

THE SPECTRAL GROUND: RELIGIOUS BELIEF DISCRIMINATION

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This article considers the ground of religious belief under anti-discrimination law and argues that it is a spectral ground. Religious belief is never defined under anti-discrimination law; it merely has to be 'lawful', which is also not defined. This gives the proscription a permeable character, allowing mainstream Christianity, neo-conservatism and other variables to seep in. An analysis of discrimination complaints shows how this occurs metonymically through other proscribed grounds, such as sex, sexuality, ethnicity and race. The phenomenon is most marked post-9/11 in relation to 'Islamophobia'. The proscription of religious vilification and incitement to religious hatred further reveals the tendency of the spectral ground to absorb prevailing political influences.

I INTRODUCTION

The proscription of discrimination on multiple grounds, including race, sex, disability and sexuality, was not only a dimension of the modernisation of the Australian state from the 1970s, but also evidence of the official commitment to diversity, multiculturalism and tolerance.¹ Despite the universal condemnation of the Holocaust that resulted in the *Universal Declaration of Human Rights*,² there is an absence of unanimity as to whether discrimination on the ground of religious belief or activity should be unlawful or not.³ While proscribed in most Australian

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¹ Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (1990) 54.

² GA Res 217A (III), UN Doc A/810 at 71 (1948).

³ The inclusion of the ground in the *Equality Act 2006* (UK) was also contentious. For a thoroughgoing analysis, see Neil Addison, *Religious Discrimination and Hatred Law* (2007).

jurisdictions,⁴ the Commonwealth,⁵ New South Wales⁶ and South Australia remain notable exceptions. Ambivalence about the nature of the harm is also reflected in the way the meaning of religious belief or activity is approached. There is either no legislative definition at all, or a curious self-referential non-definition, as may be seen in the case of the Victorian legislation:

‘religious belief or activity’ means –

- (a) holding or not holding a lawful religious belief or view;
- (b) engaging in, not engaging in or refusing to engage in a lawful religious activity.⁷

In accordance with the philosophy of state secularism to which the Australian polity is committed, this provision tacitly acknowledges tolerance of a plurality of religious beliefs in addition to the legitimacy of atheism and agnosticism, but it fails to advance our understanding of the ground of religious belief. Indeed, a cursory look at the area reveals that it is beset with confusion and ambiguity. There is not only a reticence about delineating the proscribed ground, which remains a spectre behind the text, but uncertainty is compounded by the numerous legislative exceptions arising from the persistent privileging of (mainstream) Christianity. However, it is this normative standpoint of privilege that provides the clue regarding the definitional lacuna, for the non-normative – the Other – is invariably determined in relation to the unstated point of reference of the norm.⁸

When we look to grounds such as sex, race or sexuality, the powerful norms of benchmark masculinity, white Anglo-centricity and heterosexuality can be discerned, even though legislative definitions are also likely to be absent. The meaning of these grounds may need to be explicated from time to time, for a degree of permeability always exists at the margins, but religious belief, concerned as it is

⁴ *Equal Opportunity Act 1995* (Vic) s 6(j); *Anti-Discrimination Act 1991* (Qld) s 7(i); *Equal Opportunity Act 1984* (WA) s 53; *Anti-Discrimination Act 1998* (Tas) s 16(o), (p); *Discrimination Act 1991* (ACT) s 7(1)(i); *Anti-Discrimination Act 1992* (NT) s 19(1)(m).

⁵ The *Human Rights and Equal Opportunity Commission Act 1986* (Cth) authorises the conciliation of complaints on the ground of religion, although discrimination on this ground is not unlawful. See Schedule 2, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 Articles 2(1) and 18 (entered into force 23 March 1976). The Australian Human Rights Commission is currently conducting a project entitled *Freedom of Religion and Belief in the 21st Century* which includes consideration of a federal Religious Freedom Act <<http://www.hreoc.gov.au/frb/index.html>> at 17 June 2009.

⁶ In NSW, the *Anti-Discrimination Act 1977* was originally intended to include religion as one of the grounds of discrimination, but this did not eventuate. In 1984, the New South Wales Anti-Discrimination Board published a detailed report, *Discrimination and Religious Conviction*, in which it recommended that the Act be amended to make it unlawful to discriminate on the grounds of religious belief or absence of religious belief (Recommendation 1), but this recommendation was not implemented.

⁷ *Equal Opportunity Act 1995* (Vic) s 4(1). The Territory Acts go a little further. See *Discrimination Act 1991* (ACT) s 11; *Anti-Discrimination Act 1992* (NT) s 4(4) (which expressly includes Aboriginal spiritual belief).

⁸ Martha Minow, *Making All the Difference: Inclusion, Exclusion and American Law* (1990) 51.

with a person's interior life, remains perpetually recondite. Indeed, it may be that the subjectivity and heterodoxy of beliefs are impossible to corral and universalise within a legislative instrument.

The ambiguities and the silences within the legislative texts nevertheless accentuate the interpretative burden on human rights agencies, tribunals and courts, which are compelled to wrestle with novel legislation unaided. In the absence of guiding principles and in light of the sparseness of the jurisprudence, decision-makers must rely on the values gleaned from the normative universe they inhabit in order to engage in what Robert Cover terms 'jurisgenesis', or the creation of meaning.⁹ This normative universe, with which religious belief is infused, is socially, politically and historically constructed. What is more, religious belief may be concerned with supernatural, transcendent power, divine truth and moral authority, all of which accentuate the hermeneutic challenge for the rationality and authority of the profane world of law.¹⁰ Given the metaphysical character of religious belief, how can law purport to proscribe discrimination on such a ground at all?

Generally speaking, the law has no interest in what goes on in a person's head, which affirms the paradigmatically private and subjective nature of religious belief. Law is concerned only with the outward manifestation of a belief or prejudice, which crystallises into discriminatory conduct against a person or persons. Even then, the proscription of discrimination on the ground of religious belief is restricted to certain areas of public and quasi-public life, such as employment and education. Religious vilification legislation, which takes the proscription to a new plane, as we will show, is not delimited in the same way.

Religious organisations have long held a relationship to the public sphere *qua* government through assertion of moral authority over issues of social significance, such as sexuality, reproduction and mortality, which further underscore the ambiguities besetting the secular state. While classical liberal theory accepted a division between public and private spheres, the regulatory state disrupted any notion of a stable line of demarcation.¹¹ Fluctuations in the characterisation of what

⁹ Robert Cover, 'Nomos and Narrative' (1983) 97 *Harvard Law Review* 4, 11.

¹⁰ It is notable that it took the High Court 80 years to provide a definition of religion in relation to s 116 of the *Australian Constitution*. Even then, all the judges could agree upon was that the test of religion should not be confined to theistic religions, but the definition articulated by Mason ACJ and Brennan J is frequently quoted: 'the criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief, though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion': *Church of the New Faith v Commissioner of Pay-roll Tax* (1983) 154 CLR 120 ('*Scientology case*') 136. For discussion of s 116, see Tony Blackshield, 'Religion and Australian Constitutional Law' in Peter Radan, Denise Meyerson and Rosalind F Croucher (eds) *Law and Religion: God, the State and Common Law* (2005); Reid Mortensen, 'The Unfinished Experiment: A Report on Religious Freedom in Australia' (2007) 21(1) *Emory International Law Review* 167.

¹¹ Margaret Thornton, 'The Cartography of Public and Private' and Archana Parashar, 'Reconceptualisations of Civil Society: Third World and Ethnic Women' in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (1995), together with other

is public and what is private are marked in the context of religion, religious practice and ritual, which are conventionally conceptualised as belonging to civil society, an opaque sphere of freedom that is neither strictly public nor private. However, an intimate liaison has burgeoned between religion and government in recent years so as to compromise the commitment to state secularism. The permeable nature of the public/private distinction vis-à-vis religion is clearly exemplified in the case of religious schools, which not only receive funds from the public purse,¹² but may also be exempted from anti-discrimination legislation in respect of their employment and educational practices.¹³

Australian politics has not traditionally been infused with the level of religious rhetoric that is commonplace in the United States. However, the increasing influence of fundamentalist Christian organisations on Australian political power can be discerned, reflected in a significant move towards the conservative right in mainstream politics.¹⁴ In this article, we will consider the shift in the rhetorical and conceptual framework for the understanding of religious belief in Australian discrimination law over the past thirty years which follows the trend of political discourse. During the late 1970s and 1980s, secularism and an increasing level of support for atheism, agnosticism and scepticism were overlaid with policies of multiculturalism, where diversity in religious belief was incorporated into understandings of culture. By the 1990s, a broader conceptualisation of religion and spirituality facilitated the repositioning of belief as a foundational basis of identity, reflected in the emergence of multi-faith organisations promoting religious tolerance. However, the advent of 9/11 and the emergence of the global war on terror cut short the political influence of this paradigm, which has now been superseded by a legitimisation of conservative Christian values within the body politic.

This shift to the centre of the influence of conservative Christianity is shored up by the discursive positioning of Islam as the Other to normative Christianity. Notably, it involves a slippage between religion and race, reflecting the way the construction of the dichotomous Other to the norm is invariably referenced in terms of the unknown, the exotic and the dangerous. Concurrently, what constitutes the norm has extended far beyond mainstream Christianity to include the fundamentalist strands of Christianity that were formerly consigned to the realm of the Other. Similarly, we will argue, 'othering' within a religious frame involves identification with reference to a racialised characterisation. This is clearly illustrated in the construction of the Arab-Islamic Other 'of Middle-Eastern appearance' who, in the

essays in that collection. See also, Jeff Weintraub and Krishan Kumar (eds), *Public and Private in Thought and Practice: Perspectives on a Grand Dichotomy* (1997).

¹² The government funding of religious schools was held to be constitutionally valid in *Attorney-General for the State of Victoria (At the Relation of Black) & Ors v The Commonwealth of Australia & Ors* (1981) 146 CLR 559.

¹³ Margaret Thornton, 'The Public/Private Dichotomy: Gendered and Discriminatory' (1991) 18 *Journal of Law and Society* 448, 454–55.

¹⁴ Marion Maddox, *God Under Howard: The Rise of the Religious Right in Australian Politics* (2005).

post-9/11 environment is discursively marked as ‘radical Islamist terrorist’.¹⁵ The imbrication of religion with race has come to be reflected in complaints of discrimination and vilification on the grounds of religious belief, as we will demonstrate.

The research forms part of the ‘EEO in a Culture of Uncertainty’ project, which investigates the retreat from equal employment opportunity in Australia as a result of the shift from social liberalism to neoliberalism. Fieldwork for the project involved a longitudinal study of employment-related discrimination, including examination of confidential conciliation complaint files held by anti-discrimination agencies in three jurisdictions.¹⁶ Research in this area is fraught with difficulties. Compounding the limited jurisdictional coverage, legislative ambiguity and numerous exemptions, complaint statistics are low and there are few reported decisions. In addition, there has been limited scholarly attention to the distinctive ground of religious belief in Australian discrimination law.¹⁷ Discrimination complaints can only ever be regarded as the tip of the iceberg in terms of actual experience as there are many reasons why individuals may not lodge a formal complaint about discriminatory conduct and, even if they do, why they are loath to proceed to a public hearing if conciliation fails. Paradoxically, despite the documentation of an escalation of violence and vilification against Muslims in the post-9/11 environment,¹⁸ complaints to the Human Rights and Equal Opportunity Commission (HREOC) by people who identified as being of Arab or Middle-Eastern background did not increase substantially,¹⁹ and there have been few reported decisions. Lack of clarity over legislative coverage may go some way towards explaining this situation, but research also indicates that fear of victimisation, mistrust of authorities, lack of awareness of avenues for complaint and unsatisfactory outcomes all contribute to this situation.²⁰ On the other hand, public attention through media coverage of high profile cases appears to have some impact on complaints, as was demonstrated in Victoria when complaints on the ground of religious belief peaked during the year of the test case under the *Racial and Religious Tolerance Act 2001* (Vic).²¹ Nevertheless, while law invariably lags behind social and political trends, it does provide a useful lens through which to examine the dynamic character of what is normative and what is Other in a religious frame.

¹⁵ Scott Poynting et al, *Bin Laden in the Suburbs: Criminalising the Arab Other* (2004).

¹⁶ In order to adhere to the confidentiality requirement, the jurisdictions will not be identified.

¹⁷ Cf Reid Mortensen, ‘Rendering to God and Caesar: Religion in Australian Discrimination Law’ (1994–5) 18 *University of Queensland Law Journal* 208; Carolyn Evans and Beth Gaze, ‘Between Religious Freedom and Equality: Complexity and Context’ (2008) 49 *Harvard International Law Journal Online* 40.

¹⁸ Human Rights and Equal Opportunity Commission, *Ismaʿ—Listen: National Consultations on Eliminating Prejudice against Arab and Muslim Australians* (2004) 47–69.

¹⁹ Ibid 87. However, it is understood informally that the lodgement of complaints increased after publication of this report.

²⁰ Ibid 87–93.

²¹ *Islamic Council of Victoria v Catch the Fire Ministries Inc* [2004] VCAT 2510 (‘*Catch the Fire*’).

II THE CONTINGENCY OF RELIGIOUS BELIEF

When religious belief is included in discrimination legislation, its circular self-referentiality has resulted in an undetermined field of legal interpretation. Traditionally, understandings of religious belief were formed with reference to ecclesiastical theology and established Christian denominations; however, in contemporary Australia, legislators and legal decision-makers must take cognisance of heterodoxy, atheism and religious diversity. The absence of religious belief or activity as a ground in some jurisdictions, combined with its permeable nature, means that it may be inflected in complaints on other grounds, such as sex or race. It may then function metonymically as a substitute ground, notably when the religious belief has not been successfully assimilated and is therefore constructed as Other to normative versions of Christianity. However, this is not a static paradigm and the law is itself instrumental in establishing the limits of acceptability in terms of religious belief or practice. The legal construction of the contentious and fluid standard of reasonableness plays a significant role in establishing the parameters for understanding what may be considered acceptable or 'lawful' in discrimination law. In the following sections, we will discuss these issues with reference to complaints and reported decisions where religious belief is in question.

A Definitional Ambivalence

The influence of secularism as well as changes in social attitudes towards women and sexuality is reflected in cases where complainants' beliefs, behaviour, or even embodiment, are seen to conflict with traditional Christian moral values. Where religious organisations are exempt from the application of anti-discrimination legislation, they have defended this as a right to religious freedom, but this often results in collision with other protected values. In *Thompson v Catholic College, Wodonga*,²² a teacher at a Catholic school was dismissed the day after she returned from maternity leave because she was not married and was living in a de facto relationship. The employer stated that the complainant's 'public' declaration of her 'lifestyle' as a result of her pregnancy was contrary to the teachings of the Catholic Church. Similarly, in *Griffin v Catholic Education Office*,²³ a teacher who was a co-convenor of the Gay and Lesbian Teachers and Students Association was refused classification in Catholic schools on the grounds that her 'public lifestyle' as a lesbian activist was at variance with the values and principles of Catholic teachings. These cases clearly raise questions about the vexed nature of the public/private distinction and the extent to which religious institutions should be permitted to prescribe standards for women's sexuality. The decision-makers found in favour of the complainants, demonstrating the way the notion of religious freedom may be reconstructed when it conflicts with other rights.²⁴ Nevertheless, the implacable

²² (1988) EOC ¶92-217 (Vic ESCAB).

²³ (1998) EOC ¶92-928 (HREOC).

²⁴ Reid Mortensen, 'A Reconstruction of Religious Freedom and Equality: Gay, Lesbian and De Facto Rights and the Religious School in Queensland' (2003) 3(2) *Queensland University of Technology Law & Justice Journal* 320.

pattern of sex discrimination within religious organisations was echoed in a recent complaint when a woman who worked in a Catholic primary school unsuccessfully applied for a position as acting religious education co-ordinator because it was decided that the Church was in need of young men.²⁵ The complainant, who had worked for the Catholic Education Office for over 25 years, said that this was not the first time she had encountered discrimination.

It was the proscription of discrimination on the grounds of sex and sexual preference that facilitated these complaints, rather than religious belief, but they demonstrate a destabilisation of the normative standard of conservative Christian morality. This is reflected in Census statistics which indicate a declining proportion of the population who identify with mainstream Christian denominations, but an increase in the number of people who do not identify with a religion, as well as an increase in non-Christian religions and Christian fundamentalist groups.²⁶ Rather than decreasing religiosity, these trends have been claimed as evidence of the increased significance of spirituality in Australian life.²⁷ Discrimination law has attempted to keep pace with this reframing of religious belief by assimilating religious diversity and atheism into definitions of religious belief, but this has generated further uncertainty. When confronted with populist notions of religious belief, decision-makers tend to revert to their own normative universe in attempting to establish the parameters of tolerance for religious otherness.

The liberal location of religious belief within the private realm would seem to account for its inclusion within the rubric of 'private life' in the previous Victorian legislation,²⁸ but this presented a paradoxical situation when a worker was forced to resign because of the pressure her employer placed on her to attend their Pentecostal church.²⁹ When the complainant attended the church on one occasion, she said that during the service, people spoke in tongues and rolled on the ground; she resigned shortly afterwards and the Victorian Anti-Discrimination Tribunal found in her favour when the matter could not be conciliated. Regardless of what one might think of the practices of Potter's House, the legal focus was not directed to considering whether its practices were outside the purview of acceptable or rational behaviour. The issue is whether the complainant was treated less favourably than another (real or hypothetical) person for holding or *not holding*, as in this case, a lawful belief. What was at issue was the pressure exerted on the complainant by the respondent employer that was irrelevant to her work performance. The lawfulness of the belief was not interrogated in any of the

²⁵ EEO Project CP5, 2006–07.

²⁶ The percentage of the population who identified as Christian in the Census fell from 96.1% in 1901 to 68% in 2001. Between 1996 and 2001, the number of people who identified with non-Christian religions increased by 79% for Buddhism, 42% for Hinduism, 40% for Islam and 5% for Judaism. There was also an increase of 11.4% for Pentecostal Christians: Australian Bureau of Statistics, *Year Book Australia 2006* (2006) 376.

²⁷ Gary Bouma, *Australian Soul: Religion and Spirituality in the Twenty-First Century* (2006).

²⁸ *Equal Opportunity Act 1984* (Vic) s 4(1). The category of 'private life' also included political belief and contrasted with that of 'status', which included sex, marital status, race and impairment. See Thornton, above n 13, 451.

²⁹ *Ciciulla v Curwen-Walker* (1998) EOC ¶92-934 (Vic ADT).

complaints considered, although the theological spectre perpetually 'haunts' religious hatred hearings, as we will show.

It is characteristic of evangelical and Pentecostal Christian organisations to operate within business enterprises where individual economic prosperity can be pursued under God's guidance, successfully merging neo-liberal capitalism with conservative morality.³⁰ These organisations want their activities to be viewed as religious rather than business practices in order to avoid legislative constraints. However, if not characterised as religious at the outset, they must apply for a discretionary exemption. A Baptist Church group unsuccessfully sought an exemption under the *Equal Opportunity Act 1995* (Vic) in order to employ only people who had 'publicly confessed Jesus Christ', had been baptised and were 'walking in daily fellowship with Jesus'.³¹ The organisation, which was formed for the purposes of community care, was unable to show that the employment only of committed Christians was necessary to carry out its outreach and community care projects. Employers do not have the right either to impose or require a particular belief system in relation to their employees unless the work is of a religious nature.³²

On the other hand, employees who resolutely abide with the tenets of their religion may find a high cost attaches to their commitment in a secular setting. In *Marett v Petroleum Refineries*,³³ a worker who refused to pay a union levy on the grounds that it was against his religious belief was ostracised by his co-workers who threatened industrial action; management isolated him in a small hut without work for 12 weeks and he was later dismissed. While the act of reprisal was found to be discriminatory, the then Victorian Equal Opportunity Board stated that, as a general proposition, an act of discrimination in itself is not unreasonable and declined to award costs against the respondent.³⁴

Despite a formal commitment to secularism, the heritage of English Protestantism underpins all aspects of socio-political and legal organisation in Australia and there is an ambivalent response to atheism or agnosticism as an alternative. Whether discrimination on the basis of the attribute of religious belief or activity should be understood to include an absence of belief was tested when a worker employed in a community organisation under the auspices of the Baptist Community Church was presented with a new contract which required her to be an active church member.³⁵ Demonstrating the contingency of understandings of religious belief in

³⁰ This is sometimes referred to as 'prosperity gospel theology'. See Maddox, above n 14, 226.

³¹ *Mornington Baptist Church Community Caring Inc* (2006) EOC ¶93-422 (VCAT).

³² A position with which some commentators trenchantly disagree. See, eg, Patrick Parkinson, 'Religious Vilification, Anti-Discrimination Laws and Religious Minorities in Australia: The Freedom to be Different' (2007) 81 ALJ 954, 963-66.

³³ *Marett v Petroleum Refineries (Australia) Pty Ltd* (1987) EOC ¶92-206 (VCAT); *Petroleum Refineries (Australia) v Marett* (1988) EOC ¶92-237 (SCV).

³⁴ *Marett v Petroleum Refineries (Australia) Pty Ltd* (1987) EOC ¶92-206 (VCAT). However, the normal rule that costs lie where they fall applied when the respondent appealed unsuccessfully to the Supreme Court. See *Petroleum Refineries (Australia) v Marett* (1988) EOC ¶92-237 (SCV).

³⁵ *Dixon v Anti-Discrimination Commissioner of Queensland* (2004) EOC ¶93-327 (SCQ).

discrimination law, the *Anti-Discrimination Act 1991* (Qld) did not specifically provide for complaints on the grounds of absence of religious belief at the time and the complaint was dismissed by the Commission. However, the legislation was amended a year later, redefining ‘religious belief or religious activity’ to include ‘not holding a religious belief’ and ‘not engaging in a lawful religious activity’.³⁶ The complainant successfully appealed to the Queensland Supreme Court.³⁷

In the ACT, the case of a non-denominational private school that purported to have a strong religious conviction but declined to endorse a particular religion, which arguably disadvantaged it in terms of funding arrangements, was found not to have been discriminated against on the ground of religious conviction.³⁸ Peedom DP relied on the criteria for a religion articulated by Mason ACJ and Brennan J in the *Scientology case*,³⁹ determining that an ‘ethical standard of non-discrimination’ was inadequate to satisfy the ACT provision; there had to be a standard ‘based upon a supernatural being, thing or principle’.⁴⁰ The spectre of monotheism can be clearly discerned here among the polymorphic belief systems of the secular State.

B *Ethno-Religious Origin*

Rather than functioning exclusively as a site for conflicting moral values within a multicultural society, religious belief also features prominently in understandings of ethnicity and cultural identity. The inclusion of ‘ethnic origin’ and ‘ethno-religious origin’ in the definition of race in discrimination law offers an avenue for complaints where ethnicised identity is seen to be formed in relation to religion. The attention to religious belief as a characteristic of ethnicity - along with language, culture and history - marked a significant shift in focus away from metaphysical notions of theology and faith to subjective embodiment via ethnicisation and racialisation. While the term ‘ethnic origin’ is included as one of the cognate terms under ‘race’ in all legislation, ‘ethno-religious origin’ is specifically identified only in NSW and Tasmania⁴¹ and has been a contested and ‘*ad hoc* category’.⁴² Sikhs and Jews have been found to constitute ethno-religious groups, but the situation in relation to Muslims is less clear.⁴³ Where religion is regarded as a fixed identity through its association with ethnicity or race, it is more readily recognised as a basis for discriminatory treatment. However, there has been greater ambivalence in legal responses to discrimination claims which, for instance, assert the right to accommodation of religious practices in employment or challenge

³⁶ *Anti-Discrimination Act 1991* (Qld) s 7(1).

³⁷ See also *Walsh v St Vincent de Paul Society (No 2)* (2009) EOC ¶93-522 (QADT).

³⁸ *Best Practice Education Group Ltd T/as Blue Gum School v Department of Education & Community Services* [2002] ACTDT 1 (‘*Best Practice*’).

³⁹ Above n 10.

⁴⁰ *Best Practice* [2002] ACTDT 1 [25].

⁴¹ *Anti-Discrimination Act 1977* (NSW) s 4; *Anti-Discrimination Act 1998* (Tas) s 3.

⁴² Rachel A D Bloul, ‘Anti-Discrimination Laws, Islamophobia, and Ethnicization of Muslim Identities in Europe and Australia’ (2008) 28(1) *Journal of Muslim Multicultural Affairs* 7.

⁴³ It has been suggested that the main reason why anti-religious legislation was passed in the UK was that Jews and Sikhs, but not Muslims, were protected by the *Race Relations Act 1976* (UK). See Addison, above n 3, 27.

the fundamental dominance of Christianity in public education. Notably, where religious identity is not constructed in relation to mono-ethnicity, as is the case with Muslims, it appears to present a particular challenge.

In NSW, the inclusion of ethno-religious origin under the definition of race was a concession to longstanding resistance from religious organisations to legal recognition of religious belief as ground for discrimination complaints; however, there has been confusion as to its interpretation.⁴⁴ The application of the provision in claims of religious belief discrimination was tested when a Jewish father made a complaint about the imposition of Christian ritual and celebrations such as school prayers, Christmas and Easter activities in the state school his children attended. The NSW Anti-Discrimination Tribunal dismissed the complaint, finding that members of ethno-religious groups, such as Jews, Muslims and Sikhs, cannot lodge complaints on the basis of religion under the NSW legislation 'by the back door'.⁴⁵ While Jews are recognised as a race for the purposes of the *Anti-Discrimination Act 1977* (NSW), a fundamental challenge to the hegemony of the Christian calendar was considered unreasonable by the Tribunal, despite increasing moves towards accommodation of religious diversity in state education. The Tribunal found the term ethno-religious origin 'ambiguous or obscure' in a claim by a Muslim prisoner who requested provision of *halal* meat, but determined that being a Muslim was insufficient to constitute ethno-religious origin in the absence of a 'close tie between that faith and his race, nationality or ethnic origin'.⁴⁶ However, five years later, a similar complaint by a Muslim prisoner based on the ground of religious belief or religious activity was upheld in Queensland against the State corrections system. The complainant received monetary compensation for the time that he was denied fresh *halal* meat.⁴⁷

While religious organisations have succeeded in obtaining numerous exemptions from the application of discrimination law in relation to employment, several jurisdictions make it unlawful for an employer to refuse the reasonable accommodation of employees' religious practices during working hours.⁴⁸ The failure otherwise to accommodate religious practices that do not comport with the norm is an ongoing source of complaint. In a Tasmanian case, *Ahmad McIntosh v TAFE Tasmania*,⁴⁹ a Muslim teacher argued that he had been discriminated against both directly and indirectly because he had not been provided with a dedicated prayer room, and was not released from duties on Friday afternoons or during the Islamic holy days of Eid, when the Christian holidays of Easter and Christmas were imposed on all staff. In assessing whether less favourable treatment had occurred, the Commission suggested that comparison was necessary not only with other

⁴⁴ The NSW Law Reform Commission argues that it is unnecessary and has recommended removal: *Review of the Anti-Discrimination Act 1977* (Report 92, 1999) Recommendation 30.

⁴⁵ *A obo V and A v NSW Department of School Education* [2000] NSWADTAP 14 [20].

⁴⁶ *Khan v Commissioner, Department of Corrective Services* [2002] NSWADT 131 [21].

⁴⁷ *State of Queensland v Mahommed* (2007) EOC ¶93-452 (QSC).

⁴⁸ *Equal Opportunity Act 1984* (WA) s 54(3); *Discrimination Act 1991* (ACT) s 11; *Anti-Discrimination Act 1992* (NT) s 31(3).

⁴⁹ [2003] TASADT 14. The Anti-Discrimination Tribunal reviewed and affirmed the Commissioner's decision to dismiss the complaint.

religions but also with the position of agnostics and atheists.⁵⁰ In another complaint, a Hindu man who worked as an accountant was asked to perform duties such as lifting heavy boxes whilst he was fasting. He was reprimanded by his manager for fasting on weekdays and, after a performance appraisal, was dismissed.⁵¹ In another, a driver who was required to attend a disciplinary hearing during Ramadan said that despite requesting another date, the hearing progressed in his absence and he was penalised.⁵²

While the increasing incidence of the intersection of law with diverse religions theoretically suggests a greater sensitivity to plurality and increasing permeability at the boundaries of legal understandings of religious belief,⁵³ it is not clear that this has been the case. A presupposition of strict equal treatment prevails within anti-discrimination law in the absence of an express injunction to accommodate difference. As these cases demonstrate, there has been a level of ambivalence and inconsistency in the legal responses to religious difference, including attempts to incorporate atheism.

C Race

The recognition of ethno-religious origin as an aspect of racial identity represents a significant shift in legal understandings of religious belief. It is asserted that race is an ‘immutable characteristic’, which it is some of the time, whereas religion is largely a function of individual choice.⁵⁴ However, the shift from the conceptualisation of race as biology to differentiation based on social and cultural practices is well established,⁵⁵ and is reflected in legislation which recognises a degree of mutability in understandings of race through reference to cognate terms ‘colour’, ‘descent’, ‘national origin’ or ‘ethnic origin’. The inclusion of ‘ethno-religious origin’ as a term recognised the function of religion as a signifier of race. Religion articulated as belief or theology may be incomprehensible to law but when it is understood as a characteristic of race or ethnicity, this facilitates identification because it is marked in difference. As the following complaints demonstrate, where religion is in issue, it commonly involves a connection with race, but this is not always made explicit.

In *T v Department of Education (Vic)*,⁵⁶ a Sikh teacher, harassed by students who mocked his religious practices, was undermined by his employer, transferred, declared in excess and ultimately pressured to resign. Despite finding that the complainant had suffered from a form of discrimination, The Human Rights and Equal Opportunity Commission determined that the cause of his difficulties was his

⁵⁰ Ibid [11].

⁵¹ EEO Project, CF31, 2006–07.

⁵² EEO Project, CF4, 2006–07.

⁵³ Margaret Davies, ‘Pluralism in Law and Religion’ in Peter Cane, Carolyn Evans and Zoë Robinson (eds) *Law and Religion in Theoretical and Historical Context* (2008) 95.

⁵⁴ Rex Tauati Ahdar, ‘Religious Vilification: Confused Policy, Unsound Principle and Unfortunate Law’ (2007) 26(2) *University of Queensland Law Journal* 293, 301.

⁵⁵ David Theo Goldberg, *Racist Culture: Philosophy and the Politics of Meaning* (1993) 70 ff.

⁵⁶ [1997] HREOC 38.

inability to maintain classroom discipline and to make himself understood, not his race. This would appear to be an illustration of the way seemingly rational manifestations of discrimination operate as the 'handmaiden of racelessness'.⁵⁷ That is, if a rational justification for the discriminatory conduct can be adduced, the racism at the heart of the matter is conveniently erased.

Similarly, in *Kapoor v Monash University*,⁵⁸ the complainant was criticised for wearing national dress, vegetarianism, abstention from alcohol, and her 'interpersonal skills' and was not offered a renewed contract. Basing her complaint on race or religious belief, she argued that her reserved social behaviour was a characteristic of Hindu women of Brahmin caste. The explanation for differential treatment was attributed in each of these cases to an individualised characteristic, rather than race or religious belief, precluding a finding of discrimination. However, when religious identity is assimilated into understandings of race, differential treatment becomes more apparent.

The starkest evidence of the assimilation of racial and religious identity has occurred in the aftermath of 9/11, the Bali bombing and the Iraq War through the construction of the Islamic Other of Middle-Eastern appearance. Prior to these events, conflict seen as a result of differences in religious belief was represented as a characteristic of ethnicity, occurring within and over the border of the nation state. However, the post-9/11 discourse of the 'clash of civilisations', represented as primarily a conflict over values based in religious belief, has radically altered understandings of religious belief as a result of its rhetorical association with religious fundamentalism and terrorism. Notably, the post-9/11 environment has 'propelled the phenomenon of the sacred, especially the Islamic version of monotheistic religion, into sharp political focus'.⁵⁹ The term 'fundamentalism' is used very loosely in the media and popular political discourse to describe any movements which may be characterised as anti-West and there is a slippage with radical Islamism, Jihadism and terrorism. Islamophobia, which functions to demonise through the homogenisation of differences based in race, culture and national origin, is notable for its privileging of the signifier of religion.

We found clear evidence of this phenomenon in complaint files examined. One complaint was made by a young man in the immediate aftermath of 9/11, who said that he had been discriminated against and ridiculed by his manager because of his Muslim religious belief and Arabic background and interrogated because his name was 'Jihad'. The complainant said that his manager had engaged in a campaign of hate against him by alleging that he was involved in criminal activities. He was on leave with an injury on 11 September 2001 and when he returned to work,

⁵⁷ David Theo Goldberg, *The Racial State* (2002) 228.

⁵⁸ (1999) EOC ¶92-971 (VCAT). This decision was overturned on appeal when Byrne J found that refusal to renew a contract of employment did not constitute unlawful discrimination: *Monash University v Kapoor* [1999] VSC 463; (2002) EOC ¶93-188 (VCA, FC). Cf *Ardehirian v Robe River Iron Associates* (1990) EOC ¶92-299 (HREOC); [1993] FCA 352 (FCA).

⁵⁹ Bryan Turner, 'Fundamentalism, Spiritual Markets and Modernity' (2004) 38(1) *Sociology* 195, 196.

comments were made about ‘shameful Muslims’ and Islam as a ‘disgraced religion’. He was asked if he had a pilot’s licence, interrogated about his religious and political beliefs and beard, exposed to obscene images of Osama bin Laden and told that a Muslim colleague had something to do with the 9/11 aircraft attacks. The complaint was conciliated and financial compensation paid, although the complainant resigned.⁶⁰ An Afghani Muslim woman who was employed in a management position in a large telecommunications company said that once other staff became aware of her national origin and religious beliefs, she was treated less favourably. She was denied leave during Ramadan, despite the fact that another worker had been granted leave for Jewish religious holidays. The complainant said that during a meeting, her manager imputed a connection between her and terrorism when he said that bin Laden was also from Afghanistan, which she said was intended to humiliate her. The complainant was refused an opportunity to transfer, and eventually resigned due to the culture of racism and discrimination in the workplace.⁶¹

Another Muslim complainant said that he had been subjected to discrimination by his manager on the basis of his Muslim beliefs over a number of years, although this intensified in the post-9/11 period, demonstrating the way media and political portrayals can serve to legitimise racism. After he made a complaint to the union and management, his shifts were changed, resulting in loss of income. The complainant was on stress leave for four months and when he returned to work, he was placed back on the shift with the same supervisor, who victimised him and allegedly attempted to harm him physically while driving a fork lift. The complainant suffered an injury and eventually resigned as he found the workplace environment intolerable.⁶²

Women who are readily identified as Muslim because they wear a headscarf or veil report that they have often been the targets of racist violence and discrimination and that this increased post-9/11 as their clothing is now read to signify religious fundamentalism, danger and terrorism.⁶³ This experience was demonstrated in a complaint involved a Muslim woman who was employed through a labour-hire agency as a trainer for workers in care services. The complainant, who wears a *hijab*, said that once she arrived at the workplace, the manager looked her up and down and then demanded to see her qualifications. As she was explaining that she was fully qualified, he interrupted and showed her to the door. The complainant believed that this was because of her religious beliefs.⁶⁴ However, it is not dress *per se* which causes discriminatory treatment, but rather its function as a signifier of difference which may then be used to rationalise the response.

In South Australia, a proposal to introduce a prohibition on discrimination on the grounds of religious appearance or dress,⁶⁵ but not religious belief or practice, well

⁶⁰ EEO Project CF65, 2001–02.

⁶¹ EEO Project CF35, 2006–07.

⁶² EEO Project CF54, 2001–02.

⁶³ Human Rights and Equal Opportunity Commission, above n 18, 45.

⁶⁴ EEO Project CF29, 2006–07.

⁶⁵ *Equal Opportunity (Miscellaneous) Amendment Bill 2008* (SA) s 61.

demonstrates the law's ambivalent response, particularly in relation to Muslim women. The proposal has been met with strong opposition, particularly from Christian religious groups.⁶⁶ The paradox of religious organisations opposing legislation which makes discrimination unlawful on the grounds of religious belief or practices becomes even more apparent in relation to vilification legislation, as we will go on to discuss.

III VILIFICATION AND INCITEMENT

Verbal abuse has been recognised within the gamut of unlawful behaviour covered by anti-discrimination legislation from the outset, provided sufficient nexus with a proscribed ground exists. However, legislation expressly directed towards unlawful public acts of vilification and hatred came later and was more contentious because it was seen to breach the fundamental liberal democratic principle of freedom of speech. Indeed, Australia initially reserved in respect of Article 4(a) of the *International Convention on the Elimination of All Forms of Racial Discrimination*⁶⁷ dealing with racial vilification and incitement to racial hatred. Racial vilification is now unlawful in all Australian jurisdictions, except the Northern Territory and there is a significant body of case law, although no cases have been considered by the High Court.⁶⁸ The *Racial Discrimination Act 1975* (Cth) (*RDA*) was amended in 1995 to prohibit racial vilification, but its application to vilification of religious belief emanating from ethnic origin remains unclear. In *Jones v Scully*,⁶⁹ Hely J found that Jews in Australia constitute a group of people with an 'ethnic origin' under the *RDA* by virtue of their common customs, beliefs, language and other characteristics in a case involving distribution of anti-Semitic literature. However, while clearly inflected in understandings of Jewish identity, it was not religious belief *per se* which was in question in this case, nor in others involving Holocaust denial literature.⁷⁰

Legislation in Victoria, Queensland and Tasmania specifically prohibits vilification on the basis of religious belief.⁷¹ The *Racial and Religious Tolerance Act 2001* (Vic) (*RRTA*) represents the most explicit attempt in Australia to establish a framework for balancing the principle of freedom of expression with the harmful

⁶⁶ Anne Hewitt, "'It's Not Because You Wear Hijab, It's Because You're Muslim"- Inconsistencies in South Australia's Discrimination Laws' (2007) 7 *Queensland University of Technology Law and Justice Journal* 57.

⁶⁷ Opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

⁶⁸ For an overview of the various frameworks adopted, see Luke McNamara, *Regulating Racism: Racial Vilification Laws in Australia* (2002).

⁶⁹ [2002] 120 FCR 243, 272, citing *King-Ansell v Police* [1979] 2 NZLR 531; *Mandla v Dowell Lee* [1983] 2 AC 548 *Miller v Wertheim* [2002] FCAFC 156.

⁷⁰ *Jones v Toben* [2002] FCA 1150; *Toben v Jones* [2003] FCAFC 137; *Jones v Toben* [2009] FCA 354.

⁷¹ *Racial and Religious Tolerance Act 2001* (Vic) ss 8, 25; *Anti-Discrimination Act 1991* (Qld) ss 124A, 131A; *Anti-Discrimination Act 1998* (Tas) s 19. Criminal sanctions apply in Victoria and Queensland for serious religious vilification.

effect of vilifying conduct.⁷² It also affirms the intersection of race with religious belief and expresses a commitment to religious pluralism through recognition of cultural diversity. It thereby challenges the privileged status of mainstream Christianity, representatives of which have been most strident in opposition to the legislation because it is seen to conflict with the principle of freedom of religion, so far as the right to proselytise and evangelise is concerned.

Criticism of the legislation extends to allegations that it is counterproductive, even within its own terms. Parkinson, for example, argues that religious vilification legislation effects ‘collateral damage to religious freedom’⁷³ which threatens multiculturalism. He asserts the right of religious organisations to exemption from all forms of discrimination law on the grounds of their status as ‘minority groups’, suggesting that legislation should apply only when it is demonstrated that it is necessary to protect ‘public safety, health, or morals or the fundamental rights and freedoms of others’.⁷⁴ Such a laissez-faire approach subverts the rationale for the existence of anti-discrimination legislation by exempting powerful religious organisations which, as the complaints demonstrate, are often responsible for the most egregious breaches. Additionally, it strategically performs an inversion of the meaning of tolerance as framed within legislation such as the *RRTA* by asserting the status of mainstream Christian religious groups as minorities in need of protection, arguing that this is the function of tolerance in liberal democracies committed to freedom of religion.

A Catch the Fire

The test case under the *RRTA*, *Catch the Fire*, has been described as ‘the best argument against religious vilification’ laws that are ‘conceptually unsound and produce results antithetical to the religious tolerance its promoters hope for’;⁷⁵ it has been further contended that both the legislation and decisions made under it ‘fail on a human rights analysis’.⁷⁶ While attempts to curtail religious vilification undoubtedly present the greatest challenge to legislators, this challenge is symptomatic of the jurisgenesis associated with the elusive concept of religious belief, rather than the form of conduct with which the legislation is primarily concerned, that is, the incitement to hatred of a person or persons. Notwithstanding the fine distinctions that might be made between the harm inflicted by vilifying words and other forms of discriminatory conduct, it is difficult to deny that

⁷² The Preamble to the *RRTA* affirms the importance of freedom of expression as ‘an essential component of a democratic society’ but that vilifying conduct is ‘contrary to democratic values’.

⁷³ Parkinson, above n 32, 958.

⁷⁴ Ibid 965.

⁷⁵ Ahdar, above n 54, 293–4. See also Garth Blake, ‘Promoting Religious Tolerance in a Multifaith Society: Religious Vilification Legislation in Australia and the UK’ (2007) 81 *ALJ* 386; Parkinson, above n 32.

⁷⁶ Dermot Feenan, ‘Religious Vilification: Quelling Fires of Hatred?’ (2006) 31(3) *Alternative Law Journal* 153, 156.

vilification can lead to discriminatory harms in the workplace and elsewhere, even when the connection may be ‘indirect, conjectural and rather diffuse’.⁷⁷

The action was taken by the Islamic Council of Victoria (ICV) as a representative body supported by an interfaith alliance,⁷⁸ against an evangelical Christian group, Catch the Fire Ministries (CTFM). Contrary to the legislation’s express commitment to religious tolerance and interfaith dialogue, the case has been characterised as one of religious extremism: ‘the two faces of “the Religious Other” - Muslim and Evangelical Christian’.⁷⁹ The alignment, on one side, of an interfaith coalition of mainstream Christian churches with Muslim faith organisations supporting racial and religious vilification legislation and, on the other, of an evangelical Christian sect, right-wing lobby group and conservative politician opposed to the legislation destabilised the conventional parameters for understanding religious belief in Australia.⁸⁰ The Victorian Court of Appeal decision in *Catch the Fire* provides the most thoroughgoing judicial consideration of religious vilification to date.⁸¹

Judge Higgins of the Victorian Civil and Administrative Tribunal (VCAT) identified the jurisprudential lacuna when he pointed out that the only anti-discrimination case to which he had been referred involving religious vilification was *Deen v Lamb*,⁸² a complaint made by the Chairman of the Islamic Council of Queensland concerning the distribution of literature by a candidate in the federal election. In that case, the Tribunal found that the respondent had incited serious contempt for Muslims, but that it was protected by the implied constitutional right to freedom of political speech because the literature was distributed during the course of a federal election.⁸³ *Catch the Fire* shared a number of characteristics with *Deen v Lamb*, not least because it also allegedly vilified Muslims and occurred in the wake of 9/11,⁸⁴ but it could not claim constitutional protection. The seminar in question, which according to advertising material, provided an answer to the question ‘What is Holy Jihad?’, offered an ‘insight into Islam’, and exhorted public action under the banner ‘Rise up Australia’, was conducted a few months after

⁷⁷ Ahdar, above n 54, 297.

⁷⁸ The Uniting Church of Australia, Catholic Church and Board of Imams all unsuccessfully attempted to intervene on behalf of the ICV.

⁷⁹ Hanifa Deen, *The Jihād Seminar* (2008) 9.

⁸⁰ CTFM is a non-denominational international Pentecostal Christian group which was supported throughout the case by the conservative political lobby group Salt Shakers <<http://www.saltshakers.org.au>>. It was also supported by the then Treasurer of Australia, Hon Peter Costello, who said he took great interest in the case and supported the appeal: 774 ABC Radio, Interview with Lindy Burns (8 October 2007) <<http://www.treasurer.gov.au/DisplayDocs.aspx?pageID=&doc=transcripts/2007/148.htm&min=phc>> at 22 May 2009.

⁸¹ For detailed analyses, see Ahdar, above n 54; Blake, above n 75; Mortensen, above n 10; Parkinson, above n 32.

⁸² [2001] QADT 20.

⁸³ *Australian Capital Television Proprietary Limited v The Commonwealth* [1992] 177 CLR 106.

⁸⁴ The pamphlet in question in *Deen v Lamb* was distributed for the federal election on 10 November 2001.

9/11; the related article published on the internet, 'An Insight into Islam by Richard', was dated only fifteen days after 9/11.

In *Catch the Fire*, Higgins J found that the seminar and publications failed the test of reasonableness, not having met the standard of 'good faith' which provides protection of freedom of speech and other defined areas of expression.⁸⁵ He determined that the seminar as a whole breached the *RRTA*, that it was 'presented in a way which is essentially hostile, demeaning and derogatory of all Muslim people, their god, Allah, the prophet Mohammed and in general Muslim beliefs and practices'.⁸⁶

The Court of Appeal found that the expression 'on the grounds of religious belief' in the *RRTA* does not prohibit statements concerning religious beliefs *per se*, irrespective of whether they may offend or insult, a reminder of the official commitment to both state secularism and freedom of speech. Rather, the proscription is limited to instances of incitement, which necessitates reaching 'the mind of an audience'.⁸⁷ In purporting to correct VCAT's interpretation of the legislation, the Court identified a model for religious vilification that focuses on third party hearers.⁸⁸ Nettle JA found that in order for the respondent not to be caught by the Act, it would have to be established that the conduct was engaged in 'reasonably and for a genuine religious purpose', which is based on the familiar standard of the *reasonable* person, although such a standard would need to be assessed with reference to Australia's 'open and just multicultural society'.⁸⁹ Neave JA differed as to the appropriate test, suggesting that it should be whether the statements were likely to incite hatred in the mind of an *ordinary* member of the audience, with reference to the historical and social context in which they occurred.⁹⁰

It is not clear how this hypothetical person in whom the conduct was *calculated* to incite hatred is constructed if it is not based on the actual audience, although the test is supposed to be objective. Nettle JA was critical of the disproportionate attention paid by Higgins J in VCAT to the three Muslim converts who were present,⁹¹ but how do we know how the reasonable or ordinary *non*-Muslim would respond, or even a reasonable or ordinary Muslim for that matter, and how could a judge objectively determine their response? This is just one of the hermeneutic challenges that *Catch the Fire* poses for judges in the future.⁹²

In assessing the potential to incite 'reasonable' members of the audience to hatred, Nettle JA paid particular attention to the failure of the Tribunal to take account of the ameliorating effect of Pastor Scot's invocation to 'love and to witness to

⁸⁵ [2004] VCAT 2510 [389], citing *Bropho v HREOC* (2004) 135 FCR 105, 128–9 (French J). This case, arising from *RDA* s 18C, dealt with vilification rather than incitement.

⁸⁶ [2004] VCAT 2510 [383].

⁸⁷ *Catch the Fire Ministries v Islamic Council of Victoria* (2006) 15 VR 207, 212.

⁸⁸ Ahdar, above n 54, 306.

⁸⁹ (2006) 15 VR 207, 241 (Nettle JA).

⁹⁰ *Ibid* 255 (Neave JA).

⁹¹ *Ibid* 233 (Nettle JA).

⁹² Cf Ahdar, above n 54.

Muslims'.⁹³ The argument that expressions of love counterbalance expressions of hatred would seem to appeal to the notion of the court as impartial arm of the secular State. However, Neave JA attributed less significance to the distinction between the vilification of belief and the vilification of believers as the source of error in the reasoning of Higgins J. Although the *RRTA* is concerned with the vilification of persons, she pointed out that when a person comes from a racial or religious background that differs from the majority of the population:

differences ... may define minorities in ways in which they are not seen as defining those who belong to the majority ... Attributing characteristics to people on the basis of their group membership is the essence of racial and religious prejudice and the discrimination which flows from it.⁹⁴

Neave JA has a valid point here, as it is impossible to sustain an epistemological separation between disfavoured Others and the prejudice against them as required by the *RRTA*.⁹⁵ The Holocaust denial cases illustrate this very clearly.⁹⁶

Inevitably, the spectre of the 'truth' of the religious belief also lingers. On the one hand, Nettle JA argued that it was inappropriate for a 'secular tribunal to attempt to assess the theological propriety'.⁹⁷ On the other hand, Neave JA endorses the view of Higgins J that the presentation should have been 'balanced'.⁹⁸ But how can the issue of 'balance' be determined without reference to the tenets of theology? Nettle JA discounted the Tribunal's concern with whether the statements made were a balanced representation as this entailed privileging the evidence of the 'three recent converts to Islam', finding that the affront to them was 'largely if not wholly irrelevant'.⁹⁹ In light of the differences between Neave JA and Nettle JA, it is uncertain whether the vexed issue of the 'truth' of a theological position will need to be placed under the judicial microscope or not in the future.

The Court remitted the case to VCAT, but it was settled without a rehearing, leaving ongoing uncertainty regarding the interpretation of the *RRTA* on key points. What was perverse about *Catch the Fire* was that it involved one religious group using a legal forum against another when disagreement between religions is par for the course. The legislation appears to have been hijacked from the outset and deployed in unintended ways, although the coincidence of the passage of the *RRTA* and 9/11 was totally unexpected.

The vilification jurisgenesis set the bar very high, privileging the right to free speech. This may well have been the standard that Parliament intended when it passed the *RRTA*, emerging as it did out of the discourse of tolerance that was in the ascendancy when the statute was enacted prior to 9/11. However, there has been a

⁹³ (2006) 15 VR 207, 233.

⁹⁴ Ibid 258 (Neave JA).

⁹⁵ Cf Feenan, above n 76, 156.

⁹⁶ Above ns 69 and 70.

⁹⁷ (2006) 15 VR 207, 220 (Nettle JA).

⁹⁸ Ibid 259 (Neave JA).

⁹⁹ Ibid 233 (Nettle JA).

paradigmatic shift since then. Fundamentalist Christianity no longer occupies a position of marginality, but is appealing to an increasing proportion of the population.¹⁰⁰ More significantly, however, the post-9/11 environment has given rise to increased levels of anti-Islamic sentiment which may be just as readily expressed as racism.

Catch the Fire has become a watershed in legal responses to religious belief, its influence extending to the United Kingdom, where it is said to have fuelled opposition to the *Racial and Religious Hatred Bill* in 2005.¹⁰¹ There, the new and contentious ground of ‘religion or belief’ was introduced under the *Equality Act 2006* (UK).¹⁰² This was regarded as necessary in order to extend the protection already offered to ‘mono-ethnic’ groups, specifically Sikhs and Jews, under the *Race Relations Act 1976* (UK),¹⁰³ although the legislation is more limited in coverage. The criminalisation of religious hatred under the *Racial and Religious Hatred Act 2006* (UK) requires behaviour to be intentional and ‘threatening’, and includes a freedom of speech clause.¹⁰⁴ The motivation to address the uncertainty regarding coverage had been enhanced by the exploitation of the distinction between racial and religious hatred by ultra-right wing nationalists responsible for anti-Muslim publications.¹⁰⁵ However, it has been suggested that convictions for religious hatred are unlikely under the legislation, where proof of intention is necessary for incitement to religious hatred, but not for racial hatred.¹⁰⁶ As in Australia, the legislative and jurisprudential terrain concerning religious belief is uncertain and its contingent relationship to the dynamic political climate is also readily apparent.¹⁰⁷

¹⁰⁰ Maddox, above n 14.

¹⁰¹ Addison, above n 3, 140.

¹⁰² *Equality Act 2006* (UK) s 44.

¹⁰³ *Mandla v Dowell Lee* [1983] 2 AC 548 (HL). In this decision, Jews and Sikhs were specifically identified as groups defined by ethnic origin for the purposes of the *Race Relations Act 1976* (UK) and this definition has been adopted in relation to racial hatred provisions in the *Crime and Disorder Act 1998* (UK).

¹⁰⁴ For discussion, see Javier García Oliva, ‘The Legal Protection of Believers and Beliefs in the United Kingdom’ (2007) 9 *Ecclesiastical Law Journal* 66.

¹⁰⁵ Kay Goodall, ‘Incitement to Religious Hatred: All Talk and No Substance?’ (2007) 70(1) *Modern Law Review* 89, 94.

¹⁰⁶ *Ibid* 112.

¹⁰⁷ This is exemplified in cases concerning challenges to school uniform policies. In *R (on the application of Watkins-Singh) v Governing Body of Aberdare Girls' High School* [2008] EWHC 1865 (Admin), a school was found to have indirectly discriminated against a Sikh student by refusing her permission to wear a Kara bracelet on the grounds of her race under the *Race Relations Act 1976* (UK) and her religion under the *Equality Act 2006* (UK). However, in *R (on the application of Begum) v Head Teacher and Governors of Denbigh School* [2006] UKHL 15, the House of Lords overturned the Court of Appeal’s decision that a Muslim student who was refused permission to wear the *jilbab* (a long coat-like garment) at school breached UK and European human rights law. This decision was applied in *R (on the application of X) v Head Teacher and Governors of Y School* [2007] EWHC 298 (Admin), where a school denied a Muslim student permission to wear the *niqab* veil (covering all apart from the eyes).

B Other Cases of Vilification

Catch the Fire is not the only case to have been heard under the *RRTA*. In *Fletcher v Salvation Army*,¹⁰⁸ a prisoner alleged religious vilification against witchcraft and Wicca in an educational program run at a prison. The case was dismissed by Morris J, VCAT President, as ‘preposterous’ and ‘hopeless’. He reiterated that the *RRTA* was concerned with the vilification of persons, not beliefs, a distinction that proved to be so contentious in *Catch the Fire*. Morris J found the alleged incitement to hatred in the King James version of the Bible – that witches are Satanists – could not possibly constitute vilification because it was based on ‘an arid and irrelevant theological debate’.¹⁰⁹ Perhaps unsurprisingly, *Fletcher* resulted in amendment of the *RRTA*, requiring leave of the Tribunal if a complaint is denied on the basis that it is deemed to be frivolous, vexatious, misconceived or lacking in substance.¹¹⁰

In *Ordo Templi Orientis v Legg*,¹¹¹ a representative complaint was lodged by a religious group whose members practice Thelema against two people who published on the internet allegations that it was a protected paedophile group and that it also kidnapped, tortured and killed children; the incitement of hatred against members of the group was unequivocal. This case would seem to represent a paradigm of what was intended by the *RRTA*. There is no interrogation whatsoever of the religious beliefs associated with *Ordo Templi Orientis* and its lawfulness is assumed. The entire focus of the decision is directed towards the harm to persons, that is, the hatred arising from the proscribed act of incitement. Furthermore, no time is expended on whether the casual internet surfer is a reasonable or an ordinary person, or something else altogether. Surprisingly, VCAT made no reference to *Catch the Fire*. Nevertheless, the claim represented a rare success under the *RRTA*, even more so when it resulted in a prison sentence for contempt of court when the respondents failed to comply with VCAT’s order to remove the material from the internet.

Francis v YWCA Australia,¹¹² heard after the *Fletcher* amendment to the *RRTA*, involved an application to strike out the proceedings on the basis that there was no reasonable prospect of success. The imbrication of the religious and the political was clearly apparent in the facts: an anti-abortion campaigner complained that YWCA was responsible for religious vilification against Catholics because it sold and distributed T-shirts with the slogan ‘Mr Abbott, get your rosaries off my ovaries’. Mr Abbott, the Minister for Health and Ageing in the federal Parliament at the time, who was responsible for approving the abortion drug RU 486, was known to be a devout Catholic opposed to abortion. VCAT found that while the imputation contained in the slogan might be that Catholics are bigoted, this falls short of demonstrating the vilification required by the *RRTA* and the application was dismissed.

¹⁰⁸ *Fletcher v Salvation Army Australia* [2005] VCAT 1523.

¹⁰⁹ *Ibid* [12].

¹¹⁰ *RRTA* s 23A.

¹¹¹ [2007] VCAT 1484.

¹¹² [2006] VCAT 2456.

IV CONCLUSION

We have traced the chequered history of religious belief discrimination in Australia over its short life of less than three decades. Regulatory initiatives emerged as evidence of the commitment of the secular state to difference and diversity within a multicultural milieu, but gatekeepers have been challenged in administering and interpreting what has proven to be an elusive variable. Despite the prevailing philosophy of state secularism and the legislative focus on discriminatory conduct, the unstated norm of mainstream Christianity continues to ‘haunt’ the ground of religious belief. This norm initially operated to consign fundamental Christianity to the realm of the Other, but the embrace of neo-conservatism saw a liaison effected between the polity and the religious right, which resulted in a changed configuration. While the line of demarcation between the norm and the Other is always unstable, the Other selectively began to absorb new characteristics, particularly of a corporeal nature, becoming more exotic and racialised. The conjunction of race and religion crystallised with the events of 9/11, the Bali bombing and the Iraq War, giving rise to a pronounced Islamophobia that tested the rhetoric of tolerance.

The racialisation of religious belief highlights the hermeneutic dilemma confronting judges of the secular state, for it conveniently enables them to avoid having to confront opaque and discomfiting metaphysical questions that are contingent on faith rather than proof: ‘it is not within the judicial sphere to determine matters of religious doctrine and practice’.¹¹³ If the ground of religious belief can be dealt with metonymically via race, sex or sexuality, the State then appears to retain its secularity and the courts their neutrality. The slippage between race and religion provides a striking example of this phenomenon, first via ethno-religiosity and, secondly and more overtly, via race, particularly in the wake of 9/11. The materiality of discriminatory conduct and the harm that flows from it assists in deflecting attention away from the hermeneutic conundrum at the heart of the matter. The racialisation of religious hatred legislation occurred in the same way as with the discrimination proscription. The spectral nature of the ground of belief under anti-discrimination laws allows it to absorb different incarnations of the Other according to the prevailing political climate. This does not make it any easier for judges, as *Catch the Fire* reveals. In desperation, critics averred that repeal (in this case, of the *RRTA*) is the answer while, for proponents, it was simply a matter of drafting. It seems to us, however, that the spectral nature of ‘lawful religious belief’ is always going to inhabit an elusive and contested terrain within the secular state.

¹¹³ *Scientology case*, above n 10, 151 (Murphy J).