THE FREEDOM TO OFFEND IN THE PURSUIT OF TRUTH

Johnny M. Sakr*

ABSTRACT

Being 'offended' has become the foundation by which warrants prosecution. This benchmark impacts one's ability to think, as Dr Jordan B Peterson argues, 'in order to be able to think, you have to risk being offensive'. Reasoning requires one to critique and assess the propositions put forward in the hope of reaching a conclusion that satisfies one's intellect. Unfortunately, this truth quest has the inevitable impact of 'offending' others that hold to a paradoxical ideology. If being 'offended' is legal justification for crying 'victim' of 'hate speech' and 'vilification', then this will have a 'chilling effect' on free speech. Christians have been affected by legislation that rests upon the subjective grounds of human emotion. This article provides numerous examples and concludes that Christians are persecuted in Australia.

* LL.B., Grad. Dip. Leg. Prac., LL.M. (Commercial Transactions), M.Phil. (Law), Ph.D. (Law) (candidate). Adjunct Lecturer in Law at the University of Notre Dame Australia, Sydney.

I. INTRODUCTION

Are Christians persecuted in Australia? I will answer this question using the following syllogism

1. *'Persecution is the hostility and ill-treatment of persons especially because of their race, political or religious beliefs'.*[1]
2. *In Australia, Christians are shown hostility and ill-treatment due to their religious beliefs.*
3. *Therefore, Christians are persecuted in Australia.*

This article will demonstrate the truthfulness of premise two, thus making this syllogism a valid deductive argument because the conclusion follows necessarily from the premises.[2]

In the words of Dr Jordan B Peterson, 'in order to be able to think, you have to risk being offensive'.[3] The pursuit of truth requires one to reason, to critique, to reject statements that they believe are false, which may offend those who believe the rejected proposition to be true. However, giving offence may be inevitable when undertaking an odyssey to seek truth.

The doctrine of exclusivism is part of the Christian faith.[4] The Christian *ethos* proclaims that Christ is 'the way, the truth, and the life' and that 'no one [can come] to the Father except through [Him]'.[5] As Luke in the *Book of Acts* proclaimed, 'There is salvation in no one else, for there is no other name under heaven given among men by which we must be saved'.[6] Unfortunately, in this post-modern world, exclusivism is seen as a form of bigotry and intolerance.[7]

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[1] Archie Hobson, *The Oxford Dictionary of Difficult Words* (Oxford University Press, 2004) 323.
[2] James Porter Moreland and William Lane Craig, *Philosophical Foundations for a Christian Worldview* (InterVarsity Press, 1st ed, 2003) 519.
[3] Cathy Newman, Interview with Jordan B Peterson, Clinical Psychologist and Professor (Channel 4 News, 16 January 2018) <https://www.youtube.com/watch?v=aMcjxSThD54>.
[4] William Lane Craig, 'No Other Name': A Middle Knowledge Perspective on the Exclusivity of Salvation through Christ' (1989) 6 *Faith and Philosophy* 172-88. 172, 188.
[5] John 14:6.
[6] Acts 4:12.
[7] See Jenny Trinitapoli, ''I Know This Isn't PC, But ...': Religious Exclusivism among U.S. Adolescents' (2007) 48(3) *The Sociological Quarterly* 451-483.

Dr William Lane Craig states that 'the law of non-contradiction says that P cannot be both true and false in the same sense at the same time'.[8] Thus, it cannot be both true that Christ died by crucifixion,[9] was buried,[10] and rose up on the third day[11] and, at the same; it is also true that these events not occur. But how is this relevant?

According to the Quran Christ was neither killed nor crucified. Surah 4:157 states:

> And [for] their saying, 'Indeed, we have killed the Messiah, Jesus, the son of Mary, the messenger of Allah.' And they did not kill him, nor did they crucify him; but [another] was made to resemble him to them. And indeed, those who differ over it are in doubt about it. They have no knowledge of it except the following of assumption. And they did not kill him, for certain.[12]

14th Century historian and Islamic scholar[13] Ibn Kathir wrote in his commentary on Surah 4:157:

> The Jews then boasted that they killed `Isa [Jesus] and some Christians accepted their false claim, due to their ignorance and lack of reason. As for those who were in the house with `Isa, they witnessed his ascension to heaven, while the rest thought that the Jews killed `Isa by crucifixion.[14]

Taking into consideration the law of non-contradiction, it thus cannot be the case that both accounts of this event are true. For this reason, Christians proclaim that the facts mentioned in the Quran are false as it denies the central tenant of the Christian faith. As St Paul proclaimed:

> For I delivered to you as of first importance what I also received: that Christ died for our sins in accordance with the Scriptures, that he was buried, that he was raised on the third day in accordance with the Scriptures ... [a]nd if Christ has not been raised, your faith is futile and you are still in your sins.[15]

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[8] Moreland and Craig, above n 2, 132.
[9] Matthew 27:35; Luke 23:33; John 19:18 - 23.
[10] John 19:38-42; Luke 23:50 - 56; Matthew 27:57-61; Mark 15:42-47; 1 Corinthians 15:4.
[11] 1 Corinthians 15:4; Luke 24:1 – 12.
[12] Surah 4:157 (Sahih International).
[13] Ahmad Ghabin, Ḥisba, *Arts and Craft in Islam* (Otto Harrassowitz Verlag, 2009) 109. See also; Vardit Rispler-Chaim, *Disability in Islamic Law* (Springer Science & Business Media, 2006) 136; Abdelfattah Kilito, *Auteur Et Ses Doubles* (Syracuse University Press, 2001) 89; J Halverson, S Corman and H L Goodall, *Master Narratives of Islamist Extremism* (Springer, 2011) 4; Jonathan Riley-Smith, *The Oxford Illustrated History of the Crusades* (Oxford University Press, 2001) 217.
[14] Muhammad Saed Abdul-Rahman, *Tafsir Ibn Kathir Part 6 of 30: An Nisaa 148 To Al Ma'idah 081* (Muhammad Saed Abdul-Rahman, 2018) 21.
[15] 1 Corinthians 15:3-4; 17.

Christians, having the right to free speech,[16] possess the right to proclaim the tenets of their faith while, at the same time, critiquing competing events and theories.

This article will demonstrate that Christians are persecuted in Australia, referring to three laws, both state and federal, and various examples relating to these laws.

The first example refers to the *Racial and Religious Tolerance Act 2001* (Vic) ('RRTA') and the case of *Islamic Council of Victoria Inc v Catch the Fire Ministries Inc* ('Catch the Fire Ministries Case'). The second example refers to the *Anti-Discrimination Act 1998* (Tas) and the effects it had on the Tasmanian case involving Archbishiop Porteus. The third example refers to s 18C of the *Racial Discrimination Act 1975* (Cth), and examples where Christians have been threatened, targeted in a firebomb attack and have had white powder delivered in an envelope to a Christian organisation due to the Judeo-Christian stance against same-sex marriage.

This article will also refer to the Queensland University of Technology discrimination case to illustrate that Christians are not the only group impacted by laws that rest upon a subjective foundation as the means by which misconduct is assessed.

II. CATCH THE FIRE MINISTRIES' CASE

Unfortunately, Christians have suffered persecution under the RRTA[17] as reflected in the *Catch the Fire Ministries*[18] case.

[16] In *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 and *Australian Capital Television Pty Ltd v the Commonwealth* (1992) 177 CLR 106, the majority of the High Court held that an implied freedom of political communication exists as an incident of the system of representative government established by the *Australian Constitution*. This was reaffirmed in *Unions NSW v New South Wales* [2013] HCA 58. Australia is a party to seven core international human rights treaties. The right to freedom of opinion and expression is contained in articles 19 and 20 of the International Covenant on Civil and Political Rights ('ICCPR'). See also; section 116 of the *Australian Constitution*:
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.
Cf. Alex Deagon, 'Defining the Interface of Freedom and Discrimination: Exercising Religion, Democracy and Same-Sex Marriage' (2017) 20 *International Trade and Business Law Review* 239-286.
[17] *Racial and Religious Tolerance Act 2001* (Vic) n. 1.
[18] *Islamic Council of Victoria Inc v Catch the Fire Ministries Inc* [2004] VCAT 2510.

Anti-incitement laws that rely on subjective assessment of harm or offence have caused concern in Australia.[19] Although Australia has no federal legislation that prohibits 'religious vilification,' three Australian states have passed such laws, namely Queensland,[20] Tasmania,[21] and Victoria.[22] I will focus on Victoria's incorporation of these laws since Victoria's law[23] is substantially similar to the laws used in Queensland and Tasmania. I will use the introduction of such laws to demonstrate the persecutions of Christians in Australia.

Victoria's law is subjective. This proposition is not new. Labor Premier Bob Carr also held to this idea. On the 1st March 2006, a proposed Bill to incorporate religious vilification laws in New South Wales was voted down.[24]

In 2006, Carr, in his speech to the NSW Parliament, described these laws as 'regrettable' and 'highly counterproductive'. He argued that they were 'too easy to abuse' and 'questionable to say the least'.[25] 'Determining what is or is not a religious belief is difficult', the Premier stated: 'It is subjective. It is a personal question. These laws can undermine the very freedom they seek to protect – freedom of thought, conscience and belief'.[26]

To support his view, Premier Carr referred to the Victorian case that involved Robin Fletcher, the child sex abuser and self-proclaimed Wiccan. Mr Fletcher claimed he was vilified while attending a Salvation Army Christian course in prison. Mr Fletcher made a

[19] Augusto Zimmerman, 'The Unconstitutionality of Religious Vilification Laws in Australia: Why Religious Vilification Laws are Contrary to the Implied Freedom of Political Communication Affirmed in the Australian Constitution' (2013) *Brigham Young University Law Review* 458.
[20] Queensland passed legislation introducing religion vilification laws in 2001. This Act is called the *Anti-Discrimination Amendment Act* 2001 (Qld). In a very similar provision to Victoria's law, Queensland outlines that a person must not publically act in a way that would 'incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of [their] religion.': at s 124A(1). The provision also provides the circumstances in which such an act could be legal: the act must be public, done reasonably and in good faith, for academic, artistic, scientific or research purposes; a publication of material that would be subject to the defense of absolute privilege in defamation case; or the publication of a fair report of a public act. Queensland also criminalizes serious religious vilification. The section dealing with serious religious vilification is comparable to the Victorian section.
[21] Like Queensland and Victoria, Tasmania also has legislation containing provisions against religious vilification. Section 19 of the *Anti-Discrimination Act 1998* (Tas) outlines that one must not publically act in a way which would incite 'hatred towards, serious contempt for, or severe ridicule of, a person or a group of persons on the ground of [their] religious belief[s] or affiliation[s].'
[22] *Racial and Religious Tolerance Act 2001* (Vic). See also; Zimmerman, above n 19, 458.
[23] Referring to the *Racial and Religious Tolerance Act 2001* (Vic).
[24] Augusto Zimmermann, 'Religious Vilification Laws in Australia: Philosophical Underpinnings and Constitutional Implications' (Paper presented at 'Religion, Democracy, and Civil Society', Brigham Young University, Provo/UT (United States) 7 – 10 October 2012 3.
[25] Farrah Tomazin, 'Victoria's Vilification Act Easy to Abuse: Carr', *The Age*, Melbourne/Vic, June 23, 2005, 3.
[26] Ibid.

complaint under the Victorian vilification law. Mr Fletcher argued that the course 'pose[d] a danger to his safety'[27] and discriminated against him based upon his Wiccanian beliefs.

Judge Morris dismissed this case and announced the need for an amendment to prevent this sort of 'preposterous' litigation.[28] Since then, the Victorian government amended its vilification law that now allows 'vilification' to take place for conveying or teaching a religion, 'the performance, exhibition or distribution of an artistic work' or 'in making or publishing a fair and accurate report of any event or matter of public interest'.[29]

In 2001, the Victorian Parliament introduced the RRTA to prevent instances of religious and racial vilification. Thus, the RRTA applies the same rules about religious vilification as had earlier been created in the RRTA about race.[30] Section 8(1) of the RRTA provides:

> A person must not, on the ground of the religious belief or activity of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.[31]

According to the RRTA, motives are irrelevant[32] and religious belief is the only substantial ground needed for the conduct in question.[33] It is also irrelevant whether the statement made was true or false.[34] Sections 7[35] or 8 do not apply if the person can establish that the act was, in the circumstances, reasonable and in good faith for genuine academic, artistic, religious, or scientific interest.

Further, ss 7 or 8 are not contravened if the accused established that he reasonably believed that his conduct was only meant to be seen or heard by himself alone.[36]

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[27] Australian Broadcasting Corporation Radio Network, 'Jenny Stokes on Religious vilification in Victoria', *The Religion Report*, 27 April 2005 (Jenny Stokes).
[28] *Fletcher v Salvation Army Australia* [2005] VCAT 1523.
[29] *Racial and Religious Tolerance Act 2001* (Vic) s 11.
[30] Zimmerman, above n 19, 459.
[31] *Racial and Religious Tolerance Act 2001* (Vic) s 8(1).
[32] *Racial and Religious Tolerance Act 2001* (Vic) s 9(1).
[33] *Racial and Religious Tolerance Act 2001* (Vic) s 9(2).
[34] *Racial and Religious Tolerance Act 2001* (Vic) s 10.
[35] (1) A person must not, on the ground of the race 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. (2) For the purposes of sub-section (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. Note: 'engage in conduct' includes use of the internet or e-mail to publish or transmit statements or other material.
[36] *Racial and Religious Tolerance Act 2001* (Vic) s 12.

Another case that demonstrates the persecutions of Christians is the *Catch the Fire Ministries* case. This decision, which is one of the first major litigation cases[37] concerning 'religious vilification', 'bears out the concerns of many that religious vilification laws are conceptually unsound and produce results antithetical to the religious tolerance its promoters hope for'[38] because they rely upon subjective standards.

The *Catch the Fire Ministries* case involved Pastors who were informing interested Christians about Islamic laws and practices they had encountered during their ministry in Pakistan. This offended some Muslims who attended. Those Muslims did not feel that violence was incited against them, but they argued the long term effects of such negative preaching would likely incite violence against Muslim believers because the information presented at the lectures was unbalanced and unfair.[39]

In *Islamic Council of Victoria Inc v Catch the Fire Ministries Inc*,[40] the Victorian Civil and Administrative Tribunal ('Tribunal') ruled that two Pentecostal pastors, Daniel Nalliah and Daniel Scot, and the Catch the Fire Ministries organisation, had engaged in religious vilification of Muslims in the statements they had made at a seminar, in a newsletter and a website article.

The Islamic Council argued that the statements made at the lectures, and in two other publications produced, contravened s 8 of the *Racial and Religious Tolerance Act 2001* (Vic). Pastor Scot gave a lecture answering the question 'What is holy Jihad?' The purpose of the seminar was to help Christians understand Islamic theology and to help defend and

[37] Other cases to date have not involved such an exhaustive examination: see *Deen v Lamb* [2001] QADT 20. In Deen the Queensland Anti-Discrimination Tribunal found that a pamphlet containing quotations from the Qu'ran presented a distorted view that Muslims were persons prone to disobey the laws of Australia where they perceived a conflict with the Qu'ran, to the extent of being prepared to commit murder. The defendant had incited hatred contempt for Muslims, but the pamphlet was protected since it was made during the course of a Federal election and was covered by the implied freedom of communication on matters relevant to political discussion.

37 Rex Tauati Ahdar, 'Religious Vilification: Confused Policy, Unsound Principle and Unfortunate Law' [2007] 26(2) *The University of Queensland Law Journal* 293 - 294.

[38] Rex Tauati Ahdar, 'Religious Vilification: Confused Policy, Unsound Principle and Unfortunate Law' [2007] 26(2) *The University of Queensland Law Journal* 293 - 294.

[39] Amir Butler, 'Why I've changed my mind on vilification laws', *The Age* (Melbourne), 4 June 2004 (quoted in Steve Edwards, 'Do We Really Need Religious Vilification Laws?' (2005) 21 *Policy* 33. See also Dermot Feenan, 'Religious Vilification Laws: Quelling Fires of Hatred?' (2006) 31 *Alternative Law Journal* 157.

[40] [2004] VCAT 2510.

promote the Christian faith to Muslims.[41] Tribunal Vice President, Judge Higgins, found that Pastor Scot gave an 'unbalanced' view of the Muslim faith.[42] Judge Higgins continued, ''[the lectures were] essentially hostile, demeaning and derogatory[43] of all Muslim people, their god, Allah, the prophet Mohammed and in general Muslim religious beliefs and practices.'[44]

The defence outlined in s 11 of the RRTA did not apply because the tribunal members did not believe that Pastor Scot's conduct was engaged reasonably and in good faith. In the judge's opinion, the seminar 'was a one-sided delivery of a view of the Qur'an and Muslims' beliefs, which were not representative. It was designed to put Muslim people and their beliefs in a bad light.'[45] This judgment also applied to the newsletter and the articles published.[46]

After a five year legal battle, the parties eventually came to an agreement at mediation.[47] On 22 June 2007, the Tribunal issued a joint statement on behalf of the Islamic Council, Catch the Fire Ministries and the two pastors affirming their rights to 'robustly debate' religion, which included the right to criticise opposing worldviews.[48]

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[41] Ahdar, above n 38, 304.
[42] *Islamic Council of Victoria Inc v Catch the Fire Ministries Inc* [2004] VCAT 2510, 384, 389.
[43] Derogatory statements made at the seminar included the following: the Qur'an promotes violence, killing and looting; Muslim scholars misrepresent what the Qur'an says by varying the emphasis depending on the audience; the Qur'an teaches that women are of little value ('woman, dog and donkey are of equal value'); Muslims are demons; Muslims lie for the sake of Islam and that it is 'all right', they have to hide the truth; Muslims intend to take over Australia and declare it an Islamic nation; Muslim people have to fight Christians and Jews until they accept true religion. See *Islamic Council of Victoria Inc v Catch the Fire Ministries Inc* [2004] VCAT 2510, 80, 383. The judge lists the 19 derogatory statements at [80].
[44] *Islamic Council of Victoria Inc v Catch the Fire Ministries Inc* [2004] VCAT 2510, 383.
[45] *Islamic Council of Victoria Inc v Catch the Fire Ministries Inc* [2004] VCAT 2510, 389.
[46] Ahdar, above n 38, 304.
[47] Michael Turnbull, 'Church and Islamic Council Bury Hatchet', *The Australian* (Sydney), 25 June 2007.
[48] The Joint Statement records that: 'Notwithstanding their differing views about the merits of the complaint made by the ICV, each of the ICV, Catch the Fire Ministries, Pastor Scot and Pastor Nalliah affirm and recognise: (1) the dignity and worth of every human being, irrespective of their religious faith, or the absence of religious faith; (2) the rights of each other, their communities, and all persons, to adhere to and express their own religious beliefs and to conduct their lives consistently with those beliefs; (3) the rights of each other, their communities and all persons, within the limits provided for by law, to robustly debate religion, including the right to criticise the religious beliefs of another, in a free, open and democratic society; (4) the value of friendship, respect and co-operation between Christians, Muslims and all people of other faiths; and (5) the *Racial and Religious Tolerance Act* forms part of the law of Victoria to which the rights referred to in paragraph (3) above are subject.' VCAT Media Release, VCAT Ref: A392/2002, 22 June 2007 <http://www.vcat.vic.gov.au> at 30 July 2007.

Since the RRTA states that the truth of a proposition cannot be relied on as a defence from accusations of religious vilification, the omission of this defence demonstrates the use of subjective standards to judge human conduct that affects Christians, persecuting them for critiquing other worldviews even though what Christians are presenting are true. This relativistic law is subjective because it does not provide a fixed standard as an objective standard does. Following the logic of Mr Carr, these laws are 'highly counterproductive' because they are 'too easy to abuse'. Subjective elements are used to determine what is or is not a religious belief because it is a personal question. The RTTA, therefore, undermines the 'very freedom and belief'.[49]

As argued by Zimmermann, 'such law is therefore grounded on the scepticism of truth, which in turn is deemed relative and contingent to group-thinking and social experience'.[50]

For the second example of Christian persecution in Australia, I have referred to the Tasmanian Case where it was alleged that the conduct of the Catholic Bishops of Australia constituted as 'hate speech'.

III. TASMANIAN CASE

In September 2015, Tasmania's Anti-Discrimination Commissioner received a complaint by Martine Delaney, the transgender Greens candidate for the federal seat of Franklin.[51] This complaint was filed under the hate speech laws found in the *Anti-Discrimination Act 1998* (Tas) (the 'Act'). The Tasmanian government introduced to the Tasmanian Parliament the *Anti-Discrimination Amendment Bill 2016* (the 'Bill'). The Bill proposed to amend Tasmania's hate speech laws found in the Act.[52]

[49] Ibid.
[50] Zimmerman, above n 19, 458. Citing Charles E Rice, *50 Questions on the Natural Law: What it is and Why We Need It* (Ignatius Press, 1999) 132.
[51] FamilyVoice Australia, Submission No. 2 to Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill, *Submission on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill* (20 December 2016) 6.
[52] Explanatory Memorandum, Racial Discrimination Amendment Bill 2014 6.

This complaint concerned a booklet titled *Don't Mess With Marriage*[53] issued by the Catholic Bishops of Australia relating to the same-sex marriage debate in Australia. The primary focus of this booklet was that 'marriage should be a 'heterosexual union between a man and a woman' and changing the law would endanger a child's upbringing.'[54] This was the church's traditional view of marriage and expressed their view as to why children are adversely affected if they do not have mother and father.[55] Although this complaint was later dropped,[56] it demonstrates the persecution of Christian in Australia. Consequently, this complaint prompted the Tasmanian government to consider reforming its 'hate speech' laws.[57]

According to Delaney, the booklet caused 'immeasurable harm to the wellbeing of same-sex couples and their families across Tasmania'.[58] Delaney contested that the booklet's content contravened s 17(1) of the Act. Section 17(1) presently provides:

> A person must not engage in any conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of an attribute referred to in section 16(e), (a), (b), (c), (d), (ea), (eb) and (k), (f), (fa), (g), (h), (i) or (j) in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed.[59]

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[53] Australian Catholic Bishops Conference, *Don't Mess With Marriage: A Pastoral Letter from the Catholic Bishops of Australia to all Australians on the 'Same-sex Marriage' Debate* (Australian Catholic Bishops Conference, 2015).

[54] Australian Broadcasting Corporation, 'Anti-discrimination complaint 'an attempt to silence' the Church over same-sex marriage, Hobart Archbishop says', *ABC News* (online), 28 September 2015

[55] Dr David van Gend, Submission No. 73 to the Select Committee, *the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill 2016*, 13 January 2017, 2.2.

[56] Andrew Drummond, 'Transgender rights activist Martine Delaney drops complaint over Catholic Church's marriage booklet', *The Mercury* (online), 5 May 2016 <http://www.themercury.com.au/news/tasmania/transgender-rights-activist-martine-delaney-drops-complaint-over-catholicchurchs-marriage-booklet/news-story/d8d9079bf932526b27e5f094e57dbe84>.

[57] Andrew Drummond, 'Tasmania tussles over free speech debate', *news.com.au* (online), 20 September 2016 <http://www.news.com.au/national/breakingnews/tas-govt-tables-free-speech-amendment/newsstory/ac35b8f5e2fff4991e86f1e4aa9dce70>.

[58] Australian Bureau of Statistics, 'Counts of Same Sex Couples in the 2011 Census', 2011 , at <http://www.abs.gov.au/websitedbs/censushome.nsf/home/factsheetsssc>.

58 'The attributes mentioned in s 16 of the Act to which s 17(1) refers are (in the order they appear in s 17(1)): gender, race, age, sexual orientation, lawful sexual activity, gender identity, intersex, disability, marital status, relationship status, pregnancy, breastfeeding, parental status and family responsibilities.' Cf. Joshua Forrester, Augusto Zimmerman and Lorraine Finlay, 'A Constitutional Analysis of Proposed Reforms to Tasmania's 'Hate Speech' Laws' [2016] 7(9) *The Western Australian Jurist* 280.

[59] *Anti-Discrimination Act 1998* (Tas) s 17(1).

Delaney claimed that the words 'messing with kids', which appeared in the booklet, could be used as 'a code for sexual abuse or paedophilia'.[60] She argued that these words implied that all homosexual behaviour was criminal.

The complaint was not dropped because Delaney's reaction towards the material was judged by an objective standard,[61] but because Delaney believed that 'a drawn-out legal battle would not benefit the vulnerable lesbian, gay, bisexual, transgender and intersex people. [S]he believed [these individuals were] harmed by sections of the booklet'.[62]

This case demonstrates that Christians are being persecuted for their views on marriage. Not because of factual inaccuracy, but because their views were perceived as being offensive.

The Tasmanian anti-discrimination legislation made Delaney's subjective emotional state the foundation of a valid complaint. The validity of her complaint was not measured against objective standards that represented majoritarian community standards.

An objective standard did not assess her reaction in retaliation against the *Don't Mess With Marriage* booklet. Instead, purely subjective standards allowed her to make a complaint. If complaints can be made based upon an individual's subjective feelings, freedom of speech is anything but free given the unpredictable nature of human emotion. Objective standards provide predictability, while subjective standards do not. The failure to use objective standards results in a majoritarian public view that the relevant law is unjust. The persecution of Christian will only heighten.

For the final example that demonstrates that persecution of Christians, I will discuss s 18C of the *Racial Discrimination Act 1975* (Cth) ('RDA'), its use of subjective standards and its impact on Christians.

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[60] Author Unknown, 'Anti-discrimination complaint 'an attempt to silence' the Church over same-sex marriage, Hobart Archbishop says' (28 September 2015) *Australian Broadcasting Corporation* <http://www.abc.net.au/news/2015-09-28/anti-discrimination-complaint-an-attempt-to-silence-the-church/6810276>.

[61] Nicola Berkovic, 'Complaint over Catholic Church Marriage Booklet Dropped' (5 May 2016) *The Australian* (online) <https://www.theaustralian.com.au/news/nation/complaint-over-catholic-church-marriage-booklet-dropped/news-story/3dcbf7200c6a3c7ae85a60689a72a904>.

[62] Adam Langenberg, 'Same Sex Booklet Complaint Dropped' (5 May 2016) *The Examiner* (online) <https://www.examiner.com.au/story/3891113/delaney-drops-booklet-action/>.

IV. SECTION 18C OF THE RELIGIOUS DISCRIMINATION ACT (CTH)

Section 18C represents one of the most effective means of silencing free speech in Australia.[63] Section 18C states that it is unlawful for a person to perform an act in public if the act 'is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate' a person where the act is done 'because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group'.[64]

This prohibition is extremely broad and places an extraordinary limitation on free speech. The key terms used in s 18C, namely 'offend, insult, humiliate', are indefinite and largely subjective in nature. This is because this law does not rely on the reasonable member of society, but relies on the judgment of a reasonable member of the offended group, who may have 'eggshells' for skulls.

Using the overall reasonable man standard avoids the risk that a group operating in a siege mentality will be offended if they are criticised, despite the motive behind the criticism or the truth of its content. The legislature's want to use s 18C to teach and even coerce people not to mistreat minority groups in any way however, as rightly argued by Zimmermann, the result of such intrusive legislation dilutes free speech which allows for strident dissent if focuses on bad government or false ideas in society.[65]

For example, there have been numerous reports of violent protests by same-sex marriage activists against Christian bodies and supporters of traditional marriage. In one instance, the staff of the Australian Christian Lobby (ACL) was threatened, ACL's headquarters were firebombed and white powder delivered in an envelope to the organisation.[66]

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[63] Chris Berg et al, *The Case for the Repeal of Section 18C of the Racial Discrimination Act* (December 2016) Institute of Public Affairs <https://ipa.org.au/wp-content/uploads/2016/12/IPA_Submission_The_Case_for_the_Repeal_of_Section_18C_09122016.pdf> 1.1.1.

[64] *Racial Discrimination Act 1975* (Cth) s 18C.

[65] Augusto Zimmermann, 'Section 18C Defiles Our Democracy, *Quadrant*, May 16, 2017 <https://quadrant.org.au/opinion/qed/2017/05/section18c-defiles-democracy/>.

[66] Ibid.

The threats by gay lobby activists have been the catalyst of meetings being cancelled by Christians. On September 17 2016, four Christian groups (the ACL, Marriage Alliance, Sydney Anglicans and Sydney Catholics) organised a meeting at the Mercure Hotel at Sydney Airport. However, this meeting had to be cancelled 'after a social media storm trigged phone calls that ''rattled'' employers and left the [hotel] concerned about the safety of staff and guests'.[67]

Zimmermann argued that it is necessary to have a civilised debate on the issue of same-sex marriage where 'both sides are allowed to present their case openly' because 'same-sex marriage is a contentious issue'. However, being 'offended' triggers anti-discrimination laws, making it a valid requirement for taking legal action'. As a consequence, 'this seriously impairs the targeted group's ability to express their own ideas and respond to adverse comments'.[68] As noted by Canadian lawyer Edward H. Lipsett:

> [M]uch speech criticized as 'hate speech' is in response to rebuttal of speech by or in favour of the 'protected' groups. Allowing or even encouraging speech by or supportive of 'protected' groups while prohibiting certain forms of speech against such groups unfairly favours one side of the debate against the other (or at least appears to do so) and violates the principle of neutrality. Again, it allows the proponents of some viewpoints to 'fight freestyle' while requiring others to observe 'The Marquis of Queensbury Rules'. Rather than enhancing the participation or credibility of the 'protected' group, this real or perceived unfairness might actually create a 'backlash' against them that could be more harmful to them than the impugned speech.[69]

Attempts to define the terms 'offend, insult, humiliate and intimidate' in s 18C quickly 'become[s] a circular and question-begging exercise'.[70] For example, the courts have failed to articulate a precise legal standard for identifying 'insulting' speech, with Lord Reid concluding in *Brutus v Cozens* (1973)[71] that '[t]here can be no definition. But an ordinary sensible man knows an insult when he sees or hears it'.[72] There have even been cases where

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[67] David Crowe, 'Marriage Event Off: Threats to Hotel Staff', *The Weekend Australian*, 17-18 September, 1.
[68] Augusto Zimmermann, Submission to The Expert Panel on Religious Freedom C/O Department of the Prime Minister and Cabinet, *A Legal Opinion on The Potential Impact on Religious Freedom if the Marriage Act is Amended (To Allow Same-Sex Couples to Marry)*, 25 January 2018, 45.
[69] Edward H. Lipsett, 'Case Comment Saskatchewan (Human Rights Commission) v Whatcott, 2013 SCC 11'
Manitoba Law Journal, 2013 <http://robsonhall.ca/mlj/sites/default/files/articles/Whatcott%20-%20Blog%20Post%20Version_0.pdf>.
[70] Dan Meagher, 'So Far So Good? A Critical Evaluation of Racial Vilification Laws in Australia' (2004) 32(2) *Federal Law Review* 225.
[71] AC 854.
[72] *Brutus v Cozens* (1973) AC 854, 862 (Lord Reid).

'there has been a finding that s 18C has been offended without any harm threshold analysis or reasoning whatsoever.'[73] Dan Meagher has identified at least five such matters.[74] Meagher concluded that the legal rule in s 18C is close to a 'personal discretion to do justice'.[75] He observed that:

> This practice alone gives the appearance of arbitrary and unprincipled decision-making. However, it may be the regrettable but inevitable consequence of having to apply an indeterminate harm threshold to a range of controversies of varying degrees of seriousness.[76]

The present notion of 'being offended' as encapsulated in s 18C is dangerously emotive and rests upon subjectivity. Because elastic subjective standards are used, the predictability to which the rule of law aspires is diluted, and other freedoms are unnecessarily chilled.[77] Hon. James Spigelman QC remarked, 'protecting people's feelings against offence is not an appropriate objective for the law'.[78]

As Zimmermann argued, 'this self-imposed censorship of ideas will inevitably cause the 'chilling effect' of limiting freedom of speech,[79] because of 'the fear of litigation and its risk of financial ruin, jail, collegial ostracism, or embarrassment.'[80] This is the catalyst of using subjective standards to judge human conduct. Allowing human emotion to judge human conduct has catastrophic effects on human freedom of speech, in particular, the impact upon Christians. There is a subjective standard buried in s 18C since it is not the reasonable person who must be offended to breach that Act, but a reasonable member of that class or group.

Reasonable people are offended when freedom of speech is diluted to any degree without a compelling government reason. Here the question will be whether the government's desire to stop all religious vilification, or anything resembling it, is compelling. I sense that

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[73] Meagher, above n 75, 231.
[74] The cases referred to are: *Rugema v J Gadsten Pty Ltd t/a Southcorp Packaging* [1997] EOC ¶ 92 - 887; *Combined Housing Organisation Ltd v Hanson* [1997] HREOCA 58; *Feghaly v Oldfield* [2000] EOC ¶93-090; *McMahon v Bowman* [2000] FMCA 3; *Horman v Distribution Group Ltd* [2001] FMCA 52.
[75] Meagher, above n 76, 235 – 236 (citations omitted).
[76] Ibid 235.
[77] Berg et al, above n 65, 1.7.2.
'The phrase 'chilling effect' is used to describe the impact of a law on the actions of one or more individuals (acting individually or as part of an organization), by which the individuals relinquish the exercise of a right (usually, a constitutional law right) because of fear of prosecution under that law.' Cf. Bruce R. Hopkins, *Hopkins' Nonprofit Law Dictionary* (John Wiley & Sons, 2015) 71
[78] James Spigelman, 'Free Speech Tripped up by Offensive Line', *The Australian*, 11 December 2012, 12, quoting Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press, 2012) 106.
[79] Zimmerman, above n 19, 460.
[80] Joel Harrison, 'Truth, Civility, and Religious Battlegrounds: The Context Between Religious Vilification Laws and Freedom of Expression' (2006) 12 *Auckland University Law Review* 79.

reasonable people think religious believers ought to be able to bear some criticism so long as it does not incite violence because that is the price of their free speech – being able to talk about their own beliefs freely. This idea was expressed in the Tribunals verdict in the *Catch the Fire Ministries* case.[81]

Judges have used subjective standards under the existing s 18C to judge human behaviour, not by community standards but by the standards of the alleged victim group.[82] While courts have confirmed that the test applied is objective, in that it does not appeal to the subjective effect of the individual to judge human behaviour, instead this 'objective test' is determined by reference to the effect the conduct had on a particular racial, national or ethnic group as opposed to the ordinary community.[83]

As Kiefel J noted in *Creek v Cairns Post Pty Ltd*,[84] 'it is necessary first to consider the perspective under consideration, which is to say the hypothetical person in the applicant's position or the group of which the applicant is one.'[85] *Clarke v Nationwide News Pty Ltd*[86] referred to this test as the 'reasonable victim perspective'.[87]

This test uses the subjective emotions of a minority to judge human behaviour. The effects of using subjective standards to judge human behaviour were identified by Zimmermann and Finlay:

> This 'reasonable victim' test further lowers an already minimal harm threshold, and adds a further element of imprecision and uncertainty, increasing the section's potential chilling effect on speech.[88]

[81] [2004] VCAT 2510. See VCAT Media Release, VCAT Ref: A392/2002, 22 June 2007 <http://www.vcat.vic.gov.au> at 30 July 2007.
[82] Anna Chapman, 'Australian Racial Hatred Law: Some Comments on Reasonableness and Adjudicative Method in Complaints Brought by Indigenous People' (2004) 30 *Monash University Law Review* 27, 31–2. See also; Augusto Zimmermann & Lorrain Finlay, 'A Forgotten Freedom: Protecting Freedom of Speech in an Age of Political Correctness' (2014) 14 *Macquarie Law Journal* 195.
[83] See, eg, *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615, [15] (Drummond J); *Jones v Scully* (2002) 120 FCR 243, 268–9 [98], 271 [108] (Hely J); *McGlade v Lightfoot* (2002) 124 FCR 106, 117 [46] (Carr J); *Eatock v Bolt* (2011) 197 FCR 261, 321 [253] (Bromberg J). See also Brad Jessup, 'Five Years On: A Critical Evaluation of the Racial Hatred Act 1995' (2001) 6 *Deakin Law Review* 104 and Zimmermann & Finlay, above n 87, 196.
[84] (2001) 112 FCR 352.
[85] *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, 356 [13] (Kiefel J).
[86] (2012) 201 FCR 389.
[87] *Clarke v Nationwide News Pty Ltd* (2012) 201 FCR 389, 401–3 [50]–[59] (Barker J)
[88] Zimmermann & Finlay, above n 87, 196.

The existing s 18D of the RDA provides a range of exceptions to s 18C. The conduct, however, must have been 'said or done reasonably and in good faith'.[89] The decision in *Eatock v Bolt*[90] demonstrates the subjective nature of the defences outlined in s 18D.

In concluding that Mr Bolt's conduct lacked 'objective good faith', Bromberg J relied upon a:

> [l]ack of care and diligence [as] demonstrated by the inclusion in the Newspaper Articles of the untruthful facts and the distortion of the truth which [his Honour] identified, together with the derisive tone, the provocative and inflammatory language and the inclusion of gratuitous asides.[91]

The qualifiers, 'reasonably and in good faith', have become 'ambiguous terms of art a judge could use to decide some speech on political, social, or cultural topics didn't actually qualify for the exemption.'[92]

Using subjective elements to judge human behaviour creates a sense of uncertainty. It also creates undue fear and intimidation on individuals who wish to freely express their opinions and ideas.[93] As Spigelman QC commented:

> A freedom that is contingent on proving, after the event, that it was exercised reasonably or on some other exculpatory basis is a much-reduced freedom. Further, as is well known, the chilling effect of the mere possibility of legal processes will prevent speech that could have satisfied an exception.[94]

It is important to note that Christians are not the only ones affected by s 18C of the RDA and its use of subjective standards as the grounds by which legal action can be taken. The consequences of using subjective standards to judge human behaviour can be seen in the Queensland University of Technology ('QUT') discrimination case.[95] The Federal Circuit Court dismissed Cindy Prior's case against QUT students Alex Wood, Calum Thwaites and Jackson Powell.[96] Prior had alleged that these students breached s 18C of the RDA.

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[89] *Racial Discrimination Act 1975* (Cth) s 18D
[90] (2011) 197 FCR 261.
[91] *Eatock v Bolt* (2011) 197 FCR 261, 358 [425] (Bromberg J).
[92] Chris Berg, 'Politics Stands in the Way of a Full 18C Repeal', *The Drum* (online), 25 March 2014 <http://www.abc.net.au/news/2014-03-25/berg-rda/5344302>, cited in Zimmermann & Finlay, above n 87, 197.
[93] Zimmermann & Finlay, above n 87, 197
[94] Spigelman, above n 83, 12, quoting Waldron, above n 83, 106.
[95] *Cynthia Prior v Queensland University of Technology & Ors (No.2)* [2016] FCCA 2853.
[96] The dismissal took place under *Federal Circuit Court Act 1999* (Cth) s 17A(2). This dismissal relied on the discussion of *Spencer v Commonwealth* (2010) 241 CLR 118.

However, Judge Michael Jarrett concluded that Prior's claim against them had no reasonable prospect of success.[97]

On 28 May 2013, Wood, Thwaites and Powell were using QUT's computer labs that were reserved for Aboriginal and Torres Strait Islander students. Prior asked them to leave when the students admitted they were not indigenous. The students argued that they were unaware that the computer labs were reserved for this particular ethnic group. Wood later posted on the 'QUT Stalkerspace' Facebook page - 'Just got kicked out of the unsigned Indigenous computer room. QUT stopping segregation with segregation…?' with Powell commenting, 'I wonder where the white supremacist computer lab is'.[98]

Prior complained to QUT about these and other comments, which were subsequently removed. However, Prior remained dissatisfied at QUT's handling of the case and lodged a complaint with the Australian Human Rights Commission (AHRC). Conciliation followed but the process failed to resolve the dispute. This led Prior to commence legal proceedings in the Federal Circuit Court against a number of QUT students including Wood, Thwaites and Powel, QUT and certain QUT academic staff. Prior alleged that the students breached s 18C whilst QUT breached s 9 of the RDA.

Judge Jarrett, in examining the conduct, asked - 'would the act, in all the circumstances in which it was done, be likely to offend ... a person or a group of people of a particular racial, national or ethnic group?'[99] He provided an overview of the law on s 18C whilst outlining some of the leading cases. In particular, he referred to *Eatock v Bolt*[100] and *Bropho v Human Rights & Equal Opportunity Commission.*[101] Judge Jarrett concluded that:

> [i]t is not reasonably likely that a hypothetical person in the position of the applicant, or a hypothetical member of the groups identified by Ms Prior who is a reasonable and ordinary member of either of the groups who exhibits characteristics consistent with what might be expected of a member of a free and tolerant society and who is not at the margins of those groups would feel offended, insulted, humiliated or intimidated by Mr Wood's words.[102]

[97] QUT Discrimination Case Exposes Human Rights Commission Failings', *The Conversation* (online), November 7, 2016, at https://theconversation.com/qut-discrimination-case-exposes-human-rights-commission-failings-68235#comment_1124894 (w/ Joshua Forrester and Lorraine Finlay).
[98] Ibid.
[99] *Cynthia Prior v Queensland University of Technology & Ors* (No.2) [2016] FCCA 2853, 30.
[100] (2011) 197 FCR 261.
[101] (2004) 135 FCR 105.
[102] *Cynthia Prior v Queensland University of Technology & Ors (No.2)* [2016] FCCA 2853, 49.

While supporters of s 18C may argue that this system works because a weak claim was dismissed at an early stage,[103] in addition to the legal costs involved in fighting the complaint, the reputation of the parties involved is also tainted. However, if Prior had brought more evidence showing that representative aborigines were offended by what had happened, Judge Jarrett would have been forced to conclude that the defendant's conduct contravened the subjective standard that was engaged.

V. CONCLUSION

This article has shown the persecution of Christians under Australian law and the impact these laws have on their, and others, freedom of speech as demonstrated in the three legislative examples provided.

Two common consequences presented itself in all the examples provided when subjective standards were used – confusion caused by unpredictability and the 'chilling effect' on freedom of speech.

In the first example, Martine Delaney made a complaint to Tasmania's Anti-Discrimination Commissioner against the Catholic Church and Archbishop Julian Porteous. Delaney argued that the *Don't Mess With Marriage* booklet caused 'immeasurable harm to the wellbeing of same-sex couples and their families across Tasmania'[104] and therefore breached s 17(1) of the *Anti-Discrimination Act 1998* (Tas).

To breach s 17 of the Tasmanian law, alleged discriminatory conduct need only offend a single member of a protected group. However, being 'offended' is an inherently subjective standard since different things offend different people. Conduct and words that are likely to incite violence are something reasonable members of the public can objectively agree on.

The *Catch The Fire Ministries* case was used as the second example. This case involved the religious vilification laws introduced in Victoria in 2001. The RRTA was introduced to prevent instances of either religious or racial vilification, applying the same formulations to religion as it did to race. Under the RRTA, motives are irrelevant, religious belief is the only

[103] 103 QUT Discrimination Case Exposes Human Rights Commission Failings', *The Conversation* (online), November 7, 2016, at https://theconversation.com/qut-discrimination-case-exposes-human-rights-commission-failings-68235#comment_1124894 (w/ Joshua Forrester and Lorraine Finlay).
103 Australian Bureau of Statistics, above n 58.
104 Australian Bureau of Statistics, above n 58.

substantial ground needed for the conduct, and the truth-value of the statement made is irrelevant. However, ss 11 and 12 provide some exemptions. Since the RRTA states that the truth-value and motives behind a statement are irrelevant, its reliance on subjective standards and its failure to use objective standards causes' societal dissatisfaction with the version of justice that results, it restricts the use of our freedom of speech for fear of persecution.

This subjective approach fails to adequately provide predictability, a necessary component of objective standards. The use of subjective standards offends the reasonable man's sense of justice because it disallows the critique of opposing worldviews that should be allowed so long as it does not incite violence. The ability to freely critique other ideologies and sharing one's own belief without the fear of persecution is an essential aspect of free speech. These are fundamental elements of a just legal system.

Because subjective standards ground the 'standing' of a complaint, anyone can file a complaint of religious vilification. To add insult to injury, s 9(1) outlines that the onus rests with the person charged, not the complainant. The introduction of the RRTA was not without dispute. In 2006, NSW Labor Premier Bob Carr argued that this legislation was problematic because of its inherent subjectivity - particularly when trying to determine what constitutes to a religious belief.

The *Catch the Fire Ministries* case showed the issues that arise when subjective standards are used for judicial enquiry. The *Islamic Council* argued that the statements made by Catch the Fire Ministries, including its affiliates Pastors Scot and Nalliah, incited religious vilification. The Victorian Civil and Administrative Tribunal's Vice President, Judge Higgins, argued that the information presented about Islam was unbalanced, hostile, demeaning and derogatory and the conduct in question was not done reasonably and in good faith.

The Tribunal eventually conceded and issued a joint statement affirming the right to 'robustly debate' religion, including the right to criticise opposing worldviews. This case demonstrates the issues that arise when subjective standards are the grounds by which a complaint can be made. The impact upon Christians is undeniable.

For the final example, I looked at s 18C of the RDA along with the case that relied on this section. Section 18C states that it is unlawful for a person to perform an act in public if the act is reasonably likely to offend, insult, humiliate or intimidate a person where the act is

done 'because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group'.[105]

The terms 'offend, insult, humiliate' and 'insulting', in conjunction with the notion of 'being offended', are indefinite and largely subjective. Attempts to define these terms become a circular and question-begging task. There have been cases where s 18C was triggered even when no harm had been established. This brought Meagher to conclude that the legal rule in s 18C is closer to a 'personal discretion to do justice'. Confidence in law flows from predictable objective standards. Since subjective standards do not provide predictability, laws that use such standards as its foundation are approached with distrust.

Judges appeal to subjective standards to determine whether s 18C has been contravened, thus lowering an already minimal harm threshold, and adding a further element of imprecision and uncertainty. Although s 18D provides exemptions, the decision in *Eatock v Bolt* demonstrated the subjective nature of these defences.

Using subjective standards creates a sense of uncertainty that affects free speech as individuals experience undue fear and intimidation, restricting them to share their thoughts and ideas. These consequences appeared in the case of *Cynthia Prior v Queensland University of Technology & Ors.* This case allowed Prior to make a complaint based upon her subjective feelings.

Although Judge Jarrett dismissed this case, the complaint was made based upon Priors subjective emotional state. Igniting a legal battle that was costly, timely, stressful and impacted the reputation of the parties involved. If Prior produced evidence showing that an aboriginal representative was offended by the student's conduct, Judge Jarret would have been obligated to rule that their conduct breached the subjective standard that was used.

There have also numerous reports of violent protests by same-sex marriage activists against Christian bodies and supporters of traditional marriage. As mentioned, the staff of the ACL were threatened, the ACL's headquarters were firebombed and white powder was delivered in an envelope to the organisation.

[105] *Racial Discrimination Act 1975* (Cth) s 18C.

This article has shown the persecution suffered by Christian for using their right to free speech. People should not be persecuted for expressing their beliefs;[106] rather, their ideas should be analysed and critiqued amicably. To quote American conservative political commentator and lawyer, Benjamin Shapiro, 'facts don't care about your feelings'.[107] In other words, human emotion should not be the deciding factor that dictates whether a person is guilty of 'hate speech' or vilification. Instead, the position expressed by the alleged perpetrator should be assessed for its truth value through a reasoned approach.

[106] Insofar as it does not condone criminal acts.
[107] Ben Shapiro, 'Facts don't care about your feelings', *Twitter* (5 February 2016) < https://twitter.com/benshapiro/status/695638866993115136?lang=en>.