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## FREEDOM OF SPEECH AFTER CHARLIE HEBDO: THE AUSTRALIAN LEGAL AND POLICY FRAMEWORK<sup>1</sup>

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I am honoured by the invitation to speak at this evening's launch of the UTS Law Students' Society's Speaker Series. It is an important public role of universities to provide fora for the discussion of topics of current community interest and I congratulate the Society and the ANU Legal Workshop for bringing us all together tonight. I am delighted to see that UTS is continuing a tradition that began with the symposia of ancient Greece for the discussion to take place in conjunction with a meal. However, I will leave it to the distinguished members of tonight's Q&A panel to decide whether we should have been offered the opportunity of truly emulating the Greeks by reclining on couches rather than sitting in chairs.

The organisers had originally suggested that I should be a member of the Q&A panel. However, it occurred to me that once tonight's discussion really gets under way it will, inevitably and quite properly, become political. I come before you as someone who has accepted a significant limitation on my own exercise of free speech as the price for the great privilege of holding judicial office. Though not to be found in any statute, there is an important restraint on the exercise by judges of their freedom of speech in order to preserve the impartiality and integrity of the

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<sup>1</sup> An address by the Honourable Justice François Kunc to the University of Technology Sydney Law Students' Society's Speaker Series 2015 Launch "A façade of freedom: is there such a thing as free speech?", Queen Victoria Building Tea Room, Sydney, 8 April 2015.

administration of justice.<sup>2</sup> As someone constrained from expressing political views I would have made a dull Q&A panellist. Each of our panellists this evening is someone who I have known and admired for many years. Their participation means that we are in for a treat.

Tonight's discussion will raise questions about, and the potential for collision between, free speech and religious belief. The catalyst for that discussion is the recent Charlie Hebdo incident in France. Given the constraints upon me as a serving judge, the organisers graciously accepted my suggestion that what I could usefully do this evening would be to set out some of the legal and policy framework which might inform this evening's discussion. In fifteen minutes I cannot be comprehensive but I will try to touch on some key points.

Let me begin with five preliminary comments.

First, I will confine myself to the position in Australia. What is acceptable speech in Sydney may or may not be acceptable in China, Senegal, Bolivia or Vatican City.

Second, I wish to state what I hope is obvious to everyone in this room, namely that in Australia we will not countenance resort to physical violence as a response to what some in society consider to be unacceptable speech. The actions of the perpetrators of the Charlie Hebdo incident must be unreservedly condemned.

Third, time does not permit me to investigate the jurisprudential or philosophical bases of what tonight I will refer to as "rights". Any detailed discussion of this topic must take into account what is said to be the origin of such rights, in particular

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<sup>2</sup> E. Campbell, "Judges' Freedom of Speech", (2002) 76 ALJ 499; J. Thomas, *Judicial Ethics in Australia*, 3<sup>rd</sup> edn, LexisNexisButterworths, 2009, Ch 7.

whether they are understood by an appeal to the natural law as inalienable natural rights inherent in our humanity or are nothing more or less than the product of the political process and therefore susceptible to alteration by popular will.

Fourth, statistical evidence suggests that religion will continue to be a significant part of our society well into the future, notwithstanding longstanding predictions of God's imminent demise. Let me give you some local and international statistics, although it must be acknowledged that the statistics tell us nothing about the degree of people's observance of their professed religion.

For Australia we can look at the 2011 census results.<sup>3</sup> While the number of those reporting no religious affiliation increased in the decade to 2011 from 15% to 22% of the population, 77% of Australians reported a religious affiliation in 2011. 61% of the population identified as Christian. The same decade saw non-Christian believers grow from 0.9 million to 1.5 million people. Adherents of Islam comprised 2.2% of the population, just behind Buddhists (2.5%) and ahead of Hindus (1.3%).

On a global scale, the respected Pew Research Centre in the United States last week published a report entitled "The Future of World Religions: Population Growth Projections, 2010-2050".<sup>4</sup> This predicts significant growth in the world Muslim population (and slightly less, but still significant, Christian growth). By 2050 Christians will account for 31% and Muslims 29.7% of the world's total population, with much of that growth being in the developing world. The global percentage of those with no religious affiliation is expected to decrease. One major reason for this

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<sup>3</sup> Australian Bureau of Statistics, Cultural Diversity in Australia, <http://www.abs.gov.au/ausstats/abs@.nsf/lookup/2071.0main+features902012-2013>.

<sup>4</sup> <http://www.pewforum.org/2015/04/02/religious-projections-2010-2050/>.

is that Muslims and Christians have much higher fertility rates than the non-religious (in the case of Muslims 3.1 children per woman compared to 1.7 children per unaffiliated woman).

These statistics are important not least when we recall that, contrary to the wishes of extreme secularists, the legal protection of religion expression continues to have as its object freedom *of* religion rather than freedom *from* religion.

Fifth, just so I can be the first person tonight to say it, let me remind you of the famous saying “I disapprove of what you say, but I will defend to the death your right to say it”. In doing so, I will try to make good my claim of being a judicial purveyor of useful information by telling those of you who don’t know that, contrary to popular belief, the French philosopher Voltaire never said it. It in fact comes from a book written in 1907 called “The Friends of Voltaire” where the author coined the expression to describe an attitude Voltaire adopted to a free speech debate of his time.<sup>5</sup>

My principal observations tonight are in three parts: some general history, an overview of some relevant statutes and common law and, finally, an attempt to tease out some underlying principles.

I will begin with the history.

In keeping with tonight being a successor of the ancient Greek symposia, I should record that one of the earliest assertions of freedom of speech was that attributed by Plato to Socrates at the latter’s trial in 399BC. Socrates famously said that if he was

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<sup>5</sup> S.G. Tallentyre, *The Friends of Voltaire*, (1907). This famous misattribution is discussed in E. Knowles, *What they didn’t say – a book of misquotations*, Oxford University Press, 2006, p 55.

offered an acquittal on the condition that he abandon teaching philosophy he would reply “I shall obey the God rather than you, and while I have breath and am able I shall not cease to pursue wisdom or to exhort you”.<sup>6</sup>

Moving forward 1600 years, in this 800<sup>th</sup> anniversary year of Magna Carta we can note that the famous document, while guaranteeing in Article 1 that “the English Church is to be free”, says nothing about what we would recognise as freedom of speech. Nor does it suggest that anyone should be entitled to express religious views inconsistent with those of the English Church. The importance of Magna Carta for tonight is not what it didn’t say, but rather that it is the first significant constitutional document in the English legal tradition that engages in what today would be called “rights talk”.

The English Bill of Rights of 1689 contains the first reference to the right to freedom of speech in an English constitutional document. Article 9 provided that “*freedom of speech and debates or proceedings in Parliament ought not be impeached or questioned in any court or place out of Parliament.*” While this novel advance gave parliamentarians liberty to speak their mind, ordinary persons enjoyed no such right. The Bill was silent on freedom of religion.

In 1789, the National Assembly of the French Revolution introduced rights in relation to religion (somewhat grudgingly) and freedom of speech for all citizens in what is known as the Declaration of the Rights of Man and Citizen.

Article 10 provided:

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<sup>6</sup> Plato, The Apology in R.E. Allen, Socrates and Legal Obligation, University of Minnesota Press, 1980, p 50.

*No one is to be disquieted because of his opinions, even religious, provided their manifestation does not disturb the public order established by law.*

Article 11 provided:

*The free communication of thoughts and of opinions is one of the most precious rights of man: any citizen thus may speak, write, print freely, except to respond to the abuse of this liberty, in the cases determined by the law.*

Two years later, in 1791, the First Amendment was added to the US Bill of Rights. It famously says that:

*Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.*

As one might expect, the interpretation and application of the First Amendment, including the interaction between free speech and the free exercise of religion, continues to produce a vast, complex and not always coherent jurisprudence.

In the twentieth century, Articles 18 and 19 of the Universal Declaration of Human Rights (1948) and Articles 18 and 19 of the United Nations International Covenant on Civil and Political Rights (1966) (ICCPR) proclaim rights of free speech and free exercise of religion.

The reference to treaties is not entirely academic. Australia is, for example, a party to the ICCPR. While Australia's entry into a treaty does not make it part of Australian law without further Australian statutory enactment, the covenant does have some

limited effect in Australia. For example, in some cases ambiguous Australian legislation will be construed in accordance with obligations under a treaty or international convention to which Australia is a party.<sup>7</sup>

Finally, I should conclude this historical part of my overview by referring to what might have been or could still come. The 2009 National Human Rights Consultation Report noted that its community roundtables bore out the finding of focus groups that the Australian community regards the right to freedom of speech and the right to freedom of religious expression as unconditional and not to be limited.<sup>8</sup> The report recommended that in any future Human Rights Act the freedom from restraint in relation to religion and belief should be identified as a non-derogable civil and political right<sup>9</sup> and that the freedom to manifest one's religion or beliefs and the right to freedom of expression should be included among additional rights in such an act.<sup>10</sup>

I will next consider some of the statutes and common law principles that touch on free speech and religion.

The closest Australia has to a legally guaranteed right of free speech is the right to freedom of political communication that the High Court has found to be implied in the Australian Constitution. In *Lange v Australian Broadcasting Corporation*<sup>11</sup> (a defamation case) the Court crystallised this right in 1997 when it built on its 1994

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<sup>7</sup> *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287 per Mason CJ and Deane J.

<sup>8</sup> Page 345

<sup>9</sup> Page 367

<sup>10</sup> Pages 368-369

<sup>11</sup> (1997) 189 CLR 520

decisions in *Theophanous v Herald & Weekly Times Ltd*<sup>12</sup> and *Stephens v West Australian Newspapers Ltd*.<sup>13</sup> There is a right to freedom of communication on matters of government or political affairs as an indispensable part of representative government. But the right is not absolute and legislation will not be found to infringe the right if the burden it imposes upon communications is reasonably appropriate and adapted to achieving an end, the fulfilment of which is compatible with the system of representation and responsible government.<sup>14</sup>

Turning to Commonwealth statutes, s 18C of the *Racial Discrimination Act* provides:

- (1) It is unlawful for a person to do an act, otherwise than in private, if:*
- (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and*
  - (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.*

Section 18D, however, goes some way to preserving freedom of speech by enumerating various exceptions to the offensive conduct contained in 18C:

- Section 18C does not render unlawful anything said or done reasonably and in good faith:*
- (a) in the performance, exhibition or distribution of an artistic work; or*

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<sup>12</sup> (1994) 182 CLR 104

<sup>13</sup> (1994) 182 CLR 211

<sup>14</sup> *Lange* at 567.



*(b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or*

*(c) in making or publishing:*

*(i) a fair and accurate report of any event or matter of public interest; or*

*(ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.*

Courts have attempted to strike a balance between these two sections on a case by case basis. Whether publications like the Charlie Hebdo cartoons would be caught by s 18C is something that can be discussed tonight, along with Justice Bromberg's well known decision in *Eatock v Bolt*<sup>15</sup> and the recent public controversy over proposed amendments to s 18C. I will confine myself to one observation.

Section 18C(1)(b) refers to "race, colour or national or ethnic origin", but makes no reference to religion. While there is House of Lords authority that in a will a reference to "Jewish parentage" referred to race and not religion<sup>16</sup> it is more difficult to see how followers of Islam could be said to constitute a race.

I should also interpose at this point in relation to Charlie Hebdo that religious vilification is prohibited by s 8 of Victoria's *Racial and Religious Tolerance Act, 2001* (Vic). Section 25 of that act creates the offence of serious racial vilification. However, the defences are in essentially the same terms as s 18D of the Commonwealth Racial Discrimination Act.<sup>17</sup> Thus the distribution of an artistic work (which

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<sup>15</sup> [2011] FCA 1103; (2011) 197 FCR 261

<sup>16</sup> *Clayton v Ramsden* [1943] AC 320

<sup>17</sup> *Racial and Religious Tolerance Act, 2001* (Vic), s 11.

presumably could include a cartoon) done reasonably and in good faith would not constitute religious vilification.

Public order and anti-terrorism legislation seeks to balance the tension between individual rights and the need to protect collective security. Article 18(3) of the ICCPR permits limitations on freedom of religion in circumstances where it is necessary to protect public safety:

*Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.*

Section 80.2A of the Commonwealth Criminal Code makes it an offence to urge violence against a group on the grounds, among other things, of that group's religion. Similarly, Section 80.2C makes it an offence to advocate the doing of a terrorist act where the person is reckless as to whether another person will engage in conduct as a result.

For example, s 80.2A provides:

*“(1) A person (the first person) commits an offence if:*

*(a) the first person intentionally urges another person, or a group, to use force or violence against a group (the targeted group); and*

*(b) the first person does so intending that force or violence will occur; and*

*(c) the targeted group is distinguished by race, religion, nationality, national or ethnic origin or political opinion; and*

*(d) the use of the force or violence would threaten the peace, order and good government of the Commonwealth.*

*Penalty: Imprisonment for 7 years.”*

Provisions such as these directly impact upon freedom of speech and of religion. Similarly, a control order under Division 104 of the Criminal Code prohibits an individual from communicating with specified individuals if it would assist in preventing a terrorist act. The impediment on free speech that necessarily follows is self-evident. Section 104.5 includes:

*“Obligations, prohibitions and restrictions*

*(3) The obligations, prohibitions and restrictions that the court may impose on the person by the order are the following:*

*...*

*(e) a prohibition or restriction on the person communicating or associating with specified individuals;*

*(f) a prohibition or restriction on the person accessing or using specified forms of telecommunication or other technology (including the internet).”*

In August 2014 the Commonwealth government announced further reforms to Australia's terrorism legislation.<sup>18</sup>

At the state level, both Victoria and the ACT have introduced human rights legislation. For example, the Victorian Charter of Human Rights and Responsibilities, found in the *Charter of Human Rights and Responsibilities Act, 2006 (Vic)* came into force on 1 January 2007. While the Charter does not confer significant privately

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<sup>18</sup> Barker, C 'Counter-Terrorism and National Security Legislation Reviews: A Comparative Overview', Parliament of Australia, 7 August 2014

enforceable rights (for example, s 39(3) expressly excludes a right to damages for breach of the Charter), it goes some way to ensuring legislation and governmental action respects the rights it identifies. These include freedom of speech, subject to protecting reputation and national security, and freedom of religion. Sections 14 and 15 provide:

***Freedom of thought, conscience, religion and belief***

*(1) Every person has the right to freedom of thought, conscience, religion and belief, including—*

*(a) the freedom to have or to adopt a religion or belief of his or her choice; and*

*(b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.*

*(2) A person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.*

***Freedom of expression***

*(1) Every person has the right to hold an opinion without interference.*

*(2) Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria and whether—*

*(a) orally; or*

*(b) in writing; or*

*(c) in print; or*

*(d) by way of art; or*

*(e) in another medium chosen by him or her.*

*(3) Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary—*

*(a) to respect the rights and reputation of other persons; or*

*(b) for the protection of national security, public order, public health or public morality.*

Perhaps the most well known restraint on free speech in Australia is provided by the law of defamation. “The common law recognises that people have an interest in their

reputation and that their reputation may be damaged by the publication of defamatory matter about them to others ... A person's reputation may therefore be said to be injured when the esteem in which that person is held by the community is diminished in some respect".<sup>19</sup>

Defamation is a common law tort. State legislation, such as the *Defamation Act 2005, (NSW)*, provides a number of defences including substantial truth or fair reporting.<sup>20</sup>

However, while the law will award damages once a defamation has occurred, it is notoriously difficult to obtain an injunction to restrain a defamatory publication. As the High Court explained in *ABC v O'Neil*<sup>21</sup>, "in the context of a defamation case ... particular attention (must be paid) for the considerations which courts have identified as dictating caution. Foremost among those considerations is the public interest in free speech".

An obscure intersection between free speech and religion is the common law offence of spiritual influence. My researches have not disclosed whether it has ever been used in Australia or can be properly said to form part of the Australian common law.<sup>22</sup> However, it recently obtained some notoriety in the United Kingdom where the Mayor of the London Borough of Tower Hamlets was accused in February of this

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<sup>19</sup> *Radio 2UE Sydney Pty Ltd v Chesterton* [2009] HCA 16; (2009) 238 CLR 460 at 466 per French CJ, Gummow, Kiefel and Bell JJ.

<sup>20</sup> See *Defamation Act 2005 (NSW)* Part 4 Division 2.

<sup>21</sup> (2006) 227 CLR 57 at [19].

<sup>22</sup> For example, Part XXI of the *Commonwealth Electoral Act, 1918 (Cth)* dealing with electoral offences makes no specific reference to threatening an elector with supernatural consequences.

year of securing his re-election by instructing Muslim persons that it was their religious duty to vote for him.<sup>23</sup>

In the United Kingdom the offence of spiritual influence is legislated against in the *Representation of the People Act 1983*, s 115(2) which provides:

*(2) A person shall be guilty of undue influence—*

*(a) if he, directly or indirectly, by himself or by any other person on his behalf, makes use of or threatens to make use of any force, violence or restraint, or inflicts or threatens to inflict, by himself or by any other person, any temporal or spiritual injury, damage, harm or loss upon or against any person in order to induce or compel that person to vote or refrain from voting, or on account of that person having voted or refrained from voting; or...*

Turning more specifically to religious freedom, s 116 of the Australian Constitution ensures that *“the Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.”*

Now is not the time for a lecture in s 116 jurisprudence, but I note that Professor Carolyn Evans in her book *“Legal Protection of Religious Freedom in Australia”*<sup>24</sup> observes that s 116 *“has been given a limited meaning”*.

The *Human Rights Commission Act 1986 (Cth)* does not make discrimination on the basis of religion unlawful as such (as it does with discrimination on other bases, such

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<sup>23</sup> D. Kennedy *“Muslims told to “Vote for Mayor or be Damned”*, *The Times*, 20 August 2014

<sup>24</sup> *The Federation Press*, 2006 at p 141

as race and sex). Some protection at the Commonwealth level is given against discrimination on the basis of religion in the *Fair Work Act 2009 (Cth)*, for example s 351:

**Discrimination**

*(1) An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.*

*Note: This subsection is a civil remedy provision (see Part 4-1).*

*(2) However, subsection (1) does not apply to action that is:*

*(a) not unlawful under any anti-discrimination law in force in the place where the action is taken; or*

*(b) taken because of the inherent requirements of the particular position concerned; or*

*(c) if the action is taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed--taken:*

*(i) in good faith; and*

*(ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed...*

However, outside the area of employment, Professor Evans points out<sup>25</sup> “there is no general protection under Commonwealth law to protect people from being discriminated against on the basis of their religion or belief, despite a recommendation by the Australian Human Rights Commission to introduce one.”

Most Australian states prohibit discrimination on the basis of religion, with the exception of New South Wales (which rejected the recommendation of its own Law

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<sup>25</sup> Id.

Reform Commission on this point) and South Australia. Discrimination on the basis of religious belief is prohibited in at least some circumstances in the Australian Capital Territory, the Northern Territory, Queensland, Tasmania, Victoria and Western Australia.<sup>26</sup>

Finally in relation to legal principles I should note the rule of statutory interpretation that “courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment”.<sup>27</sup>

So what does all this tell us about the underlying principles that might inform our discussion tonight? Painting with a very broad brush, I suggest that the statutes and common law to which I have referred are shaped by three basic principles: the primacy of autonomy, the rejection of self-help and the preference for proportional rather than majoritarian response.

Those principles may be expanded into the following seven propositions:

1. Human beings are not chattels or objects but autonomous beings possessed of free will.
2. Human beings flourish in an environment of social order characterised by peace which includes physical and economic security.

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<sup>26</sup> Ibid, p 142

<sup>27</sup> *Al-Kateb v Godwin* [2004] HCA 37; (2004) 219 CLR 562 at [19] per Gleeson CJ.



3. Individuals have given up the possibility of seeking redress for their grievances by self-help in return for regulation and protection by the State.
4. The State is responsible for maintaining social order and, in doing so, is entitled to infringe upon the autonomy of individuals.
5. The assertion of rights such as free speech and freedom of religion are assertions of individual autonomy.
6. The justifiable extent of the State's infringement of an individual's autonomy in any particular case will depend upon and must be proportional to the degree to which a person's exercise of their autonomy threatens social order by harming another citizen or the State itself. I acknowledge that referring to "harm" at this level of generality disguises the most difficult area in the debate about free speech and religion – how serious and direct should the harm be? Preventing murder in the name of defending religion is one thing. But is the offence felt by a devout Catholic at Jean-Luc Godard's 1985 film "Hail Mary" a sufficient harm to justify banning the movie? Where to draw the line is not always easy, especially when, as Justice Sackville recently observed, "in Australia, so it appears, incivility and free speech are inseverable."<sup>28</sup>
7. The principle of autonomy requires respect for the rights of those who hold unpopular or minority views. That is why the legitimate infringement of minority rights is determined by reference to proportionality rather than the assertion of the view of the majority. In other words, someone's free speech is not automatically curtailed just because most people disagree with it.

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<sup>28</sup> The Hon Justice R Sackville, "Lawyers and judges: the fifth attribute" (2015) 12 (2) TJR 187 at 196.

How these propositions might be applied to the Charlie Hebdo cartoons I will leave for you to discuss. However, they may also cast light on how society should deal with the increasing impact of social media on free speech. Time and circumstances mean I can do no more than raise the issue and invite discussion. Let me give two examples.

Earlier this year the New York Times Magazine featured a story entitled “How One Stupid Tweet Blew Up Justine Sacco’s Life”.<sup>29</sup> The start of the story will give you the flavour:

*“As she made the long journey from New York to South Africa, to visit family during the holidays of 2013, Justine Sacco, 30 years old and the senior director of corporate communications at IAC, began tweeting acerbic little jokes about the indignities of travel. There was one about a fellow passenger on a flight from John F Kennedy International Airport:*

*“Weird German Dude: You’re in First Class. It’s 2014. Get some deodorant” Inner monologue as I inhale BO. Thank God for pharmaceuticals.”*

*Then, during her layover at Heathrow:*

*“Chilly – cucumber sandwiches – bad teeth. Back in London!”*

*And on December 20, before the final leg of her trip to Cape Town:*

*“Going to Africa. Hope I don’t get AIDS. Just kidding. I’m white!”*

*She chuckled to herself as she pressed send on this last one, then wandered around Heathrow’s international terminal for half an hour, sporadically checking her phone. No one replied, which didn’t surprise her. She had only 170 Twitter followers.*

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<sup>29</sup> New York Time Magazine, 12 February 2015.

You can guess how this story ends. By the time her plane landed in Cape Town eleven hours later a hashtag had begun to trend worldwide #HasJustineLandedYet. Tens of thousands of angry tweets were sent in response to her comment. One included “We are about to watch this @JustineSacco bitch get fired. REAL time. Before she even KNOWS she’s getting fired”. The article goes on to describe how she lost her job and, among other things, ended up going as far as she could from America by taking volunteer employment for an NGO based in Addis Ababa, Ethiopia.

Closer to home is last year’s incident concerning the Georgian opera singer Tamar Iveri, who had been retained by Opera Australia. A homophobic post was found on her Facebook page. A huge social media campaign ensued not only by patrons of Opera Australia but also by Opera Australia’s commercial sponsors, who had themselves become the target of social media criticism for their association with a company that was associated with Ms Iveri. Despite her issuing a fulsome apology, Opera Australia “released” her from her contract.<sup>30</sup>

These examples, and others like them, raise a serious issue for the contemporary discussion about free speech. Referring to the principles I have identified, there is a strong argument that the responses through social media to these incidents completely disregard the autonomy of the speaker, are a resort to self-help, are not proportionate to the offence caused and represent a majoritarian triumph over a minority view. On this analysis such social media campaigns are the internet’s version of the lynch mob.

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<sup>30</sup> “Opera Australia Sacks soprano Tamar Iveri over gay slurs”, Sydney Morning Herald, 23 June 2014.

In legal terms these are two contemporary examples of an old dilemma as to how far the law should protect an unpopular speaker from what appear to be unjust and disproportionate consequences. In the absence of such protection, it might be argued that the right of free speech is worth very little indeed. Does it force the holders of minority or unpopular views into the same world of “don’t ask, don’t tell” that is now discredited in relation to sexuality? These examples and the dilemmas they raise only serve to demonstrate how much there is to discuss tonight.

I will leave you with two final observations.

First, in most matters of social policy the law is a follower rather than trendsetter. While frustrating for some, I suggest that is both necessary and desirable. What is acceptable speech one day may not be acceptable the next, but the process is rarely clear cut. Legislation in areas such as this must reflect a substantial societal consensus. Otherwise, the least worst outcome is that such laws will be ignored. The worst outcome is that they will incite violent or other unlawful responses.

Second, and most importantly, even among people of good will discussion about free speech and religion can quickly become emotional and disrespectful. The emotion renders speech incoherent and unpersuasive. The disrespect destroys the charitable openness to the other’s viewpoint without which meaningful dialogue on social issues is impossible.

Our topic tonight demands reason, respect and courtesy. I therefore conclude with this suggestion. Before any of us rushes to support the prohibition of the public expression of any particular opinion by someone else, we should stop to ask

ourselves this question: how would I feel if it was some deeply held belief of mine that someone was telling me I could not publicly share or express?

Like all of you, I am very much looking forward to this evening's discussion.