cases that provide more or less direct analogies to religious vilification laws, rather than rely upon the vagaries of the various abstract formulas and tests that have been proposed.

B The nature of 'political communication' — religious speech?

In addition to the uncertainties that surround the application of the *Lange* test, there is fundamental disagreement among the judges as to the constitutional foundation of the implied freedom. And different views of its foundation have led to different

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24 *ACTV* (1992) 177 CLR 106, 142–4 (Mason CJ), 169 (Deane and Toohey JJ), 217–8 (Gaudron J) 235 (McHugh J); *Nationwide News* (1992) 177 CLR 1, 76–7 (Deane and Toohey JJ); *Levy* (1997) 189 CLR 579, 647 (Kirby J); *Coleman* (2004) 220 CLR 1, 122–4 (Heydon J); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 200–1 (Gleeson CJ) ('*Mulholland*').

25 See, eg, *Levy* (1997) 189 CLR 579, 596–9 (Brennan CJ); cf 608 (Dawson J), 624 (McHugh J). See also *Coleman* (2004) 220 CLR 1, 50–1 (McHugh J).

26 See, eg, *ACTV* (1992) 177 CLR 106, 143 (Mason CJ), 169 (Deane and Toohey JJ), 235 (McHugh J); *Nationwide News* (1992) 177 CLR 1, 77 (Deane and Toohey JJ); *Levy* (1997) 189 CLR 579, 614 (Toohey and Gummow JJ), 618–9 (Gaudron J), 647 (Kirby J); *Kruger v Commonwealth* (1998) 190 CLR 1, 126–9 (Gaudron J) ('*Kruger*'); *Coleman* (2004) 220 CLR 1, 31 (Gleeson CJ), 110 (Callinan J), 122–3 (Heydon J). Cf *Mulholland* (2004) 220 CLR 181, 254 (Kirby J).

27 See *Lange* (1997) 189 CLR 520, 562; and compare the variety of views expressed in *Coleman* (2004) 220 CLR 1, 52–3 (McHugh J), 90 (Kirby J), and in *Mulholland* (2004) 220 CLR 181, 197 (Gleeson CJ), 252, 266–7 (Kirby J).

28 See Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21 *Melbourne University Law Review* 1; Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23 *Melbourne University Law Review* 668.

29 See *Levy* (1997) 189 CLR 579, 607 (Dawson J); *Coleman* (2004) 220 CLR 1, 48–50 (McHugh J).

conceptions of what kinds of communications are protected by the freedom.[30] As touched on already, it is not at all clear what it means for a communication to be relevantly political in character.

The narrowest formulation is that of Dawson J, who has insisted that the only relevant prohibition imposed by ss 7 and 24 of the *Constitution* is that the people of Australia must remain free to make a true or genuine 'choice' when voting in federal elections, which will not occur without at least an opportunity to gain an appreciation of the available alternatives. Accordingly, as his Honour put it in *ACTV*, 'an election in which the electors are denied access to the information necessary for the exercise of a true choice is not the kind of election envisaged by the Constitution.'[31] Marginally wider is the formulation of McHugh J, who has held that the effectiveness of the system of representative government mandated by the *Constitution* requires that electors be free to discuss any matter that is relevant to voting in a federal election. The implied freedom of communication extends, therefore, only to communications which are made during the course of a federal election, or which are intended or likely to affect voting in such an election.[32] Slightly wider still, it seems, is the unanimous judgment of the High Court in *Lange*. There the Court held that the freedom extends to political communication generally and is not limited to election periods. Nonetheless, the Court — following McHugh and Dawson JJ — tied the implied freedom to what is necessary to enable the people to exercise a free and informed choice as electors.[33] It was because many of the requisite communications will be disseminated during the period between the holding of one election and the calling of the next that the Court held that the implied freedom cannot be limited, a priori, to communications during election periods. However, the basic criterion for whether the communication is relevantly political had to do with its relevance to voting in federal elections.

What, then, is of relevance to voting in federal elections? Importantly, the *Lange* case referred, not simply to an appreciation of the available alternatives (as Dawson J had put it), but to 'matters of government and politics' generally.[34] This, it appears, includes communications concerning the conduct and performance of members of the Parliament and Ministers of State, as well as the 'affairs of statutory authorities and

30 I will limit my discussion here to decisions of the High Court of Australia. For lower court decisions that have considered the meaning of 'political communication', see, eg, *Brown v Classification Review Board* (1997) 145 ALR 464; *Brown v Classification Review Board* (1998) 82 FCR 225; *Communications, Electrical, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Commissioner Laing of the Australian Industrial Relations Commission* (1998) 89 FCR 17; *Australian Broadcasting Corporation v Hanson* (Unreported, Supreme Court of Queensland, Court of Appeal, de Jersey CJ, McMurdo P and McPherson JA, 28 September 1998); *Gordon v Dimitriou* (Unreported, McPherson and Davies JJA, Fryburg J, Supreme Court of Queensland, Court of Appeal, 16 April 1999); *John Fairfax Publications Pty Ltd v Attorney-General (NSW)* [2000] NSWCA 198 (Unreported, Spigelman CJ, Priestley and Meagher JJA, 2 August 2000); *Bennett v President, Human Rights and Equal Opportunity Commission* (2003) 134 FCR 334, 354 (Finn J).

31 *ACTV* (1992) 177 CLR 106, 187.

32 *ACTV* (1992) 177 CLR 106, 232; *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 206 ('*Theophanous*').

33 *Lange* (1997) 189 CLR 520, 560; see also *APLA* (2005) 219 ALR 403, 422 (McHugh J); *Coleman* (2004) 220 CLR 1, 125–6 (Heydon J).

34 *Lange* (1997) 189 CLR 520, 559–60.

public utilities'.[35] And the relevant parties to such communications include electors, elected representatives and candidates for election.[36] But how far does this extend? As McHugh J pointed out in *Stephens v West Australian Newspapers Limited*, 'a narrow view should not be taken of the matters about which the general public has an interest in receiving information.'[37] In *ACTV*, Mason CJ thus maintained that the freedom extends to the views of 'all interested persons, groups and bodies' concerning 'public affairs and political discussion' generally, including 'the wide range of matters that may call for, or are relevant to, political action or decision'.[38] Moreover, rejecting the view that the freedom is limited to communications that are 'calculated to influence choices', Mason CJ, Toohey and Gaudron JJ said in *Theophanous* that the implied freedom extends to 'all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about.'[39] This latter observation is arguably inconsistent with the stance adopted by the Court in *Lange*.[40] However, it is at least clear that 'political communication' is not a closed category. Mason CJ, Toohey and Gaudron JJ rightly stated in *Theophanous* that 'it is not possible to fix a limit to the range of matters that may be relevant to debate in the Commonwealth Parliament'.[41] The meaning of the expression, 'government or political matters', is 'imprecise', Gleeson CJ has said,[42] and McHugh J has suggested that '[i]t may be impossible to formulate an exhaustive definition of the term "political" for the purpose of the constitutional freedom.'[43] Nonetheless, as the Court pointed out in *Lange*, political communication at least includes 'information, opinions and arguments concerning government and political matters that affect the people of Australia'.[44] Thus, in *ACTV*, *Theophanous* and *Stephens* it was suggested that the implied freedom could in principle (and perhaps inevitably must) apply to political discussion in relation to *all* levels of government;[45] and in *Lange* the Court considered that the existence of national political parties, the financial dependence of the States and Territories upon federal funding and the 'increasing integration of social, economic

35 *Lange* (1997) 189 CLR 520, 561. See Chesterman, above n 5, 23, who refers to 'other persons or bodies for whose official conduct the representatives are responsible'.

36 *Lange* (1997) 189 CLR 520, 560.

37 (1994) 182 CLR 211, 264 ('*Stephens*'); cited in *Lange* (1997) 189 CLR 520, 570–1.

38 *ACTV* (1992) 177 CLR 106, 138.

39 *Theophanous* (1994) 182 CLR 104, 124, quoting Eric Barendt, *Freedom of Speech* (1985) 152. Their Honours also cited Alexander Meiklejohn, *Political Freedom* (1960) 42, to the effect that political communication extends to 'speech which bears, directly or indirectly, upon issues with which voters have to deal', that is, the 'consideration of matters of public interest'. Cf Alexander Meiklejohn, 'The First Amendment is an Absolute' [1961] *Supreme Court Review* 245, 256–7.

40 Although see *Kruger* (1998) 190 CLR 1, 90–1 (Toohey J), 114 (Gaudron J).

41 *Theophanous* (1994) 182 CLR 104, 123.

42 *Coleman* (2004) 220 CLR 1, 30–1 (Gleeson CJ); *APLA* (2005) 219 ALR 403, 412–13 (Gleeson CJ and Heydon J).

43 *APLA* (2005) 219 ALR 403, 422 (McHugh J).

44 *Lange* (1997) 189 CLR 520, 571.

45 *ACTV* (1992) 177 CLR 106, 142 (Mason CJ), 168–9 (Deane and Toohey JJ), 215–7 (Gaudron J); *Theophanous* (1994) 182 CLR 104, 122–3 (Mason CJ, Toohey and Gaudron JJ), 164 (Deane J); *Stephens* (1994) 182 CLR 211, 232 (Mason CJ, Toohey and Gaudron JJ), 257 (Deane J).

and political matters in Australia' made the connection 'inevitable'.[46] Thus, the implied freedom of political communication can, in principle, apply to the discussion of what are primarily state political issues, as well as to restrictions on political communication imposed by state legislation.[47] Accordingly, just because religious vilification laws are enacted by the States does not mean that they fall outside the scope of the implied freedom.

Is the category of protected speech effectively unlimited, then? In *Cunliffe v Commonwealth*, four members of the Court went so far as to consider that the implied freedom could, in principle, extend to communications between people who had recently arrived in Australia and their migration advisors.[48] Among the other three judges, however, Brennan J considered that while discussion concerning the merits of immigration laws would undoubtedly fall within the implied freedom, private conversations occurring solely for the purpose of rendering legal advice or assistance would not.[49] The decision of the Court in *Lange* suggests that the exceptionally wide view of political communication adopted by a majority in *Cunliffe* was too broad. As will be discussed later, in the High Court's recent decision in *APLA Limited v Legal Services Commissioner (NSW)*,[50] the Court held, consistently with *Lange*, that the implied freedom does not extend to legal advertising, that is, to communications made by lawyers to potential clients predominantly for commercial reasons. Accordingly, it is clear that the implied freedom of 'political communication' is not the same thing as an 'unlimited freedom of communication'.[51] There are limits. In *Theophanous*, Mason CJ, Toohey and Gaudron JJ acknowledged that the implied freedom would not ordinarily extend to 'private speech',[52] such as mere 'entertainment' or purely 'commercial' speech.[53] However, they also pointed out that, depending on the 'content, emphasis or context'[54] of a particular communication, entertaining or commercial speech could nonetheless constitute relevantly political communication. This observation, while advanced in the context of an excessively wide view of what constitutes 'political communication',[55] applies equally to the narrower formulations favoured by Dawson and McHugh JJ and adopted in *Lange*.[56] And if entertainment

46 *Lange* (1997) 189 CLR 520, 571–2. However, cf *Levy* (1997) 189 CLR 579, 596 (Brennan J), 626 (McHugh J), 643–4 (Kirby J); *Kruger* (1998) 190 CLR 1, 68–9 (Dawson J). On the even wider scope of the defence of qualified privilege potentially available to defendants in defamation actions: see *Lange* (1997) 189 CLR 520, 571–6.

47 The clearest example of this latter point is *Levy* (1997) 189 CLR 579.

48 (1994) 182 CLR 104, 298–9 (Mason CJ), 336 (Deane J), 379–80 (Toohey J), 387 (Gaudron J) ('*Cunliffe*'). Justice Toohey nonetheless joined with Brennan, Dawson and McHugh JJ in the conclusion that the relevant provisions of the *Migration Act 1958* (Cth) were not constitutionally invalid.

49 *Cunliffe* (1994) 182 CLR 104, 329 (Brennan J); see also 365–6 (Dawson J), 395 (McHugh J).

50 (2005) 219 ALR 403 ('*APLA*').

51 *Theophanous* (1994) 182 CLR 104, 123 (Mason CJ, Toohey and Gaudron JJ), discussing *ACTV* (1992) 177 CLR 106, 141 (Mason CJ).

52 *Theophanous* (1994) 182 CLR 104, 124, citing Alexander Meiklejohn, *Political Freedom* (1960) 42.

53 *Theophanous* (1994) 182 CLR 104, 123–5. See, likewise, *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc* (1993) 41 FCR 89, 114 (Hill J).

54 *Theophanous* (1994) 182 CLR 104, 124.

55 See text to n 39 above.

56 See text to nn 31–33 above.

and commercial speech can, depending on the circumstances,[57] possess a relevantly political dimension, why not religious speech?

By 'religious speech', I mean both speech that is religiously inspired or motivated and speech that is about or concerns religion or religious topics. Not all such speech, of course, is prohibited by religious vilification laws, but some speech of this description certainly is. Could speech which falls within the scope of Australian religious vilification laws also fall within the protection conferred by the implied freedom of political communication? As suggested earlier, two distinct issues are embedded in this question. The first is whether the specific kind of religious speech that is prohibited by vilification laws would count as political communication in terms of the principles discussed so far. On this question, it has been suggested by one of the leading commentators in this area that it would not.[58] The second question is whether s 116 of the *Constitution*, in so far as it prevents the Commonwealth from making any law in respect of the establishment of religion,[59] means that the implied freedom cannot extend to discussion of religious matters. There is judicial authority that has suggested that s 116 does in fact have this effect,[60] and at least one commentator has uncritically accepted this finding.[61]

There are, however, grave problems with both of these propositions. For convenience, I will deal with the latter question first.

III RELIGIOUS SPEECH AND NON-ESTABLISHMENT OF RELIGION

In *Harkianakis v Skalkos*, Dunford J of the New South Wales Supreme Court held that, as a result of s 116 of the *Constitution*, the implied freedom of political communication does not extend to religious speech. What were Dunford J's reasons, and are they compelling?

In *Harkianakis*, a defamation case,[62] the defendants brought an application in which they sought leave to file a further amended defence to the effect that the allegedly defamatory matters were published 'pursuant to an implied or express right of

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57 See Chesterman, above n 5, 46–9.

58 See Adrienne Stone, 'Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication' (2001) 25 *Melbourne University Law Review* 374, 399 at n 136. For a contrary view, see Meagher, 'What is "Political Communication"?', above n 5, 460.

59 Section 116 of the *Constitution* 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 any religion, and no religious test shall be required as a qualification for any office or public trust under the Constitution'.

60 *Harkianakis v Skalkos* (1999) 47 NSWLR 302 ('*Harkianakis*').

61 Meagher, 'What is "Political Communication"?', above n 5, 460. Cf, however, the view expressed in *Halsbury's Laws of Australia*, [80–1445].

62 The controversy involved separate actions for defamation and contempt of court initiated by the Archbishop of the Greek Orthodox Archdiocese of Australia in respect of articles published in two Greek language newspapers containing imputations concerning the plaintiff's personal conduct and fitness for ecclesiastical office. President Mason observed that the actions involved a number of issues of what he called 'church politics', meaning that they related to 'issues of governance and authority within the Church community'. See *Harkianakis* (1997) 42 NSWLR 22, 26.

freedom of speech concerning religious matters'.[63] On the assumption that leave would be granted, the defendants also sought an order that a number of questions be removed to the Court of Appeal for consideration, including the question whether 'expressly pursuant to s 116 of the Constitution, or pursuant to any freedom of speech implied into the Constitution, there is a defence to a cause of action in defamation arising from any right to freedom of speech concerning religious matters'.[64] Justice Dunford, who heard the application, refused to grant leave to further amend the defence,[65] concluding that the defence was 'bad in law' and had 'no prospect of success'.[66] Furthermore, his Honour thought that the question was not a matter of 'great complexity', and should not be referred to the Court of Appeal for determination.[67]

Justice Dunford's reasons for this conclusion rested upon a distinction which he drew between the implied freedom of political communication and the religious freedoms and immunities guaranteed by s 116 of the *Constitution*.[68] Following the reasoning in *Lange*, freedom of political communication, he said, is an indispensable and necessary incident of the system of representative and responsible government established by the Australian *Constitution*. Relying, however, on the judgment of Latham CJ in *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth*,[69] Dunford J considered that s 116 has 'nothing to do with the essential nature' of the representative system of government established by the *Constitution*. Rather, he said, s 116 is a provision that imposes restrictions on the legislative powers of the Commonwealth, and has the effect of 'making religion, religious observance and religious tests irrelevant' to the 'structure or conduct' of the federal government or appointment to federal office. Thus, s 116 'excludes religion from the system of government' and is in this sense 'the antithesis' of the constitutional provisions that establish the Australian system of representative government. In other words, 'there is no need for discussion of religious matters to give effect to the system of government established by the Constitution'. Accordingly, his Honour concluded, the principles relating to freedom of communication discussed in *Lange* 'have no application to the discussion of religious matters or religious organisations', and it would be 'futile' for the defendant to rely upon 'an alleged right of freedom of discussion of religious matters'.[70]

There is an ambiguity, as well as a fundamental problem, in this reasoning. The ambiguity derives largely from the fact that Dunford J did not distinguish clearly between the argument based on the constitutionally prescribed system of representative government and the argument based on s 116 of the *Constitution*. Admittedly, the main thrust of the reasoning was that s 116 circumscribes the scope of the freedom of political communication. And yet, ambiguously, Dunford J also said that 'there is no need for discussion of religious matters to give effect to the system of

63 *Harkianakis* (1999) 47 NSWLR 302, 303. A similar argument was made, and rejected, in *Catch the Fire Ministries* [2003] VCAT 1753 (Unreported, Higgins V-P, 21 October 2003) [8]–[17].
64 *Harkianakis* (1999) 47 NSWLR 302, 304.
65 Ibid 307.
66 Ibid 305.
67 Ibid; cf 308, in which the denial of leave to amend the defence meant that it was not necessary to consider whether the question should be referred to the Court of Appeal.
68 See ibid 306.
69 (1943) 67 CLR 116, 122–3 ('*Jehovah's Witnesses Case*').
70 *Harkianakis* (1999) 47 NSWLR 302, 307.

government established by the Constitution' — which is to suggest a limit on the scope of the implied freedom of political communication that derives, not simply from s 116, but also from the necessities of the constitutionally prescribed system of representative government. By adverting to this last consideration, Dunford J appears to have accepted that the scope of the implied freedom of political communication involves considerations that are separable from s 116. And yet, by placing such emphasis on s 116, the main thrust of the reasoning suggests that s 116 somehow overrides the argument from the necessities of the constitutionally prescribed system of representative government.

But does s 116 have such an overriding application? And what conceptions of religious and political freedom are implied by such a proposition?[71] The suggestion that s 116 makes religion irrelevant to government and politics entails, in the first place, a conception of s 116 in which the 'free exercise' clause of s 116 is subsumed within the 'non-establishment' clause. The non-establishment of religion, it is then suggested, makes religion — even the free exercise of religion — utterly irrelevant to the structure and conduct of the federal government. Given that the case concerned communications about religious matters, this is made to mean that, not only is the Commonwealth prohibited from making laws which establish any religion, but that government policy must not be based upon religious considerations or arguments. The explicit conclusion is that the implied freedom of political communication does not extend to communications about religious matters. The troubling corollary is that communications about Australian politics and government must not involve religious considerations or arguments.

In this way, s 116 is said to constrain the scope of the implied freedom of political communication. However, the decisions of the High Court that have considered the scope of political communication have treated the question as ultimately a factual one: is a specific communication about a particular matter in fact relevant to federal politics?[72] According to the High Court, it seems there is no a priori limit to what matters might become relevantly 'political' or 'governmental'. In spite of this, Dunford J's reasoning suggests that there is such an a priori limit: communications about religious matters are, by virtue of s 116, simply irrelevant to federal politics.

The proposition that s 116 has this effect depends on two subsidiary claims. The first is that s 116 has an overriding operation. The second is that non-establishment renders religious considerations and arguments irrelevant to federal politics and government. As to the first claim, it is true that Latham CJ in the *Jehovah's Witnesses Case* said that s 116 is 'an overriding provision' which 'does not compete with other provisions', so that the Court does not need to 'reconcile it' with other sections of the

71 The significance of the decision is, of course, limited by the fact that it was merely an application to amend the pleadings. The case can also be limited to the facts, in so far as the religiously motivated defamatory remarks were made within a specific ecclesiastical context.

72 Chesterman, above n 5, 54, has remarked that 'the agenda for "political discussion", as conceived for the implied freedom, is open-ended, and should indeed be responsive to, and at times enlarged by, the public debate occurring amongst citizens generally. Furthermore … limitations on this agenda which would seem to arise naturally from aspects of the constitutional structure of the country — for example, its federal nature — should not in fact be taken for granted.' See, likewise, Meagher, 'What is "Political Communication"?', above n 5, 460–1.

Constitution.[73] However, these remarks were made specifically in light of the fact that s 116 is an express prohibition on the power of the Commonwealth to make laws, so that, as Latham CJ explained, s 116 'prevails over and limits all provisions which give power to make laws'.[74] On the other hand, the provisions upon which the implied freedom of political communication is based (primarily, ss 7, 24, 64 and 128) are not simply provisions that confer power to make laws, but are rather in the form of constitutional imperatives which themselves constrain the law-making powers of the Commonwealth. For this reason, the High Court has said that the implied freedom is (likewise) an 'overriding' provision, in the face of which federal laws, although enacted on the basis of other provisions of the *Constitution*, must nonetheless give way.[75] The interface between s 116 and the implied freedom (based on ss 7, 24, 64 and 128) thus concerns two sets of provisions both of which prevail over ordinary statutes enacted by the federal Parliament. It is not obvious that s 116 must somehow prevail over ss 7, 24, 64 and 128 so as to limit, a priori, the scope of the implied freedom of communication about political and governmental matters. An explicit argument to this effect is necessary.

What would such an argument look like? It can readily be accepted, in accordance with general principles of interpretation, that ss 7, 24, 64 and 128 should not be read in total isolation from s 116. However, the way in which these provisions are to be read together depends, in part, on their proper construction. Whatever meaning is to be given to the non-establishment and free exercise clauses,[76] it must be accepted that s 116 limits the legislative powers of the federal Parliament.[77] It also goes without saying that ss 7 and 24 require that members of the two houses of that Parliament are to be chosen by the people of the Commonwealth and the States, voting in elections. In this respect, it is indeed arguable that the implied freedom of political communication, in so far as it derives from the system of representative government established by ss 7 and 24 (ie, read in isolation from ss 64 and 128), is a freedom to discuss matters of government and politics that fall *within* the constitutional powers and functions of the Parliament.[78] Moreover, these powers are clearly limited by s 116, and thus it is arguable that s 116 (whatever it means) limits the scope of the implied freedom in so far as it is derived from ss 7 and 24 alone.

However, ss 7 and 24 are not the only provisions upon which the implied freedom is based. The freedom is also derived from the constitutionally prescribed system of parliamentary responsible government (alluded to in s 64), as well as, even more relevantly, the process for the amendment of the *Constitution* (set out in s 128). And here, it is important to keep in mind two things. First, s 116 does not directly apply to the executive powers of the Commonwealth; the application of s 116 to executive power is channeled through its constraint upon legislative power and does not extend to the aspects of the executive power of the Commonwealth that derive from the

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73 *Jehovah's Witnesses Case* (1943) 67 CLR 116, 123.

74 Ibid.

75 See, eg, *Coleman* (2004) 220 CLR 1, 49 (McHugh J).

76 A question to which I will turn shortly.

77 This includes, it seems, not only legislation enacted under ss 51 and 52, but also the appropriation of money under s 81 and the making of grants to the States under s 96: *Attorney-General (Vic) (ex rel Black) v Commonwealth* (1981) 146 CLR 559, 576 (Barwick CJ), 593 (Gibbs J), 621 (Murphy J), 648, 651 (Wilson J) ('*State Aid Case*').

78 Cf Stone, 'Rights, Personal Rights and Freedoms', above n 58, 381.

Constitution itself and that are not dependent upon federal enactment.[79] Secondly, an amendment to the *Constitution* under s 128 could certainly effect an alteration or repeal of s 116 and, thus, enable the Parliament to legislate on religious matters in a way that would otherwise have been contrary to s 116.[80] Now, amendments under s 128 must first be passed by the Parliament, and then assented to by the voters at a referendum. But the implied freedom of political communication is based, in part, upon this constitutionally prescribed amendment process. Communications that are relevant to a potential or proposed amendment to the *Constitution*, initiated by Parliament and confirmed by referendum, are therefore protected by the implied freedom. Because the amendment process can constitutionally be used to amend or repeal s 116, the prohibitions in s 116 cannot, by definition, circumscribe the scope of the implied freedom of political communication in this respect.

Moreover, as noted, the effect — if any — of s 116 on the scope of the implied freedom, depends on the meaning of the non-establishment and free exercise clauses. However, it is not at all clear that the best interpretation of s 116 is one that would make religion simply irrelevant to federal politics and government. In this respect, it may be acknowledged that Latham CJ said in the *Jehovah's Witnesses Case* that s 116 is 'based on the principle that religion should, for political purposes, be regarded as irrelevant'.[81] However, firstly, this remark was made in the context of the free exercise clause, not the non-establishment clause. Further, the High Court has very explicitly affirmed that the non-establishment clause does not prohibit governmental assistance being given to religious bodies,[82] and it certainly has never held that s 116 somehow prohibits the enactment of federal laws or the execution of government policies that are supported, either in whole or in part, on the basis of religious considerations or reasons. Rather, the debate over the meaning of non-establishment has concerned the question of whether the prohibition applies only to the establishment of a state church and an official religion, whether it extends to prohibit any preferential financial aid or other forms of state assistance to religious organisations, or whether it goes so far as to prohibit all forms of support to religion, even on a non-discriminatory basis.[83] In the United States, the equivalent provision contained in the First Amendment has been interpreted, at times, to prohibit virtually all forms of state assistance;[84] but in Australia, state aid to religious schools has been upheld.[85] To suggest that the non-establishment principle makes religious considerations entirely irrelevant to federal law-making and policy-formation is simply beyond the pale — particularly in

79 *State Aid Case* (1981) 146 CLR 559, 580–1 (Barwick CJ); *Minister for Immigration & Ethnic Affairs v Lebanese Moslem Association* (1987) 17 FCR 373, 374 (Fox J), 378–9 (Jackson J).

80 However, on potential amendments to the *Constitution*, cf *John Fairfax Publications Pty Ltd v Attorney-General (NSW)* [2000] NSWCA 198 (Unreported, Spigelman CJ, Priestley and Meagher JJA, 2 August 2000) [84] (Spigelman CJ).

81 *Jehovah's Witnesses Case* (1943) 67 CLR 116, 126.

82 *State Aid Case* (1981) 146 CLR 559.

83 *State Aid Case* (1981) 146 CLR 559, 580–2 (Barwick CJ), 603–4 (Gibbs J), 605–10 (Stephens J), 612–18 (Mason J), 622–32 (Murphy J), 651–5 (Wilson J).

84 See, eg, *Everson v Board of Education*, 330 US 1, 15–16 (1947). On the shifts in American non-establishment jurisprudence, see John Witte Jnr, *Religion and the American Constitutional Experiment* (2nd ed, 2005) ch 8.

85 *State Aid Case* (1981) 146 CLR 559.

Australia, but even in the United States.[86] Such a conclusion goes even further than John Rawls' position that citizens should restrict themselves to 'public reasons' when engaging in political advocacy.[87] Not even Rawls would exclude religious reasons as supplements to political debate, so long as public reasons are also adduced in support of any particular policy proposal.[88] And there are many other liberals, William Galston, Michael Perry and Jeremy Waldron for example, who are even more accommodating of religious perspectives.[89] Justice Dunford's reasoning, however, would make religious considerations completely irrelevant to — indeed, the 'antithesis' of — the system of representative government prescribed by the Australian *Constitution*. Such a conclusion is not supported by the High Court's decisions concerning s 116; nor is it supported by the Court's decisions in relation to what is 'political' for the purposes of the implied freedom. Rather, it is to adopt a particular perspective about the relationship between religion and politics which would exclude religious speech entirely from political discussion — and in this sense, to privilege secularism over religion.

Having cleared this out of the way, however, it remains necessary to address the submission made by the defendants in *Harkianakis* that it was at least arguable that there is, under the *Constitution*, 'an implied or express right of freedom of speech concerning religious matters',[90] derived, alternatively, from s 116 or as part of the implied freedom of communication founded upon the constitutionally prescribed system of representative and responsible government.[91] Notwithstanding the decision of Dunford J, is there such a freedom?

The free exercise clause in s 116 undoubtedly protects at least some (if not most) forms of religiously motivated speech, and may also protect communication about

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86 *McDaniel v Paty*, 435 US 618, 640–1 (Brennan J, concurring). See Kent Greenawalt, *Religious Convictions and Political Choice* (1988) 244–60; Kent Greenawalt, 'The Role of Religion in a Liberal Democracy: Dilemmas and Possible Resolutions' (1993) 35 *Journal of Church and State* 503; Michael Perry, 'Why Political Reliance on Religiously Grounded Morality does not Violate the Establishment Clause' (2001) 42 *William and Mary Law Review* 663; contrast Robert Audi, 'The Separation of Church and State and the Obligations of Citizenship' (1987) 18 *Philosophy and Public Affairs* 259.

87 John Rawls, *Political Liberalism* (1996) 212–54; John Rawls, 'The Idea of Public Reason Revisited', in Samuel Freeman (ed), *The Cambridge Companion to Rawls* (2003) 591; see also Charles Larmore, 'Public Reason', in Samuel Freeman (ed), *The Cambridge Companion to Rawls* (2003) 383–6. Rawls' insistence upon public reason and his exclusion of reasons based on 'comprehensive doctrines' from public debate, first, is a matter of normative political theory, not constitutional law, secondly, does not apply to all political determinations, but is limited to decisions about 'constitutional fundamentals and questions of fundamental justice' and, thirdly, does not apply to personal deliberations about political matters.

88 Rawls, *Political Liberalism*, above n 87, li–lii.

89 William Galston, *Liberal Pluralism* (1992); Michael Perry, 'Why Political Reliance on Religiously Grounded Morality is not Illegitimate in a Liberal Democracy' (2001) 36 *Wake Forest Law Review* 217; Jeremy Waldron, 'Religious Contributions in Public Deliberation' (1993) 30 *San Diego Law Review* 817; Kent Greenawalt, *Private Consciences and Public Reasons* (1995). For an illuminating debate, see Robert Audi and Nicholas Wolterstorff (eds), *Religion in the Public Square: The Place of Religious Convictions in Political Debate* (1997). See, also, Christopher Eberle, *Religious Conviction in Liberal Politics* (2002).

90 *Harkianakis* (1999) 47 NSWLR 302, 303.

91 Ibid.

religion even where such speech is not itself religiously motivated.[92] Moreover, s 116 clearly imposes a prohibition in respect of the legislative power of the Commonwealth. However, there is doubt about whether s 116 limits the powers of the Territory legislatures,[93] and it has been emphatically held not to apply to the States.[94] Thus, even if s 116 is the source of a freedom of communication in respect of religious matters, it will have no operation in relation to State enactments, such as State religious vilification laws, and would only have a potential application to federal laws of this kind, if enacted.

IV RELIGIOUS SPEECH AND POLITICAL COMMUNICATION

There is no a priori reason, then, why speech that happens to be about religious matters cannot simultaneously be characterised as political communication for the purposes of the implied freedom.[95] The High Court has made clear that, even on the narrowest view, a communication will be relevantly political so long as it is intended or is likely to influence voting choices at federal elections. Whether the specific kind of religious speech that falls within the scope of State religious vilification laws is protected speech under the implied freedom is, however, another question.

Perhaps the most relevant case on this question is the High Court's recent judgment in *APLA Limited v Legal Services Commissioner (NSW)*.[96] The case involved a challenge to Part 14 of the *Legal Profession Regulation 2002* (NSW), cl 139(1) of which prohibited legal practitioners from publishing advertisements containing references to personal injuries or advertising the availability of legal services in relation to personal injuries claims.[97] A number of issues were raised in the case.[98] Of particular relevance is the fact that an overwhelming majority of the Court held that the prohibitions did not infringe the implied freedom of political communication. The reasoning of the majority suggests that it may be difficult to establish that religious vilification laws place a

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92 In the *Jehovah's Witnesses Case* (1943) 67 CLR 116, 123, Latham CJ considered that s 116 operates to protect not only freedom of religion, but also the right to have no religion.

93 *Porter v R; ex parte Yee* (1926) 37 CLR 432, 448 (Rich J); *Lamshed v Lake* (1958) 99 CLR 132, 143 (Dixon CJ), 152 (Williams J), 154 (Kitto J); *Teori Tau v Commonwealth* (1969) 119 CLR 564, 567, 571 (Barwick CJ for the Court); *State Aid Case* (1981) 146 CLR 559, 593–4 (Gibbs J), 621 (Murphy J), 649 (Wilson J); *Kruger* (1997) 190 CLR 1, 58–61 (Dawson J), 85–7 (Toohey J), 121–4 (Gaudron J), 142 (McHugh J), 160–1 (Gummow J).

94 *Grace Bible Church Inc v Reedman* (1984) 54 ALR 571. Note, however, the free exercise and religious test clauses contained in *Constitution Act 1934* (Tas) s 46.

95 See *APLA* (2005) 219 ALR 403, 519 (Callinan J), discussed below.

96 (2005) 219 ALR 403.

97 Clause 139(1) of the *Legal Profession Regulation 2002* (NSW) provided:
A barrister or solicitor must not publish or cause or permit to be published an advertisement that includes any reference to or depiction of any of the following:
(a) personal injury,
(b) any circumstance in which personal injury might occur, or any activity, event or circumstance that suggests or could suggest the possibility of personal injury, or any connection to or association with personal injury or a cause of personal injury,
(c) a personal injury legal service (that is, any legal service that relates to recovery of money, or any entitlement to recover money, in respect of personal injury).

98 See Nicholas Aroney, 'Lost in Translation: From Political Communication to Legal Communication?' (2005) 28 *University of New South Wales Law Journal* 833.

relevant burden on communications concerning government or political matters as required by the first limb of the *Lange* test. Can this obstacle be avoided?

It was common ground in *APLA* that an advertisement that falls within the scope of the legal advertising prohibitions might possibly contain political material that could potentially enjoy the protection of the implied freedom. Indeed, the plaintiffs in the case had constructed an advertisement that deliberately contained an element of political commentary.[99] However, only Kirby J and, to a lesser extent, McHugh and Gummow JJ considered that the implied freedom might protect an advertisement of this kind.

Justice Kirby pointed to the width of the prohibition imposed by the *Legal Profession Regulation*. The 'broad net' that the law cast, he said, meant that at least 'to some degree' the law imposed a burden upon political communication in terms of the first limb of the *Lange* test.[100] Justice McHugh likewise considered that cl 139 of the Regulations could not validly apply to any part of an advertisement that contained political matter. However, he considered that the political matter in the advertisement under consideration was not so intertwined with the non-protected matter that it could not be severed from it.[101] Because the Regulations *targeted* advertisements that were not themselves communications about government or political matters, he considered that they were not contrary to the implied freedom.[102] Gummow J also came close to affirming, with McHugh and Kirby JJ, that the Regulations could not validly proscribe the political aspects of an advertisement.[103] However, his central point was that while a communication may contain a 'mixture' of both advertising and political communication, it would only be the former which attracted the prohibition: the admixture of political material would not 'deny to the balance the character of an advertisement which may validly be proscribed'.[104] Justice Kirby also expressed scepticism for the contrived way that the *APLA* advertisement had been constructed so as to contain political material, and doubted whether this would be sufficient to trigger constitutional protection.[105] However, because McHugh and Kirby JJ also held that the NSW law infringed a separate implied freedom to communicate in respect of the availability of legal rights (derived from Chapter III of the *Constitution*, rather than Chapters I and II), they did not pursue the possible application of the implied freedom of political communication to the law in question any further than this.[106]

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99 One of the advertisements that the Australian Plaintiff Lawyer's Association presented in evidence began by saying: 'Despite the best efforts of Premier Bob Carr and Senator Helen Coonan to stop you, you may still have legal rights to compensation for such injuries at law or under the *Trade Practices Act 1975* (Cth).' See *APLA* (2005) 219 ALR 403, 510.

100 Ibid 486–7.

101 Ibid 422–3.

102 Ibid 421–2.

103 See ibid 457.

104 Ibid.

105 Ibid 486.

106 See *APLA* (2005) 219 ALR 403, 486–7 (Kirby J). It is notable that Kirby J nonetheless adopted a very wide view of the 'political', which encompasses not only the legislative and executive institutions established in Chapters I and II of the Constitution, but also the judicial institutions established in Chapter III. See *APLA* (2005) 219 ALR 403, 487–9, discussed in Aroney, above n 98.

The remaining members of the High Court categorically held that the Regulations did not place a relevant burden on political communication. For Gleeson CJ and Heydon J it was relevant that the Regulations did not in their terms prohibit communications about government or political matters and that they were not aimed at preventing discussion about questions of public policy, even the issue of 'tort law reform'. The communications targeted by the Regulations were, they said, commercial activity, not political activity. The mere possibility that an advertisement caught by the Regulations might mention some political issue was not enough.[107] For Hayne J, the question likewise turned on the fact that the 'focus' of the Regulations, in terms of both their legal operation and practical effect, was upon matters that were not of themselves political.[108] As his Honour pointed out:

> demonstrating that an advertisement can be constructed in a way that contains political commentary, does not show that the regulations constitute a burden on the freedom of communication about government or political matters. The political point can be made if it is shorn of reference to the subjects with which the impugned regulations deal.[109]

Justice Callinan similarly considered that the Regulations had little if anything to do with political or governmental matters and that, even if they did, they did not place any burden on political communication. The Regulations were targeted, rather, at commercial publications[110] — that is, advertisements calculated to 'incite people to sue for personal injuries'.[111]

In the course of his reasoning, it is notable that Callinan J suggested that, if a State should decide to make laws of the kind prohibited by s 116 of the *Constitution*, perhaps even religion could be, or come to be, regarded as a political matter.[112] Given the approach that the Court has taken to defining communications about government or political matters, it is certainly possible that communications concerning religious matters could fall within the definition. However, the more apparent problem that emerges from the approach adopted by the Court in *APLA* is that it seems that the impugned law must place a burden, not simply on a particular communication that happens to be relevantly political, but on 'freedom of political communication' as an abstract right or immunity. The question, then, is whether a law which prohibits religious vilification, like a law which prohibits legal advertising in relation to personal injuries, interferes with political communication so as to impose a burden of this kind. In other words, a number of members of the Court in *APLA* observed that the Regulations were targeted at legal advertising, not political communication, and that while it was possible to construct an advertisement that contains a mixture of both commercial and political material, this was not enough to conclude that the law placed a burden on the implied freedom itself. Does this mean that, since religious vilification laws are likewise targeted at religious vilification, they similarly do not place a similar burden on freedom of political communication?

Two points need to be made. The first is that, when the various judges in *APLA* observed that the Regulations were targeted at legal advertising rather than political

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107 *APLA* (2005) 219 ALR 403, 413.
108 Ibid 497.
109 Ibid 498.
110 Ibid 521, 522.
111 Ibid 522.
112 Ibid 519.

communication, they were drawing attention to a distinction that arguably concerns the question whether a law is reasonably appropriate and adapted (or proportionate) to achieving its objectives, rather than the question whether the law imposes a burden on political communication. On this interpretation, while the Regulations burdened political communication, the law was upheld in *APLA* because it was appropriate and adapted to achieving a legitimate objective.

The second point is that, compared with laws targeting commercial advertising of legal services, religious vilification laws are targeted at communications that are more closely associated or more likely to be mixed up with communications concerning government or political matters.[113] Political discussion is not ordinarily combined with commercial advertising, if we take commercial advertising to mean communications that are primarily calculated to promote the sale of goods or services. However, political discussion often involves disagreement about, and the defence or alternatively the criticism of, fundamental political perspectives, philosophies and practices; and religion, religious beliefs and religious practices (as well as irreligious beliefs) not infrequently inform, or are tied up with, political perspectives, philosophies and practices.[114] There are political parties in Australia that are specifically and openly religious in orientation. There are politicians who more or less openly profess religious faith and acknowledge its impact on their own political perspectives, deliberations and decision-making. And there are different views about the proper content of religious belief, specifically in terms of its implications for political decision-making. Moreover, political debate (sometimes acrimonious debate, of the kind that is at times abusive and offensive) potentially can, and occasionally does, involve disagreement over particular religious positions, as well as religious and secular perspectives about the proper role that religious considerations ought to play in politics. It is therefore difficult to separate religious disagreement from political disagreement, as well as religious acrimony from political acrimony. And if political speech can at times involve what we might call political abuse (serious contempt, revulsion, severe ridicule and even hatred on political grounds), and if the line between religion and politics is itself a matter of political debate, it is doubtful whether we can draw an a priori line between political abuse and religious vilification. It is doubtful, in other words, that speech which vilifies on the basis of religion cannot, by definition, at the same time constitute speech that vilifies in a way that is politically relevant. And, if so, it follows that a law that prohibits religious vilification can, in at least some of its applications,[115] constitute

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113 Cf Sadurski, above n 7, 190; Flahvin, above n 5, 336, and Meagher, 'What is "Political Communication"?', above n 5, 460, arguing for a similar overlap between racial vilification and political discussion.

114 See Stone, above n 58, 386–7, suggesting that 'questions of religion, moral philosophy, history, medical science and sociology' can all arise in public debate that influences the 'attitudes of voters' to the federal government.

115 No doubt many particular acts of religious vilification may have no tangible relevance to federal politics in the narrow sense of being relevant to federal electoral choices. In such cases, only the wider view adopted by Mason CJ, Toohey and Gaudron JJ in *Theophanous* could possibly constitute such communications as being relevantly political. Either way, religious vilification laws are likely in at least some cases to involve religious speech which is at the same time relevantly political speech. Moreover, in any particular case, line-drawing will be unavoidable. See the discussion and examples given in Stone, above n 58, 378–90; Meagher, 'What is "Political Communication"?', above n 5, 463–71.

a relevant burden on freedom of political communication for the purposes of the first limb of the *Lange* test.[116]

Indeed, religious vilification laws are more closely analogous to the kind of law that was at stake in another recent decision of the High Court, *Coleman v Power*,[117] a case that turned not on the first but on the second limb of the *Lange* test — namely whether the law is reasonably appropriate and adapted to securing a legitimate objective in a manner that is compatible with the constitutionally prescribed system of representative government. And *Coleman* was a case in which a majority of the High Court affirmed that political communication, for the purposes of the implied freedom, may properly (that is, constitutionally) involve political insults and abuse.

V POLITICAL INSULTS AND RELIGIOUS VILIFICATION

Coleman involved challenges to ss 7A(1)(c) and 7(1)(d) of the *Vagrants, Gaming and Other Offences Act 1931* (Qld) ('*Vagrants Act*'). Section 7A(1)(c) imposed a penalty of $100 or six month's imprisonment upon any person who distributed printed matter containing 'threatening, abusive, or insulting words' likely to injure a person's reputation or likely to induce other persons to 'shun, avoid, or ridicule, or despise' that person. Section 7(1)(d) imposed the same penalty on any person who 'in any public place' used 'any threatening, abusive or insulting words to any person'.

Mr Coleman was convicted by a magistrate under the *Vagrants Act* when, in the course of alleging that certain police officers in Townsville were corrupt, he engaged in language that was held to be relevantly 'insulting'. On appeal to the Queensland Court of Appeal, however, the conviction under s 7A(1)(c) was quashed on the ground that its application to the defendant was inconsistent with the implied freedom of political communication. The Court of Appeal also concluded that s 7(1)(d) imposed a relevant burden on the implied freedom of political communication, but held that this burden was nonetheless justified as being reasonably appropriate and adapted to achieving a legitimate objective compatible with the constitutionally prescribed system of representative government.[118] On appeal to the High Court, it was conceded by the parties and assumed by the Court that s 7(1)(d) placed a relevant burden on political communication.[119] The question, rather, was whether s 7(1)(d) on its proper construction applied to the conduct of the defendant and, if so, whether the provision was reasonably appropriate and adapted to achieving a legitimate objective, in terms of the second limb of the *Lange* test.

Coleman's appeal was allowed by a majority of the High Court. Three members of the majority, Gummow, Kirby and Hayne JJ, held that s 7(1)(d), properly construed,

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116 See, likewise, in relation to the NSW and Commonwealth racial vilification laws: *Kazak* [2000] NSWADT 77 (Unreported, Hennessy DP, Members Farmer and Jowett, 22 June 2000) [95] and *Jones v Scully* (2002) 120 FCR 243, 305; and compare the detailed analysis in Meagher, 'Protection of Political Communication', above n 5, 56, 58–60.

117 (2004) 220 CLR 1 ('*Coleman*').

118 *Coleman v Power* [2002] 2 Qd R 620.

119 Justices Heydon, Gummow and Hayne were very explicit that this was an assumption and nothing more; Callinan J added that he in fact disagreed with the concession; Gleeson CJ merely referred to the concession; McHugh and Kirby JJ considered the concession to have been made correctly. See *Coleman* (2004) 220 CLR 1, 30 (Gleeson CJ), 44–5 (McHugh J), 64 (Gummow and Hayne JJ), 78, 89 (Kirby J), 112–15 (Callinan J), 120 (Heydon J).

could only apply to words that were, firstly, directed at an identified person and, secondly, were provocative, 'in the sense that either they [were] intended to provoke unlawful physical retaliation, or were reasonably likely to do so'.[120] In so construing the statute, these judges specifically adverted to the constitutional question, and noted that if the provision were not confined to provocative insults (analogous to the US doctrine of 'fighting words') it would not satisfy the second limb of the *Lange* test.[121] Like the other members of the majority, McHugh J interpreted s 7(1)(d) as requiring that insulting words have a personal effect upon an identified person, but he did not interpret it as requiring that the insulting words be likely to provoke a breach of the peace.[122] Nor, he pointed out, did the *Vagrants Act* provide for any defence, such as the defences of public interest, qualified privilege, truth and fair comment that are available in defamation cases.[123] The absence of provocation, and the unqualified nature of the offence (the absence of the defences), meant for McHugh J that the constitutional question had to be squarely addressed. And his conclusion was that s 7(1)(d) was in fact contrary to the implied freedom, and thus unconstitutional.[124] The judges constituting the minority (Gleeson CJ, Callinan and Heydon JJ) also considered that the Queensland legislature in s 7(1)(d) had deliberately eliminated the element of provocation, so that an 'intention to provoke, or a likelihood of provoking, unlawful physical retaliation' or a 'breach of the peace' was not a necessary element of the offence.[125] It was therefore necessary for them, like McHugh J, to address the constitutional question directly. Unlike McHugh J, however, they concluded that the law was constitutional.[126]

In this context, *Coleman* provides important, albeit limited,[127] guidance on the question whether religious vilification laws are consistent with the implied freedom of political communication. The limitations on its usefulness derive from the following factors. First, the concession that the law imposed a burden on political communication in terms of the first limb of the *Lange* test meant that the Court was not required to address this question specifically, and only McHugh and Kirby JJ stated clearly their view that the concession had been made correctly.[128] Secondly, the case was decided by three members of the majority (Gummow, Hayne and Kirby JJ) on the basis of the construction of the Queensland statute. Thirdly, and as a consequence, only McHugh J among the majority, and Gleeson CJ, Callinan and Heydon JJ of the minority, addressed the constitutional question directly, and they came to diametrically opposed conclusions. Fourthly, there is a number of important differences between s 7(1)(d) of the *Vagrants Act* and religious vilification laws, not least of which are the exceptions

120 Ibid 74–5 (Gummow and Hayne JJ).
121 Ibid 78–9 (Gummow and Hayne JJ), 88–9 (Kirby J).
122 Ibid 39–40, 41.
123 Ibid 41–2.
124 Ibid 53–4.
125 Ibid 24 (Gleeson CJ), 108–9 (Callinan J), 116–7 (Heydon J). See also ibid at 26 where Gleeson CJ added that the conduct must be 'contrary to contemporary standards of public good order, and goes beyond what, by those standards, is simply an exercise of freedom to express opinions on controversial issues.'
126 Ibid 32 (Gleeson CJ), 114 (Callinan J), 127 (Heydon J).
127 See ibid 119 (Heydon J).
128 Ibid 44–5 (McHugh J), 89 (Kirby J).

that are available in the latter but which are conspicuously absent in the former. The significance and relevance of *Coleman* is thus limited.

Moreover, if s 7(1)(d) of the *Vagrants Act* is understood as including an element of provocation, then it is clearly distinguishable from what might be called 'ordinary' religious vilification laws which require, simply, that particular conduct incites hatred, serious contempt, revulsion or severe ridicule. Indeed, when s 7(1)(d) is construed in this way it is more closely analogous to serious religious vilification under the Victorian and Queensland Acts, which involves intentional conduct that the offender knows is likely, not only to incite hatred, but also to threaten, or incite others to threaten, physical harm to another person on the ground of that person's religious belief or activity.[129] The decision of Gummow, Hayne and Kirby JJ that s 7(1)(d) included an element of provocation means that their conclusion that the provision was consistent with the implied freedom is of more relevance to serious religious vilification than it is to ordinary religious vilification. However, if s 7(1)(d) is understood not to require provocation, then the provision is more closely analogous to 'ordinary' religious vilification. In this respect, the conclusions and reasoning of McHugh J on one hand, and Gleeson CJ, Callinan and Heydon JJ on the other, are particularly relevant.

Subject to these qualifications, what guidance does the reasoning in *Coleman* provide in relation to the question whether religious vilification laws are consistent with the implied freedom? The *Lange* test, as interpreted in *Coleman*, calls for an assessment of whether the law pursues a legitimate objective in a manner that is compatible with the constitutionally prescribed system of representative and responsible government, and whether the means chosen are reasonably appropriate and adapted to secure that objective. As noted at the outset, a number of ambiguities attend the application of this test. One possible approach, then, is to adopt a particular view of the meaning of the second limb of the *Lange* test and to come to a more or less definite conclusion as to whether Australian vilification laws are constitutional. Thus, Dan Meagher has argued that a contextual approach should be adopted which, rather than automatically applying strict scrutiny to laws that are directed to the content of communications, calls for careful balancing of the significance of the detriment to political communication (ie, the relative value of the political communication in question and the degree to which it is inhibited) against the relative importance of the objectives that the law seeks to secure.[130]

Whatever the substantive merits of this approach, I am not inclined to adopt it for the purposes of this article in view of the far-reaching uncertainty of the High Court's jurisprudence in this area. Moreover, McHugh J's reformulation of the *Lange* test in *Coleman* in fact directly repudiates the kind of 'balancing' that Meagher proposes,[131] and three other members of the majority, while not necessarily rejecting balancing, certainly agreed with McHugh J's reformulation of the test.[132] What I want to underscore, rather, is that the question of the application of the implied freedom to

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129 *Racial and Religious Tolerance Act 2001* (Vic) s 25(1); *Anti-Discrimination Act 1991* (Qld) s 131A. As noted earlier, s 25(2) of the Victorian Act does not require any threat of harm, but merely that the vilifying conduct be done knowingly and with intent to vilify.

130 Meagher, 'Protection of Political Communication', above n 5, 44–52.

131 *Coleman* (2004) 220 CLR 1, 49–50.

132 Ibid 77–8 (Gummow and Hayne JJ), 82 (Kirby J). See Aroney, above n 21, 527.

religious vilification laws should not be separated from the question of how religious vilification laws are to be interpreted. This, as will be seen, is the key lesson to be learned from *Coleman* as far as religious vilification laws are concerned. Thus, while in what follows I will work through the various aspects of the second limb of the *Lange* test, my main point is that the constitutionality of religious vilification laws must turn, ultimately, on the way that they are interpreted.

A Compatibility with the constitutionally prescribed system

The first part of the second limb of the *Lange* test requires that the law in question pursues a legitimate objective that is compatible with the constitutionally prescribed system of representative government. In this connection, it is notable that in *Coleman* there was general acceptance that the objectives of the law were indeed compatible in this sense. Justice McHugh accepted the submission of the Solicitor-General of Queensland, for example, that the relevant purposes of the law were, first, to avoid breaches of the peace, and second, to protect freedom of political communication, 'by removing threats, abuses and insults from the arena of public discussion, so that persons would not be intimidated into silence'.[133] Justice Heydon, of the minority, identified three similar objectives: first, to diminish the risk that interpersonal 'acrimony' could give rise to 'breaches of the peace, disorder and violence'; secondly, to forestall the 'wounding effect' on a person who is publicly insulted; and thirdly, to prevent other persons who hear the insults from being 'intimidated or otherwise upset'.[134] All members of the Court appear to have accepted that objectives such as these were legitimate and compatible with the system of government prescribed by the *Constitution*.[135]

The similarity between these objectives and those of typical religious vilification laws is significant. The *Racial and Religious Tolerance Act* states that its purposes and objectives include the promotion of 'racial and religious tolerance', the promotion of 'the full and equal participation of every person in a society that values freedom of expression and is an open and multicultural democracy', the maintenance of 'the right of all Victorians to engage in robust discussion of any matter of public interest', and the promotion of conciliation in order to 'resolve tensions' between those who vilify others and those who are vilified.[136] It is highly unlikely that a Court would consider objectives such as these to be incompatible with the *Constitution*.[137]

The real question, therefore, is whether the means adopted by the law are reasonably appropriate and adapted to achieving these objectives.

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133 *Coleman* (2004) 220 CLR 1, 53.

134 Ibid 121–2.

135 Ibid 31 (Gleeson CJ), 53 (McHugh J), 78 (Gummow and Hayne JJ), 91, 98–9 (Kirby J), 111–12 (Callinan J), 122 (Heydon J). Note the similarity between these goals and the formula adopted by Deane and Toohey JJ in *Nationwide News* (1992) 177 CLR 1, 77, namely, 'the preservation of an ordered society or for the protection or vindication of the legitimate claims of individuals to live peacefully and with dignity in such a society'. See Chesterman, above n 5, 241.

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

137 See, likewise, in relation to the Commonwealth racial vilification law: *Kazak* [2000] NSWADT 77 (Unreported, Hennessy DP, Members Farmer and Jowett, 22 June 2000) [96]; *Jones v Scully* (2002) 120 FCR 243, 305–6.

B Reasonably appropriate and adapted

In *APLA*, the *targeting* of the law at a particular form of commercial advertising (ie, legal advertising involving reference to personal injury) supported the conclusion of the majority that the law did not impose a burden on freedom of political communication in terms of the first limb of the *Lange* test.[138] In *Coleman*, essentially the same considerations led the minority to conclude that the prohibition upon the use of insulting words in a public place was reasonably appropriate and adapted to achieving the objectives of the law in terms of the second limb of the *Lange* test.[139] In other words, the law was sufficiently narrowly tailored, and not too widely drafted, so as to interfere disproportionately with political communication. Thus, Gleeson CJ considered that, while the law could have a practical operation which in some circumstances placed a relevant burden on political communication, the law was not aimed at regulating the discussion of political matters; its effect on political discussion would be incidental at best and would in most cases have nothing to do with political matters.[140] Justice Callinan similarly considered that the law placed no 'realistic' burden on freedom of political communication and, in any case, was well adapted to secure the preservation of social peace.[141]

Critical to the conclusions of the minority was a view of the proper role of insulting and abusive words in political communication. Gleeson CJ, Heydon and Callinan JJ considered that such language was not essential to the implied freedom of political communication. The majority, however, considered that it was, with the result that a law cannot, consistently with the implied freedom, prohibit communications of a insulting nature without significant qualifications.[142] Thus, among the majority, McHugh J held that in so far as insulting words are used in the course of political discussion, '[a]n unqualified prohibition on their use cannot be justified as compatible with the implied freedom', or as reasonably appropriate and adapted to preventing breaches of the peace or preventing the intimidation of participants in political

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138 That is, notwithstanding the argument advanced earlier that the targeting point made in *APLA* is better understood as applying to the second, rather than the first, limb of the *Lange* test.

139 It was noted earlier that some judges have said that a distinction should be drawn between laws which target the content of communications and those which merely impose restrictions on the manner or form in which communication can take place, and have held that laws which target communicative content must be strictly scrutinised by the Courts. The emphasis in *APLA* and *Coleman* upon the targeting of the law, particularly in the judgments of Gleeson CJ and Heydon J, should be read in this light. However, as explained earlier, in this article I avoid reliance upon abstract tests and approaches, opting rather to argue by analogy with the decided cases. I therefore deliberately avoid the question of whether strict scrutiny will be applied to religious vilification laws, given their focus on the 'content' of communication. Strict scrutiny would, of course, make it relatively more likely that religious vilification laws will be found unconstitutional. Sadurski, above n 7, 193 argues that strict scrutiny should be applied to racial vilification laws because of the 'proximity of [racist] speech to public debate on political issues'. The contrary point of view is articulated in Meagher, 'Protection of Political Communication', above n 5, 40–52.

140 *Coleman* (2004) 220 CLR 1, 30.

141 Ibid 111–14.

142 On the tension between conceptions of the kind of debate that is appropriate to representative government ('rich and balanced' as opposed to 'robust and rigorous'), see Stone, above n 58, 392–400.

discussion.[143] For example, he said, any prohibition on the use of insulting words in this context would, at the least, need to make proof of breach of the peace as well as proof of an intention to commit the breach elements of the offence — and that other qualifications might also need to be made in order to ensure that freedom of political communication is maintained.[144] Gummow, Hayne and Kirby JJ similarly considered that if s 7(1)(d) were construed so as not to require the provocation of a breach of the peace element then it would not pass constitutional muster.[145] In this connection, McHugh J observed:

> The use of insulting words is a common … technique in political discussion and debates. No doubt speakers and writers sometimes use them as weapons of intimidation. And whether insulting words are or are not used for the purposes of intimidation, fear of insult may have a chilling effect on political debate. However … insults are a legitimate part of the political discussion protected by the Constitution.[146]

Among the majority, Gummow and Hayne JJ appeared to agree, observing that '[i]nsult and invective have been employed in political communication at least since the time of Demosthenes'.[147] Justice Kirby very emphatically concurred, considering that Australian politics has regularly included 'insult and emotion, calumny and invective' and that the implied freedom must allow for this.[148]

The minority judges, however, disagreed. Justice Callinan thought that 'insulting or abusive words' may 'generate heat', but not throw 'light' on political issues, and that the freedom protected by the *Constitution* is limited to communications that are capable of 'throwing light on government or political matters'; the implied freedom only protects 'reasonable conduct', and '[t]hreatening, insulting, or abusive language' is 'unreasonable conduct'.[149] Justice Heydon similarly considered that insulting words are a form of 'uncivilised violence and intimidation' which, 'in its outrage to self-respect, desire for security and like human feelings, may be as damaging and unpredictable in its consequences as other forms of violence.'[150] Insulting words, he concluded, are neither a 'necessary' nor a 'beneficial' element of political communication. Insults are liable, in fact, to 'create obstacles to the exchange of useful communications', and are, indeed, 'alien to the virtues of free and informed debate'.[151] Chief Justice Gleeson likewise thought that it was 'open to Parliament to form the view that threatening, abusive or insulting speech and behaviour may in some circumstances constitute a serious interference with public order', and should therefore be prohibited.[152]

Crucial, therefore, to the difference between the majority and the minority in *Coleman* was a different view about the role of insults, abuse and ridicule in political communication. The majority clearly thought that the implied freedom protects political communication even when it involves insults, abuse and ridicule. This in turn

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143 *Coleman* (2004) 220 CLR 1, 54.
144 Ibid.
145 Ibid 78–9 (Gummow and Hayne JJ), 91, 98–9 (Kirby J).
146 Ibid 54.
147 Ibid 78.
148 Ibid 91. See, likewise, *Roberts v Bass* 212 CLR 1, 62–3 (Kirby J), 78 (Hayne J).
149 *Coleman* (2004) 220 CLR 1, 114.
150 Ibid 121–2.
151 Ibid 125–6.
152 Ibid 24, 30–31.

meant that any prohibition on insulting, abusive or ridiculing speech which is also relevantly political must be strictly limited and qualified. For Gummow, Hayne and Kirby JJ, it was sufficient that s 7(1)(d), properly construed, only applied where insulting words were likely to provoke or incite a breach of the peace. For McHugh J, it was likewise necessary that any such prohibition only apply where the conduct is intentional and a breach of the peace is likely; and he added that other qualifications might also be necessary.

What implications does this have for laws that prohibit religious speech which involves insults, abuse and ridicule, where such speech is at the same time political in character or relevant to voting in federal elections? To the extent that religious speech can, at least in some circumstances, be characterised as political speech, the decision in *Coleman* suggests that, absent qualifications of the kind relied upon by the majority, laws which prohibit religious vilification will infringe the implied freedom of political communication.

C Interpretation and constitutionality

The question that remains to be addressed, then, is whether the prohibitions in Australian religious vilification laws contain the kinds of limitations and qualifications that, according to the majority in *Coleman*, were vital to the conclusion that s 7(1)(d) was consistent with the implied freedom.[153] One way in which this is arguably the case is that religious vilification laws are limited to communications that incite a certain attitude (rather than merely express an attitude), and that the incited attitude must be one of hatred, revulsion, serious contempt or severe ridicule. Inciting mere disapproval, dislike or distaste is not sufficient, and neither is the incitement of a degree of contempt or ridicule that is less than serious or severe.[154] Secondly, the laws are aimed at activities that incite hatred against persons or classes of persons; they are not aimed at conduct that is critical of particular religious beliefs, even if such conduct incites hatred, revulsion, serious contempt or severe ridicule of those beliefs.[155] A third relevant factor is that religious vilification laws include specific exceptions where

153 Alternatively put, are Australian religious vilification laws 'targeted' in such a way as to meet the relatively lower standard required by the minority in *Coleman*?

154 As noted, the *Racial and Religious Tolerance Act 2001* (Vic) s 8(1), the *Anti-Discrimination Act 1991* (Qld) s 124A, and the *Anti-Discrimination Act 1998* (Tas) s 19, are virtually identical on these points, except that the latter do not include 'revulsion'. Cf *Harou-Sourdon v TCN Channel Nine Pty Limited* (1994) EOC 92–604; *Wagga Wagga Aboriginal Action Group v Eldridge* [1995] EOC 92–701 and *Kazak* [2000] NSWADT 77 (Unreported, Hennessy DP, Members Farmer and Jowett, 22 June 2000), discussing the meaning of 'incite', 'hatred', 'serious contempt' and 'severe ridicule' in the *Anti-Discrimination Act 1977* (NSW) ss 20C and 20D. See also *Houston v Burton* [2003] TASADT 3 (Unreported, Chairperson Wood, Member Bishop, 18 June 2003). Compare also the 'classic' definition of defamation in *Parmiter v Coupland* (1840) 6 M&W 105, 108 (Parke B), cited in Chesterman, above n 5, 206.

155 See *Fletcher* [2005] VCAT 1523 (Unreported, Morris P, 1 August 2005) [7], discussed below. Of course, if a particular communication, while referring only to beliefs also has the effect of inciting hatred of particular individuals or groups, then it will be a different matter. And, indeed, the line between inciting hatred of beliefs and inciting hatred of persons may be a difficult one to draw. But by proscribing only the incitement of hatred against persons or groups, the legislation calls for the distinction to be made. And if the law leaves room for the vitriolic criticism of beliefs, then this is a factor to be considered in an assessment of whether the law is likely to pass constitutional muster.

vilifying conduct is engaged in 'reasonably and in good faith', in connection, for example, with genuine academic, artistic, religious or scientific debate or discussion, or for any purpose that is in the public interest, or in making a fair and accurate report of something that is of public interest.[156] Notably, these exceptions are analogous to the limitations to the scope of the defence of qualified privilege as reformulated in *Lange* so as to be consistent with the implied freedom.[157]

Do these considerations provide sufficient ground for concluding that Australian religious vilification laws are, in the final analysis, likely to be upheld as constitutional in terms of the implied freedom of political communication?[158] Some difficulties remain. Generally, it has been said that the law relating to group vilification is lacking in precision and clarity, so that the body of case law that has built up in each jurisdiction is — in important respects — inconsistent and incoherent.[159] And ambiguity in the law itself has a chilling effect on speech.[160] This general problem is compounded by a number of more particular problems with 'ordinary' religious vilification laws. First, mere vilification is sufficient; provocation of a breach of peace is not an element of the offence. However, such an element was regarded by the majority in *Coleman* as essential to the constitutionality of the law in that case. Secondly, the motives or intentions of the speaker are irrelevant; it is not necessary to show that a respondent intended to incite hatred.[161] While the sanctions are not criminal,[162] the

156 *Racial and Religious Tolerance Act 2001* (Vic) s 11. As noted, the *Anti-Discrimination Act 1991* (Qld) s 124A(2) refers to 'the publication of a fair report' of an act to which s 124A(1) refers, as well as to an act done for 'academic, artistic, scientific or research purposes or for other purposes in the public interest, including public discussion or debate …'. Section 124A(2) also refers to 'the publication of material in circumstances in which the publication would be subject to a defence of absolute privilege in proceedings for defamation'. The *Anti-Discrimination Act 1998* (Tas) s 55 contains very similar provisions, except that it does not refer specifically to 'public discussion or debate' and simply refers to acts done 'in good faith', without the additional requirement of reasonableness.

157 See Chesterman, above n 5, 204–16, discussing the similarities and differences between Australian defamation law and the various Australian racial vilification laws. Chesterman notes that the parallels are particularly evident in the case of the 'NSW-based' racial vilification legislation enacted in New South Wales, the Australian Capital Territory and South Australia.

158 Both racial and religious vilification laws have been upheld by various State tribunals on grounds such as these. See *Kazak* [2000] NSWADT 77 (Unreported, Hennessy DP, Members Farmer and Jowett, 22 June 2000) [96]; *Jones v Scully* (2002) 120 FCR 243, 306; *Deen v Lamb* [2001] QADT 20 (Unreported, Sofronoff P, 8 November 2001) 5–7; *Catch the Fire Ministries* [2003] VCAT 1753 (Unreported, Higgins V-P, 21 October 2003) [8]–[17]. Compare the detailed analysis in Meagher, 'Protection of Political Communication', above n 5, 63–8.

159 Meagher, above n 7, 231–9, 247–53. For an argument that hate speech laws are congenitally vague, see Eric Heinze, 'Viewpoint Absolutism and Hate Speech' (2006) 69 *Modern Law Review* 543.

160 Ibid 227–8, 252–3.

161 See *Racial and Religious Tolerance Act 2001* (Vic) s 9(1). Cf the *Anti-Discrimination Act 1991* (Qld) s 124A and the *Anti-Discrimination Act 1998* (Tas) s 19, which do not require intent. Contrast 'serious' religious vilification under the *Racial and Religious Tolerance Act 2001* (Vic) s 25(1) and the *Anti-Discrimination Act 1991* (Qld) s 131A, which require that a person 'knowingly' or 'recklessly' incites hatred.

162 Contrast the criminal penalties for 'serious' vilification: *Racial and Religious Tolerance Act 2001* (Vic) s 25; *Anti-Discrimination Act 1991* (Qld) s 131A.

elimination of a necessary mental element extends the reach of the prohibition considerably. Notably, the hate speech law upheld by a close majority of the Canadian Supreme Court in *R v Keegstra* required that the conduct be 'wilful', and this mental element in the offence weighed significantly in the Court's conclusion that the legislation was constitutionally justified as a proportionate burden on freedom of speech.[163] Thirdly, the exceptions in Australian religious vilification laws only apply where a person engages in the conduct reasonably and in good faith.[164] It is debatable, however, whether communications need to be reasonable or in good faith in order to enjoy the protection of the implied freedom of political communication. Indeed, it is not exactly clear how a 'reasonableness' requirement can or ought to apply to religious speech. And, finally, the onus of establishing these exceptions is, in Victoria at least, cast upon the respondent.[165]

It is therefore difficult to give a definite answer to the question whether religious vilification laws are likely to be upheld. There are significant considerations to be borne in mind on both sides of the ledger. Add to this the fact that, as has been seen, there is extensive disagreement about what the *Lange* test means and how it is to be applied in any particular case. Some judges are inclined to allow the legislatures a relatively generous margin of appreciation; others are more inclined to subject legislation to heightened scrutiny, especially where a law targets the content of communications.

Nonetheless, on balance, it seems likely that religious vilification laws will be upheld by the courts. This is because, properly construed, the laws only apply to the most extreme forms of hate speech.[166] Indeed, there is reason to believe that the existence of the implied freedom is one of the considerations that has led legislators to construct relatively narrow harm thresholds and to include free speech exceptions in vilification laws generally.[167] As the Victorian Premier explained during parliamentary debate, the *Racial and Religious Toleration Bill* was aimed only at the 'most noxious form of conduct' and at the 'most repugnant behaviour' — in other words, 'extreme behaviour that has no regard for the rights of others to participate in society'.[168] Just as three members of the majority in *Coleman* read the legislation so as to leave room for political communication, there is real prospect that the High Court

163 See *R v Keegstra* [1990] 3 SCR 697, 773–5.

164 As noted earlier, only good faith is required in Tasmania: *Anti-Discrimination Act 1998* (Tas) s 55.

165 See *Racial and Religious Tolerance Act 2001* (Vic) s 11; *Anti-Discrimination Act 1998* (Tas) s 19; *Anti-Discrimination Act 1991* (Qld) ss 124A, 206, but cf *Deen v Lamb* [2001] QADT 20 (Unreported, Sofronoff P, 8 November 2001), 12–13.

166 See, likewise, *Fletcher* [2005] VCAT 1523 (Unreported, Morris P, 1 August 2005) [1], [4]–[10]; and compare *Judeh v Jewish National Fund of Australia Inc* [2003] VCAT 1254 (Unreported, McKenzie DP, 13 March 2003). Chesterman, above n 5, 242, points out that the Commonwealth *Racial Discrimination Act 1975* (Cth) s 18C(1), which applies to racist speech that is 'reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate', is less likely to be upheld.

167 Meagher, above n 7, 243–4.

168 *Racial and Religious Tolerance Act 2001* (Vic), Second Reading Speech, 17 May 2001, Victoria, *Parliamentary Debates* (2001) 1284–6 (Premier Bracks). See, likewise, Meagher, above n 7, 231–5, 240–41, 243–5, 247–9, discussing the scope of State and federal racial vilification laws.

would read the harm threshold in religious vilification laws narrowly and the exemptions widely so as to protect freedom of political communication from undue interference. This is particularly so, given the kinds of objectives typically spelt out in Australian religious vilification laws, such as (in the Victorian case) the promotion of 'the full and equal participation of every person in a society that values freedom of expression and is an open and multicultural democracy', and which maintains 'the right of all [citizens] to engage in robust discussion of any matter of public interest', including the 'discussion of religious issues or academic debate'.[169] Explicit statements like this give the courts a particularly firm basis upon which to read the prohibitions narrowly and the exemptions widely.[170] And, even where such statements have not been included in the legislation, the *Interpretation Acts* of the various jurisdictions incorporate the constitutional imperative explicitly.[171]

To the extent, then, that the courts are able to interpret Australian religious vilification laws along these lines, they are likely to be upheld. To the extent, however, that this is not possible, there is real prospect that religious vilification laws, in cases where they interfere with political communication, will be found to be contrary to the implied freedom of political communication.

VI CONCLUSIONS

The arguments in this article should not be taken as a defence of the substantive merits of religious vilification laws. Indeed, cogent arguments have been made that religious vilification laws are not good public policy, especially in view of the chilling effect of potential litigation, the way in which the legislation is apt to be used as a weapon in inter-religious disputes and the degree to which this in turn promotes ill-will among people of different faiths. Although the powers of the various State tribunals to make orders are to an extent limited, religious vilification laws legitimate the use of State power to intervene in inter-religious disputes, often by enforcing the claims of one religious group against another. Doubts expressed by Judge Higgins concerning the credibility of 'expert' and other witnesses called by both sides in the recent *Islamic Council of Victoria* case illustrate the way in which such legislation is apt to be used as a tool in inter-religious disagreement and conflict.[172]

Moreover, as Patrick Parkinson has argued, '[t]he law that impacts upon people's lives is not the law as enacted by parliaments, and not even the law as interpreted by

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169 *Racial and Religious Tolerance Act 2001* (Vic) s 4(1); and see the *Explanatory Notes* to the *Anti-Discrimination Amendment Bill 2001* (Qld). Compare *Fasold v Roberts* (1997) 70 FCR 489, 550 (Sackville J): 'considerable care must be exercised before making orders restraining statements made in the course of public discussion on issues regarded by many people as important to their religious or ideological beliefs … Unless caution is exercised, there is a serious risk that the courts will be used as the means of suppressing debate and discussion on issues of general interest to the community … '.

170 See Meagher, above n 7, 230–37, 247–9.

171 For example, *Acts Interpretation Act 1901* (Cth) ss 15A, 15AA, 15AB; *Interpretation of Legislation Act 1984* (Vic) ss 6, 35; *Acts Interpretation Act 1954* (Qld) ss 9, 14A, 14B.

172 See *Islamic Council of Victoria Inc v Catch the Fire Ministries Inc (Final)* [2004] VCAT 2510 (Unreported, Higgins V-P 22 December 2004) [50], [63], [67], [73], [76], [276], [373], [393], passim. (The judgment at particular stages does not use numbered paragraphs, making it difficult to provide further pin-point references.)

the courts. What matters is the law as people believe it to be.'[173] An evaluation of religious vilification laws should take into account the 'collateral damage' caused by folk-law of this kind, as well as risk-averse management and the chilling effect of potential litigation. Judicial interpretation of religious vilification laws is only one factor among many others.

Nonetheless, properly construed, Australian religious vilification laws apply in only very limited circumstances and for this reason are likely to be upheld as consistent with the implied freedom of political communication. Yet, as I have argued, the corollary also applies: *unless* religious vilification laws are (or can be) construed in this way, they are likely to be held unconstitutional. The constitutionality of religious vilification laws cannot, in other words, be divorced from their interpretation.

It is not always clear, however, that vilification laws have received the kind of interpretation that would be conducive to a finding of constitutional validity.[174] A significant number of interpretive issues are relevant here. One such issue is the question of whether it is indeed necessary under the legislation to demonstrate incitement of hatred against a person or class of persons (rather than just hatred of particular beliefs), and of what kind of evidence would be necessary to establish such a fact. A second interpretive issue is whether evidence of actual incitement of hatred is necessary (rather than just engaging in conduct that would be reasonably likely to incite hatred). A third issue concerns the problem of determining the harm threshold in terms of 'hatred', 'serious contempt', 'revulsion' and 'severe ridicule', as distinct from mere disapproval, dislike or distaste, or inciting a degree of contempt or ridicule that is less than serious or severe. A fourth has to do with the relationship between the prohibition on the incitement of hatred and the exceptions for conduct undertaken for academic, artistic, religious or scientific purposes and the like. How these distinctions and relationships are interpreted and applied cannot be separated from the question of the constitutional validity of the legislation. An interpretation that insisted upon the demonstration of the incitement of an actual response, which is serious enough to be called hatred, serious contempt, revulsion or severe ridicule, and which involves hatred for particular persons or classes of persons, as well an interpretation which gave the exceptions a real exculpatory effect, would certainly contribute to the conclusion that such laws are indeed constitutional.

Recently, the President of the Victorian Civil and Administrative Tribunal observed that the Victorian religious vilification law

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173 Parkinson, above n 8.

174 Cf *Bryl and Kovacevic v Nowra and Melbourne Theatre Company* [1999] HREOCA 11 (Unreported, Commissioner Johnston, 21 June 1999) [4.3]; *Kazak* [2000] NSWADT 77 (Unreported, Hennessy DP, Members Farmer and Jowett, 22 June 2000) [29], [93]–[97]; *John Fairfax Publications Pty Ltd v Kazak* [2002] NSW ADTAP 35 (Unreported, Latham DP, Judicial Member Goode, Member Antonios, 25 October 2002) [16]; *Deen v Lamb* [2001] QADT 20 (Unreported, Commissioner Sofronoff, 8 November 2001) 5–7; *Jones v Scully* (2002) 120 FCR 243, 304–6; *Catch the Fire Ministries* [2003] VCAT 1753 (Unreported, Higgins V-P, 21 October 2003) [6], [17]; *Islamic Council of Victoria Inc v Catch the Fire Ministries Inc (Final)* [2004] VCAT 2510 (Unreported, Higgins V-P 22 December 2004) [6], [10]–[11], [81], [382], [384], [388]–[390]; *Judeh v Jewish National Fund of Australia Inc* [2003] VCAT 1254 (Unreported, McKenzie DP, 13 March 2003); *Fletcher* [2005] VCAT 1523 (Unreported, Morris P, 1 August 2005) [7]. See, further, the cases on racial vilification cited in Whelan and Fougere, above n 2, 10–21.

> is not concerned with the vilification of a religious belief or activity as such. Rather it is concerned with the vilification of a *person*, or a class of *persons*, on the ground of the religious belief or activity of the person or class. … The law does not stop a person from engaging in conduct that involves contempt for, or severe ridicule of, a religious belief or activity, provided this does not incite hatred against, serious contempt for, or revulsion or severe ridicule of another person or a class of persons on the ground of such belief or activity. The law recognises that you can hate the idea without hating the person.[175]

Moreover, in *Bropho v Human Rights and Equal Opportunity Commission*, French J observed in relation to the exception provisions in s 18D of the *Racial Discrimination Act 1975* (Cth):

> Section 18D places certain classes of acts outside the reach of s 18C. … It is important however to avoid using a simplistic taxonomy to read down s 18D. The proscription in s 18C itself creates an exception to the general principle that people should enjoy freedom of speech and expression. That general principle is reflected in the recognition of that freedom as fundamental in a number of international instruments and in national constitutions. It has also long been recognised in the common law albeit subject to statutory and other exceptions. … Against that background s 18D may be seen as defining the limits of the proscription in s 18C and not as a free speech exception to it. It is appropriate therefore that s 18D be construed broadly rather than narrowly.[176]

To the extent that religious vilification laws are interpreted with principles such as these in mind, they are likely to leave sufficient room for freedom of religious discussion that happens to be relevantly political. The implied freedom of political communication means that the prohibitions imposed by religious vilification laws need to be interpreted narrowly, and the exceptions construed widely, in order to leave room for political communication. At the same time, however, to the extent that religious vilification laws are not (or cannot) be interpreted in this way, there is good reason to think that they are unconstitutional.

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175 *Fletcher* [2005] VCAT 1523 (Unreported, Morris P, 1 August 2005) [7]. The approach adopted in *Fletcher* is in rather stark contrast to *Islamic Council of Victoria Inc v Catch the Fire Ministries Inc (Final)* [2004] VCAT 2510 (Unreported, Higgins V-P 22 December 2004).

176 *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105, 125–6. See also his Honour's remarks at 128 and 131–2 in relation to reasonableness and good faith.