

## Religious Vilification Legislation: Balancing Competing Rights in the Light of the Universal Declaration

### Introduction: The Emergence of Human Rights Thinking

On 10 December 1948, in the midst of a burgeoning Cold War, the newly created United Nations laid the foundation of modern human rights law when it adopted the Universal Declaration of Human Rights. The adoption of the Declaration was only achieved through the remarkable contributions of a number of diplomats and statespersons of whom Eleanor Roosevelt is the best known but not the only one.<sup>1</sup>

The Declaration is remarkably concise and extremely beautifully written and provides one of the best and most readily available arguments for taking the protection of human rights seriously. The Declaration does not purport to be the last word on human rights protection. Those who were involved in its drafting came from a wide variety of cultural backgrounds and the world's great religious and philosophical traditions were represented.<sup>2</sup> The Articles of the Declaration contain a series of deeply considered and carefully drafted compromises. The Declaration does claim to represent a common standard against which government actions, legislative proposals and administrative practices can be measured.

The Preamble to the Declaration explains why the Declaration was adopted. It is both rooted in its historical context and set against the broader history of humankind. It is a strongly argued and persuasively expressed piece of reasoning. It puts forward the Declaration claim to be a common standard as follows:

“Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

...

Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

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<sup>1</sup> The history of the negotiation of the Declaration is contained in the monograph: Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*, Random House, 2000. A review of this book by the present author may be found at [http://www.hearsay.org.au/index.php?option=com\\_content&task=view&id=1324&Itemid=203](http://www.hearsay.org.au/index.php?option=com_content&task=view&id=1324&Itemid=203).

<sup>2</sup> The drafters included Charles Malik, a Greek Orthodox Christian Arab from Lebanon; Rene Cassin, a Jewish lawyer from France; and Dr. Peng-chun Chung, a Chinese philosopher whose ideas drew strongly on Confucianism.

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realisation of this pledge,

NOW, therefore this General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal recognition and observance ...”

It is trite to observe both that the Universal Declaration stresses the universality of its application: its benefits extend to everybody, and that equality is one of its primary hallmarks: everyone is equally entitled to respect and freedoms it provides. Article 2 both sets this out in terms but also uses language that is reflected and used throughout the Declaration:

“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

...”

It is equally trite that any set of freedoms that applies equally to everybody are inherently limited. Unlimited freedom of one person leads to oppression of another if the first person takes it into their head to mistreat his or her colleague.

A second inherent set of limitations derives from the cross-over between important areas of human action and aspiration. One person’s freedom to listen to rock and roll music may conflict with another person’s reasonable aspirations to get to sleep at some time on a Saturday night.

From its earliest beginnings, the Declaration and the system of international human rights doctrine of which it marks a beginning has addressed the restrictions on rights and freedoms that make an enjoyment of rights and freedoms possible. This charting of the boundaries and the justification by which limits may be imposed may be found throughout the Declaration. It is expressed clearly, however, in the concluding three Articles. Article 28 is a product of the Declaration’s origins within the new international order that had emerged after World War II and had given birth to the United Nations. Article 28 reads as follows:

“Everyone is entitled to a social and international order in which the rights and freedoms set forth in this declaration may be fully realised.”

Article 29 discusses the enjoyment of the rights and freedoms protected by the Declaration in the context of the individual’s community “in which alone the full and free development of his personality is possible”. In paragraph 2, Article 29 goes on to set out the basis for restricting the exercise of rights and freedoms as follows:

“2 In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and

respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic order.”

The final touchstone for limiting the exercise of the rights and freedoms is the protection of those rights and freedoms. Article 30 states:

“Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.”

### Religion and the Declaration

The contribution of the Declaration to promoting freedom of religion is not restricted to a single article. Article 2, as noted, is an anti-discrimination clause. It provides that “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race ... religion ... or other status”.

Article 7 provides for equality before the law and equal protection of the law. It provides that “All are entitled to equal protection against any discrimination in violation of this Declaration and **any incitement to such discrimination**”. (My emphasis)

Article 18 is directed expressly towards promoting freedom of religious belief. It provides:

“Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”

Article 19 is relevant both to freedom of religious belief but also to the freedom to express views that may be critical of others’ religious beliefs. It protects freedom of opinion and to impart information and ideas “through any media and regardless of frontiers”.

Article 20 which protects freedom of assembly and association also is potentially relevant to the holding and expressing of religious belief.

### The Declaration Finds a Binding Form: Vilification

An Australian, Dr HV Evatt chaired the General Assembly the night that the Declaration was adopted. Australia was part of the overwhelming majority of nations that voted in favour of adoption.<sup>3</sup> Nonetheless, despite its tremendously persuasive qualities, the Declaration was not binding on nation states and it was always intended that it would be followed by a treaty which would have binding effect on those states who ratified it.

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<sup>3</sup> Forty-eight nations voted in favour and none opposed. The eight abstentions included the Soviet Union and Saudi Arabia.

For present purposes, that binding document became the International Covenant on Civil and Political Rights which entered into force on 23 March 1976.<sup>4</sup>

The Covenant canvasses similar obligations to those in the Declaration but tends to use language more akin to obligations of nations rather than the rights of individuals protected thereby. Article 18 protects the freedom of thought, conscience and religion and provides as follows:

“1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.”

The obligation on parties to the Covenant to prevent religious vilification derives from Article 20 which also deals with the broader problem of propaganda for war. The Article provides:

“1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”

The vilification addressed by the article may be broken up into elements. The article requires nation states to take steps to prohibit a certain kind of conduct. The conduct to be prohibited is incitement of other people to engage in discriminatory conduct or violent behaviour or hostility. However, the type of incitement that is the subject of concern is that which seeks to create hatred on racial or national (origin) or religious grounds.

The importance of preventing the vilification of ethnic or culturally identified groups was well-known to the drafters of the Declaration. They had seen people of Jewish origins and Romany people targeted by Nazi opinion makers throughout the 1930s which paved the way for the State directed genocide that followed.<sup>5</sup> In more recent generations, ethnic and religious oriented group hatred has paved the way for genocide in a number of regions of which Former Yugoslavia and Rwanda are the more famous.

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<sup>4</sup> The Declaration also found binding force through another covenant, the International Covenant on Economic, Social and Political Rights which, as its name suggests, promotes the protection of a different selection of those rights mentioned in the Declaration.

<sup>5</sup> Note the references in the Preamble to the Declaration to “barbarous acts which have shocked the conscience of mankind”.

In the light of the international human rights instruments developed since the end of World War II and to which Australia has become a party, religious and racial hatred is clearly a proper target for human rights oriented legislative action.

### Religious Vilification Legislation in Australia

Religious vilification legislation has not proved as popular with legislators as similarly structured legislation focussed on race. Queensland,<sup>6</sup> Victoria<sup>7</sup> and Tasmania<sup>8</sup> have enacted religious vilification legislation among the Australian jurisdictions.<sup>9</sup> The Commonwealth has not legislated against religious vilification as such although a sedition type offence makes it illegal to urge groups distinguished inter alia by religion to use force or violence against such groups so as to threaten the peace, order and good government of Australia.<sup>10</sup>

Slightly different language and slightly different drafting approaches have been availed of among the three State jurisdictions. The Tasmanian legislation makes express reference to inciting hatred although other forms of conduct are also prohibited. Section 19 provides that a person must not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or a group of persons, relevantly, the religious belief or affiliation or religious activity of the person or any member of the group.

The prohibition is similar to that of the other states in requiring the offending act to have a public element. The Tasmanian provision is directed to the negative or hostile feelings generated in others against those persons whose religious status is the target of the hostile public act. This focus is fairly close to that evinced by article 20 of the Covenant. It may also be noted that the hostile feelings whose generation forms an element of the prohibited conduct are expressed at a fairly strong level with words and phrases such as “hatred”, “severe ridicule” and “serious contempt” being used.

The section does not set out any form of freedom of speech defence for the prohibited conduct.

Similar language is used in s.124A of the Queensland legislation although the offending ground is simply referred to as “the religion of the person or members of the group”. However, the Queensland legislation also provides that the section does not make unlawful the conduct described if any one of three circumstances is present. The first two are for third party reporting of an initial act that breaches the prohibition created by the section. One is a fair report of the act and the second is a report which, in the case of defamation, would have absolute privilege. This would include a report made in Parliament or a statement made in the course of legal proceedings.

The third available defence involves an original public act which is done reasonably and in good faith and which is done for purposes of an academic, artistic, scientific nature or otherwise in the public interest. The approach of s.124A protects the values of free speech both by requiring a high threshold of anti-religious conduct for the section to be breached and by providing a general good faith defence.

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<sup>6</sup> Sections 124A and 131A Anti-Discrimination Act 1991 (Queensland)

<sup>7</sup> Section 8 Racial and Religious Tolerance Act 2001 (Victoria)

<sup>8</sup> Section 19, *Anti-Discrimination Act 1998* (Tasmania)

<sup>9</sup> Evans, C, *Legal Aspects of the Protection of Freedom in Australia*, published on the website of the Australian Human rights Commission at [http://www.hreoc.gov.au/frb/papers/Legal\\_%20Aspects.pdf](http://www.hreoc.gov.au/frb/papers/Legal_%20Aspects.pdf). (accessed: 24 April 2012), page 49

<sup>10</sup> *Criminal Code* (Commonwealth), s. 80.2(5) although cited in Evans, op. cit.

Section 131A of the Queensland legislation creates a criminal offence carrying a maximum of six months imprisonment. The section uses a similar method to that of s.124A but adds the element of “knowingly or recklessly” to the requirements of a public act of inciting hatred, etcetera, on the ground of religion. A further element that adds to the level of seriousness is that the public act include either the threat of physical harm to the person or group or their property or the incitement of others to threaten such physical harm.

No “defences” are prescribed which would take the conduct outside the reach of the section although a safeguard against too easy resort to prosecution is contained in the requirement for the consent of the Attorney-General or the Director of Public Prosecutions for the commencement of any prosecution.

Perhaps because of the litigation which has ensued, there has been a greater degree of controversy concerning the Victorian legislation than seems to have occurred in the other two jurisdictions. There has also been controversy concerning the vilification provisions in the *Race Discrimination Act 1975* (Commonwealth)<sup>11</sup> although the Commonwealth statute is limited to conduct engaged in on grounds of race or associated categories not including a person’s religion as such.<sup>12</sup> This may also be the result of high profile litigation involving the Commonwealth provisions.<sup>13</sup>

### The Victorian Provisions

Section 8 *Racial and Religious Toleration Act 2001* (Victoria) provides as follows:

#### 8. Religious vilification unlawful

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

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

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

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

(b) may occur in or outside Victoria.

Section 9 provides that, in determining whether a person engaged in unlawful religious vilification, the person’s motivation is irrelevant.

Section 11 of the Act provides a number of grounds by which conduct, otherwise in breach of s.8, is rendered outside the reach of the prohibition created by that section. Section 11 provides, relevantly, as follows:

“11. Exceptions-public conduct

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<sup>11</sup> Sections 18C and 18D *Racial Discrimination Act 1975* (Commonwealth)

<sup>12</sup> There is potential for cross-over between ethnic and religious categorisation. For example, Sikh and Jewish people may be understood as identifying as a group on both religious and ethnic lines and a combination of both. Thus, the RDA can provide protection against vilification on religious grounds on some occasions.

<sup>13</sup> See *Eastock v Bolt* [2011] FCA 1103

- (1) A person does not contravene section 7 or 8 if the person establishes that the person's conduct was engaged in reasonably and in good faith-
  - (a) in the performance, exhibition or distribution of an artistic work; or
  - (b) in the course of any statement, publication, discussion or debate made or held, or any other conduct engaged in, for-
    - (i) any genuine academic, artistic, religious or scientific purpose; or
    - (ii) any purpose that is in the public interest; or
  - (c) in making or publishing a fair and accurate report of any event or matter of public interest.
- (2) For the purpose of subsection (1)(b)(i), a religious purpose includes, but is not limited to, conveying or teaching a religion or proselytising.”

It may be noted that s.7 uses the high threshold concepts of “hatred”, “serious contempt”, “revulsion” and “severe ridicule” as triggers for the unlawfulness of the conduct legislated against. In *Catch the Fire Ministries Inc v Islamic Council of Victoria* [2006] VSCA 284, a decision of the Court of Appeal in Victoria, the court held that the reference to “on the ground of religious belief or activity ...” referred to the basis for the feelings of “hatred” etcetera to arise and not to the basis of the actions of the person said to be engaging in the act in contravention of the section.<sup>14</sup>

The Court also held that s. 8 refers to conduct capable of inciting hatred or other relevant emotion and its operation is not dependent on such emotion having been proved to have arisen.<sup>15</sup> In terms of the relevant subject of such incitement, the Court concluded that the relevant effect was that on an ordinary member of the audience to whom the act was directed.<sup>16</sup> Thus, if an act of spiteful religious demagoguery was directed at an audience of excitable young people, s. 7 might be more likely to be breached than if even similar words directed to a group of attendees at an academic seminar. In this regard, the historical and social context may be relevant to the capability of an act to produce the relevant emotions in an ordinary member of the target audience.

It is significant that s.11 protects a wide variety of purposes for which conduct, otherwise in breach of s.8, is exempted from the strictures of that section. These include both religious and non-religious purposes including unspecified purposes that are “in the public interest”. In terms of religious purposes, s. 11 specifies that advancing one’s own religion is a legitimate religious purpose. This is appropriate in that legislation seeking to protect the rights of people to follow their religion without discrimination should not unreasonably restrict the rights of others to advance their religion.

The overarching requirement of s.11 is that conduct which is exempted from the strictures of s.8 be engaged in “reasonably and in good faith” for the permissible purpose.

This overarching requirement contains two elements indicated by the separate concepts of reasonableness and good faith. Good faith only requires subjective genuineness in the pursuit of the religious, scientific or other purpose which authorises the exemption. If a person engages in the conduct honestly believing that the actions carried out are necessary or desirable for the genuinely pursued purpose, the requirement of good faith is satisfied. The test is one of subjective honesty in the pursuit of the purpose.<sup>17</sup>

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<sup>14</sup> For example, see paragraph [24] in the reasons of Nettle JA and paragraphs [141] – [144] in the reasons of Neave JA.

<sup>15</sup> Paragraph [154]

<sup>16</sup> Paragraph [158]

<sup>17</sup> Paragraphs [91] – [92]

Reasonableness on the other hand imposes an objective limit on the conduct that can be engaged in but it is a limit of the kind to be expected in “a fair and just multicultural society”.<sup>18</sup> This involves the allowance of room for advocates of a particular set of views to expound ignorant, misguided or bigoted views but it involves a limit on such conduct if it goes beyond even what is considered reasonable in a tolerant society.<sup>19</sup> Justice Nettle expressed the limits of reasonableness as follows:

“Of necessity, the standards of an open and just multicultural society allow for differences in views about religions. They acknowledge that there will be differences in views about other people’s religions. To a very considerable extent, therefore, they tolerate criticism by the adherents of one religion of the tenets of another religion; even though, to some and perhaps to most in society, such criticisms may appear ill-informed or misconceived or ignorant and otherwise hurtful to adherents of the latter faith. It is only when what is said is so ill-informed or misconceived or ignorant and so hurtful as to go beyond the bounds of what tolerance should accommodate that it may be regarded as unreasonable.”<sup>20</sup>

### Discussion

Articles 19 and 20 are two of the most important provisions of the Universal Declaration of Human Rights. Freedom of belief, freedom of religion and freedom of speech are fundamental freedoms. However, as the Declaration, itself, acknowledged in articles 29 and 30, each of us find our realisation and obtain the benefits of our rights in communities where the rights of all need to be respected and competing rights must find their appropriate limitations.

Religious and racial vilification and the religious and racial hatred have been causes of some of those “barbarous acts which have outraged the conscience of mankind” both before and after the adoption of the Declaration. The prevention of such vilification is essential to ensuring the right of all to exercise their fundamental rights and freedoms in the “the absence of distinction of any kind” of which article 2 of the Declaration speaks so articulately. On the other hand, freedom of belief requires an ability to express those beliefs forcibly and with conviction.

Legislation preventing religious vilification will, therefore, involve difficult balancing acts. The Victorian legislation, tested in the furnace of the *Catch the Fire Ministries* dispute and seen through the prism of the Court of Appeal judgment, goes a long way to find an appropriate form of that balance.

**Stephen Keim**  
**Chambers**  
**24 April 2012**

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<sup>18</sup> Paragraph [96]

<sup>19</sup> Ibid

<sup>20</sup> Paragraph [98]