

The Continued Existence of the Crime of Blasphemy in Australia

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I INTRODUCTION

The future of law and religion in Australia will depend in part on how we address the legacies of the past. One of the more bizarre legacies of the past is that blasphemy is still a crime in most parts of Australia. This is despite a growing trend internationally among developed countries of abolishing this antiquated offence and a general official recognition in Australia that the offence should be abolished. The purpose of this comment is to present an overview of the current legal position and recent movements towards law reform.

II BLASPHEMY IN AUSTRALIA

Blasphemy offences are regulated by statute in New South Wales,¹ Tasmania,² and the Australian Capital Territory,³ and the offence exists entirely at common law in Victoria and South Australia.⁴ Blasphemy was abolished in Queensland and Western Australia through its omission from the criminal code of those jurisdictions.

In 1987, the Federal Court gave this summary of the elements of the offence of blasphemy:

The essence of the crime of blasphemy is to publish words concerning the Christian religion which are so scurrilous and offensive as to pass the limits of decent controversy and to be calculated to outrage the feelings of any sympathiser with or believer in Christianity. A temperate and respectful denial of the existence of God is not an offence against the law which does not render criminal the mere propagation of doctrines hostile to the Christian faith. The crime consists in the manner in which the doctrines are advocated. Whether in each case this is a crime is a question of fact ...⁵

The New South Wales and ACT statutes give ‘scoffing’ at Christianity as an example of the kind of conduct that attracts criminal liability.⁶

In Victoria, statute also provides for the destruction of blasphemous documents following conviction⁷ and that there is no privilege against prosecution for publishing material of blasphemous nature as part of a fair report of court proceedings.⁸ In South Australia, there is a

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¹ *Crimes Act 1900* (NSW) ss 529, 574.

² *Criminal Code Act 1924* (Tas) s 119.

³ *Crimes Act 1900* (ACT) s 440.

⁴ Thomson Reuters, *Indictable Offences in Victoria* (at 19 November 2021) Indictable Offences A-D, ‘Blasphemy (common law)’ [53.10]–[53.120].

⁵ *Ogle v Strickland* (1987) 13 FCR 306, 317 (Lockhart J) (citations omitted).

⁶ *Crimes Act 1900* (NSW) s 574; *Crimes Act 1900* (ACT) s 440.

⁷ *Crimes Act 1958* (Vic) s 469AA.

⁸ *Wrongs Act 1958* (Vic) s 4.

statutory defence in respect of participating in the production and distribution of certain classified publications, films, and computer games.⁹

It is important to distinguish blasphemy from other legal concepts like religious vilification and religious discrimination. Vilification and discrimination laws protect *individuals* against incitement to hatred and less favourable treatment respectively. By contrast, the law of blasphemy protects Christianity itself rather than individuals or groups of individuals. As I have observed elsewhere, blasphemy laws involve the state in enforcing religious orthodoxy (correct belief) and religious orthopraxy (correct behaviour) by threatening people who do not conform with criminal punishment.¹⁰

III THE OFFENCE OF BLASPHEMY IS INCONSISTENT WITH AUSTRALIA'S INTERNATIONAL LAW OBLIGATIONS

Blasphemy offences of the kind that exist in Australia are wholly inconsistent with international human rights law. Australia is a party to the *International Covenant on Civil and Political Rights*.¹¹ Blasphemy laws are inconsistent with both Article 18's guarantee of freedom of thought, conscience and religion, and Article 19's guarantee of freedom of opinion and expression.

In respect of Article 19, the United Nations Human Rights Committee's *General Comment 34* declares that '[p]rohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant.'¹² In respect of Article 18, the United Nations Special Rapporteur on Freedom of Religion or Belief explained in his 2019 report to the Human Rights Council that blasphemy laws 'cannot be justified under the international human rights framework as that framework is intended to protect human beings and does not protect religions or beliefs as such.'¹³ The Special Rapporteur also emphasised 'the growing consensus in the international human rights community that anti-blasphemy laws run counter to the promotion of human rights for all persons.'¹⁴ The Special Rapporteur concluded that 'the international normative standard is clear: States may not impose punishment for insults, criticism or giving offence to religious ideas, icons or places, nor can laws be used to protect the feelings of religious communities.'¹⁵

In making these comments, the Special Rapporteur drew attention to the *Beirut Declaration on Faith for Rights*, a 2017 declaration made by faith-based and civil society actors under the auspices of the United Nations High Commissioner for Human Rights. The Beirut Declaration is accompanied by eighteen commitments, including a call for the repeal of blasphemy laws: '[W]e urge States that still have anti-blasphemy or anti-apostasy laws to repeal them, since such laws have a stifling impact on the enjoyment of freedom of thought, conscience, religion or belief as well as on healthy dialogue and debate about religious issues.'¹⁶

⁹ *Classification (Publications, Films and Computer Games) Act 1995* (SA) s 84.

¹⁰ Luke Beck, 'Blasphemy is still a crime in Australia – and it shouldn't be', *The Conversation* (online, 19 June 2017) <<https://theconversation.com/blasphemy-is-still-a-crime-in-australia-and-it-shouldnt-be-78990>>.

¹¹ *International Covenant on Civil and Political Rights*, opened for signature 16th December 1966, 999 UNTS 171 (entered into force 23 March 1976).

¹² Human Rights Committee, *General Comment No 34: Article 19, Freedoms of Opinion and Expression*, 102nd session, CCPR/C/GC/34 (12 September 2011) [48].

¹³ Special Rapporteur on Freedom of Religion or Belief, *Report of the Special Rapporteur on Freedom of Religion or Belief*, A/HRC/40/58 (5 March 2019) [56].

¹⁴ *Ibid* [22].

¹⁵ *Ibid*.

¹⁶ Office of the High Commissioner for Human Rights, *18 Commitments on 'Faith for Rights'* (27 June 2018) XI.

IV RECENT DEVELOPMENTS

In recent times, the offence of blasphemy has been abolished in a number of countries to which Australia often compares itself. Legislation abolished the offence of blasphemy in England and Wales in 2008,¹⁷ in Scotland in 2021,¹⁸ in the Republic of Ireland in 2019,¹⁹ in Canada in 2018,²⁰ and in New Zealand in 2019.²¹

At the federal level in Australia, there has been recent recognition that the continued existence of blasphemy laws is problematic. In 2017, the Joint Standing Committee on Foreign Affairs, Defence and Trade's Human Rights Sub-Committee observed that it was 'noteworthy' that blasphemy remains a crime in most Australian jurisdictions.²² However, the committee made no recommendations about reforming this area of law. In 2018, the *Expert Panel Report: Religious Freedom Review* (also known as the 'Ruddock Review' or 'Ruddock Report' after the panel chair, former federal Attorney-General Phillip Ruddock) described blasphemy laws as 'out of step with a modern, tolerant, multicultural society.'²³ The Panel concluded that 'abolition of blasphemy laws is desirable' and that since blasphemy laws exist at the sub-national level 'the abolition of these laws should commence and take place entirely within those jurisdictions [which presently retain the offence].'²⁴ In other words, the Panel did not consider that the Commonwealth should enact a law under the 'external affairs power'²⁵ to override State laws in order to abolish blasphemy offences throughout Australia. The Panel offered no reasons for this approach.

The Commonwealth Government's official response to the 'Ruddock Report' accepted this recommendation in principle, commenting 'State and Territory laws specifically prohibiting blasphemy place too great a burden on freedom of expression and infringe upon people's enjoyment of other fundamental rights.'²⁶ The Government also undertook to work with the States and Territories to bring about the necessary law reform. Since the 'Ruddock Report' was published, the issue of blasphemy laws has not appeared in any Meeting of Attorneys-General Communiqués and no law reform has taken place in any relevant State or Territory.

Despite the lack of law reform, there is recognition at a State level that the existence of blasphemy laws is problematic. In 1994, the New South Wales Law Reform Commission recommended that the offence should be abolished.²⁷ However, the New South Wales Parliament has never acted on this recommendation. In 2002, the Tasmanian Law Reform Institute was asked by the Tasmanian Government to conduct a project into the repeal of obsolete offences such as blasphemy. However, 'due to other priorities' that project was not

¹⁷ *Criminal Justice and Immigration Act 2008* (UK) s 79.

¹⁸ *Hate Crime and Public Order (Scotland) Act 2021* (Scot) s 16.

¹⁹ *Blasphemy (Abolition of Offences and Related Matters) Act 2019* (Ireland).

²⁰ *An Act to Amend the Criminal Code and the Department of Justice Act and to make Consequential Amendments to another Act*, SC 2018, c 29.

²¹ *Crimes Amendment Act 2019* (NZ) s 5.

²² Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Interim Report Legal Foundations of Religious Freedom in Australia* (Report, 15 November 2017) [2.30].

²³ Department of Prime Minister and Cabinet, *Expert Panel Report: Religious Freedom Review* (Report, 18 May 2018) [1.367].

²⁴ *Ibid* [1.368].

²⁵ *Australian Constitution* s 51(xxix).

²⁶ Department of Prime Minister and Cabinet, *Australian Government Response to the Religious Freedom Review* (13 December 2018) 13.

²⁷ New South Wales Law Reform Commission, *Blasphemy* (Report No 74, November 1994).

completed.²⁸ More recently in 2017 in Tasmania, the Leader of the Government in Legislative Council expressed surprise upon being informed during the course of parliamentary debate on a bill to expunge historical gay sex convictions that blasphemy remains an offence in Tasmania.²⁹

An attempt at substantive law reform occurred more recently in Victoria. In 2019, a private member's bill, the *Crimes Amendment (Abolition of Blasphemy) Bill 2019*, was introduced into the Victorian Legislative Council by a crossbench parliamentarian (Fiona Patten of the Reason Party) to abolish the offence in that State. Beyond the private member's own Second Reading Speech, the bill has not progressed and has not been debated. The Victorian Legislative Council's Scrutiny of Acts and Regulations Committee declined to offer any comments on the bill.³⁰ The bill looks likely to lapse when the Victorian Parliament is dissolved for a general election in November 2022. There does not appear to have been any recent action on the subject of blasphemy in other Australian jurisdictions.

V CONCLUSION

There is much in the relationship between law and religion in Australia that requires reform, and the continued existence of the crime of blasphemy is one obvious example. Given the general consensus in Australia that blasphemy laws should be abolished, it is curious that that abolition has not happened, especially when opportunities for reform of this area of law have come onto the political agenda such as with the response to the Ruddock Report and the Victorian private member's bill. As one Tasmania parliamentarian put it in 2017, 'it is a crazy situation. I cannot understand why we have not gone through our legislation and brought it up to a contemporary standard.'³¹

²⁸ Tasmanian Law Reform Institute, *Annual Progress and Financial Report 2011* (Report, 2011) 3.

²⁹ Tasmania, *Parliamentary Debates*, Legislative Council, 20 September 2017, 30 (Leonie Hiscutt).

³⁰ Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest* (Digest No 1 of 2020, 5 February 2020) 1.

³¹ Tasmania, *Parliamentary Debates*, Legislative Council, 20 September 2017, 30 (Ivan Dean).