

# The Fine Art of Giving and Taking Offence

## Birkenhead Lecture

Chief Justice Robert French AC  
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The ways of love were counted by Elizabeth Barrett-Browning. The ways of giving offence and taking it have not been so poetically enumerated. Offence given may be directed to attributes which one human or group of humans may attach to others. They may be directed to opinions or beliefs. The taking of offence may involve various levels of emotional intensity ranging from annoyance to anger and even physical violence. Where the law should step in to sanction the giving of offence is a matter of ongoing debate. Should the law imagine and protect a right not to be offended? Should it be concerned with the feelings of individuals or wider issues of social harmony? While these things are debated, the legislative finger moves on under the imperatives of the day, pulled one way by the value we accord to freedom of speech and expressive action and the other by the need to protect perceived interests of the community and its members. In interpreting such laws the courts apply legal standards rather than precise legal rules. Hence the frequent appearance in such cases of the 'reasonable person' as the judge's helper. It is a purpose of this lecture to illustrate the many forms of the law's responses to offensive speech or conduct, their historically contingent nature and the difficulty of formulating a general principle about whether and when the law should have anything to say about such conduct.

The unforgettable man in whose memory this Annual Lecture is held, was said to be good at giving offence. Ivor Thomas, who wrote in 1930 'An Oxford Appreciation' of Lord Birkenhead, attributed this in part to him not having finished classics. Thomas observed, in the gendered terms of his time:

The study of law casts a man at once into the sordid and harsh, into an atmosphere where everybody who is not trying to do down is trying not to be done down. If a man takes "Greats" first and then passes to the study of law ... he has been

innoculated against the disease and jurisprudence may do little harm to his character.<sup>1</sup>

The famously offensive remarks to judges attributed to Lord Birkenhead when he was plain 'F E Smith', have been quoted so often by desperate after-dinner speakers, as not to bear repetition here. Some of them were reconstructions. Lord Birkenhead's biographer, John Campbell, quotes George Jager who shared chambers with F E:

He would invent incidents which never occurred in order to introduce some especially neat repartee which had subsequently floated into his mind, too late for actual use, but too good not to be retailed to his admiring audience.<sup>2</sup>

It is not unusual for barristers to construct biting repartees when the time for their deployment has fled and perhaps that is just as well. Many years ago I requested a magistrate in Perth to reconsider the breadth of an evidentiary ruling adverse to my prosecutorial case. He responded impressively — *quod scripsi scripsi* — what I have written, I have written. A riposte along the lines that 'the words of Pontius Pilate are a fitting expression of Your Worship's resolve', would have given me some transient satisfaction, but would not have assisted my case.

There are reliable accounts of F E Smith's acerbic tongue, not least that of his maiden speech in the House of Commons in 1906, given by Paul Johnson, writing in the *Spectator* a hundred years after the event. Johnson said that the new member craved no indulgence of the House nor did he observe the convention of keeping his material uncontroversial but 'made his speech as offensive to the government benches as he possibly could.'<sup>3</sup> His view of what it took to get ahead as a nation and as an individual did not place him in the forefront of the *bien pensants* of his day nor would it have placed him at the forefront today. In his rectorial address at Glasgow University in 1923, he told the students that the recently formed League

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<sup>1</sup> Ivor Thomas, *Our Lord Birkenhead: An Oxford Appreciation* (Putnam, 1930) 11–12.

<sup>2</sup> John Campbell, *F E Smith: First Earl of Birkenhead* (Jonathan Cape, 1983) 113, n 54.

<sup>3</sup> Paul Johnson, 'The age of stout hearts, sharp swords — and fun', *Spectator* (online), April 2006 <http://new.spectator.co.uk/2006/04/the-age-of-stout-hearts:sharp-swords-and-fun>.

of Nations would not keep the peace. There would always be wars. The motive of self-interest was the mainspring of human conduct and 'the world continue[d] to offer glittering prizes to those who have stout hearts and sharp swords.'<sup>4</sup> If he were alive today, he would give more offence than he did then and much more offence would be taken. On that note let me turn to the vast generality of my topic.

The idea of legal sanctions attaching to expressive conduct characterised as offensive, and particularly to constituted authority and organised religion, seems to have existed for a very long time. Historically, offences involving speech and other forms of offensive conduct have included insulting the dignity of the sovereign, popularly known as *lese majeste*, seditious libel, blasphemy, scandalising the courts, defamation, obscenity, and offensive language and communications generally. Racist and other kinds of negative speech today can contravene laws reflecting, and sometimes extending beyond, international human rights norms. Those classes of communication are typically gathered under the rubric of 'hate speech'. It is a widely used term and seems to have a wide meaning. The American Bar Association defines 'hate speech' as 'speech that offends, threatens or insults groups based on race, colour, religion, national origin, sexual orientation, disability or other traits.'<sup>5</sup> Its use in that way involves an appropriation of the strong negative connotation of 'hatred' to condemn a range of conduct, including conduct which while it should be strongly deprecated, may be informed by something less than 'hatred' in its ordinary sense. The appropriation of narrowly focussed negative terms to market broadly defined norms can risk undercutting what it seeks to promote. It can detract from the moral clarity of the law.

Overregging the negative nomenclature of offensive speech goes back a long way. Sir William Blackstone, writing of high treason, which he equated to the *crimen laesae majestatis* of the Romans, quoted deplorable examples of persons executed for mere oral insults against the King. Happily, by the time he wrote, it seemed, as he put it, clearly to be

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<sup>4</sup> Ibid.

<sup>5</sup> Students in Action, 'Debating the Mighty Constitutional Opposites: Debating Hate Speech', American Bar Association, [www.americanbar.org/groups/public\\_education/initiatives\\_awards/students\\_in\\_action/debate\\_hate](http://www.americanbar.org/groups/public_education/initiatives_awards/students_in_action/debate_hate)

agreed by the common law and the Statute of Edward III that words spoken amounted only to a high misdemeanour and not high treason. As he said of offensive spoken words directed at the sovereign:

They may be spoken in heat, without any intention, or be mistaken, perverted, or mis-remembered by the hearers; their meaning depends always on their connexion with other words and things; they may signify differently even according to the tone of voice, with which they are delivered; and sometimes silence itself is more expressive than any discourse. As therefore there can be nothing more equivocal and ambiguous than words, it would indeed be unreasonable to make them amount to high treason.<sup>6</sup>

That is an observation about the spoken word which is as true today as it was when Blackstone wrote it and tells us something of the slipperiness of the legal labelling of speech as offensive or insulting. And even though Blackstone distinguished the spoken from the written word, there is much about the character of the latter that depends upon context, circumstances and readership which must be considered before treating it as offensive.

The common law offence of *Crimen Laesae Majestatis*, sometimes connected with the French words *lese majeste*, surfaced in the Union of South Africa in 1935. Two persons published a pamphlet reflecting adversely on King George V and the amount which the English taxpayer was paying for his upkeep. They were convicted of *Crimen Laesae Majestatis* in having wrongfully and unlawfully printed and published certain scandalous and dishonouring words against 'our Sovereign Lord, the King, whereby the Majesty of our said Sovereign Lord, King George V, was dishonoured and his dignity injured.' Davis J wrote the judgment of the Supreme Court allowing an appeal against the convictions.<sup>7</sup> He found that the charge alleged only an injury to the dignity of the King, and did not mention his Union Government. It was therefore defective, for the essence of the offence was injury to the *majestas* of the State. The judgment ended with a cautionary quotation reflecting a general issue:

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<sup>6</sup> William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1769, Reprint 1983) vol IV, 81.

<sup>7</sup> *R v Gomas* (1930) SALR-KPA 225.

there is hardly any crime in which greater caution is to be enjoined upon the judge, so as on the one hand to preserve the maintenance of peace and good order, and on the other hand not to render anyone the unfortunate victim of political dissensions by excessive severity.<sup>8</sup>

As we shall see shortly, half a century later a kind of low grade statutory *Crimen Laesae Majestatis*, protecting the Industrial Relations Commission of Australia from being brought into disrepute by its critics ushered in the implied freedom of political communication under the Australian Constitution.

I should not, in the presence of the Treasurer of Gray's Inn, a distinguished practitioner of the dark arts of defamation law, let this occasion pass without some reference to that subject which has played a significant part in the development of the implied freedom in Australia. Although the common law provided limited recourse in respect of defamatory speech generally and required publication to a third person, the Star Chamber Court took a less benign view, particularly of libelling and scandalous words against Nobles. William Hudson, a Bencher of Gray's Inn, was a leading practitioner in that Court appointed as a counsellor of the Star Chamber Bar in 1608. In his treatise on that unlamented institution, he recounts cases of libel and of scandalous words against Nobles severely punished and extending to libels made against the dead.<sup>9</sup> Holdsworth in his history quotes the seriously threatening words of the Star Chamber '[I]et all men take heed how they complayne in words against any magistrate for they are Gods.' The common law of defamation in the United Kingdom and in Australia today is substantially affected by statute. In Australia, in relation to defamation against public figures, the reach of the tort is constrained by the implied constitutional freedom of political communication, which also affects the reach of legislative power of any Australian parliament, Federal, State or Territory, to impose burdens on offensive speech and expressive conduct generally, and is discussed later in this lecture.

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<sup>8</sup> Ibid 235.

<sup>9</sup> William Hudson, *A Treatise of the Court of Star Chamber*, (Legal Classics Library, first published 1792, 1986 ed) vol 2, 100–104.

Yesterday I visited the magnificent Codrington Library at All Souls College, Oxford with its splendid statue of William Blackstone surrounded by written learning from floor to ceiling. The students there for the most part appeared to be working off personal computers. In our age, when it is said that a child thinks of a book as an iPad that does not work, it is good to recall the fine art of giving offence in words printed on paper in a book that can be held. An example which also makes a useful point about offensive speech generally, appeared in a book review, which was itself the length of a short novel, written in 1830 by a former resident of 8 South Square, Grays Inn, Thomas Babington Macaulay. The book which was his target was written by an evangelical Anglican Member of Parliament, the Reverend Michael Thomas Sadler MP. Sadler argued, contrary to Professor Malthus, who was still alive at the time, that human fertility was inversely proportional to population density. This was a theory underpinned by an optimistic view of divine providence. It was about as convenient to mankind as that presently promulgated on the website of the Institute of Creation Research that the current trend of global warming may be returning our global temperatures to levels prevalent in the Garden of Eden.<sup>10</sup> Macaulay began his review of Sadler's book, with the warning '[w]e did not expect a good book from Mr Sadler and it is as well that we did not for he has given us a very bad one.'<sup>11</sup> It was, he said, full of 'vague bombastic declamations made up of those things in which boys of 15 delight and which everybody who is not destined to be a boy all his life weeds vigorously out of his compositions by five and twenty.'<sup>12</sup> Sadler's criticisms of others and in particular of Professor Malthus were dismissed as 'that kind of reproach which is vulgarly said to be no slander.'<sup>13</sup> His efforts to wound resembled those of a juggler's snake — 'the bags of poison are full but the fang is wanting.' Macaulay's reptilian metaphor may be translated into the more prosaic title of this lecture. On his account of it, Sadler tried to give offence and failed because no reasonable person would take him seriously enough to take offence.

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<sup>10</sup> Larry Vardiman, *Evidence for Global Warming* (2007), Institute for Creation Research, [www.icr.org/article/evidence\\_for\\_global\\_warming](http://www.icr.org/article/evidence_for_global_warming).

<sup>11</sup> Baron Thomas Babington Macaulay, 'Sadler's Law of Population' in *Miscellaneous Writings and Speeches* (London, 1860) 226.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid 227.

The ordinary meaning of the word 'offend' encompasses vexing, annoying, displeasing, angering, exciting resentment or disgust.<sup>14</sup> Its various registers are defined in terms of the reaction of one person to the conduct of another rather than by that conduct itself. Related terms like 'insult' and 'humiliate' have elements of what is given and what is taken by the recipient of the insult or humiliation. In the law, however, the need to determine whether expressive conduct is offensive or insulting or humiliating is not necessarily met by asking the victim. They may take offence or feel insulted or humiliated too easily. So the law tends to engage the services of that leading light in the judge's small band of imaginary friends — the reasonable person.<sup>15</sup> Other members of that band include the 'right-thinking person'<sup>16</sup>, the ordinary prudent man of business, the officious bystander, the reasonable juror properly directed and the fair minded and informed observer. As Professor John Gardner has written in the latest part of the *Law Quarterly Review*:

All of these colourful characters, and many others besides, provide important standard-setting services to the law. But none more so than the village's most venerable resident, that is to say the reasonable person.<sup>17</sup>

This paragon of rationality played a part in a leading Australian decision on offensive behaviour, which has some interesting historical resonances. It involved a former Governor-General of Australia, Sir John Kerr. He has been in the news lately as 11 November 2015 was the 40th anniversary of his dismissal of the Australian Labour Prime Minister, Gough Whitlam, an action which supporters of the Prime Minister thought seriously offensive and which left the Governor-General as a controversial figure in modern Australian history. He had left, however, another legacy. As a Judge of the Supreme Court of the Australian Capital Territory in 1966 he wrote a judgment on the subject of offensive behaviour.<sup>18</sup> A student, Desmond Ball, protesting against Australia's involvement in the Vietnam War, climbed on to a statue of King George V outside Parliament House in Canberra. He placed on its head a placard reading 'I will not fight in Vietnam'. He refused to remove the placard or climb down. Unlike the detractors of the same King in South Africa in 1935, he was not charged

<sup>14</sup> Concise Oxford English Dictionary (Oxford University Press, 11th ed, 2004).

<sup>15</sup> John Gardner, 'The many face of the reasonable person' (2015) 131 *Law Quarterly Review* 563.

<sup>16</sup> *Derbyshire v Police* [1967] NZLR 391.

<sup>17</sup> Gardner, above n 15, 563, 563.

<sup>18</sup> *Ball v McIntyre* (1966) 9 FLR 237.

with *Crimen Laesae Majestatis*, but with the rather more pedestrian misdemeanour of behaving in an offensive manner in a public place contrary to s 17 of the *Police Offences Ordinance 1930–1961* (ACT).

There being little evidence of anyone actually being offended by this behaviour, Justice Kerr called upon the 'reasonable person', albeit in its gendered manifestation as the 'reasonable man'. To be offensive, he said, the behaviour must be 'calculated to wound the feelings, arouse anger, resentment, disgust or outrage in the mind of a reasonable man.'<sup>19</sup> He defined that person carefully as one 'reasonably tolerant and understanding, and reasonably contemporary in his [or her] reactions.'<sup>20</sup> We can perhaps note the curiosity that the reasonable person was to be observed by the Judge for his emotional rather than rational reaction to the impugned behaviour. Despite that incongruity, the decision in *Ball v McIntyre* established the threshold of the imputed emotional response required for conviction at a fairly high level and with it the requirement that the allegedly offensive conduct must elicit that response from someone not readily moved to anger. That legal standard acted as a warning to the judge to proceed with caution before making a finding that a legal prohibition on offensive behaviour had been breached. The interpretive technique has been reflected in many later decisions, many of which have cited Justice Kerr's judgment. By way of historical footnote the student in question, Desmond Ball, became a renowned scholar in strategic studies both nationally and internationally, Professor at the Australian National University and the recipient of many honours, including the award of Officer of the Order of Australia. He was invited by the United States Government to provide advice on strategic studies, including the uncontrollability of limited nuclear exchanges. President Carter said of him '[Desmond] Ball's counsel and cautionary advice, based on deep research, made a great difference to our collective goal of avoiding nuclear war.'<sup>21</sup> So he may have saved the world. To all of that we can add that he contributed substantially to the development of the law relating to offensive behaviour in Australia.

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<sup>19</sup> Ibid 243.

<sup>20</sup> Ibid 245.

<sup>21</sup> Brendan Taylor, Nicholas Farrelly, Sheryn Lee (eds) *Insurgent Intellectual: Essays in Honour of Professor Desmond Ball* (ISEAS, 2012) 18.

On the other side of the globe, in 1971, young Mr Brutus interrupted a tennis match involving a South African player during the Wimbledon tennis championships. His protest against the apartheid regime involved throwing leaflets around and blowing a whistle. The Divisional Court held that the offence of engaging in insulting behaviour, contrary to the *Public Order Act 1936* (UK), with which Brutus was charged, included behaviour which affronts other people and evidences a disrespect or contempt for their rights. It included behaviour which reasonable persons would foresee as likely to cause resentment or protest.<sup>22</sup> The House of Lords took the view that what was an insult was a question of fact, but rejected the interpretive approach of the Divisional Court as setting the bar too low. Properly interpreted the statutory prohibition would not touch vigorous, distasteful or unmannerly speech or behaviour as long as it was not threatening, abusive or insulting.<sup>23</sup> Such speech might show disrespect, or contempt for people's rights, but it did not follow that it must always be characterised as insulting behaviour. Moreover, there could be many manifestations of behaviour which could cause resentment or protest without being insulting.<sup>24</sup>

A high bar was reflected in the decision of the European Court of Human Rights in *Handyside v United Kingdom*.<sup>25</sup> The Court said that the protection of freedom of expression in Art 19 of the ICCPR applies not only to information or ideas that are favourably received or regarded as inoffensive but also 'those that offend, shock or disturb the State or any sector of the population.'<sup>26</sup> Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society.'

As a general proposition, the bar for civil or criminal sanctions attaching to offensive expressive conduct is set higher than incivility or rudeness. Where it is set may be determined by reference to a variety of circumstances including the content and mode and apprehended consequences of the conduct. Does it have a capacity to lead to a breach of the

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<sup>22</sup> *Brutus v Cozens* [1972] 1 WLR 484, 487 (Melford Stevenson J).

<sup>23</sup> *Brutus v Cozens* [1973] AC 854, 862 (Lord Reid).

<sup>24</sup> *Ibid* 863–64 (Lord Morris of Borth-Y-Gest).

<sup>25</sup> (1976) 1 EHRR 737.

<sup>26</sup> *Ibid* [49].

peace, incitement to break the law or to violence against a person? Does it single out particular people or groups of people by reference to characteristics beyond their control, such as race, colour, ethnic or national origin? Is it enough that it does that, or must there be something else? The application of criminal or civil sanctions attached to offensive speech or conduct is variously constrained but, like most areas of the law, the constraints are not susceptible of neat, coherent ordering. They are the product of historical and cultural contingencies and the political imperatives of particular times.

Philosophers and legal writers have suggested limits on societal interference with free speech in general and offensive speech in particular. John Stuart Mill's harm principle is said to be applicable 'the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.'<sup>27</sup> That statement, of course, raises the question — what is meant by harm? Harm in the law is what some people today would call a fact-value complex. There are many 'harms' which can be defined depending upon social-value judgments which do not involve physical injury or loss.

Joel Feinberg proposed a seemingly wider offence principle:

It is always a good reason in support of a proposed criminal prohibition that it would properly be an effective way of preventing some offense ... to persons other than the actor, and that it is probably a necessary means to that end ... The principle asserts, in effect, that the prevention of offensive conduct is properly the state's business.<sup>28</sup>

One critique of the Feinberg principle points out that it is attractive to those who are concerned about the impact of offensive behaviour and those against whom it is directed, but will engender anxiety amongst those who worry about extending the heavy handed reach of the criminal law or increasing the potentially oppressive discretion allowed to law enforcement officers and about sanctioning an illiberal lack of acceptance or toleration of

<sup>27</sup> John Stuart Mill, *On Liberty* (John W Parker, 1859) 14–15.

<sup>28</sup> Joel Feinberg, *Offense to Others: The Moral Basis of the Criminal Law* (Oxford University Press, 1985) 1.

other ways of life.<sup>29</sup> This lecture does not pretend to cover the field of jurisprudential debate about the legal regulation of expressive offensive conduct. However, reflections upon historical and more contemporary examples of such regulation may stimulate us to think carefully about the need for a long term perspective on the topic. Religion provides a case in point.

Saying things about religion has long been a hazardous activity. Blasphemy which used to be dealt with by Ecclesiastical Courts and later by the Star Chamber, appeared in the common law after the abolition of the Chamber. In 1676, when convicting John Taylor of blasphemy for insulting remarks about Jesus Christ, Chief Justice Hale described the offence as:

a crime against the laws, State and Government, and therefore punishable in this Court. For to say religion is a cheat is to dissolve all those obligations whereby the civil societies are preserved and that Christianity is parcel of the laws of England and therefore to reproach the Christian religion is to speak in subversion of the law.<sup>30</sup>

In those remarks may be seen not so much a concern for the protection of the Christian religion as the protection of the social order. Eventually freedom of expression was acknowledged as a limit on the offence of blasphemy. Coleridge LCJ said in 1883:

I now lay it down as law, that if the decencies of controversy are observed even the fundamentals of religion may be attacked without the writer being guilty of blasphemy.<sup>31</sup>

That was the position adopted by the House of Lords in 1917 in *Bowman v Secular Society*.<sup>32</sup> Blasphemy then seemed to fall away until 1977. In that year the publication, in a newspaper,

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<sup>29</sup> R A Duff and S E Marshall, 'How Offensive Can You Get' in Andrew von Hirsch and A P Simester, *Incivilities: Regulating Offensive Behaviour* (Hart Publishing, 2006) 57.

<sup>30</sup> *Taylor's Case* (1676) 1 Vent 293; (1676) 88 ER 189.

<sup>31</sup> *Ramsey v Foote* (1883) 15 Cox Criminal Cases 231 (QB).

of a poem and cartoon depicting indecent acts on the body of Christ led to the editor and publisher being convicted by a jury of a blasphemous act. The House of Lords in *Whitehouse v Lemon*<sup>33</sup> upheld the conviction. Lord Scarman described the rationale for the law of blasphemy again in terms of the social order '[t]he offence belongs to a group of criminal offences designed to safeguard the internal tranquillity of the kingdom.'<sup>34</sup> He recognised that, on that rationale, there was a case for extending the offence to protect the religious beliefs and feelings of non-Christians. He said:

In an increasingly plural society such as that of modern Britain it is necessary not only to respect the differing religious beliefs, feelings and practices of all but also to protect them from scurrility, vilification, ridicule and contempt.<sup>35</sup>

His social order justification was of general application to all kinds of religious belief. However, the common law would not stretch that far. The limit on the law of blasphemy was demonstrated by a decision that Salman Rushdie's book *The Satanic Verses* did not involve the offence of blasphemy against the teachings of Islam.<sup>36</sup> The common law offence did not cover offensive language about religions other than Christianity. The offence was abolished in the United Kingdom in 2008.<sup>37</sup>

Blasphemy was a common law offence in the Australian colonies before federation. There were not many prosecutions after federation. However, in 1997 the then Archbishop of Melbourne, now Cardinal George Pell, applied for an injunction to restrain the National Gallery of Victoria from exhibiting a photograph entitled 'Piss Christ' showing a crucifix immersed in urine. The application was refused by Harper J of the Supreme Court of

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<sup>32</sup> [1917] AC 406.

<sup>33</sup> [1979] AC 617.

<sup>34</sup> Ibid 658.

<sup>35</sup> Ibid.

<sup>36</sup> *Regina v Chief Metropolitan Stipendiary Magistrate; Ex parte Choudhury* [1991] 1 QB 429; [1990] 3 WLR 986.

<sup>37</sup> *Criminal Justice and Immigration Act 2008* (UK); *Racial and Religious Hatred Act 2006* (UK).

Victoria.<sup>38</sup> The photograph, he said, was 'offensive, scurrilous and insulting at least to a very large number of Christians.' He quoted Lord Scarman from *Whitehouse v Lemon* and added:

a plural society such as contemporary Australia operates best where the law need not bother with blasphemous libel because respect across religions and cultures is such that, coupled with an appropriate capacity to absorb the criticisms or even jibes of others, deep offence is neither intended nor taken.<sup>39</sup>

In order to amount to a blasphemous libel the manner complained of had to raise the risk of a breach of the peace. That approach may invite consideration of the particular sensitivities of the offended party or group.

Laws relating to religious vilification defined by reference to the incitement of hatred, serious contempt for or serious ridicule of a person or group on account of their religious beliefs or affiliations are found in a number of Australian States.<sup>40</sup> The high threshold before those provisions are engaged has resulted in a low to non-existent strike rate which is perhaps just as well.

This area of the law raises the question — what is to be protected — civil tranquillity or people or both? We can say that people are entitled to have their dignity respected and protected. But do we have to respect beliefs if that means not speaking against their truth or pointing to their harmful consequences. Some religions still hold that homosexual conduct is sinful. That belief may be rejected or even denounced as inflicting harm. Can it be ridiculed and treated with contempt? Can one say — I hate the belief but respect the believer? These things are not easy to disentangle. They point to some of the difficulties in determining the appropriate policy to inform law-making about offensive or insulting speech in relation to religion.

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<sup>38</sup> *Pell v The Council of the Trustees of the National Gallery of Victoria* (1998) 2 VR 391.

<sup>39</sup> *Ibid* 393.

<sup>40</sup> *Anti-Discrimination Act 1991* (Qld); *Anti-Discrimination Act 1998* (Tas), s 19; *Racial and Religious Tolerance Act 2001* (Vic).

In 2006, the Court of Appeal in the Supreme Court of Victoria considered the application of the *Racial and Religious Tolerance Act 2006* (Vic) in connection with a complaint by the Islamic Council of Victoria about statements made by the Pastor of an organisation known as Catch the Fire Ministries Inc. The complaint alleged conduct inciting hatred against and serious contempt for, or ridicule of, the Islamic faith. The statement complained of related to the text of the Koran and reflected on Muslim people generally. Nettle J, writing in the Court of Appeal,<sup>41</sup> made the important point that a class of people may be defined by their religious beliefs — to incite hatred or some other relevant emotion towards their beliefs may result in hatred of the believers. But that was not a necessary consequence. He said 'there are any number of persons who may despise each other's faiths and yet bear each other no ill will.'<sup>42</sup> The purpose of the Act was to promote religious tolerance not to mandate it. It was essential, he said, 'to keep the distinction between the hatred of beliefs and the hatred of their adherents steadily in view.'<sup>43</sup>

Debates about the law affecting offensive speech or conduct tend to focus upon the reach of the law and its effect on freedom of speech and expressive action which is protected by the common law, and by international human rights norms. Neither the written nor the unwritten law can resolve those tensions with precision. Generally speaking, however, the courts interpret laws affecting freedom of expression so as to protect that freedom from unnecessary burdens.

The scope of any statutory provision is determined by a process of interpretation. The court attributes meaning to the provision by reference to its text, its context and its purpose. A statute which, on the face of it, limits freedom of speech may present to a court interpretive or constructional choices with differing impacts on that freedom. In the area of offensive speech those choices are defined not so much by different discrete meanings but by the range of the prohibition or restriction.

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<sup>41</sup> *Catch the Fire Ministries Inc v Islamic Council of Victoria* (2006) 15 VR 207.

<sup>42</sup> *Ibid* 218–19 [33].

<sup>43</sup> *Ibid* 219 [34].

The common law directs a court interpreting statutes to a construction which has least impact on freedom of expression. That is a particular case of a general interpretive approach protective of common law rights and freedoms. It is applied on the basis that 'curial insistence on a clear expression of an unmistakable and unambiguous intention to abrogate or curtail a fundamental freedom will enhance the parliamentary process by securing a greater measure of attention to the impact of legislative proposals on fundamental rights.'<sup>44</sup> That proposition is, of course, well known in the United Kingdom and was powerfully enunciated by Lord Hoffman in *R v Secretary of State for Home Department; Ex parte Simms* as a principle of legality requiring that the legislature 'squarely confront what it is doing and accept the political cost'.<sup>45</sup>

The common law of England has long accepted that freedom of speech and the press serve the public interest. Blackstone characterised freedom of the press as 'essential to the nature of a free state'.<sup>46</sup> That freedom, however, did not extend to 'criminal acts'. Lord Coleridge in 1891 characterised the right of free speech as 'one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done'.<sup>47</sup> The qualifications upon the freedom which both of them recognised, reflected the qualifications on freedom of speech which are to be found in international human rights instruments and national constitutions. In the United Kingdom and in Australia particular applications of the qualifications attract judgments as to the legitimacy of their purpose and the proportionality of the limiting measure. In Australia, those judgments are made in deciding whether a law transgresses the implied freedom of political communication.

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<sup>44</sup> *North Australian Aboriginal Justice Agency Ltd v Northern Territory* [2015] HCA 41 [11] citing *Coco v The Queen* (1994) 179 CLR 427, 437–38.

<sup>45</sup> [2000] 2 AC 115, 131.

<sup>46</sup> William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1769, Reprint 1983) vol IV, 151–52.

<sup>47</sup> *Bonnard v Perryman* [1891] 2 Ch 269, 284 and see *R v Police of the Metropolis; Ex parte Blackburn (No 2)* [1968] 2 QB 150, 155; *Wheeler v Leicester City Council* [1985] AC 1055, 1056; *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] AC 109, 220.

I mentioned earlier that in Australia there is an implied freedom of political communication which began its life with a law giving statutory protection against insult to the dignity of the Industrial Relations Commission of Australia. In or about 1992 the *Australian Newspaper* published an article highly critical of the Commission. It said, among other things:

The right to work has been taken away from ordinary Australian workers. Their work is regulated by a mass of official controls, imposed by a vast bureaucracy in the ministry of labour and enforced by a corrupt and compliant 'judiciary' in the official Soviet-style Arbitration Commission.<sup>48</sup>

The newspaper was prosecuted for a breach of s 299 of the *Industrial Relations Act 1988* (Cth), which provided that:

- (1) A person shall not:
- ...
- (d) by writing or speech use words calculated:
- ...
- (ii) to bring a member of the [Industrial Relations] Commission or the Commission into disrepute.

The High Court held the section invalid. Three members of the Court held that it infringed an implied freedom of political communication.<sup>49</sup> The implication was essentially based on the text and structure of the Constitution relating to representative democracy and election of parliamentary representatives by the people. The implied freedom was also applied by a majority of the Court in the companion decision, *Australian Capital Television v Commonwealth*.<sup>50</sup>

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<sup>48</sup> *Nationwide News Pty Ltd v Willis* (1992) 177 CLR 1, 96.

<sup>49</sup> *Ibid* 52–53 (Brennan J), 95 (Gaudron J), 105 (McHugh J).

<sup>50</sup> (1992) 117 CLR 106.

The implied freedom is not framed as an individual right but as a limitation on the legislative power of the Commonwealth and also of the States and Territories of Australia. It also limits the application of the common law of defamation in relation to public figures. It was in fact elaborated in a number of defamation cases involving politicians.<sup>51</sup> They culminated in the decision of the Court in *Lange v Australian Broadcasting Corporation*.<sup>52</sup> That case concerned a defamation action brought by a former Prime Minister of New Zealand against the Australian Broadcasting Corporation in connection with statements made on a current affairs program. The Court held in *Lange* that the common law of defamation burdened the implied constitutional freedom and the traditional defence of qualified privilege, did not save it. The Court extended the defence of qualified privilege to protect publications to mass audiences concerning governmental and political matters although it imposed a condition that the publisher's conduct must be reasonable.<sup>53</sup>

*Lange* set out a two-step test for the validity of laws said to impinge on the implied freedom of political communication as it came to be called. They were:

1. Does the law effectively burden the freedom, either in its terms, operation or effect?
2. If the law effectively burdens that freedom, is it reasonably appropriate and adapted to serve a legitimate end, the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.<sup>54</sup>

That text has recently been elaborated in relation to the proportionality limb.<sup>55</sup>

Far from the fields of political discourse considered in the implied freedom cases involving the defamation of politicians, Patrick Coleman stood in the Townsville Mall in Far

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<sup>51</sup> *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211.

<sup>52</sup> (1997) 189 CLR 520.

<sup>53</sup> *Ibid* 573–75.

<sup>54</sup> *Ibid* 567.

<sup>55</sup> *McCloy v New South Wales* (2015) 87 ALJR 857.

North Queensland in 2002 with a placard reading 'Get to know your local corrupt type coppers' and referred to police as 'slimy lying bastards'. He was charged with an offence under the *Vagrancy Gaming and Other Offences Act 1931* (Qld), which provided that any person who in a public place used insulting words to any person committed an offence. The High Court held that the conviction should be set aside.<sup>56</sup> Although the case slightly modified the *Lange* test, only one of the Justices set aside the conviction on the basis that the section under which Coleman was charged, offended the implied freedom of political communication.<sup>57</sup> Three of the Justices adopted a restrictive approach to the interpretation of the section creating the offence.<sup>58</sup> They read it as only proscribing the use of words which were insulting in the sense that they were intended or reasonably likely to provoke unlawful, physical retaliation. On that interpretation the section served a legitimate public purpose by appropriate means. That interpretive approach, setting a high threshold before impugned conduct could be said to contravene the section, has been used by courts in Australia generally in dealing with challenges to legislation said to contravene constitutional guarantees or prohibitions and, in particular, the implied freedom.

While it might be thought that the implied freedom of political communication is a peculiar feature of the Australian Constitution, its interaction with offensive speech and expression involving, as it does, a proportionality analysis, throws up similar questions of the relationship between freedom of speech and offensive speech or conduct as those which are involved in interpreting and applying legislation that is said to infringe upon freedom of speech in other jurisdictions.

The difficulty of applying legal standards rather than precise legal rules in this area, was demonstrated in the decision of the High Court in 2013 in *Monis v The Queen*.<sup>59</sup> The appellant had been charged with using a postal service in a way that reasonable persons would regard as being, in all the circumstances, offensive, contrary to s 471.12 of the *Criminal Code* (Cth). The charges related to letters he had sent to parents and relatives of

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<sup>56</sup> *Coleman v Power* (2004) 220 CLR 1.

<sup>57</sup> *Ibid* 33 (McHugh J).

<sup>58</sup> *Ibid* 74–77 (Gummow and Hayne JJ), 87 (Kirby J).

<sup>59</sup> (2013) 249 CLR 92.

soldiers who had been killed in active duty in Afghanistan. The letters were critical of the involvement of Australian military forces in Afghanistan and reflected upon the part played in it by the deceased soldiers in a derogatory and insulting fashion. He and a co-accused tried to have their indictments quashed on the basis that s 471.12 was invalid in its application to 'offensive' communications because it infringed the implied constitutional freedom of political communication. The case came on as an appeal to the High Court from the Court of Criminal Appeal of New South Wales, which had dismissed the challenge to the validity of the provision. Because one of the members of the Court was shortly to retire, six members sat. In the event, the Court was evenly divided. Justices Hayne and Heydon and I held that, in its application to offensive communications, the section under which the appellants were charged was invalid as impermissibly burdening the implied freedom of political communication.<sup>60</sup> Justices Crennan, Kiefel and Bell held that, if interpreted as referring to high level offensiveness, the section went no further than was reasonably necessary to achieve its purpose of preventing the misuse of postal services to effect an intrusion of seriously offensive material into a person's home or workplace and did not impose too great a burden on the implied freedom and was therefore valid.<sup>61</sup> The Court being evenly divided, the appeal was dismissed. Monis was later killed after taking hostages in a cafe in Sydney. Tragically two innocent young people, one of them a barrister, were killed in that awful event.

There are analogous provisions under the laws of the United Kingdom which prohibit communications offensive to public feeling or of a 'grossly offensive nature', which were mentioned in the judgments.<sup>62</sup> In *R (ProLife Alliance) v British Broadcasting Corporation*<sup>63</sup>, the House of Lords in effect upheld a refusal by the BBC to transmit a political party broadcast showing images of aborted fetuses. An issue was whether the material would be 'offensive to public feeling' within the meaning of the *Broadcasting Act 1990* (UK). The interesting question was what right was being protected by the law? Lord Walker referred to the 'right' of the citizen 'not to be shocked or affronted by inappropriate material transmitted

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<sup>60</sup> Ibid 134 [74] (French CJ), 158 [162] (Hayne J), 178 [236] (Heydon J).

<sup>61</sup> Ibid 215–16 [350]–[353].

<sup>62</sup> (2013) 249 CLR 92, 110–12 [15]–[19], 207 [326] (Crennan, Kiefel and Bell JJ).

<sup>63</sup> [2004] 1 AC 185.

into the privacy of his home'.<sup>64</sup> Although not a right to be found under the *European Convention on Human Rights* (ECHR),<sup>65</sup> his Lordship characterised it as an 'indisputable imperative'.<sup>66</sup> That invocation of negative juristic rights beyond those enumerated in the ECHR and derogating from the freedom of expression in Art 10, has been debated. One commentator has suggested that:

Such a potentially limitless pool of 'countervailing rights' is deeply unattractive and troubling, threatening as it does to swallow up the right of freedom of expression.<sup>67</sup>

Whether that is a valid observation and whether it could apply to laws burdening the implied freedom of political communication in Australia, it does direct attention to the acute difficulty of line drawing in this area.

In *Connolly v Director of Public Prosecutions*<sup>68</sup> that characterisation was held to apply to the conduct of an anti-abortion campaigner who sent photographs of aborted fetuses through the mail to pharmacists. The relevant provision of the Act prohibited 'grossly offensive' communications. As required by the *Human Rights Act 1998* (UK), the House of Lords construed the prohibition in light of the freedom of expression in Art 10 of the ECHR and found it to infringe that freedom. Nevertheless, the prohibition was held justified under the Article 'as necessary in a democratic society ... for the protection of the ... rights of others'.<sup>69</sup> The legitimate purpose and proportionality analysis was analogous to that applied in Australia to laws burdening the implied freedom of political communication.

Before closing, it is appropriate to make some reference to a substantial controversy of recent times in Australia concerning the prohibition of offensive behaviour directed to

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<sup>64</sup> Ibid, 252 [123].

<sup>65</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms* opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) amended by Protocol No 11.

<sup>66</sup> [2004] 1 AC 185, 252 [123].

<sup>67</sup> Ian Cram, 'The Danish Cartoons, Offensive Expression and Democratic Legitimacy' in Ivan Hare & James Weinotein (eds) *Extreme Speech and Democracy* (Oxford University Press, 2009) 320.

<sup>68</sup> [2008] 1 WLR 276.

<sup>69</sup> Ibid 285 [28] (Dyson LJ).

people because of their race, colour, or national or ethnic origin. The relevant statutory prohibition is to be found in s 18C of the *Racial Discrimination Act 1975* (Cth), which provides in sub-s (1):

It is unlawful for a person to do an act, otherwise than in private, if:

- (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
- (b) 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.

It is subject to some good faith defences which it is not necessary to go into here.

Section 18C was introduced into the *Racial Discrimination Act* by the *Racial Hatred Act 1995* (Cth). The intention of the amendment as explained by the Attorney-General of the day in the Second Reading Speech was 'to close a gap in the legal protection available to the victims of extreme racist behaviour'.<sup>70</sup> The Attorney-General asserted that the Bill struck a balance. He said:

In this bill, free speech has been balanced against the rights of Australians to live free of fear and racial harassment. Surely the promotion of racial hatred and its inevitable link to violence is as damaging to our community as issuing a misleading prospectus, or breaching the Trade Practices Act.<sup>71</sup>

Section 18C was, in part, inspired by Article 4 of the *International Convention on the Elimination of All Forms of Racial Discrimination*.<sup>72</sup> That Article itself was the product of a difficult drafting process. It required that the States Parties to it, among other things:

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<sup>70</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 15 November 1994, 3336 (Michael Lavarch, Attorney-General).

<sup>71</sup> Ibid 3337 (Michael Lavarch, Attorney-General).

<sup>72</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

- (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

There was no express reference to offensive conduct which is the focus of recent debate in Australia about s 18C. That debate illustrates the way in which prohibitions on offensive conduct can sometimes lie at the interface of differing community views.

In the end the law cannot save us from being offended. Nor can it save us from the social disharmony which some kinds of offensive expression can cause. It cannot protect the dignity of people if our culture does not respect them.

We must be free to speak our minds and hear other people speak theirs. We must accept that we will sometimes be offended or even outraged by the things other people say about us or others or about our or their beliefs or values. At the same time we must accept that for a culturally and ethnically diverse society to work there must be an ethic of respect for the dignity of all its members. In this respect there are some very old fashioned ideas of courtesy and good manners which embody that kind of world view. They empower us to apply the art, much finer than that of giving and taking offence, of getting along together in full participation in a free and democratic society. We can perhaps borrow from Lord Birkenhead's confronting speech at Glasgow University in 1923 to say that we are well served in this area by stout hearts and sharp swords — not real weapons but our steely determination to exemplify the great civic virtue of doing unto others as we would have them do unto us.