New South Wales Law Reform Commission Paper

Discussion Paper 24 (1992) – Blasphemy

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Chapter 4: OPTIONS FOR REFORM

TERMS OF REFERENCE

On 26 September1991, the then Attorney General, the Honourable PEJ Collins MP made to the Commission a reference to inquire into and report upon:

(a) wheter the present law relating to the offence of blasphemy is adequate and appropriate to current conditions; and

(b) any related manner.

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The Law Reform Commission is constituted by the Law Reform Commission Act 1967. Pursuant to section 12A of the Act, the Chairman has constituted a Division for the purposes of this reference. The members of the Division are:

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1. INTRODUCTION

THE REFERENCE

1.1 On 26 September 1991 the Commission was given a reference by the Attorney General, the Hon Peter Collins, QC, MP, to inquire into and report upon:

(a) whether the present law relating to the offence of blasphemy is adequate and appropriate to current conditions; and

(b) any related matter.

BACKGROUND TO THE REFERENCE

1.2 In 1990, the then Attorney General, the Hon JRA Dowd QC, MP, wrote to a number of the major churches seeking views on the need for a review of the law of blasphemy. The current reference follows on from that original inquiry, and with regard to the work currently being undertaken by the Australian Law Reform Commission in connection with its reference on *Multiculturalism and the Law.*

THE PROBLEMS

1.3 The Salman Rushdie affair in England revived interest in the crime of blasphemy, highlighting problems with the offence. A key issue is whether the offence is anachronistic in a modern society such as ours which is both multi-religious and secular, and which maintains a separation between Church and State. The common law offence of blasphemy applies only to scurrilous criticism of the fundamental tenets of the Christian religion - and perhaps only to the tenets of the Church of England and other Christian denominations whose tenets happen to coincide with these.[1] Such discrimination by the law in favour of or against particular religions is itself an indicator of the need for review and possible reform.

1.4 Another important concern is whether the blasphemy offence improperly impinges upon the fundamental human right of freedom of speech. The law imposes many restrictions and qualifications upon free speech and freedom of action [2]- arguably *too* many. In the absence of a Constitutional right, there should be a strong presumption of free speech, with only the most compelling justification accepted for any limitation imposed by law.

1.5 Providing a contemporary definition of the offence of blasphemy in New South Wales presents a serious problem. The law of blasphemy was fashioned over the centuries by English courts, reflecting in different periods particular social tensions and the level of social and religious tolerance achieved. A study of English history raises the possibility that the offence of blasphemy was *never* really suited to the circumstances of New South Wales, established in 1788 as a penal colony and described (with some irony) by one commentator as the "most godless place under heaven."[3] There is a real question whether blasphemy still exists in the criminal law of New South Wales, even if it was "received" as law in colonial times, given the long period of disuse.[4]

1.6 Although the New South Wales Parliament has offered a degree of guidance in the *Crimes Act* 1900, ss 574-574A, resort to the case law is necessary to flesh out the elements of the offence (assuming it is still part of the law). However, there have been no reported judicial decisions in Australia, and only one case in New South Wales - in 1871 - uncovered by the noted author Peter Coleman as part of an investigation into the history of censorship in Australia. [5]

1.7 The English judiciary recently has had occasion to consider the law of blasphemy again, but opinion is divided on some important issues.[6] Further, it is questionable how much reliance can be placed upon the reasoning of the English courts, given that the common law of Australia now has departed markedly from the English law with respect to the basic principles of criminal responsibility. [7]

1.8 In this Discussion Paper we also look at the way the offence of blasphemy has been dealt with in other common law legal systems, as well as consider a number of other related offences, such as disturbing religious worship ceremonies, assaults on officiating ministers, racial vilification and incitement. It may be that to the extent the offence of blasphemy is concerned with the prevention of civil disorder, this may be better achieved through the use of other existing public order offences or the creation of a new offence or offences.

PURPOSE OF THIS DISCUSSION PAPER

1.9 The purpose of this Discussion Paper is to promote informed public debate about the modern application in New South Wales of the ancient English common law offence of blasphemy, and to make some preliminary suggestions about possible avenues for reform.

1.10 In analysing the elements of the offence of blasphemy, the Commission has also raised more general questions about the role and development of the criminal law in this State, including refinement of the general principles of criminal responsibility, the need for codification of the common law, and the extent to which the exercise of basic freedoms should be qualified by the criminal law.

1.11 **The views expressed in this Discussion Paper do not represent the Commission's final recommendations and are made for the purpose of encouraging comments and suggestions from interested persons and groups.** Such submissions will be of great assistance to the Commission in formulating its final Report to the Attorney General. No final decisions about recommendations will be made by the Commission until after the deadline for submissions has passed.

OUTLINE OF THE PAPER

1.12 In Chapter 2, we trace the development of the common law crime of blasphemy from its English, ecclesiastical origins to modern times, including a detailed analysis of the elements of the offence. Chapter 3 looks at the position in the other Australian jurisdictions (state, territory and federal) as well as in English-speaking jurisdictions overseas. Chapter 4 considers the options and arguments for reform, and offers some tentative proposals to focus the debate. The options considered are: (1) retention of the common law offence of blasphemy; (2) progressive codification of a new offence of blasphemy; (3) replacement of blasphemy with other public order offences; and (4) abolition of the offence of blasphemy without specific replacement.

FOOTNOTES

1 See paras 2.31, 2.42, and 4.51-4.52, below.

2 For example, the criminal laws on offensive, indecent and obscene behaviour, and the civil law of defamation.

3 I Breward, *Australia: The Most Godless Place Under Heaven?* (1988).

4 See paras 2.50-2.55 and 4.50, below.

5 *Jones' case*, described by Peter Coleman in *Obscenity, Blasphemy, Sedition: 100 years of Censorship in Australia* (2nd ed, 1974) 66.

6 See paras 2.84-2.88, below.

7 See paras 2.77-2.107, below.

2. THE LAW OF BLASPHEMY

INTRODUCTION: THE CONCEPT OF "BLASPHEMY"

2.1 One reason why the debate over the law of blasphemy can engender such passionate feelings is that "blasphemy", in its common rather than legal usage, means different things to different people. Some consider the use of "swear words" with a religious connotation in the broadcast media to be blasphemous[1] as well as offensive; others regard any public repudiation of basic religious concepts to be blasphemous; while many regard the whole concept of blasphemy to be obsolete in modern society.[2] Another view is that blasphemy laws rarely should be utilised, but should nevertheless be maintained to signal the society's distaste for scurrilous abuse against persons based on their religion or beliefs, and perhaps to punish particularly outrageous cases. It would be remarkable if such differences of opinion did not exist, given that the concept of blasphemy is inextricably linked to personal religious beliefs and notions of pluralism, tolerance and freedom.

2.2 Dictionary definitions of blasphemy include: "impious utterance or action concerning God or sacred things", "irreverent behaviour towards anything held sacred"[3], "profane speaking of God or sacred things; pious irreverence", and "slander, evil speaking, defamation".[4] In the Old Testament, the Third Commandment proscribes the taking of the Lord's name in vain,[5] with traditional Judaism prohibiting even the uttering or spelling out of God's name. In its modern, vernacular sense, however, irreverent behaviour towards anything held in great esteem and respect is sometimes said to be "blasphemous".

2.3 As a term of art in the criminal law, blasphemy (and the closely related "blasphemous libel") is used in a much more restricted fashion. A starting point for a modern legal definition of blasphemy and blasphemous libel is *Stephen's Digest of the Criminal Law*, which states that:

> every publication is said to be blasphemous which contains any contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ, or the Bible, or the formularies of the Church of England as by law established ... . Everyone who publishes any blasphemous document is guilty ... of publishing a blasphemous libel. Everyone who speaks blasphemous words is guilty of ... blasphemy.[6]

2.4 In *Whitehouse v Lemon and Gays News Ltd* (1979), the leading authority on the current state of the English common law of blasphemy, the summing-up given by the judge to the jury was in substantially the same terms,[7] and on appeal Lord Scarman cited *Stephen's Digest* with approval. The essence of blasphemy, according to Lord Scarman, is that:

> the words must constitute an interference with our religious feelings, creating a sense of insult and outrage by wanton and unnecessary profanity.[8]

2.5 Thus, for an act or statement to be criminally blasphemous under the English common law, it must be highly and unnecessarily offensive in character, and it must relate specifically to the Christian religion. *Stroud's Judicial Dictionary* characterises blasphemy as:

> the publication of that which [crosses] the dividing line between moderate and reasoned criticism of Christianity on the one hand, and immoderate or offensive treatment of Christianity or sacred subjects on the other hand.[9]

2.6 In a recent challenge in England to the publication of Salman Rushdie's *The Satanic Verses* on the grounds that it contained "a blasphemous libel concerning Almighty God (Allah) the Supreme Deity common to all the major religions of the world, the Prophet Abraham and his son Ishmael, Muhammad (Pbuh) the Holy Prophet of Islam, his wives and companions and the religion of Islam and Christianity", the Divisional Court held that there was no uncertainty over the scope of the common law offence of blasphemy: it was restricted to a scurrilous vilification of the Christian religion and could not be judicially extended to other religions.[10]

2.7 In order to appreciate the current *legal* meaning of blasphemy in New South Wales, and to help understand whether it has any continued relevance in modern times, it is necessary to examine the origins of this old concept. Unless otherwise indicated, the term blasphemy will be used in its narrow legal sense in this Paper. Subject to the context, it will be used to refer to both offences of blasphemy and blasphemous libel.

ORIGINS IN ENGLISH ECCLESIASTICAL AND COMMON LAW

2.8 At the time of the settlement of the New South Wales colony, blasphemy had been established in England as a common law offence for about a century. The offence had its earlier origins in ecclesiastical law, where it was closely related to the other religious offences of heresy, schism and atheism, within the jurisdiction of the separate Ecclesiastical Courts.

2.9 A person convicted of blasphemy in the Ecclesiastical Courts was liable to be burnt at the stake by virtue of the common law writ *de Haeretico Comburendo*.[11] Blasphemy could also be dealt with by the Star Chamber and the Court of High Commission, which tended to regard irreligion as an offence against civil order. These Courts were dissolved in 1641, and the writ, together with the punishment of death in pursuance of any ecclesiastical censure, was abolished in 1689. The Court of King's Bench stepped in to fill what could have been a gap in the law, declaring at the trial in 1663 of Sir Charles Sedley for indecency and blasphemy that the (common law) Court acted as the guardian of morals for all the King's subjects, and would punish all profane actions that were contrary to modesty and Christianity.[12]

2.10 *Taylor's case*[13] (1676) is said to be "the foundation stone" of the common law of blasphemy,[14] confirming that blasphemy had indeed become an offence punishable by the common law courts. Hale CJ is reported as saying:

> such kind of wicked blasphemous words were not only an offence to God and religion, but a crime against the laws, State and Government, and therefore punishable in this Court. For to say, religion is a cheat, is to dissolve all those obligations whereby the civil societies are preserved... . *Christianity is parcel of the laws of England; and therefore to reproach the Christian religion is to speak in subversion of the law.*[15] [Emphasis supplied]

2.11 By holding that "Christianity is parcel of the laws of England", the courts were declaring their readiness to punish all blasphemies, whether scurrilous and offensive or not. This attitude was reflected in the Parliament at the same time. The *Blasphemy Act* 1698 made it an offence for any person educated in or having professed the Christian religion to deny its truth.[16] As late as 1841 the Commissioners on Criminal Law reported that "the law forbids *all* denial of the Christian religion", adding, however, that in actual practice "the course has been to withhold the application of the penal law unless insulting language is used".[17] Hale's statement was only officially disapproved of by the courts over 200 years later.[18]

2.12 The function of ecclesiastical law was to protect the professed religion of the State. Until the Reformation, England was a Catholic country; after 1536, the established religion was the Church of England.[19] An attack on the State religion of England was equated with an attack on the security of the State itself, and so blasphemy was punished as an offence which "tends manifestly to a dissolution of the civil government."[20] There was no threat to the State where attacks were made on creeds other than the State religion, and consequently no need for such attacks to be made subject to the criminal law.

2.13 In the case of *R v Gathercole* (1838), Alderson B told a jury that:

> a person may, without being liable to prosecution for it, attack Judaism, or Mahomedanism, or even any sect of the Christian religion (save the established religion of the country); and the only reason why the latter is in a different situation from the others is because it is the form established by law, and is therefore a part of the constitution of the country.

2.14 From early on in its history it is evident that blasphemy was punished for two different reasons: that it offended against God and the Christian religion (the theological justification), and that it could lead to civil disorder (the social justification). A court which accepted the theological arguments for punishing blasphemers would be unswayed by arguments that the alleged blasphemy was published in a sober and serious manner, intended to promote discourse and rational thought rather than civil unrest. Conversely, a court which focussed upon the social justification for the criminalisation of blasphemy would be concerned mainly to punish those blasphemous statements made in such an inflammatory manner as potentially to provoke violence or serious social unrest.

2.15 *Fox's Libel Act* 1792 placed upon the jury the responsibility for determining, as a matter of fact, whether published matter was blasphemous. Prior to the passage of the Act this was considered to be a question of law for the judge to decide. The Act related to both blasphemous libel and seditious libel. Given that temperate criticism of government was not seditious, the blurring of these offences probably had the effect of further "secularising" the nature of the blasphemy offence.[22]

2.16 The trend towards the social, rather than religious, justification for blasphemy has meant that the manner in which an allegedly blasphemous statement is made figures strongly in whether it will attract criminal liability. In *R v Hetherington* (1841), Lord Denman CJ summed up to the jury in the following terms:

> even discussions upon the [great doctrines of Christianity itself] may be by no means a matter of criminal prosecution, but if they be carried on in a sober and temperate and decent style, even those discussions may be tolerated and may take place without criminality attaching to them; but ... if the tone and spirit of them is offence and insult and ridicule, which leaves the judgement really not free to act and therefore cannot be truly called an appeal to the judgement, but an appeal to the wild and improper feelings of the human mind, more particularly in the younger part of the community, in that case the jury will hardly feel it possible to say that such opinions so expressed do not deserve the character [of blasphemy] which is affixed to them in this indictment.[23]

2.17 In 1883, Lord Coleridge CJ stated his view on this issue firmly and concisely:

> I now lay it down as law, that, if the decencies of controversy are observed, even the fundamentals of religion may be attacked without the writer being guilty of blasphemy.[24]

2.18 This question was considered settled by the English courts in 1917, when it was held by the House of Lords in *Bowman v Secular Society* that:

> a temperate and respectful denial, even of the existence of God, is not an offence against our law, however great an offence it might be against the Almighty Himself. [25]

Blasphemy at common law, according to the House of Lords in this case, involves "a denial or an attack upon some of the fundamental doctrines of the Christian religion" and requires "an element of vilification, ridicule, or irreverence as would be likely to exasperate the feelings of others and so lead to a breach of the peace". [26]

2.19 This understanding of the law, which emphasises the public order character of the common law offence, was applied in the next reported judgment, *R v Gott*,[27] in 1922. The trial judge in this case directed the jury that it must ask itself whether the words complained of were:

> indecent and offensive attacks on Christianity or the Scriptures or sacred persons or objects, calculated to outrage the feelings of the general body of the community and so lead possibly - not inevitably, but so lead possibly - to a breach of the peace.

2.20 For 55 years after *Gott*, there were no successful prosecutions for blasphemy in England and there was a strong body of opinion that the offence had ceased to exist in modern law. For example, in 1949, Lord Denning pronounced the offence of blasphemy "a dead letter":

> The reason for this law was because it was thought that a denial of Christianity was liable to shake the fabric of society, which was itself founded on the Christian religion. There is no danger to society now and the offence of blasphemy is a dead letter.

2.21 Despite Lord Denning's confident pronouncement, in 1979 the majority of the House of Lords upheld the 1977 convictions for blasphemous libel of the defendants in *Whitehouse v Lemon*. [29] (This case is discussed in more detail below.) In 1990, the Divisional Court also accepted the continuing existence of the blasphemy offence at common law, but refused to extend the offence to cover vilification of non-Christian religions. [30]

2.22 The convictions in *Whitehouse v Lemon* were followed by considerable public concern and a *Blasphemy (Abolition of Offence) Bill* was introduced in the House of Lords in 1978. (A number of other attempts at abolition had failed in the British Parliament between 1885 and 1930.)[31] It was decided to refer the issue to the Law Commission of England and Wales for review and wider public consultation. In 1966, the Law Commission had recommended repeal of the *Blasphemy Act* 1697, as part of its review of "ancient offences",[32] and this was accomplished by the *Criminal Law Act* 1967 (UK).[33] In the same year, the Criminal Law Revision Committee recommended abolition of common law blasphemy and blasphemous libel, but this did not eventuate. After a detailed Working Paper in 1981, which "provisionally concluded" that the offence of blasphemy should be abolished,[34] the Commission reported its final recommendations in 1985, and by a majority recommended that the common law offences of blasphemy and blasphemous libel should be abolished without replacement.[35]

2.23 This recommendation has not yet been taken up by the British Parliament, but the Law Commission's Report was taken into account by the Divisional Court in its decision not to extend the law of blasphemy in the proceedings arising out of the Rushdie Affair.[36] The recent English case law is considered further, under the heading of "The Elements of the Offence", below.

RECEPTION OF THE OFFENCE IN NEW SOUTH WALES

The doctrine of reception

2.24 When the New South Wales colony was founded in 1788, there was a well-established doctrine of English law that the colonial settlers "carried the law of England with them on their backs". The benefits of the English law were regarded as the birthright and inheritance of the settlers and the law was thus "received" into the colony. The doctrine of reception was qualified, however. Only so much of the law as was applicable to the situation of the settlers and the circumstances of the new colony was carried with them.[37] As the Privy Council stated in 1875:

> statutes relating to matters and exigencies peculiar to the local condition of England, and which are not adapted to the circumstances of the particular colony, do not become a part of its law.[38]

2.25 If blasphemy had remained an ecclesiastical offence at the time of the settlement of New South Wales, it probably would not have been capable of being received into the colony, since the old cases and texts[39] suggest that ecclesiastical law is "no part of the common law in any colony"[40]; it is "left behind in the mother country."[41] The position would be somewhat different, however, if the colony was said to have its own established church and ecclesiastical jurisdiction.[42] (See discussion below.) In any event, by 1788 blasphemy had become a common law offence in England which, if received, could be tried by the Supreme Court of New South Wales.

2.26 This transplantation of law (and legal institutions) was further limited by reference to the laws of England in force at the time of first settlement. No Act of the Imperial Parliament could come into force in a colony after its settlement without express provision being made in the Imperial Act for such extended jurisdiction.[43]

2.27 These principles of reception are easy to state but more difficult to apply in practice. There were doubts over which areas of the law were in fact applicable to the circumstances of the settlers of the new colony and disputes arose over the precise date to be used to mark the time of first settlement, rendering unclear the status of many Imperial Acts.[44] To settle this latter question, s24 of the *Australian Courts Act* 1828 (UK) provided that:

> all laws and statutes in force within the realm of England at the time of the passing of this Act ... shall be applied in the administration of justice in the courts of New South Wales ... so far as the same can be applied within the [colony].[45]

2.28 Although s24 was primarily concerned with the setting of a date after which time no Imperial Act would extend to New South Wales without specific provision, it applied equally to the incorporation of the common law.[46] As a law "in force within the realm of England" in 1828, blasphemy would have been received in New South Wales insofar as it was applicable to the particular circumstances of the new colony.

2.29 The approach adopted by the courts in considering the circumstantial applicability of an area of law has been to examine the policy reasons behind the enactment or creation of the relevant provision, and the methods employed by the law in enforcing such aims, to determine whether such policy or procedures could have been reasonably applied in 1828 to the condition and circumstances of New South Wales.[47] For example, in the Victorian case of *M'Hugh v Robertson* (1885), the test was stated as follows:

> courts shall consider, from the circumstances of the colony, as to population and habits, whether it was so like England at the time of the passing of the [Act] that the law might be reasonably applied.[48]

In this case, the Full Court of the Supreme Court of Victoria considered that the English statutory prohibition against taking money for admission to an entertainment on a Sunday was reasonably applicable to the circumstances of the colony in 1828. (According to Coleman, the Victorian Government deliberately chose this offence in preference to reviving the common law of blasphemy, as it did not wish to risk public outcry or the creation of popular support for the defendant based on the controversy of the charge.)[49]

2.30 In determining the substance of the law which applied in the colony, as in most things, no account was taken of the laws and customs of the Aboriginal inhabitants of Australia. In *M'Hugh v Robertson*, Holroyd J observed wryly that:

> from the first the English have occupied Australia as if it were an uninhabited and desert country. The native population were not conquered, but the English Government, and afterwards the colonial authorities, assumed jurisdiction over them as if they were strangers who had immigrated into British territory, and punished them for disobeying laws which they could hardly understand, and which were palpably inapplicable to their condition.[50]

Reception of the law of blasphemy

2.31 There are several concerns about whether, and to what extent, the English common law of blasphemy was received in New South Wales. The English common law of blasphemy only protects with certainty the tenets of the Church of England "as by law established",[51] and probably other Christian denominations as well, but:

> only to the extent that their fundamental beliefs are those which are held in common with the established Church. It is less likely that the present law affords any protection in respect of beliefs not so held; for example, the special place held by the Virgin Mary in the beliefs of certain denominations of the Christian religion.[52]

As discussed below, it is questionable whether the Church of England in New South Wales has ever been the established church, and it is clear that there is currently no established church. There also is a question whether common law blasphemy was appropriate to the circumstances of New South Wales. The courts have held a number of other laws linked to religion to be inapplicable to the particular conditions of New South Wales. Finally, it may be that common law blasphemy was received in New South Wales, but in a modified form adapted to local circumstances.

2.32 An "established church" at law is generally said to be one which is formally recognised as the official State religion.[53] Limited recognition and the protection of the law may be accorded to other religions, however. For example, legislation may authorise ministers of various religions to act as marriage celebrants.[54] The process of establishment means that the State has given a pre-eminent legal status to the particular church, and certain legal sanctions to its decrees. There is a duty on the civil power to give support and assistance to the established church.[55]

2.33 The status of the Church of England in New South Wales has been the subject of much academic debate. Not surprisingly, Church of England/Anglican authorities and scholars have been more likely to support the idea of the established church, with Catholic and other religious authorities and scholars questioning this on historical and policy grounds.[56] One problem facing the participants in this debate is the lack of any official consideration of this issue in the eighteenth and early nineteenth centuries. The Colonial Office never defined the legal status of the Church of England in Australia. The reason for this could be, as suggested by one Anglican commentator, that "the various Secretaries of State for the Colonies simply took for granted the status of the Church of England as by law established"[57]; but there is no written evidence to confirm this hypothesis.

2.34 The first chaplain to the penal settlement was a member of the Church of England. By 1821 there were eight chaplains in New South Wales, overseeing not only the religious needs of the community but also the construction of churches. At this time, the British Government gave permission for two Roman Catholic priests to go to New South Wales, and granted them stipends of one hundred pounds each. Another government grant of three hundred pounds was advanced to the first Presbyterian minister of the colony, in addition to an amount equalling one-third of the cost of a Presbyterian chapel. This suggests something more than mere toleration, tending towards the acceptance of religious equality, at least among the various Christian denominations.

2.35 In a number of judicial statements of the last century this reasoning was accepted. In *R v Roberts* (1850), Dickinson J declared that the English *Marriage Acts* were inapplicable to New South Wales as being "too inconsistent with the religious equality existing in this colony to be by us adjudged applicable to its condition"; he was clearly of the view that "there is no church established as in England."[58] Similarly in *Nelan v Downes* (1917), the High Court refused to declare that a testamentary gift to a Roman Catholic priest for the saying of masses was void as a "gift for superstitious uses", holding instead that "this is a country without any established church. Within its bounds, all religions are on equal footing." [59]

2.36 As early as 1828, the Permanent Under-Secretary of the Colonial Office was advising against attempting to secure for the Church of England in North America (Canada) "that species of monopoly of secular privileges which it enjoys in this country"[60]; and in 1835 the Secretary of State informed the Governor of New South Wales that any attempt to select any one Church as the exclusive object of public endowment would not be tolerated. The natural consequence of this direction was the enactment of the *Church Act* 1836 (NSW), providing state funding (for the construction of facilities and the payment of stipends to ministers of religion) for all denominations.[61] In 1864, the Privy Council stated in *re Bishop of Natal* that:

> The [Church of England] is not a part of the Constitution in any colonial settlement, nor can its authorities, or those who bear office in it, claim to be recognised by the law of the colony otherwise than as members of a voluntary association.[62]

2.37 The early church history of New South Wales was considered in some depth in 1948 by the High Court in *Wylde v Attorney General for New South Wales*.[63] Dixon J stated that:

> notwithstanding judicial statements to the contrary tendency, the better opinion appears to be that the Church of England came to New South Wales as the established church and that it possessed that status in the colony for some decades.[64]

Dixon J based his conclusion on three factors: (1) the first chaplain formed part of the civil establishment in the colony; (2) the Governor was instructed that it was his duty to enforce the due observance of religion and to take steps for the due celebration of public worship as circumstances would permit; and (3) Australia lay within the limits of the East India Company's charter, and by the *East India Company's Act* 1813 provision was made for the establishment of a bishopric, which arguably created an ecclesiastical jurisdiction in New South Wales.

2.38 Similarly, Latham CJ held that:

> the Church in New South Wales is still a Church of England, not a Church of New South Wales or Australia ... [W]hen New South Wales was occupied the Church of England was recognized and treated as teaching the State religion, and the chaplains of the church were paid from public funds.[65]

2.39 Whatever the correct historical position, there seems to be little dispute that the Church of England in New South Wales today is a "voluntary association organised on a consensual basis"[66] with no question of State establishment. In *Wylde*, Dixon J wrote that:

> although in the beginning and for a not inconsiderate period the position of the Church of England in New South Wales appears to have been that of the church established by law, time changed its relation to the law ... [E]ventually it came to be considered as a body like other churches established upon a consensual basis. The Ecclesiastical Court was disused and forgotten, the Acts of Council referring to it ceased to be law as did other early legislation in which might be seen a recognition of the church as an institution established by law. But the chief reason doubtless is to be found in the grant of representative government and the separation of the colonies. The Church itself resolved in effect upon the principle of voluntary association.[67]

2.40 Another factor in the determination of the modern status of the Church of England was the principle embodied by the *Church Act* 1836 (NSW) of state aid to religion generally as against that of state endowment of the Church of England alone. The *Grants for Public Worship Prohibition Act* 1862 (NSW), ending all state subsidies, signalled the end of any connection between the state and the Church of England that might tend to suggest that the latter was "by law established."[68] Rich J suggested that the Church in Australia is in the same position as the Church of England in England would be if the latter were disestablished and the *Act of Uniformity* 1662 (UK) ceased to be a paramount law.[69]

2.41 In a number of cases where the courts have been asked to rule on the local suitability of English laws of a religious nature, it has been held that the policy and provisions of such laws are inapplicable to the circumstances of New South Wales, and consequently of no effect. Two examples have been cited above: *R v Roberts* [70] (English *Marriage Acts* inapplicable to New South Wales as being "too inconsistent with the religious equality existing in this colony"); and *Nelan v Downes*[71] (a gift to the Catholic church not void as a "superstitious use", given the absence in Australia of an established church: "within its bounds, all religions are on equal footing"). In *ex parte Ryan*[72] (1855), an English statute prescribing certain religious holidays on which there should be an abstinence from work was held to be of no force in New South Wales, for two reasons. First, the Supreme Court noted that its provisions could not be carried out in New South Wales since the only penalties provided for were spiritual sanctions to be administered by an ecclesiastical court. Secondly, the court felt that

the statute, passed for the maintenance of a uniformity of religion, was clearly inapplicable to the circumstances of the colony:

> Where the professors of all religions were placed upon a footing of equality, a law obviously passed for the maintenance of a dominant church was clearly not applicable.[73]

2.42 In the absence of any definitive judicial consideration of this point, there are several possible conclusions about the early status - and therefore to some extent the present status - of the common law of blasphemy in New South Wales. If the Church of England was the established church of the colony, blasphemy would have been received as a common law crime with a definition identical to that in England. If the Church of England was not the established church, however, then the common law of blasphemy might be regarded as inapplicable to the circumstances of New South Wales and therefore not received, in the same way that some other religious laws have been found to be inappropriate. Another possibility may be that the common law of blasphemy was received, but only to the extent that it could be adapted to local circumstances. In the latter case, blasphemy was received but in a modified form, with its ambit extended to other Christian denominations, but only to the extent that the basic tenets of those denominations coincide with those of the Church of England.[74]

CURRENT STATUS IN NSW

Legislation

2.43 Whatever the correct theoretical position on the question of the reception of blasphemy might be, it has been assumed from an early date by the state legislature in New South Wales that a law of blasphemy does exist here. In 1827, the Governor and Council passed an Act "restraining the Abuses arising from the publication of Blasphemous and Seditious Libels".[75] The penalty of banishment was imposed upon any person convicted on two separate occasions of the "high misdemeanour" of publishing "any blasphemous... Libel tending... to Excite His Majesty's subjects to attempt the alteration of any matter in the Church or State as by law established otherwise than by lawful means".[76]

2.44 In 1883, the *Criminal Law Amendment Act* (NSW) was enacted, amounting to a major revision and consolidation of the criminal law in New South Wales (to be read together with the common law). Section 463 of that Act, subject to minor changes in punctuation, was reproduced as s574 of the *Crimes Act* 1900 (NSW), which provides that:

> No person shall be liable to prosecution in respect of any publication by him orally, or otherwise, of words or matter charged as blasphemous, where the same is by way of argument, or statement, and not for the purpose of scoffing or reviling, nor of violating public decency, nor in any manner tending to a breach of the peace.

2.45 It is probably no coincidence that the New South Wales legislation was enacted in 1883, the same year as the notorious prosecutions in England of Ramsay and Foote[77] and (the noted dissident Member of Parliament) Bradlaugh[78], for blasphemous libel. Unfortunately there is no Hansard record to determine how direct the relationship between these events was. Certainly the prosecutions of Bradlaugh, at least, and his unsuccessful efforts to have blasphemy abolished by legislation, would have attracted attention as far away as New South Wales.

2.46 Schedule 1 of the *Defamation Act* 1974 (NSW) later inserted s574A into the *Crimes Act*, relating to the initiation of criminal proceedings for blasphemous libel. Under s574A, it is not necessary in an information or indictment alleging an "obscene or blasphemous libel" to set out the obscene or blasphemous passages. Rather, it is sufficient to deposit the relevant publication with the information or indictment, specifying in the particulars which portion or passage is the subject of the allegation.

2.47 The *Defamation Act* 1974, s49(1), abolished the common law misdemeanour of criminal libel, but expressly left in operation "the law relating to blasphemous, seditious or obscene libel" (sub-s(2)). A new offence of criminal defamation was created by s50 to replace common law criminal libel. Under s50(4), proceedings for criminal defamation may not be commenced except with the written consent of the Attorney General or, now, the Director of Public Prosecutions.[79] This replaced the similar requirement under s6 of the *Australian Courts Act* 1828 (UK) that leave of the Supreme Court was required before proceedings for criminal libel could be commenced. No such requirement of judicial or executive consent was introduced in respect of blasphemy, however, despite the opportunity to do so with the insertion of s574A into the *Crimes Act*.

2.48 Thus the current statute law in New South Wales clearly assumes the existence of the offence of blasphemy (and/or blasphemous libel). The *Crimes Act* provides aspects of the law in relation to the manner and motive of the communication (s574) and the form of the information or indictment (s574A), but leaves much to be supplied by the common law. Consequently, it is still necessary to determine the precise nature of the common law of blasphemy which would be applied by the courts in this State.

Common Law

2.49 Blasphemy shares a number of important features with all common law crimes. There is no comprehensive statutory definition of blasphemy (although s574 of the *Crimes Act* 1900 (NSW) contains some important limitations). Sentencing is at large, given the absence of any fixed maximum for the term of imprisonment. In theory, at least, it would be possible for a person convicted of blasphemy to be sentenced to life imprisonment. Proceedings would have to be by way of indictment, heard before a Supreme Court judge and jury, since summary jurisdiction is entirely a statutory creation.

2.50 Notwithstanding the implicit assumptions in the legislation, it is necessary to consider whether the common law crime of blasphemy is in fact extant in New South Wales. The common law itself includes a concept of "desuetude", whereby an offence may lapse through prolonged disuse. In the 1977 English case of *R v Lemon*,[80] the defendants argued at their trial that the offence of blasphemy, by virtue of the lack of prosecutions in England since 1922, should be regarded as having fallen into desuetude. This line of argument was rejected by the trial judge, and unfortunately was not raised before the higher courts on appeal.

2.51 The desuetude argument might meet with more success in New South Wales, however, should a prosecution for blasphemy ever be commenced, given the rare usage of the offence here. There have been no reported judgments in relation to prosecutions for blasphemy in New South Wales and the literature reveals only a single prosecution, over 120 years ago. In 1871, William Lorando Jones was convicted in the Parramatta Quarter Sessions of blasphemy and sentenced to two years imprisonment and a fine of one hundred pounds, the judge reportedly telling Jones: "There is enough infidelity in this world without people publicly proclaiming the Bible as a mass of lies."[81] The defence was conducted on the premise that Jones was entitled to freedom of speech; the actual existence of the offence with which he was charged apparently was never challenged. The outcry at the severity of the sentence meant that Jones ultimately spent only four weeks in gaol before being released.

2.52 As a consequence of Jones' case, a private member's bill, the *Religious Opinions Bill* 1871, was introduced into the New South Wales Legislative Assembly, which sought to prohibit further prosecutions for blasphemy. In the ensuing debate, the Attorney General of New South Wales told the Legislative Assembly in opposing the Bill that "anyone should be free to ridicule the 39 Articles, the Roman Catholic Church, or indeed any religious opinion, but that atheistic opinions and attacks on the Bible were really attacks on the law since `the Scriptures are the basis of the common law'".[82] The Bill was defeated 17-5 at the Second Reading stage, but there have been no further prosecutions for blasphemy in New South Wales. According to Peter Coleman's analysis of the events, "Jones and the freethinkers were ... the real victors in the whole affair and no further attempts were made to prosecute freethinkers for the crime of blasphemy."[83]

2.53 The last use of blasphemy by prosecuting authorities in Australia was in Victoria in 1919, when the eponymous editor of *Ross's Magazine of Protest, Personality and Progress*, an "aggressively socialist, anti-militarist, atheist and anti-clerical" publication was charged by the Post Office and the Victorian Police with common law blasphemy and sending a blasphemous article through the mails.[84] Ross was convicted of the latter offence in controversial circumstances, and ultimately fined £50, but the common law action was dropped by the Crown. Shortly thereafter a petition containing over 6000 signatures calling for the repeal of blasphemy laws was presented to the Commonwealth Government, but did not meet with success.[85]

2.54 The main argument against the application of the doctrine of desuetude to blasphemy in New South Wales is that, notwithstanding the rarity of prosecutions, the legislature has continued to assume the existence of the offence, expressly and by implication. Blasphemy was taken to exist in the debate over the *Religious Opinions Bill* 1871, in the *Criminal Law Amendment Act* 1883, in the *Crimes Act* 1900 and in the *Defamation Act* 1974. Despite the opportunities to abolish blasphemy or considerably restrict the possibility of its use, and the fact that many other common law crimes have been abolished or substantially modified during the same period,[86] the NSW Parliament has left blasphemy in place.

2.55 It is likely that, despite the judicial development of the law of blasphemy, the courts would now feel constrained from judicially abolishing this offence, considering it a matter for the legislature. For the purposes of this Discussion Paper, at least, the Commission assumes the continued existence of a common law offence of blasphemy.

THE ELEMENTS OF THE OFFENCE

2.56 Reading s574 of the *Crimes Act* 1900 (NSW) together with the common law, the elements of the offence of blasphemy appear to be that the Crown must prove beyond reasonable doubt that:

> the accused has published any words or matter,
>
> which refer to the basic tenets of the Christian religion (as defined by the Church of England),
>
> not by way of argument or statement but in a manner which is scoffing, reviling or violating public decency, or in any manner tending to a breach of the peace,
>
> with the intention of causing offence or outrage.

The first three matters may be said to constitute the *actus reus* or conduct element of the offence, and the latter the *mens rea* or mental element of the offence. These requirements are dealt with in turn, below.

Publication of the alleged blasphemy

2.57 The allegedly blasphemous material must be "published" in the legal sense, which simply means that it has been disclosed to a third party[87], before any prosecution may be brought. Such disclosure may be orally or in writing, in common with the requirement in the law of defamation, or the law relating to the publication of indecent or obscene material. Section 5(1) of the *Indecent Articles and Classified Publications Act* 1975 (NSW), for example, defines "publish" to include "distribute, disseminate, circulate, deliver, send, display, exhibit...".

2.58 At common law, blasphemy referred to the spoken word and the parallel offence of blasphemous libel referred to the written publication - for example, in a book, pamphlet or newspaper article. The reference in s574A of the *Crimes Act* to "blasphemous libel", inserted by the *Defamation Act* 1974, suggests that the NSW Parliament accepts this dichotomy. The only consequence of maintaining two blasphemy offences rather than merging them is that more care must be taken in the framing of a particular indictment to specify the relevant offence (or offences) on the facts. The modern trend has been to consolidate like offences and causes of action, rather than accumulate large numbers of specific instances, as witnessed by the merger of slander and libel in defamation law and the merger of assault and battery in the criminal law.

The nature of the alleged blasphemy

The character of the words or material

2.59 Section 574 refers to words or matter which are "scoffing or reviling" or "violating public decency". The English courts and commentators have used these and similar terms, such as "contemptuous", "reviling", "scurrilous", "ludicrous", "wanton", "offensive", "outrageous" and "profane". [88]

2.60 Both s574 and the English common law cases seek to distinguish between comment on or criticism of Christianity which is "carried on in a sober and temperate and decent style"[89], "by way of statement or argument"[90], where "the decencies of controversy are observed",[91] and those immoderate, intemperate or disrespectful communications made in a "spirit of ... offence and insult and ridicule"[92] which exceed "the permitted limits".[93]

2.61 According to the Law Commission of England of Wales, it is the character of the publication rather than its *motive* which is of principal concern:

> [I]t is settled that an "attack" on the Christian religions is not an essential element of the offence: an attack may be couched in terms which do not insult or vilify and, if this is the case, the law does not penalise it. But if the words are an outrage upon the feelings of the "general body of the community", the opinion or argument they are used to advance or destroy is "of no moment".[94]

The *intention* of the alleged blasphemer is, of course, material. This element of the offence is discussed below.[95]

Tendency to cause a breach of the peace

2.62 As discussed above,[96] one of the reasons for enforcing a common law offence of blasphemy was to prevent social unrest. It is clear from numerous decisions that the courts were very concerned to preserve the existing social structure, and insulate it from change or upheaval. Probyn J in *Curl's Case* (1727) explained that blasphemy was punishable at common law as "an offence against the peace in tending to weaken the bonds of civil society."[97]

2.63 Lord Parker in *Bowman v Secular Society* (1917) found that an essential element of blasphemy was vilification, ridicule or irreverence such as would be likely to exasperate the feelings of others and so lead to a breach of the peace. The law was unconcerned with the simple expression of dissenting opinion, insofar as such expression was consistent with the maintenance of public order.[98] In the same case, Lord Sumner noted that in the eighteenth and nineteenth centuries, various publishers of Paine's *Age of Reason* were prosecuted; the words indicted were chosen for their irreverence, but the motive behind the prosecutions was to prevent the wide circulation of a book which was "the badge of revolution and tended to jeopardise the State."[99] The courts would not punish irreligious words against God unless such words might:

> endanger the peace then and there ... deprave public morality generally ... shake the fabric of society ...[or] be a cause of civil strife.[100]

2.64 There is an important difference in emphasis in the approaches taken by Lords Parker and Sumner. Lord Parker used the term "breach of the peace" in its "traditional and longstanding sense, which does not necessarily signify general disorder"[101] and includes any public situation where there is danger to the person or property. A breach of the peace has been defined as:

> an act done ... which either actually harms a person, or in his presence his property, or is likely to cause such harm.[102]

Lord Sumner, however, had in mind a much narrower concept.[103] Having looked at the history and development of the law of blasphemy, and characterised it as being principally concerned with the preservation of the social fabric, Lord Sumner's reference to a "tendency to endanger the peace"[104] would limit blasphemy to a communication which could cause widespread social unrest, rather than merely risk a traditional, small-scale, breach of the peace.

2.65 In *R v Gott* (1922), Avory J told the jury that:

> what you have to ask yourselves in this case is whether these words [are] calculated to outrage the feelings of the general body of the community and so lead, possibly ... to a breach of the peace.[105]

2.66 The trial judge in *R v Lemon* (1977) instructed the jury that, for the purposes of blasphemy law, a tendency to cause a breach of the peace meant:

> to provoke or arouse angry feelings, something which is a possibility, not a probability ... the alleged blasphemy must be such as might well arouse anger or provoke strong feelings of resentment and be such that any reader could - not would but could - be provoked into committing a breach of the peace.[106]

2.67 This summing up was approved as "faultless" in the Court of Appeal and "masterly" in the House of Lords, although the jury had to request clarification of the meaning of the words "breach of the peace" and "tendency". Lord Scarman added that:

> it is a jejune exercise to speculate whether an outraged Christian would feel provoked ... to commit a breach of the peace... [T]he true test is whether the words are calculated to outrage and insult the Christian's religious feelings: and in modern law the phrase "a tendency to cause a breach of the peace" is really a reference to that test. The use of the phrase is no more than a minor contribution to the discussion of the subject. It does remind us that we are in the field where the law seeks to safeguard public order and tranquillity.[107]

2.68 It is doubtful whether Lord Scarman's words confirm the trial judge's directions, or whether they add another element: that the words be *calculated* to insult the religious sentiments of Christians. One thing is evident: that the meaning of and requirement for a tendency to a breach of the peace remains unclear under English common law.

2.69 In New South Wales, s574 of the *Crimes Act* 1900 specifies that a person will be liable for blasphemy where the "scoffing or reviling" words or matter in question are "in any manner tending to a breach of the peace."[108] This goes no further in settling which of the two common law positions is to be followed.

2.70 In the absence of any judicial guidance, this Commission believes that Lord Sumner's view in *Bowman v Secular Society* of the meaning of "breach of the peace" in this context is preferable, both on the basis of historical accuracy as well as contemporary policy. Modern statutory offences similar to the traditional, common law "breach of the peace", such as offensive behaviour and simple assault, tend to be triable summarily and carry relatively light maximum penalties. Blasphemy, however, was a "high misdemeanour", at one time carrying the penalty of death or banishment. Sentencing for blasphemy now, as a common law offence, is at large, leaving open the possibility of a significant term of imprisonment and considerable stigma for the person convicted. As Lord Sumner noted, "the gist of the offence of blasphemy is a supposed tendency in fact to shake the fabric of a society generally".[109] The Crown should therefore be required to prove that the published or matter complained of is capable of causing this degree of social distress, or else pursue other, less serious, charges.

2.71 The breach of the peace issue also raises the more general concern relating to the ability of an aggrieved audience, by their own conduct, to criminalise the lawful actions of another. This is referred to derisively in American law as the "heckler's veto": the possibility that the threat of violence by observers can colour otherwise lawful speech or assembly, and cause the organisers or demonstrators to be liable for a criminal offence if a breach of the peace is caused by those who disagree with the speaker.[110] The leading English case of *Beatty v Gillbanks* expressly denied the proposition "that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act."[111] More recently, however, the English courts have accorded greater emphasis to public order considerations than to the freedom of expression. In *Jordan v Burgoyne* (1963), it was decided that the speaker "must take the audience as he finds them, and if those words to that audience or that part of the audience are likely to provoke a breach of the peace, then the speaker is guilty of an offence."[112] This is true even where "a body of hooligans ... came with the preconceived idea of preventing [the person] from speaking."[113]

2.72 The law in New South Wales may, at present, place similar emphasis on public order considerations at the expense of freedom of expression. In *Commissioner of Police v Willis*,[114] a "non-violent, silent and solemn" procession was refused authorisation, one reason being that the procession could lead to a breach of the peace. The Supreme Court envisaged that violence and resentment could be stirred up *against* the marchers (who were members of the Sydney Women Against Rape Coalition, attempting to march on Anzac Day) not *by* them.

2.73 This issue would be of greater concern in the context of blasphemy if the Commission was of the view that the mental element of the offence would be read down to something approaching strict liability, as is the case in England. However, the Commission is confident that the Australian courts would demand a much higher standard of fault, requiring the Crown to prove not merely that a breach of the peace was caused or was likely, but that the defendant intended this result and used scurrilous or abusive language for this purpose. The question of intention is dealt with in more detail, below.[115]

The limitation to Christianity

2.74 As discussed earlier in this Chapter,[116] for theological, historical and political reasons, the offence of blasphemy under English law was limited to protection of the tenets of the Church of England as by law established, and perhaps other Christian denominations to the extent that their tenets overlap with those of the Church of England. This was clear in the early common law cases cited above, and has not been altered in the recent English cases.[117]

2.75 In *Whitehouse v Lemon*, Lord Scarman defended the role of blasphemy law in modern society and suggested its broadening to include other religions, but assumed that this needed to be accomplished by Parliament rather than the courts:

> I do not subscribe to the view that the common law offence of blasphemous libel serves no useful purpose in the modern law. On the contrary, I think there is a case for legislation extending it to protect the religious beliefs and feelings of non-Christians. The offence belongs to a group of criminal offences designed to safeguard the internal tranquillity of the kingdom. In an increasingly plural society such as that of modern Britain it is necessary not only to respect the differing religious beliefs, feelings, and practices of all but also to protect them from scurrility, vilification, ridicule and contempt. ... My criticism of the common law offence of blasphemy is not that it exists but that it is not sufficiently comprehensive. It is shackled by the chains of history.[118]

2.76 This issue was squarely raised in *R v Chief Metropolitan Stipendiary Magistrate, Ex parte Choudhury*[119], in which summonses were sought by a private citizen alleging that the author and publisher of Salman Rushdie's *The Satanic Verses* were guilty of blasphemous libel. The magistrate refused to issue the summons on the basis that in England and Wales blasphemy protects only the Christian religion, and the matter was sent to the Divisional Court for review. After a thorough consideration of the preceding cases, the Court concluded that:

> We have no doubt that as the law now stands it does not extend to religions other than Christianity.[120]

The Court also concluded that even if the blasphemy offence was now anomalous, it was "not the proper function of this court to extend it", but rather the function of Parliament.[121] However, in *obiter dicta* the Court did consider the wisdom of extending the offence to other religions and decided "it would, in our judgment, be wholly wrong to extend the law, even if, which we do not, we had the power to do so."[122] The reasoning of the Court is discussed further in Chapter 4, below.

The intention of the author

The English approach

2.77 As discussed above, blasphemy requires the publication of words or material of an offensive, abusive, intemperate nature. In many cases, it may be readily inferred from the published matter that the author intended to insult or wound the feelings of others. However, this is not a *necessary* inference in all cases. The question is whether the common law of blasphemy requires the jury to be convinced beyond reasonable doubt that the author intended not only to publish the material but also to cause serious offence.

2.78 Although it is now considered fundamental that "the Golden Thread of the Common Law" means that the Crown must affirmatively prove *mens rea* beyond reasonable doubt in common law crimes, rather than asking the jury to presume intention based on the actions of the accused, this doctrine actually dates back only to the 1935 House of Lords decision in *Woolmington v DPP*.[123] Prior to that time, juries were routinely directed that they could presume that the accused intended the natural and probable consequences of his or her actions, which effectively shifted the onus of proof onto the accused to convince the jury that he or she did not have the requisite intention. In *Woolmington*, the House of Lords unanimously decided that the general presumption of innocence required that the Crown bear the onus of proving intention as well as proving that the accused did the prohibited act.

2.79 It must be kept in mind, therefore, that much of the judicial development of the law of blasphemy occurred prior to *Woolmington*. The pre-*Woolmington* cases, such as *Taylor's case*,[124] *R v Hetherington*,[125] and *Bowman v Secular Society*,[126] considered the elements of blasphemy in the framework of the law of that time. The intention of the actor was a relevant consideration, but mainly for the purposes of characterising the *act* as "scurrilous," "abusive", etc. Nevertheless the language of intention does appear in some of the early cases and texts[127] (albeit with the burden of proof reversed). For example, in *R v Richard Carlile* (1819), Lord Abbott CJ directed the jury that:

> It will be for you to say whether in anything you have heard from the defendant you can find anything enabling you to say that the defendant did not at the time he published this intend to bring the Christian religion into disbelief and contempt. If he did, that is an unlawful intention and it appears to me that you ought on your consciences to pronounce him guilty.[128]

2.80 Starkie's 1830 treatise on the law of libel stated that:

> It is the mischievous abuse of this state of intellectual liberty [the right to criticise religion in sober and moderate terms] which calls for penal censure. The law visits not the honest errors, but the malice of mankind. A wilful intention to pervert, insult, and mislead others, by means of licentious and contumelious abuse applied to sacred objects, or by wilful misrepresentations or wilful sophistry, calculated to mislead the ignorant and the unwary, is the criterion and test of guilt. A malicious and mischievous intention, or what is equivalent to such an intention, in law, as well as morals - a state of apathy and indifference to the interests of society - is the broad boundary between right and wrong. [129]

2.81 Although this statement of the law was criticised 149 years later by Lord Diplock as being well in advance of its time and "perhaps more that of the advocate of law reform than of the draftsman of a criminal code"[130], Starkie's proposition was in fact referred to in trial judges' directions to the juries in *R v Ramsay and Foote*[131] and *R v Bradlaugh*.[132]

2.82 The issue of intention was raised squarely in the modern context before the House of Lords in *Whitehouse v Lemon*.[133] This case involved a private prosecution for blasphemy by the campaigner Mrs Mary Whitehouse against the editor and publisher of the magazine *Gay News*, for publishing a poem which suggested that Christ had engaged in homosexual practices. The defendants were convicted on a majority verdict of 10-2, and appealed on the principal ground that the trial judge had not properly directed the jury on the question of intention. The appellants contended that the direction should have been in the terms suggested by Starkie and employed in *R v Ramsay and Foote*, requiring proof of "the intention to attack the Christian religion so violently or so scurrilously as to insult the adherents of the Christian religion to such an extent that a breach of the peace is likely."

2.83 The Court of Appeal rejected this argument and dismissed the appeal, stating that:

> The cases before Ramsay and Foote seem to us clearly to show that if an accused person deliberately published that which crossed the line which divided the blasphemous from the non-blasphemous, he could not be heard to say that he did not know or realise or intend that which he had deliberately put into circulation possessed hose characteristics which rendered him liable to conviction for blasphemy... .[134]

The Court of Appeal certified as a matter of public importance the question whether "any further intention on the part of the appellants beyond an intention to publish that which in the jury's view was a blasphemous libel".

2.84 By a 3-2 majority,[135] the House of Lords held that the trial judge's direction was correct; that is, that the only intention that the Crown need prove is the intention to publish the material in question. An intention to publish material knowing it to be offensive, abusive, etc, is thus not a requirement under English law. After surveying the case law, Viscount Dilhorne considered that the law of blasphemy has remained essentially unchanged since the 18th Century, concluding that:

> If it be accepted, as I think it must, that that which is sought to prevent is the publication of blasphemous libels, the harm is done by their intentional publication, whether or not the publisher intended to blaspheme. ... Guilt of the offence of publishing a blasphemous libel does not depend on the accused having an intent to blaspheme but on proof that the publication was intentional (or, in the case of a bookseller, negligent (Lord Campbell's Act 1843)) and that the matter published was blasphemous.[136]

2.85 Lord Scarman, while coming to the same conclusion as Viscount Dilhorne, did not feel constrained by the case law on this point, however:

> The history of the law is obscure and confused. The point is, therefore, open for your Lordships' decision as a matter of principle. And in deciding the point your Lordships are not saying what the law was in the past or ought to be in the future but what is required of in the conditions of today's society. 137

As a matter of social policy, then, Lord Scarman concluded that:

> It would be intolerable if by allowing an author or publisher to plead the excellence of his motives and the right of free speech he could evade the penalties of the law even though his words were blasphemous in the sense of constituting an outrage upon the religious feelings of his fellow citizens. This is no way forward for a successful plural society. ... The character of the words published matter; but not the motive of the author or publisher.[138]

2.86 Lord Diplock, in dissent, pointed out that there have been "significant changes in the general concept of mens rea in criminal law that have occurred in the last 100 years" from which the law of blasphemy should not be "immune".[139] Lord Diplock considered that these changes meant that the House of Lords should adopt:

> the milder view that the offence today is no longer one of strict liability, but is one requiring proof of ... a "specific intention," namely, to shock and arouse resentment among those who believe in or respect the Christian faith."[140]

The classification of blasphemy as a strict liability offence, Lord Diplock stated, would:

> be a retrograde step which could not be justified by any considerations of public policy. The usual justification for creating by statute a criminal offence of strict liability, in which the prosecution need not prove mens rea as to one of the elements of the actus reus, is the threat that the actus reus of the offence poses to public health, public safety, public morals or public order. The very fact that there have been no prosecutions for blasphemous libel for more than 50 years is sufficient to dispose of any suggestion that in

> modern times a judicial decision to include this common law offence in this exceptional class of offences of strict liability could be justified upon grounds of public morals or public order.[141]

Lord Diplock concluded that the majority's failure to require an intention to shock and arouse indignation was based on a "judicial distrust of the jury's capability" of appreciating the meaning of "intention" in English criminal law.[142]

2.87 Lord Edmund-Davies, in dissent, also undertook a detailed analysis of the statutes and case law on blasphemy. He considered that the common law had passed through several stages of development:

> In the earliest stage it was clearly a crime of strict liability and consisted merely of any attack upon the Christian Church and its tenets. In the second stage the original harshness of the law was ameliorated, and the attack was not punishable unless expressed in intemperate or scurrilous language. In the third stage, opinions were mixed. some judges held that the subjective intention of the author or publisher was irrelevant, others that it was of the greatest materiality. ... The preponderance of authority was nevertheless increasingly and markedly in favour of the view that intention to blaspheme must be established if conviction was to ensue. In my judgment, such is now indeed the law, and any 20th century cases in conflict with it ... should be regarded as wrongly decided.[143]

Lord Edmund-Davies concluded that, after a century of judicial refinement of the concept of *mens rea*, "to treat as irrelevant the state of mind of a person charged with blasphemy would be to take a backward step in the evolution of a humane code."[144]

2.88 It should be noted that despite the division of opinion on this important point of legal principle, all five Law Lords expressed their "revulsion over this deplorable publication"[145] in the particular case, and were of the view that whatever form the judge's direction took, the jury would have convicted the defendants of blasphemous libel. It is also relevant that the defendants in *Lemon* only received fines after their convictions (following review by the Court of Appeal),[146] so that it is somewhat more understandable that the majority of the House of Lords would treat blasphemy - despite its origins and the potency of the term itself - as just another offence of strict liability.

The Australian approach

2.89 It is most unlikely that the High Court of Australia would follow *Whitehouse v Lemon*. It is precisely in the area of *mens rea* that English and Australian common law have diverged most strikingly in the past 30 years.[147]

2.90 Even after Federation, the Australian courts demonstrated a marked reluctance to depart from the decisions of the senior English courts. "Judicial nationalism" in Australia arrived with the High Court's 1963 decision in *Parker v R*.[148] In the preceding English case of *DPP v Smith*,[149] the House of Lords considered the mental element in murder, deciding that the test was whether a reasonable person in the position of the accused would have foreseen the danger of death or grievous bodily harm. In settling upon this objective standard, the House of Lords further decided that the accused person was not entitled to bring his or her *actual* state of mind into issue. In essence, therefore, the House of Lords was saying that a person could be convicted of murder on the basis of negligence, where the jury believed that he or she did not actually perceive the dangerousness of the situation but a "reasonable person" in the circumstances would have. The decision raised considerable controversy in England and was ultimately reversed by legislation[150] and effectively renounced by the Privy Council.[151]

2.91 In *Parker*, the High Court of Australia refused to accept the decision of the House of lords in *Smith*. As Dixon CJ wrote,[152] with the authorisation of all the other members of the High Court:

> Hitherto I have thought that we ought to follow decisions of the House of Lords, at the expense of our own opinions and cases decided here, but having carefully studied *Smith's case* I think that we cannot adhere to that view or policy. There are propositions laid down in the judgment which I believe to be misconceived and wrong. They are fundamental and they are propositions which I could never bring myself to accept. I wish there to be no misunderstanding on the subject ... *Smith's Case* should not be used as authority in Australia at all.

2.92 Since *Parker*, the High Court has pursued a consistent approach to the concept of *mens rea* in criminal law, emphasising the need to incorporate a subjective element of awareness as a condition of ascribing liability for serious crimes. In *R v O'Connor*,[153] the High Court again split with the House of Lords[154] on the issue of

the relevance of intoxication to criminal liability. The majority of the House of Lords, for policy reasons, had limited the application of evidence of intoxication to crimes of specific intent - that is, crimes in which the actor must have intended a particular consequence, rather than merely intended to do the act. The majority of the High Court, however, ruled that evidence of intoxication was relevant to every offence, insofar as it may show that the accused person was so intoxicated as to lack volition or the necessary intention or other guilty state of mind.

2.93 In *Crabbe*,[155] the High Court considered the *mens rea* for murder under the common law, and decided that this consisted of the actual intention to cause death or grievous bodily harm, or a conscious appreciation of the probable risk of death or grievous bodily harm (recklessness). Recklessness is thus a wholly subjective concept in Australian law,[156] relating to the accused person's actual state of mind. The English authorities, however, have extended this concept to include inadvertent or negligent conduct, although its application to murder has been limited.[157]

2.94 Other recent examples of the Australian courts' insistence on strict proof of actual state of mind include the development of the law relating to complicity,[158] rape[159], and possession of drugs.[160]

2.95 As a general matter, then, the Australian courts have been far more concerned to develop and refine the "awareness" element in crime in a consistent, principled manner, while a majority of the English judiciary has taken a more pragmatic approach, determined by its view of the exigencies of a "law and order" oriented public policy. This shows through clearly in the opinions of the majority in *Whitehouse v Lemon*: the Law Lords were willing to allow a person to be convicted of a serious crime such as blasphemy based on proof of the negative social consequences of his or her actions, even where such actions were inadvertent. As quoted above, Viscount Dilhorne considered that the bookseller who displays or sells material which is found to be blasphemous is guilty of the offence, notwithstanding that the bookseller actually may be unaware of the contents. According to this view, it is socially preferable to render the offence one of strict liability, and thus to convict the negligent, in order to induce booksellers to ensure that they *are* aware of all of the material available in the shop. By contrast, for example, in *R v Willy Wampfler*,[161] the New South Wales Court of Criminal Appeal quashed the conviction of a person convicted of publishing indecent articles[162] (by making duplicate copies for commercial release of a prohibited "X rated" video) on the basis that, for such a serious offence, evidence that the accused had an honest and reasonable belief that his actions were not improper was relevant to criminal liability. As Street CJ noted, "There is a discernible trend in modern authorities away from construing statutes as creating absolute liability".[163] In *Jeffs v Graham*,[164] the New South Wales Supreme Court also read in a requirement of *mens rea* into the statutory offence of "offensive conduct".

2.97 The courts in *Wampfler* and *Jeffs* were heavily influenced by the landmark High Court decision of *He Kaw Teh*.[165] In this case the High Court considered the mental element of the offence of possession of a prohibited drug under s233B of the *Customs Act* 1901 (Cth). Under the then-existing position in New South Wales[166] and England[167], Crown proof of actual physical custody of the drugs by the accused lead to the *presumption* of knowledge. The accused person then was obliged to affirmatively rebut this presumption on the balance of probabilities. A jury unsure on this point would have been obliged to convict, given the reversal of the onus. The High Court, however, found that this position violated basic common law concerns about the presumption of innocence and the onus of proof dating back at least to *Woolmington's case*. The Court took s233B to include an implied requirement that the Crown must prove that the accused *actually* knew that he or she was in possession of prohibited drugs.

2.98 The actual ruling of the High Court in *He Kaw Teh* is less important for our purposes than the reasoning of the Court and, especially, the general principles of statutory interpretation that were laid down consistently with the earlier decision of *Proudman v Dayman*.[168] According to the High Court, the primary principle is that:

> There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject matter with which it deals, and both must be considered.[169]

2.99 Thus, there is a presumption that a subjective element of intention or awareness is a part of every offence, unless this presumption is rebutted by the wording of the offence expressly or by necessary implication. Where this presumption is successfully rebutted, it is replaced by a subordinate presumption that the accused person should be able to avoid criminal liability by showing that he or she engaged in the behaviour complained of on the basis of an honest and reasonable mistake of fact (known as the "*Proudman v Dayman* defence"). In these circumstances, intention is not an essential element of the offence which must be proved by the prosecution in every case, but state of mind is relevant where the accused acted under a reasonable mistaken belief. Where both these common law presumptions are found to be inapplicable, the resulting offence is said to

be one of "absolute liability", in which criminal liability attaches where a prohibited *act* is proved and the actor's state of mind is irrelevant (except, perhaps, for the purposes of sentencing). Absolute liability offences tend to appear in the public health and safety area; for example, in laws about pure food and drugs, some motor traffic offences, and the handling of hazardous substances.

2.100 It is often the case that the wording and context of a statutory offence do not expressly rebut the common law presumptions, and it left for the courts to employ a number of related factors to be weighed in interpreting and classifying the offence. Among these recognised factors are: (1) the history of the offence; (2) the severity of the punishment for breach; (3) the stigma which attaches to conviction; and (4) the subject matter of the offence.

2.101 The courts will look at the history of the offence to determine how the matter has been looked at over time. To oversimplify somewhat: is it a matter which has traditionally been the subject of the criminal law in the common law, and is therefore a "truly criminal" offence, or is it an area new to the criminal law that is really "regulatory" in character and "not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty"?[170] In the former case the presumption of *mens rea* is unlikely to be dispensed with, while in the latter case there is a greater likelihood that *Proudman v Dayman* will apply or that the subjective element will be dispensed with entirely. Assault, rape, homicide, larceny, fraud, forgery and burglary were all basic common law crimes. A statutory provision which used a different name to describe the offence but covered substantially the same subject would thus carry a presumption of subjective fault, absent clear language to the contrary. For example, an offence of "sexual assault" may be thought to be analogous to the common law crimes of rape and assault. The characterisation of an offence is not always patent, however; is "fare evasion" on the railways analogous to the old offence of larceny, or is it a regulatory offence incidental to the operations of the railway and the preservation of public revenues?[171]

2.102 The severity of the punishment available is a key factor, since the greater the penalty the greater the reluctance of the courts to impose liability absent a showing of subjective fault. Similarly, the courts will be loath to see persons convicted of offences which carry significant social stigma where subjective fault - and therefore moral blameworthiness - is not an ingredient. The courts have on a number of occasions expressed their concern about the possibility defining offences in such a way as to create a class of "luckless victims".[172]

2.103 In *He Kaw Teh*, for example, the High Court found that the prohibition on the possession and distribution of certain drugs entered the criminal law through the regulatory law and was not a subject of concern at common law. Indeed, the placement of drug offences in statutes such as the *Customs Act* 1901 (Cth) and the *Poisons Acts* (NSW)[173] rather than the *Crimes Act* is an indicator (albeit not a conclusive one) of its regulatory origins. However, in recent times drug offences have been treated as among the most serious on the criminal calendar, attracting penalties of up to life imprisonment, massive fines and civil forfeiture. A conviction, particularly for drug trafficking, would carry a very high degree of stigma. In the circumstances, the High Court determined that although the offences contained in s233B of the *Customs Act* did not start off as common law offences, they were now sufficiently of a "common law type" or of a "truly criminal" character to indicate that the common law presumption of subjective fault had not been rebutted by the wording of the statutory provisions.

2.104 The New South Wales courts in the *Wampfler* and *Jeffs v Graham*[174] cases (see above) went through a similar analysis, considering the "not insubstantial" penalties involved, the subject matter and the stigma attached to conviction, before deciding that the offences required fault. In the case of *Jeffs v Graham*, the penalty for offensive conduct available at that time was a fine of not more than $200, without the direct possibility of any term of imprisonment.[175]

2.105 The common law requirement of subjective fault is almost certain to be upheld in the context of the offence of blasphemy. Although there is also a statutory component in New South Wales under s574 of the *Crimes Act*, blasphemy is a common law offence. It was developed by the common law courts after its beginnings in ecclesiastical law, and it is triable in New South Wales only under common law procedures (judge and jury). The penalty available upon conviction is potentially very large (life imprisonment), and the stigma attaching to conviction would be considerable.

2.106 The Commission is therefore confident that the courts in New South Wales would require that subjective fault be an element of blasphemy, requiring the prosecution to prove not only that the accused person intended to publish the material in question, but also that he or she intended to cause such grave offence that a breach of the peace was a real possibility.

2.107 There is a question whether recklessness is sufficient to meet the requirement of subjective fault - that is, where the accused does not necessarily *intend* such consequences, but is aware that such consequences are likely to flow from his or her actions. Recklessness is normally comprehended by the common law requirement of intention or malice,[176] but this is not necessarily so. For example, in the law of complicity, the High Court has

ruled[177] that the accomplice must intentionally render assistance or encouragement to the principal offender *knowing* of "the essential matters constituting the principal offence". Recklessness in these circumstances would not, according to the majority of the High Court, render the alleged accomplice liable of aiding and abetting the principal offence.[178] The rationale behind elevating the *mens rea* requirement in this area of the law is that the *actus reus* required for complicity is somewhat vague and truncated. The accomplice is punished for the facilitation of the act of another, and the accomplice's act may be relatively minor in the scheme of things, such as shouting encouragement to the principal actor. Since the accomplice is guilty of the same offence and to the same degree as the principal actor,[179] the High Court was thus reluctant to impose criminal liability for serious offences based on a minor act without a showing of substantial moral culpability in the form of clear evidence of intention. There is an argument that this rationale applies in the context of blasphemy as well, on the basis that the actus reus of the offence is expressed in uncertain terms and the scope of criminal liability needs to be limited by a restrictively defined mental element.

2.108 Some of the deficiencies in the existing common law of blasphemy are discussed further in Chapter 4, below.

FOOTNOTES

1 Of the 1800 submissions received by the Law Commission of England and Wales in response to their Working Paper, *Offences against Religion and Public Worship*, over one quarter of correspondents complained of the bad language in broadcasting: Law Commission, *Offences against Religion and Public Worship* (Report No 145, 1985) 5. See *Boyd v Angus & Robertson Ltd* (1946) 63 WN (NSW) 189, in which Studdert ChQS found that the book *We Were the Rats* by Lawson Glassop was an obscene publication, stating that:

> The dialogue, from beginning to end, teems with the irreverent use of the name of the Founder of Christianity and in a way which can only be a constant affront to the members of a Christian community. If the intention of the author was to give a robust flavour to the conversation of the Australian fighting man I think it fails dismally to achieve that object and succeeds only in leaving the decent-minded reader with a feeling of disgust.

2 See, eg, S Quinn, "Blasphemy laws are an unholy mess", *Sunday Telegraph*, 29 September 1991, at 44; "Call to abolish blasphemy law", *Daily Telegraph Mirror*, 30 September 1991, at 4; and letters to the Editor of the *Sydney Morning Herald* by R Prince (1 October 1991) and the Rev C Norton (9 October 1991).

3 The *Macquarie Dictionary* (1981).

4 The *Oxford English Dictionary* (1933, reprinted 1961).

5 Exodus 20:7; Deuteronomy 5:11.

6 *Stephen's Digest of the Criminal Law* (9th ed, 1950) Article 214.

7 Judge King-Hamilton QC in *R v Lemon, R v Gay News Ltd*, Central Criminal Court, London, 11 July 1977.

8 *Whitehouse v Lemon* [1979] AC 617, at 661, citing Ogders, *Libel and Slander* (6th ed, 1929) 404.

9 *Stroud's Judicial Dictionary* (5th ed, 1986).

10 *R v Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury* [1990] 3 WLR 986.

11 *Hawkins' Pleas of the Crown 1716-1721* (1973) Book 1, Part 2, c26.

12 (1663) 1 Sid 168, cited in WS Holdsworth, 8 *A History of English Law* 407 (7th ed, 1972).

13 (1676) 1 Vent 293; 86 ER 189.

14 *Bowman v Secular Society Ltd* [1917] AC 406, at 457, per Lord Sumner. See also Nokes, *A History of the Crime of Blasphemy* (1928), and Kenny, "The Evolution of the Law of Blasphemy" (1922) 1 CLJ 127.

15 Cited by Lord Sumner in *Bowman v Secular Society* [1917] AC 407, at 458.

16 Repealed in New South Wales by the *Criminal Law (Amendment) Act* 1883, Schedule 1.

17 *Sixth Report of Her Majesty's Commissioners on Criminal Law* (1841) cited by Lord Edmund-Davies in *Whitehouse v Lemon* [1979] AC 617, at 647.

18 *R v Ramsay and Foote* [1883] 15 Cox CC 231, at 235 per Coleridge CJ.

19 With the exceptions of the reign of Mary (1553-1558) and the rule of Cromwell (1649-1660).

20 *R v Woolston* (1728) Fitzg 64 per Raymond CJ.

21 (1838) 2 Lew 237, at 254.

22 The Law Commission of England and Wales, *Offences Against Religion and Public Worship* (WP 79, 1981) para 2.4. (Hereafter, "Law Commission, WP 79".)

23 (1841) 4 St Tr NS 563, at 590.

24 *R v Ramsay and Foote* [1883] 15 Cox CC 231, at 235.

25 [1917] AC 407, at 466 (HL) per Lord Sumner.

26 Ibid, at 445-446, per Lord Parker.

27 (1922) 16 Cr App R 87.

28 *Freedom Under the Law* (Hamlyn Lectures, 1st series, 1949) 46.

29 [1979] AC 617.

30 *R v Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury* [1990] 3 WLR 986.

31 Law Commission, WP 79, at para 2.25.

32 Law Commission, *Proposals for the Abolition of Certain Ancient Offences* (Report No 3, 1966).

33 Section 13 and Schedule 4.

34 Law Commission, WP 79, para 9.2.

35 Law Commission, *Offences Against Religion and Public Worship* (Report No 145, 1985) para 2.47.

36 *R v Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury* [1990] 3 WLR 986, at 1000-1003.

37 *Halsbury's Laws of England* (4th ed) vol 6, para 1101.

38 *Yeap Cheah Neo v Ong Cheng Neo* (1875) PCAC 381, at 394.

39 See *Blackstone's Commentaries on the Laws of England* (1876) Vol 1, at 81; 14 *Halsbury's Laws of England* (4th ed) para 334.

40 *Ex parte King* (1861) Legge 1307, 1324.

41 *Ex parte Thackeray* (1874) 13 SCR 1, 65.

42 See *Wylde v Attorney General for New South Wales* (1948) 78 CLR 225, and A Castles, *An Introduction to Australian Legal History* (1971) 60-61.

43 See TP Webb, *Imperial Law* (2nd ed, 1892) 14-20.

44 The Charters of Justice that initially established the court system in New South Wales did nothing to clarify the substance of the law that was to be applied: see Castles, ch 8.

45 *9 Geo IV c 83*. The Act provided that, in the event of doubt, the Governor, with the advice of the Legislative Council, was to declare whether any Imperial statute extended to the colony and to limit or modify such law as seemed expedient. The Supreme Court was directed to decide upon the circumstantial applicability of any law when doubt arose in any proceedings before it.

46 See, eg, *R v Governor* (1900) 17 WN (NSW) 185: common law of England in regard to outlawry is not in force in New South Wales (distinguished in *Dugan v Mirror Newspapers Ltd.* [1976] NSWLR 403 on different grounds).

47 *Whicker v Hume* (1858) 7 HLC 124; *Quan Yick v Hinds* (1905) 2 CLR 345; *Garrett v Overy* (1968) 69 SR (NSW) 281.

48 (1885) 11 VLR 410, at 428 (FC) per Molesworth CJ.

49 For a review of the few cases concerning blasphemy in Australia see P Coleman, *Obscenity, Blasphemy, Sedition: 100 Years of Censorship in Australia* (2nd ed, 1974) Ch 4.

50 (1885) 11 VLR 410, at 431.

51 *Stephen's Digest of the Criminal Law* (9th ed, 1950) Art 214.

52 Law Commission, WP 79, at para 6.19.

53 The matters which make the Church of England the "established church" in England can be inferred from the provisions of the *Welsh Church Act* 1914, which *disestablished* that Church.

54 See *Attorney-General for the State of Victoria (ex rel Black) v Commonwealth of Australia* (1981) 146 CLR 559, at 597.

55 *Marshall v Graham* [1907] 2 KB 112.

56 See Clarke, *Constitutional Church Government* (1924) 77, for the Anglican position; O'Brien, *The Dawn of Catholicism* (1928) vol II at 216, for the contrary view. *The Australian Encyclopaedia* (vol 1, at 143: "Anglican Church") suggests that "as elsewhere in the Empire, the Church of England was to be accorded quasi-established status as the upholder of a conservative social order".

57 Border, *Church and State in Australia 1788-1872* (1962) 54.

58 (1850) Legge 544, at 570.

59 (1917) 23 CLR 546, at 550; see also *ex parte King* (1861) Legge 1307; *ex parte Ryan* (1855) Legge 876; *M'Hugh v Robertson* (1885) 11 VLR 410.

60 P Knaplund, *James Stephen and the British Colonial System* (1953) 138.

61 For a general history of the Church and Schools Corporation see Austin, *Australian Education 1788-1900* (Pitman Australia, 1972) ch 1.

62 (1864) 3 Moore NS 115, at 149.

63 (1948) 78 CLR 225; see also *Attorney General for the State of Victoria (ex rel Black) v Commonwealth of Australia* (1981) 146 CLR 559, at 607: "Australia's colonial history does indeed disclose, first, something at least approaching official recognition of the Church of England; followed, however, by a general recognition of a wide variety of denominations, accompanied by impartial financial assistance to all their churches and schools; then, in the latter part of the nineteenth century, there occurred a move towards complete separation of church and state, with the abolition of all financial aid to church and to church schools."

64 Ibid, at 284.

65 Ibid, at 256-257.

66 Ibid, at 257.

67 Ibid, at 285-286.

68 The language of the 1862 Act does not refer to the "disestablishment" of any religion; it had "no need to deal in such concepts because there existed in Australia no established church capable of being disestablished"; see *Attorney General for the State of Victoria (ex rel Black) v Commonwealth of Australia* (1981) 146 CLR 559, at 608, per Stephen J.

69 Ibid, at 276.

70 (1850) Legge 544, at 570.

71 (1917) 23 CLR 546, at 550. See also *In the Will of Purcell* (1895) 21 VLR 249, in which it was said that: "it would not be reasonable to apply a Statute passed in England, in the interests of one religious body as against the interests of another religious body, to a colony where these religious bodies were equal in number."

72 (1855) Legge 876.

73 Ibid. However, cf *M'Hugh v Robertson* (1885) 11 VLR 410, in which an English statute prohibiting the operation of an entertainment for profit on a Sunday was held to be reasonably applicable to Australian conditions and thus received law.

74 See para 2.31, above.

75 8 Geo IV No 2. It may be argued that this legislative reference is an inferential declaration by the Governor, with the advice of the Legislative Council, of the extension of the English offence of blasphemy to New South Wales, as provided for by the *Australian Courts Act* 1828. The wording also lends force to the view that the Church of England was regarded by the Governor as the established church in the early days of the colony. The Act was eventually repealed by the *Newspapers Act* 1898 (NSW).

76 Section 20. The penalty provision was amended by 11 Geo IV No 1, ss 9-10 (limiting banishment to not less than two and not more than seven), and by 5 Vic No 19, s1 (repealing the penalty of banishment). The latter Act also provided, in s2, that no actions for this offence could be commenced except in the name of the Attorney General, the Solicitor General or the Crown Prosecutor.

77 *R v Ramsay and Foote* (1883) 15 Cox CC 231.

78 *R v Bradlaugh* (1883) 15 Cox CC 217.

79 See the order made under s11(2) of the *Director of Public Prosecutions Act* 1986 (NSW), published in the *New South Wales Government Gazette* No 189, 30 December 1988, at 6680.

80 *R v Lemon, R v Gay News Ltd*, Central Criminal Court, London, 11 July 1977.

81 Cited in Coleman, at 66.

82 Ibid, at 67.

83 Ibid, at 67.

84 Ibid, at 74.

85 Ibid.

86 For example, the offences of criminal libel, riot, rout, affray, and rape. The general question of common law crime (non-statutory offences) will be the subject of another Discussion Paper in 1992, under the Commission's new reference on Conspiracy, Complicity, Attempt and Common Law Crime.

87 In theory, publication to one other person would be sufficient, but there are no known prosecutions in these circumstances. See Law Commission, WP 79, at para 3.5.

88 See paras 2.3 et seq, above.

89 *R v Hetherington* (1841) 4 St Tr NS 563, at 590, per Lord Denman CJ.

90 *Crimes Act* 1900 (NSW), s574.

91 *R v Ramsay and Foote* [1883] 15 Cox CC 231, at 235, per Lord Coleridge CJ.

92 *R v Hetherington* (1841) 4 St Tr NS 563, at 590, per Lord Denman CJ.

93 *R v Boulter* (1908) 72 JP 188, at 189, per Phillimore J.

94 Law Commission, WP 79, at para 3.1, citing *Whitehouse v Lemon* [1979] AC 617, at 662, (HL) per Lord Scarman.

95 See paras 2.77 et seq.

96 See paras 2.14 et seq.

97 (1727) 2 Str 788.

98 [1917] AC 407, at 445-446 (HL).

99 Ibid, at 459; see, eg, *R v Williams* (1797) 26 St Tr 654.

100 Ibid, at 467.

101 Law Commission, WP 79, at para 2.13.

102 *Howell* [1982] 1 QB 416, at 426. See also Glanville Williams, “Arrest for Breach of the Peace” [1954] Crim LR 578, at 578-583.

103 Law Commission, WP 79, at para 2.13.

104 [1917] AC 407, at 460.

105 [1922] 16 Cr App R 87.

106 *R v Lemon, R v Gay News Ltd.* Central Criminal Court, 11 July 1977.

107 *Whitehouse v Lemon* [1979] AC 617, at 662 (HL).

108 *Crimes Act* 1900 (NSW), s574.

109 [1917] AC 406, at 459-460.

110 See D Brown, D Neal, D Farrier, and D Weisbrot, *Criminal Laws* (1990) 1046.

111 (1882) 9 QBD 308, at 314. See para 4.87, below, for further discussion of this point.

112 *Jordan v Burgoyne* [1963] 2 QB 744, at 748-749, per Lord Parker CJ.

113 Ibid, at 749.

114 NSW Supreme Court, Admin Law Div, unreported, 22 April 1983; see Brown, Farrier, Neal and Weisbrot, at 1039.

115 See paras 2.77 et seq.

116 See especially para 2.42, above.

117 In Canada, the reach of blasphemy has been extended to encompass ridicule of the Roman Catholic Church, but not to other non-Christian religions. See para 3.25, below.

118 [1979] AC 617, at 658.

119 [1990] 3 WLR 986 (QBD).

120 Ibid, at 999.

121 Ibid.

122 Ibid, at 1000.

123 [1935] AC 462, per Lord Sankey LC.

124 (1676) 1 Vent 293; 86 ER 189.

125 (1841) 4 St Tr NS 563.

126 [1917] AC 406. This was a civil case, but the House of Lords was obliged to consider the criminal law of blasphemy in order to reach its decision.

127 These examples are taken from the Law Commission, WP 79, paras 2.7-2.11.

128 [1819] 1 St Tr NS 1387, at 1390.

129 Starkie, *Treatise on the Law of Slander and Libel* (2nd ed, 1830) 146.

130 *Whitehouse v Lemon* [1979] AC 617, at 635. Starkie was one of the Criminal Law Commissioners in the 1830s and 1840s.

131 (1883) 15 Cox CC 231.

132 (1883) 15 Cox CC 217.

133 [1979] AC 617.

134 *R v Lemon* [1979] QB 10, at 27.

135 [1979] AC 617. Viscount Dilhorne, Lord Russell and Lord Scarman formed the majority, with Lords Diplock and Lord Edmund-Davies dissenting.

136 Ibid, at 645-646.

137 Ibid, at 662. Lord Russell agreed that the "authorities embrace an abundance of apparently contradictory or ambivalent comments. The question is open for decision." Ibid, at 657.

138 Ibid, at 665.

139 Ibid, at 636.

140 Ibid.

141 Ibid, at 638.

142 Ibid.

143 Ibid, at 654-655.

144 Ibid, at 656.

145 Ibid.

146 £500 in the case of the editor, Lemon, and £1000 in the case of the publishing company, Gay News Ltd. See *R v Lemon* [1979] QB 10, at 30.

147 See Brown, Farrier, Neal and Weisbrot, at 438-538; B Fisse, *Howard's Criminal Law* (5th ed, 1990) 478-539.

148 (1963) 111 CLR 610.

149 [1961] AC 290.

150 *Criminal Justice Act* 1967 (Eng) s8.

151 See *Frankland* [1987] AC 576 (PC).

152 (1963) 111 CLR at 632-633.

153 (1980) 149 CLR 64.

154 See *DPP v Majewski* [1977] AC 443.

155 (1985) 156 CLR 464.

156 The New South Wales Court of Criminal Appeal had reached this view before the High Court's decision in *Crabbe*: see *Solomon* [1980] 1 NSWLR 321.

157 See *Caldwell* [1982] AC 341 (HL) and *Lawrence* [1982] AC 510 (HL); cf *Moloney* [1985] AC 905 (HL) and *Hancock* [1986] AC 455 (HL).

158 *Giorgianni v R* (1985) 156 CLR 473 (HCA).

159 Here, the Australian and English common law coincide. In *DPP v Morgan* [1976] AC 182, the House of Lords decided that rape was a crime of subjective fault: the accused must be shown to have intended to have carnal knowledge of the victim knowing that she was not consenting or being recklessly indifferent to the fact of consent. This case has been followed in all Australian jurisdictions. In New South Wales, see *R v McEwan* [1979] 2 NSWLR 926, over-ruling *R v Sperotto* [1970] SR (NSW) 334 (which asked juries to consider whether the "reasonable man" in the position of the accused would have realised the woman was not consenting). Common law rape has since been replaced in New South Wales, but a similar subjective mental element applies in respect of sexual assault: *Crimes Act* 1900 (NSW), s61D.

160 *He Kaw Teh* (1985) 157 CLR 523 (HCA), discussed below.

161 (1987) 11 NSWLR 541.

162 Under the *Indecent Articles and Classified Publications Act* 1975 (NSW), s6(1).

163 (1987) 11 NSWLR 541, at 547. The New Zealand courts had earlier come to the same conclusion in a similar case: see *R v Ewart* (1905) 25 NZLR 709.

164 (1987) 8 NSWLR 292 (SC). See also *Pregelj and Wurramurra v Manison* (1988) 31 A Crim R 383, in which the Northern Territory Court of Criminal Appeal came to a similar result.

165 (1985) 157 CLR 523 (HCA).

166 *R v Bush* [1975] 1 NSWLR 298 (NSW CCA).

167 *R v Carver* [1978] QB 472.

168 (1941) 67 CLR 536 (HCA). See also the English cases of *Sweet v Parsley* [1970] AC 132, *Sherras v De Rutzen* [1895] 1 QB 918, and *Tolson* (1889) 23 QBD 168; and the New Zealand case of *Millar v Ministry of Transport* [1986] 1 NZLR 660.

169 (1985) 157 CLR 523, at 528, per Gibbs CJ.

170 *Sherras v De Rutzen* [1895] 1 QB 918, at 922 per Wright J.

171 See *Phipps v State Rail Authority for New South Wales* (1986) 4 NSWLR 444 (NSW Court of Criminal Appeal).

172 On this last factor, see *Boucher v GJ Coles & Co* (1974) 9 SASR 495, at 523, and *Lim Chin Aik v R* [1963] AC 160.

173 1902, 1952 and 1966. In NSW, drug trafficking offences and related offences are now dealt with by the *Drugs Misuse and Trafficking Act* 1985.

174 See para 2.95.

175 Under the *Offences in Public Places Act* 1979 (NSW), s5, as amended in 1983. Imprisonment would only have been available for defaulting upon the imposed fine. The Act has since been repealed and replaced by the *Summary Offences Act* 1988.

176 See *Crabbe* (1985) 156 CLR 464 (HCA). Regarding "malice", see also the *Crimes Act* 1900 (NSW), s5.

177 *Giorgianni v R* (1985) 156 CLR 473, esp at 506-507 per Wilson, Deane and Dawson JJ.

178 For a critique of the reasoning of the High Court in *Giorgianni*, see Fisse, at 329-337.

179 This is true both under the common law and under s345 of the *Crimes Act* 1900 (NSW).

3. OTHER JURISDICTIONS

INTRODUCTION

3.1 In this Chapter we review the law of blasphemy (if any) in the other Australian jurisdictions and in a range of other common law (English-speaking) legal systems.

THE LAW IN OTHER AUSTRALIAN JURISDICTIONS

Tasmania

3.2 Among the states and territories in Australia, the only express statutory reference to blasphemy apart from that made in the *Crimes Act* 1900 (NSW), s574, is to be found in the Tasmanian *Criminal Code*. Section 119 provides that:

> (1) Any person who, by words spoken or intended to be read, wilfully publishes a blasphemous libel is guilty of a crime.
>
> Charge: Blasphemy.
>
> (2) The question whether any matter so published is or is not blasphemous is a question of fact.
>
> (3) It is not an offence under this section to express in good faith and in decent language, or to attempt to establish by arguments used in good faith and conveyed in decent language, any opinion whatever upon any religious subject.
>
> (4) No person shall be prosecuted under this section without the consent in writing of the Attorney-General.

This provision is similar to the law in New South Wales insofar as it leaves the full definition of the offence to the common law, but draws a distinction between sober and decent denials of religious doctrine and scurrilous attacks. The Tasmanian law differs insofar as there is no statutory reference to a breach of the peace, and the prior consent of the Attorney is required before launching a prosecution. No maximum penalty is specified in s119, which means that the general Code limitation of 21 years imprisonment applies.[1] Sections 120-121 of the Tasmanian Code deal with the offences of interfering with an officiating minister and disturbing religious worship. These offences are framed in similar terms to the equivalent provisions in NSW.[2]

Queensland

3.3 Blasphemy was apparently considered obsolete in the state of Queensland at the turn of the last century. In 1899, Queensland became the first Australian state to codify its criminal law. The Queensland *Criminal Code* was the work of Sir Samuel Walker Griffith, Chief Justice of Queensland and, after Federation, the first Chief Justice of the High Court of Australia. In a letter of 29 October 1897, sending the draft *Criminal Code* to the Attorney-General, Griffith pointed out that the *Code* did not deal with "the provisions of the English Criminal Law in force in 1828, whether Statutory Law or Common Law, as are manifestly obsolete or inapplicable to Australia."[3]

3.4 By s5 of the *Criminal Code Act* 1899 (to which the *Criminal Code* is attached as a Schedule), it is provided that no person shall be liable to be tried or punished in Queensland for an indictable offence except under the express provisions of the *Code*, some other statute of Queensland or an English statute expressly applied to Queensland. By repealing the *Blasphemy Act* 1697,[4] and making no provision for an offence of blasphemy in the *Criminal Code*, blasphemy was effectively abolished in Queensland.

3.5 There is a related offence in Queensland, however. The *Objectionable Literature Act* 1954 (Qld) is designed to prevent the distribution in Queensland of such literature as the Literature Board of Review deems

objectionable. The term "objectionable" is broadly defined to include material that is "blasphemous".[5] There is no attempt to define what blasphemous means in this context.

Western Australia

3.6 The drafters of the Western Australian *Criminal Code* closely followed the the Queensland *Criminal Code*. Section 4 of the *Criminal Code Act Compilation Act* 1913 (WA) is in virtually identical terms to s5 of the *Criminal Code Act* 1899 (Qld). As in Queensland, the failure to make provision for an offence of blasphemy in the Code effectively abolishes it.

Victoria

3.7 There is no mention of the offence of blasphemy in the *Crimes Act* 1958 (Vic), but the offence may exist as a common law crime to the same extent as it applies in New South Wales (although without the statutory modifications introduced by s574 of the *Crimes Act* 1900 (NSW)). Victoria does not have a comprehensive Criminal Code; in this respect it is similar to the other "common law" states of New South Wales and South Australia. The last attempt to prosecute for common law blasphemy in Victoria was in 1919, but the matter was dropped by the Crown before the trial started.[6]

3.8 The *Summary Offences Act* 1966 (Vic) s21 includes an offence of disturbing religious worship, framed in similar terms to that offence provided for by s39 of the *Imperial Acts Application Act* 1969 (NSW). In one of the few cases to consider this area of the law, the Supreme Court of Victoria decided that the interruption of a rally featuring the American evangelist Billy Graham was not an offence under s21, as the assembly did not amount to a meeting for the purpose of religious worship.[7]

South Australia

3.9 The position in South Australia is similar to that in Victoria: there are no statutory references to the crime of blasphemy, nor is there an express abolition of the offence. Under the heading of "Offences against religion", the *Criminal Law Consolidation Act* 1935 (SA) ss 257-259 contains the related offences of interrupting religious worship, molesting preachers and pretending to witchcraft, the latter offence derived from the *Witchcraft Act* 1735 (UK).

3.10 In 1977, the Criminal Law and Penal Methods Reform Committee completed its report on the substantive criminal law of South Australia. The Committee dealt with blasphemy as one of four types of common law libels punishable by the criminal law (the others being seditious libels, libels affecting the administration of justice, and other defamatory libels.) While considering that blasphemy as defined in *Bowman v Secular Society Ltd* [8]was a common law offence under state law, the Committee concluded that "today it would seem anachronistic to charge anyone with blasphemous libel". The Committee accordingly recommended its abolition.[9]

The Northern Territory

3.11 Under the heading of "Offences Relating to Religious Worship", the Northern Territory *Criminal Code* provides for only one offence: offering violence to officiating ministers of religion. The Northern Territory *Code* was based substantially on the Queensland *Criminal Code*, and this provision is in very similar terms to s206 of the Queensland *Code*. Unlike the position in Queensland, however, there is an argument that the Northern Territory Criminal Code is not meant to displace entirely the common law, so that non-statutory offences may still exist.[10]

The Australian Capital Territory

3.12 The Australian Capital Territory (ACT) has adopted and modified the *Crimes Act* 1900 (NSW).[11] Having emerged out of New South Wales, the reception position in the ACT would be the same. Section 574 is retained in the ACT, so the offence of blasphemy in the ACT exists to the same extent as in New South Wales. There are no related offences, however; neither s56 of the *Crimes Act* 1900 (NSW) nor s39 of the *Imperial Acts Application Act* 1969 (NSW) have been adopted.

The Commonwealth of Australia

3.13 The *Crimes Act* 1914 (Cth) includes no reference to blasphemy as a specific offence, nor to any related offence against religion. An offence of sending blasphemous material through the post was repealed in 1989, and replaced by an offence (s85S) of using federal postal or telecommunications services to harass or in a manner that would be regarded by reasonable persons as "offensive" in the circumstances.

3.14 There are a number of uses of the term "blasphemous" in federal legislation. By the *Customs (Cinematograph Films) Regulations* (Cth), a Censorship Board and a Film and Literature Board of Review is created to register films that are imported for public exhibition, and pass advertisements. The Board will not do so if the film or advertising matter is, amongst other criteria, blasphemous.[12]

3.15 In pursuance of an agreement between the Governments of the Commonwealth and the States of Australia in 1968, regulations were made under the *Customs Act* 1901 (Cth) providing for the establishment of a National Literature Board of Review. The Board was to fulfil the same functions as the film Censorship Board, by considering whether books referred to it were suitable for distribution in Australia. One factor affecting the suitability of a particular work is the inclusion of any blasphemous material. As from 1990, the functions of the Board were assumed by the Film and Literature Board of Review.

3.16 The *Customs (Prohibited Imports) Regulations* (Cth) prohibit the importation of material which is blasphemous, unless permission in writing has been obtained from the Attorney-General.[13]

3.17 The *Broadcasting and Television Act* 1942 (Cth) s118 provides that the Australian Broadcasting Commission or a licensee shall not broadcast or televise matter which is blasphemous, indecent or obscene. The term "blasphemous" is not defined in the legislation, but in a policy statement the Australian Broadcasting Tribunal has adopted the modern, common law definition.[14] Accordingly, the transmission of programmes criticising or opposing belief in God, Christ or the Christian religion will not be blasphemous unless the programme content goes beyond the normal boundaries of reasonable argument. The Tribunal is aware that the use of words of Christian significance, and words of significance to other religions, may be offensive to a section of the public. In this respect the prohibition on the transmission of blasphemous material is to be read in conjunction with Programme Standards covering the denigration of religious faiths and beliefs of all kinds (rather than with notions of punishment under the criminal law).

3.18 The Australian Law Reform Commission has recently proposed the removal of all references to blasphemy in federal legislation.[15] The Commission considered that the offence of blasphemy (and cognate offences) failed to protect the religious sensibilities of non-Christians, and that the legislative extension of the offence to cover other religions was fraught with difficulties.[16]

OTHER COMMON LAW JURISDICTIONS

Scotland

3.19 Blasphemy is a common law offence under Scottish law, defined as the uttering of impious and profane things against God or the authority of the Holy Scriptures "in a scoffing or railing manner, out of a reproachful disposition in the speaker, and ... with passion against the Almighty, rather than with any purpose of propagating the irreverent opinion."[17]

3.20 The continued existence of the offence has been doubted by some commentators. A leading textbook states that "it is not usual now to prosecute for blasphemy, except summarily as a breach of public order."[18] Another leading commentator considers that "it may be said that blasphemy is no longer a crime."[19] The last reported cases were 150 years ago, and concerned the prosecutions of booksellers and publishers of anti-religious, radical and obscene books. "Today any alleged blasphemous conduct would be dealt with as obscenity or breach of the peace."[20]

Ireland

3.21 Article 40.6.1.i of the Constitution of Ireland provides that the publication of blasphemous matter is an offence which shall be punishable in accordance with law. There is divided opinion over the current state of the common law in Ireland relating to blasphemy, especially as regards the effect of the House of Lords' decision in *Bowman v Secular Society.* [21] Although its value as a binding precedent has been questioned, as it was not a case on appeal from Ireland, the better view seems to be that all decisions of the House of Lords formed part of the law of Ireland carried over by the Constitution of the Irish Free State, and subsequently by the Constitution of Ireland, unless the principle is inconsistent with the Constitution.[22] The law of blasphemy is thus in similar terms to that of the law in England, although the offence would, of course, be applicable to the Catholic Church.

3.22 In a recent Paper on *The Crime of Libel* in Ireland, the Law Reform Commission of Ireland was of the view that "there is no place for the offence of blasphemous libel in a society which respects freedom of speech."[23] Recognising that it is impossible to abolish the offence of blasphemous libel under the existing constitutional provision without a referendum, the Commission proposed a temporary improvement. The new definition of the offence of blasphemous libel would refer to the publication of matter "the sole effect of which is likely to cause outrage to a substantial number of adherents concerning a matter or matters held sacred by that religion."

Canada

3.23 Section 296[24] of the Canadian *Criminal Code* provides for an offence of blasphemous libel. It is in similar terms to s119 of the Tasmanian *Criminal Code*, with the one exception that the consent of the Attorney General is not required for the commencement of a prosecution.

3.24 The limited case law on this section of the Canadian *Criminal Code* is somewhat contradictory. In *R v Kinler* (1925),[25] the court held that the offence of blasphemous libel is only committed by a direct attack upon the Deity; neither an attack upon the clergy nor one upon the doctrine of a particular church will be sufficient. In *R v St. Martin* (1933),[26] however, it was held that blasphemous libel is not confined to a direct attack upon the Deity. It may consist in any publication containing expressions grossly repugnant to religious sentiments, exceeding the limits of decent controversy, and having as their sole object that of outraging the feelings of every sympathiser with the Christian faith. In that case the publication of a number of vitriolic articles attacking the Roman Catholic faith and religious practices of the majority of the people of Quebec was held to be blasphemous libel.

3.25 In *R v Rahard* (1935), an Anglican priest was convicted of blasphemous libel for fixing posters on his church property which were found by the court to be "offensive and injurious to Roman Catholics and of such a nature that they may lead to a disturbance of the peace", in terms which were "calculated and intended to insult the feelings of the great majority of persons amongst whom we live."[27] The court looked to the English common law cases to determine the elements of the offence of blasphemy but, in Roman Catholic Quebec, conveniently avoided discussion of the limitation of the offence in England to the Church of England. The case is generally taken to mean that the Canadian Criminal Code offence of blasphemous libel extends to the vilification of the Christian religion generally, but not beyond it.[28]

3.26 Under the general heading of "Hate Propaganda", s319 of the Canadian *Criminal Code* creates offences of public incitement of, and wilful promotion of, hatred against an identifiable group. "Identifiable group" is defined widely to include any section of the public distinguished by colour, race, *religion* or ethnic origin. Some cases of alleged blasphemy may be more suitably dealt with under these provisions, where the emphasis is on the promotion of inter-group hatred rather than challenges to religious doctrine.

New Zealand

3.27 Section 123 of the *Crimes Act* 1961 is in similar terms to s119 of the Tasmanian *Criminal Code*, and is the only recognised crime against religion in New Zealand. The consent of the Attorney General also is required before a prosecution may be commenced. However, the offence carries a maximum penalty of only one year's imprisonment. The last reported prosecution under this section was in 1922, for the publication of Siegfried Sassoon's poem "Stand To"[29], and a commentator has stated that:

> it is doubtful whether it can be said that the Christian religion is part of New Zealand common law, and, if it is not, the main reason for giving preference to the Christian faith disappears.

United States of America

3.28 According to one authority, blasphemy exists as a common law offence in American law, and consists in maliciously reviling God or religion. It is classified under three headings: "(1) denying the being and providence of God; (2) contumelious reproaches of Jesus Christ; profane and malevolent scoffing of the Scriptures, or exposing any part of them to contempt and ridicule; (3) certain immoralities tending to subvert all religion and morality, which are the foundation of all governments." A "wilful and malicious intent in assailing God or a doctrine of the Christian religion" is required for a successful prosecution.[31]

3.29 This view must be considered in the light of the American Constitution, however, which guarantees the freedoms of speech, religious liberty and worship, and provides that "Congress shall make no law respecting the establishment of religion."[32] Thus a blasphemy offence arguably would fall foul of these Constitutional freedoms and would only be sustained by the courts upon a showing that there was a compelling need for the offence which substantially outweighed those freedoms. There have been no prosecutions for blasphemy in America in modern times.

Papua New Guinea

3.30 The Papua New Guinea *Criminal Code* 1974 is based very substantially on the Queensland *Criminal Code*, which was adopted by the colonial administration in 1902.[33] As with the Queensland Code, the Papua New Guinea (PNG) Code is comprehensive and the omission of blasphemy is tantamount to abolition. Under the heading of "Offences Relating to Religious Worship" in the PNG Code, there are offences (ss207-208) of offering violence to officiating ministers of religion, and disturbing religious worship.

3.31 Under Schedule 2 of the Papua New Guinea Constitution, the senior courts are given broad powers to fashion an "underlying law" - that is, a Papua New Guinean common law - which is appropriate to the unique circumstances of PNG. Among the sources of underlying law are customary law and the English common law. However, the PNG courts would not be able to introduce common law blasphemy through the back door, since s37(2) of the Constitution specifies that it is a fundamental human right that (except in the case of contempt of court) no one "may be convicted of an offence that is not defined by, and the penalty for which is not prescribed by, a written law".

Nauru

3.32 The position in the Republic of Nauru still is governed by the Queensland *Criminal Code* 1899 (Adopted), which was brought in during the period of Australian administration of the United Nations Trusteeship before independence in 1968. (The High Court of Australia is the final court of appeal in the Nauru legal system as well, hearing appeals from the single judge Supreme Court of Nauru). Consequently, the position with respect to the law of blasphemy is the same as in Queensland: the offence has been effectively abolished by the failure to include it in the Code.

India

3.33 In the nineteenth century Lord Macaulay protested in the English Parliament against the way the blasphemy laws were then being administered, stating that:

> If I were a judge in India, I should have no scruple about punishing a Christian who should pollute a mosque.

3.34 The Indian *Penal Code* 1860 was based on the draft drawn up by the first Indian Law Commission, of which Lord Macaulay was President. Section 298 provides that:

> Whoever, with the deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person or makes any gesture in the sight of that person, or places any object in the sight of that person, shall be punished with imprisonment.

3.35 Section 295A provides for the written form of blasphemy:

> Whoever, with the deliberate and malicious intention of outraging the religious feelings of any class of citizens of India, by words, either spoken or written, or by signs or by visible representations or otherwise insults or attempts to insult the religion or the religious beliefs of that class, shall be punished with imprisonment.

3.36 These provisions are wider than the common law in one important respect: the *Code* protects the religious feelings of any person or class of citizens of India. There is no limitation of the offence to one religion; indeed there is no definition of what constitutes a religion.

3.37 Under s298, the defendant must deliberately intend to wound someone's religious feelings by acting in the proscribed manner. To be guilty of an offence under s295A the defendant must deliberately and *maliciously* intend to *outrage* the religious feelings of others. The elements of the offence under s295A are more restrictively defined, and consequently the difficulties of obtaining a conviction greater, for this more serious offence.

Fiji

3.38 The Fiji *Penal Code* (Ch 17 of the Laws of Fiji) is closely based on Macaulay's Indian *Penal Code* 1860. In Ch XVI of the Fijian Code, entitled "Offences Relating to Religion", there are four misdemeanour offences: damaging, destroying or defiling a place of worship (s145); disturbing a religious assembly (s146); trespass to burial places (s147); and writing or uttering words with intent to wound religious feelings (s148), which is in identical terms to s298 of the Indian *Penal Code*. As with the Indian Code, the offences in Fiji are not limited to protection of the Christian religion. For example, s145 relates to "any place of worship or any object which is held sacred by any class of persons". Section 148 is the offence most analogous to blasphemy, with a specified maximum penalty, being imprisonment for one year. There was a large demonstration in Suva recently by Methodists calling for a stronger blasphemy offence and for charges to be laid against members of Muslim group who screened a film alleged to be blasphemous,[34] but no action was taken by the authorities.

The Solomon Islands

3.39 The Solomon Islands *Penal Code* is also closely based on Macaulay's Indian *Penal Code* 1860 and is very similar to its counterpart in Fiji. The four offences mentioned in the preceding paragraph are reproduced in identical terms in the Solomon Islands *Penal Code*, ss 123-125 and 127.

Vanuatu

3.40 The Vanuatu *Penal Code* is loosely based on the Indian *Penal Code*, but was substantially revised in 1981 (after Independence in 1980). Under the Vanuatu *Penal Code*, ss 88-89, there are offences of damaging/defiling a place of worship and disturbing religious worship, but there is no longer an offence of blasphemy or of wounding religious feelings.

Western Samoa

3.41 The Western Samoa *Crimes Act* 1961, which was imported from the New Zealand *Crimes Act* 1961, contains an offence of blasphemous libel (s42) in identical terms to s123 of the New Zealand *Crimes Act* and in similar terms to s117 of the Tasmanian *Criminal Code*. The maximum penalty is imprisonment for one year.

South Africa

3.42 Blasphemy is a common law crime in South Africa. One commentator has stated that "although this crime is undoubtedly still part of the law, there is great uncertainty about its exact scope."[35] The only reported prosecution for blasphemy was in 1934.[36] Modern authorities favour the view that the crime should now be

restrictively interpreted and applied.[37] The *Publications Act* 1974 (SAfr) prohibits the publication and distribution of blasphemous material, and criminal prosecutions may be brought for a breach of that Act.

SUMMARY

3.43 The legal systems of Victoria, South Australia, Scotland and South Africa all may be said to have retained the common law offence of blasphemy in the absence of any legislative or judicial abrogation, although there is a question whether the offence may have lapsed through disuse. Commentators in these jurisdictions mainly regard blasphemy as an anachronism.

3.44 In the Queensland *Criminal Code* 1899, and its regional derivatives in Western Australia, the Northern Territory, Papua New Guinea and Nauru, blasphemy was effectively abolished by the move to codification itself (which excludes purely common law, or non-statutory, offences) and the decision by Sir Samuel Griffith not to include blasphemy among the comprehensive list of major crimes. It is interesting to note that blasphemy was considered obsolete as long ago as 1897 by the first Chief Justice of Australia, who decided that the offence had no place in a modern codification of the criminal law.

3.45 The criminal laws of Tasmania, Canada, New Zealand and Western Samoa all contain a (virtually identical) statutory reference to blasphemy, limited by the "good faith" exception. The provisions in Tasmania, New Zealand and Western Samoa all require the consent of the Attorney General before any proceedings are launched. Prosecutions have been very rare, especially in the second half of this century. The Irish Constitution entrenches the offence of blasphemy in Irish law, together with other aspects of the established (Catholic) church. The maximum penalty is one year's imprisonment in New Zealand and Western Samoa, two years in Canada, and (by default) 21 years in Tasmania.

3.46 The Indian *Penal Code* 1860 and its regional derivatives in Fiji and the Solomon Islands all contain offences analogous to blasphemy. However, it is worth noting that: (1) these Codes were drafted well over a century ago, having regard to the state of the English common law at that time; (2) the offences created by Macaulay were meant to operate in the diverse, multicultural context of colonial India and were not limited to the protection only of an established Christian religion or particular denomination; and (3) the offences were oriented more in nature and penalty to modern public order offences than to ancient ecclesiastical law - a maximum penalty of one year's imprisonment is prescribed. In Vanuatu, where the adopted *Penal Code* was subjected to a thorough post-Independence review in 1981, the blasphemy offence was dropped.

3.47 All of the several law reform commission inquiries into the law of blasphemy in recent times - in South Australia, England and Wales, Ireland (notwithstanding the need for a Constitutional referendum) and the Australian Commonwealth - have recommended abolition.

3.48 In sum, while a significant number of the jurisdictions surveyed retain an offence of blasphemy (or blasphemous libel) in the statute book or in the common law, prosecutions this century are very rare. The continued existence of the offence, then, may owe as much to inertia in the absence of controversy than to conscious policy decisions. Even where incidents arise which may raise issues of blasphemy, it is clear that in modern times the preferred course of action for prosecuting authorities is to utilise other offences, such as obscenity, indecency, or public order offences. This would be reinforced by the requirement in several of the jurisdictions that the consent of the Attorney General is required before proceeding with a charge of blasphemy. It is notable that the House of Lords considered this area of the law in 1979 only after a *private* prosecution was commenced by Mrs. Mary Whitehouse against some publishers for blasphemous libel,[38] 30 years after Lord Denning pronounced the offence "a dead letter" in England.[39]

FOOTNOTES

1 *Criminal Code* 1924 (Tas), s389(3).

2 See paras 4.32-4.34, below.

3 Quoted in Carter, *Criminal Law of Queensland* (6th ed, 1982) 4.

4 *Criminal Code Act* 1899, s3.

5 It is not sufficient that the material is merely blasphemous; it must tend to deprave and corrupt the classes of persons amongst whom it is likely to be distributed: see *Literature Board of Review v Invincible Press; ex parte Invincible Press and Truth And Sportsman Ltd* [1955] St R Qd 525.

6 See para 2.47, above, and P Coleman, *Obscenity, Blasphemy, Sedition: Censorship in Australia* (2nd ed, 1974) Ch 4.

7 *Macrae v Joliffe* [1970] VR 61. In response to Billy Graham's exhortation that the assembled people make a decision for Christ, the defendant had made her way through the crowd, thrown a bundle of pamphlets in the air and loudly shouted "bullshit".

8 [1917] AC 406.

9 Criminal Law and Penal Methods Reform Committee of South Australia, *The Substantive Criminal Law* (4th Report, 1977) 248.

10 There is some doubt over the continued application of the common law in the Territory; there is no "exclusive jurisdiction" provision in the Territory *Criminal Code* as there is in the Queensland Code (see para 3.4, above).

11 Areas where the *Crimes Act* (NSW) has been substantially modified in its application to the Territory include the law of homicide and defences.

12 *Customs (Cinematograph Films) Regulations*, reg 13. In the guidelines produced by the Office of Film and Literature Classification there is no reference to blasphemous material, however: see the *Guidelines for the Classification of Films, Videotapes and Printed Matter* (Information Bulletin No 5, March 1990).

13 *Customs (Prohibited Imports) Regulations*, reg 4A. For a review of the existing censorship procedures and the interplay of the various Regulations, see Australian Law Reform Commission, *Censorship Procedure* (ALRC 55, 1991).

14 Australian Broadcasting Tribunal, *Blasphemous, Indecent or Obscene Matter* (POS 03, 17 October 1983).

15 Australian Law Reform Commission, *Multiculturalism: Criminal Law* (DP 48, 1991) para 4.33.

16 Ibid, at paras 4.12 and 4.30-4.32.

17 Hume, *Commentaries on the Law of Scotland Respecting Crimes* (4th ed, 1844) vol 2, 568.

18 MacDonald, *Criminal Law of Scotland* (1948) 153; an earlier edition of 1894 contains the same passage.

19 Gordon, *Criminal Law* (2nd ed, 1978) 998.

20 Maher, "Blasphemy in Scots Law" [1977] Scots LT 257, 260.

21 [1917] AC 407.

22 See Law Reform Commission of Ireland, *The Crime Of Libel* (Consultation Paper, August 1991) 17, 80.

23 Ibid, at 172.

24 Previously s260, renumbered in the 1985 Revised Statutes of Canada. See *Snow's Annotated Criminal Code*.

25 (1925) 63 Que SC 483.

26 (1933) 41 R de Jur 411.

27 [1936] 3 DLR 230, at 237-238.

28 Law Commission of England and Wales, *Offences Against Religion and Public Worship* (WP 79, 1981) para 4.7.

29 *R v Glover* [1922] GLR 125.

30 Adams, *Criminal Law and Practice in New Zealand* (2nd ed, 1971) 258.

31 Wharton, *Criminal Law and Procedure* (1957) vol 2, at 666-669.

32 The First Amendment to the US Constitution.

33 See DRC Chalmers, D Weisbrot and W Andrew, *Criminal Law and Practice of Papua New Guinea* (2nd ed 1985).

34 "Blasphemy ban sought", *The Australian*, 6 July 1991, at 12.

35 Joubert, *The Law of South Africa* (1981) vol 6, para 249.

36 *R v Webb* [1934] AD 493.

37 Ibid, at 497; see *Publication Control Board v Gallo (Africa) Ltd* [1975] 3 SA 665.

38 Counsel for the defendants in *R v Lemon* frankly admitted before the Court of Appeal that the material in dispute may well have led to a successful prosecution under the *Obscene Publications Act* 1959 (UK). The choice of prosecuting the publishers for blasphemy appears to have been made after a copy of the offending poem was sent to Mrs. Whitehouse by a supporter just as she was thinking of trying the law of blasphemy as a new weapon in her campaigns: see Tracey and Morrison, *Whitehouse* (1979) 114.

39 Denning, *Freedom Under the Law* (Hamlyn Lectures, 1st series, 1949) 46.

4. OPTIONS FOR REFORM

INTRODUCTION

4.1 In this Chapter, the Commission canvasses the main options for reform of the law of blasphemy, ranging from retention of the common law to abolition. The Commission currently favours the latter option, for the reasons discussed below, but it is important to note again that **the views expressed in this chapter are not the final recommendations of the Commission, which will be determined after public consultation.**

OPTION ONE: RETENTION OF THE COMMON LAW

4.2 The first option is simply to retain the existing common law offence of blasphemy - that is, to take no action. Below, we consider the general policy arguments for and against retention of a blasphemy offence, and then consider some questions about the current legal definition of the offence.

Policy arguments in relation to retention

4.3 The Law Commission of England and Wales identified four general arguments in favour of retention of a the common law offence of blasphemy: (1) the protection of religion and religious beliefs; (2) the protection of society; (3) the protection of individual feelings; and (4) the protection of public order.[1] These possible justifications are discussed in turn, below.

Protection of God and religion

4.4 As discussed in Chapter 2, blasphemy had its origins in ecclesiastical law, where it was developed in conjunction with the related religious offences of heresy, schism and atheism.[2] As the historical material indicates, the offence has always had a dual justification, linking the protection of the established (Christian) church with the maintenance of the established social and political order. The former concern may have dominated in the early development of the offence, but by the late nineteenth century[3] the case law clearly manifests a greater interest in the latter.

4.5 As a consequence of the shift in focus, the courts began to demand evidence that there was not only a grave insult to Christianity but also that a breach of the peace was caused or apprehended in the process. Further, the courts removed liability for criticism which was moderate and reasoned, even if trenchant. This aspect of the development of the law also is found in the *Crimes Act* 1900 (NSW), s574.

4.6 Thus while the *context* of blasphemy may still be religious, the protection of religion has become incidental. The Law Commission of England and Wales has made the point that if the role of the blasphemy offence is to promote the observance of Christianity, it is anomalous that only scurrilous attacks on the religion are punishable. Informed criticism of Christianity is far more destructive of religion, and has a greater prospect of promoting irreligion than gratuitous and offensive abuse: "reasoned persuasion is ultimately far more effective than attacks devoid of intellectual content."[4] Yet it is established that "a temperate and respectful denial, even of the existence of God, is not an offence against our law, however great an offence it may be against the Almighty Himself."[5]

4.7 Furthermore, the cognate offences of heresy, schism and atheism are no longer offences known to the law, although such actions and beliefs are no doubt inimical to the status and welfare of the Christian religion. The view for some time has been that, whatever the merits of promoting religious values and respect for religious beliefs, the use of the criminal law is entirely the wrong instrument. Indeed, the criminal law is incapable of achieving these aims "without resort to measures which would be regarded as unacceptable infringements upon freedom of expression in modern society ... [which] could give rise to greater problems than they solve."[6]

4.8 It is natural for people to wish to protect objects of their love, respect or veneration. It is entirely understandable that Christians should wish to defend the God they worship from offensive abuse. It is equally understandable that followers of other religions desire protection for the object(s) of their religious worship. Even if the utilitarian arguments expressed above about the role of law in protecting religion are rejected, there remains

the question of whether criminal sanctions should be employed for the sole protection of the Christian religion. We no longer live in a society in which one religion formally dominates, and the law should reflect contemporary social attitudes and mores, rather than commit itself forlornly to old precepts.

Protection of society

4.9 Blasphemy emerged as a distinct common law offence in England at the time of the Restoration. The country had seen a civil war resulting in the execution of a King, a decade of republicanism, and a restoration of the monarchy in the space of 20 years. It was inevitable that any hint of criticism of the Establishment would be treated harshly:

> In the post-Restoration politics of 17th and 18th century England, Church and State were thought to stand or fall together. To cast doubt on the doctrines of the established church or to deny the truth of the Christian faith upon which it was founded was to attack the fabric of society itself; so blasphemous and seditious libel were criminal offences that went hand in hand.[7]

4.10 The law of blasphemy also was much used in the 19th century when republican fervour was sweeping Europe and attacks on organised religion were regarded as thinly disguised calls to arms in the cause of revolution. The courts became the battleground between the Secularists and the "Society for Carrying into Effect His Majesty's Proclamations against Vice and Immorality"; the Freethinkers and the "Society for the Suppression of Vice".[8] In modern times, some religious organisations believe that the mere presence of an offence of blasphemy is sufficient to keep lawlessness in check, and any attempt to remove a law which encourages respect for and fear of God would result in increased criminality.

4.11 Today, the role of blasphemy in preserving the social fabric in Australia is negligible. (And overseas - particularly in Eastern Europe and Latin America - the moral and political force of the church has been used successfully in recent times to overturn established, but oppressive, governments.) There has only been one prosecution for blasphemy in New South Wales in the last 120 years, and the outcry resulting from the penalty imposed upon the convicted blasphemer caused far more civil unrest than the material which the prosecution was intended to suppress.[9]

4.12 Any notion that the offence of blasphemy has a role to play in the preservation of social order relies upon a showing that the existence of the offence has some deterrent effect. There is no evidence of this. On the contrary, it is unlikely that many people are aware that the offence actually exists in modern law, and few would be able to define its scope or penalty. As the Law Commission of England and Wales has said:

> it is a commonplace that differences of view on religious matters run deep, and the existence of the criminal law is unlikely to deter those with a determination to express their views, even in the sharpest terms, about practices and beliefs which they consider undesirable ... .[10]

4.13 Moreover, the crime of blasphemy may actually encourage some to do those acts which the law seeks to proscribe: many authors and publishers have in the past relished their "martyrdom" at the hands of a legal instrument of suppression.[11] In some cases the public exposure resulting from the prosecution increases the profit and notoriety accruing to the blasphemer; this is one example of the sacred maxim in the advertising industry that "there is no such thing as bad publicity." Indeed, a prosecution for blasphemy may lead to more commercially calculated law-breaking: shortly after the trial of Lemon, for example, an illustrated book of "blasphemous" verse was published, entitled "Good God". It is worth recalling the comment of Lord Sumner in *Bowman v Secular Society* that "most men have thought that such writings are better punished with indifference than with imprisonment".[12] The actual sentences imposed for blasphemy in recent times probably would not dissuade someone from breaching blasphemous laws for principle or profit. The defendants in *Whitehouse v Lemon*, for example, ultimately only received fines.[13]

4.14 In Chapter 2, we noted that in 1949 Lord Denning questioned the continued viability of the blasphemy offence based on the need for the protection of society:

> The reason for this law was because it was thought that a denial of Christianity was liable to shake the fabric of society, which was itself founded on the Christian religion. There is no such danger now and the offence of blasphemy is a dead letter.

Lord Denning may have incorrectly predicted subsequent events in England, but the absence of a single successful prosecution for blasphemy in Australia in this century must lead to the suggestion that as a matter of practice, blasphemy is "a dead letter" in this country.

4.15 In *Whitehouse v Lemon*,[14] Lord Scarman defended the contemporary value of maintaining the blasphemy offence and extending it to cover non-Christian religions:

> The offence belongs to a group of criminal offences designed to safeguard the internal tranquillity of the kingdom. In an increasingly plural society such as that of modern Britain it is necessary not only to respect the differing religious beliefs, feelings and practices of all but also to protect them from scurrility, vilification, ridicule and contempt.

4.16 There are some major problems with this approach, however. First, the history and development of the law of blasphemy is in no way linked with the *promotion* of religious tolerance. Blasphemy was not a primitive form of race relations law or anti-discrimination law. Quite the contrary, the criminal law and its severe sanctions were used expressly to enforce the pre-eminence of one religion over all others, running contrary to the modern view that "the law does not assert the truth of a single system of religious beliefs".[15] Thus, to hold that an attack on *any* religious doctrine should be regarded as "blasphemy" is to render the concept nugatory.

4.17 Second, the existing offence of blasphemy at least has the benefit of being self-limiting. The scope does not extend beyond the scurrilous attack on the central tenets of Christianity. If the offence was extended to all religions - leaving aside for the moment the significant difficulties in appropriately defining "religion" for these purposes - then an interlocking grid of blasphemy could be created, for it is fundamental to most faiths that they assert the truth of their own doctrines and at least implicitly deny the validity of others. Does the devout Christian who fervently asserts the truth of his or her own beliefs inevitably blaspheme against Judaism, Islam, Buddhism and so on? Might the "reform" Jew blaspheme against the "orthodox" branch of Judaism? Would strong criticism of the Rastafarian use of marijuana as a religious sacrament blaspheme against that religion? Are these appropriate matters for the criminal courts to decide in any event?

4.18 Lord Scarman is no doubt correct in identifying racial and religious strife as negative forces capable of tearing at the fabric of society. One needs only to look at most of the world's "trouble spots" for ready confirmation of this. However, the remedy does not lie in opening up the criminal courts to parties with strong religious convictions to pursue atheists or dissenting coreligionists or followers of other religions. This could only lead to much greater social dislocation than now exists. The view taken by one commentator is that:

> An offence of blasphemy which uses the need to prevent religious persecution to prohibit the general publication of matter which offends the religious is actually an encouragement to religious persecution by those whom it is supposed to protect.[16]

4.19 Apart from those circumstances in which there is actual incitement to violence, and the intervention of the criminal law is both apt and necessary, the substance and techniques of anti-discrimination law in New South Wales are much better suited to the promotion of concepts of religious freedom and social tolerance, and to the remedying of conflict based on social difference.

4.20 It would be perverse indeed if concepts of pluralism and multiculturalism were used to justify the retention and significant expansion of a criminal offence which was developed precisely to enforce the maintenance of a single set of "established" beliefs by severely punishing expressions of dissent.

Protection of individual feelings

4.21 The Commission has no doubt that there are many members of the community who have deeply-held religious convictions and that these views should be respected. It is less clear that religious views merit the special attention of the criminal law, as opposed to, say, political or humanist or aesthetical beliefs, or that the

veneration of religious ideas or objects is markedly different in kind from, say, the love of a patriot for flag and country, or the love of a parent for a child.

4.22 An early submission received by the Attorney General and forwarded to the Commission states that the present law of blasphemy has a role to play in educating the community to respect the beliefs of others. The Bishop of Leicester has argued that a law of blasphemy is still needed:

> to register the fact that there are certain things that are so repellent to the general conscience and mind of the country that this hostility to them should have some form of expression.[17]

4.23 The criminal law does have an important role to play in both declaring the limits of acceptable behaviour and in educating people in that regard. It is also true that the promotion of tolerance for different beliefs, and respect for different opinions is a legitimate aim. The federal Government policy of multiculturalism, the current review of federal law by the Australian Law Reform Commission with the aim of identifying how the law and legal system can act to the disadvantage of minorities, and State anti-discrimination legislation, all have similar objectives.

4.24 On this view the justification for an offence of blasphemy is not that God is insulted or society is threatened, but that the feelings of religious individuals are outraged and offended. In a Parliamentary debate on a Bill to abolish the offence of blasphemy in the United Kingdom, one member stated that:

> Blasphemy is an act of violence to the mind and spirit and deeply spiritual feelings of very large numbers, millions and millions, of people capable of entertaining such feelings. It is an assault upon the mind and spirit just as much as mayhem is an assault on the body.[18]

4.25 There is also judicial authority for the premise that this is the correct justification for the present existence of an offence of blasphemy. In the 1883 case of *R v Ramsay and Foote*, Lord Coleridge directed the jury to decide whether the libels:

> are not calculated and intended to insult the feelings and the deepest religious convictions of the great majority of persons amongst whom we live.[19]

Lord Scarman also supported this view in *Whitehouse v Lemon*, stating that:

> it is necessary not only to respect the differing religious beliefs, feelings and practices of all but also to protect them from scurrility, vilification, ridicule and contempt.[20]

4.26 However, it is questionable whether the present law of blasphemy actually fulfils the valuable role of educating the community to respect the beliefs of others. If it is accepted that religious beliefs merit protection, the law should ensure that all such beliefs are protected equally; the respect shown by a Christian for an atheist should be the same as that shown by an atheist for a Christian, a Muslim for a Jew, a Hindu for a Sikh.[21]

4.27 The Commission begins with the principle that the law should only intrude upon the exercise of the freedom of speech where there is an absolutely compelling countervailing right which demands priority. This has been recognised at the international level in the *International Covenant on Civil and Political Rights*, to which Australia is a party, although the rights contained therein have not been entrenched in Australian municipal law. Article 19(1) of the Covenant recognises the freedom of expression, but art 18(3) provides that such limits as are necessary "to protect public safety, order, health or morals or the fundamental rights and freedoms of others" may be imposed by law.

4.28 In the Commission's view, the balance in New South Wales has too often been made in favour of private feelings and public order, at the expense of the freedoms of expression and association. In any event, as a matter of positive law, it is possible to identify a large number of civil and criminal restraints upon free speech: the laws of civil and criminal defamation,[22] criminal prohibitions upon indecent or obscene behaviour or publications,[23] restrictions on material in the broadcast media,[24] official secrets laws[25] and many others, including offences against public order. The latter category is dealt with in the section following below.

Protection of public order

4.29 As discussed earlier in the Paper, the main rationale for blasphemy has shifted over time from the protection of religion to the maintenance of public order. To find this rationale sufficiently compelling to justify the retention of the common law offence, however, there would have to be a showing that the publication of blasphemous material has led or is likely to lead to public disorder in New South Wales, and that the blasphemy offence is the best mechanism for preventing or punishing such conduct.

4.30 A range of other existing "public order" criminal offences may apply in this area. Some of these offences have a specifically religious context. Section 56 of the *Crimes Act* 1900 (NSW) creates statutory offences of obstructing (by threats or force), striking or offering violence to a member of the clergy in the discharge of his or her duties It is modelled on s36 of the *Offences Against the Person Act* 1861 (UK) which has been recommended for repeal without replacement by the English Criminal Law Revision Committee.[26] The maximum penalty for a conviction under s56 is imprisonment for two years. This is the same maximum available under the common assault provision in the Crimes Act.[27]

4.31 Sections 106-107 of the *Crimes Act* provide for offences of "sacrilege", which are breaking and entering with intent type offences with the aggravating element being that the place in question is "a place of Divine worship". The latter term is helpfully defined in s4 as including "any building or structure ordinarily used for Divine worship". The definition has not been judicially considered in New South Wales, but there is no reason to believe that the offence would be limited to Christian churches. The maximum penalty is 14 years imprisonment, or up to 20 years if the offence was committed with arms or in company.

4.32 Section 39 of the *Imperial Acts Application Act* 1969 (NSW) creates a statutory offence of "wilfully and without lawful justification or excuse" disquieting or disturbing any meeting of persons lawfully assembled for religious worship, or assaulting a person lawfully officiating at or attending such a meeting. The matter is to dealt with summarily and the maximum penalty is a fine of $100 or imprisonment for up to two months. The section is modelled on a Victorian statute, which in turn was based on ss 206-207 of the Queensland *Criminal Code* 1899. The substance of the section is drawn from two Imperial Acts: s15 of the *Toleration Act* 1688 (UK),[28] and s12 of the *Places of Religious Worship Act* 1812 (UK). These latter statutes were repealed in their application to New South Wales by the 1969 Act, but s5(5) of that Act provides that in construing the new provisions regard may be had to the Imperial Acts for which they are substituted. The *Toleration Act* and the *Places of Religious Worship Act* protected only Christian churches, ministers, and worshippers. Although there is nothing in s39 of the Act currently in force which would expressly limit its application to Christianity, this limitation may be implied by reference to the Imperial enactments it replaces.

4.33 At common law there existed an ill-defined misdemeanour, the essence of which was the disruption of lawful religious worship. There is old authority for the broad proposition that "all irreverent behaviour" in a church or churchyard is criminal.[29] English cases have dealt in particular with the disturbance of a priest of the established church in the performance of divine worship, and the striking of any person in a church or churchyard.[30] The *Brawling Act* 1551 (UK) punished quarrelling, chiding or brawling in a church or churchyard, and although the Act has been repealed in New South Wales, it appears that the offence subsisted at common law before the statute was enacted[31] and it may still obtain in the rather uncertain mixed common law and statute system that applies in this State.

4.34 This common law offence was considered by the Supreme Court of New South Wales in 1884.[32] The Court unanimously held that the offence was in force in New South Wales and, notably, refused to limit the application of the offence to an established church, holding that "if the service is not illegal, then the common law applies for the protection of those participating in it."[33]

4.35 Outside of the religious context, there is a range of other criminal offences which may cover, or potentially cover, much of the same territory as blasphemy. The term "public order offences" usually refers to that part of the criminal law which is principally concerned with the control of public space. The "keystone of public order legislation is usually a provision which permits the police to act where behaviour in a public place is regarded as offensive, insulting, abusive or indecent."[34] By creating offences which restrict an individual's right to free expression, and by their broad definitions give police enormous operational discretion, a balance has to

be struck between the genuine concern for public safety and order on the one hand, and toleration for behaviour that is merely annoying or eccentric (rather than threatening) on the other.

4.36 The current provisions relating to offensive conduct are contained in s4 of the *Summary Offences Act* 1988 (NSW), which penalises offensive conduct (including, expressly, offensive language) in or within view or hearing of a public place[35] or a school. It is a defence for the accused to satisfy the court that he or she had a "reasonable excuse" for behaving in the manner alleged. The maximum penalty for this summary offence is now a fine of six penalty units (approximately $600) or imprisonment for three months. An identical offence is created with respect to conduct in a non-public place, under s4A of the *Inclosed Lands Protection Act* 1901 (NSW).

4.37 In order for conduct or language to be offensive, it must be intended to wound the feelings, or arouse anger, resentment, disgust or outrage in the mind of a reasonable person.[36] Without the need for any extension, the offensive behaviour offences clearly cover one type of conduct that the offence of blasphemy is designed to suppress: the gratuitous wounding of another's feelings.

4.38 It is an indictable offence at common law for a person to commit in public an act of such a lewd, obscene or disgusting nature as to amount to an outrage to public decency, whether or not it tends to deprave and corrupt those who see it. Cases have centred on indecent exposure, but the offence is not so limited and some conduct presently punishable as blasphemous would fall within this definition. Indeed, the most recent English case to deal with the offence of outraging public decency relied heavily on *Whitehouse v Lemon*, the leading blasphemy authority.[37]

4.39 It is a common law misdemeanour in New South Wales to incite or solicit another person to commit a criminal offence.[38] Unlike the law of conspiracy, no agreement is required between the parties. A common example of incitement would be a speaker at a political rally urging the audience to use violence against any person (or class of person) or property. An exhortation to harm a class of persons based on their religious beliefs could amount to blasphemy in certain circumstances. In any event, the offence of incitement could cover substantially the same mischief as blasphemy, as well as more serious threats of violence.

4.40 Another relevant area of public order legislation is that dealt with by the *Anti-Discrimination Act* 1977, as amended. By the *Anti-Discrimination (Racial Vilification) Amendment Act* 1989, s20C, it is provided that:

> It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group.

Under this section, "racial vilification" becomes a ground of complaint under the principal Act, and the Anti-Discrimination Board is empowered to use its normal powers and procedures for investigation and conciliation or determination. Ultimately, civil remedies are available to a complainant under s20C, through the Equal Opportunity Tribunal. A wide definition of "public act" is included in s20B, covering virtually any form of communication to the public.

4.41 Section 20D creates an offence of "serious racial vilification" in the following terms:

> A person shall not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group by means which include-
>
> (a) threatening physical harm towards, or towards any property of, the person or group of persons; or
>
> (b) inciting others to threaten physical harm towards, or towards any property of, the person or group of persons.

4.42 Communications "done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussion or debate" are expressly exempted from any liability for racial vilification under s20C(2)(c), but not from liability for serious racial vilification.

4.43 Criminal penalties of a fine of up to 10 penalty units (approximately $1,000) and a maximum term of imprisonment for six months are available for a person convicted under s20D.[39] A prosecution for serious racial vilification may be commenced only with the consent of the Attorney General, under s20D(2).

4.44 "Race" is defined in s4 of the *Anti-Discrimination Act* 1977 to include only "colour, nationality and ethnic or national origin".[40] There have been no reported cases under these new provisions in New South Wales, but the relevant case law overseas suggests that it may be possible for members of a religious group to argue that public acts aimed at them or their religious practices which incite hatred or provoke ridicule fall within the racial vilification provisions.

4.45 In *Mandla v Dowell Lee*,[41] the House of Lords considered whether a Sikh, who had been refused admission to a private school with a "no turban" rule, had been discriminated against on the basis of race (under the "ethnic origins" branch of the definition) under the English *Race Relations Act* 1976, s3(1). The House of Lords unanimously held that members of the Sikh religion did constitute a "racial" group within the statutory definition (which is essentially the same as the definition used in the New South Wales legislation). Lord Fraser wrote:

> For a group to constitute an ethnic group in the sense of the Act of 1976, it must, in my opinion, regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics. ... The conditions which appear to me to be essential are these: (1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive; (2) a cultural tradition of its own, including family and social customs and manners, often but necessarily associated with religious observance. In addition to those two essential characteristics the following characteristics are, in my opinion, relevant: (3) either a common geographical origin, or descent from a small number of common ancestors; (4) a common language, not necessarily peculiar to the group; (5) a common literature peculiar to the group; (6) a common religion different from that of neighbouring groups or from the general community surrounding it; (7) being a minority or being an oppressed or a dominant group within a larger community ... .[42]

4.46 Earlier cases in England had established that members of the Jewish community belonged to a group with a "dual (racial and religious) character",[43] and in *Mandla* it was argued that it was "unthinkable that Parliament would have passed a Race Relations Act which did not afford protection for the Jews."[44] The New Zealand Court of Appeal in *King-Ansell v Police* [45]similarly found that Jews were covered by the New Zealand *Race Relations Act* 1971. In *King-Ansell*, Richardson J wrote that:

> a group is identifiable in terms of ethnic origins if it is a segment of the population distinguished from others by a sufficient combination of shared customs, beliefs, traditions and characteristics derived from a common or presumed common past, even if not drawn from what in biological terms is a common racial stock. It is that combination which gives them an historically determined social identity in their own eyes and in the eyes of those outside the group. They have distinct social identity based not simply on group cohesion and solidarity but also on their belief as to their historical antecedents.[46]

4.47 The criteria in *Mandla* and *King-Ansell* for determining whether an ethno-religious group is included within the definition of "race" have been applied in the English courts and tribunals in recent years to decide that "Gipsies" fell within the definition,[47] although Rastafarian did not.[48]

4.48 Given the interpretation of similar provisions in other jurisdictions, it is logical to assume (and the Anti-Discrimination Board does assume) that religious or ethno-religious groups would come within the protections afforded by the *Anti-Discrimination Act* 1977, including the racial vilification provisions. It may be that the Act should be amended to make this explicit, for the avoidance of doubt. The same behaviour which would give rise to a blasphemy prosecution would almost certainly trigger the racial vilification provisions as well. The Commission believes that these provisions are better designed to handle the problem in a modern democratic society, given: the non-discriminatory (indeed, the *anti*-discriminatory) nature of the provisions; the emphasis on education and conciliation in the first instance; the clarity of the elements of the offences, and the protection of

debate or discussion carried out in good faith; the more realistic penalties; and the requirement of the consent of the Attorney General before criminal proceedings may be instituted.

Problems with the common law offence

4.49 Whatever the relative merits of the view that there should be *some* offence of blasphemy to protect against the scurrilous abuse of religious values, there are problems with the *particular* offence of blasphemy which is made part of the law of this State by s574 of the *Crimes Act* 1900 and the operation of the common law. These matters were canvassed more fully in Chapter 2, particularly under the heading "The Elements of the Offence", and are summarised below.

Uncertainty over current status

4.50 The very existence of the common law blasphemy offence is under something of a cloud. The common law has itself developed a doctrine of desuetude, whereby an unwritten law may be "repealed", effectively, through disuse. There has not been a criminal prosecution for blasphemy in New South Wales in this century, and the offence is often regarded as an anachronism, if not a "dead letter" as Lord Denning has suggested.[49] It may be that the enactment of statutory provisions relating to blasphemy in 1883 (now s574 of the *Crimes Act*) and 1974 (s574A) has "revived" the offence, although these provisions do not alter the fundamental common law (rather than statutory) nature of the offence. The Commission believes that it is likely that the courts would, if asked, hold that the common law offence of blasphemy is still known at law in New South Wales. However, it is most unsatisfactory that so much uncertainty surrounds the existence of an offence, the breach of which could result in the imposition of a very substantial penalty.

Limitation to Christianity

4.51 As discussed in the preceding chapters, the English common law offence of blasphemy is limited to scurrilous abuse of the tenets of the Church of England as by law established. Coverage may extend to other Christian denominations insofar as their tenets coincide with those of the Church of England,[50] but even making this determination would involve the civilian courts in a difficult and inappropriate examination of the comparative doctrines of the respective Christian churches. In any event, the courts have felt unable or unwilling to extend the law to cover other, non-Christian religions, despite the basic shift in social, political and legal assumptions about discrimination and dissent.[51]

4.52 In the modern plural society that Australia has become, this inherited discrimination is hard to defend, given that it is contrary to contemporary morality, many judicial pronouncements, and expressed State and federal Government policies. The discriminatory impact of the offence has been well publicised recently as a result of the Salman Rushdie affair, and it is no longer sensible to ignore its operation. Among the important functions of a Law Reform Commission are "eliminating defects and anachronisms in the law", "repealing obsolete or unnecessary enactments", and "modernising the law by bringing it into accord with current conditions".[52]

Uncertainty over the elements of the offence

4.53 Liability for serious criminal offences in Australia - as judged by the subject-matter, sentence and stigma involved - normally requires strict proof of subjective fault. In England, the House of Lords in *Whitehouse v Lemon*, however, decided by a bare majority that the only intention that the Crown need prove is the intention to publish the material in question and that no further or specific intention (to publish the material knowing it to be scurrilous or tending to a breach of the peace) is required.[53] The Commission considers that it is unlikely that the courts here would follow this precedent, and there are numerous recent instances of the Australian courts departing from the English law in the area of criminal responsibility. Again, however, it is unsatisfactory that an essential element of a serious offence is not clear and could not be determined with certainty until *after* a conviction and appeal. There is a similar problem with the construction of the breach of the peace aspect of the offence under s574 (and the common law), as discussed above in Chapter 2.[54]

Sentencing and procedure

4.54 There are two further issues worthy of consideration in relation to the prosecution of the offence of blasphemy, in common with other non-statutory offences. First, the offence must be tried upon indictment before a Supreme Court judge and jury, based on the inherent jurisdiction of that court, since summary jurisdiction is entirely a statutory creation. In the case of blasphemy, this may actually be a very good thing for two reasons. The definition involves an application of general concepts such as "offensiveness" and "indecency". It is quintessentially the role of the jury in our system of criminal justice to reflect the common sense and understanding of the community, and juries are in a better position to determine this than a single judicial officer. Also, the much greater trouble and expense of prosecuting an indictable offence would tend to discourage vexatious or tenuous actions as a practical matter. It would not be a useful development for the police or private citizens to view blasphemy charges as ready alternatives to prosecution for offensive behaviour.

4.55 However, it should be said that there is a countervailing trend towards the expansion of summary jurisdiction through, among other means, the transformation of indictable offences into "hybrid" offences which permit the summary hearing of matters with (or sometimes without) the consent of the accused. The advantages for an accused of summary proceedings are speedier hearings and lower maximum penalties. In New South Wales, the *Crimes (Amendment) Act* 1988 expressly abolished the common law offences of riot, rout and affray and replaced them with similar statutory offences (ss 93B and 93C) which are triable upon indictment but may be heard summarily before a magistrate with the consent of the accused.[55]

4.56 The second problem is that the sentence for a common law offence is not, by definition, limited by statute, so that the penalty is said to be "at large". In theory, this means that a person convicted of blasphemy could receive a sentence of anything up to life imprisonment.

4.57 At common law, blasphemy was classified as a misdemeanour rather than a felony, so this would probably have some restraining effect in practice. In *Whitehouse v Lemon*, the only actual convictions for blasphemy in recent times, a suspended sentence of nine months' imprisonment suspended for 18 months was imposed on the editor by the trial judge, but this was quashed by the Court of Appeal. Fines of £500 imposed on the editor and £1000 on the company (Gay News Ltd) were upheld.[56] These sentences contrast with the expressions of "revulsion"[57] from the members of the Court of Appeal and the House of Lords over the published material, which contained graphic descriptions of Jesus Christ engaged in various homosexual practices, and suggest that the English courts may have had in mind a notional maximum penalty something like the two year' gaol available under the Canadian *Criminal Code* for a "worst case" offence.

Provisional conclusion

4.58 At this stage, without the benefit of consultation with the community, the Commission does not find this option attractive. Public order is clearly capable of being preserved in New South Wales without the use of the common law crime of blasphemy, which has not been utilised here in this century. The general criminal law, including offences particularly geared to incitement and offensive behaviour, covers this area adequately, and there are also offences directly applicable to the ethno-religious context (and civil procedures for conciliation and the award of damages) which are less controversial, are better defined, have more appropriate penalty structures, are less intrusive upon personal liberty, and do not discriminate against Australians who are not of the Christian faith.

OPTION TWO: "PROGRESSIVE CODIFICATION" OF A BLASPHEMY OFFENCE

4.59 If it is thought that there is justification for an offence of blasphemy, although the present offence is too uncertain and unsatisfactory, it may be possible to codify a modified blasphemy offence which meets all or most of the modern objections. The issues to be resolved are discussed below.

The mental element

4.60 In Chapter 2 and in the preceding Option, we discussed the uncertainty of the mental element, or *mens rea*, for common law blasphemy. In England, the majority House of Lords in *Whitehouse v Lemon*[58] focussed on the public order aspect of blasphemy and decided that it was not an offence requiring Crown proof of further

or specific intent. In Chapter 2, we argued that the Australian courts would be unlikely to reach the same conclusion, given the differing approach here to the concept of subjective fault and the High Court's guidelines for statutory interpretation which emerge from the judgment in *He Kaw Teh*.[59] As a matter of law and policy, a codified blasphemy offence should incorporate a concept of subjective fault. The Crown should be required to prove beyond reasonable doubt that the accused intentionally published material about religion with the intention of causing grave offence to members of the community, or at least that he or she realised that the publication created a substantial risk of causing grave offence.

Protection of bona fide debate

4.61 Any new blasphemy offence should contain an express provision removing liability (with the onus of proof on the Crown to disprove or "negative" this element) for words or matter which are published for the purposes of bona fide discussion or debate. Section 574 of the *Crimes Act* 1900 (NSW) already removes liability for a publication "by way of argument or statement". Section 20C(2)(c) of the *Anti-Discrimination Act* 1977 (NSW) shields from racial vilification law communications made "reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussion or debate".

"Breach of the peace" requirement clarified

4.62 The common law and s574 both refer to the element of a "tendency to cause a breach of the peace". In Chapter 2, we outline[60]d the fact that this concept is not certain, at least in its application to the law of blasphemy. One view, based on the origins and basis of the offence, is that the requirement refers to the endangering of public peace and the fabric of society. The other view is that "breach of the peace" should be used in its traditional, far more limited sense, which refers only to the possibility of causing harm to any person or property. In the trial of *Lemon*, the trial judge's direction to the jury employed the more limited meaning, referring to "the possibility, not a probability" that any reader "could, not would" be provoked into committing a breach of the peace. The Court of Appeal and the House of Lords both applauded the direction.

4.63 The Commission believes that the essence of the law of blasphemy is that the behaviour complained of does more than injure private feelings but rather strikes at the society and causes a real danger of public disorder. We believe that a codified offence should clarify that the Crown must prove not only that the accused person had the requisite intention to cause grave offence to others, but also that the accused *intended thereby to foment public disorder* or was aware that such disorder was *likely*.

Extension to other religions

4.64 The discriminatory nature of the existing common law blasphemy offence is one of the major concerns of those opposed to blasphemy laws, and is perhaps the major concern of those who, in common with Lord Scarman, see a modern role for the offence if this negative aspect can be remedied. However, while it is easy to recommend that the law be extended to encompass other religions, it is far more difficult to fashion a sensible provision which would achieve this aim.

4.65 The main problem lies in defining with the necessary precision just what constitutes a "religion". In considering s116 of the Constitution, which provides that the "Commonwealth shall not make any law for establishing any religion", the High Court of Australia has said that:

> it would be difficult, if not impossible, to devise a definition of religion which would satisfy the adherents of all the many and various religions which exist, or have existed, in the world .... what is religion to one is superstition to another.[61]

4.66 Precision is necessary because it would be unfair to bring a person to trial for blasphemy in circumstances in which it could not have been confidently predicted in advance that the criticism made referred to a "religion", rather than, say, a political group or a business association or a movement or a sect. To cast the definition too narrowly[62] or too inflexibly[63] would unfairly deny coverage to some bona fide religious groups. To make the definition too inclusive would be far more dangerous, however, as it would further impinge upon free speech. As with an overly broad defamation law, an overly broad blasphemy law would stifle public scrutiny and

debate about the activities of some groups, even where the disclosure of unsavoury practices would be in the public interest. It is not hard to imagine that some groups would be formed deliberately with an eye to the definition of religion, affecting the familiar trappings of religion precisely to suppress criticism. The experience already exists of groups contriving religious status for the purpose of gaining taxation and other financial advantages.

4.67 The Law Commission of England and Wales has struggled with the possibilities of directly or indirectly defining "religion" for the purposes of extending the law of blasphemy. The Law Commission concluded that a single definition was impossible to formulate which did not offend against one or the other of the competing concerns mentioned in the preceding paragraph, and leaving the matter for the courts to determine on a case-by-case basis was even less satisfactory. Definition by reference to other existing legal criteria, such as the law of charitable trusts, or the list of premises used for religious purposes compiled by the Registrar General also proved to be unsatisfactory.[64] Reference to charities registered for the advancement of religion is unhelpful, for example, since the "constitutional possession of religious doctrine by a society is not sufficient in itself to make that society charitable."[65] The law of charitable trusts is not concerned with defining religion; in a graphic example, a community of cloistered Roman Catholic nuns was held to be non-charitable.[66]

4.68 The legislation could attempt a comprehensive list of all religions protected by the extended offence,[67] but the problems involved in this approach seem insuperable. Not only would the contents of the list be highly controversial, but as new religious sects spring up, and old groups merge or disappear, the list would quickly become outdated. The questions of who is to decide and on what criteria would provoke heated debate, given the understandable interest of all groups who may be vying for this status. Omissions, deliberate or accidental, and indeed some inclusions, would provoke far more tension and outrage than the offence would be designed to prevent, leaving aside that the offence has not enforced in New South Wales in this century.

4.69 The Law Commission of England and Wales concluded that it was "impossible to define `religion' or `religious' satisfactorily for this purpose" and that this was sufficient reason alone to abandon the offence of blasphemy.[68] At this stage, this Commission agrees, but would be interested in receiving submissions on this point.

Specification of a penalty

4.70 Another of the serious concerns about the offence of blasphemy is the absence of any statutory guidance about sentencing convicted persons (in particular, a specified maximum). As a common law crime, the sentence is "at large", giving the trial judge the discretion to impose any sentence between, say, a good behaviour bond and imprisonment for life. (A side effect of this uncertain position is that an accused person would be loathe ever to plead guilty, since it would be impossible to predict the degree or kind of penalty likely to be imposed.)

4.71 Almost all of the other old common law offences have now been given some statutory form in New South Wales.[69] Often this involves no more than mentioning the offence and specifying the maximum penalty, leaving the common law to flesh out the elements of the defence, the applicable defences, and so on. For example, common assault is now an offence under s61 of the *Crimes Act* 1900 (NSW) with a maximum penalty of two year's imprisonment; larceny is an offence under s117, carrying a maximum of five years.

4.72 The Commission believes that if blasphemy is retained as an offence a maximum penalty should be fixed. In New Zealand, Western Samoa, India, Fiji, and the Solomon Islands the maximum is one year's imprisonment; in Canada, the maximum is two years.[70] In *Whitehouse v Lemon*, the modern English precedent, the trial judge gave the editor a nine months suspended sentence with a fine of £500 and the publishing company received a fine of £1000. On appeal, the suspended sentence was quashed, leaving in place only the fines.[71] In consideration of the above, and having regard to the penalties for other similar public order offences, the Commission believes that a penalty of one year's imprisonment would be the most that could be justified.

Indictable process requiring consent of the Attorney General or the DPP

4.73 A possible improvement to the law in this area would be to provide that prosecutions shall not be commenced without the approval in writing of the Attorney General or the Director of Public Prosecutions. This requirement would help guard against harassment and frivolous or vexatious litigation. This is the position under the statutory blasphemy offences in Tasmania, New Zealand and Western Samoa.[72] In New South Wales, proceedings for somewhat analogous offence of criminal defamation now require the consent of the Attorney General or the Director of Public Prosecutions.[73]

4.74 The Commission believes, on balance, that if blasphemy was to be retained in some form, a consent requirement should be imposed in order to limit its use. However, this would not in itself remedy the other defects in the definition of the law which we have identified above, and it would import other problems. As the Law Commission of England and Wales has stated:

> Where, as in blasphemy, there is uncertainty as to the ambit of the offence, provision of a requirement of executive consent would in practical terms go a long way towards deciding at what point the law should impose criminal sanctions; and in this particular offence, this in substance would mean deciding what limits are to be set to freedom of expression. This in our view is quite unacceptable... .[74]

The Law Commission also recalled the remarks of Lord Reid in a similar context:

> A bad law is not defensible on the ground that it will be judiciously administered.[75]

4.75 The Commission believes that if the offence of blasphemy is retained in some form, it should remain an indictable offence only, on the basis that: (1) the key issues of fact should be determined by a jury; (2) as a practical matter, frivolous or vexatious prosecutions would be discouraged; and (3) the stigma attaching to conviction requires all of the procedural safeguards and presumptions found in the common law (superior) courts.

Provisional conclusion

4.76 All of the general *policy* concerns that the Commission expressed above in relation to Option One (retention)[76] apply equally to this proposal. We believe that the criminal law and anti-discrimination law in this State already adequately cover the same ground as blasphemy with fewer problems and anomalies. In Option Two, we have endeavoured to remedy the *legal* concerns about the existing offence of blasphemy. The resulting statutory offence would be far preferable to the existing common law offence, but serious problems remain - particularly in the definition of “religion” for these purposes. On balance, therefore, and without the benefit of submissions, the Commission does not favour Option Two, but rates it more highly than Option One.

OPTION THREE: POSSIBLE REPLACEMENT OFFENCE(S)

4.77 If it is accepted that blasphemy - in its common law form or as progressively codified above - should no longer be part of the law, there may be cause for the development of some new offences which replace blasphemy.

Insulting or outraging religious feelings

4.78 The emphasis of the modern-day application of blasphemy seems to have shifted from the right of society to prosecute scurrilous attacks on Church and State, to the protection of religious sensibilities from serious and gratuitous offence. The judgments of the Law Lords in *Whitehouse v Lemon* bear out this change in approach. Lord Russell held that the single ingredient of the offence was the publication of matter “which will in fact shock and outrage the feelings of ordinary Christians”[77]. Lord Scarman described the “interference with our religious feelings” as the essence of the offence,[78] and went further to state that the religious feelings of all persons deserved respect and protection from offensive abuse. The English Law Commission felt that the protection of religious feelings was the “most decisive - albeit far from decisive” justification for the imposition of criminal penalties.[79]

4.79 Given the serious problems involved in retaining or reforming blasphemy, a new offence could be created, the essence of which would be the criminalisation of behaviour which is offensive to the religious convictions of others. However, many of the same difficulties will arise: how to frame a satisfactory definition of "religion" or "religious" which would be neither so narrow as to exclude from its ambit some groups deserving of protection, or so wide as to result in the stifling of free speech and counter-productive litigation.

4.80 A number of jurisdictions outside of Australia have offences which punish the intentional wounding or outraging of religious feelings. In Chapter 3, we set out ss 295A and 298 of the Indian *Penal Code*,[80] which are the models for similar provisions in Fiji and the Solomon Islands. These provisions - drafted by Macaulay in the mid-19th century, well in advance of the development of race relations or anti-discrimination laws - prohibit doing any act with the intention of wounding or outraging the religious feelings of any person.

4.81 In New South Wales, however, the *Summary Offences Act* 1988 (NSW), s4, and the *Inclosed Lands Protection Act* (NSW) 1901, s4A, already cover offensive conduct and offensive language in public places or in private, and the *Anti-Discrimination Act* 1977 already covers racial vilification. A number of other similar offences also may be found in the statute books governing behaviour in specific situations, such as on the railways. The creation of a new offence specifically geared to the protection of religious feelings would add little to the existing law while creating fresh problems of definition and application. The Law Commission of England and Wales also has rejected this approach for similar reasons, concluding with these remarks with which we agree:

> this possible offence, however drafted, would either be unavoidably wide or would raise substantial difficulties in practice. Furthermore, we believe its availability would not be conducive to the interests of a society which is at the same time both multi-religious and secular, and would be wasteful of the limited resources possessed by the community for the control of crime.[81]

Incitement of hatred or violence on religious grounds

4.82 An offence expressly prohibiting the incitement of hatred on the basis of religious beliefs would cover the most extreme examples of blasphemy, and would draw together both the idea that blasphemy exists to prevent breaches of the peace, and the right of an individual not to be exposed to hatred and violence. There are a number of possible models that could guide the formulation of a new offence.

4.83 The "Hate Propaganda" provisions of the Canadian *Criminal Code*, introduced in 1970, have been referred to above.[82] Section 319 creates offences of making a public statement which (1) "incites hatred against any identifiable group" in a manner likely to lead to a breach of the peace; or (2) "wilfully promotes hatred against any identifiable group". Section 319(3) exempts statements which are true or made in good faith for the purposes of public debate or discussion.

4.84 In 1986 the Law Reform Commission of Canada considered the role of these hatred offences "to affirm some principles of international law and to denounce unequivocally certain racist practices in our society".[83] The Commission recognised that the mere fact that certain conduct had been outlawed in the past was not sufficient justification for the creation of new offences, or the retention of old crimes. It must be shown that the State has a proper interest in controlling words within the context of modern society.[84] In the search for a balance between the freedom of expression and the freedom from oppression, the Canadian Law Reform Commission stated that:

> Promoting enmity is clearly dysfunctional to society. It stirs up hatred among social groups. It can even lay the foundation for physical attacks upon persons or property. Preventing such harm justifies the use of the criminal law.[85]

4.85 The Canadian Commission acknowledged that retention of these offences was desirable, but suggested certain changes to their definitions.[86] In particular, it was recommended that s319(1) should be re-defined to include a specific element of intention, and to replace the "breach of the peace" element with "likely to cause harm to a person or damage to property". It was proposed to re-define s319(2) to include a requirement of intention and more clearly to limit the offence to public acts. The definition of "identifiable group" also was proposed to be widened to include groups identifiable on the basis of national origin, sex, age or mental or

physical disability, as well as the existing criteria of race, ethnic origins, colour and religion. According to that Commission, this expanded definition would bring the Code into line with the Canadian Charter of Rights and Freedoms, which is part of the new Canadian Constitution.[87] The question of whether to require the Attorney General's consent to a prosecution was reserved for later consideration, and subsequently rejected.[88]

4.86 The Australian Law Reform Commission (ALRC) recently has considered the merits of creating new offences concerned with racist violence.[89] The ALRC noted that the general law, although providing protection against violence and vilification, does not punish racist conduct *because* it is racist.[90] The ALRC proposed the introduction of a new offence of "incitement to racist violence"[91] in the following terms:

> (1) A person must not, by a public act, incite, urge or encourage another person to commit an act of violence against a third person or against his or her property, the incitement, urging or encouraging being because of the third person's colour, race, religion or ethnic origin.
>
> (2) The third person need not be identified specifically.

4.87 We see merit in the creation of an offence of incitement to racist violence in similar term in New South Wales, with two provisos. First, it must be clear that a *Beatty v Gillbanks* or "heckler's veto" situation is *not* caught by the statute.[92] That is, lawful speech should not be made unlawful by the actions of a hostile audience which turns against the speaker conveying an unpopular message. In *Beatty v Gillbanks*,[93] the leaders of a Salvation Army march were arrested by the police for participating in an unlawful assembly which disturbed the peace. The Salvation Army's procession was otherwise quite lawful, but the response of the "Skeleton Army", a "disorderly and riotous mob of more than 2000" who were accustomed to gathering to accost the marchers, was considered sufficient to arrest the march's leaders on the grounds that it was foreseeable that their actions would provoke a disturbance which might endanger life, property and public peace. The convictions were quashed by a court which saw as the central consideration the fact that the Salvation Army was pursuing a lawful object which should not be rendered unlawful by the improprieties of others:

> The disturbances were caused by other people antagonistic to the appellants, and ... no acts of violence were committed by them.... What has happened here is that an unlawful organisation has assumed to itself the right to prevent the appellants and others from lawfully assembling together, and the finding of the justices amounts to this, that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act. There is no authority for such a proposition.[94]

The wording of the ALRC's proposed offence, although somewhat inelegant, would probably avoid this problem by reference to the "third person", but a better form of words may be possible.

4.88 The second proviso is that the offence should be clearly expressed as one of further or specific intent, requiring proof of subjective fault. That is, the speaker must be shown to have intended racist violence to result from his or her words, or at least have been aware of the likelihood of this eventuating (recklessness). Incitement to violence is already a common law crime in New South Wales, and the Commission believes that the specification and codification of appropriate offences within the incitement area is useful, so long as these offences are carefully drawn. We do see this proposed offence as a refinement upon the law of incitement, however, and not a replacement for common law blasphemy in particular.

4.89 The ALRC left open the question of whether a separate offence prohibiting incitement to racial *hatred* (rather than violence) should be created. The ALRC listed the powerful arguments they believed to exist against the creation of such an offence: the limiting of freedom of expression in circumstances where there was no proven threat to persons or property; the difficulties in expressing the precise standard of conduct that would fall foul of the new offence; and the omission of other grounds, such as the incitement of hatred based on sexual orientation, mental or physical disability, and so on.

4.90 This Commission agrees that there are many more problems with laws prohibiting incitement to hatred than those proscribing incitement to violence. In any event, in New South Wales there is already suitable provision made in the racial vilification provisions of the *Anti-Discrimination Act* 1977 for the handling of racial

vilification through the Anti-Discrimination Board's complaints procedures and the handling of serious racial vilification through the criminal process (with the consent of the Attorney General).[95]

Summary

4.91 Offences should not be created without good reason: "all punishment is mischief; all punishment in itself is evil."[96] There should be a clearly identifiable need for the intervention of the criminal law, and the prohibited conduct should be capable of accurate definition so as not to be unduly repressive to the rights and freedoms of all individuals. The ancient offence of blasphemy fails to meet these criteria, and replacement criminal offences which rely on the "racial hatred" concept also suffer from imprecision. The Commission does see merit in the creation of an offence of incitement to racial violence, using a broadly inclusive definition of "race". This is not necessarily seen as a direct replacement for the law of blasphemy, which was developed to meet other concerns.

OPTION FOUR: ABOLITION WITHOUT SPECIFIC REPLACEMENT

4.92 It follows from what we have said in relation to the previous three options that the Commission provisionally favours the express abolition of the common law offence of blasphemy, without specific replacement. We would suggest in this connection, however, that for the avoidance of doubt the racial vilification provisions of the *Anti-Discrimination Act* 1977[97] be amended to explicitly include ethno-religious groups within the definition of "race".

4.93 The Commission does not believe that abolition is a radical step. There have been no successful prosecutions for blasphemy in New South Wales this century, and it is exceedingly rare that such a charge is even considered. As the review in Chapter 3 indicates, there have been no prosecutions for blasphemy in Australia, Scotland, Ireland, Canada, New Zealand or other comparable jurisdictions for over 50 years, and every law reform commission which has considered the question has recommended abolition.

4.94 As discussed in para 4.91, the Commission is inclined towards the creation of an offence of incitement to racial violence, although we do not see this as a specific replacement for common law blasphemy, but rather as a "related matter" within the terms of reference.

FOOTNOTES

1 The Law Commission, *Offences Against Religion and Public Worship* (Working Paper No 79, 1981) paras 7.5-7.23, and (Report No 145, 1985) paras 2.10-2.42.

2 See para 2.8, above.

3 See *R v Bradlaugh* (1883) 15 Cox CC 217, and *R v Ramsay and Foote* (1883) 15 Cox CC 31.

4 Law Commission, WP No 79, at para 7.10.

5 *Bowman v Secular Society* [1917] AC 406, at 466, per Lord Sumner.

6 Law Commission, WP No 79, at para 7.10.

7 *Whitehouse v Lemon* [1979] AC 617, 634 per Lord Diplock.

8 This society, which included such leading members of the establishment as William Wilberforce and Thomas Bowdler, launched an "orgy of prosecutions" against Richard Carlile and his followers, landing some 150 people in prison between 1817 and 1824: J R Spencer, "Blasphemy: The Law Commission's Working Paper" [1981] Crim LR 810, at 818.

9 See the discussion of *Jones' case* in Chapter 2.

10 Law Commission, Report No 145, at para 2.36.

11 "Many of the evangelists of unbelief ... showed a compulsion to martyr themselves worthy of any primitive Christian": Spencer, at 818; see also P Coleman, *Obscenity, Blasphemy, Sedition: 100 Years of Censorship in Australia* (2nd ed, 1974) 74.

12 [1917] AC 406, at 461.

13 *R v Lemon* [1979] QB 10, at 30 (Eng CA).

14 [1979] AC 617 (HL).

15 Law Commission, Report No 145, at para 2.36.

16 Spencer, at 814.

17 *Hansard* (HL) of the British Parliament, vol 389, col 318, 23 February 1978, in the debate on the *Blasphemy (Abolition of Offence) Bill* 1978.

18 Ibid, at col 290, per the Earl of Halsbury.

19 (1883) 15 Cox CC 217, at 230. According to one commentator, "what was novel in Coleridge's judgement was ... his willingness to [take account of the character of an attack upon Christianity] in such a way that the object of the legal protection became Christian believers rather than Christian belief": Jones, "Blasphemy, Offensiveness and Law" (1980) 10 British Journal of Political Science 129, at 134.

20 [1979] AC 617, at 658.

21 The following letter appeared in *The Guardian*, 10 October 1972, after the BBC had apologised to Mrs. Mary Whitehouse over allegedly blasphemous material featured in a BBC comedy: "Perhaps some of your readers can explain to me why the BBC should have to apologise to Mary Whitehouse and her Christian pressure group ... I do not subscribe to their myths and legends and am constantly outraged and aggravated by their religious programmes on both radio and television ... their opinions offend me deeply. Mary Whitehouse and the rest of the Festival of Light burn me up with aggravation. Yet I, and I expect thousands like me, can never expect an apology from the BBC." Quoted in Tracey and Morrison, *Whitehouse* (1979) 114.

22 See the *Defamation Act* 1974 (NSW).

23 *Indecent Articles and Classified Publications Act* 1975 (NSW).

24 See the *Broadcasting Act* 1942 (Cth), s118.

25 For example, under the *Independent Commission Against Corruption Act* 1988 (NSW) s8(1)(d), it is "corrupt conduct" for a public official or former official to "misuse ... information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit".

26 Criminal Law Revision Committee, *Offences against the Person* (14th Report, 1980) paras 179-180.

27 Under s61. The maximum for assault on a police officer in the execution of duty under s58 was raised in 1988 from two years to five. Assault on a person engaged in preserving a shipwreck draws a maximum of seven years under s57.

28 The *Toleration Act* only dealt with other Christian denominations, such as the Methodists.

29 *Hawkins' Pleas of the Crown 1716-1721* (1973) c63, s23.

30 *R v Parry* (1686) Trem PC 239; *Wilson v Greaves* (1757) 1 Burr 240.

31 *Hutchins v Denziloe* (1792) 1 Hag Con 181.

32 *R v Darling* (1884) 5 NSWLR 405. Martin CJ, with whom the other members of the Court agreed, expressed the view in this case that Christianity was part of the law in New South Wales, but this view cannot stand in light of the judgments of the House of Lords in *Bowman v Secular Society* [1917] AC 406.

33 Ibid, at 410. See also *R v Wroughton* (1765) 3 Burr 1683; *R v Hube* (1792) Peake 180.

34 Brown, Neal, Farrier, Weisbrot, *Criminal Laws* (1990) 1003.

35 Public place is defined broadly in s3 of the Act. See also ibid, at 971-973, and *Appeal of Camp* [1975] 1 NSWLR 452, at 453.

36 Ibid, at 1003-1023.

37 *R v Gibson* [1990] 3 WLR 595: the prosecution need not prove a specific intention to outrage public decency.

38 See Glanville Williams, *Textbook of Criminal Law* (2nd ed, 1983) 439-445. Brown, Farrier, Neal and Weisbrot, at 1257; and B Fisse, *Howard's Criminal Law* (5th ed, 1990) 381.

39 A corporation convicted under s20D is liable for a fine of up to 100 penalty units (approximately $10,000).

40 An earlier, unsuccessful attempt at enacting racial vilification legislation in New South Wales did not utilise the Act's limited definition of "race", preferring to use the concept of "minority group", which was defined to include members of a group who are distinctive "because of their race or the possession in common of linguistic, religious, social or cultural features" and who are "numerically inferior to the rest of the population of New South Wales and in a non-dominant position". See Brown, Farrier, Neal and Weisbrot, at 1005.

41 [1983] AC 548 (HL). Referred to by the High Court of Australia in *Street v Queensland Bar Association* (1989) 168 CLR 461, at 509-510, per Brennan J.

42 [1983] AC 548, at 562, per Lord Fraser of Tullybelton.

43 Ibid, at 555. See *Clayton v Ramsden* [1943] AC 320; *In re Tuck's Settlement Trusts* [1978] Ch 49; and *Seide v Gillette Industries Ltd* [1980] IRLR 427.

44 [1983] 2 AC at 555.

45 [1979] 2 NZLR 531.

46 Ibid, at 543.

47 *Commissioner for Racial Equality v Dutton* [1989] QB 783.

48 *Crown Suppliers (Property Services Agency) v Dawkins* [1991] ICR 583.

49 *Freedom Under the Law* (Hamlyn Lectures, 1st series, 1949) 46.

50 See paras 2.31 and 2.42, above.

51 The first modification of the legislation against religious nonconformity was the *Toleration Act* 1689 (UK) affecting Protestant dissenters; Roman Catholics had to wait until the *Roman Catholic Emancipation Act* 1829 (UK) (adopted in New South Wales in 1830); Jews until the *Religious Disabilities Act* 1846 (UK).

52 *Law Reform Commission Act* 1967 (NSW) s10(1)(a).

53 [1979] AC 617. See paras 2.82-2.87, above.

54 See paras 2.62-2.73.

55 See the *Crimes Act* 1900 (NSW), s476(6)(d). Riot carries a maximum gaol term of 10 years under s93B and affray a maximum of 5 years under s93C, but if heard summarily the maximum penalty for each is two years.

56 *R v Lemon* [1979] QB 10, at 30: Roskill LJ, for the Court of Appeal simply stated that "We do not consider this an appropriate case for a prison sentence."

57 See, eg, [1979] AC 617, at 656, per Lord Edmund-Davies.

58 [1979] AC 617.

59 (1985) 157 CLR 523 (HCA).

60 See paras 2.62 et seq.

61 *Adelaide Company of Jehovah's Witnesses Inc v the Commonwealth* [1943] 67 CLR 116, at 123, per Latham CJ.

62 By limiting coverage to "major" religions, for example, or those with a large number of adherents. See the Law Commission, WP 79, at para 8.17.

63 By limiting coverage to "theistic" religions, for example, which would likely leave out Buddhism: "We must always remember that one of the chief religions of the world, Buddhism, has risen to great moral and intellectual heights without using the conception of God at all". Quoted by Latham CJ in *Adelaide Company of Jehovah's Witnesses Inc v the Commonwealth* [1943] 67 CLR 116, at 124. See also the Law Commission, WP 79, at para 8.18.

64 Law Commission, WP 79, at paras 8.18-8.20.

65 Hanbury, *Modern Equity* (9th ed, 1969) 262.

66 *Gilmour v Coats* [1949] AC 426: proof of public benefit is necessary to constitute a charity, and there was no evidence of such public benefit to be derived from the nuns' devotional activity.

67 As a part of the legislation, in the form of a Schedule, for example, or perhaps as an order or regulation made pursuant to the legislation.

68 Law Commission, WP 79, at paras 8.22 and 9.2.

69 The Commission will soon be looking at those other purely common law offences which arguably still exist, as part of the new reference on Conspiracy and Common Law Crime.

70 See paras 3.45-3.46, above.

71 [1979] QB 10, at 30 (Eng CA).

72 See para 3.45, above.

73 Section 50(4) of the *Defamation Act* 1974 (NSW). See para 2.47, above.

74 Law Commission, WP 79, at para 6.10.

75 *Knuller v DPP* [1973] AC 435, at 458-459. This was said in the context of the offence of "outrage to public decency".

76 See para 4.58, above.

77 [1979] AC 617, at 657.

78 Ibid, at 661.

79 Law Commission, Report No 145, at para 2.37. See also WP 79, at paras 7.12-7.21.

80 See paras 3.34-3.35, above.

81 Law Commission, Report No 145, at para 2.51.

82 See para 3.26, below.

83 Law Reform Commission of Canada, *Hate Propaganda* (WP 50, 1986) 7.

84 This is reminiscent of Lord Sumner's words in *Bowman v Secular Society* with respect to blasphemy, that the application of rules should be varied "to the particular circumstances of our time": [1917] AC 406, at 467 (HL).

85 Law Reform Commission of Canada, *Hate Propaganda*, at 31.

86 Ibid, at 40-41.

87 Canadian Charter of Rights and Freedoms, Part 1 of the *Constitution Act* 1982, which is Sch B of the *Canada Act* 1982 (UK).

88 The Commission later recommended that the personal consent of the Attorney General should not be required prior to the prosecution of *any* crime: see Law Reform Commission of Canada, *Controlling Criminal Prosecutions* (WP 62, 1990) 67-69.

89 Australian Law Reform Commission, *Multiculturalism: Criminal Law* (DP 48, 1991) 40-45.

90 But see *Anti-Discrimination (Racial Vilification) Amendment Act 1989* (NSW) and Criminal Code 1913 (WA) sections 76-80

91 An offence of *racist violence* was also proposed, but this is not discussed here; in the context of formulating an offence of incitement to hatred and/or violence we are concerned only with *verbal* assaults.

92 See para 2.71, above.

93 *Beatty v Gillbanks* (1882) 9 QBD 308

94 Ibid, at 314.

95 See paras 4.40 et seq, above.

96 Bentham, *An Introduction to the Principles of Morals and Legislation* (Oxford, Clarendon Press, 1879) 170

97 See para 4.40, above.

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