

**SUBMISSION TO THE OPTIONS PAPER FOR THE REVIEW OF CRIMINAL
LAW PROTECTIONS AGAINST THE INCITEMENT OF HATRED
RELEASED BY JOHN SACKAR AM KC**

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This submission is made to the Options Paper for the Review of Criminal Law Protections against the Incitement of Hatred released by John Sackar AM KC (‘the Paper’). It is made in my personal capacity. This submission focusses on various Constitutional and human rights implications of the various matters considered by the Paper and is ordered according to the following headings:

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Introduction

Western democracies are witnessing increasing levels of extremism and hate speech. Among a range of measures employed in an effort to assure social cohesion, prohibitions on vilification have been implemented across Australian jurisdictions, recognising that hate speech can incite violence.² Emerging tensions can be observed in relation to this rapid overhaul of vilification laws, including the need to balance protections for minorities with fundamental rights and freedoms. This submission focusses on the proposal that existing section 93ZAA may be extended to other attributes under the *Crimes Act 1900* (NSW) (‘the Act’). It particularly focusses upon the proposal that section 93ZAA be extended to protect against religious vilification. In that context, this document examines the implications of religious vilification

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² Michael McGowan ‘Religious Groups Split on Changes to Hate-Speech Laws’ *Sydney Morning Herald* (24 January 2025).

laws for religious freedom and freedom of speech and opinion. In light of the important contribution that religious teaching makes to the formation of an open society committed to democratic accountability, it posits a reform framework that enshrines the principle that religious vilification laws should only render unlawful the most serious forms of conduct, which amounts to advocacy of hatred which incites to discrimination, hostility or violence. The constitutional doctrine of the implied freedom of political communication squarely raises questions of free speech and freedom of religion. I argue that there may be a convergence of principle which encompasses the implied freedom of political communication and international human rights law, whereby religious speech should only be made unlawful where it amounts to the advocacy of hatred which incites to discrimination, hostility or violence.

Overview of Current Australian Vilification Law

Australian vilification law is comprised of criminal and civil prohibitions that vary in scope among Commonwealth, State and Territory jurisdictions.³ These consist of civil prohibitions which regulate, broadly described, hatred against, revulsion, serious contempt for, or severe ridicule of, a person or group, but where no threats of physical harm or violence or damage to property are involved, and may be litigated by private citizens. There are exceptions, including conduct engaged in ‘reasonably and in good faith’ and in the ‘public interest’ or, in a number of cases, for a qualifying religious purpose.⁴ The criminal prohibitions regulate ‘serious vilification’, which broadly include the same conduct covered by the civil provisions where that conduct also involves threats of physical harm, violence or damage to property, or incites violence against a person or group. Criminal offences recently enacted in New South Wales

³ *Racial Discrimination Act 1975* (Cth) s 18C; *Criminal Code 1995* (Cth) ss 80.2A, 80.2B, 80.2BA, 80.2BB; *Discrimination Act 1991* (ACT) s 67A; *Criminal Code 2002* (ACT) s 750; *Anti-Discrimination Act 1977* (NSW) ss 20B, 20C, 38R, 38S, 49ZD, 49ZE, 49ZS, 49ZT, 49ZXA, 49ZXB; *Crimes Act 1900* (NSW) ss 93Z, 93ZAA; *Anti-Discrimination Act 1992* (NT) s 20A; *Anti-Discrimination Act 1991* (Qld) ss 124A, 131A; *Criminal Code Act 1899* (Qld) s 52A; *Civil Liability Act 1936* (SA) s 73; *Racial Vilification Act 1996* (SA) s 4; *Anti-Discrimination Act 1998* (Tas) ss 17, 19; *Racial and Religious Tolerance Act 2001* (Vic) ss 7, 8, 24, 25; *Criminal Code Act Compilation Act 1913* (WA) ss 77, 78.

⁴ *Racial Discrimination Act 1975* (Cth) s 18D; *Criminal Code 1995* (Cth) ss 80.2A, 80.2B, 80.3 and s 80.2BA, 80.2BB (yet to come into force); *Discrimination Act 1991* (ACT) s 67A(2); *Anti-Discrimination Act 1977* (NSW) ss 20C(2)(c), 38S(2)(c), 49ZE(2)(c), 49ZT(2)(c), 49ZXB(2)(c); *Anti-Discrimination Act 1992* (NT) s 20B; *Anti-Discrimination Act 1991* (Qld) s 124A(2)(c); *Criminal Code Act 1899* (Qld) s 52D; *Civil Liability Act 1936* (SA) s 73(1)(c); *Anti-Discrimination Act 1998* (Tas) s 55; *Racial and Religious Tolerance Act 2001* (Vic) s 11(1); *Criminal Code Act Compilation Act 1913* (WA) s 80G. These provisions variously include other forms of permitted conduct such as ‘fair report’, a range of qualifying purposes including academic, artistic, scientific and research purposes and comments subject to a defence of absolute privilege in defamation proceedings.

and Victoria join Western Australia in not requiring threats or incitement of violence.⁵ Section 93ZAA of the New South Wales *Crimes Act 1900* is the subject of the current inquiry.

Overview of Human Rights Law

Freedom of religion is recognised under international law as a fundamental right that cannot be readily abrogated.⁶ Freedom of religion is recognised and protected in a range of ways in Australian law, including s 116 of the Constitution,⁷ the principle of legality⁸ and in the provisions of State and Territory human rights legislation.⁹ Core to the freedom of religion is the ability to adopt a religion of one's choosing and also to manifest one's belief through teaching, worship and other conduct.¹⁰ Freedom to manifest one's religion is not absolute, but may be limited, although only for carefully prescribed reasons.¹¹ Proposed vilification laws must be closely measured for consistency with the international standards to which Australia is a party, especially the freedoms of speech and religion, which are fundamental rights that cannot be readily abrogated.¹² Restrictions on the separately protected human right of the freedom of expression 'must be exceptional, subject to narrow conditions and strict oversight'.¹³ International human rights law thus mandates a high level of protection for freedom of expression, and that it can only be restricted in narrow circumstances. Ridicule, and the right to offend and mock are included within this protection.¹⁴

⁵ *Crimes Act 1900* (NSW) s 93ZAA, *Crimes Act 1958* (Vic) s 195N (both yet to come into force), *Criminal Code Act Compilation Act 1913* (WA) ss 77, 78.

⁶ *International Covenant on Civil and Political Rights* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18 ('ICCPR'). Under article 4.2, no derogation from the rights contained in article 18 is permitted ('ICCPR'), even in time of public emergency.

⁷ See further Benjamin B Saunders and Dan Meagher, 'Taking Seriously the Free Exercise of Religion under the Australian Constitution' (2021) 43(3) *Sydney Law Review* 287.

⁸ *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ); *Canterbury Municipal Council v Moslem Alawy Society Ltd* (1985) 1 NSWLR 525, 544 (McHugh JA).

⁹ *Human Rights Act 2019* (Qld) s 20; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 14; *Human Rights Act 2004* (ACT) s 14.

¹⁰ ICCPR art 18.1; *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, GA Res 36/55, UN GAOR, 36th sess, 73rd plen mtg, Supp No 51, UN Doc A/RES/26/55 (25 November 1981) art 6.

¹¹ ICCPR art 18.3; Human Rights Committee, *General Comment 22: The Right to Freedom of Thought, Conscience and Religion* (Art 18), 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993) [8]; United Nations Commission on Human Rights, *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4 (28 September 1984) [10]–[11].

¹² ICCPR arts 18, 19.

¹³ Special Rapporteur Report A/74/486 (9 October 2019) [5]–[6].

¹⁴ Nicholas Aroney and Paul Taylor, 'Building Tolerance into Hate Speech Laws: State and Territory Anti-Vilification Legislation Reviewed Against International Law Standards' (2023) 42(3) *University of Queensland Law Journal* 317, 329.

Article 20(2) of the *International Covenant on Civil and Political Rights* ('ICCPR') states that '[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'.¹⁵ The threshold established by Article 20(2) is 'extremely high', covering hatred that incites to discrimination, hostility or violence, and it should not be too readily assumed that forms of expression fall within the scope of the article.¹⁶ Its purpose is 'to prevent the public incitement of racial hatred and violence',¹⁷ and so article 20(2) establishes a 'high threshold' because 'as a matter of fundamental principle, limitation of speech must remain an exception'.¹⁸ Thus, any domestic legislation which aims to give effect to Art 20 of the ICCPR must be targeted at the advocacy of hatred which incites to discrimination, hostility or violence, rather than mere offence or mockery. This cautions against a low threshold for religious vilification, and as discussed further below, constitutional validity may require this. For all the above reasons, I argue that religious vilification laws should only render unlawful the most serious forms of conduct, which amounts to advocacy of hatred which incites to discrimination, hostility or violence.

Constitutional Issues

In the following section I consider how the implied freedom of political communication bears on the proposal that section 93ZAA be extended to protect against religious vilification. I argue that the extension of section 93ZAA to religious vilification laws may be constitutionally invalid on the basis that it would infringe the implied freedom of political communication. The implied freedom is potentially applicable because some religiously motivated communications which express religious teaching have a political dimension and are therefore a form of political communication.

One threshold issue is how religious speech is treated for the purpose of the implied freedom. In *Harkianakis v Skalkos* Dunford J held that religious communications are not protected by the implied freedom. His Honour held that s 116 'effectively excludes religion from the system of government established by The Constitution'; as such it 'has nothing to do with the essential

¹⁵ ICCPR art 20(2).

¹⁶ Paul M Taylor, *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights* (Cambridge University Press, 2020) 581.

¹⁷ William A Schabas, *UN International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (NP Engel, 3rd ed, 2019) 584.

¹⁸ *Rabat Plan of Action on National, Racial or Religious Hatred* (Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred, Appendix) (11 January 2013) UN Doc A/HRC/22/17/Add 4, [18], [21].

nature of the Federal polity or system of government’, and so there is no constitutional guarantee of freedom of communication in relation to religious matters.¹⁹

However, there is no *priori* reason why speech that is about religious matters or religiously motivated cannot also be characterised as political communication for the purpose of the implied freedom.²⁰ Some religiously motivated speech has a political dimension, and there is no principled reason to exclude communication about political matters merely because it can also be characterised as ‘religious’. To the extent that Dunford J’s comments suggest otherwise, I respectfully consider that this is incorrect. This view is supported by the comments of French CJ in *A-G (SA) v Corporation of the City of Adelaide*:

some ‘religious’ speech may also be characterised as ‘political’ communication for the purposes of the freedom. ... Plainly enough, preaching, canvassing, haranguing and the distribution of literature are all activities which may be undertaken in order to communicate to members of the public matters which may be directly or indirectly relevant to politics or government at the Commonwealth level. The class of communication protected by the implied freedom in practical terms is wide.²¹

Thus, a law prohibiting religious vilification can, at least in some of its applications, burden political communication for the purposes of the implied freedom.²² As Walter Sofronoff KC noted in *Deen v Lamb*, ‘it would not be easy for any legislature to prohibit a publication made in the genuine and reasonable exercise of the right to free communication about political matters merely because it had a tendency to incite hatred, contempt or ridicule’.²³

It can be accepted that at least some religious and religiously motivated communications have a political dimension for the purpose of the implied freedom. Religious teaching is relevant to a range of contemporary laws and policies, including same sex marriage,²⁴ bans on conversion

¹⁹ *Harkianakis v Skalkos* (1999) 47 NSWLR 302, 306–7 [18].

²⁰ Nicholas Aroney, ‘The Constitutional (In)Validity of Religious Vilification Laws: Implications for Their Interpretation’ (2006) 34(2) *Federal Law Review* 287, 303. An example of speech that was religious and political in nature is *Deen v Lamb* [2001] QADT 20.

²¹ *A-G (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1 [67] (French CJ) cf. *Wertheim v Haddad* [2025] FAC 720 [244] (Stewart J).

²² Nicholas Aroney, ‘The Constitutional (In)Validity of Religious Vilification Laws: Implications for Their Interpretation’ (2006) 34(2) *Federal Law Review* 287, 306–7.

²³ *Deen v Lamb* [2001] QADT 20, 4.

²⁴ *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth).

therapy,²⁵ abortion and exclusion zones,²⁶ migration and humanitarian protections to refugees, the vulnerable, infirm or those otherwise in need of benevolent relief. Expressions of opinion on these topics could well raise the applicability of a religious vilification law. There is an inescapably political dimension to the expression of some religious opinions and it is impossible to neatly demarcate ‘religious’ and ‘political’ speech.

Therefore, any religious vilification law is likely to apply to religious communications which have a political dimension, thereby engaging the question of compatibility with the implied freedom. Any religious vilification law is likely ‘to prohibit, or put some limitation on, the making or the content of’ such communications, and so effectively burden them.²⁷ In relation to the racial vilification provisions of the *Racial Discrimination Act 1975* (Cth) (‘RDA’), Stewart J considered that ‘[i]t is hard to conceive of examples of communication that would be unlawful under those provisions that would concern political or government matters and be capable of bearing on the making of an informed electoral choice by Australian voters’.²⁸ His honour conceded, however, that the RDA does effectively burden political speech, ‘but only slightly’.²⁹ Thus, it would be necessary to demonstrate that the proposed law pursues a legitimate goal in a proportionate manner, a consideration I return to below.

In *A-G (SA) v Corporation of the City of Adelaide* a council by-law which imposed a prohibition on preaching, canvassing, haranguing or distributing printed material unless the person had obtained the written permission of the Council was not invalidated by the implied freedom of political communication.³⁰ The High Court held that the by-law served a legitimate purpose, namely the prevention of obstructions on roads, and did so in a manner which was compatible with the system of representative and responsible government prescribed by the Constitution.³¹ One important feature of the regime was that, as noted by Hayne J, ‘[t]he granting or withholding of permission to engage in such activities cannot validly be based upon approval

²⁵ See, eg, *Change or Suppression (Conversion) Practices Prohibition Act 2021* (Vic); *Conversion Practices Ban Act 2024* (NSW).

²⁶ See, eg, *Public Health and Wellbeing Act 2008* (Vic) s 185D; *Reproductive Health (Access to Terminations) Act 2013* (Tas) s 9; *Clubb v Edwards* (2019) 267 CLR 171.

²⁷ *Monis v The Queen* (2013) 249 CLR 92, 142 [108] (Hayne J).

²⁸ *Faruqi v Hanson* [2024] FCA 1264, [330] (Stewart J).

²⁹ *Ibid* [338].

³⁰ *A-G (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1.

³¹ *A-G (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1, 44–45 [68] (French CJ); 58 [119], 62 [134], 63 [136] (Hayne J), 64 [141]; 84 [203], 89 [219], 90 [221] (Crennan and Kiefel JJ); 90 [224] (Bell J agreeing with the orders proposed by Hayne J and, relevantly, the reasons given by Crennan and Kiefel JJ).

or disapproval of their content'.³² Thus, the freedom to communicate on religious matters may be limited to serve purposes such as public order and safety for the purpose of the implied freedom, provided that those restrictions are 'content neutral'.

*Coleman v Power*³³ considered the constitutional validity of a Queensland law which made it a criminal offence to use insulting words in a public place. A majority held the law to be valid. Critical to the reasoning was a view about the role of insults in political communication:³⁴ the minority held that insults are not essential to political communication and so could legitimately be restricted,³⁵ while Kirby J and Gummow and Hayne JJ in the majority considered that a law cannot prohibit insulting communications unless such communications are likely to provoke a hostile retaliatory response.³⁶ One implication to be drawn from the majority judgments is that offence is a legitimate and even necessary part of political communication, as Gummow and Hayne JJ would have it: '[i]nsult and invective have been employed in political communication at least since the time of Demosthenes'.³⁷ As such, to the extent that religious speech can be characterised as political, 'the decision in *Coleman* suggests that, absent qualifications of the kind relied upon by the majority, laws which prohibit religious vilification will infringe the implied freedom of political communication'.³⁸ This, of course, closely reflects the position in international human rights law surveyed above, especially art 20(2) of the ICCPR.

Would the extension of section 93ZAA to religious vilification pursue a legitimate goal? *Coleman v Power* suggests that objectives such as maintaining public order and preventing conduct which is likely to intimidate another person are legitimate goals.³⁹ Further, it has been held that the purpose of Pt IIA of the RDA is to deter and eliminate *racial* hatred and discrimination and that this is a legitimate goal.⁴⁰ It would seem to follow that eliminating

³² *A-G (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1, 44 [68]

³³ (2004) 220 CLR 1.

³⁴ Aroney (n 22) 312–3.

³⁵ *Coleman v Power* (2004) 220 CLR 1, 24, 30–1 (Gleeson CJ), 114 (Callinan J), 121–2, 125–6 (Heydon J).

³⁶ *Coleman v Power* (2004) 220 CLR 1, 54 (McHugh J), 78–9 (Gummow and Hayne JJ), 91, 98–9 (Kirby J). Gummow and Hayne JJ (at 77) and Kirby J (at 87) construed the impugned law narrowly as requiring an intention to provoke an unlawful physical reaction, which, on that construction, rendered the law valid. 'Without seeking to state exhaustively the qualifications needed', McHugh J required, in addition to insult, an intention to breach the peace and to commit the breach elements of the offence in order for a law to be valid, along with unstated 'further qualifications' applicable to the implied freedom (at 53–4).

³⁷ *Ibid* 87 (Gummow and Hayne JJ).

³⁸ Aroney (n 22) 313.

³⁹ *Coleman v Power* (2004) 220 CLR 1, 31 (Gleeson CJ), 53 (McHugh J), 78 (Gummow and Hayne JJ), 91, 98–9 (Kirby J), 111–12 (Callinan J), 122 (Heydon J).

⁴⁰ *Faruqi v Hanson* [2024] FCA 1264 [342], [345], [346] (Stewart J), affirmed in *Wertheim v Haddad* [2025] FAC 720 [235]–[240] (Stewart J).

religious hatred and discrimination is a legitimate goal. However, there are significant differences between religion and race, such that a higher bar is to be applied when contemplating restrictions on religious speech.

Many people may feel threatened or emotionally unsafe as a result of the forceful expression of traditional religious teaching. It is likely that the prevention of feelings of offence or emotional harm are not legitimate goals for the purposes of the implied freedom. That is, in light of the decision in *Coleman*, it is likely that only conduct which amounts to threats or intimidation relating to physical violence would be considered legitimate legislative goals. To the extent that section 93ZAA imposes more onerous restrictions on religious speech, it may be inconsistent with the implied freedom. The implied freedom may therefore require a reading down of the provisions so that they only apply to threats or intimidation relating to physical violence. However, in the absence of an expressed limitation to that effect in the legislation itself, this raises rule of law concerns. If the courts apply a narrower and stricter threshold, then the legislation may mean something different from the face value meaning of the words. Such a ‘strained but benign construction’ may ensure constitutional validity, but result in a rule of law problem given that the legal meaning of the words departs from the face value meaning.⁴¹

Assuming that the extension of section 93ZAA to religious vilification pursues a legitimate goal, does it do so in a proportionate manner? Adopting the *McCloy v New South Wales* (*McCloy*) test, in order to be compatible, a law must be ‘suitable’, ‘necessary’ and ‘adequate in its balance’.⁴² The inquiry as to necessity is informed by the breadth of the burden. As noted above, when determining the threshold inquiry as to whether a burden is placed on the impugned political speech in *Faruqi v Hanson* Stewart J held that Part IIA of the RDA ‘effectively burdens the implied freedom’, but that ‘the burden is slight ... because there is so little political communication that is ultimately proscribed by Pt IIA’.⁴³ While those comments may apply to a prohibition on offensive, insulting, humiliating or intimidating political comments on the ground of *race*, a law may foreseeably burden speech about political matters concerning *religion* because religion motivates, inhabits, and is relevant to, a broader range of political determinations and controversies. Religious adherents whose beliefs lend themselves

⁴¹ See *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 604–5 [75]–[79] (Gageler J).

⁴² *McCloy v New South Wales* (2015) 257 CLR 178, 194–5 [2]–[3] (French CJ, Kiefel, Bell and Keane JJ).

⁴³ *Faruqi v Hanson* (n 40) [332] (Stewart J).

toward a notion of the common good are frequently motivated to publicly engage on a range of legal and policy questions.⁴⁴ As Stewart J went on to assert when determining the necessity inquiry, ‘if the burden is great it will be easier to establish that there is a practicable less burdensome alternative’, with the result that the law will be invalid.⁴⁵

Section 93ZAA(1) states the relevant prohibition:

93ZAA Offence of publicly inciting hatred on ground of race

(1) A person commits an offence if—

- (a) the person, by a public act, intentionally incites hatred towards another person or a group of persons on the ground of race, and
- (b) the public act would cause a reasonable person who was the target of the incitement of hatred, or a reasonable person who was a member of a group of persons that was the target of the incitement of hatred, to—
 - (i) fear harassment, intimidation or violence, or
 - (ii) fear for the reasonable person’s safety.

The Australian Oxford Dictionary provides that to ‘intimidate’ means ‘to frighten or overawe, especially to subdue or influence’.⁴⁶ In *Eatock v Bolt* Bromberg J quoted the following definition of ‘intimidate’ from the Macquarie Dictionary: ‘[t]o make timid, or inspire with fear; overawe; cow’.⁴⁷ Thus, ‘intimidate’ may include threats of violence, but also has a broader meaning. ‘Harass’ means to repeatedly trouble or annoy another person.⁴⁸

It can be seen how broad a range of conduct these definitions collectively refer to, including but extending well beyond threats of physical violence (which is properly the domain of criminal law). The meaning of ‘harass’ could include religious teaching that repeatedly troubles or annoys another person. ‘Intimidate’ includes threats of violence but also includes ‘to frighten’, which potentially includes orthodox teaching of mainstream religions (such as eternal damnation). If these terms can be read down so as to cover only threats of violence specifically directed at a person or persons, then they are likely to be compatible

⁴⁴ Mark Fowler, ‘Charity Law and Critiques of Modernity: An Application of Philosophical and Theological Critiques of Liberalism to Four Fields of Charity Law and Regulation: Civic-Engagement, Anti-Discrimination Law, Critique of Government Policy and Tax Exemption’ (PhD Thesis, University of Queensland, 2023).

⁴⁵ *Ibid* [353] (Stewart J).

⁴⁶ *Australian Oxford Dictionary* (2nd ed, 2004) ‘intimidate’ (def 1).

⁴⁷ *Eatock v Bolt* (2011) 197 FCR 261, 324 [262] (Bromberg J). See also *Wertheim v Haddad* [2025] FAC 720 [182] (Stewart J).

⁴⁸ *Australian Oxford Dictionary* (2nd ed, 2004) ‘harass’ (def 1).

with the implied freedom. However, any broader interpretation of these terms seems likely to be disproportionate for the purpose of the implied freedom. Notably, there is no proposed exception for conduct engaged in reasonably and in good faith ‘for any genuine academic, artistic, religious or scientific purpose’, there is no exception for conduct engaged in for a genuine political purpose, and no requirement to demonstrate the conduct was engaged in ‘reasonably and in good faith’. Thus, to the extent that the provisions can be construed narrowly, they are likely to be held to be valid, but to the extent that they cannot, there is a risk of invalidity.⁴⁹

Conclusion

In conclusion, the extension of section 93ZAA to incorporate a religious vilification prohibition raises significant concerns that serve to illustrate the challenges that present to existing vilification laws that regulate religious speech. There is arguably a convergence of principle under the implied freedom of political communication and international human rights law, whereby religious speech should only be made unlawful where it amounts to the advocacy of hatred which incites to discrimination, hostility or violence. The conduct prohibited by the contemplated religious vilification provision is much more restrictive than this, and unnecessarily restricts the ability to teach religious doctrines. In my view there is a legitimate distinction to be drawn between laws regulating incitement to actual force or violence and laws that would inhibit claims to religious truth. This is because religious claims to truth rarely involve claims to incitement to violence.⁵⁰ Where they do, they should be the subject of criminal vilification laws. Any religious vilification law should therefore be limited to conduct that amounts to specific threats of violence or incitement to hatred which are directed to specific persons or groups based on their religion. The mere expression of religious truth claims should be welcome within a free, open and accountable democratic community and should not be subject to judicial sanction because they are out of step with perceived community values.

⁴⁹ Aroney (n 22) 318.

⁵⁰ See, eg, Islamic Council of Victoria submission to Senate Standing Committee on Legal and Constitutional Affairs Inquiry into Criminal Code Amendment (Hate Crimes) Bill 2024 (Cth), Submission 14: ‘a genuine religious practice or political expression should not involve calling for violence against a group or individual’ 7, however cf *Wertheim v Haddad* [2025] FAC 720.