

# O wolność wyznawania religii we współczesnym świecie

Przeciwdziałanie przyczynom dyskryminacji  
i pomoc prześladowanym na przykładzie chrześcijan

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## Recent attacks on religious freedom in Australia

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## 1. Introduction

Religious freedom must always be more than internally held beliefs. Religious freedom must allow people to make important decisions on how they should live their lives, raise their children, and participate in their communities.<sup>1</sup> Because freedom to believe must always be accompanied by the freedom to speak and the freedom to associate (or dissociate), religious freedom must also be necessarily about the external practice and manifestation of belief.<sup>2</sup>

Michael Hernandez, Dean of Law at Regent University, comments that religious freedom “serves the common good and facilitates the proclamation of the Gospel”.<sup>3</sup> From the point of view of communicating “religious truths”, writes Professor Hernandez, “preserving religious liberty protects the rights of conscience of all, including people of no faith, while allowing the Gospel to be preached so that the world may truly, intimately, fully and *freely* know Jesus Christ and the blessings of the kingdom of God”.<sup>4</sup> The assumption taken here is that the convictions of religious persons, freely gathered in churches and voluntary associations, “will permeate society by persuasion and example”.<sup>5</sup>

Be as it may, “there is an increasing demand from the secular left in Australia that religious worship and expression be confined to private space and that religious reasons for political decisions should be affirmatively excluded from debate in the public square”.<sup>6</sup> This phenomenon has been described as the “new sectarianism” – a new form of radical secularism where religious values and beliefs – especially Christianity – are “deemed unworthy and unacceptable” and “discounted as either meaningless, irrelevant, or even harmful when it comes to consideration of key social issues”.<sup>7</sup>

In this sense, there is no exaggeration in stating that Christianity is in nearly existential decline in Australia. As Greg Sheridan points out, “Australia is about to become, if it has not already become, a majority atheist nation”.<sup>8</sup> As a consequence, there is “an astonishing level of ignorance about religion”,<sup>9</sup> coupled with a truly remarkable hostility towards Christianity that is now pervasive in every

[1] P. Kurti, “Religious Liberty: A Forgotten Freedom?” [in:] Iain T. Benson, Michael Quinlan, A. Keith Thompson (eds.), *Religious Freedom in Australia – A New Terra Nullius?* Sydney 2019, p. 25–6.

[2] *Id.*, p. 27.

[3] M. V. Hernandez, “Theistic Legal Realism and Normative Principles of Law”, *Liberty University Law Review* 2007-8, p. 709.

[4] *Id.*

[5] *Id.*

[6] A. K. Thompson, “Should Public Reason Developed Under U.S. Establishment Clause Jurisprudence Apply to Australia?” *The University of Notre Dame Australia Law Review* 2015, Vol. 17, p. 108.

[7] P. Kurti, *The Tyranny of Tolerance: Threats to Religious Liberty in Australia*, Brisbane/Qld 2017, p. 165.

[8] G. Sheridan, *God is Good for You: A Defence of Christianity in Troubled Times*, Sydney/NSW 2018, p. 2.

[9] M. Quinlan, “An Unholy Patchwork Quilt: The Inadequacy of Protections of Freedom of Religious in Australia”, [in:] I. T. Benson, M. Quinlan, and A. K. Thompson (eds.), *Religious Freedom in Australia – A New Terra Nullius?*, Sydney/NSW 2019, p. 44.

single aspect of Australia's society.<sup>10</sup> In some cases, individuals and organisations have been sued for merely expressing traditional Christian values and beliefs. Likewise, Christian schools are no longer even allowed to exclusively hire Christian teachers or teach students according to a biblical perspective, inter alia, on matters of marriage and sexuality.

These are the matters to be addressed in this article, which also has a special focus on the wrongful conviction of Cardinal George Pell. The article contends that his notorious conviction provides an opportunity to raise important questions not just about religious freedom, but also about the state of the nation's criminal justice system. Arguably, the High Court's unanimous acquittal of Cardinal Pell after two previous court rulings that failed to acknowledge reasonable doubt as to his guilt, makes one seriously consider whether the administration of justice in Australia has been compromised by a desire to persecute and punish, rather than prosecute justly.

The other cases mentioned in this article support a general concern about the dramatic erosion of religious freedom in Australia – especially by means of ill-conceived, anti-discrimination laws that are having a profoundly negative impact on the fundamental rights of religious people who merely desire to be engaged in the political debate, whilst remaining true to their own values and convictions as their consciences might dictate. Because it coerces people to leave their religious values and convictions behind them when they are asked to discuss anything in the public square, such a form of “radical secularism” as developed in Australia prevents a considerable number of citizens from more freely expressing themselves in the language that is most familiar to them.

## 2. The Rise of Anti-Religious Sentiment in Australia

While the role of Christianity in Australia's history and law is irrefutable, it is also irrefutable that the country has now considerably departed from its Christian origins.<sup>11</sup> When the first census was taken in 1911, 96 per cent of Australians self-identified as Christian. By 2016, not only had this figure fallen to 52 per cent, but also nearly a third of Australians (30 per cent) now reported that they had no religion at all.<sup>12</sup> In fact, a significant number of Australians (8 per cent) do not even know any person who claims to be a Christian.<sup>13</sup> As for those who know any Christian, a significant number of them associate Christians with a variety of negative characteristics, including being insensitive, intolerant, and judgmental.<sup>14</sup> As noted by Michael Quinlan, Dean of Law at Notre Dame University in Sydney,

Many [Australians] associate Christians with negative stereotypes such as being judgemental, opinionated, hypocritical, intolerant, insensitive, rude, greedy, with outdated beliefs that they seek to impose on others. Some consider that even discussing the traditional Christian – particularly the Catholic – position on, for example, sexual morality, confession, abortion, euthanasia or marriage – is hateful, bigoted and offensive and merely an excuse for protecting child abusers, covering up child sexual assault, sexism, homophobia, transphobia and discrimination akin to racism, apartheid and slavery.<sup>15</sup>

Michael Sexton SC has been the Solicitor-General of New South Wales since 1998. No doubt Mr Sexton is not exaggerating when he describes how “the forces of political correctness” in Australia

[10] K. Donnelly, “Persecution of Christians Being Taken to Extremes”, *The Australian*, 24 April 2019, <https://www.theaustralian.com.au/commentary/persecution-of-christians-being-taken-to-extremes/news-story/038ad2176b1ce5cf2fa94ad4bf7430bf>

[11] See: A Zimmermann, *Christian Foundations of the Common Law – Volume III: Australia*, Brisbane/Qld 2018.

[12] Australian Bureau of Statistics, *2016 Census: Religion*, 27 June 2017, <https://www.abs.gov.au/AUSSTATS/abs@.nsf/mediareleasesbyReleaseDate/7E65A144540551D7CA258148000E2B85>

[13] McCrindle Research Pty Ltd., *Faith and Belief in Australia*, 2017, p. 35.

[14] 20 per cent: *Id.*

[15] Quinlan, op cit., p. 45.



have decided to “wage a war” on everything that may appear to them as inconsistent with their own secular-progressive “articles of faith”. These zealous secularists, writes Mr Sexton, ardently desire to completely eradicate from the public life anything that does not entirely support their anti-religious worldview – particularly Christianity. Such individuals, according to him, have developed a “hostility to all forms of Christian religion but especially the Catholic Church”.<sup>16</sup>

According to Peter Kurti, a legal academic and co-ordinator of the Religion and Civil Society program at the Centre for Independent Studies, the opponents of religious expression in Australia like very much to comment that “people of faith” already have all the freedoms they could possibly want and shouldn’t be given licence to indulge in further acts of “hate speech” and discrimination.<sup>17</sup> Such an approach, Kurti continues, assumes that religious beliefs are irremediably divisive, bigoted, and irrational.<sup>18</sup> It follows from this very premise that, according to these radical secularists, the expression of religious values and ideas should be entirely limited to the private realm, and therefore that any such expression of values and ideas must be eradicated from public debate.<sup>19</sup>

As a consequence of this profound aversion to religious expressions in the public square, a hardened form of secularism has been developed. As noted by Dr Alex Deagon, a legal academic whose research focuses primarily on jurisprudence and religious freedom, fundamentally the sort of secularism prevailing in Australia rests itself on an alternative manifestation of religiosity. Such a manifestation, according to him, attempts to impose “the religion of secularism” by means of “violent coercion by the law or other means”.<sup>20</sup> This disturbing trend has been explained by Nicholas Tonti-Filippini AO in the following terms:

We are witnessing in this country a very aggressive exclusionist form of secularism, which views religious belief and practice with arrogant intolerance and dismissiveness [...] Notwithstanding the legal position, many politicians and others have behaved in a way that does not respect the Australian Constitution by demanding that bishops, priests, ministers, churches, and other religious bodies stop ‘meddling’ in politics. Such *ad hominem* attacks represent an egregious appeal to prejudice and unjust discrimination against certain people or institutions. It is also hypocritical in the strict sense because such advice is usually given by, but not expected to apply to, those whose religion is variously described as secular, ‘humanist’, atheistic, or agnostic.<sup>21</sup>

Because religious freedom entails people having the fundamental right to make decisions on how they should live their lives and participate in their communities,<sup>22</sup> such freedom must be accompanied by the freedom to speak and the freedom to associate (or dissociate). Indeed, “religious freedom must be about the external practice and manifestation of belief”.<sup>23</sup> However, as law professor Keith Thompson points out, there is “an increasing demand in Australia that religious worship and expression should be confined to private space and that religious reasons for political decisions should be affirmatively

[16] M. Sexton, “Revisionists Drive Old Dixie Down Again”, *The Australian*, 21 August 2018, <https://www.theaustralian.com.au/commentary/opinion/revisionists-drive-old-dixie-down-again/news-story/8972a2300f26a645672503deefc91eff>

[17] Kurti, “Religious Liberty”, op. cit., p. 29.

[18] See: S. L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion*, New York/NY 1994, pp 54–55; See also: R. W. Garnett, “Religion, Division, and the First Amendment” *Georgetown Law Journal* 2006, Vol. 94, p. 1667.

[19] In answer to the argument that religious freedom must be confined to the private sphere, and that Australia “is for the most part secularist”, Associate Professor Neil Foster comments: “Australia is not defined as a “secular” country if by that [one] mean[s] to exclude all religion from the public sphere. I agree that a religious view alone is not justification for a law, but we do have a legal system that allows people the right to express their religion in various ways. It is certainly not the case that all religion has to be kept “indoors”. Section 116 of the Constitution provides that the Commonwealth shall not unduly impair “free exercise” of religion. While this does not give religion the right to “trump” other rights, it does give religious belief a weight and it must be taken into account” – Neil Foster, “Law and Religion in Australia”, 22 February 2016, <https://lawandreligionaustralia.blog/about/>

[20] A. Deagon, “A Christian Framework for Religious Diversity in Political Discourse”, Brisbane/Qld 2019, p.152.

[21] N. Tonti-Filippini, “Religion in a Secular Society”, *Quadrant* 2008, Vol. 59, p. 84.

[22] Kurti, “Religious Liberty”, op. cit., pp. 25–6.

[23] *Id.*, p. 27.

excluded from debate in the public square”.<sup>24</sup> Hence, Cardinal George Pell comments on the great irony that the foundations for Australia’s “secular democracy”, as proposed by radical secularists, appears to rest entirely “on the invention of a wholly artificial human being who has never existed, pretending that we are all instances of this species”.<sup>25</sup>

### 3. Cardinal Pell’s Trial and Ordeal

*George Pell v The Queen*<sup>26</sup> is one of the most notorious appeal cases in the history of the Australian judicial system. This is a case that involves unsubstantiated allegations of sexual conduct against a minor by one of the most senior prelates in the hierarchy of the Catholic Church in Australia. George Pell had been Archbishop of Melbourne from 1996 to 2001. He then served as Archbishop of Sydney until 2014 and Cardinal Prefect of the Secretariat for the Economy, in the Vatican.

Curiously, Cardinal Pell was a pioneer in dealing with institutional child sex abuse. In purely statistical terms, Australian children have been safer in Catholic institutions than public schools and even their own homes, “where the vast majority of abuse occurs at the hands of someone within the family or known to it”.<sup>27</sup> Because the Cardinal has always expressed his concern about the matter, coupled with a personal determination to fight against this great evil, he actively cooperated with the Royal Commission into Institutional Responses to Child Sexual Abuse.<sup>28</sup>

Cardinal Pell’s appearances before the Royal Commission comprised close to 20 hours of interrogation, especially from counsel assisting Gail Furness SC.<sup>29</sup> Due to the hostile reception faced by him during these appearances, anyone unfamiliar with the person of the Cardinal would be inclined to believe that he was primarily responsible for the cases of child sexual abuse in the Catholic Church. Of course, nothing could further from the truth, writes Gerard Henderson, the executive director of the Sydney Institute. After reminding us that Pell was not even in charge of a diocese or archdiocese when most of these historical cases of child abuse took place, Henderson adds by informing that, when in a position of authority,

George Pell was the first leader in the Catholic Church to establish a procedure to tackle clerical paedophilia. His predecessor, Archbishop Frank Little, had covered up the crimes of his clergy. Pell took action some six years before American newspaper *The Boston Globe*, in its *Spotlight* series, revealed clerical child abuse in the Boston archdiocese. Nor did the royal commission did due consideration to the fact, soon after been appointed archbishop, Pell sacked two offending priests, Peter Searson and Wilfred Baker, the former, despite the Vatican’s instructions to the contrary.<sup>30</sup>

In December 2018, however, after a trial lasting over a month, Cardinal Pell was found guilty of charges of child sexual abuse against two choirboys. Although he has always strongly denied these accusations, Pell was sentenced to six years’ imprisonment by a jury verdict. Even prior to that trial,

[<sup>24</sup>] A. K. Thompson, “Should Public Reason Developed Under U.S. Establishment Clause Jurisprudence Apply to Australia?” *The University of Notre Dame Australia Law Review* 2015, Vol. 17, p. 109.

[<sup>25</sup>] G. Pell, “Is There Only Secular Democracy?”, *Quadrant* 2004, Vol. 48, No.12, p. 12.

[<sup>26</sup>] *Pell v The Queen* [2019] VSCA 186.

[<sup>27</sup>] M. Giffin, “What the Pell Case is Really About”, *Quadrant*, 21 September 2019, <https://quadrant.org.au/opinion/qed/2019/09/what-the-pell-case-is-really-about/>

[<sup>28</sup>] The Royal Commission into Institutional Responses to Child Sexual Abuse was established in 2013 by the federal government pursuant to the *Royal Commissions Act 1902* (Cth) to inquire into and report upon responses by institutions to instances and allegations of child sexual abuse in Australia. See: Commonwealth of Australia, *Royal Commission into Institutional Responses to Child Sexual Abuse*, 25 May 2020, <https://www.childabuseroyalcommission.gov.au/>

[<sup>29</sup>] G. Henderson, “Royal Commission Denies George Pell Legal Justice”, *The Sydney Institute*, 17 May 2020, <https://thesydneyinstitute.com.au/blog/royal-commission-denies-george-pell-legal-justice/>

[<sup>30</sup>] *Id.*



Victoria's Chief Commissioner Graeme Aston was already implying that Pell had committed these crimes. Since he constantly described his accusers as the "victims", Aston might have induced the outcome of the case by extinguishing the benefit of doubt from the minds of potential jurors.<sup>31</sup>

Cardinal Pell appealed against that conviction on grounds that the jury came to a conclusion that essentially disregarded the standard required of "guilt beyond reasonable doubt". The majority arguably shifted the onus of the proof by arguing that the accused had failed to establish that certain matters were either improbable or impossible. In a remarkably short time, with little comment or case precedent to support their decision, trial judges Anne Ferguson (Supreme Court of Victoria's Chief Justice) Chris Maxwell J (President of the Victorian Court of Appeal) dismissed such argument and concluded, at paragraph 39: "We do not experience a doubt about the truth of [the accuser's] account, or the Cardinal's guilt".<sup>32</sup>

As noted by John Finnis AC QC, professor emeritus at Oxford University,

The Judgement's contention that the complainant's evidence was not false should only have been made by reference to the whole of the evidence, and not just by reference to his appearing credible. The contemporaneous case of Beech simply illustrates the point: accusations about sexual abuse made by a complainant who was very credible to many experienced officers were shown to have been entirely false. Despite their recitations of the rules about onus, the majority shifted the onus onto the defence by saying that he had failed to establish that certain matters were improbable or (practically) impossible.<sup>33</sup>

Not so brief was the powerful dissenting of Justice Mark Weinberger. He did not disregard any evidence and pondered all the facts before remarking, in a compelling 215-page dissection of the case, that, unusually, "this case depended entirely upon the complainant being accepted, beyond reasonable doubt, as a credible and reliable witness. Yet the jury was invited to accept his evidence without there being an independent support for it".<sup>34</sup> After considerable reflection Justice Weinberg concluded that he could not disagree more with the majority. Thus he stated:

Objectively speaking, this was always going to be a problematic case. The complainant's allegations against the applicant were, to one degree or another, implausible ... [T]here is to my mind a significant possibility that the applicant [Pell] in this case may not have committed these offences. That means that in my respectful opinion, these convictions cannot be permitted to stand.<sup>35</sup>

Therefore, a serious concern started to emerge after the trial appeal that a great wrong had been inflicted on an innocent person. Since the case seemed to have been decided on the basis of one single person's accusation and a radical shift in the onus of proof, there were some serious questions demanding answers. Some of these questions related to how the case came to trial in the first place. There was the thinness of the evidence provided by the police, coupled with the reliance of the uncorroborated testimony of a single complainant; the absence of a pattern of abuse behaviour by the accused and of

[31] A. Bolt, "Chief Commissioner Hails Pell's 'Victims'", *The Herald Sun*, 29 July 2016, <https://www.heraldsun.com.au/blogs/andrew-bolt/chief-commissioner-hails-pells-victims-update-this-witch-hunt-is-an-abuse-of-state-power/news-story/79101dc1a25313bbfee8e0b1b952bbcd>

[32] *Pell v The Queen* [2019] VSCA 186, [39] (Ferguson CJ, Maxwell P)

[33] John Finnis AC QC, "Where the Pell Judgment Went Fatally Astray", *Quadrant*, 30 September 2020, <https://quadrant.org.au/opinion/qed/2019/09/where-the-pell-judgment-went-fatally-wrong/>

[34] A. Cooper, "Why Justice Mark Weinberg Believed George Pell Should Go Free", *The Age*, 21 August 2019, <https://www.theage.com.au/national/victoria/why-justice-mark-weinberg-believed-george-pell-should-go-free-20190821-p52jaj.html>

[35] *Pell v The Queen* [2019] VSCA 186, [1054] and [1111] (Weinberg J)

material evidence of a crime; and the reported denial by the second alleged victim that such incident had never occurred.<sup>36</sup>

The criminal trial process in an adversarial system (such as Australia's common-law system) depends heavily upon cross-examination. According to Felicity Davis, a judge of the District Court of Western Australia, "the aim and object of cross-examination is to bring out skilfully all that the witness omitted to say, all that was suppressed or slurred over and all that the witness deliberately lied about, and/or to suggest that the witness is either unreliable or dishonest".<sup>37</sup> According to Judge Davis, what is so fundamental about cross-examination in an adversarial system is that it can present the accuser's evidence "in an entirely new light", and with the object of, among other things, obtain admissions that damage the accuser's case, and/or discredit the evidence of the accuser and his own credibility.<sup>38</sup>

Simply put, the goal of cross-examination is therefore to ensure the accuser (or the witness) is tested by the opposing side. The purpose of such a testing is to ensure that evidence is both truthful and accurate. Therefore, one may expect that the accuser's history of mental illness would constitute an important indicator of reliability. However, the accuser was not even required to appear before the jury to be subject to cross-examination.

In Australia's court proceedings, if there is insufficient evidence in a case it will either be dismissed early on or a non-guilty verdict be found. Although the judge can dismiss the case at any time, dismissal would typically happen early on in a case if it fails at the early stages. Typically this is during the committal hearing. During such a hearing (sometimes called a committal mention) the judge will assess the evidence of the prosecution, and if they believe the prosecution does not have a *prima facie* case, the judge can dismiss the case. From there, assuming a *prima facie* case is made, it is sent to the appropriate court (i.e., District Court or Supreme Court) where the process continues and the court can decide there on the fate of the case.

When the trial takes place it is for the jury to decide on matters of fact, whilst the judge presiding over the trial by jury decides on matters of law. That being so, a case typically will not go to trial as earlier procedure requires a degree of proof to satisfy a *prima facie* case. Evidence is a question for a jury and if they do not find it to prove someone guilty beyond reasonable doubt, they cannot return a guilty verdict. As such, the jury must be convinced "beyond reasonable doubt". If they are not, they must usually find a person not guilty. Furthermore, a judge would not typically remit a case to a lower court unless it was an appeal and an error of law (of some kind) was made. Also, a jury cannot instruct a jury on how to find a defendant guilty "beyond reasonable doubt".<sup>39</sup>

All this sounds perfectly good and proper although there is actually one major problem. According to Kenneth J. Arenson, an emeritus law professor and leading expert on Australia's criminal processes and investigative procedures, especially in the Victorian jurisdiction,<sup>40</sup> there has been an "unsettling trend" in Victoria (and other Australian jurisdictions) regarding the introduction of new laws that have, according to him, egregiously violated "sacrosanct tenets" of criminal justice, including, but not limited to, the presumption of innocence and that all persons are regarded as equal before the

[<sup>36</sup>] P. Collits, "The Networks That Snared George Pell", *Quadrant*, 1 September 2019, <https://quadrant.org.au/opinion/qed/2019/09/hidden-networks-and-the-get-pell-sting/>

[<sup>37</sup>] F. Davis, "Cross-Examination and Re-examination", [in:] *The College of Law, Western Australian Practice Papers – Volume 2*, Chatswood/NSW 2013, p. 445.

[<sup>38</sup>] *Id.*

[<sup>39</sup>] Re to Victorian sentencing Act and Regulations, see: *Criminal Procedure Act 2009* (Vic), <https://www.legislation.vic.gov.au/in-force/acts/criminal-procedure-act-2009/075>, and *Criminal Procedural Regulations 2009* (Vic), <https://www.legislation.vic.gov.au/in-force/statutory-rules/criminal-procedure-regulations-2009/004>. One can also find basic answers to criminal matters with *LegalAid* for the respective state. For Victoria, see: <https://www.legalaid.vic.gov.au/find-legal-answers>

[<sup>40</sup>] See: K. J. Arenson, *Criminal Processes and Investigative Procedures: Victoria and Commonwealth*, Chatswood/NSW 2018. Topics in his book include the hierarchy of courts in Victoria, commencement of criminal proceedings, bail, search and seizure, forensic procedures, police questioning, identification evidence, pleas, the parameters of double jeopardy and the jury system.

law.<sup>41</sup> It follows that laws are in effect in Victoria that effectively prohibit, inter alia, an accused from adducing evidence of the accuser's reputation in the community.<sup>42</sup> As Professor Arenson points out,

Although it is one thing to seek to protect those who have been traumatised by criminal conduct, it is quite another to presume guilt and dispense with the presumption of innocence before there has been an adjudication of guilt.<sup>43</sup>

Over the last two decades the laws of evidence and procedure have been considerably modified in Victoria, to the effect that those who are accused, including by a complete stranger making decade-old allegations, cannot investigate an accuser's psychological history in the hope of uncovering a reason why a seemingly reasonable person is making a false accusation. As a result, the Counsel for Pell was not permitted to cross-examine his accuser and even to ask some basic questions about the accuser's troubled psychological history.

In the Pell case, writes Chris Merritt, legal affairs editor of the prestigious *The Australian* newspaper, "relevant evidence about the complainant was kept from the jury by virtue of legislation that was put in place with the clear intention of protecting those who claim to be victims of sexual assault".<sup>44</sup> As for the trial appeal judgement, one is left with the impression that the appeal court was considerably biased against the accused – that it was in effect finding Pell guilty a second time, which was not its remit. For at times, writes Anthony Daniels, the appeal judges "went beyond saying that the testimony of his accuser was not such that it could be dismissed out of hand, but that the accuser was a credible and even truthful witness".<sup>45</sup>

There was indeed a strong odour of miscarriage of justice about the whole matter. This is precisely what some of the greatest jurists of the common law feared the most in a criminal justice system. Chief Justice of the King's Bench, Sir John Fortescue (1394–1476) famously declared: "I verily rather have twenty evil-doers should escape through tenderness or pity, than that one innocent man should be unjustly condemned".<sup>46</sup> The same opinion dominated the writings of his successors, not least the celebrated eighteenth-century English jurist William Blackstone. In *Commentaries on the Laws of England*, Blackstone stated that "the law holds that it is better that ten guilty persons escape than one innocent person suffers".<sup>47</sup> This has become a fundamental maxim of the common-law's criminal justice, generally known as "Blackstone's Ratio".

What sort of society can possibly tolerate the condemnation (and deprivation of liberty) of an innocent individual? As Peter West points out, "the conviction of the innocent strikes at the heart of justice. If it happens through error or negligence, it is bad enough; when it happens by design, it is an abomination that corrodes the trust in the law itself".<sup>48</sup> There is indeed much scope for abuse when the state invents criminal offences which carry long-term imprisonment on the basis of "someone might have done it" rather than "surely the person has done it".<sup>49</sup>

[41] See: K. J. Arenson, "When Some People Are More Equal Than Others: The Impact of Radical Feminism In Our Adversarial System of Criminal Justice", *The Western Australian Jurist* 2014, Vol. 5, p. 213.

[42] *Id.*, p. 256.

[43] *Id.*

[44] C. Merritt, "George Pell's Verdict: Victoria's Flawed Justice System Must Be Fixed", *The Australian*, 8 April 2020, <https://www.theaustralian.com.au/commentary/george-pell-verdict-victorian-justice-system-is-the-biggest-loser-as-convictions-quashed/news-story/a3744bd98ff6d973250dc36a6cbc671>

[45] A. Daniels, "The Pell Case: A Strong Odour of Injustice", *Quadrant*, 30 September 2019, at <https://quadrant.org.au/magazine/2019/10/the-strong-odour-of-injustice/>

[46] J. Fortescue, *De Laudibus Legum Anglie*, Cambridge/UK 1949, p. 73. See also: A. Zimmermann, *Christian Foundations of the Common Law – Volume 1: England*, Brisbane/Qld 2018, p. 141.

[47] W. Blackstone, *Commentaries on the Laws of England*, Oxford/UK 1770, p. 358 (margin).

[48] P. West, "Cardinal Pell and the Burden of the Proof", *Quadrant*, 30 December 2019, <https://quadrant.org.au/opinion/qed/2019/12/cardinal-pell-and-the-burden-of-proof/>

[49] P. Smith, "The Justice System and Cardinal Pell", *Quadrant*, 16 May 2019, <https://quadrant.org.au/opinion/qed/2019/05/the-justice-system-and-cardinal-pell/>

Think for instance about the criminal system of a totalitarian government, for example, the former Soviet Union. Felix Dzerzhinsky, the founder of the Cheka and a major perpetrator of the Red Terror, had his own practical way to solve criminal court matters: “Better to execute ten innocent men than to leave one guilty man alive”.<sup>50</sup> Nicolai Krylenko, the first People’s Commissar of Justice in the 1920s, shared a similar view of the matter: “We must execute not only the guilty. Execution of the innocent will impress the masses even more”.<sup>51</sup>

Occasionally a country’s ruling elite will carry a deep-seated grudge against a particular individual. Thanks to the state-owned broadcaster and numerous other radio and television hosts, by the time of trial “Pell was the single most widely loathed person in the country”.<sup>52</sup> So it does not appear to matter so much if the accuser of the “loathed person” actually had no witness in his favour, no incriminating objects, no photographs or CCTV, no DNA, and no evidence independent of his own recollection. The accuser did not even have to appear in person to confront the accused with his testimony. Because the accuser’s evidence was given by video-link, the accused was denied the opportunity to cross-examine him and have the opportunity to probe for further contradictions and weaknesses in his testimony.<sup>53</sup>

By contrast, the defence had a substantial volume of evidence in his favour. This included numerous witnesses and countless other alibis demonstrating that the accused was nowhere near where the accuser said he was when the alleged abuse occurred. Despite the absence of witnesses to verify the accuser’s claim, the prosecution decided to go further and create its own version of what might be counted as corroboration – namely the credibility of the accuser’s account being somehow enhanced by the accuracy of his description of the priests’ sacristy.<sup>54</sup> Accordingly, the Victorian Director of Prosecutions (Ms Keri Judd QC) told the court that the accuser’s recall of the layout of the sacristy provided “independent support” and comprised “an important aspect of ... the assessment of [his] credibility”.<sup>55</sup>

Cardinal Pell’s legal team filed their submission to the High Court on January 3, 2020. The Victorian Public Prosecution office did so on January 31. Fortunately, Pell had his unfair conviction overturned by the highest court of the land, which has found no evidence that he had committed that crime. In this special appeal the High Court summarily dismissed the accusation, stating that it was beside the point to find that it was open to the jury to view the accuser’s knowledge of the sacristy as independent confirmation of him having been inside it.

Furthermore, by a seven-to-zero vote the Court accepted the applicant’s argument that, “during a recorded police-walk through the cathedral in 2016, the choirboy looked at the renovated archbishop’s sacristy and said it was the same as at the one and only time he was inside it in 1996”. The accuser was looking at that renovated premise and he said: “That’s unchanged”.<sup>56</sup> Above all, the High Court found that the jury ought to have entertained the benefit of doubt. The Victorian Court of Appeals had according to judges of the High Court committed some quite serious errors of law. In a ruling handed down on April 7, 2020, by Chief Justice Susan Kiefel, the full bench determined that the Victorian Court of Appeal effectively “failed to engage with the question whether there remained a reasonable possibility that the offending had not taken place”.<sup>57</sup>

The full bench concluded also that the other witnesses’ evidence had been entirely inconsistent with the complaint’s account. As a result, the summary stated there was a very substantial possibility that an innocent person had been unjustly convicted “because the evidence did not establish guilt

[<sup>50</sup>] West, *op. cit.*

[<sup>51</sup>] N. Krylenko, *Revoliutisonnyye Tribunaly* [1918]; quoted from: R. Pipes, *The Russian Revolution*, New York/NY: 1991, p. 796.

[<sup>52</sup>] West, *op. cit.*

[<sup>53</sup>] K. Windschuttle, “Two Judges and the Baying Mob”, *Quadrant*, 29 April 2020, <https://quadrant.org.au/opinion/qed/2020/04/two-judges-baying-mob/>

[<sup>54</sup>] *Id.*

[<sup>55</sup>] *Id.*

[<sup>56</sup>] *Id.*

[<sup>57</sup>] *Pell v The Queen* [2020] HCA 12 [1].

to the requisite standard of proof”.<sup>58</sup> In its judgement, the High Court justices stated that the jury, if acting reasonably, should have had doubt about the charges against Cardinal Pell, and that the Court of Appeal should have recognised the grounds for reasonable doubt based on the unchallenged evidence of 23 opportunity witnesses. The Full Court concluded:

The issue for the Court of Appeal was whether the compounding improbabilities caused by the unchallenged evidence ... nonetheless required the jury, acting rationally, to have entertained a doubt as to the applicant's guilt. Plainly they did.<sup>59</sup>

Cardinal Pell was released from jail on April 7, 2020, and soon after the High Court quashed his convictions. He has always maintained his innocence. “I have consistently maintained my innocence while suffering from a serious injustice”, said Pell shortly after the decision was announced. He has also declared: “The point was whether I had committed those awful crimes, and I did not. The only basis for long-term healing is truth and the only basis for justice is truth, because justice means truth for all”.<sup>60</sup>

The case against Cardinal Pell should be primarily about whether a person is guilty of the charges laid against him. In practice, however, this case was about something rather different. As noted by David Flint, an emeritus professor and one of the nation's leading constitutional lawyers, the accused was actually a victim of “unjust treatment” and “character assassination”, because Cardinal Pell has simply dared “to take unpopular positions on current matters, for example, global warming. Rather than being hated, he should be admired for this. But such is the narrow thinking of the elites today that dissent is intolerable and any dissenter must be punished”, writes Professor Flint.<sup>61</sup>

Michael Giffin, a priest in the Anglican Diocese of Sydney, concurs with Professor Flint. According to him, the case against Cardinal Pell is part of a “broader war” over everything he symbolises. “Pell endorses all of the beliefs and teachings of the Catholic Church and is not afraid to say so”, argues Giffin.<sup>62</sup> “What is uniquely sinister about the Pell Case”, Giffin adds, “is the way it brings out the darker side of human nature ... While the case against Pell was notoriously weak, motivations of convicting him were strong, and our judicial system is permanently compromised as a result”.<sup>63</sup>

Finally, the High Court ruling should invite a reflection on the Victorian Premier's commitment to the presumption of innocence. Two days after Pell's unanimous acquittal, in a brief statement, Daniel Andrews made it clear that his sympathies did not lie with the 78-year-old whom the High Court unanimously found to be wrongfully imprisoned for more than 400 days. Rather than regretting that an innocent person became another victim of the Victorian criminal justice system, Mr Andrews responded to the Court's unanimous quashing of Cardinal Pell's conviction by reinforcing that he would always believe in anyone who claims to have been a victim of sex abuse.<sup>64</sup> Premier Andrews stated:

I make no comment about today's High Court decision. But I have a message for every single victim and survivor of child sex abuse: I see you. I hear you. I believe you.<sup>65</sup>

[<sup>58</sup>] *Id.*

[<sup>59</sup>] *Pell v The Queen* [2020] HCA 12 [1]

[<sup>60</sup>] G. Pell, “Statement of Cardinal Pell”, *Catholic Archdiocese of Sydney*, 6 April 2020, <https://www.sydneycatholic.org/casys/wp-content/uploads/2020/04/STATEMENT-FROM-CARDINAL-GEORGE-PELL-070420.pdf>

[<sup>61</sup>] D. Flint, “Cardinal Pell: Is a Fair Trial Possible?”, *Quadrant*, 3 July 2017, <https://quadrant.org.au/opinion/qed/2017/07/cardinal-pell-fair-trial-possible/>

[<sup>62</sup>] *Id.*

[<sup>63</sup>] M. Giffin, “What the Pell Case is Really About”, *Quadrant*, 1 September 2019, <https://quadrant.org.au/opinion/qed/2019/09/what-the-pell-case-is-really-about/>

[<sup>64</sup>] R. Baxendale, “George Pell Case: I believe You, Daniel Andrews Tells Child Sex Abuse Victims”, *The Australian*, 7 April 2020, at <https://www.theaustralian.com.au/nation/politics/george-pell-case-i-believe-you-daniel-andrews-tells-child-sex-abuse-victims/news-story/631673b43a880b59aa470a117a210efb>

[<sup>65</sup>] *Id.*



It is a fundamental principle of criminal justice that everyone is innocent until proven guilty. The High Court has held that the conviction of Cardinal Pell did not meet the standard of proof required. It is therefore entirely wrong for the Victorian Premier to categorically state as a principle that we must believe all victims. As Mark Powell, *the Associate Pastor of Cornerstone Presbyterian Church* in New South Wales, asks rhetorically:

Is Daniel Andrews rejecting the authority and wisdom of the highest court in our land, in favour of the unfounded accusations of anyone who claims to have been sexually abused? Perhaps the Premier is grumpy that a champion of religious and cultural conservatism has not been criminally condemned? Maybe he realises that the Australian legal system and its citizens expect the criminal law to be administered justly, which means meeting the required standards of proof?<sup>66</sup>

#### 4. Recent Cases of Religious Intolerance in Australia

The anti-discrimination laws in Australia are known to be broad, with a low entry-point for complainants. In States like New South Wales (NSW), they have been used by serial litigants to pursue claims against residents in other Australian states when the legislation in those states either does not make unlawful the complained of act, or sets too high a bar for the complainant.

The current standards that the *Anti-Discrimination Act 1977* (NSW) sets for standing are so low that practically anybody can make a complaint to the state Anti-Discrimination Board with little to no material connection to the respondent or their actions. Section 89 in the Act only requires that the complaint be in writing and that this needs not even demonstrate a prima-facie case.

This sets the bar far too low. The complainant is not even required to provide sufficient detail that demonstrates that the alleged act, if true, would constitute an act of unlawful discrimination under the Act. Therefore, the complainant does not have to show *why* they are complaining. Complainants currently have very little to dissuade them from making misconceived or vexatious complaints.

John Steenhof is the managing director of Human Rights Law Alliance (HRLA), a not-for-profit law firm associated with the Australian Christian Lobby that represents persons and organisations in matters involving freedom of religion and the fundamental freedoms of expression, thought, and association.<sup>67</sup> According to him, there is evidence of significant time and resources being wasted in the pursuit of vexatious claims against vulnerable individuals who suffer from a cognitive disability and, as a result, cannot help or filter themselves when engaging in public discourse on political and social issues.<sup>68</sup>

Deficiencies in the current NSW anti-discrimination system have long been subject to abuse. With the Act in its current state, there is a worrying proliferation of complaints being targeted at the same individuals, for broadly the same reasons. These complaints, often from the same serial litigants are not only being entertained by the Board under the current Act, but also the resulting matters drain significant time and resources from the NSW justice system. The cumulative processes that respondents face end up dealing out a far greater punishment than any of their allegedly vilifying behaviour could possibly warrant.

[<sup>66</sup>] M. Powell, 'The George Pell Travesty Is Over. Now Journalists, Politicians and Courts All Stand Condemned', *The Spectator Australia*, 7 April 2020, <https://www.spectator.com.au/2020/04/the-george-pell-travesty-is-over-now-journalists-politicians-and-courts-all-stand-condemned/>

[<sup>67</sup>] The Human Rights Law Alliance ("HRLA") was originally established in 2016 within the Australian Christian Lobby to connect Australian Christians to allied lawyers in religious freedom matters.

[<sup>68</sup>] J. Steenhof, 'Submission to the NSW Legislative Council – Anti-Discrimination Amendment (Complaint Handling) Bill 2020', *Human Rights Law Alliance*, 1 May 2020, p. 5



Mr Steenhof mentions the case of a small business owner in Queensland.<sup>69</sup> In January 2020, she was one of many commenters on a Facebook post for a petition opposing a Drag Queen Story Time event in Brisbane public libraries. It was a local petition for Brisbane residents. She is a Christian lady who on grounds of Christian principles posted that it was inappropriate to have adult entertainers reading stories to little children where many adult entertainers are involved in drugs and prostitution. The post did not mention homosexuals.

A serial litigant in New South Wales (“NSW”) linked the post with the person’s small business, sent an e-mail threatening a claim of homosexual vilification in New NSW under its Anti-Discrimination Act, and stated that they would be “seeking damages”. The activist also sent her a purported media release naming her business, her previous address and her mobile phone number, thus publishing personal information to encourage harassment and malicious attacks against the respondent.<sup>70</sup>

The respondent ignored the threat and heard nothing more until receiving an e-mail from the NSW Board in April 2020, stating that it had written to the client about the complaint (the letter had not been received) and that it had heard nothing. The e-mail required a response within 30 days and threatened that the NSW Board had powers to compel a Queensland resident to provide it information and threatened to proceed with the complaint. This was the first correspondence the respondent had received from the Board.

While the respondent has not yet seen the complaint, presumably, the Board is already aware that:

- the complainant is vexatious and a serial complainant;
- the respondent lives in Queensland not NSW;
- the respondent was posting from Queensland on a local Brisbane issue;
- the respondent did not make any reference to homosexuals in the post; and
- the respondent has no connection with the vexatious claimant.<sup>71</sup>

Clearly the claim has no merit. The Board should not enable this complaint and it has powers to decline the complaint at first instance under the Act. Nonetheless, NSW public servants at the Board have threatened to compel a Queensland resident to produce information in their very first correspondence after failing to ensure proper service of the claim.

This suggests that the Board is not effectively using existing powers to dismiss vexatious complaints, and is therefore misusing its powers to overreach and threaten residents outside their jurisdiction to comply with document production orders. It is unclear how many other Queensland residents who posted on the internet in opposition to Drag Queen Story Time have been targeted by this NSW serial complainant with claims. Secrecy provisions in the Act prevent any oversight of the extent to which these vexatious claims are being made and the extent to which the Board is subsidising these claims.

In March 2020, a high-profile claim by a serial litigant against Israel Folau was declined by the NSW Board on the basis of lacking substance and being vexatious and malicious. In contrast, the Board has entertained a claim against a small business owner who is a resident of another Australian State, despite currently having sufficient power under the Act to ensure that the claim doesn’t proceed. This kind of inconsistency in approach, and the support by the Board for a clear misuse of the existing discrimination regime, provide opportunity for vexatious litigants to abuse the anti-discrimination complaints process.<sup>72</sup>

[<sup>69</sup>] *Id.*, pp. 2–4.

[<sup>70</sup>] *Id.*, p. 3.

[<sup>71</sup>] *Id.*

[<sup>72</sup>] *Id.*, pp. 3–4.

#### 4.1. *Delany v Porteous* [2015] TACD

Cardinal Pell is not the only top-ranking authority in the Catholic Church who has had to face unfair court proceedings. In September 2015, a transgender person, Martine Delaney, lodged a complaint under the Tasmanian Anti-Discrimination Act with the state Anti-Discrimination Commissioner against the Catholic Church and, in particular, Archbishop Julian Porteous.<sup>73</sup> This complaint concerned the booklet *Don't Mess With Marriage*. This booklet stated, amongst other things, that “marriage should be a heterosexual union between a man and a woman and changing the law would endanger a child’s upbringing”.<sup>74</sup> The complaint relied primarily on s 17(1) of the Act, which provides:

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

The attributes mentioned in s 16 of the Act to which s 17(1) refers are (in the order they appear in s 17(1)): gender, race, age, sexual orientation, lawful sexual activity, gender identity, intersex, disability, marital status, relationship status, pregnancy, breastfeeding, parental status and family responsibilities. Section 17(1) therefore concerns acts based on the above criteria. Hence, such provision directly affects political discussions about groups with these attributes.

Naturally, the “chilling effect” of a provision that makes unlawful the “offending” of another person should not be underestimated. The risk of anyone being dragged into court proceedings will deter many religious people from arguing about their beliefs and convictions. This self-imposed censorship of religious ideas inevitably causes the “chilling effect” of limiting freedom of speech, because of “the fear of litigation and its risk of financial ruin, jail, collegial ostracism, or embarrassment”.<sup>75</sup>

Curiously, making unlawful these comments concerning religious doctrine has far more of a “chilling effect”. The provision that is found in s 17(1) of the Tasmanian legislation effectively burdens the freedom of political communication that the country’s highest court has found to be implied in the Australian Constitution. In our system of representative and responsible government, there are often controversial issues concerning such things as race, colour, ethnicity, nationality, and sexuality. That being so, in *McCloy*, the majority of the High Court held that the law’s overall burden on the implied freedom of political communication was relevant to determining whether or not it was impermissibly infringed. The majority in that case noted that such a determination required comparing “the positive effect of realising the law’s proper purpose with the negative effect of the limits on constitutional rights or freedoms”, and that “[l]ogically, the greater the restriction on the freedom, the more important the public interest purpose of the legislation must be for the law to be proportionate”.<sup>76</sup>

Although Ms Delaney withdrew her complaint for purely tactical reasons (“My primary reason is the tribunal process is a very long and drawn out process and during that time the message of this booklet is going to continue to be spread”, she told AAP), it is still quite disturbing that an archbishop, a top-ranking authority in the Catholic Church, was dragged to an anti-discrimination authority for merely expressing a traditional view of the Church on marriage. This leaves all religious groups in Tasmania open to attack, and their practices and beliefs unguarded. As such, one of our leading

[73] Australian Broadcasting Corporation, “Anti-discrimination Complaint ‘an attempt to silence’ the Church Over Same-Sex marriage, Hobart Archbishop Says”, *ABC News* (online), 28 September 2015, <https://www.abc.net.au/news/2015-09-28/anti-discrimination-complaint-an-attempt-to-silence-the-church/6810276>.

[74] *Id.*

[75] J. Harrison, “Truth, Civility, and Religious Battlegrounds: The Context Between Religious Vilification Laws and Freedom of Expression” *Auckland University Law Review* 2006, Vol. 12, p. 79.

[76] *McCloy v NSW* (2015) 257 CLR 178 [87] (French CJ, Kiefel, Bell and Keane JJ).

columnists, Angela Shanahan, is absolutely right to remind us that, “[i]f people are forced to appear before an Anti-Discrimination provision ... this is a major disincentive to people making a contribution to debate across Australia”.<sup>77</sup>

#### 4.2. Exclusion Zone Legislation – Various Cases

An increasing number of Australian States and Territories have introduced exclusion zones around facilities where termination of pregnancies are carried out. The zones provide a buffer that shields patients from people who oppose abortion and are engaged in behaviour such as quite protest and counselling. While primarily designed to provide safe zones for women seeking to terminate a pregnancy, the zones can also be extended to other types of premises such as programs where needles and syringes are freely offered to drug addicts by the government.

In the Australian Capital Territory<sup>78</sup>, New South Wales<sup>79</sup>, Northern Territory<sup>80</sup>, Queensland<sup>81</sup>, Tasmania<sup>82</sup>, Victoria<sup>83</sup>, communication including by prayer, counselling and protest (no matter how peaceful, respectful or caring) is a criminal offence if it occurs within designated areas around abortion clinics. In Western Australia, the government has recently announced legislation that will provide a 150-metre buffer around premises where abortions are provided. This will bring Western Australia in line with all other Australian jurisdictions, apart from South Australia where there is presently a similar Bill before the South Australian Parliament to introduce such abortion access zones.

People may be driven to communicate about abortion for a range of acceptable reasons. These exclusion zone laws have a deeply detrimental effect on freedom of speech and freedom of expression. What is more, these laws have had a particularly detrimental effect on the right of religious people to express their opinion about abortion. As Professor Quinlan reminds us, “to date only Christians have been prosecuted for breaching these laws”.<sup>84</sup>

For example, motivated by their faith three pro-life activists (Mr and Mrs Stallard and Mr Graeme Preston) stood on a street corner near a Hobart clinic with placards with statements about the “right to life” and depictions of a foetus. They were convicted of an offence against Section 9(2) of the *Reproductive Health (Access to Terminations) Act 2013* (Tas), which prohibits such peaceful protests that can be seen or heard by a person accessing an abortion clinic. In other words, they were successfully prosecuted for breaching the exclusive zone legislation by protesting too close to the abortion clinic, in 2016.<sup>85</sup> The magistrate made these observations concerning the religions motivations of these three defendants:

[Mr Preston] has been a Christian since he was 14 and he believes that human life has been created in the image of God uniquely and that human life is of absolute importance as referred to in the Scriptures. That God knows us even when we are growing in our mother’s womb and in particular he believes in the incarnation of Jesus as God coming into the world born in his mother’s womb and that that validates human life at every stage. Mr Person explained that the Bible teaches people to care for one another and in particular to help those who are most vulnerable or defenceless. He considers that a child in the womb would be probably

[77] A. Shanahan, “Discrimination Police Indulging In Gay Abandon”, *The Australian*, 15 October 2011, <https://www.theaustralian.com.au/opinion/discrimination-police-indulging-in-gay-abandon/news-story/c1457f01388bc4f3b1fe0a1a974f82fd>

[78] *Health Act 1993* (ACT)

[79] *Public Health Amendment (Safe Access to Reproductive Health Clinics) Act 2018* (NSW)

[80] *Termination of Pregnancy Law Reform Act 2017* (NT)

[81] *Termination of Pregnancy Act 2018* (Qld)

[82] *Reproductive Health (Access to Terminations) Act 2013* (Tas).

[83] *Public Health and Wellbeing Amendment (Safe Access Zones) Act 2015* (Vic)

[84] Quinlan, op. cit., p. 45.

[85] *Police v Preston and Stallard* [2016] TASMC (27 July 2016).

the most vulnerable category of human beings and that they are completely defenceless. He believes that it is right and necessary that people come to the aid of those who are vulnerable and defenceless which includes unborn children [...].<sup>86</sup>

Essentially as I understood Mrs Stallard's evidence she regards herself as a practicing Christian, and as part of her Christian beliefs she believes that every life is sacred, that an unborn life does not have a voice, and that as part of her Christian beliefs she needs to stand up for people without a voice which led her to protest with Mr Preston.<sup>87</sup>

The religious motivations of protestors, coupled with the fact that they acted peacefully and respectfully, presenting no obstacle to the entrance to the abortion clinic, did not prevent their conviction. Despite it being a decision in Tasmania, other laws exist in other Australian jurisdictions which have been applied in a similar measure to stifle public debate and respectful disagreement. For instance, on 21 March 2017, the Supreme Court of Victoria handed down a decision which unanimously upheld the criminal conviction of Ms Michelle Fraser, a Christian pro-life activist, for simply displaying the image of a dead foetus outside an abortion clinic, in 2013. She stood on a footpath in the vicinity of an abortion clinic holding images of a dead foetus and the words, "This Is Your Choice" and "Blood Money".<sup>88</sup>

The decision arose from an appeal of the judgement in the County Court of Victoria, in November 2015. The appeals' court unanimously upheld that the image of a dead foetus was obscene because such images "may be so distressing as to be potentially harmful".<sup>89</sup> The court also stated in its observations on these images: "They are images which, according to accepted community standards, are of such horror or such a disgusting nature that people ought not to be unwittingly exposed to them while going about their everyday business or be obliged to take steps to avoid them".<sup>90</sup>

With this particular ruling, the Victorian Supreme Court struck a crucial blow to freedom of speech. Its primary effect is that now showing the image of a dead foetus is deemed obscene and therefore a criminal act under laws that ban obscenity in most of the Australian jurisdictions. Such a ruling effectively means that the truth about abortion practices can no longer be displayed in public. Arguably, if the photo of a dead unborn child is so deeply distressing, then one is invited to ask why it is not even more distressful to be reminded of the reality of an abortion procedure and that, every year, approximately 100,000 unborn children are aborted in Australia.<sup>91</sup>

This only goes to show that many Australian judges are more concerned about dead babies being shown in public than about protecting communication concerning political matters that are constitutionally protected. After all, it is a basic principle of our constitutional law in Australia that no law should unreasonably burden free communication on political matters among voters. This implied freedom of political communication is a strong constitutional guarantee that has been developed by the Australian High Court in order to recognise that this is so even where communication might be seriously offensive.<sup>92</sup> Hence, as Martyn Iles has observed:

[<sup>86</sup>] *Id.* [58]

[<sup>87</sup>] *Id.* [65]

[<sup>88</sup>] *Fraser v County Court of Victoria & Anor* [2017] VSC 83 (21 March 2017)

[<sup>89</sup>] *Id.* [56]

[<sup>90</sup>] *Id.* [71]

[<sup>91</sup>] A. Zimmermann, "Abortion: Law Condone the Act as it Criminalizes the Image", *Newsweek*, 22 April 2017, p. 17.

[<sup>92</sup>] Together with my colleagues Joshua Forrester and Lorraine Finlay, we have endeavoured to explain the nature and scope of this implied freedom, as follows: "Almost twenty years ago the High Court recognized an implied freedom of political communication in the Australian Constitution. The High Court has found that the right to speak freely on matters of public importance lies at the very foundation of our democratic system ... While promoting racial tolerance is a highly laudable objective, it is also true that many important political debates occurring at present in Australia involve issues of race, colour, ethnicity or nationality ... The simple fact that the Australian Government includes a Minister for Indigenous Affairs, Minister for Immigration and Border Protection, and an Assistant Minister for Multicultural Affairs is indicative of this. The Australian people need to be able to

Often it is the shocking nature of a political communication which is the very thing that makes it effective, especially where, far from being gratuitous or unrealistic, the images are shocking precisely because they portray the truth about abortion to the public.<sup>93</sup>

From 9 to 11 October 2018, the High Court heard two challenges to the constitutional validity of legislation establish abortion access zones in Victoria and Tasmania. The Court delivered its decisions to these challenges on April 10, 2019. The majority of the Court dismissed the constitutional challenge to the Victorian legislation, and the Court unanimously dismissed the same challenge to the Tasmanian legislation.<sup>94</sup> It did so on the grounds that, because the implied freedom of communication apparently does not guarantee a constitutional right to “a mode of protest”, the plaintiffs’ particular exercise of a right to protest may therefore “be abrogated by statute”.<sup>95</sup> That being so, the Court went on to fully acknowledge that the both the Victorian and Tasmanian legislation burdened the implied freedom of communication. However, in both cases, it was considered by the Court that such burden can be justified by reference to the so-called “legitimate purposes of the legislation”, including the privacy of pregnant women accessing abortion provider services.

There is much to be said about our members of the judicial elite ignoring such an important element of the Australian Constitution, and of every truly functional democracy for that matter. As a result, the confronting reality of abortion on demand has now been stifled by the unelected judiciary in the name of political correctness. The truth about abortion may indeed be uncomfortable to such individuals, but the solution should be not judicial censorship of our freedom of political communication on such matters. Instead, the solution should be more public debate coupled with a more critical discussion about the seriousness of the problem.

#### 4.3. *Hordyk v Wanslea Family Services* [2019] WAEOC

Byron and Keira Hordyk are a Christian couple from Western Australia (WA) who attend the Free Reformed Church of Baldavis (WA). They applied to become respite foster carers for children between the age of 0–5 in January 2017. They said they would love any foster child who was placed with them, but that they couldn’t affirm or promote a sexual identity that conflicts with their Christian convictions.

Byron and Keira were promptly rejected by the foster care agency and labelled as “unsafe” due to their traditional Christian beliefs about gender and sexuality. In a letter addressed to them by the Wanslea Family Services, it is stated that their Christian beliefs surrounding LGBTQI issues “meant they failed to meet one of the five competencies specified by the Department of Communities for foster carers – providing a safe living environment”.<sup>96</sup> They lodged then a complaint with the Equal Opportunity Commission under the *Equal Opportunity Act 1984* (WA). The couple argued that their views were part of their Christian faith, which the organisation refused to reasonably accommodate.

In 2019, the WA Equal Opportunity Commission dismissed Byron and Keira’s complaint of religious discrimination after unsuccessful conciliation. The Acting Commissioner determined that

freely and robustly discuss political matters, including controversial political issues concerning race, colour, ethnicity or nationality”. – J Forrester, L Finlay, A Zimmermann, “The Sound of Constitutional Silence”, *IPA Review* August 2016, Vol. 68, <https://ipa.org.au/ipa-review-articles/the-sound-of-constitutional-silence>. For a detailed information about this implied constitutional freedom, see: J Forrester, L Finlay, A Zimmermann, *No Offence Intended: Why 18C is Wrong*, Brisbane/Qld 2016, pp. 117–212.

[93] *Id.*

[94] *Clubb v Edwards; Preston v Avery* [2019] HCA 11

[95] *Id.* [8]

[96] K. Hedley, “Couple Who Believe It’s a Sin to be Gay Fight for Right to be Foster Carers”, *WAToday*, 6 February 2020, <https://www.watoday.com.au/national/western-australia/couple-who-believe-it-s-a-sin-to-be-gay-fight-for-right-to-be-foster-carers-20200205-p53y3c.html>



their claim was “misconceived and not substantiated”.<sup>97</sup> Byron and Keira required the Commission to refer their complaint to the State Administrative Tribunal. In late 2019, the foster care agency made an application to strike out Byron and Keira’s claim on the basis that it was misconceived and lacking in substance. This agency’s attempt to knock out the claim in the Tribunal was unsuccessful.<sup>98</sup> The Hordyks are currently being prepared for a hearing in late 2020. If the Western Australian legislation did not include the ability to refer the claim to the Tribunal, it would have been terminated at first instance and the Hordyks would have no recourse to justice.

#### 4.4. *Burns v Gaynor – Various Cases*<sup>99</sup>

Bernard Gaynor is a Queensland resident who has been subjected to a half-decade legal battle over his conservative internet blogging and promotion of Christian views of marriage, gender, and the family. An LGBT+ activist in New South Wales (Mr Garry Burns) has filed over 40 complaints of discrimination and vilification (36 of them during a period of 32 months) against Mr Gaynor for the views expressed on his blog. Defending these accusations has been stressful, time consuming, and costly for Mr Gaynor, who has been forced to sell his house and incurred over 400 thousand dollars of legal fees.<sup>100</sup> As reported by the nation’s leading newspaper, “Mr Burns said Mr Gaynor ‘has an asset, namely his house’, and that if enough complaints were substantiated at the New South Wales’s Civil and Administrative Tribunal (“NSWCAT”) then ‘we can look at taking his house through bankruptcy.’”<sup>101</sup>

As a practising Catholic, Mr Gaynor correctly believes he has been persecuted for his Christian views on marriage, family and morality<sup>102</sup>, and that the system effectively encourages radical activists to lodge complaints where the process is the punishment.<sup>103</sup> “It has had a terrible impact on our lives, it has destroyed us financially and put enormous stress on our family. There is no escape, even when you win in the High Court”, Mr Gaynor says.<sup>104</sup> He has been unable to have complaints dismissed as vexatious harassment, and unable to get claims consolidated into a manageable, single proceeding despite the fact that not a single discrimination claim against him has ever been successful.

All of these complaints have been filed by the same NSW complainant and have been the subject of a proliferation of claims and counter-claims by the respective parties that the Board and the Tribunal have spent huge sums administering and adjudicating. Mr Burns has made it his life’s work to pursue anyone who makes comments he regards as being detrimental to the LGBTIQI community, primarily by complaining to the NSW Anti-Discrimination Board. There is no cost to file a complaint with the Board, and no cost to have a complaint referred to NSW Administrative Tribunal. Neither are there costs awarded against complainants if they lose in the tribunal. In fact, there is even a potential upside for complainants, who can be awarded up to \$100,000 in compensation.

[<sup>97</sup>] Steenhof, op. cit., pp. 7–8.

[<sup>98</sup>] *Hordyk v Wanslea Family Services Inc* [2019] WASAT 146

[<sup>99</sup>] See, e.g.; *Burns v Gaynor* (No 2) [2019] NSWDC 552; *Burns v Gaynor* [2018] NSWDC 358; *Burns v Gaynor* [2015] NSWDC 283; *Burns v Gaynor* [2015] NSWDC 24; *Burns v Gaynor* [2015] NSWCATAD 211; *Burns v Gaynor* [2015] NSWCATAD 77; *Burns v Gaynor* [2015] NSWCATAD 24.

[<sup>100</sup>] A. Zimmermann, “The State of Freedom of Speech in Australia: Universities, the Media, and Society in General”, [in:] Grzegorz Blicharz (ed.), *Freedom of Speech: A Comparative Law Perspective*, Warsaw 2019, p. 242.

[<sup>101</sup>] Y. Bashan, “Mark Latham Takes Aim at Discrimination Cases Overkill”, *The Australian*, 27 February 2020, <https://www.theaustralian.com.au/business/legal-affairs/mark-latham-takes-aim-at-discrimination-cases-overkill/news-story/b7e73aa3off039b104b32cb5e76bf38>

[<sup>102</sup>] N. Berkovic, “Christian Anti-Gay Blogger’s Bid for Ban on Lawsuits”, *The Australian*, 2 May 2019, <https://www.theaustralian.com.au/business/legal-affairs/christian-antigay-bloggers-bid-for-ban-on-lawsuits/news-story/ca7a325717684bf9c90c7e478>

[<sup>103</sup>] N. Berkovic, “Same-Sex Marriage Opponents Tongue-Tied by the Thought Police”, *The Australian*, 27 November 2015, <https://www.theaustralian.com.au/nation/inquirer/samesex-marriage-opponents-tonguetied-by-the-thought-police/news-story/f4b1fafob7421ddf757b4e503d1dd27>

[<sup>104</sup>] N. Berkovic, “Gay-hate Victim Garry Burns Turns Lawfare Crusader”, *The Australian*, 16 June 2018, <https://www.theaustralian.com.au/nation/nation/gayhate-victim-garry-burns-turns-lawfare-crusader/news-story/486b43fd937012f6630cc8d913426f2e>



#### 4.5. *Burns v Sunol* – Various Cases<sup>105</sup>

There is also evidence of significant time and resources being wasted in the pursuit of vexatious claims against vulnerable individuals who suffer from a cognitive disability and, as a result, cannot help or filter themselves when engaging in public discourse on political and social issues.

The case of John Sunol provides one such example. He suffered a car accident in the late 1970s and acquired a mental disability as a result. He has taken to engaging in online posts against the Sydney Mardis Gras, radical Muslims, and on other contentious social topics. He has very few online followers, no material impact, and no real social media influence.

Serial litigant activists discovered Mr Sunol's online social media posts and have subjected him to intense lawfare by using the NSW Anti-Discrimination Act to file multiple complaints. He has been the subject of about 77 complaints to the NSW Anti-Discrimination Board, with more than 20 such cases against him having come before the NSW Tribunals and Courts. These have led to about 24 tribunal or court matters and 30 days of hearings.<sup>106</sup> As a result, Mr Sunol has become entirely bankrupt. He cannot pay his court ordered fines and faces jail time. Due to his disability, he cannot appreciate the seriousness of his position, nor can he find suitable relief to help him.

The fact that the current system aids and abets serial litigious activists to persecute mentally unwell people instead of using those resources and time on real cases is a serious issue.<sup>107</sup> According to Steenhof, "much of the leading case law in relation to the Act has been produced as a result of cases involving Sunol, often in a self-represented capacity".<sup>108</sup> Without the aid of expert arguments being advanced by competent counsel in meritorious claims, the Tribunal will develop bad precedent that will adversely affect future legitimate claims.

#### 4.6. Jason Tey WAEOC [2018]

Jason Tey is a leading wedding photographer in Perth. He was named as one of the Top 30 international wedding photographers in the International Wedding Photographer Awards in 2016 and 2017. He is also a committed Christian who describes himself on his website as "A Christian photographer based in Perth".<sup>109</sup>

In 2018 Mr Tey was approached by a homosexual couple who wanted him to photograph their children. He agreed to do so, but also revealed he had a "conflict of belief" on the issue of same-sex marriage which related to his religion, and that the couple might be more comfortable hiring someone else. His words were: "I am happy to shoot family photos for you with skill and professionalism but think I should let you know my view on same-sex marriage".<sup>110</sup>

As can be seen, there was no refusal to provide a service, and no unfavourable terms and conditions attached to the provision of services or in the manner in which the services were provided. Even so, the woman remained unsatisfied and brought a complaint to the Western Australian Equal Opportunity

[105] *Burns v Sunol* [2018] NSWCATAD 78; *Burns v Sunol* [2012] NSWADT 246; *Burns v Sunol* (No 2) [2012] NSWADT 247; *Burns v Sunol* [2014] NSWCATAD 2; *Burns v Sunol* [2014] NSWCATAD 61; *Burns v Sunol* [2014] NSWCATAD 62; *Burns v Sunol* [2014] NSWCATAD 63; *Burns v Sunol* [2016] NSWCATAD 16; *Burns v Sunol* [2016] NSWCATAD 74; *Burns v Sunol* [2016] NSWCATAD 81; *Burns v Sunol* (No 2) [2017] NSWCATAD 236; *Burns v Sunol* [2017] NSWCATAD 215; *Burns v Sunol* (No 2) [2017] NSWCATAD 236; *Burns v Sunol* [2018] NSWCATAD 10.

[106] *Id.*

[107] Steenhof, op. cit., p. 6.

[108] *Id.*

[109] See: *Jason Tey Studios*, <https://www.jasontey.com/>

[110] C. Brohier, "The Battle for Religious Freedom in Australia – From Disciplinary Proceedings to the High Court" *The Western Australian Jurist* 2019, Vol.19, p. 85.

Commission (“WAEOC”), demanding he admit the alleged discrimination and publish an apology on his website and social media pages for two months.<sup>111</sup>

The hearing was set down for December 2018 and then re-scheduled for February 14 last year. At the conciliation, writes Christopher Brohier, “the Conciliation Officer mentioned numerous times how this was a clear case of discrimination, and that the Commission would assist the complainant (and the WAEOC lawyer would represent her) if the matter was remitted to the Tribunal”.<sup>112</sup> While the complaint has been discontinued, Mr Tey still had to go through the process of the action. Indeed, the complainant eventually dropped the complaint but after many months of expensive and time-consuming legal and conciliation processes. As Brohier also points out,

The complaint was based on mere expression of a Christian view in relation to same-sex marriage. There was an express willingness to do the work and to do it “with skill and professionalism”. Yet there was a complaint and it found some support from the EOC. The process itself can be the punishment and that is especially the case for a small businessman like Tey.<sup>113</sup>

#### 4.7. *Colvin v Ballarat Christian College* [2019] VCAT

Ballarat Christian College is an independent school located in Ballarat, Victoria, which provides education for children in the evangelical Protestant tradition. The school was sued by Rachel Colvin, a former teacher, for discrimination because the school requires teachers to teach according to orthodox Christian principles. Moreover, its statement of faith explicitly defines marriage as a union between a man and a woman.

Ms Colvin formally notified the school of her objections to the statement in a letter on August 14, 2018. She was directed to meet a female member of the school leadership to discuss her views. As reported, the college indicated that she was perfectly entitled to hold her views but was required to teach in accordance with the Christian beliefs of the school.

Ms Colvin subsequently filed a complaint to the Victorian Civil and Administrative Tribunal (“VCAT”). Fortunately the matter was settled in March 2020. As a result of the settlement, Ms Colvin received an undisclosed amount for loss of income and damages and the school will have to provide her with a positive employment reference.<sup>114</sup>

It is difficult to understand why a teacher who is entirely opposed to a particular school belief system would even apply for a job at that school. However, the complainant claimed that the Christian teachings of that school discriminated against her despite the school itself advising Ms Colvin that she was free to hold her own personal beliefs.

One has to wonder why Ms Colvin chose to work for a Christian school in the first place, when she strongly opposed the moral teachings of Christianity. As well as the payout and a positive reference for Ms Colvin, the parties have also agreed to issue a statement of ‘mutual regret’. According to the school’s Principal, Mr Ken Nuridin, “the claim has taken enormous cost in time and resources already – detracting from the ability of a small school ... to focus on what is important, the education of students”.<sup>115</sup>

[<sup>111</sup>] *Id.*

[<sup>112</sup>] *Id.*

[<sup>113</sup>] *Id.*

[<sup>114</sup>] R. Ferguson, “Ballarat Christian College Settles Case With Former Teacher Rachel Colvin Over Same-Sex Beliefs”, *The Australian*, 5 March 2020, <https://www.theaustralian.com.au/nation/ballarat-christian-college-settles-case-with-former-teacher-rachel-colvin-over-samesex-beliefs/news-story/e258dob6fdf50b51a0ebaf8e4f8c09a6>

[<sup>115</sup>] *Id.*

## 5. Final Considerations

Deficiencies in the Victorian criminal justice have been fully exposed by the High Court's verdict on Cardinal Pell's case. The Court's unanimous and definite verdict indicates that Pell was unfairly and improperly targeted by that criminal justice system. This is confirmed by the testimony of criminal law academics who have witnessed a disturbing trend whereby reforms in the legislation have egregiously compromised fundamental principles of criminal justice, especially the presumption of innocence and that all persons are regarded as equals before the law.

It follows that, throughout Australia, disparate rules apply which afford no protection to the accused against false allegations. The implications are of great significance not only for the criminal justice system, but also for the behaviour of society more generally. They reveal a disturbing trend evident across every Australian jurisdiction, of "undeservingly believing alleged victims of abuse or assault, and pursuing charges based on their testimony regardless of counter-evidence".<sup>116</sup>

In particular, the Cardinal's wrongful conviction raises serious doubts about the possibility that "there may be other individuals in Victorian prisons who have similarly been unjustly convicted but lack the resources necessary to appeal a conviction to the High Court".<sup>117</sup> Arguably, if a prominent religious person such as Cardinal Pell can be wrongly convicted (and deprived of his freedom for over 400 days), then nobody is really safe – especially not so equally influential religious individuals. As stated by Merritt,

The baseless conviction of Cardinal Pell is an international scandal that will rank alongside the jailing of Lindy Chamberlain for the murder of her baby, who was actually taken by a dingo. Just like the Chamberlain case, the Pell disaster will inevitably find its way into a movie that will do no favour's for the standing of Australian justice. Two of the state's most senior judges – Chief Justice Anne Ferguson and Court of Appeal president Chris Maxwell – have been shown to have made a fundamental error; the reliability of the state's jury system has been left in doubt; and the wisdom of the state's police in effectively advertising for complaints about the cardinal is open to question.<sup>118</sup>

Unfortunately Cardinal Pell is not the only religious authority to be victimised by a deeply flawed legal system. For example, the Catholic Archbishop of Tasmania, Julian Porteous, has also been a victim of the system and forced to respond to an Anti-Discrimination Tribunal after a transgender person filed a complaint over a pamphlet containing the traditional Catholic view on marriage which had been circulated to Tasmanian Catholic schools. The complainant eventually dropped the claim, but not without substantial amount of money and resources involved in legal fees and other costs relating to the litigation.

This article has also pointed out to several other innocent victims of the Australian court system, in particular where vexatious claims by serial litigants have become a serious problem for religious people. Indeed, it is truly disturbing to observe how easily people of faith can become the regular victims of vexatious litigants who take special delighted in conducting "political lawfare" against those who dare to manifest values and ideas that they do not appreciate.

[116] J. Hodge, "The Scapegoating of Cardinal Pell", *Quadrant*, 28 May 2020, <https://quadrant.org.au/magazine/2020/06/the-scapegoating-of-cardinal-pell/>

[117] G. Walsh, "Australia's High Court was Right, Despite Critics", *Mercatornet*, 14 April 2020, <https://mercatornet.com/australias-high-court-was-right-despite-critics/47830/>

[118] Merritt, op. cit. Here Merritt refers to the notorious case of Lindy Chamberlain, who was accused, convicted by a jury and jailed for the murder of her baby, who had been taken by a dingo at Uluru/NT, in 1980. Mrs Chamberlain was eventually exonerated, her story immortalised in the movie *Evil Angels*, starring Meryl Streep. – See: M. Bowling, "Convict Cardinal Has Another Chance to Clear His Name, Judge Compares Case to Lindy Chamberlain", *The Catholic Leader*, 30 August 2019, at <https://catholicleader.com.au/news/convicted-cardinal-has-another-chance-to-clear-his-name-judge-compares-case-to-lindy-chamberlain>

Of course, freedom of religion must encompass a freedom to communicate beliefs free from penalty. However, this article has also pointed out to the existence of exclusive zone legislation that criminalizes religiously motivated and non-threatening behaviour. It effectively does so with very little evidence that such behaviour may cause harm to anyone, thus posing a considerable burden to the right of religious people to exercise their constitutionally implied freedom of political communication.

In a true democracy, speech must be met with speech and not with legal actions and threats to a person's freedoms, although I am afraid to state this is definitely not the case in Australia. And since religious views are so often intertwined with political views, then any limitation imposed on the political communication of religious people should be interpreted as a violation of the broader protection to the freedom of political communication afforded by the Australian Constitution, as recognised by the High Court of Australia.<sup>119</sup>

Prof. Augusto Zimmermann  
Perth/WA, 02 June 2020

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[119] See: A. Zimmermann, "Religious Freedom of Political Communication: A Constitutionally Protected Freedom", *The Spectator Australia*, 20 March 2018, <https://www.spectator.com.au/2018/03/religious-freedom-of-political-communication-a-constitutionally-protected-freedom/>

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- Hordyk v Wanslea Family Services Inc* [2019]
- Pell v The Queen* [2019]

