CASE NOTE

PELL v COUNCIL OF TRUSTEES OF THE NATIONAL GALLERY OF VICTORIA*

SHOULD BLASPHEMY BE A CRIME? THE 'PISS CHRIST' CASE AND FREEDOM OF EXPRESSION

I INTRODUCTION

The case of *Pell v Council of Trustees of the National Gallery of Victoria*,[1] in which Dr George Pell, Catholic Archbishop of Melbourne, applied for an injunction restraining the National Gallery from displaying the work 'Piss Christ' by Andres Serrano, aroused significant public controversy. This note reviews the finding in the case and then considers whether blasphemy should remain a criminal offence in light of the protection afforded freedom of expression by the common law.[2]

II THE FACTS

At issue in this case was the respondent's display of a photograph by Serrano depicting a crucified Christ immersed in liquid. This in itself would probably not have attracted particular attention, were it not for the fact that the title — 'Piss Christ' — indicated that the liquid was the artist's urine. The applicant, acting as representative of the Catholic community, sought an injunction on two grounds: (i) that the photograph amounted to the common law offence of the publication of blasphemous libel, and (ii) that the exhibition contravened the *Summary Offences Act 1966* (Vic) s 17(1)(b) which states that where a person 'writes or draws exhibits or displays an indecent or obscene word figure or representation' in a public place they shall be guilty of an offence.

* (Unreported, Supreme Court of Victoria, Harper J, 9 October 1997) ('*Pell*').

1 Ibid.

2 Blasphemy laws may also be incompatible with the implied freedom of political communication protected by the *Australian Constitution*, given that the boundary between 'art' and 'politics' can often be difficult to determine. However, considerations of space put discussion of the implied constitutional freedom outside the scope of this note, the focus of which is the position at common law.

III THE COURT'S DECISION

A *Blasphemy*

No Australian court has authoritatively defined blasphemous libel.[3] The most recent definition of the offence in English law in *R v Lemon*[4] and *R v Chief Metropolitan Stipendiary Magistrate; Ex parte Choudhury*[5] is that the offence consists in publication of scurrilous material likely to outrage Christian believers.[6] The *Choudhury* case, in which an unsuccessful attempt was made by Muslims to prosecute the publishers of Salman Rushdie's *The Satanic Verses*,[7] is important because it affirmed that the offence exists only in relation to the Christian religion. It has long been established that mere criticism of Christian belief is not blasphemous — the publication must contain an element of scurrility, insult, mockery, vilification or the like.[8] The English definition was adopted in three obiter statements by Australian courts. First, in *Ogle v Strickland*[9] Lockhart J stated that:

> The essence of the crime of blasphemy is to publish words concerning the Christian religion which are so scurrilous and offensive as to pass the limits of decent controversy and to be calculated to outrage the feelings of any sympathiser with or believer in Christianity.[10]

Second, in *North Coast Environmental Council Inc v Minister for Resources,*[11] Sackville J defined blasphemy as the 'publication of offensive words about the Christian religion calculated to outrage the feelings of a believer in Christianity'.[12] Third, in *Right to Life Association (NSW) Inc v Secretary, Department of Human Services and Health,*[13] Gummow J cited *Choudhury* as authority for the common law definition. Whether the common law definition also requires that the publication of the scurrilous material must be likely to produce a breach of the peace is disputed. In *R v Lemon* two of the five members of the court held that this was not an element,[14] but this is inconsistent with *Bowman v Secular*

3 Butterworths, *Halsbury's Laws of Australia*, vol 23 (at 16 June 1996) 365 Religion, 'Definition' [365–690].

4 [1979] AC 617.

5 [1991] 1 QB 429 ('*Choudhury*').

6 In both *R v Lemon* [1979] AC 617, 665 and *Choudhury* [1991] 1 QB 429, 446 the courts cited with approval the somewhat fuller definition of blasphemous libel in *Stephen's Digest of the Criminal Law* (9th ed, 1950) 163 as publication of 'contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ, or the Bible or the formularies of the Church of England'. It is clear that the essence of the offence is the publication of material vilifying Christian belief.

7 Salman Rushdie, *The Satanic Verses* (1988).

8 *Bowman v Secular Society Ltd* [1917] AC 406, 460.

9 (1987) 13 FCR 306.

10 Ibid 317.

11 (1994) 55 FCR 492.

12 Ibid 509.

13 (1995) 128 ALR 238, 271.

14 [1979] AC 617, 656 (Lord Edmund-Davies), 662 (Lord Scarman)

Society Ltd[15] and *R v Gott*[16] where breach of the peace was held to be a requirement. This was the basis upon which the court in *Pell* proceeded, citing in support the New South Wales Law Reform Commission's report on blasphemy,[17] which mentioned this as an element.

It was not denied by the respondent in *Pell* that the work was offensive to Christians, rather it was argued that blasphemous libel was not part of the law of Victoria or, in the alternative, that if it was part of the law, an injunction to restrain its commission was not available as a remedy to the applicant. In so far as the first argument — the existence or not of the offence in Victorian law — was concerned, the court made no conclusive finding. The offence does not exist by virtue of statute and the common law offence may have lapsed due to desuetude (and here it may be noted that the last successful prosecution for blasphemy in Australia was in 1871).[18] Against this, however, Harper J noted that s 469AA of the *Crimes Act 1958* (Vic) contemplates the existence of the common law offence in that it provides that where a conviction is entered for blasphemy, the court may order the seizure and destruction of the blasphemous material.[19] Furthermore, the existence of the offence at common law was asserted by Lockhart J sitting as a member of the Full Court of the Federal Court in *Ogle v Strickland*.[20] I will return to the question of the existence of the offence later. Here it is sufficient to note that the court in *Pell* left open the option to a finding either of survival or of extinction. That having been said, the court in *Pell* did nevertheless address the issue of whether the exhibition of 'Piss Christ' satisfied that element of the common law crime requiring a tendency to cause a breach of the peace. The court found that there was no evidence that such a consequence was likely to flow from the exhibition. That being so, Harper J found that (even if the crime did still exist) the applicant had not shown that all elements had been satisfied.[21] The breach of the peace issue is an important one, and it too will be addressed later in this note.

B *Obscenity*

In so far as the applicant's claim that 'Piss Christ' fell within the scope of s 17(1)(b) of the *Summary Offences Act 1966* (Vic) was concerned, Harper J firstly noted that dictionary definitions of the words 'indecent' and 'obscene' imported a connection with lewdness rather than with blasphemy.[22] Secondly, having earlier stated that s 17(1)(b) mandates an inquiry as to whether there has

[15] [1917] AC 406, 446, 467.
[16] (1922) Cr App Rep 87, 89–90.
[17] New South Wales Law Reform Commission, *Blasphemy*, Report No 74 (1994) [2.22].
[18] *R v Jones* (Unreported, New South Wales Supreme Court Quarter Sessions, Simpson J, 18 February 1871) in Butterworths, *Halsbury's Laws of Australia*, vol 23 (at 16 June 1996) 365 Religion, 'Status' [365–695].
[19] *Pell* (Unreported, Supreme Court of Victoria, Harper J, 9 October 1997) 4.
[20] (1987) 13 FCR 306, 317, 319.
[21] *Pell* (Unreported, Supreme Court of Victoria, Harper J, 9 October 1997) 6.
[22] Ibid 5.

been 'a failure to meet recognised standards of propriety',[23] Harper J noted the difficulty of deciding that issue given that a 'court must have regard to contemporary standards in a multicultural, partly secular and largely tolerant, if not permissive, society'.[24] Finally, on this issue, Harper J noted the particular difficulty in applying the test where the indecent or obscene quality of the work resided not in the image itself, but in the image coupled with the title of the work and the public's knowledge of its method of creation.[25] As a result of these difficulties, the court was unable to decide conclusively whether exhibiting 'Piss Christ' amounted to an offence under s 17(1)(b) — that is, it found itself in the same uncertain position as it had done in relation to the blasphemy issue. In view of the possibility that it might therefore have granted injunctive relief against conduct which was lawful, the court declined the application.[26]

C *The Procedural Issue — Equitable Relief and Criminal Offences*

As an additional reason for his decision, Harper J held that the fact that the exhibit might be subject to criminal proceedings was in itself a reason to deny equitable relief, citing with approval the decision of Kirby P in *Peek v New South Wales Egg Corporation*,[27] where it was held that where criminal sanctions have not been exhausted the courts ought not to grant such relief.[28] In other words, it is clear that the court in *Pell* came to the conclusion it did on purely procedural grounds, rejecting the application because of uncertainty over the very question of whether the exhibition was unlawful either as common law blasphemy or as statutory indecency, and because of the principle in *Peek*.[29] The remainder of this note addresses these issues of blasphemy and indecency not conclusively decided by the court. I will argue that it was open to the court to find that blasphemy is no longer part of the law, that the work in question did not fall within the ambit of s 17(1)(b) and that considerations of freedom of expression should have led the court to so decide.

IV THE ARGUMENT FOR ABOLITION

The essence of this critique of the decision in *Pell* is that had the injunction been granted, the expressive rights of the respondent (and of course of the artist whose work it was exhibiting) would have been curtailed. Considerations of freedom of expression, coupled with the increasing secularity of Australian society, support the argument that blasphemy laws should be repealed because they privilege Christian ideas above others and constitute an unwarranted

[23] Ibid.
[24] Ibid 6.
[25] Ibid.
[26] Ibid 7.
[27] (1986) 6 NSWLR 1 ('*Peek*').
[28] *Pell* (Unreported, Supreme Court of Victoria, Harper J, 9 October 1997) 6–7.
[29] (1986) 6 NSWLR 1.

restriction in freedom of expression.[30] Thus in *Right to Life Association (NSW) Inc v Secretary, Department of Human Services and Health,*[31] Gummow J questioned whether the existence of the offence was defensible, given that s 116 of the *Australian Constitution* has been held to protect the principle of absence of religion as well as tolerance of religion, and that freedom of expression is recognised under the common law. I will firstly address the issue of religious preference and then examine the arguments that blasphemy laws are justified.

A *Preference for Christianity — An Argument for Extension of the Offence?*

The fact that only the Christian religion is protected by the offence of blasphemy would seem to provide a strong argument against the continued existence of the offence. As Mortensen states, by protecting Christian doctrines and religious figures, the law abandons the scepticism on religious questions that is one of the hallmarks of the modern liberal state and effectively adopts the Christian view of religious truth as its own.[32] Although s 116 of the *Australian Constitution* does not bind State legislatures and is thus not of direct relevance to cases such as *Pell*, the principle of respect for non-belief which some argue the section implies is important.[33] Given that religious tolerance was stated to be a principle respected by contemporary Australian society in *Council of the Municipality of Canterbury v Moslem Alawy Society Ltd,*[34] it can be argued that this principle should be taken into account in interpreting the common law, and that on this ground the offence should be declared obsolete. However, the argument that blasphemy laws are objectionable because of the preference they give to Christianity is potentially more harmful than beneficial to the case for abolition. The response may be that inconsistency can be removed from the law by *extending* the protection offered by the law of blasphemy to belief systems other than Christianity. The clearest judicial argument in favour of extension was put by Lord Scarman in *R v Lemon* where he argued that:

> [T]here is a case for legislation extending [blasphemous libel] to protect the religious beliefs and feelings of non-Christians. The offence belongs to a group of criminal offences designed to safeguard the internal tranquillity of the kingdom. In an increasingly plural society such as that of modern Britain it is necessary not only to respect the differing religious beliefs, feelings and practices of all but also to protect them from scurrility, vilification, ridicule and contempt. ... My criticism of the common law offence of blasphemy is not that it exists but that it is not sufficiently comprehensive.[35]

[30] See, eg, Reid Mortensen, 'Blasphemy in a Secular State: A Pardonable Sin?' (1994) 17 *University of New South Wales Law Journal* 409.

[31] (1995) 128 ALR 238, 271–2.

[32] Mortensen, above n 30, 426–7.

[33] *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 123, 126 (Latham CJ). For a discussion of the principle of 'non-religion', see Stephen McLeish, 'Making Sense of Religion and the Constitution A Fresh Start for Section 116' (1992) 18 *Monash University Law Review* 207, 224–7.

[34] (1987) 162 CLR 145, 149

[35] [1979] AC 617, 658.

But if respect for the sensibilities of non-Christians requires that their beliefs be accorded the protection of blasphemy laws, does not the argument based on consistency also support the conclusion that the sensibilities of those who are deeply committed to secular philosophies should be accorded equal protection?[36] As the Law Commission of England and Wales noted in its 1985 report on blasphemy, some people treat national symbols and great thinkers with as much reverence as religious devotees do the doctrines they believe in, and that the law ought therefore to give equal treatment to religion and to objects of secular reverence.[37] Similarly, Sackville J noted in *North Coast Environmental Council Inc v Minister for Resources* that arguably the law should not only not distinguish between different religions 'but that cultural and spiritual beliefs, of the kind that may confer standing to challenge decisions offending those beliefs, can be non-religious in character'.[38] Although Sackville J was addressing the issue of standing to challenge administrative decisions rather than blasphemy (and should therefore not be seen as commenting one way or the other on the extension of blasphemy to all thought systems), his dictum well encapsulates the argument of those who would extend the offence. Thus Ten argues:

> [W]hy is it that the law should protect only *religious* groups? Substantial political, social, racial or sexual minorities may be shocked as much as religious minorities by unfavourable comments ... if there is to be a crime of blasphemy at all, then basic requirements of fairness demand that atheists, agnostics and humanists should receive the protection of the law.[39]

The absence of contemporary academic support for the retention of the offence makes it unsurprising that the idea of differentiation between religious and other beliefs has also failed to attract endorsement.[40] However, support for differentiation is to be found in some of the submissions in favour of retention of the common law offence made by private individuals and by church groups to the New South Wales Law Reform Commission. Some argued that religious sentiments merited protection because the Christian religion was part of Australia's heritage, while others suggested that the undermining of religion would lead to the abandonment of religious values by society and that this in turn would have an adverse effect on public morality.[41] These arguments are not persuasive. Even if it were true that a majority of the population professed the Christian faith, the plea for special protection of Christian beliefs impliedly dismisses the sensibilities of non-believers. The argument that the protection of religious ideas from disrespect serves the general good of society firstly assumes that religion is necessarily a beneficial social phenomenon — or at least that it is somehow more beneficial to society than other belief systems — which is at least debatable, and

[36] This argument is canvassed in Mortensen, above n 30, 429.

[37] England and Wales Law Commission, *Offences against Religion and Public Worship*, Report No 145 (1985) [2.42].

[38] (1994) 55 FCR 492, 509–10.

[39] C L Ten, 'Blasphemy and Obscenity' (1978) 5 *British Journal of Law and Society* 89, 91.

[40] Retention of the offence last received favourable academic comment by Courtney Kenny, 'The Evolution of the Law of Blasphemy' (1921–23) 1 *Cambridge Law Journal* 127, 140–2.

[41] New South Wales Law Reform Commission, above n 17, [4.6]–[4.11].

secondly ignores the fact that religion can just as effectively be undermined by attacks couched in moderate language as by those which are blasphemous.[42] Finally, the argument in favour of protecting only religious beliefs essentially depends upon the proposition that religious sensibilities are more vulnerable than non-religious ones, which in turn amounts to an unjustified imputation that adherents of non-religious belief systems are less committed to their ideas than religious believers.[43] None of these arguments are tenable in a society seeking to maintain official neutrality between religious and secular belief systems.

B *Blasphemy and Freedom of Expression*

1 *Blasphemy As an Anti-Vilification Measure*

The extensionist argument is illuminating because by following it to its logical conclusion, the contemporary rationale of the offence becomes apparent. Once the nexus between the offence and any special status for the Christian religion is broken, criminalisation is justified not as a measure to protect a particular institution (the Christian religion) but rather as one to protect the sensibilities of those who are offended by insults directed toward beliefs, thought systems or ideas — religious or secular — which they venerate. The argument therefore is that blasphemy is really a species of vilification law, analogous to laws penalising racial vilification, and that the same social interests justifying laws which protect the sensibilities of members of racial and other groups may similarly provide justification for what was previously thought to be the moribund concept of blasphemy. Thus while arguing for the abolition of blasphemy laws, Mortensen is to some degree pessimistic as to the likelihood of this occurring, given that the trend in anti-vilification law is towards an *extension* of the protection the law offers to groups on the basis of their race, gender, sexual orientation, etc.[44] Similarly, the New South Wales Law Reform Commission noted that those arguing for retention or extension of the crime did so on the basis that it served to protect adherents of religions from offence to their sensibilities,[45] and that the harm inherent in blasphemy might already be remedied by s 20 of the *Anti-Discrimination Act 1997* (NSW) which includes 'ethno-religion' as an aspect of 'race' for the purpose of the anti-vilification provisions of the Act.[46] On this argument then, blasphemy laws are seen as consistent with contemporary solicitude for the sensibilities of groups, be they defined by race, gender, sexual orientation, religion and, as consistency would now seem to require, thought system. An evaluation of whether a limit on freedom of expression is justified requires a balancing of the interest protected by the limitation against the size of

[42] This point is made in the context of a comment on the English and Welsh Law Commission discussion paper in J Spencer, 'Blasphemy: The Law Commission's Working Paper' [1981] *Criminal Law Review* 810, 812.
[43] Ibid 815–16.
[44] Mortensen, above n 30, 428–31.
[45] New South Wales Law Reform Commission, above n 17, [4.20], [4.49] – [4 50]
[46] Ibid [4 30].

the limitation. Does the anti-vilification argument provide a satisfactory rationale for limiting freedom of expression?

I would suggest that the answer to this is in the negative, and that the anti-vilification argument is based on a fundamental misunderstanding of the nature of blasphemy on the one hand and vilification on the other. To repeat the definition stated at the beginning of this note, blasphemy consists in vilification of Christian *beliefs* (rather than believers) in a manner likely to outrage believers. Racial vilification consists of hostile expression directed *towards a person* on the basis of some characteristic. By contrast, believers take offence at blasphemy not because of any insult directed towards them, but because of the blasphemer's contumelious disparagement of Christian doctrines, practices and historical figures. It is this fundamental distinction which shows why blasphemy is not analogous to racial vilification laws which, although restrictive of freedom of expression, at least serve to protect groups, rather than ideas or historical figures, from insult. There is, in short, a crucial difference between saying 'you Catholic bastard' on the one hand and 'Christ was a charlatan' on the other. This becomes all the more clear (and the anomaly of blasphemy laws all the more apparent) if one considers that the law does not otherwise provide a remedy where a person's sensibilities are affected by speech directed against a third party — never mind speech directed against an idea or an historical figure. Thus the law of defamation provides no remedy to the relatives of a defamed person, even though those relatives may well experience emotional hurt as a result of the defamation.[47]

The distinction between insults directed against persons and those directed against ideas is well illustrated by two cases from South Africa. There the law of delict, while very similar in many respects to the English common law of torts (particularly in respect of negligence), provides a right of action for certain infringements of personality interests not protected by English common law.[48] Under the *actio injuriarum*, which was received by Roman-Dutch law from Roman law, a civil remedy is available for impairment of personality rights. Such impairments may also be prosecuted criminally as *crimen injuria*. Both actions require that the defendant has intentionally injured the plaintiff in respect of *corpus* (physical integrity), *fama* (reputation) or *dignitas* (dignity).[49] The first two aspects of the action provide a remedy in the same circumstances as English common law does for the individual torts of assault and defamation, and there is indeed a significant overlap between English common law and Roman-Dutch law in these areas. The action for impairment of dignity, however, is not restricted to a single type of harm, and provides a remedy in a wide range of circumstances, some of which are remediable under English common law (for example, wrong-

47 Where A defames a relative of B, B has no action even though such conduct would obviously be emotionally wounding to him or her: *Krahe v TCN Channel Nine Pty Ltd* [1986] 4 NSWLR 536

48 For a discussion of the contribution of English common law to South African law, see H Hahlo and E Kahn, *The South African Legal System and Its Background* (1968) 585–6.

49 For the textual basis of liability in Roman law, see Alan Watson (ed), *The Digest of Justinian* (1985). The Roman-Dutch law action is discussed in R Lee, *An Introduction to Roman-Dutch Law* (5th ed, 1953) 322.

ful imprisonment), and some of which are not (for example, invasion of privacy). The latter category includes impairment of dignity through insult.[50]

In two reported cases, an action was brought on the basis of an insult not directed against a person, and in each the court held that no impairment of dignity had occurred. In *S v Tanteli*[51] the court overturned the conviction of an appellant who had been convicted of insulting the complainant's language, holding that:

> [T]here was in the present case no basis for finding that the complainant's *dignitas* (proper pride in himself) was impaired at all. The attack was not, and was not understood as being, an attack against the plaintiff personally. It was an attack upon his language. Undoubtedly, the complainant found that to be hurtful and offensive in a general sense; but it did not, in relation to the person of the complainant, have that degrading, insulting or ignominious character which is required of an *injuria*.[52]

Similarly, in *Church of Scientology in South Africa (Incorporated Association Not for Gain) v Reader's Digest Association Pty Ltd*[53] the court held that the *actio injuriarum* was not available to the plaintiff who alleged that the religion of Scientology had been defamed by an article published by the defendant. In particular, the court stated that the 'legal system recognises freedom of speech, inter alia, in the sense of not protecting ideas or philosophies against attack' and that 'it would be a sad day indeed were we to revert to an approach whereby the author of an attack upon belief ... could be subject to a damages claim or interdicted from airing his opinion'.[54] Although the court stated in passing that 'in theory' blasphemy remained an offence under criminal law, it noted that prosecutions were a rarity, and referred to academic authority which doubted its continued existence.[55] These cases provide a clear indication from a legal system with a large body of accumulated case law on liability for insult that vilification of ideas does not fall within the scope of that delict, and by parity of reasoning it is therefore argued that even though blasphemy may cause emotional harm, it cannot be equated with personal vilification.

[50] There is an enormous body of case law on liability for insult. For the most recent cases see *Mbatha v Van Staden* 1982 (2) SA 260 (N), *S v Bugwandeen* 1987 (1) SA 787 (N) and *S v Rasenyalo* 1988 (2) SA 208 (O). The confusion between blasphemy and vilification, and the tendency to conflate what are in reality two quite distinct concepts, is perhaps not surprising given that the concept of liability for insult is foreign to English common law. It is important here to note that the emotional hurt which arises from insult is separate from that of nervous shock, in respect of which there is an action under the rule in *Wilkinson v Downton* [1897] 2 QB 57 — the former involves only emotional harm (such as feelings of shame, humiliation, etc), whereas the latter involves conduct which has *physical* consequences (for example, a heart attack, miscarriage, etc). In the United States there has been some movement towards expanding the tort of intentional infliction of emotional harm to cover 'outrageous' conduct inflicting emotional injury, however the element of 'outrageousness' is stated to bar liability for 'mere insult': W Keeton (ed), *Prosser and Keeton on the Law of Torts* (5th ed, 1984) 56–62, American Law Institute, *Restatement (Second) of Torts* (1991) [46](d), (f).

[51] 1975 (2) SA 772 (T).

[52] Ibid 775 (Nicholas J).

[53] 1980 (4) SA 313 (C).

[54] Ibid 317 (van den Heever J).

[55] See, eg, academic comment in Butterworths, *The Law of South Africa*, vol 6 (at 31 December 1980) Criminal Law, 'Blasphemy' [249].

2 *The Breach of the Peace Argument*

Another justification advanced for the retention of the offence is that it serves to prevent breaches of the peace. Although there is controversy over whether a tendency to create a breach of the peace is an element of the offence, it was accepted as such by the court in *Pell*.[56] The court's finding that no such disturbance was apprehended was, unfortunately, not borne out by subsequent events — vandals damaged the work and the gallery withdrew the exhibit for fear of injury to its staff should another attack be mounted.[57] Does preservation of the peace provide adequate justification for the continued existence of the offence? The literature on whether expression ought to be proscribed because of an anticipated violent reaction by those who find it offensive is voluminous, particularly in the United States, where the 'fighting words' doctrine in *Chaplinsky v New Hampshire*[58] was stated to justify the suppression of speech which incited a breach of the peace.[59] However, later cases throw doubt on this reasoning,[60] with the Supreme Court most recently stating that speech cannot be suppressed simply because it is 'unpopular with bottle-throwers'.[61] Furthermore, even in jurisdictions which do not accord as great a degree of protection to freedom of expression as the United States, a clear distinction has been drawn between speech which is harmful in that it amounts to incitement by the speaker of his or her audience to harm *others*[62] and expression which moves the audience to harm *the speaker* because they object to its contents, in respect of which there is no precedent of a court denying the speech (and thus, indirectly, the speaker) protection. In this regard, it is interesting to note that in the most recent Bill of Rights enacted by a Commonwealth country, that contained in the *Constitution of the Republic of South Africa Act 1996*, the only circumstances in which the freedom of expression provision denies protection to speech are those where the speaker incites harm towards others.[63] The public order argument presents the law with a choice: to impose an obligation on those engaging in expression to tailor their speech, to meet the threshold of tolerance of those unable to restrain themselves when confronted with ideas which they find objectionable or,

[56] (Unreported, Supreme Court of Victoria, Harper J, 9 October 1997) 6.

[57] Jane Faulkner, 'Serrano Show Axed', *The Age* (Melbourne), 13 October 1997, A1.

[58] 315 US 568 (1942) ('*Chaplinsky*').

[59] For the most recent analysis of *Chaplinsky*, see especially Michael Mannheimer, 'The Fighting Words Doctrine' (1993) 93 *Columbia Law Review* 1527.

[60] See, eg, *Terminiello v City of Chicago*, 337 US 1, 4 (1949) where Douglas J held that 'a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest ... or even stirs people to anger'; *Village of Skokie v National Socialist Party of America*, 373 NE 2d 21, 25 (1978) where, in declaring unconstitutional a statute aimed at preventing members of the American Nazi Party from marching through a suburb in which many survivors of World War II concentration camps lived, the court stated that 'courts have consistently refused to ban speech because of the possibility of unlawful conduct by those opposed to the speaker's philosophy.'

[61] *Forsyth County v Nationalist Movement*, 505 US 123, 134 (1992).

[62] An example of which is the hate speech provision contained in s 319 of the Canadian *Criminal Code*, upheld by the Canadian Supreme Court in *R v Keegstra* (1990) 61 CCC (3d) 1.

[63] Under s 16(2) constitutional protection is denied to expression which constitutes propaganda in favour of war or which amounts to incitement of violence or other harm by the speaker.

alternatively, to impose an obligation on those confronted with ideas they find objectionable to register their dissent in a lawful manner. It should be obvious which course is required in a free and democratic society.

3 *The Impact on Freedom of Expression*

In light of what has been said in the preceding two sections, there would seem to be little justification for maintaining the offence. Nevertheless, it is worthwhile to consider the extent to which the existence of the offence limits freedom of expression, because if that limitation is found to be significant, then given that the arguments in favour of maintaining the offence are not persuasive, the case for abolition would be all the stronger.

Freedom of expression is protected by the common law.[64] Even in the limited form in which it currently exists (protecting only the Christian religion), the crime of blasphemy amounts to a substantial limit on freedom of expression. The fact that the offence penalises the manner rather than the content of expression, and that whether words amount to blasphemy is a matter of degree, make the contours of the offence unacceptably vague, and thus likely to have a 'chilling effect' on freedom of expression.[65] As MacFarlane and Fisher state, '[b]lasphemy is no longer a crime of disbelief: it may be committed with the profoundest religious intentions ... There is no "public good" defence which can justify the publication by reference to literary or sociological merit'.[66] If the expansionist view of blasphemy — that which sees it as protecting the sensibilities of adherents to any idea, religious or secular — was accepted, the potential of the offence for limitation of freedom of expression would be all the greater. Under the expanded offence, could a person who displayed a work entitled 'Piss Marx' conceivably be prosecuted by Marxists? Could the writer of the words 'economic rationalism is a crackpot theory devoid of common sense, ludicrous in its application and farcical in its results' be prosecuted because mocking criticism of this theory offends the sensibilities of free market economists? What is the boundary between mere criticism of an idea and its vilification? Should mockery, scorn and ridicule be proscribed as rhetorical tools? Surely, as Smith states, the best way of combating socially harmful ideas may be through ridicule and contempt?[67] And if their use is permitted, how is the boundary to be drawn between mockery which is justified and that which is excessive?

4 *The Obscenity Issue*

The obscenity issue was, I would submit, of secondary importance in *Pell*. Firstly, as has already been noted, it is questionable whether, given that the work

[64] *Right to Life Association (NSW) Inc v Secretary, Department of Human Services and Health* (1995) 128 ALR 238, 270; *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96, 110.

[65] The 'chilling effect' was first adverted to by the United States Supreme Court in *New York Times v Sullivan*, 376 US 254, 300 (1964) (Goldberg and Douglas JJ), where the court noted that where the boundary between permissible and impermissible expression is unclear, publishers will tend to engage in self-censorship in order to ensure that they do not fall foul of the law.

[66] Peter MacFarlane and Simon Fisher, *Churches, Clergy and the Law* (1996) 188–9

[67] J Smith, 'Blasphemy' [1979] *Criminal Law Review* 311, 313.

did not contain any sexual element, it fell within the scope of an obscenity statute. However, even assuming that it did, it was open to the court to interpret the phrase 'indecent or obscene' narrowly, in accordance with the general principle, most recently reaffirmed by the High Court in *Coco v The Queen*,[68] that the

> courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.[69]

The words 'indecent' and 'obscene' are inherently ambiguous and uncertain. As Harper J noted, they are interpreted as importing a community standard.[70] This by its very nature must necessarily favour majoritarian concepts of morality at the expense of those in social fringe groups. Given the risk posed to minority viewpoints by this majoritarian bias, the terms 'indecent and obscene' should be interpreted narrowly. In the *Pell* case, the court did not make a conclusive finding on the obscenity issue, but since the burden was on the appellant to prove a breach of the obscenity statute, the inconclusive result meant that the application had to fail. However, the court's decision would have been stronger from the point of view of freedom of expression had it affirmatively stated that 'Piss Christ' was not 'indecent or obscene'. This it could have done by taking into account the very factors which Harper J mentioned — that tolerance is one of the values comprising the social standards against which obscenity is to be tested, and that the character of the work in question was ambiguous.[71]

V CONCLUSION

In light of the above, I suggest that there were strong grounds upon which the court in *Pell* could have concluded that considerations of freedom of expression justified a finding that the offence of blasphemy no longer exists at common law. Nor should the court have felt constrained by mention of blasphemy in the *Crimes Act 1958* (Vic) s 469AA — as noted above, that section assumes, but does not declare, the continued existence of the crime at common law, and so a finding that the crime does not exist, while making s 469AA redundant, would not have amounted to an usurpation of legislative function by the court. Harper J's decision not to make a conclusive finding on the blasphemy issue is explicable on the basis that for some judicial restraint means going no further than is required for disposition of the case. However, even though the outcome of the case was favourable from the perspective of freedom of expression, I would argue that *Pell* highlights the need for reform in this area of the law, and it is

68 (1994) 179 CLR 427.
69 Ibid 437.
70 *Pell* (Unreported, Supreme Court of Victoria, Harper J, 9 October 1997) 6.
71 Ibid.

perhaps unfortunate that the court did not take the opportunity presented by the case to initiate this process.[72]

BEDE HARRIS*

[72] What would be required to remove blasphemy from the law varies between jurisdictions, as in some the offence exists at common law, while in others it has been codified. For a comprehensive overview, see Butterworths, *Halsbury's Laws of Australia*, vol 23 (at 16 June 1996) 365 Religion [365–695] – [365–705]

* BA (Mod) (Dublin), LLB (Rhodes), DPhil (Waikato); Senior Lecturer in Law, James Cook University of North Queensland