

# NSW Law Reform Commission

## REPORT 74 (1994) - BLASPHEMY

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## Terms of Reference and Participants

To the Hon John P Hannaford, MLC  
Attorney General for New South Wales

### Blasphemy

Dear Attorney

We make this final Report to the reference to this Commission dated 26 September 1991.

The Hon Gordon J Samuels AC QC

(Chairman)

Professor Michael Tilbury

(Commissioner)

Professor Brent Fisse

(Commissioner)

November 1994

### Terms of Reference

On 26 September 1991, the Attorney General, the Hon Peter Collins QC MP, required the Commission to inquire into and report the following matters:

- (i) whether the present law relating to the offence of blasphemy is adequate and appropriate to current conditions; and
- (ii) any related matter.

In making its Report the Commission should have regard to the reference being conducted by the Australian Law Reform Commission on Multi-culturalism and the Law.

### Participants

The Law Reform Commission is constituted by the *Law Reform Commission Act 1967*. For the purpose of this reference, the Chairman, in accordance with the Act, created a Division comprising the following members of the Commission:

The Hon R M Hope AC CMG QC (until 2 April 1993)

The Hon G J Samuels AC QC (from 3 April 1993)

Professor Brent Fisse

Professor David Weisbrot (until 7 October 1994)

## **NSW Law Reform Commission: REPORT 74 (1994) - BLASPHEMY**

Professor Michael Tilbury (from 8 October 1994)

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## 1. Introduction

### BACKGROUND

1.1 In 1990, the then Attorney General, the Hon J R A 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 flows on from that original inquiry, and from the work which was undertaken by the Australian Law Reform Commission in connection with its reference on *Multiculturalism and the Law*.

#### The main issues

1.2 In recent years, the Salman Rushdie affair in England has revived interest in the crime of blasphemy, and highlighted modern problems with the offence. A key issue is whether the offence is anachronistic in a modern society such as ours which is multicultural, pluralistic and secular, and maintains a strict separation between Church and State. The common law offence of blasphemy applies only to scurrilous criticism of the fundamental tenets of the Church of England and other Christian denominations of coincident conviction. Such discrimination by the law in favour of a particular religion is itself an indicator of the need for review and possible reform.

1.3 Another important concern is whether the offence of blasphemy improperly impinges upon the fundamental right of freedom of speech. The law imposes many restrictions on free speech. While Australia lacks an explicit constitutional guarantee of free speech, the High Court has in recent years found the existence of an implied guarantee of political discourse.<sup>1</sup> It is becoming clear that only the most compelling justifications will now be accepted for any limitation upon free speech.

1.4 Providing a contemporary definition of the offence of blasphemy in New South Wales presents a serious problem. The law of blasphemy was fashioned over centuries by the 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".<sup>2</sup> 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.<sup>3</sup>

1.5 Although the New South Wales Parliament has offered a degree of guidance in sections 574 and 574A of the *Crimes Act* 1900, resort to the case law is necessary to establish elements of the offence (assuming that it is still part of the law). However, there have been no reported judicial decisions in Australia. The only prosecution in New South Wales was in 1871.

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

### THE COMMISSION'S APPROACH

#### Essential aspects of the process of law reform

1.7 The Commission's approach to all its references involves extensive research and consultation. The purpose of research is to ascertain what the existing law is, identify its defects and what has been done to correct these defects in other jurisdictions, ascertain how effective those solutions have been and which solutions would

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work best in New South Wales, and to approach these issues within a coherent analytical framework. The purpose of consultation is to involve the community in the law reform process in order to facilitate a workable and practical solution to the matter under review, and to allow those people who are affected by the relevant law to contribute to the reform process.

### The conduct of the reference

1.8 As mentioned above, the Attorney General wrote to a number of the major churches in 1990, seeking views on the need for a review of the law of blasphemy. The current reference follows on from that original inquiry. The issues which were raised in written submissions, preliminary meetings and telephone calls were incorporated in the Commission's *Discussion Paper 24: Blasphemy*, ("DP 24") which was published in February 1992.

1.9 DP 24 did not make any recommendations for reform; rather it considered the various options for reform, and offered some tentative proposals to focus the debate. The purpose of the discussion paper was to promote discussion of, and invite submissions on, the issues raised therein. The Commission received 61 written submissions in response to DP 24, including submissions from:

a number of religious bodies;

private individuals;

individual religious leaders;

professional organisations and interest groups such as the New South Wales Bar Association, the Law Society of New South Wales, the Australian Journalists Association, the Free Speech Committee, the NSW Council for Civil Liberties, the New South Wales Humanist Society and the Rationalist Association of New South Wales; and

government bodies such as the Ethnic Affairs Commission of New South Wales.

### The purpose of this Report

1.10 This Report discusses the relevant issues and the options for reform which were raised in DP 24. The Commission has formulated its recommendations for reform in light of the merits of the policy arguments, and with regard to the submissions which it received in response to DP 24.

### The structure of this Report

1.11 This Report consists of four chapters.

*Chapter 1* outlines the approach that the Commission has adopted in conducting this reference.

*Chapter 2* consists of a summary of DP 24, and traces the development of the common law crime of blasphemy from its ecclesiastical origins to modern times.

*Chapter 3* canvasses the position in other jurisdictions, both Australian and overseas.

*Chapter 4* discusses the options and arguments for reform and the tentative proposals which were raised in DP 24, in light of the submissions which the Commission received, and the community debate following the release of DP 24. It concludes with the Commission's recommendations for reform.

## FOOTNOTES

1. *Nationwide News Pty Ltd v Wills* (1992) 108 ALR 681; *Australian Capital Television Pty Ltd v Commonwealth of Australia (No 2)* (1992) 108 ALR 577; *Theophanous v The Herald and Weekly Times*

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*Limited and Anor* (1994) 124 ALR 1; *Stephens v West Australian Newspapers Limited* (1994) 124 ALR 80.

2. I Breward *Australia: 'the Most Godless Place Under Heaven'?* (Lutheran Publishing House, Adelaide, 1991).
3. New South Wales. Law Reform Commission. *Blasphemy* Discussion Paper 24 at paragraphs 2.50 - 2.55 and 4.50.

## 2. The Law of Blasphemy

### DISCUSSION PAPER 24 IN BRIEF

2.1 In Chapter 2 of DP 24, the Commission traced the development of the common law crime of blasphemy from its ecclesiastical origins to modern times, concluding with a detailed analysis of the elements of the offence. In Chapter 3, the position in other Australian jurisdictions as well as in a number of other English-speaking common law countries was examined. Chapter 4 considered the options and arguments for reform and offered some tentative proposals to focus the terms of the debate. The options put forward were:

- Option One:* Retention of the common law offence of blasphemy;
- Option Two:* Progressive codification of a new offence of blasphemy;
- Option Three:* Replacement of blasphemy with other public order offences;
- Option Four:* Abolition of the offence of blasphemy without specific replacement.

2.2 The provisional conclusion of the Commission in DP 24 was that the common law offence of blasphemy should be abolished expressly and without specific replacement. The Commission felt that this provisional recommendation was not a radical one, given that - apart from a successful private prosecution in England in 1979 - the offence had fallen into disuse in most of the common law world in the last half-century, and had not been used in New South Wales for over 120 years. The Commission also pointed out that every other law reform agency in Australia and in other common law countries which had considered the question had likewise recommended the abolition of the offence of blasphemy.

2.3 The Commission's tentative support for the fourth option was subject to its consideration of the submissions, consultations and public debate resulting from DP 24. Nothing which was brought to the Commission's attention has deflected it from its original intent.

### THE EXISTING LAW OF BLASPHEMY

#### History

2.4 The origin of the offence of blasphemy lies in ecclesiastical law, and the offence was capable of being dealt with by the Ecclesiastical Courts, the Star Chamber and the Court of High Commission. With the dissolution of the latter courts and the abolition of the common law writ *de Haeretico Comburendo* in the seventeenth century, the Court of King's Bench declared blasphemy a common law offence, punishable by the common law courts.<sup>1</sup>

2.5 In so doing, Christianity was held in *Taylor's Case* (1676) to be "parcel of the laws of England; and therefore to reproach the Christian religion is to speak in subversion of the law". The common law courts were thus able to punish any attack on the religion of the State (the Church of England) as a crime against the State itself.<sup>2</sup> While the rationale for regarding Christianity as parcel of English law may be open to conjecture, the legitimisation of the Court's powers (exercised previously only in the ecclesiastical courts) and the contemporary theory that "true religion" was essential to social stability, appear to have been persuasive in *Taylor's Case*.<sup>3</sup>

2.6 One consequence of this alliance of Church and State was the fact that attacks on religions other than the State religion were not subject to the criminal law of blasphemy.<sup>4</sup> Another was a discernible "secularising" trend. One notable point in this trend was the grouping together of blasphemous libel and seditious libel in *Fox's Libel Act* of 1792. More significant is the fact that initially any criticism of the central beliefs of Christianity - whether offensive or temperate - was sufficient to constitute the offence.<sup>5</sup> The "matter and not the manner of publication" made the publication blasphemous.<sup>6</sup>

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2.7 However, over time the nature of the attack became increasingly important.<sup>7</sup> By 1917 the element of “vilification, ridicule or irreverence” was taken as part of the law of blasphemy,<sup>8</sup> and this was entrenched in the modern law in 1922.<sup>9</sup> The significance of this change is that the justification for punishment was coming more and more to rest on the prevention of social disorder rather than on offence to God. The offence of blasphemy is taken to prohibit only insult and ridicule; language which did not appeal to rational judgment, but to the “wild and improper feelings of the human mind”.<sup>10</sup> Thus, the modern offence has been personalised - it no longer protects the institutions and theology of the established church, but rather the sensitivities of the believing Christian. Mortensen suggests that the evolution of the offence into one protecting individual (Christian) sensibilities displaces the law of blasphemy from its original rationale and undermines any claims as to its ability to secure legitimate social and political objectives.<sup>11</sup>

2.8 Between 1922 and 1979 there were no successful prosecutions for blasphemy in England and by 1949 the offence was confidently pronounced a “dead letter” by Lord Denning.<sup>12</sup> In 1979, however, the continued existence of blasphemous libel was confirmed by the House of Lords in *Whitehouse v Lemon*.<sup>13</sup> The limitation of the common law offence to scurrilous criticism of the Christian religion was confirmed by the Divisional Court in 1990 in *R v Chief Stipendiary Magistrate; ex parte Choudhury*.<sup>14</sup> The Court dismissed an attempted private prosecution of Salman Rushdie for his book, *The Satanic Verses*.<sup>15</sup>

2.9 The conviction in *Whitehouse v Lemon* was followed by considerable public concern and a bill to abolish the offence of blasphemy was introduced in the House of Lords in 1978.<sup>16</sup> The issue was referred to the Law Commission of England and Wales for review and public consultation. The Law Commission produced a detailed working paper in 1981 which provisionally recommended abolition and which was widely distributed for community comment.<sup>17</sup> The final Report of the Commission recommended (by majority) that the common law offences of blasphemy and blasphemous libel should be abolished without replacement.<sup>18</sup>

### Reception of the offence in New South Wales

#### *The doctrine of reception*

2.10 It is a well established doctrine of English law that so much of the English law as existed at the time of settlement of a new colony and was applicable and appropriate to its circumstances would form part of the received law of that colony. This meant that Imperial Acts passed after settlement did not come into force in New South Wales in the absence of express provision.<sup>19</sup> It also meant that the courts were required to make a determination of what was “appropriate” to the circumstances of New South Wales. In carrying out this task, the courts examined the policy and method of the relevant law to determine whether it could reasonably have been applied to the conditions of New South Wales in 1828.<sup>20</sup>

#### *Reception of the law of blasphemy*

2.11 If blasphemy had remained only an ecclesiastical offence it would not have been received into New South Wales law, as ecclesiastical law is generally considered an exception to the doctrine of reception<sup>21</sup> unless the colony could be said to have had its own established ecclesiastical jurisdiction.<sup>22</sup> By 1828, however, the offence of blasphemy had passed into English common law and thus would have been received into New South Wales in so far as it was applicable to the circumstances of the new colony.

2.12 Several concerns about the nature and extent of the reception of blasphemy into New South Wales law were considered in DP 24. These include doubts about whether the Church of England was ever the established church of New South Wales (it clearly is not today). Dixon J (as he then was) wrote in *Wylde v Attorney General for New South Wales* 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. ... [A]lthough in the beginning and for a not inconsiderable 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 ... eventually it came to be considered as a body like other churches established upon a consensual basis.<sup>23</sup>

2.13 The Commission also canvassed issues about whether the offence could be said to have been applicable and appropriate to the circumstances of the new colony, and whether it might consequently have been received in some modified form.<sup>24</sup> The Commission pointed out that there has been no definitive judicial resolution of these issues and that a number of possible conclusions concerning the early status of blasphemy in New South Wales could be drawn.

## **Current status in New South Wales**

### **Legislation**

2.14 Despite the theoretical uncertainties about the reception and status of the common law offence of blasphemy, several pieces of legislation in New South Wales have assumed the existence of the crime.<sup>25</sup> In 1827, the Governor in Council passed an Act "restraining the Abuses arising from the publication of Blasphemous and Seditious Libels",<sup>26</sup> with banishment available as a punishment for a repeat offender. Section 574 of the *Crimes Act 1900* (NSW)<sup>27</sup> 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.

2.15 The *Imperial Acts Application Act 1969* (NSW) s 8 repealed all Imperial enactments not expressly saved by other provisions of that Act. However, s 35, which relates to the orders for seizure of material which a court may make following a verdict or judgment for libel, expressly refers to "any verdict or judgment ... against any person for composing, printing, or publishing any blasphemous libel".

2.16 Similarly, s 49 of the *Defamation Act 1974* (NSW) abolished the common law misdemeanour of criminal libel, but expressly left in operation "the law relating to blasphemous, seditious or obscene libel".<sup>28</sup> Schedule 1 of that Act inserted s 574A into the *Crimes Act*, relating to the initiation of criminal proceedings for blasphemous libel. Under s 574A, 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.

### **Common law**

2.17 Notwithstanding these assumptions in the legislation, the Commission pointed out in DP 24 that the common law concept of "desuetude", whereby an offence may lapse through prolonged disuse, requires an investigation of whether or not the crime of blasphemy is extant in New South Wales. There has only been one successful prosecution for blasphemy in this State and it occurred over 120 years ago. The case of *William Lorando Jones* (1871) was never formally reported, but a newspaper account of the matter located by the Commission is attached as Appendix A to this Report.<sup>29</sup> While the Commission considered that there was some possibility that a desuetude argument might succeed in a court in New South Wales,<sup>30</sup> we assumed the continued existence of the offence for the purposes of the Discussion Paper. The same approach is adopted in this Report.

### **The elements of the offence**

2.18 In DP 24, the Commission set out (in the absence of any binding authority) what it believes to be the elements of the modern law of blasphemy in New South Wales, having regard to the English common law, local statutory references, and current Australian approaches to the construction of criminal liability (especially in relation to the *mens rea* element).<sup>31</sup>

#### ***Publication or disclosure***

2.19 The material must be “published” or disclosed, either orally or in writing, in the same manner that the term is used in defamation law. While the essential elements of both offences are the same, at common law “blasphemy” referred to the spoken word and “blasphemous libel” to a written publication.

#### ***Limitation to Christianity***

2.20 The scope of the offence of blasphemy is limited to attacks against the central tenets of the Church of England and probably other Christian denominations, at least to the extent that their tenets do not substantially depart from those of the Church of England. In *Whitehouse v Lemon*,<sup>32</sup> the suggestion that the offence be broadened to include other religions was said to be a task for the legislature, and in *R v Chief Metropolitan Stipendiary Magistrate; ex parte Choudhury* it was concluded that “as the law now stands it does not extend to religions other than Christianity”.<sup>33</sup>

#### ***Character of the words or material***

2.21 Under the modern law, it is the character of the publication which will determine whether or not it is blasphemous. On the one hand, sober and temperate criticism of Christianity, made by way of argument or statement will not be penalised even where it challenges the central beliefs of Christians. But publications made in a manner which may be characterised as “scoffing or reviling, [or] violating public decency” may be blasphemous.<sup>34</sup>

#### ***Tendency to cause a breach of the peace***

2.22 As noted above, blasphemy was perceived as a threat to social order and the “bonds of civil society”.<sup>35</sup> Consequently, under both s 574 and the common law, the publication also must have the tendency to cause a breach of the peace. There is some debate as to the precise meaning of a “breach of the peace” in this context. One broad approach includes any public situation in which there is danger to person or property, without necessarily involving general disorder.<sup>36</sup> There is also authority for a narrower concept of liability, however, which would limit blasphemy to publications which cause widespread social unrest.<sup>37</sup> In DP 24, the Commission expressed a preference for the latter, narrower interpretation, on the basis of both historical accuracy and contemporary policy.<sup>38</sup>

#### ***The intention of the author***

2.23 In DP 24, the Commission traced the history of the *mens rea* of the English common law offence of blasphemy from the early cases and texts to the modern position reflected in the 1979 House of Lords decision in *Whitehouse*. In that case, the House of Lords held (by a 3-2 majority)<sup>39</sup> that the prosecution need only prove the basic intention to publish the material in question, and therefore need not prove any further or ulterior intention to

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shock or cause offence.<sup>40</sup> This makes blasphemy a crime of strict liability under English law. As Lord Scarman wrote, in the majority, “The character of the words published matter; but not the motive of the author or publisher”.<sup>41</sup>

2.24 The Commission considered that, given the divergence between English and Australian approaches to the concept of *mens rea* over the last 30 years,<sup>42</sup> it was unlikely that the Australian courts would follow the House of Lords in *Whitehouse*. The consistent trend of the High Court in recent decades has been to emphasise the need for the Crown to prove a subjective element of intention, knowledge or awareness as a condition of imposing liability for serious crimes. For instance, the majority of the High Court in *Wilson v The Queen*<sup>43</sup> referred to the development of the law “towards a closer correlation between moral culpability and legal responsibility”,<sup>44</sup> and essentially abolished the category of battery manslaughter because a conviction following a minor assault “does not reflect the principle that there should be a close correlation between moral culpability and legal responsibility”.<sup>45</sup> The Commission considered that the Australian “common law requirement of subjective fault is almost certain to be upheld in the context of the offence of blasphemy”, which is a traditional common law offence, carries a large maximum penalty, and could easily result in considerable stigma in the event of conviction.

2.25 In the Commission’s view, the proper construction of the offence would require the prosecution to prove, beyond reasonable doubt, that the accused not only 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.<sup>46</sup>

### FOOTNOTES

1. *Trial of Sir Charles Sedley* (1663) 1 Sid 168, cited in WS Holdsworth, *A History of English Law* (7th edition, Methuen Sweet and Maxwell, London, 1972) vol 8 at 407. For approaches to the definition of blasphemy, see D Lawton *Blasphemy* (University of Pennsylvania Press, Philadelphia, 1993) at Chapter 1.
2. *Taylor’s Case* (1676) 1 Vent 293; 86 ER 189. See DP 24, at para 2.10.
3. R Mortensen, “Blasphemy in a Secular State: a Pardonable Sin?”(1994) 17 *UNSWLJ* 409 at 411.
4. See, for example, *R v Gathercole* (1838) 2 Lew 237 at 254; 168 ER 1140.
5. For example the *Blasphemy Act 1698* (Eng) made it an offence for any person educated in or having professed Christianity to deny its truth.
6. J F Stephen *A History of the Criminal Law of England* (London, Macmillan, 1883) vol II at 471.
7. See *R v Hetherington* (1841) 4 St Tr (NS) 563 at 590; *R v Ramsay and Foote* (1883) 15 Cox CC 231 at 235, per Coleridge CJ.
8. *Bowman v Secular Society* [1917] AC 407 at 445, per Lord Parker.
9. *R v Gott* (1922) 16 Cr App R 87.
10. *R v Hetherington* (1840) 4 St Tr (NS) 563 at 591.
11. Mortensen at 413.
12. Lord Denning *Freedom Under the Law* (Hamlyn Lectures, 1st series Stevens, London, 1949) at 46.
13. [1979] AC 617.
14. [1990] 3 WLR 986.

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15. *R v Chief Metropolitan Stipendiary Magistrate; ex parte Choudhury* [1990] 3 WLR 986. For a detailed background to the Rushdie affair, and the nature of his offence against Islamic law, see M M Slaughter, "The Salman Rushdie Affair: Apostasy, Honor and Freedom of Speech" (1993) 79 *Virginia Law Review* 153; R Webster, *A Brief History of Blasphemy* (The Orwell Press, Suffolk, 1990).
16. *Blasphemy (Abolition of Offence) Bill* 1978.
17. England and Wales. Law Commission *Offences Against Religion and Public Worship* (WP 79, 1981). For comment see J R Spencer, "Blasphemy: the Law Commission's Working Paper" [1981] *Criminal Law Review* 810.
18. England and Wales. Law Commission *Offences Against Religion and Public Worship* (Report 145, 1985). The Report has not been implemented by the Government.
19. TP Webb *A compendium of the imperial law and statutes in force in the colony of Victoria together with a table of the sections of imperial statutes transcribed into Victorian statutes* (2nd ed, Charles F Maxwell, Melbourne 1892) at 14-20. The relevant date was settled as being 1828 by s 24 of the *Australian Courts Act* 1828 (Imp) which applied to both Imperial statutes and the common law.
20. See, for example, *Whicker v Hume* (1858) 7 HLC 124; *Quan Yick v Hinds* (1905) 2 CLR 345; *M'Hugh v Robertson* (1885) 11 VLR 410.
21. See Blackstone's *Commentaries on the Laws of England* (4th ed, John Murray, London, 1876) vol 1 at 81; *Ex parte King* (1861) Legge 1307 at 1324; *Ex parte Thackeray* (1874) 13 SCR 1 at 65.
22. *Wylde v Attorney General for New South Wales* (1948) 78 CLR 225.
23. *Wylde v Attorney General for New South Wales* (1948) 78 CLR 225, at 284-286.
24. See DP 24, at paras 2.31-2.42, for a detailed discussion of these matters.
25. See DP 24, at paras 2.43-2.48.
26. 8 Geo IV No 2.
27. This provision originally appeared as s 463 of the *Criminal Law Consolidation Act* 1883 (NSW), but was subsequently repealed and re-enacted in the *Crimes Act* 1900, which is still the principal piece of criminal legislation in New South Wales. The 1883 Act, in Schedule 1, repealed (so far as it may have applied as an Imperial Act) the English *Blasphemy Act* 1698, 9 & 10 William III c 32.
28. Section 49(1)-(2).
29. The last use of blasphemy in Australia in 1919 (in Victoria) is described in P Coleman *Obscenity, Blasphemy, Sedition: 100 years of Censorship in Australia* (2nd edition, Angus & Robertson, Sydney, 1974) at 66 ff.
30. It was rejected by the trial judge in *R v Lemon*, *R v Gay News Ltd*, Central Criminal Court London, 11 July 1977 and the point was not argued on appeal.
31. DP 24, at paras 2.56-2.108. See also G F Orchard, "Blasphemy and mens rea" (1979) 16 *New Zealand Law Journal* 347.
32. [1979] AC 617 at 658, per Lord Scarman. A detailed background to the case is provided by L Levy, *Blasphemy: Verbal Offense Against the Sacred, from Moses to Salman Rushdie* (Alfred A Knopf, New York, 1993) at chapter 26; N Walter, *Blasphemy in Britain: the practice and punishment of blasphemy, and the trial of Gay news* (Rationalist Press Association, London, 1977).

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33. [1990] 3 WLR 986 at 999. See also R Harrison, "Blasphemy laws only protect Christianity" (1991) 55 *Journal of Criminal Law* 123; L Knapman and J C Smith, "Offence confined to Christianity" [1990] *Criminal Law Review* 711
34. *Crimes Act* 1900 (NSW) s 574. The case law also uses such terms as "scurrilous", "ludicrous", "wanton", "offensive", "obscene", "outrageous" or "profane".
35. *Curl's Case* (1727) 2 Str 788.
36. *Bowman v Secular Society* [1917] AC 407 per Lord Parker.
37. *Bowman v Secular Society* [1917] AC 407, at 460, per Lord Sumner.
38. DP 24, at paras 2.59-2.73, esp para 2.70.
39. [1979] AC 617. Viscount Dilhorne, Lord Russell and Lord Scarman formed the majority, with Lord Diplock and Lord Edmund-Davies dissenting.
40. DP 24, at paras 2.77-2.88.
41. [1979] AC 617, at 665.
42. See, for example, *Parker v R* (1963) 111 CLR 610, refusing to follow *DPP v Smith* [1961] AC 290. And see DP 24 at 2.89-2.107 for a detailed discussion of the differences in various areas of the criminal law.
43. (1992) 174 CLR 313.
44. *Wilson v The Queen* at 327.
45. *Wilson v The Queen* at 334.
46. DP 24, at paras 2.105-2.107. In para 2.107, the Commission considered whether reckless indifference would satisfy the mental element for blasphemy. Although this would normally be the case, there is an argument that the vague and uncertain actus reus element in blasphemy should be offset by a restrictively defined mental element in order to limit the scope of criminal liability.

### 3. Other Jurisdictions

#### THE LAW IN OTHER AUSTRALIAN JURISDICTIONS

3.1 This chapter examines the law of blasphemy in various Australian jurisdictions and in a range of overseas jurisdictions.

##### **Tasmania**

3.2 Apart from s 574 of the *Crimes Act 1900* (NSW), s 119 of the Tasmanian *Criminal Code* is the only express statutory reference to blasphemy in the laws of the Australian States and Territories. It provides that anyone who wilfully publishes blasphemous libel (either orally or in written form) is guilty of a crime, that the question of whether the matter published is blasphemous is a question of fact and that prosecutions shall only be commenced with the consent of the Attorney-General. It also provides that “arguments used in good faith and conveyed in decent language” shall not amount to the offence. Unlike the New South Wales provision there is no statutory reference to a breach of the peace. Sections 120-121 of the Code deal with offences similar to those covered by sections 56 and 106-107 of the *Crimes Act 1900* (NSW).

##### **Queensland**

3.3 When the criminal law of Queensland was codified in 1899, Sir Samuel Walker Griffith, who was responsible for the Code, expressed the opinion that it did not deal with those provisions of English law which were “manifestly obsolete or inapplicable to Australia”.<sup>1</sup> By the combined operation of the repeal of the *Blasphemy Act 1697*,<sup>2</sup> the absence of any offence of blasphemy in the *Criminal Code* and the provisions of s 5 of the *Criminal Code Act 1899* (Qld),<sup>3</sup> the offence was abolished in Queensland.

3.4 It should be noted, however, that the *Objectionable Literature Act 1954* (Qld) prevents the distribution of literature that the Literature Board of Review deems objectionable. “Objectionable” is broadly defined to include matter that is “blasphemous” although the latter term is not defined in this context.

##### **Western Australia**

3.5 By virtue of s 4 of the *Criminal Code Act Compilation Act 1913* (WA) (which essentially mirrors s 5 of the *Criminal Code Act 1899* (Qld)) the failure to codify blasphemy in Western Australia abolished the offence.

##### **Victoria**

3.6 Blasphemy does not appear on the Victorian statute books but it may exist as a common law crime to the same extent as it does in New South Wales. The last attempt to prosecute for the common law offence occurred in 1919 but the charges were dropped by the Crown before trial.<sup>4</sup>

3.7 It should also be noted that s 21 of the *Summary Offences Act 1966* (Vic) makes it an offence to disturb religious worship.

##### **South Australia**

3.8 The position in South Australia is similar to that in Victoria. Sections 257-259 of the *Criminal Law Consolidation Act 1935* (SA) contain offences of interrupting religious worship, molesting preachers and pretending to witchcraft, the latter offence being derived from the *Witchcraft Act 1735* (UK).

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3.9 The Criminal Law and Penal Methods Reform Committee, reporting in 1977, concluded that while blasphemy was an offence under the common law of the State “today it would seem anachronistic to charge anyone with blasphemous libel” and accordingly recommended its abolition.<sup>5</sup>

### ***The Northern Territory***

3.10 The Northern Territory *Criminal Code* provides for an offence of violence to officiating ministers of worship. Although the Code was substantially based on the Queensland *Criminal Code* there is an argument that the Northern Territory Code is not meant to entirely displace the common law.<sup>6</sup> If that argument is correct, certain non-statutory offences such as blasphemy may still exist.

### ***The Australian Capital Territory***

3.11 The Australian Capital Territory has adopted and modified the *Crimes Act 1900* (NSW). Having emerged out of New South Wales, the position of the Australian Capital Territory in relation to the reception of the offence would be the same. Section 574 is retained in the ACT, and thus the offence of blasphemy in the Australian Capital Territory exists to the same extent as it does in New South Wales.

### ***The Commonwealth of Australia***

3.12 There are a number of references to the term “blasphemous” in federal legislation.

The *Customs (Cinematograph Films) Regulations* (Cth) reg 13 prohibits the Censorship Board from registering imported films and advertising matter which are, amongst other things, blasphemous.

The criteria used by the Film and Literature Board of Review for assessing the suitability of books for distribution in Australia include the presence of blasphemous material.

The *Customs (Prohibited Imports) Regulations* (Cth) reg 4A prohibits the importation of blasphemous material without the written permission of the Attorney-General.

Section 118 of the *Broadcasting and Television Act 1942* (Cth) provides that the Australian Broadcasting Commission and licensees shall not broadcast or televise matter which is, amongst other things, blasphemous.<sup>7</sup>

3.13 There are, however, no references to blasphemy or any related religious offences in the *Crimes Act 1914* (Cth). The former offence of sending blasphemous material through the post was abolished in 1989 and replaced with the offence of using the postal or telecommunications services to menace or harass a person, or in a manner that would be regarded by reasonable persons as “offensive” in the circumstances.<sup>8</sup>

3.14 The Australian Law Reform Commission has recently recommended the removal of all references to blasphemy in federal legislation.<sup>9</sup> The Commission did not favour extending the law to cover faiths other than Christianity, considering that it would be very difficult to devise a satisfactory definition of religion and that such a course would unreasonably interfere with freedom of speech.

## THE LAW IN OTHER JURISDICTIONS

### ***Scotland***

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3.15 Blasphemy, defined as the uttering of profanities against God or the Holy Scriptures in a scoffing manner out of a reproachful disposition rather than with the purpose of propagating the irreverent opinion, is a common law offence under Scottish law. However, due to disuse, many commentators question its continued existence.<sup>10</sup>

### **Ireland**

3.16 Article 40.6.1.i of the Constitution of Ireland provides that the publication of blasphemous matter is an offence. Although opinion is divided over the current state of the common law in Ireland, particularly the effect of the decision of the House of Lords in *Bowman v Secular Society*,<sup>11</sup> in DP 24 the Commission preferred the view that all decisions of the House of Lords form part of the law of Ireland and that therefore blasphemy in Ireland exists in similar terms to that of the law of England, although it operates by reference to the Catholic Church.

3.17 It should also be noted that the *Prohibition of Incitement to Hatred Act* 1989 prevents the publication of material designed to stir up "hatred". This includes hatred against a group on account of their religion.

3.18 The Law Reform Commission of Ireland, being of the view that "there is no place for the offence of blasphemous libel in a society which respects freedom of speech", but recognising that blasphemy could not be abolished without a referendum to amend the Constitution,<sup>12</sup> recently recommended the creation of a new statutory offence of blasphemous libel. The offence would cover 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" and would extend to other religions.<sup>13</sup>

### **Canada**

3.19 Section 296 of the Canadian *Criminal Code* is in similar terms to s 119 of the Tasmanian *Criminal Code*, although the consent of the Attorney-General is not required in order to commence a prosecution. The case law on the provision is contradictory, rendering uncertain the precise elements of the offence. For example, it is unclear whether only a direct attack on the deity will constitute the offence<sup>14</sup> or whether the offence is not so confined.<sup>15</sup> It is reasonably clear that the offence extends to the Christian religion generally,<sup>16</sup> although not beyond it.<sup>17</sup>

3.20 In addition, the "hate propaganda" provisions of the *Criminal Code*<sup>18</sup> create offences of public incitement of and wilful promotion of hatred against an identifiable group. "Identifiable group" is widely defined to include a religion.

3.21 The Canadian Law Reform Commission's report relating to the recodification of the *Criminal Code*<sup>19</sup> omitted any reference to blasphemous libel. Thus, by implication, it recommended the abolition of the offence.

### **New Zealand**

3.22 Section 123 of the New Zealand *Crimes Act* 1961 is in similar terms to section 119 of the Tasmanian *Criminal Code* except that the offence carries a maximum of one year's imprisonment. The last reported prosecution under the section was in 1922.<sup>20</sup>

### **United States of America**

3.23 In the earlier United States cases the offence of blasphemy consisted of malicious speech against the Christian religion.<sup>21</sup> However it seems that it is now regarded as a crime because of its tendency toward breaching the peace, rather than its violation of religious tenets.<sup>22</sup>

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3.24 However any blasphemy prosecution may well fall foul of the guarantees in the United States Constitution of freedom of speech, religious liberty and worship and against the establishment of any state religion.<sup>23</sup> In a landmark 1970 case, the Maryland Supreme Court held a blasphemy statute unconstitutional for violation of freedom of speech under the First Amendment.<sup>24</sup> It would only be upheld if it could be shown that a compelling need existed which substantially outweighed these freedoms. There have been no blasphemy prosecutions in the United States in modern times.<sup>25</sup>

### ***Papua New Guinea***

3.25 The Papua New Guinean *Criminal Code* is based substantially on the Queensland *Criminal Code* and, as with that Code, the omission of blasphemy was tantamount to abolition. Sections 207-208 create offences of violence to ministers of religion and disturbing religious worship. Although the Papua New Guinean Constitution allows the Courts to fashion an "underlying law", that is, a Papua New Guinean common law, this does not extend to criminal laws, which s 37(2) of the Constitution provides must be prescribed in writing.

### ***Nauru***

3.26 The position in the Republic of Nauru is still governed by the Queensland *Criminal Code* and consequently the position is the same as in Queensland.

### ***India***

3.27 Section 298 of the Indian *Penal Code* 1860 (based on the draft of Lord Macaulay) makes the deliberate intentional wounding of religious feelings by word or gesture an offence.<sup>26</sup> Section 295A makes the deliberate intentional and malicious outraging of religious feelings of any class of citizens by either the spoken or written word an offence. These offences are wider than the common law in that they protect the religious feelings of any person or class of citizens in India.<sup>27</sup>

### ***Fiji***

3.28 The Fijian *Penal Code* is closely based on the Indian *Penal Code* and s 148 is in identical terms to s 298 of the latter Code with a one year maximum term of imprisonment. In addition there are offences of damaging, destroying or defiling a place of worship, disturbing a religious assembly and trespass to burial places.<sup>28</sup> As in India, the offences are not limited to the protection of the Christian religion.

### ***The Solomon Islands***

3.29 Sections 123-5 and 127 of the Solomon Islands *Penal Code* are in identical terms to the above mentioned offences in the Fijian *Penal Code*.

### ***Vanuatu***

3.30 The Vanuatu *Penal Code* was loosely based on the Indian *Penal Code* but was substantially revised in 1981 following independence. Sections 88-89 provide for offences of damaging or defiling a place of worship and disturbing religious worship but there is no longer an offence of blasphemy or wounding religious feelings.

### **Western Samoa**

3.31 Section 42 of the Western Samoan *Crimes Act* 1961 is in identical terms to s 123 of the New Zealand *Crimes Act* 1961 and in similar terms to s 119 of the Tasmanian *Criminal Code*. The maximum penalty is imprisonment for a term of one year.

### **South Africa**

3.32 Blasphemy is a common law crime in South Africa. While its scope is uncertain, recent authorities suggest that it should be restrictively interpreted and applied.<sup>29</sup> The last reported prosecution was in 1934.<sup>30</sup> In addition, the *Publications Act* 1974 prohibits the publication and distribution of blasphemous material.

### **Indonesia**

3.33 Section 156(a) of the *Criminal Code* forbids conduct which affronts a recognised religion (that is, Islam, Buddhism, Hinduism, Catholicism or Protestantism). In addition, s 19 of the *Main Press Ordinance* 1982 forbids the publication of blasphemous material. In a recent prosecution of a newspaper and its editor for publishing a poll in which the top ten most admired persons nominated by readers did not include the Prophet Mohammed, the published material was found to breach both sections. The court ruled that the Code did not require the use of insulting language and that intention to do the offensive act was sufficient, without intention to offend.<sup>31</sup> In the result the editor was sentenced to five years imprisonment and a A\$5000 fine.

## **OVERVIEW**

3.34 The legal systems of Victoria, the Australian Capital Territory, South Australia, Scotland and South Africa may have retained a 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 generally regard blasphemy as an anachronism.

3.35 In the Queensland *Criminal Code* and its regional derivatives in Western Australia, the Northern Territory, Papua New Guinea and Nauru, blasphemy was effectively abolished by the move to codification and the decision by Sir Samuel Griffith not to include blasphemy among the comprehensive list of major crimes in 1897.

3.36 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 require the consent of the Attorney-General before any proceedings are launched. 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.

3.37 The Irish Constitution entrenches the offence of blasphemy in Irish law, together with other aspects of the established (Roman Catholic) church.

3.38 The Indian *Penal Code* and its regional derivatives in Fiji and the Solomon Islands all contain offences analogous to blasphemy. However, it is worth noting that:

these Codes were drafted well over a century ago, having regard to the state of the English common law at that time;

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the offences were meant to operate in the diverse, multicultural context of colonial India and were not limited to the protection of only an established Christian religion or particular denomination;

the offences require a subjective element of intention; and

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.

3.38 In Vanuatu, where the adopted *Penal Code* was subjected to a thorough post-Independence review in 1981, the blasphemy offence was dropped.

3.39 All of the 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 Law Reform Commission - have recommended abolition.

### Conclusion

3.40 In conclusion, while a significant number of the jurisdictions surveyed retain an offence of blasphemy (or blasphemous libel), prosecutions in this century have been very rare. The continued existence of the offence may owe more 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. 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,<sup>32</sup> 30 years after Lord Denning pronounced the offence "a dead letter" in England.<sup>33</sup>

### FOOTNOTES

1. Explanatory letter dated 29 October 1897 from Sir Samuel Griffith to the Attorney-General. Quoted in RF Carter *Criminal Law of Queensland* (6th ed, Butterworths, Sydney 1982) at 4. Note that Griffith included a section in his Draft Code (s 213) creating a misdemeanour punishable by imprisonment for one year for holding up the doctrines of *any* religious faith to derision or contempt. This section did not form part of the Code as enacted: see R O'Regan "Two Curiosities of Sir Samuel Griffith's Criminal Code" (1992) 16 *Criminal Law Journal* 209.
2. *Criminal Code Act 1899* (Qld), s 3.
3. According to which no person is liable to be tried for an indictable offence except under the express provisions of the Code.
4. See account by P Coleman *Obscenity, Blasphemy, Sedition: 100 Years of Censorship in Australia* (2nd ed, Angus & Robertson, Sydney, 1974) at 66ff.
5. South Australia. Criminal Law and Penal Methods Reform Committee of South Australia. *Fourth Report: The Substantive Criminal Law, 1977* at 248.
6. There is no "exclusive jurisdiction" provision analogous to s 5 of the Queensland Code.
7. The term is not defined in the legislation but the Australian Broadcasting Tribunal has adopted the common law definition in its policy statement, *Blasphemous, Indecent or Obscene Matter* (POS 03, 17 October 1983).
8. *Crimes Act 1914* (Cth), s 85S.
9. Australia. Law Reform Commission *Multiculturalism and the Law* (Report 57, 1992) at para 7.59.

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10. JHA MacDonald *Criminal Law of Scotland* (5th edition, Green, Edingburgh, 1948) at 153; GH Gordon *Criminal Law* (2nd ed, Green [for] the Scottish Universities Law Institute, Edinburgh, 1978) at 998; G Maher "Blasphemy in Scots Law" [1977] *Scots LT* 257 at 260.
11. [1917] AC 407.
12. A referendum with the sole aim of amending the blasphemy provision was considered to be time wasting and expensive but the Commission thought that in any more extensive review of anachronistic Constitutional provisions, the opportunity should be taken to delete the blasphemy provision.
13. Ireland. Law Reform Commission *The Crime of Libel* (Consultation Paper, August 1991).
14. See *R v Kinler* (1925) 63 Que SC 483.
15. See *R v Martin* (1933) 41 R de Jur 411.
16. See *R v Rahard* [1936] 3 DLR 230.
17. England and Wales. Law Commission *Offences Against Religion and Public Worship* (WP 79, 1981) at para 4.7.
18. Section 319.
19. Canada. Law Reform Commission *Recodifying Criminal Law* (Report 31, 1987).
20. *R v Glover* [1922] GLR 125.
21. C E Torcia (ed) *Wharton's Criminal Law* (Volume 4, 14th ed, The Lawyers Co-operative Publishing Company / Bancroft-Whitney Co, New York, 1981) at 196.
22. Torcia at 196.
23. See further R C Post, "Cultural heterogeneity and the law: pornography, blasphemy, and the First Amendment" (1988) 76 *California Law Review* 297.
24. *Maryland v West* (1970) 9 Md App 270. R Mortensen, however, doubts the justification for the decision: "Blasphemy in a Secular State: a Pardonable Sin?" (1994) 17 *UNSWLJ* 409 at 422.
25. There have been recent moves in some states to abolish archaic and rarely used blasphemy laws dating back to the late seventeenth century, see report in *Daily Telegraph Mirror*, 9 June 1992, at 11 concerning a Massachusetts law. For a very detailed history of blasphemy in the US see L Levy, *Blasphemy: Verbal Offence against the Sacred, from Moses to Salman Rushdie* (Alfred A Knopf, New York, 1993), especially chapters 24 and 25.
26. O'Regan notes the similarity of s 298 to the proposed s 213 in the Queensland Draft Code and suggests that Griffith must have been aware of the Indian provision: R O'Regan "Two Curiosities of Sir Samuel Griffith's Criminal Code" (1992) 16 *Criminal Law Journal* 209 at 213.
27. For a comparative approach to Indian and UK law see F S Nariman, "Freedom of speech and blasphemy: the laws in India and UK" (1989) 42 *International Commission of Jurists Review* 53.
28. Sections 145-147.
29. WA Joubert *The Law of South Africa* (Butterworths, Durban, 1981) vol 6, para 249.
30. *R v Webb* 1934 AD 493 at 497; see *Publication Control Board v Gallo (Africa) Ltd* 1975 (3) SA 665.

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31. The "Monitor Blasphemy Case". Details taken from K Henderson "Blasphemy in a Pluralistic Society" (1992) 11 *Communications Law Bulletin* 26.
32. Previously, the UK Home Secretary had declined to prosecute for blasphemy three men dressing as priests accompanying their victorious soccer team and carrying placards reading 'They Shall Reign Forever', 'Hallowed be Their Names' and 'Adore Them for They are Glorious': M Armstrong, M Blakeney and R Watterson, *Media Law in Australia: A Manual* (2nd edition, OUP, Melbourne, 1988) at 146. 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: M Tracey and D Morrison, *Whitehouse* (Macmillan, London, 1979) at 114.
33. Lord Denning, *Freedom Under the Law* (Hamlyn Lectures, 1st series, Stevens, London, 1949) at 46.

## 4. Reform of the Law of Blasphemy

### SUBMISSIONS AND COMMUNITY DEBATE FOLLOWING DP 24

4.1 The release of DP 24 received significant media attention in NSW and interstate. Articles appeared in all the major press outlets; the release was featured on all but one of the television network news programs, the issues were canvassed on ABC Television's religious affairs program "Compass", and the Commission was involved in numerous radio interviews. A significant amount of community discussion also occurred in the letters columns of the newspapers and on "talk-back" radio. For example, the Commission was provided with a tape of a talkback segment on blasphemy from ABC Radio 2 JJJ (the National Youth Network) which consisted of sixteen calls.<sup>1</sup>

4.2 The Commission received a total of sixty-one written submissions. Over half (approximately 60%) were from private individuals or families or from individual religious leaders, such as Cardinal Edward Clancy, the Catholic Archbishop of Sydney and Rabbi Raymond Apple of the orthodox Jewish community. Keith Mason QC (Solicitor General of New South Wales, writing in his personal capacity), and George Zdenkowski of the University of New South Wales Faculty of Law (a former Australian Law Reform Commissioner) also made submissions. The remaining submissions were on behalf of groups or organisations, including religious bodies, the Law Society of New South Wales, the New South Wales Bar Association, the Ethnic Affairs Commission of New South Wales, the Australian Journalists Association, the Australian Press Council, the Buddha-Dhamma Foundation, the Free Speech Committee, the New South Wales Humanist Society, the New South Wales Council for Civil Liberties, the Probation and Parole Officer's Association of New South Wales and the Rationalist Association of New South Wales.

4.3 DP 24 outlined four options for reform. Most of the submissions favoured the more absolute options of either maintenance of the existing offence of blasphemy or outright abolition (that is, Options One and Four respectively), while a smaller number favoured either progressive codification or selective replacement (Options Two and Three).

### OPTION ONE: RETENTION OF THE COMMON LAW

4.4 The first option was simply to retain the law of blasphemy in its existing (mixed common law and statutory) form.

#### **Submissions in support of Option One**

4.5 The Commission received twenty-six submissions in favour of the retention of the offence of blasphemy, twenty-one from private individuals or families and five from Churches or Church groups.

4.6 The submissions in this category tended to be statements of the authors' personal convictions, and the expression of fears that the abolition of the offence of blasphemy would serve to encourage outrageous and anti-religious conduct. The Commission appreciates the time and trouble taken by the authors to apprise us of their views. However, very few of the submissions sought to address the many specific difficulties presented by the offence which were emphasised in DP 24, such as the problems of definition, application and procedure. (It is interesting to note that this Commission's experience is similar to that of the Law Commission of England and Wales in the preparation of its 1985 Report on blasphemy and other offences against religion and religious worship<sup>2</sup>.) The issues raised by the submissions in support of Option One are summarised immediately below.

#### ***Protection of God and of individual feelings***

4.7 The major concern emerging from the submissions was that the abolition of blasphemy would lead to an increase in offensive behaviour directed at Christians and Christianity, and would provide, in effect, a “licence to profane the sacred”.<sup>3</sup> One submission suggested that while God was “quite able to defend Himself”, blasphemy still amounted to an improper rejection of God.<sup>4</sup>

#### ***Protection of morality and society***

4.8 It is clear that for those who support the retention of the crime of blasphemy, the offence has important symbolic value, constituting a statement about the respect for religion and the morality derived from religious belief in our society. Thus, the abolition of blasphemy could be seen as an attack on morality, “Christian ethics” or “traditional values”.<sup>5</sup> Indeed, one submission thought that DP 24:

makes the fatal error of treating blasphemy as a social matter rather than a moral issue. A moral issue such as blasphemy involves questions of good and evil, right or wrong, and can only be determined by obedience to injunctions contained in God’s Holy Word, not by the changing concepts of present day popular thinking ... . [A]ccording to Scripture, blasphemy has been, is and always will be sin.<sup>6</sup>

4.9 The members of the Hurstville Baptist Church submitted, through one of its deacons, that:

the dishonouring of God in our community surely weakens respect for moral law and codes which are the foundation of our society. The repeal of the laws concerned will be very detrimental to the well being of our community.<sup>7</sup>

4.10 Another submission put this argument in similar terms, stating that:

any action, no matter how seemingly insignificant, that diminishes respect for and fear of God or detracts from adherence to the Christian principles which are part of our heritage as a Nation, will ultimately have adverse repercussions within our community.<sup>8</sup>

4.11 One submission considered that abolition would be the “thin edge of the wedge”, opening the way for further moral decline.<sup>9</sup> In a similar vein, a number of the submissions were concerned about what might subsequently occur in the daily mass media and in films, doubting the ability of the media to act responsibly without the (assumed) restraining effect of the law of blasphemy.<sup>10</sup>

#### ***The infrequency of prosecutions***

4.12 Some proponents of retention said that the absence of any actual prosecutions for blasphemy in New South Wales for over 120 years should not of itself be used as a ground for abolition.<sup>11</sup> One submission stressed the deterrent effect of law.<sup>12</sup> Another was concerned about what might happen in the future, arguing that regardless of the feeling of the moment, it was clear that:

just as the environmental issues have shown ... people have not thought ahead to the enormity of the impact that their decisions and actions would bring. I think this amendment stands on the same ground. Years ahead we would see, if this amendment were to go ahead, that it would have opened the door to corruption that we don’t as yet see.<sup>13</sup>

#### ***Extension to other religions***

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4.13 Support was voiced for Option One by the Presbyterian Church of Australia in the State of New South Wales, which made submissions through its Standing Committee (of the General Assembly) on Church and Nation,<sup>14</sup> and through its Law Agent and Procurator.<sup>15</sup>

4.14 In the latter submission, it was said that, by reference to the 1986 Census figures:

the great majority of the Australian (and New South Wales) population adhere, at least nominally, to the Christian religion ... There is no basis upon which the State could form the view that this body would wish to lose the protection now afforded by the law of blasphemy. Indeed there is no reason to think that non-Christians would want Christians to cease to have available this protection.

We regard it as appropriate that the legal system of New South Wales should continue to reflect its historic protection of Christian religious beliefs so as to protect public order. Legal protection of non-Christian religious beliefs may be considered if sufficient community interest supports such action, but any such legal protection should be contained in a separate enactment and should be linked to protection of public order.<sup>16</sup>

4.15 Another submission suggested that the ostensible discrimination in blasphemy was remedied by other laws of more general application:

[T]his society requires for its own ultimate integrity and security the continuation of the law of blasphemy against the Christian Lord, while it grants protection for the integrity and security of other belief systems through such methods as proposed under the Anti-Discrimination Act 1977.<sup>17</sup>

4.16 There were also a number of submissions which suggested that the legal system of New South Wales should properly continue to reflect its historic protection of Christianity.<sup>18</sup>

### The Commission's evaluation of the policy arguments

4.17 *Protection of God and religion.* Blasphemy has its origins in ecclesiastical law, together with the other related religious offences of heresy, schism and atheism.<sup>19</sup> However, the secularising trend in blasphemy law has clearly shifted the concern from the protection of religion to the protection of the established social and political order. If religious protection is considered to be the primary aim of the offence, it is anomalous that only scurrilous attacks are penalised while well reasoned, intellectual debate is not, though such debate may be far more effective in destroying religious belief.<sup>20</sup>

4.18 The Commission recognises the natural wishes of people to protect objects of their veneration, but recourse to the criminal law may be entirely inappropriate for that purpose, particularly in a context where only one religion receives the benefits of the protection.

4.19 As regards the discriminatory nature of the current blasphemy law, 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 policies.<sup>21</sup>

4.20 Most of the submissions, including those which advocated retention of the offence, recognised that the underlying basis of blasphemy law had changed from the protection of religion to the protection of social order and/or the protection of adherents from an offence to their sensibilities.

4.21 *Protection of society.* The English common law crime of blasphemy (as opposed to the ecclesiastical offence) emerged during the Restoration, a period marked by social turbulence and a strong alliance between the Church and the State. Blasphemy and sedition were seen as closely related, and criticism of the Church was seen as an attack on the very structure of society itself.

4.22 This is no longer a genuine perception - the Commission doubts whether the offence of blasphemy has any existing deterrent effect, given that the offence is so obscure, prosecutions are so rare, and the penalty

largely unknown. There has only been one prosecution for blasphemy in New South Wales in the last 120 years - 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.<sup>22</sup> As discussed in DP 24,<sup>23</sup> wider knowledge of the offence could 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. 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,<sup>24</sup> 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".<sup>25</sup> The actual sentences imposed for blasphemy in recent times probably would not dissuade anyone from breaching the law for principle or profit. The defendants in *Whitehouse v Lemon*,<sup>26</sup> for example, ultimately only received fines.

4.23 Blasphemy has no significant utility as a means of promoting religious tolerance. The history and development of the law of blasphemy indicates that the criminal law and its sanctions were used to enforce the pre-eminence of one religion over all others. While recognising the socially divisive and destructive effect of religious and racial conflict, the Commission has grave doubts as to the remedial possibilities of the criminal law and considers that modern anti-discrimination legislation is a superior vehicle to promote religious freedom and social tolerance, and to remedy conflict based on social difference. 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.

4.24 *Protection of individual feelings.* The retention of the offence of blasphemy has been said to be justified on the basis that criminal liability is appropriate when individuals with deeply held religious convictions are caused grave offence by truly scurrilous expressions.<sup>27</sup>

4.25 The Commission has no doubt that there are many members of the community who have such 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 aesthetic beliefs.<sup>28</sup>

4.26 Apart from the fact that the offence would currently "protect" only Christians, it is also open to question whether the criminal law of blasphemy is capable of adequately educating the community to respect the beliefs of others and to promote tolerance for such beliefs, or to deter wilful breaches.

4.27 Further, the Commission accepts the principle that freedom of speech should be curtailed only where a compelling countervailing right demands priority.<sup>29</sup> The protection of private feelings in this area may not be considered sufficiently compelling,<sup>30</sup> and the protection of public order is better accomplished by other means (see below).

4.28 *Protection of public order.* In order to justify the retention of blasphemy on the basis that it protects public order, it is necessary to show that publication does in fact disrupt public order and that the offence is the appropriate mechanism to control this conduct.

4.29 There are several existing "public order" criminal offences in New South Wales which could cover the same ground as blasphemy. Some of these already have a religious context. Sections 56, 106 and 107 of the *Crimes Act 1900* (NSW) deal with obstructing members of the clergy in the exercise of their duties and with "sacrilege"; s 39 of the *Imperial Acts Application Act 1969* (NSW) creates a statutory offence of disturbing a meeting for religious worship and the common law misdemeanour protecting lawful religious worship against disruption. General criminal offences which may be relevant include provisions relating to offensive conduct in section 4 of the *Summary Offences Act 1988* (NSW), and section 4 of the *Inclosed Lands Protection Act 1901* (NSW), which operate to prevent or to punish the gratuitous wounding of an individual's feelings. The common law misdemeanour of incitement to commit a criminal offence would also cover some similar ground to that covered by blasphemy, where there was an exhortation to harm a person or class of persons (or their property) based on those persons' religious beliefs.

4.30 Finally, the racial vilification provisions of the *Anti-Discrimination Act 1977* (NSW)<sup>31</sup> may be applicable. The provisions have been amended by the *Anti-Discrimination (Amendment) Act 1994* (NSW), which explicitly includes “ethno-religion” as an aspect of “race” for the purposes of the racial vilification and racial discrimination provisions of the *Anti-Discrimination Act*. The amendment clarifies some previous case law to the effect that certain ethno-religious groups fall within the definition of “race” for the purpose of racial discrimination legislation. For instance, in *King-Ansell v Police*,<sup>32</sup> the New Zealand Court of Appeal held that Jews in New Zealand formed a group with common ethnic origins within the meaning of the *Race Relations Act 1971* (NZ). The New Zealand decision was discussed with approval in the English case of *Mandla v Dowell Lee*,<sup>33</sup> in which the House of Lords held that Sikhs constituted an “ethnic” group for the purposes of the *Race Relations Act 1976* (UK).

4.31 The Commission believes that these provisions in the *Anti-Discrimination Act* are better designed to preserve public order and social cohesion in a modern democratic society, given several important considerations: 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.<sup>34</sup>

### **Summary**

4.32 There are both legal and policy concerns with preserving the existing common law offence of blasphemy.

4.33 Public order is clearly capable of being preserved in New South Wales without the offence of blasphemy, which has not been utilised this century. The general criminal law, including offences relating to incitement and offensive behaviour, covers this area adequately. Further, it is inappropriate for the criminal law to be used to protect an individual’s religious convictions in a secular society, particularly where the adherents of only one faith are protected. The offence curtails freedom of speech, without a sufficiently compelling countervailing right. Whether the offence is capable of adequately educating the community to respect the beliefs of others must be questioned. Finally, it is unclear why religious beliefs merit special protection whereas other beliefs do not.

4.34 In addition to the policy concerns with the offence of blasphemy, there are problems with the particular offence of blasphemy which is made part of the law of this state by s 574 of the *Crimes Act 1900* (NSW) and the operation of the common law.<sup>35</sup> In particular:

there is considerable uncertainty about the elements (and indeed the very existence) of the offence;

the scope of the existing offence is limited to attacks on the Church of England and related Christian denominations;

as a common law offence, blasphemy would have to be tried upon indictment in a superior court, with a judge and jury; and

as a common law offence, sentencing is “at large” - that is, without any statutory limits or guidance.

4.35 The Commission considers this Option to be unattractive, given the problems identified above. Public order clearly could be maintained (and has been maintained) without resort to the law of blasphemy. The general criminal law covers this area adequately. In a multicultural, pluralistic society, a law which provides discriminatory protection to a particular religion cannot be justified.

### **OPTION TWO: PROGRESSIVE CODIFICATION OF THE OFFENCE OF BLASPHEMY**

4.36 The second option is to codify the ancient offence in such a way as to meet the various objections mentioned above and produce a suitably redefined modern offence.

4.37 In DP 24, the Commission considered that the following should be contained in any new offence:

*a. Subjective fault.* A codified offence should incorporate a concept of subjective fault. As noted in Chapter 2, para 2.25, the Commission's view is that the proper construction of the offence would require the prosecution to prove, beyond reasonable doubt, that the accused not only 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.<sup>36</sup>

*b. The protection of bona fide debate.* Any codified offence would require a provision making it clear that publications made for the purposes of bona fide discussion or debate would not attract criminal liability. The onus should lie on the Crown affirmatively to disprove (or negative) this element.

*c. Clarification of the "breach of the peace" requirement.* Since the essence of the offence of blasphemy is its potential to harm the very fabric of society, a codified offence should require the prosecution to prove that the accused intended to foment general public disorder or was aware that such disorder was likely - the less inclusive formulation of Lord Sumner in *Bowman v Secular Society*<sup>37</sup> is preferable to that of Lord Parker in the same case.

*d. Extension to other religions.* Any attempt to codify the offence of blasphemy would need to remedy its discriminatory application.<sup>38</sup> However, this is more easily stated than achieved. The main problem lies in defining precisely what would constitute a religion for the purposes of the offence. A narrow definition would deny coverage to some *bona fide* religious groups which are new or outside the mainstream, while an overly broad definition could encourage the contrivance of religious status to attract the protection of the offence, and result in an unjustifiable impingement upon free speech. Various solutions, including a single definition to be applied by the courts on a case-by-case basis, definition by reference to other legal criteria (such as the law of charitable trusts) or a comprehensive list of religions were considered by the Commission in DP 24.

*e. Sentencing and procedure.* If blasphemy is retained as an offence, a maximum penalty should be fixed. In light of the penalties for the offence in other jurisdictions, and for similar public order offences in New South Wales, a maximum of one year's imprisonment would be the most that could be justified. The approval of the Attorney General or the Director of Public Prosecutions should be necessary to commence proceedings for blasphemy, as is the case in some other jurisdictions, in order to prevent frivolous or vexatious prosecutions. The offence should remain an indictable one, so that it would be the role of the jury (or the judge alone if an accused person has so elected) to determine questions of fact with regard to prevailing community mores, attitudes and sensibilities.

### **Submissions in support of Option Two**

4.38 The Commission received six submissions in support of Option Two, advocating "progressive codification" of blasphemy law. With one exception,<sup>39</sup> the submissions in this category focussed almost exclusively on the need to extend the protection of the law to other religions. Unfortunately, the issues raised for discussion by the Commission in DP 24 concerning the mens rea of the offence, the "bona fide debate" exception, the clarification of the breach of the peace requirement, and matters of sentencing and procedure were not addressed to any significant extent.

### ***Mens rea, bona fide debate, breach of peace, sentencing and procedure***

4.39 The New South Wales Council of Churches<sup>40</sup> made detailed submissions about a new codified offence. As a basis for discussion, the Council cited figures on religious affiliation from the 1986 national Census and submitted that:

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retaining the offence of blasphemy is clearly not an anachronism, but a reasonable response to the needs of at least 80% of the population of NSW [which identified themselves as Christians].

4.40 The Council of Churches made a number of specific points about the way the law should develop. Firstly, the Council submitted that the Commission's concerns about the continued existence and the scope of the offence were exaggerated. Secondly, it submitted that the mens rea for the offence should be the one expressed by the House of Lords in *Whitehouse v Lemon* - that is, the basic intention to publish the material in question (and not the further intention to cause offence). Thirdly, the Council of Churches submitted that any newly codified offence of blasphemy should make it clear that bona fide debate about religious matters was excluded from criminal liability, although the Council felt that this already was implicitly part of the existing offence. Fourthly, the Council recommended removing the requirement to prove a tendency to cause a breach of the peace. This was because it was considered that the essence of the offence was injury to religious sensibilities.<sup>41</sup> Fifthly, the Council supported the need for the prior approval of the Attorney General or the Director of Public Prosecutions to prosecute anyone for blasphemy, and supported the specification of a maximum penalty for the offence. Sixthly, the Council suggested that a new blasphemy law should contain a provision similar to that in the racial vilification provisions of the *Anti-Discrimination Act 1977* (NSW), enabling a court or specialist tribunal to hold an inquiry into blasphemy complaints before criminal charges could be laid. Finally, the Council of Churches submitted that:

as the word "blasphemy" may be misunderstood or misconstrued, it may be appropriate to rename the new blasphemy offence as "religious vilification" or "religious defamation".

### ***The extension to other religions***

4.41 The primary concern of the submission of the Islamic Council of New South Wales was that:

The existing law is an inheritance of English Common Law and, as it stands, openly presumes and affirms the mono-cultural matrix of English society and the specific relationship between the Anglican Church and Britain, which does not apply in Australia. In so far as this goes, the law of blasphemy is incompatible with a multicultural, cosmopolitan and multi-faith New South Wales.

4.42 The Islamic Council submitted that blasphemy is not an archaic offence, but rather would have clear relevance to a contemporary multicultural society if it could be made to operate in a non-discriminatory fashion. The Islamic Council concluded, therefore, that the offence of blasphemy should be extended to other religions.<sup>42</sup>

4.43 A number of submissions dealt with the problems of defining "religion" for the purposes of extending the scope of blasphemy law. One submission suggested that:

one must be careful not to overstate these difficulties. An all-encompassing definition is not necessary. The Courts would be quite capable of receiving and assessing evidence about the existence of a religious tradition and its beliefs and practices.<sup>43</sup>

4.44 Another submission suggested that the offence could be extended to protect blasphemy "concerning the Supreme Deity common to all the major religions", and that where the faith claiming protection "is obscure, perhaps the informant should be obliged to prove a number of tenets of the faith as adhered to by a significant number of believers, which are offended by the blasphemy alleged".<sup>44</sup> It was also submitted<sup>45</sup> that the definition adopted by the High Court in *The Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)*<sup>46</sup> might be an appropriate one. Finally, one response to those concerned about the difficulties of definition was that "where there is a will, there is surely a way. Where there is no will, there are always excuses".<sup>47</sup>

### **The Commission's view**

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4.45 While Option Two attempts to address the *legal* concerns with the existing offence of blasphemy, many of the *policy* concerns expressed in relation to Option One apply equally here.<sup>48</sup>

4.46 Further, the problems associated with defining “religion” are not easily solved. While the NSW Council of Churches submitted that the “definition” adopted by the High Court in *The Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)*<sup>49</sup> might be appropriate, a definitive test was not propounded by a majority of the Court. Mason CJ and Brennan J took the view that for the purposes of the law, the criteria are twofold: belief in a supernatural being, thing or principle along with the acceptance of canons of conduct in order to give effect to that belief. Canons of conduct which offend against ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion. Wilson and Deane JJ were of the view that there is no single characteristic that could constitute a formalised legal criterion for whether a particular system of ideas and practices constitutes a religion. In their Honours’ view, all that can be done is to formulate indicia by reference to which the question is to be decided - they identified five indicia. Murphy J also did not propound a definite “test”, but rejected the first criterion of Mason CJ and Brennan J as no longer essential to a definition of religion.

4.47 These judgments have been criticised for their minimisation of the subjective factor in the nature of religion.<sup>50</sup> They illustrate how the courts have not been at ease when faced with the issue of whether a particular set of beliefs constitutes a religion. In response to the argument that “where there is a will there is a way”, the Commission really does not have the will to proceed along this path. The Commission is inclined to agree with the conclusion of the Law Commission of England and Wales<sup>51</sup> that it is impossible to define “religion” satisfactorily, and that this alone is sufficient reason to abandon the offence of blasphemy.

### OPTION THREE: POSSIBLE REPLACEMENT OFFENCE(S)

4.48 The third option is the possibility of creating a new offence (or offences) to replace blasphemy, which would be less objectionable on legal and policy grounds. Two main types of replacement offences were considered.

4.49 *Insulting or outraging religious feelings.* The emphasis of contemporary applications of the offence of blasphemy appears to be on the protection of religious sensibilities from scurrilous and gratuitous attack. This protection could be retained by criminalising behaviour which is offensive to the religious sensibilities of others. Similar offences exist in other jurisdictions such as s 298 of the Indian *Penal Code*.<sup>52</sup>

4.50 *Incitement of hatred or violence on religious grounds.* The Commission considers that the creation of an offence which would prohibit the incitement of hatred on the basis of religious beliefs would combine the notion that blasphemy exists to prohibit breaches of the peace with the right of an individual not to be exposed to hatred and violence. This is achieved to some extent by Division 3A of the Anti-Discrimination Act 1977 (NSW). Since 1989, it has been unlawful to incite racial hatred in New South Wales<sup>53</sup>, with incitement to racial violence being a criminal offence.<sup>54</sup> ‘Race’ is defined to include ethno-religious origin.<sup>55</sup> Section 319 of the Canadian *Criminal Code* goes further by making incitement to racial hatred (rather than racial violence) an offence.

4.51 At the Commonwealth level three reports have recommended the need for racial vilification legislation (the *Report of the National Inquiry into Racist Violence (NIRV)*<sup>56</sup>, the Royal Commission into *Aboriginal Deaths in Custody: National Report*<sup>57</sup> and the ALRC Report on *Multiculturalism and the Law*<sup>58</sup>), although there is some disparity on matters of detail such as the precise nature of the offences.

4.52 The Commonwealth is yet to pass racial vilification legislation. The *Racial Discrimination Amendment Bill 1992 (Cth)* was introduced into the federal Parliament on 16 December 1992. At the time, the Government did not have a final position on the Bill and proposed to let it lie in order to encourage all interested parties to comment on the legislation. The Bill lapsed on the proroguing of Parliament before the March 1993 federal election.

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4.53 There is a draft Bill in circulation at present,<sup>59</sup> which proposes to make racial vilification unlawful (by amending the *Racial Discrimination Act 1975* (Cth) to add racial vilification as a ground upon which a person can bring a complaint to the Human Rights and Equal Opportunity Commission<sup>60</sup>), and to amend the *Crimes Act 1914* (Cth) to create an offence of racial incitement. The Attorney General is considering the proposed legislation in light of comments received during consultations with the community. The date for reintroduction of the legislation has yet to be determined.<sup>61</sup>

### Submissions in support of Option Three

4.54 Several submissions were received in support of Option Three, for the replacement of blasphemy with other suitable offences.

4.55 The Uniting Church in Australia's Board for Social Responsibility (in a submission made primarily in the context of federal law reform), was of the opinion that blasphemy was not an appropriate subject for treatment by the criminal law and that it should be replaced with provisions criminalising incitement to violence on the grounds of (among other things) religion. The Board did not, however, support the creation of an offence of incitement to *hatred* (as opposed to *violence*) because it considered that such an offence could constitute an unreasonable limitation on freedom of speech.<sup>62</sup>

4.56 The Anglican Church of Australia, Diocese of Sydney, submitted that it would not be greatly concerned with the abolition of the offence of blasphemy, as long as there was adequate legislation dealing with offensive behaviour.<sup>63</sup>

4.57 The submission of the National Spiritual Assembly of the Baha'is stressed the importance of freedom of speech and welcomed public scrutiny of the tenets and practices of their religion. However the Assembly felt that there was a need for protection from ridicule and vilification and suggested that this could best be achieved by the replacement offences suggested in Option Three.<sup>64</sup> The Baha'is considered that it would be equitable to extend the protection of vilification provisions "to religious communities which are heterogenous and do not stand identified with any particular ethnic community".

### The Commission's evaluation of the policy arguments

4.58 The criminal law should intervene only where there is a clearly identifiable need and where the prohibited conduct is capable of accurate definition, so as not to be unduly repressive of individual rights and freedoms. The offence of blasphemy does not meet these criteria.

4.59 As regards an offence based on insulting religious feelings, section 4 of the *Summary Offences Act* and s 4A of the *Inclosed Lands Protection Act 1901* already cover offensive conduct and offensive language in public places or in private. A number of similar offences govern behaviour in specific situations, such as the railways. However, the creation of a new offence aimed at the protection of religious feelings would add little to the existing law while creating fresh problems of definition and application. Further, it may have a chilling effect on free speech and be wasteful of the limited resources possessed by the community for the control of crime.

4.60 Option Three attempts to provide more appropriate solutions to the problems of religious intolerance in contemporary society, but the Commission considers its review of the *Anti-Discrimination Act 1977* (NSW) as the appropriate forum for discussion of the extent of religious vilification legislation. It is appropriate that the Commission considers the possibility of making unlawful the incitement of hatred and violence on the ground of religion as part of this review.

4.61 The key to these offences is not the protection of the individual's feelings from injury, but the protection of the relevant group from the incitement of hatred and violence against its members. Historically, the political impetus for the introduction of the vilification provisions has been linked to the incidence of "hate" or "bias"<sup>65</sup> crime and the distribution of hate propaganda against certain groups. The case for legal regulation of "hate

speech” and incitement to violence against certain groups is based on several principles, such as the need to reduce threats to social cohesion and public order by encouraging and preserving tolerance; the normative power of a clear legislative expression that the community disapproves of certain types of behaviour; reversing the inferior status accorded to historically disadvantaged groups; and respecting cultural and group identity. The novel inclusion of the vilification provisions in the *Anti-Discrimination Act* clearly implies that considerable weight has been given to the view that the legislation sets out clear community standards which can positively influence behaviour. The use of the conciliation mechanism with regard to vilification also reflects the faith that has been placed in the educative potential of the respondent having to confront the complainant and learn that his or her conduct is unacceptable.

#### **OPTION FOUR: ABOLITION WITHOUT SPECIFIC REPLACEMENT**

4.62 The final option is the abolition of the offences of blasphemy and blasphemous libel without specific replacement.

#### **Submissions in support of Option Four**

4.63 Twenty-three submissions were received in support of the option to abolish the offence of blasphemy, ten from organisations and thirteen from individuals or families. In addition, the majority of callers to a radio talkback program provided to the Commission as a submission were in favour of abolition.<sup>66</sup> The reasons given for the recommendation of abolition may be summarised as follows.

#### ***Blasphemy is an anachronism***

4.64 A number of submissions expressed the view that the law of blasphemy is anachronistic and irrelevant to the circumstances of modern Australian society.<sup>67</sup> As a matter of practice, the offence is very rarely used in the English-speaking world, and is even more rarely successful.<sup>68</sup> One person thought that the issues were irrelevant given the far more pressing problems currently facing society.<sup>69</sup> As a matter of principle, the Humanist Society submitted that:

by far the strongest case for abolishing the law of blasphemy arises from its nature. It is a relic of religious persecution, a penalty on opinion and it defies the hard-won freedom of speech which underpins democracy. It is inequitable. It does not protect the often vilified atheists, agnostics, pagans and infidels.<sup>70</sup>

4.65 A number of submissions noted that the rarity of prosecutions in modern times should not lead to complacency about the need for active reform:

The lack of successful prosecutions should not be used as a rationale for making no change. Long dormant offences - particularly those restricting freedom of speech - have a habit of being revived when least expected. See for example the history of criminal defamation.<sup>71</sup>

4.66 The historian, Mr Ken Cable, provided the Commission with information on the role of the established church, arguing that slander against God was at the centre of the offence and that the object of the law was to protect the community against God's wrath and not to protect the religious sensibilities of others. Because of this emphasis, there could be no blasphemy against a non-Anglican God because in those cases the community would be in no danger of divine retribution. However, the submission noted that the concept of blasphemy was obsolete and that an “established church” was, if anything, a mere matter of convenience.<sup>72</sup>

***The limited scope of the offence is unfairly discriminatory***

4.67 There was a widespread feeling that blasphemy laws are discriminatory and anomalous in a multicultural society.<sup>73</sup> One submission was of the opinion that to give one religion a special status would contravene s 116 of the Constitution.<sup>74</sup> A number of submissions were concerned about the discriminatory effect against non-Christians, atheists and agnostics.<sup>75</sup>

***The law is deficient and uncertain***

4.68 The submission of the Free Speech Committee raised a number of difficulties with the existing law of blasphemy.<sup>76</sup> It echoed the view of the English Law Commission that the law is "to an unacceptable degree uncertain" making it difficult to know in advance whether a particular publication will be blasphemous and basing liability on differing subjective interpretations which may vary with time. It was further submitted that the *mens rea* for the common law offence of blasphemy (as determined in the United Kingdom by the House of Lords) is highly undesirable, and that the application would involve an impermissible degree of arbitrariness, since some "attacks" on Christianity are authorised in the name of bona fide debate.

***Extension to other religions***

4.69 Despite its discriminatory operation, the submissions in this category argued strongly against extending the protection of the law of blasphemy to other religions.<sup>77</sup> It is argued that the requirement that "all faiths be equal before the law" can best be achieved by abolition.<sup>78</sup>

4.70 Firstly, it was submitted that extension to other religions would raise "impossible questions" about what constitutes a religion.<sup>79</sup> The point also was made that such a course raises questions of why non-religious philosophies, belief-systems and personal attributes should not be afforded similar protection.<sup>80</sup>

4.71 It was also submitted that extension could create difficulties *between and within* religions, and would be "fraught with danger for this increasingly secular society".<sup>81</sup> It was argued that:

it is against the interests of religions to have the law extended, since all religions involve beliefs which are considered blasphemous by other religions. Extension of the law would encourage inter-religious strife and cross prosecution.<sup>82</sup>

As one submission pointed out, "in the end, all religions would suffer, not being able to preach anything without legal advice".<sup>83</sup>

4.72 Three further general policy arguments emerged from these submissions. Some submissions pointed out that an extension to other religions would quite unjustifiably restrict debate over religion.<sup>84</sup> Some submissions raised the possibility that extension of the offence to other religions (and, perhaps, smaller cults) may prevent exposure of, and discussion about, allegedly unacceptable practices.<sup>85</sup> Finally, some submissions expressed fear that extension of the scope of the offence would result in a revival of its use, leading to increased litigation and a drain on the public purse.<sup>86</sup>

***Freedom of speech arguments***

4.73 Freedom of speech was a fundamental concern of many of the submissions.<sup>87</sup> The point was made that, in a democracy, the onus for justifying restrictions on freedom of speech rested heavily upon those supporting the restrictions.<sup>88</sup> While it was recognised that freedom of religion also was an important human right, it was submitted that:

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the freedom of expression of all cannot be limited by the religious convictions of some, since freedom of expression is integral to democratic life and is itself necessary for the protection of freedom of religion.<sup>89</sup>

4.74 Freedom of speech was considered from a number of different perspectives. From the point of view of the society at large, it was put by Rabbi Apple, among others, that in a democracy all ideologies must tolerate vigorous questioning, debate and criticism.<sup>90</sup> From the point of view of religion, Keith Mason QC stressed that it was in the interests of a religion to have its truths exposed to the “market place of public debate”.<sup>91</sup> A number of submissions suggested that those members of the community holding strong religious beliefs should be sufficiently confident of their views to be able to deal with the contrary views and criticism of others.<sup>92</sup> From the point of view of individual rights, the offence of blasphemy was condemned in some submissions as unacceptably restrictive of freedom of speech and freedom of information:

The law does not protect the faithful so much as penalise the unfaithful. Without recourse to law, the faithful can protect themselves from writing which they may be outraged by through the exercise of their right not to read that writing. What the law does is prevent people who may *not* be outraged by that writing from exercising their right to read it.<sup>93</sup>

### ***Possibility of social divisiveness***

4.75 It was pointed out by some submissions that Australia has a reasonably good record of religious tolerance, and the desire to maintain this was expressed.<sup>94</sup> The possibility of an expanded offence “rekindling obsolete and archaic laws ... fostering dangerous and divisive attitudes in the community” was clearly seen as a matter of concern.<sup>95</sup>

### ***The role of the law***

4.76 A number of submissions argued that anti-discrimination laws and the criminal laws protecting public order provide sufficient safeguards for the sensibilities of the religious members of the community, and that there was no need for other legislation in the area.<sup>96</sup>

4.77 One submission discussed the idea that laws should not protect any one religion and cannot ever be the appropriate way to bring harmony between religions. Such matters would be better dealt with by education and not by laws at all.<sup>97</sup> It was also pointed out that, from a religious point of view, it may be counterproductive to the interests of the Church to rely on the secular law for support.<sup>98</sup>

### ***The separation of Church and State***

4.78 Some submissions advocated maintaining as rigid a separation of Church and State as possible,<sup>99</sup> and one organisation felt that:

in a secular society, there is no role for the State in enforcing religious attitudes for a single denomination or religion or limiting religious debate.<sup>100</sup>

### **The Commission's evaluation of the policy arguments**

4.79 Each of the other three options is problematic. To adopt Option One would leave untouched the problems identified with the current offence. Thus, the uncertainty concerning the status and elements of the offence, its limitation to Christianity and the sentencing and procedural problems would remain untouched. On

the other hand, a codified offence, while addressing many of the legal issues identified with the retention of blasphemy, would ignore the policy concerns. Thus, the question of how the offence is to be justified - in terms of protecting religion, personal feelings or society or in terms of the maintenance of public order - and issues of freedom of speech are not addressed by adopting Option Two. In addition, definitional problems would inevitably arise if the offence were to be extended beyond Christianity. Option Three attempts to provide more appropriate solutions to the problems of religious intolerance in contemporary society, but the Commission considers that the specific form of these solutions are more appropriately dealt with in its review of the *Anti-Discrimination Act 1977* (NSW).

4.80 There have not been any successful prosecutions for blasphemy in New South Wales this century, and it is exceedingly rare that such a charge is even considered, in light of the plethora of public order offences which are available. There have been no prosecutions for blasphemy in other Australian states, Scotland, Ireland, New Zealand or other comparable jurisdictions for over 50 years, and every law reform commission which has considered blasphemy law reform has recommended abolition of the offence. The arguments raised in DP 24 and in this chapter in favour of abolition of the offence of blasphemy suggest that it is the most commendable option in a modern, pluralistic and secular society. Abolishing the offence of blasphemy would not undermine Christianity, but would be more consonant with the multi-religious, multicultural society in which we live.

## **Conclusion**

4.81 The Commission favours the abolition of blasphemy, and considers there is no need for a substituted or replacement offence. Abolition of the offence without replacement raises the issue of the need to provide adequate legal protection for religions and religious beliefs. The Salman Rushdie affair in England demonstrated the depth of the religious feelings in parts of British Muslim communities. However, the public demonstration of those feelings also created hostility towards Muslim communities from many people in the wider community.<sup>101</sup>

4.82 In Australia, the Gulf War stirred up hatred and hostility against Muslims. However, the way to address such matters is not, in the Commission's view, by retention or expansion of the blasphemy laws. Rather they should be addressed in the context of determining whether conduct which amounts to the incitement of hatred or violence against a person on the ground of religion should be prohibited. The Commission's review of the *Anti-Discrimination Act 1977* (NSW) is the appropriate forum to consider this matter. The policy concerns which underpin the anti-discrimination legislation will inform such a discussion, and thus the issues can be dealt with in a more cohesive and comprehensive fashion.

## **Recommendation:**

**The common law of blasphemy should be abolished.**

## **FOOTNOTES**

1. Radio 2 JJJ. Tape provided as a submission dated 3 April 1992 by Owen Trembath who conducted the discussion.
2. England and Wales. Law Commission. *Offences Against Religion and Public Worship* (Report No 145, 1985). At para 2.7, the Law Commission states that a large number of correspondents gave no reason for opposing the abolition of the law of blasphemy.
3. Submissions of the Southside Christian Fellowship (6 February 1992); R Wilkinson (26 March 1992); C Slough (25 March 1992); E Lane (25 March 1992); A Jago (5 May 1992) and S Gayner (1 May 1992).
4. Submission of R Golder (14 April 1992).

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5. Submissions of the Southside Christian Fellowship; G Thornley (21 March 1992); M Milham (23 March 1992); S Donald (4 April 1992).
6. Submission of R Thorncroft (7 April 1992).
7. Submission by the members of the Hurstville Baptist Church, by Mr J R Wyard, a deacon of that church (23 March 1992). See also the submission of R Doran (23 April 1992).
8. Submission of Stewards' Foundation of Christian Brethren (5 March 1991).
9. Submission of A Seymour (29 April 1992). On the other hand, the submission of E Lane put the position that the rise of sodomy (as evidenced by the Mardi Gras) and gambling following the legalisation of homosexuality and off-course betting were analogous to the moral decline which would follow from the abolition of blasphemy.
10. Submissions of H and F Henderson, on behalf of the Parish Council of Elders of the Camden Uniting Church (2 April 1992); D Thornton (11 May 1992).
11. Submission of the Presbyterian Church of Australia of Mr KJ Swan, Convenor, Church and Nation Committee (23 April 1992).
12. Submission of R Thorncroft.
13. Submission of M Welle (29 April 1992).
14. Submission of Mr KJ Swan, Convenor, Church and Nation Committee.
15. Submission of Mr SH Fraser, Law Agent, and Mr G Downes QC, Procurator (18 April 1992).
16. At p 2-3
17. Submission of the Rev J Boyall (28 April 1992).
18. Submissions of the Presbyterian Church; R Cush (20 March 1992) and R Thorncroft.
19. See DP 24, at para 2.8.
20. Charles Bradlaugh's controlled and reasoned attack on Christianity did not offend Lord Coleridge's restatement of blasphemy: *R v Bradlaugh* (1883) 15 Cox CC 217. It probably achieved far more for the anti-religious cause than John Gott's scurrilous *Rib Ticklers: R v Gott* (1922) 16 Cr App Rep 87.
21. New South Wales. Law Reform Commission. *Blasphemy* Discussion Paper 24 at para 4.52 at 62.
22. DP 24, at para 4.11.
23. DP 24, at para 4.13.
24. See Chapter 2 at paras 2.8 - 2.9
25. [1917] AC 406, at 461.
26. [1979] AC 617.
27. See, for example, *R v Ramsay and Foote* (1883) 15 Cox CC 231; *Whitehouse v Lemon* [1979] AC 617.
28. DP 24, at para 4.21.
29. DP 24, at paras 4.27-4.28. See also 1.4.

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30. Cf the European Commission of Human Rights' decision in *Gay News Ltd & Lemon v United Kingdom* (1982) 5 EHHR 123. Despite the fact that the law of blasphemy was held to violate the right to freedom of expression, it was upheld on the ground that it protected the prosecutrix's rights. The law's main purpose was to protect the rights of citizens not to be offended in their religious feelings by publications.
31. Sections 20B-20D.
32. [1979] 2 NZLR 531. At 543, it was stated that "a group is identifiable in terms of its 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 that group. They also have a distinct social identity based not simply on group cohesion and solidarity but also on their belief as to their historical antecedents."
33. [1983] 1 All ER 1069,
34. DP 24, at para 4.48.
35. DP 24, at para 4.49.
36. DP 24, at paras 2.105-2.107. In para 2.107, the Commission considered whether reckless indifference would satisfy the mental element for blasphemy. Although this would normally be the case, there is an argument that the vague and uncertain actus reus element in blasphemy should be offset by a restrictively defined mental element in order to limit the scope of criminal liability.
37. *Bowman v Secular Society* [1917] AC 407. See esp at 460, per Lord Sumner.
38. See generally M Tregilgas-Davey, "Ex parte Choudhury - An Opportunity Missed" (1991) 24 *Modern Law Review* 294 at 296.
39. The submission of the NSW Council of Churches, discussed in detail below (15 April 1992).
40. Representing the Anglican Church (Sydney Diocese), Baptist Church, Churches of Christ, Presbyterian Church, Uniting Church, Fellowship of Congregational Churches, The Salvation Army and the Reformed Church.
41. Cardinal Clancy, Archbishop of Sydney also submitted that an intention to foment public disorder should not be an element of the offence, as injury to feelings should be sufficient to claim redress (11 May 1992).
42. This was also the submission of the Australian Federation of Islamic Councils Inc (28 April 1992); Cardinal Clancy, J Coombs (19 March 1992); the New South Wales Council of Churches (15 April 1992); Dr N Weeks on behalf of the Reformed Church of Liverpool (9 April 1992) and two callers on Radio 2 JJJ talkback program. Tape provided to the Commission as a submission by solicitor Owen Trembath who conducted the talkback discussion .
43. Submission of Cardinal Clancy, Archbishop of Sydney.
44. Submission of J Coombs.
45. Submission of the New South Wales Council of Churches.
46. (1983) 154 CLR 120.
47. Submission of the Islamic Council of New South Wales (7 April 1992).
48. See above para 4.33

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49. (1983) 154 CLR 120.
50. 58 ALJ 366 at 366. The case note argues for a subjective definition of religion and points out that the subjective aspect of religion receives more emphasis in the international domain, where religion is regarded as a human right, with the stress on freedom of belief.
51. Law Commission, WP 79 at paras 8.22 and 9.2.
52. See para 3.27 of Chapter 3.
53. *Anti-Discrimination Act 1977 (NSW)* s 20C.
54. *Anti-Discrimination Act 1977 (NSW)* s 20D.
55. *Anti-Discrimination Act 1977 (NSW)* s 4 (1)
56. National Inquiry into Racist Violence *Racist Violence: Report of the National Inquiry into Racist Violence in Australia/Human Rights and Equal Opportunity Commission* (AGPS, Canberra, 1991). The NIRV recommended that the *Racial Discrimination Act 1975 (Cth)* be extended to prohibit conduct which amounts to racist harassment and the incitement of racial hostility. It also recommended the creation of two new criminal offences in the *Crimes Act 1914 (Cth)* to cover an offence of racist violence and intimidation and an offence of incitement to racist violence and racial hatred, which is likely to lead to violence.
57. The final report of the Royal Commission into Aboriginal Deaths in Custody recommended that racial vilification legislation along the lines of the New South Wales model be enacted, but be restricted to create only a civil wrong. Australian Royal Commission into Aboriginal Deaths in Custody. *National Report: Overview and Recommendations* (AGPS, Canberra, 1991) at para 213.
58. Australia. Law Reform Commission. *Multiculturalism and the Law* (Report 57, 1992) at paras 7.33-7.39. A majority of the Commission was in favour of making incitement to racist hatred and hostility a civil wrong, susceptible to conciliation and (if that fails) civil remedies. Two Commission members dissented, proposing a new provision for the *Crimes Act 1914 (Cth)* relating to the incitement of hatred and hostility. The Commission, once again by majority, also recommended amendments to the Commonwealth legislation regulating broadcasting, including a provision prohibiting the broadcast of material likely to incite hatred or hostility on the grounds of race.
59. Public consultation processes were instituted in 1993: written submissions were invited and public meetings conducted by the Attorney General's Department. Officers of the Department also carried out an extensive media campaign.
60. The provisions would also include acts which could be offences. This allows an individual to receive personal redress in much the same way that criminal defamation is a crime, but the act of defamation can also be the subject of a claim for damages in the civil courts. There are a number of exceptions in the legislation: acts that are done reasonably and in good faith in relation to artistic works; statements, publications and the like made for academic, artistic or scientific purposes or for any other worthwhile purpose in the public interest; fair reporting of an event or matter of public interest.
61. "PM backs racial vilification bill" *Sydney Morning Herald* 30 May 1994 at 3; "Racists may face prison terms" *The Australian* 30 May 1994.
62. Submission dated 20 March 1992. Note that this was also the view of N Weeks on behalf of the Reformed Church of Liverpool.
63. Submission of the Anglican Church Diocese of Sydney (17 July 1991).
64. Submission of the National Spiritual Assembly of the Baha'is of Australia Incorporated (5 April 1993).

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65. "Hate crime" refers to crime motivated by prejudice, bias or hatred towards a particular group of which the victim is presumed to be a member. Victims of hate violence are chosen because they are members of a particular group, not because of who they are as individuals. This is a significant difference from other forms of interpersonal violence. Hate crime is intended to intimidate all other people who belong to the same group as the victim.
66. Radio 2 JJJ talkback program.
67. Submissions of Rabbi Raymond Apple (which in his opinion represented the views of the orthodox rabbis of Australia, dated 6 May 1992); B Bryceson (18 October 1991); New South Wales Bar Association (30 July 1992).
68. Submission of the Rationalist Association of NSW Incorporated (23 April 1992).
69. Caller to Radio 2 JJJ talkback program.
70. Submission of the New South Wales Humanist Society (22 April 1992).
71. Submissions of the Australian Journalists Association (27 March 1992); Australian Press Council (14 April 1992).
72. Submission of K Cable (9 February 1991).
73. Submission of the New South Wales Bar Association; Buddha-Dhamma Foundation (13 January 1992); Australian Press Council; Free Speech Committee (4 May 1992). The latter submission adopted the reasons for abolition presented in *The Crime of Blasphemy - Why It Should Be Abolished* (Report of the International Committee for the Defence of Salman Rushdie and his Publisher, 1989).
74. Submission of Rabbi Apple.
75. Submissions of C and R Besselink (27 March 1992); V Potempa (25 April 1992); N Stoneman (undated), J Tendys (undated).
76. Submission of the Free Speech Committee.
77. Submissions of the New South Wales Humanist Society; Free Speech Committee; caller to Radio 2JJJ talkback program.
78. Submission of Free Speech Committee.
79. Submissions of Rabbi Apple; B Bryceson; Free Speech Committee.
80. Submission of the Free Speech Committee.
81. Submission of T Bain (26 March 1992).
82. Submission of the Free Speech Committee.
83. Submission of the New South Wales Humanist Society.
84. Submissions of the Australian Journalists Association; Australian Press Council; Free Speech Committee.
85. Submissions of B Bryceson; Rationalist Association of NSW Incorporated; Southside Christian Fellowship.
86. Submissions of T Bain; New South Wales Humanist Society; L Emmett (29 April 1992).
87. Submissions of G James (31 March 1992); New South Wales Council for Civil Liberties Inc (21 February 1992); The Australian Journalists Association; Australian Press Council; Free Speech Committee.

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88. Submission of The Australian Journalists Association.
89. Submission of the Free Speech Committee.
90. Submissions of Rabbi Apple; N Stoneman.
91. Submission of Keith Mason QC, Solicitor General of NSW
92. Two callers to Radio 2 JJJ Talkback program.
93. Submission of the Free Speech Committee.
94. Submission of the Rationalist Association of NSW Incorporated.
95. Submission of V Potempa. See also submissions of G James; New South Wales Humanist Society.
96. Submissions of Rabbi Apple; New South Wales Council for Civil Liberties Inc.; The New South Wales Bar Association. But note that the Probation and Parole Officers' Association of New South Wales thought that it was the laws in regard to offensive language and behaviour that were themselves in need of urgent attention (24 April 1992).
97. Submission of Buddha-Dhamma Foundation.
98. Submission of Keith Mason QC, Solicitor General of NSW.
99. Submission of B Bryceson; caller to Radio 2 JJJ talkback program.
100. Submission of the Australian Journalists Association.
101. S Poulter "Towards legislative reform of the blasphemy and racial hatred laws" [1991] *Public Law* 371.

## Appendix A: Report of The Queen v William Lorando Jones

The Sydney Morning Herald, 20 February 1871

LAW. PARRAMATTA QUARTER SESSIONS, FEBRUARY 18.

[FROM OUR CORRESPONDENT]

### BLASPHEMY

(Before Mr. District Judge Simpson.)

Mr W. H. Wilkinson, Crown Prosecutor.

William Lorando Jones surrendered to his bail on a charge of blasphemy.

The following jurors were empanelled, viz.: William Byrnes, James Bell, John Booth, Edward Braddick, sen., W. H. Byrnes, Sydney J. Brown, James Benson, C. J. Byrnes, James Bergan, C. R. Brown, and William Henry Burgin.

This case had excited a great deal of interest, and the moment the doors of the Court were opened all available space was filled with hearers.

The defendant is a man advanced in years, who may be remembered as exhibiting specimens of statuary at the late Intercolonial Exhibition, held in Alfred Park, Sydney. Mr. D. Buchanan, instructed by Mr. Greer, appeared for the defence.

Before the jury were sworn, Mr. Buchanan asked the judge to allow him as a favour to challenge any of the jurors, whom his client might think held preconceived opinions in this matter. His Honor said he would give the defendant every chance, and would allow a challenge of any juror, provided evidence were given of the cause of challenge.

Two jurors, William Byrnes and William Henry Byrnes, were challenged, but both denied having had any preconceived opinions as to the merits of the case. The jury therefore remained intact.

The following indictment was then read:-"For that on the 22nd January last, at Parramatta, in the colony of New South Wales, William Lorando Jones, being a wicked and evil disposed person, and disregarding the laws and religion of the said colony, wickedly, profanely, deviously, and intending to bring the Holy Scriptures and the Christian religion into disrepute and contempt among the people of the said colony, and to blaspheme God unlawfully and wickedly, and blasphemously in the presence and hearing of divers subjects of our lady the Queen, spoke and pronounced, and with a loud voice published the profane and blasphemous words to the effect - ie: 'The Bible (meaning the Holy Bible) is the most immoral book that ever has been published; that it is a mass of immoralities and a lie; that it is not a fit book for any female to read; that it is corrupt and immoral; that Moses (meaning Moses who is mentioned in the Old Testament, called the Book of Exodus) was a cruel old wretch - a murderer of the deepest dye, without mercy; that the elect of God (meaning the children of Israel referred to in the 2nd Book of Exodus) murdered the Egyptians, and that the elect of God (meaning the said children of Israel and their descendants) burned every one who interfered with them, and that the barbarous wretches cut up the people with swords and arrows of iron and axes; that Moses (meaning the said Moses) was a robber; that the Israelites, called God's elect, were robbers and murderers, and that they murdered the first born of the Egyptians; that Jethro, then high priest, killed the first born of the Egyptians; that Rachel held Bellah on Jacob's knee while he made a child, respectively meaning Rachel, Billah, and Jacob, mentioned in the 30th chapter of the book of the Old Testament called Genesis; that Elisha made Jehu King, respectively meaning Elisha the prophet, Jehu, King of Israel, mentioned the book of the Old Testament, called the second Book of Kings, so that he might cut off the heads of seventy children, which he did, and put them in baskets; that he (meaning the said Elisha) murdered a number of priests of Baal by *his* God's authority; that the God of the

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Israelites was a murdering God; that Moses (meaning the said Moses) saved 40,000 Midianitish women to make them prostitute to his soldiers to the high displeasure of Almighty God, to the great scandal and reproach of the Christian religion, to the evil example of all others in the like case offending, and against the peace of Our Lady the Queen, her Crown and Dignity." The defendant pleaded "not guilty."

The Crown Prosecutor proceeded to open the case. He enlarged upon the indictment, and gave expression to his opinion as to the words used by the defendant, as set forth in the indictment, and stated that he, as a thorough advocate of freedom of speech and honest inquiry, would be the last person to infringe upon the civil and religious liberties gained for us by our forefathers. Still, he could not for a moment defend the conduct of defendant, which went far beyond the bounds of propriety, and tended to violate public morality and decency. It would be proved by the evidence before the Court that defendant in a public place, and before a mixed crowd, had taken advantage of the opportunity to utter language of a most blasphemous nature. There were two things to regarded. 1st. Whether the character of the language used by defendant did not in itself betray an improper and illegal direction of motive. 2nd. That the arena chosen by defendant was not the one he should have selected for expounding his teachings. There was no doubt that this was an offence against Christianity, which was part and parcel of the law, as was proved by the oath the jurors had that day taken. While every officer of the Crown, from the Governor downwards, had to acknowledge the fundamental truths of Christianity, any attempt therefore to overthrow the established religion would not be tolerated. The way in which defendant had acted precluded him from all sympathy. No one could tell what amount of social misery has been occasioned by this and similar controversies. He then proceeded to call evidence as follows:

Senior-sergeant Kelly in charge of the Parramatta police deposed: That he knew defendant was in Parramatta Domain on 22nd January last between 3 and 5 o'clock: defendant was then addressing about 100 people; he said that the Bible was the most immoral book ever published, that it was a mass of immorality and a lie, that it was not a fit book for any female to read, it was corrupt and immoral, that Moses was a cruel old wretch and a murderer of the deepest dye, without mercy; that the elect of God stole golden ornaments; murdered the Egyptians, burned anybody that interfered with them and that the barbarous wretches cut up the people with harrows, swords, and axes of iron; that Jehu was appointed King of Israel for the purpose of committing barbarous atrocities; that 70 children were murdered, and their heads put into baskets; that thousands of women were murdered in cold blood; and 32,000 virgins were given to the soldiers for debauchery; that the Israelites were murderers, robbers, and thieves.

By Mr. Buchanan: Some of the females present went away; could not say whether defendant's whole discourse did or did not refer to the Old Testament.

By Crown Prosecutor: When defendant referred to God's elect, I think he referred to the Jews; when he spoke of Moses I knew him to mean the Moses mentioned in the Bible.

By Mr. Buchanan: I spoke to Messrs. Melville and Kingsbury, but never compared notes with them; I know that Melville is not in holy orders; I know he is what is commonly called a "spouter." Defendant's manner was solemn and earnest. He was occasionally excited, but there was no levity; his speech was full of contradictions, but he maintained his solemnity throughout. Mr. Melville did not interrupt the defendant, but waited till he had done speaking; I was not there when defendant began his discourse; I never heard that he appeared there in answer to a challenge from Mr. Kingsbury; defendant said he believed in God, the Creator of the Universe - he believed in one God - that Jesus Christ was a good man, but not God; defendant's whole manner shewed that he had great respect for this one God.

By Crown Prosecutor: Defendant said that Jesus Christ was a good man, that his teachings were good, and worthy of being followed, but that he was not God.

Ninian Melville, jun., deposed on affirmation that on the day mentioned by last witness heard defendant speaking; there were about 200 people present of all ages and sexes; defendant spoke loud, and said that Moses was a cruel-hearted old murderer; that the God of the Bible, the God of the Israelites, was not *his* (defendant's) God, because *He* was a murdering God, as shown by the Israelites, who were called *His* elect people; defendant said Moses killed the first-born of the Egyptians; that Jethro killed the first-born of the Egyptians; that the Israelites killed the first-born of the Egyptians, and He robbed the Egyptians; that the last chapter of the 2nd Book of Chronicles, and the last two verses and the 1st chapter of the Book of Ezra, the first three verses were copied the one from the other; that Elisha made Jehu King of Israel to kill 70 children and put their heads in baskets, as also

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to kill 400 priests of Baal, whom he murdered, the act being approved of by his God; that Sarah held Hagar on Abraham's knee whilst he put her with child; that Rachel held Bilhah on Jacob's knee while he put her with child. Defendant afterwards corrected both these statements by saying that Rachel held Bilhah on her knee while Jacob put her with child; that Moses saved 40,000 Midianitish women to make prostitutes of the soldiers, in proof of which they (the soldiers) were told to wash themselves before they went in to the women, and what else did that prove but that these women were to be kept as prostitutes; that the Israelites were a cruel, murdering people, for they cut up people with harrows and saws of iron. In reply to a statement I made that I would warn all present to avoid and crush the opinions expressed by defendant as they would a black snake, he said: "There, now, if you are a Christian, and believe what Christianity teaches, I'll bring a black snake and the poison, but you are not game to take it; that shews you don't believe in Christianity, and it's a lie." Defendant also said that the Bible was an immoral book and contained statements unfit to be read or spoken in the hearing of females, and that he would oppose the Bible and its teachings on every opportunity; I understand that by the Bible defendant meant the Holy Bible, and by Moses, Jethro, Sara, Hagar, Abram, Rachel, Bilhah, Elisha and Jehu, the persons so named in the Holy Bible; by the Egyptians, the persons so named in the Holy Bible, and by Chronicles and Ezra, two books in the Bible.

By Mr. Buchanan: The Bible, as a historical narrative, contains some statements similar to those made by defendant; I have read Tom Paine's "Age of Reason;" I have never read Volney; I have read Adam Clarke; the speech or lecture was not a critique upon the Bible and the treatment of the people named; it was a positive statement that such and such was in the Bible; I have seen a statement of historical facts recorded in the Bible contained in other works than the Bible itself; I am not a clergyman, but preach; I never applied to be a clergyman; I never applied to be a minister of the Independent or any other church; I have read portions of Josephus and a little of Volney; the latter wrote profane history, and I have seen a marvellous resemblance in his statements to the untruths uttered by defendant; I am a member of the Church of Christ called Christians; I never was a member of the Independent Church; I did apply to be a member, but would not comply with the terms required of me; defendant said he was quoting from the Bible; his discourse was confined to the Old Testament. I have had conversation with different persons as to this case, but not to the evidence. I spoke to Senior-sergeant Kelly about the excited state of defendant. I took one note at the time, but have not got it with me. My objects in coming to Parramatta were - first, to hear defendant, a reputed infidel, speak; and, secondly, to refute his statements. I never volunteered to come to Parramatta to give evidence. I have read the new Testament, and find it therein recorded that Jesus Christ called the scribes and pharisees "vipers". These scribes and pharisees were, I believe, the descendants of God's people. Nowhere in secular literature do I find more fearful denunciations of the people to whom Christ referred than in the New Testament. Defendant's manner was at times earnest and solemn, at other times it displayed levity; he laughed sometimes. I never interrupted him, or had any words while he was speaking. I spoke when he was done. His statements occupied a quarter of an hour or twenty minutes in delivery.

Mr. Buchanan, during the cross-examination of the witness, had several times to complain of the evasive manner in which witness gave his evidence, and his evident desire to place himself in impertinent opposition to the examining counsel.

Joseph Kingsbury affirmed that on the day in question he was in the Parramatta Domain, and heard the defendant addressing over 200 people of all ages and both sexes. (Witness here corroborated the evidence given by the previous witness Melville as to some of the statements made by the defendant.) Witness said to defendant, "Have you a wife, or daughters?" he said "Yes; but I would not allow them to read such an immoral book as the Bible."

By Mr. Buchanan: About five weeks before the 22nd of January I was sent by the church of which I am a member, viz., the Church of Christ, to preach in the Parramatta Domain; never challenged any one to a discussion; my church never challenges; I might have said, holding up the Bible, - "I call upon any one here to produce a better light than is contained in this Book"; I always do hold up the book when preaching; the defendant might have been one of the audience; I will not affirm he was not there; the defendant's manner was earnest and solemn; he spoke very loud; I say levity amongst the audience, and reproved them for it; this levity was aroused by the defendant's excited manner.

The Bible, as a whole, was here put in as evidence by the Crown-Prosecutor.

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Mr. Buchanan, before addressing the jury, submitted that there was no case to go to them. The defendant was charged with blasphemy; this, according to the highest authorities, was an offence consisting in an attack upon the established religion of the country. In England there was an established religion, which thus became part of the law of the land, and to speak against that religion was to speak against the law itself; at the same time, however, any person who choose to do so might criticise, or even libel, the religious belief of any other sect in England beside the Church of England, and might call into question the doctrines of the Roman Catholic, Wesleyan, Congregational, or other dissenting sect, with the utmost impunity. Here in Australia the case was different, for we have no established religion; therefore, as a logical sequence, as the religion established by law in England is not law in this country, to speak against that religion here could not be an infringement of the law.

His Honor considered that any one who, in a wholesale way, says that the Bible is not true, and denies the divinity of our Saviour, is amenable for blasphemy.

Mr. Buchanan still contended that any attacks, save upon an established religion, were not amenable to law.

His Honor admitted that Christianity was not established in this colony by Act of Parliament, but did not hesitate to say that it came to us as part and parcel of the common law of England necessarily incorporated in the Constitution of the colony as an offspring of the British nation.

At the request of Mr. Buchanan, however, his Honor reserved the point.

Mr. Buchanan, in a forcible and eloquent speech extending over two hours, upheld the right of the defendant as a free subject in a free country to express his opinions on matters of religious belief, either public or private, and contended that a jury who would convict a man as guilty of blasphemy when he had merely given utterance to the convictions of his soul for the benefit (as, he however, wrongly thought) of his fellow-creatures, were individually and collectively worthy of being held up to the utter scorn and contempt of the entire civilised globe. To punish such a man for expressing his honest belief would be to roll us back to those dark ages, when, as in the case of Galileo, pains and penalties were held over every man who dared to think for himself and publicly express his opinions.

At the conclusion of Mr. Buchanan's speech, during the delivery of which the Court was crowded to excess by a most attentive audience, whilst the seats on the Bench were occupied by many of the leading magistrates, there were audible expressions of approval, which, however, were promptly suppressed by the police.

The Crown Prosecutor was about the rise in reply when Mr. Buchanan interposed, and stated that, in cases of misdemeanour, it was not usual for the Crown to exercise its prerogative, especially as no witnesses had been called for the defence.

His Honor intimated that it was entirely optional with the Crown Prosecutor, who thereupon rose, and after stating that in his experience the Crown had always replied in similar cases proceeded to expound the law and review the evidence.

His Honor summed up with great precision and discernment, and the jury, without leaving the box, returned a verdict of "Guilty".

His Honor remarked that he considered the case one of an extremely grave nature, and would do his utmost by making an example of the defendant to prevent a repetition of such an offence. He therefore sentenced the defendant to two years' imprisonment in Darlinghurst gaol, and inflicted a fine of 100 pounds, to be paid to her Majesty the Queen.

## Appendix B: Submissions Received

### Submissions in favour of Option One

Presbyterian Church of Australia

Southside Christian Fellowship

Hurstville Baptist Church

Stewards Foundation of Christian Brethren

Parish Council of Elders of the Camden Uniting Church

Mr R Wilkinson

Mrs M Welle

Mr D Thornton

Mr G Thornley

Ms C Slough

Ms A Seymour

Ms D Osborne

Ms K Mottley

Mrs M Milham

Mr E Lane

Dr A Jago

Mrs R Golder

Mr S Gayner

Mr R Doran

Mrs S Donald

Mrs R Cush

Mr B and Mrs C Beer

Mrs D Barry

The Rev J Boyall

Mr R and Mrs T Wray

Mr R Thorncroft

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### **Submissions in favour of Option Two**

Australian Federation of Islamic Councils Inc

New South Wales Council of Churches

Islamic Council of New South Wales Inc

Dr N Weeks on behalf of the Reformed Church of Liverpool

Cardinal Edward Clancy, Archbishop of Sydney

Ms J Coombs, Barrister

### **Submissions in favour of Option Three**

Anglican Church Diocese of Sydney

Ethnic Affairs Commission of New South Wales

Uniting Church in Australia Board for Social Responsibility

### **Submissions in favour of Option Four**

Australian Journalists Association

Australian Press Council

Buddha-Dhamma Foundation

New South Wales Humanist Society

Free Speech Committee

New South Wales Council for Civil Liberties Inc

Probation and Parole Officers' Association

The Rationalist Association of NSW Incorporated

Law Society of New South Wales

New South Wales Bar Association

Keith Mason, QC, Solicitor General of New South Wales

Rabbi Raymond Apple

George Zdenkowski, Senior Lecturer in Law, University of New South Wales

Mr C and Mrs R Besselink

## **NSW Law Reform Commission: REPORT 74 (1994) - BLASPHEMY**

Ms B Bryceson

Mrs G James

Mrs V Potempa

Mr N Stoneman

Mrs J Tendys

Ms A Young

Mr T Bain

### **General submissions**

National Spiritual Assembly of the Baha'is of Australia Incorporated

New Apostolic Church

Mrs L Emmett

Mr K Cable

Owen Trembath, tape of talkback segment on Blasphemy on Radio Triple J.