

Religious vilification, anti-discrimination law and religious freedom

Speech to the International Religious Liberty Association conference at Sydney University on 24 August 2011

1. John Graz, Secretary General of the International Religious Liberty Association; Patrick Parkinson, our kind host; delegates: thank you for inviting me to address the International Religious Liberty Association's 13th meeting of experts.
2. The Association has been addressing, here at Sydney University the broad theme of the challenges of secularism to religious freedom.
3. The discussion has been in an international context with the panel of experts from a variety of countries offering insights into religious freedom issues not only here in Australia, but also in the United States and Europe.
4. When looking at religious freedom around the world, it is indeed a topic of high importance for the international community.

5. The recent report by the United States Commission on International Freedom¹ paints a troubling picture of religious freedom across the globe.

6. The report describes the critical situation for millions of people who are suffering persecution, in many cases violent persecution, oftentimes sponsored by the state or governmental bodies in countries (among many others) such as Burma, North Korea, Egypt, Eritrea, Iran, Iraq, Nigeria, Pakistan, China, Saudi Arabia, Sudan and Vietnam.

7. For example, it describes the situation for religious minorities in Iraq which include Christians, Yazīdīs, Mandaeans, Jews, and Bahā'īs:

“Since 2004, members of these minorities have been kidnapped, raped, tortured, beheaded, and evicted from their homes. Christians have seen their churches repeatedly bombed. The worst single attack against Christians was launched on October 31, 2010, during Sunday Mass. An al Qaeda affiliate assaulted Our Lady of Perpetual Help Church in Baghdad, killing or wounding nearly all of the more than 100 worshippers inside. Wijdan Michael, then Iraq’s human rights minister and a Christian, said that the goal of the perpetrators was —to empty Iraq of Christians.☐ Since 2004, there has been a mass exodus of Christians from Iraq, reducing its Christian community by more than half. Significant declines also have

¹ Annual Report of the United States Commission on International Religious Freedom May 2011 (Covering April 1, 2010 – March 31, 2011)

occurred among smaller religious minorities such as the Yazidis and also the Mandaeans, who have lost more than 80 percent of their members, mostly through emigration.”²

8. These troubling situations require the serious and concerted efforts of the entire international community to work constructively and effectively in addressing the specific problems experienced in these countries and building religious freedom around the world.
9. They also offer a context for the topic which I am invited to address today: *Religious vilification, anti-discrimination law and religious freedom*.
10. Firstly, the situations in those countries make me grateful to live in a country which experiences a high degree of freedom, including religious freedom.
11. Secondly, and flowing from that attitude of gratitude is the reminder that we must ever cherish the freedoms that we enjoy by ensuring that in an ever changing society those freedoms are not diminished or lost. To borrow a phrase: “the price of freedom is eternal vigilance.”

² Ibid, p. 2

12. In addressing the topic of religious freedom, I will explore religious freedom under Australian law in its proper historical context, for as Winston Churchill said “the longer you can look back, the farther you can look forward”³. I will then discuss challenges to religious freedom in Australia and then I will discuss some aspects of religious vilification and anti-discrimination laws in New South Wales and other states of Australia.
13. Freedom as a core Australian characteristic is not new in Australian history.
14. The Australian national anthem begins with the words “Australians all let us rejoice, for we are young and free.” This song became the national anthem in 1984, but was first performed in Sydney in 1878.⁴
15. The Australian Constitution, adopted in 1901, was drafted following a series of democratic constitutional conventions in the 1890s which were made up largely of elected representatives from colonial parliaments who put draft proposals to popular votes of the people in each of Australia’s colonies.
16. At around that time, the colonies began to grant women the right to vote, with all women having the right to vote for the Commonwealth parliament from near the beginning of our federation.

³*Churchill by Himself*, 2008, Appendix I: Red Herrings, ed. Langworth, PublicAffairs, p. 577

⁴http://www.dfat.gov.au/facts/nat_anthem.html

17. Consistent with this Australian version of freedom, the Australian Constitution did not follow major political upheaval. In that sense, its adoption was very different to the adoption of the US Constitution, which was the result the war of independence with Britain or as did the original constitution of France, the Declaration of the Rights of Man and Citizen, which was the result of the French Revolution.

18. The formation of the Australian constitution was instead the result of an organic and orderly transition to a new nation. One historian describes the prevailing attitude as follows:

“there remained a consensus that the remedy for society’s ills lay not in the violent overthrow of the established order but in orderly structural reform.”⁵

19. Although adopting elements of other constitutions, most notably the US constitution’s model of federalism, an upper house made up of elected representatives and a federal judiciary as well as the Swiss constitution’s use of the referendum to amend the constitution, the Australian Constitution retained the monarchy and Westminster parliamentary government from Britain. According to Justice McHugh in the High Court case of *Australian Capital Television v Commonwealth*⁶:

⁵ Ely, Richard, *Unto God and Caesar: religious issues in the emerging Commonwealth, 1891-1906*, MUP (1976), p4

⁶ (1992) 177 CLR 106

“the purpose of the Constitution was to further the institutions of representative government.”⁷

20. In that sense, the Australian constitution was overlaid onto an already existing tradition of legal jurisprudence which accepted the basic tenets of Westminster democracy. In the words of Justice Isaacs in the case of *Commonwealth v Kreglinger*,⁸ the principle of responsible government⁹:

“is part of the fabric on which the written words of the Constitution are superimposed.”

21. With that system came a series of principles and conventions which were unwritten but nevertheless fundamental to the operation of government and free society in Australia.

22. Viscount Bollingbroke, an early proponent of the principles of Westminster democracy, once said that the constitution is: “...that assembly of laws, institutions and customs, derived from certain fixed principles of reason... that compose the general system, according to which the community has agreed to be governed”.¹⁰

⁷ Ibid, p 228

⁸ (1926) 37 CLR 393

⁹ Ibid at 413

¹⁰ Henry St. John Bolingbroke, “Dissertation upon Parties, Letter X” in *The Craftsman* (London: R. Francklin, 1754), 108

23. That statement is particularly true of Australian constitutional law. The principles of representative and responsible government embodied in the Westminster system of government go well beyond the written words of the constitution and embrace the laws, institutions, customs and principles which underpin it.

24. And fundamental to the principles of that system of government are the fundamental freedoms of speech, association, assembly, religion, and movement which can be traced back through the common law to the Magna Carta, which declared in 1215:

“No freeman is to be taken or imprisoned or disseised of his free tenement or of his liberties or free customs, or outlawed or exiled or in any way ruined, nor will we go against such a man or send against him save by lawful judgement of his peers or by the law of the land.”¹¹

25. Therefore, with one main exception, to which I will come shortly, the drafters of the Australian constitution did not see it necessary to include a US style bill of rights or other statement of principles guaranteeing the fundamental freedoms of those bound under it.

¹¹ Clause 29

26. His Honour Justice McHugh expressed this well in *Australian Capital Television v Commonwealth*¹²:

“Although the makers of the Constitution were much influenced by the terms and structure of the Constitution of the United States and ‘felt the full fascination of its plan’, they rejected the United States example of a Bill of Rights to protect the people of the Commonwealth against the abuse of governmental power. They did so because they believed in the efficacy of the two institutions which formed the basis of the Constitutions of Great Britain and the Australian colonies - representative government and responsible government - and because they believed that the interests of people of the States would be protected by the Senate as the States' House.”

27. The absence of the express rights such as those granted by the Bill of Rights under the US constitution in the written document of the Australian constitution did not prevent the High Court in that case from finding a constitutional protection for freedom of communication. To the contrary, the system of representative government was the precise reason why such a right existed. In the words of Chief Justice Mason in that case¹³:

“Freedom of communication...is so indispensable to the efficacy of the system of representative government for which

¹²*Australian Capital Television Pty Ltd v Commonwealth (No 2)* (1992) 177 CLR 106 at pp. 228-229

¹³ *Ibid*, p. 140

the Constitution makes provision that it is necessarily implied in the making of that provision.”

28. Although the High Court’s finding of the implied right to freedom of speech under the Australian constitution came some 91 years after the Constitution was adopted, this did not mean of course that the right was not available until that time. Instead, it was the first time in which it had been tested before the High Court.

29. The essential point is that fundamental freedoms of speech, association, assembly, religion, and movement are indispensable to and inseparable from a system of responsible and representative government and embodied in Australian constitutional law.

30. However, as I mentioned earlier, there is one main exception¹⁴ in the Australian constitution to the general attitude of avoiding ‘bill of rights’ style guarantees. 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 Commonwealth.”

¹⁴ The other exception is the right to trial by jury “on indictment of any offence” against a Commonwealth law granted by section 80 of the Constitution.

31. Before I discuss the consideration that has been given to section 116 by the High Court since the Constitution was adopted, it is worth considering the context in which it was adopted.

32. Historian Richard Ely gives an interesting and insightful account of the various individuals and groups involved in debating a clause that would ensure freedom of religion under the Australian constitution in his book *Unto God and Caesar: religious issues in the emerging Commonwealth*.¹⁵

33. What becomes apparent is that those delegates to the Constitutional Conventions who opposed the inclusion of the clause in the Constitution did so on the grounds that it was unnecessary, given that the Constitution would embody the broader principles guaranteeing citizens' fundamental freedom.

34. Edmund Barton QC, one of my predecessors and the leader of the NSW delegation to the Constitutional convention (and to later become Australia's first Prime Minister and two years later one of the first Justices of the High Court) argued at the 1898 convention:

“Because we are a Christian community we ought to have advanced so much...since the days of imposing religious observances or exacting a religious test as a qualification for any office of the State as to render any such dangers practically

¹⁵ Ely, Richard, *Unto God and Caesar: religious issues in the emerging Commonwealth, 1891-1906*, MUP (1976)

impossible. We will be going a little too far if we attempt to load this Constitution with a provision for dangers which are practically non-existent. The whole advancement in English speaking communities, under English laws and English institutions, has shown less and less inclination for imposing religious tests, or exacting religious observances or to maintain any religion. We have not done that in Australia. We have abolished state religion in all these colonies; we have wiped out every religious test, and we propose now to establish a Government and a Parliament which will be at least as enlightened as the Governments and Parliament which prevail at various states.”¹⁶

35. This argument is evidence of the prevailing view of the framers of the constitution was, generally, the best protection of freedoms under the constitutional law of Australia was seen to be the principles of representative and responsible government embodied in the Westminster system of government. Another framer, Sir Josiah Symon, a South Australian delegate went as far as to say that religious freedom:

“is embodied in the Constitution as a part of the unwritten law that no church establishment shall prevail and that religious freedom shall be observed.”¹⁷

36. The argument also highlights the perspective of the framers that in its foundation they saw Australia as a Christian community.

¹⁶ Ibid at 80

¹⁷ Ibid at 84

Similar sentiments were expressed by other framers, such as Sir Henry Parkes often referred to as the Father of Federation who said “as we are a British people, we are pre-eminently a Christian people – as our laws, our whole system of jurisprudence, our Constitution – are based upon and interwoven with our Christian belief”¹⁸. Alfred Deakin, later to become Australia’s second Prime Minister prayed that the federation may be a “means of creating and fostering throughout all Australia a Christlike citizenship”¹⁹.

37. Therefore, it appeared difficult at least for Barton and those who argued in a similar vein to conceive of a situation in Australia where there would not be religious freedom. For them, it was so ingrained in their conception of the prevailing legal jurisprudence and religious outlook that possible threats to religious freedom were almost inconceivable.

38. Some however, who ultimately prevailed, had perhaps a keener sense of history. Bernard Wise, another of my predecessors and a NSW delegate to the Convention indicated that he could not share Barton’s optimism as to the death of religious persecution saying:

“but we have seen in our own time a recrudescence of that evil demon, which I fear, is only scotched and not killed.”²⁰

¹⁸ Sydney Morning Herald, 26/8/1885

¹⁹ Alfred Deakin *Boke of Praer and Praes*, 1884-1913, Prayer 233, 4 June 1998.

²⁰ Ely, Richard, *Unto God and Caesar: religious issues in the emerging Commonwealth, 1891-1906*, MUP (1976) at 82

39. The rest, as they say, is a matter of history, and section 116 was adopted as we know it today.
40. Since Federation in 1901, section 116 has been interpreted by the High Court on four significant occasions.²¹
41. Looking at these judgments together as a whole, some conclusions may be drawn about freedom of religion in Australia.
42. Firstly, there is no evidence of a 'strict separationist' doctrine in the High Court's decisions. In Australia, freedom of religion does not mean freedom from religion.
43. That is to say, the Constitutional provision is an exhortation against government interference in the free exercise of religion, either by prohibition of interference by Government of the religious acts or beliefs of private individuals and communities or by establishing a religion itself.
44. It is neither a moratorium on religious involvement in public institutions nor does it prevent the government from cooperating or supporting Church initiatives. As Chief Justice Barwick said in *Attorney-General (Vic) (Ex rel Black) v Commonwealth*²² there is

²¹ *Krygger v Williams*(1912) 15 CLR 366, *Adelaide Company of Jehovah's Witnesses Inc. v The Commonwealth* (1943) 67 CLR 116, *Attorney-General (Vic) (Ex rel Black) v Commonwealth*(1981) 146 CLR 559 and *New Faith v Commissioner for Pay-Roll Tax (Vic)*

²² (1981) 146 CLR 559 at [insert]

nothing preventing the Commonwealth giving aid to or encouragement of religion.

45. For that reason, I concur with sentiments of the NSW Premier Barry O'Farrell, who in a speech given before the state election said²³:

“I am pleased that in Australia we have not gone down the United States path where the strict legal separation of Church and State goes beyond common sense.”

46. No doubt the Premier was referring to decisions of the United States Supreme Court, such as *Engel v. Vitale*²⁴ where the Court determined it unconstitutional for state officials to compose an official school prayer and require its recitation in public schools. This was notwithstanding the fact that the prayer was non-denominational and students were permitted to excuse themselves from participation. The prayer in question read: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our country. Amen". In that decision the majority of six judges referred to the “wall of separation” between Church and State.

47. And although the US Supreme Court now applies, the ‘Lemon Test’ (the name derived from the US Supreme Court case of

²³Address to forum ‘NSW Votes’ hosted by the Australian Christian Lobby, 15 February 2011, <http://www.nswvotes.org.au/questions-videos/>

²⁴370 U.S. 421 (1962)

*Lemon v. Kurtzman*²⁵, which gave permission for the US Government to fund the salaries of teachers in religious schools) is a more flexible test than the rule expressed in *Engel v. Vitale*, the “wall of separation” doctrine appears to still have a strong hold in US legal jurisprudence.

48. The second conclusion to be drawn about section 116 from the High Court decisions is that the free exercise of religion is not an unbounded right. In much the same way that freedom of speech is not unlimited, and is subject to laws such as defamation laws, laws prohibiting the publication of terrorist material and the restriction from publication of material that is obscene under the National Classification Scheme, the free exercise of religion is not unlimited.

49. The main limitation cited by the Courts is that the free exercise of religion cannot be against “the common weal” to use the words of Justice Rich in *Adelaide Company of Jehovah’s Witnesses Inc. v The Commonwealth*²⁶ and government will be entitled to exercise rights which might contravene the free exercise of religion for the “protection of the community”²⁷ to use the words of Chief Justice Latham in that case. It should be noted that the context of these statements was in the context of a world war which Australia was fighting. What might be necessary to protect the community in war time may be different to what might be necessary in times of peace.

²⁵403 U.S. 602 (1971)

²⁶ (1943) 67 CLR 116 at 149-150

²⁷ Ibid at 132

50. The third observation, rather than conclusion, from these High Court cases is that there have been few instances in which section 116 has been invoked. This may be explained by a variety of circumstances. However, I believe that it is in part because, as I have argued earlier, the Australian system of representative and responsible government particularly in the broader sense, generally protects against contraventions of that clause.

51. That being said, I am not naïve to believe that Australia has an unblemished record of religious freedom.

52. To just take one obvious example, for the first half of the twentieth century, social relations in this Country were marred by a bitter sectarian divide between Catholics and Protestants. Until the 1960s, Catholics experienced religious discrimination as some job vacancy advertisements read 'Catholics Need Not Apply'.²⁸

53. Fast forwarding to the 21st century, that sectarian divide is now wholly a thing of the past. However, new developments cause me to remember my predecessor's dictum that threats to religious freedom may be "only scotched and not killed."

54. The Boycotts Divestment and Sanctions Resolution against Jewish businesses passed in December 2010 by the Marrickville

²⁸Macintyre, Stuart, *Oxford History of Australia*, vol 4, (Melbourne, OUP, 1986), pp. 67-8.

Council²⁹ and, more recently, violent activist protests against Jewish businesses, in particular, Max Brenner chocolate and coffee stores are eerily reminiscent of Jewish pogroms of earlier times.

55. The Marrickville Council resolution was championed by Greens Mayor and Greens state election candidate Fiona Byrne and supported by Lee Rhiannon now a Federal Senator. Their support for this action revealed an ugly underbelly of the Australian Greens' agenda.

56. Fortunately, elected representatives from Australia's mainstream parties have shown strong solidarity with the Jewish Community.

57. Premier Barry O'Farrell wrote to the Council giving it 28 days to rescind the resolution. Within a week, the Council announced that it withdrew the resolution.³⁰

58. In response to the protests against Max Brenner, which resulted in 19 charges for offences including trespassing, besetting

²⁹ Marrickville Council media release:

<http://www.marrickville.nsw.gov.au/BridgeDownload/MR.+COUNCIL+BACK+GLOBAL+BOYCOTT.PDF?s=324044938,docID=1159.11>

³⁰

<http://www.marrickville.nsw.gov.au/BridgeDownload/MR.+COUNCIL+WITHDRAWS+FROM+GBDS.PDF?s=324044938,docID=24720.11>

a premises and assaulting police³¹, Foreign Minister Kevin Rudd visited a store in Melbourne where he said:

“I don't think in 21st century Australia there is a place for the attempted boycott of a Jewish business. I thought we had learned that from history.”³²

59. During the 2007 parliamentary debate on human cloning, the Catholic Cardinal George Pell was investigated by the NSW Upper House's Privileges Committee for public comments to the effect that Catholic MPs who vote in favour of human cloning would be acting contrary to their Church's teaching about the sanctity and dignity of human life and would be denied Holy Communion.³³ According to the investigation, he was to be investigated for contempt of parliament.

60. At the time, Lee Rhiannon boasted in her media release:

“The President of the Upper House has agreed to my request that the Privileges Committee investigate the appropriateness of Cardinal Pell's comments.”³⁴

61. The then MLC (now Senator) made it clear that her intention was to intimidate Cardinal Pell into silence in the human cloning debate saying:

³¹<http://www.heraldsun.com.au/news/chocolate-protest-boils-over/story-e6frf7jo-1226086045748>

³²<http://www.aice.com.au/politics.php?newsID=32>

³³ NSW Legislative Council, Report 38, *Comments by Cardinal Pell concerning the Human Cloning and Other Prohibited Practices Amendment Bill 2007*

³⁴http://archive.lee.greens.org.au/index2.php?option=com_content&do_pdf=1&id=1899

“Hopefully this referral will act as a warning to Cardinal Pell that he should refrain from launching a fresh assault on Upper House MPs who are yet to cast a vote on this important bill.”³⁵

62. In response to the inquiry, Cardinal Pell argued³⁶:

“It is my submission that it is essential that religious leaders, including myself, are free to express the position taken by their Church or religion on matters of public interest and debate. To prevent religious leaders from doing so has the effect of stifling religious freedom and hampers effective and open debate on matters of public interest”.

63. Ultimately, the Committee cleared Cardinal Pell of any contempt³⁷ and thanked him for his cooperation³⁸. It did so after considering the nature of contempt citing examples of situations where MPs had been directed to vote in a particular manner by their party or trade union, with the sanction of disendorsement if they failed to vote as directed. In some cases, they were in fact disendorsed.

64. The Committee also made reference to a similar action taken by the speaker of the Western Australian Legislative Assembly who issued a warning letter to the Perth Catholic Archbishop

³⁵ Ibid

³⁶ NSW Legislative Council, Report 38, *Comments by Cardinal Pell concerning the Human Cloning and Other Prohibited Practices Amendment Bill 2007*, at para. 2.14

³⁷ Ibid at para. 3.29

³⁸ Ibid at Foreword

Barry Hickey. The Archbishop had made similar statements to those of Cardinal Pell concerning Catholic members of Parliament who chose to vote in favour of the Human Reproductive Technology Amendment Bill 2007. The letter warned that comments of that nature “may be regarded as a contempt of the House and are punishable accordingly.”³⁹

65. In 2008, the Victorian parliament passed legislation concerning the matter of abortion. Relevant to today’s discussion was section 8 of the *Victorian Abortion Law Reform Act 2008 (Vic)*, which eliminates the right to conscientious objection by mandating doctors to either participate in the abortion process or recommend a doctor who will do so.

66. The then president of the Victorian branch of the Australian Medical Association, Doug Travis, who generally supported the legislation⁴⁰, made the following point in an open letter to then Premier John Brumby⁴¹:

“The Bill infringes the rights of doctors with a conscientious objection by inserting an active compulsion for a doctor to refer to another doctor who they know does not have a conscientious objection. Respect for a conscientious objection is a fundamental principle in our democratic country, and

³⁹Ibid at para. 3.14

⁴⁰http://amavic.com.au/page/Member_Services/Policy_and_Media/Media_Releases/2007/AMA_Victoria_welcomes_parliamentary_review_of_abortion_laws/

⁴¹<http://www.abc.net.au/news/2008-10-02/proposed-abortion-laws-threaten-doctors-rights/528682>

doctors expect that their rights in this regard will be respected, as for any other citizen.”

67. The Australian Medical Association made similar comments when it said in a media release:

“We are still concerned about the conscientious objection clause (section 8), and would like to see it amended. The Victorian Law Reform Commission stated that the AMA Code of Ethics provided a sensible balance between the needs of the practitioner and the patients, and we have asked the Parliament to amend the legislation to reflect the law.”

68. The AMA Code of ethics, of course, provides that when a personal moral judgment or religious belief prevents a doctor from recommending some form of procedure or therapy the doctor may inform the patient and decline to provide the procedure on that basis.⁴²

69. Senator Xenophon recently announced that he would introduce a private members’ bill in the Senate to, in effect, repeal section 127 of the Evidence Act, according to which a person who is a member of the clergy of any church or religious denomination is

⁴²<http://ama.com.au/codeofethics>, clause 1.1p

entitled to refuse to divulge to a Court the contents of a religious confession made to that member of the clergy.⁴³

70. Looking further afield, in 2009, two Democrat senators in the Connecticut State Senate introduced a bill called An Act Modifying Corporate Laws Relating to Certain Religious Congregations and also known as Raised Bill 1098⁴⁴.

71. The bill provided for the incorporation of Catholic parishes throughout the state. Priests and bishops would be prohibited from having any voting rights in such corporations (but would be permitted to be ex-officio non-voting members).⁴⁵ The books and records of the corporations would become accessible by any member of the corporation⁴⁶.

72. The bill was ultimately “tabled” to use US procedural terminology to mean that it was not put to a vote of the State Senate. According to newspaper reports, the tabling was announced in the face of large protests.⁴⁷

⁴³<http://www.theaustralian.com.au/news/world/nick-xenophon-urges-government-to-force-priests-to-report-confessions-of-child-abuse/story-fn3dxix6-1226099268403>

⁴⁴

http://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=SB01098&which_year=2009

⁴⁵Ibid, sub-sections (a) and (b).

⁴⁶ Ibid, sub-section (g).

⁴⁷Dixon, Ken (March 11, 2009). "Catholics celebrate at Capitol Protest". Connecticut Post. http://www.connpost.com/localnews/ci_11889412.

73. Time does not permit me to elaborate on various other examples which raise concerns about potential threats to religious freedom in this country and the Western World more broadly.
74. However, I have taken some time to elaborate on several examples in order to demonstrate that these potential threats are in fact real and substantial.
75. I would make some other points which arise from these examples.
76. Firstly, it is oftentimes the case, at least in Australia, where there is an attempt to curtail the rights of religious groups, particularly Christian ones, the Greens are never too far away.
77. As the Greens have come to hold the balance of power in the Federal Senate, and also to hold five seats in the NSW Upper House, their policies and underlying philosophies have come under greater scrutiny. And from that scrutiny, there has been revealed a strong atheistic and anti-religious tendency.
78. In their book, *The Greens*, Bob Brown and Peter Singer expressly reject what they refer to as the ethic of “traditional Western belief” which has “prevailed throughout virtually the

entire history of Western Civilisation”.⁴⁸ They stridently declare that there is “an alternative tradition.”⁴⁹ That tradition, which puts trees and animals on a par with human dignity is conspicuously atheistic. One of the book’s authors, Peter Singer, has consistently praised the atheistic philosophy of Marxism.⁵⁰

79. It would be fair to say that if the Greens had their way, people with any religious beliefs, particularly Christian ones, would not have any role or say in public life. Lee Rhiannon made this plain in the Pell Privileges Committee episode when she demanded that two Christians on the committee “leave their religious beliefs at home.”⁵¹

80. This attitude would undoubtedly lead to the situation which the NSW Premier warned of when he said:

“The great danger of excluding religious belief from public life altogether is that then the only religious views acknowledged in those circumstances are of those who have none.”⁵²

81. Therefore, protection of religious freedom in Australia would be aided by the diminished political influence of the Greens.

⁴⁸ Brown, Bob, Singer, Peter, *The Greens*, Melbourne: Text Publishing, 1996, p52

⁴⁹ Ibid, p52

⁵⁰ Singer, Peter, *Marx: a very short introduction*, Oxford University Press, 1980

⁵¹ http://archive.lee.greens.org.au/index2.php?option=com_content&do_pdf=1&id=1899

⁵² Address to forum ‘NSW Votes’ hosted by the Australian Christian Lobby, 15 February 2011, <http://www.nswvotes.org.au/questions-videos/>

82. Secondly, it is often times the case that these threats are mitigated by ordinary democratic processes of our society.
83. The disappearance of sectarianism in Australia had a number of causes, none of which related to legislative changes such as discrimination legislation which came later.
84. In the case of the Marrickville Council boycott, it was a combination of democratic forces which caused the council to reverse its position: fierce local anti-boycott campaigns leading to Fiona Byrne's failure to win the seat of Marrickville in the NSW State Election and the letter from the newly elected NSW Premier to the Council precipitated a complete reversal of policy.
85. Arguably, various Jewish groups might have availed themselves of remedies under the Anti-Discrimination Act for race discrimination given that the term 'race' is defined in the Act to include 'ethno-religious origin'. The term 'ethno-religious origin' was inserted in the legislation in 1994. In his second reading speech, the then Attorney-General stated that the amended definition of race would allow 'members of ethno-religious groups such as Jews, Muslims and Sikhs to lodge complaints, not on the basis of their religion, but based on 'their membership of a group which shares a historical identity in terms of their racial national or ethnic origin.' However, no group as far as I am aware, made

any complaints or sought any remedy under that Act. As I just indicated, democratic processes achieved a satisfactory result.

86. Similarly, in the NSW Upper House, common sense prevailed and Cardinal Pell was cleared of contempt of the parliament by the democratic process of the privileges committee.

87. Arguably, and consistent with my earlier thesis, these examples are evidence that the best form of protection for religious freedom is Australia's system of representative and responsible democracy.

88. This brings me to religious vilification legislation. NSW does not have any specific religious vilification legislation.

89. In 2005, independent MLC Peter Breen introduced a private member's bill, the Anti-Discrimination Amendment (Religious Tolerance) Bill 2005, which sought to amend the NSW Anti-discrimination Act 1977 by inserting provisions into the Act:

- a. To make it unlawful for a person to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the religious belief or activity of the person or members of the group;

b. To create an offence, for such vilification if it includes a threat or incitement of others to cause physical harm.

90. It would be a defence under the Bill if the alleged vilification was done “reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussion or debate and expositions of any act or matter” but not expressly if done for religious purposes.

91. As the proposed legislation consisted of an amendment to the NSW Anti-discrimination Act 1977, a finding by the Tribunal of such vilification could lead to orders being made, including the payment of compensation of up to \$100,000.⁵³

92. At the time that the Bill was debated, Victoria, Tasmania and Queensland had already enacted legislative provisions similar to those proposed by the Breen bill. However, Western Australia and South Australia had declined to enact such provisions.⁵⁴

93. Ultimately, the only supporters of the Bill were Mr Breen, Democrats MLC Dr Chesterfield-Evans and Greens MLCs Ian Cohen and Lee Rhiannon. The mainstream political parties and the Christian Democrats opposed the Bill.⁵⁵

⁵³ Section 108

⁵⁴ Hansard, NSW Legislative Assembly, 21 June 2005, at p. 17,085

⁵⁵ Hansard, NSW Legislative Council, 1 March 2006, at p. 20,779

94. That the Bill had only this narrow group of supporters, mainly Greens, is already a clue as to the dangers of this type of legislation. Another clue was the inflammatory and hostile language by the proponent of the Bill, Peter Breen MLC. At one point in the debate, he approved a description of Christianity as “Christian religious imperialism” which “grew out of a minority group of revisionist Jews”.⁵⁶ The speech was littered with veiled attacks on Christians and Christianity. For a bill which aimed to promote religious tolerance, such language seemed telling of what religious tolerance actually meant to the promoters of the legislation.

95. For an external observer, less close to the debate, it would appear, at first blush, that legislation designed to promote religious tolerance would be supported wholeheartedly by religious groups.

96. However, as one opponent of the Bill, The Hon. Rev Gordon Moyes said during the course of the debate:

“The thing that this legislation upholds as the ultimate aim is the very thing that has not been accomplished in jurisdictions where it has become law. Experience shows that such laws have promoted intolerance, rather than tolerance, divisiveness, rather than harmony, and tension, rather than peace.”⁵⁷

⁵⁶ Ibid, at p. 20,776.

⁵⁷ Hansard, NSW Legislative Council, 22 September 2005, at p. 18,161-18,163

97. Patrick Parkinson, Professor of Law at Sydney University and our host similarly warned of the practical dangers of religious vilification legislation in a paper published in 2004:

“At the heart of the debate about these laws is religious freedom: not the freedom to be intolerant, and certainly not the freedom to vilify – neither of these are legitimate expressions of religious freedom. Rather, at issue is the freedom to express views about truth and falsehood, right and wrong, good and evil, which may offend others who have a different view on these matters. Religious vilification laws in practice, if not in theory, pose a grave danger to this freedom because of the collateral damage that can be caused by a legislative strategy to enforce tolerance.”⁵⁸

98. This clash of laudable aim – to promote religious tolerance – and practical experience, was illustrated in the *Catch the Fire Ministries* case.⁵⁹

99. In that case, the Victorian Court of Appeal considered a claim that *Catch the Fire Ministries Inc* had engaged in conduct that contravened s8 of the *Racial and Religious Tolerance Act 2001 (Vic)*.

⁵⁸ Parkinson, Prof. Patrick, *Enforcing Tolerance: Vilification Laws and Religious Freedom in Australia*, 2004

⁵⁹ *Catch the Fire Ministries Inc, Daniel Nalliah and Daniel Scot v Islamic Council of Victoria Inc and Attorney-General for the State of Victoria*(2006) 15 VR 207

100. Section 8 of the Victorian Act creates a civil prohibition on religious vilification similar to that of the defeated NSW Bill which prohibits a person, on the ground of the religious belief, to engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that another person or group.

101. Section 11 of that Act provides a defence to s8 also similar to the defeated NSW Bill, that a person does not contravene s8 if the conduct was reasonable and in good faith in the course of any statement, publication, discussion or debate made or held, or any other conduct engaged in, for any genuine academic, artistic, religious or scientific purpose.

102. The conduct complained of included statements made at a seminar presented by Catch the Fire Ministries in 2002, publication of a newsletter by Catch the Fire Ministries in 2001 and publication of an article on the Catch the Fire Ministries website in 2001.

103. Some of the impugned statements included that the Qur'an promotes violence and killing, that the Qur'an teaches that women are of little value, that Allah is not merciful, that Muslims practicing Jihad are following the Qur'an and a number of other statements. The seminar also included statements about "accepting, tolerating, reaching out to and loving Muslim people" and distinguishing between their criticisms of Islamic belief and practice and Muslims themselves.

104. Initially the Victorian Civil and Administrative Tribunal (VCAT) held that Catch the Fire Ministries had contravened s8 and could not claim the defence at s11(1)(b). Catch the Fire Ministries subsequently successfully appealed the VCAT decision.

105. The Victorian Court of Appeal recognised the distinction between the pastors' criticisms of Islamic belief and their attitudes to Muslim people, which, according to the pastors, should be loving and tolerant. Appeal Justice Nettle expressed it this way⁶⁰:

“the Tribunal did not give a great deal of consideration to the distinction between hatred of the religious beliefs of Muslims and hatred of Muslims because of their religious beliefs. The Tribunal appears to me to have assumed that the two conceptions are identical or at least that hatred or other relevant emotion of or towards the religious beliefs of Muslims must invariably result in hatred or other relevant emotion of or towards Muslims. In my view, that is not so.”

106. Although ultimately successful on appeal, the case cannot in my opinion be considered a victory for freedom of religion or freedom of speech. This is well expressed by Patrick Parkinson:

⁶⁰ Ibid at p. 218

“The main danger of religious vilification laws is that they will have a chilling effect on legitimate religious activity even where the outcome of a complaint is to declare the religious expression to have been lawful. The punishment imposed by religious vilification laws does not lie in the penalties imposed by courts or tribunals for breaches of the law, but in the necessity to defend oneself from plausible claims that the law has been breached”⁶¹.

107. I make other observations about this case and vilification laws generally.

108. Firstly, it appears on the evidence taken by the Tribunal that one of the key witnesses was both an officer of the complainant, the Islamic Council of Victoria and an employee of the Equal Opportunity Commission.⁶² It appears that other witnesses for the complainant attended the seminar in questions at the instigation of that person. It concerns me that an employee of an Equal Opportunities Commission might have, encouraged by religious vilification laws, seen it appropriate to act as a sort of religious tolerance police.

109. Secondly, the defences to the Racial and Religious Tolerance Act 2001 (Vic) are more expansive than the equivalent Bill defeated here in NSW. As I mentioned earlier, there is a defence

⁶¹ Parkinson, Prof. Patrick, *Enforcing Tolerance: Vilification Laws and Religious Freedom in Australia*, 2004 at p. 10.

⁶² *Islamic Council of Victoria v Catch the Fire Ministries Inc (Final)* [2004] VCAT 2510 (22 December 2004) at para. 67

in the Victorian Act if the conduct was reasonably and in good faith “for any genuine academic, artistic, *religious* or scientific purpose”. The word “religious” was omitted from the drafting of the defence to the NSW Bill such that one would have had a defence available if the comments were made in the context of academic, artistic or scientific discussion but not religious discussion. Accordingly, had the Catch the Fire Ministries Case taken place under the proposed NSW legislation, the result might arguably have been different.

110. Thirdly, and without traversing all of the detail of what was said, much of the debate in connection with the NSW Bill placed emphasis on our strong democratic traditions and the values which underpinned them as the best protection of religious freedoms. This is consistent with my thesis throughout this discussion, that religious freedom is best protected by our Australian form of responsible and representative government.

111. Fourthly, and following from that third point, religious vilification legislation does not respect the role of freedom of religion (and other fundamental freedoms) in our legal jurisprudence. Rather, such legislation constitutes an interference by government in the free exercise of religion.

112. As NSW Attorney General, I have no intention to introduce any religious tolerance legislation here in NSW. I would be delighted to see the Victorian, Tasmanian and Queensland governments

consider bringing their states into line with the NSW, South Australian and West Australian position.

113. I now turn to the treatment of religion in under the Anti-Discrimination Act 1977 (NSW) (ADA) and in anti-discrimination statutes in other Australian jurisdictions.

114. The ADA prohibits discrimination on those grounds set out in the legislation: race, sex, transgender, marital or domestic status, disability, responsibilities as a carer, homosexuality and age. Significantly, these do not include religious belief, although the race ground is defined to include 'ethno-religious origin'.

115. Unlike all other Australian jurisdictions⁶³, there is no ground for discrimination on religious grounds. Rather, the religious exemptions in NSW exempt religious bodies from other grounds of unlawful discrimination under the ADA.

116. Section 56 creates a general exemption from the ADA for religious bodies. Religious bodies are not required to comply with the ADA in relation to:

- a. the training, education, ordination or appointment of religious leaders [s56(a)&(b)];

⁶³s6. Equal Opportunity Act 2010 (Vic); s53 Equal Opportunity Act 1984 (WA); ss 4, 7(i), 7(j), Ch 2 Pt 3, Dictionary Anti-Discrimination Act 1991 (Qld); ss 19(1)(m), 19(1)(n) Anti-Discrimination Act (NT); ss 3, 16(m), 16(n), 16(o), 16(p) Anti-Discrimination Act 1998 (Tas); s85T(1)(f)&(7) Equal Opportunity Act (SA); s 7(1)(i), Pt 3 Discrimination Act 1991 (ACT).

- b. the appointment of any other person [s56(c)];
- c. any other act or practice that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion [s56(d)].

117. Section 56 was included in the ADA when first enacted. While other jurisdictions have adopted a general exception from their anti-discrimination statutes for religious bodies, the exceptions are narrower than that under the ADA in the following ways:

- a. While section 56(c) of the ADA exempts appointment of persons 'in any capacity' by a religious body, other jurisdictions' exempt only appointment of persons to perform functions related to religious practices;
- b. Some other jurisdictions have provisions equivalent to s56(d) of the ADA, but others are narrower. Those that are narrower limit the exemption to acts done as part of a religious practice [NT], or don't extend the exemption to discrimination in work or education [Qld], or limit the grounds of discrimination that are exempt [Vic].

118. The exemptions from the ADA for religious bodies were considered by the recent NSW Court of Appeal case of *OV & OW v Members of the Board of the Wesley Mission Council*. That case concerned a same sex couple who contacted Wesley Dalmar Child and Family Care to enquire about becoming foster carers. They were told that an application from a same sex couple would not be accepted.

119. The couple argued that the refusal to consider their application was unlawful discrimination under the ADA. Wesley Mission argued that they were exempted from the prohibition on discrimination because of the religious bodies exemption to the ADA. The question for the Court was whether Wesley Mission's refusal to consider the couple's application conformed to the relevant doctrines of the religion that the Wesley Mission was established to propagate.

120. The case was appealed all the way to the Court of Appeal. In considering the religious bodies exemption, the Court of Appeal adopted a broad definition of religion. It stated that an act or practice will be exempt where required by a religious doctrine, even where the doctrine is held by only by some elements within a particular denomination. Further, the exemption applies to the contemporary doctrines of the religious body. The doctrines are not required to be those that applied at the time of a religious bodies' establishment.

121. I make the following observations about this case and discrimination laws generally.

122. To a great extent, Australian laws which prohibit discrimination represent shared values and beliefs in the Australian community. The principle of giving people a "fair go" irrespective of race,

religion, political belief, gender or sexual orientation is a widely held moral value.⁶⁴

123. That being said, these laws ought take into account the fundamental freedoms which go to the heart of our democratic system of responsible and representative government: of speech, association, assembly, religion, and movement.

124. Further, and although the Constitutional guarantee of freedom of religion in section 116 of the Constitution operates only to restrict Commonwealth legislation from breaching that right, the legal context and jurisprudence of Australia and each of its states is such that freedom of religion is fundamental to our system of democracy and laws.

125. As such, although drafted as 'exemptions' to the Anti-Discrimination Act, I consider that such provisions are in fact a legislative recognition of the fundamentality of freedom of religion. The legislature recognises that it is not permitted to encroach upon the freedom of religion.

126. In other words, to refer to the rights of religious groups vis-à-vis discrimination legislation as an exemption is accurate as far as the drafting of the legislation is concerned. However, as a matter of substantive legal principle, rather than the creation of special

⁶⁴ Parkinson, Prof. Patrick, *Enforcing Tolerance: Vilification Laws and Religious Freedom in Australia*, 2004 at p. 2.

rights or interests, the 'carve out' protects pre-existing rights which go to the heart of our democracy as I have argued extensively today.

127. The same principle applies to private educational institutions. Such institutions, motivated by a particular belief or philosophy, oftentimes religious belief, should not be excluded from the rights enjoyed by religious institutions, merely because they do not carry the label of religious or because they do not have a belief in the supernatural.

128. On this basis I believe that NSW's anti-discrimination laws strike the best balance in terms of protecting against discrimination on the one hand, and protecting the rights of freedom of religion and association on the other.

129. Nevertheless, there may be grounds for some reform. However, as I have indicated above, I am not in favour of religious vilification laws.