IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE
CRIMINAL DIVISION

Revised
Not Restricted
Suitable for Publication

Case No. AP-17-2306

BLAIR COTTRELL — Appellant

v

ERIN ROSS — Respondent

JUDGE:	HIS HONOUR CHIEF JUDGE KIDD
WHERE HELD:	MELBOURNE
DATE OF HEARING:	11, 12, 13 and 14 November 2019
DATE JUDGMENT:	19 December 2019
CASE MAY BE CITED AS:	Cottrell v Ross
MEDIUM NEUTRAL CITATION:	[2019] VCC 2142

REASONS FOR JUDGMENT

Subject:	Criminal law – Appeal against conviction from Magistrates' Court.
Catchwords:	Charge of serious religious vilification – Video of an Islamic style mock-beheading - Construction of s 25(2) of the *Racial and Religious Tolerance Act 2001* – How s 25(2) is to be construed in light of the rights under the *Charter of Human Rights and Responsibilities 2006* - Whether s 25(2) is constitutionally valid – Determination of appeal against conviction.
Legislation Cited:	*Racial and Religious Tolerance Act 2001,* ss 1, 4, 7, 8, 9, 25; *Charter of Human Rights and Responsibilities 2006*, ss 7, 14, 15, 18, 32; Australian Constitution.
Cases Considered:	*Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* (2006) 15 VR 207; *Momcilovic v The Queen* (2011) 245 CLR 1; *Slaveski v Smith* (2012) 34 VR 206; *Magee v Delaney* (2012) 29 VR 50; *Clubb v Edwards* (2019) 93 ALJR 448; *Jones v Scully* (2002) 120 FCR 243; *Sunol No 2* (2012) (2012) 289 ALR 128; *Owen v Menzies* (2012) 293 ALR 571; *Durston v Anti-Discrimination Tribunal* (No 2) [2018] TASSC 48; *McCloy v New South Wales* (2015) 257 CLR 178; *Coleman v Power* (2004) 220 CLR 1; *Brown v Tasmania* (2017) 261 CLR 328; *Fraser v County Court of Victoria* (2017) 265 A Crim R 421.
Judgment:	Section 25(2) of the *Racial and Religious Tolerance Act 2001* is constitutionally valid. The appellant is convicted and fined $2000.

APPEARANCES:	Counsel	Solicitors
For the Appellant	Mr J Bolton	
For the Respondent	Ms J Watson (hearing) Ms F Dalziel QC (judgment)	Abbey Hogan Acting Solicitor for Public Prosecutions
For the Intervener (Attorney-General of Victoria)	Mr L Brown, with Ms R Amamoo	Marlo Baragwanath Victorian Government Solicitor

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HIS HONOUR:

INTRODUCTION

1 At the Melbourne Magistrates' Court on 5 September 2017, Mr Cottrell – the appellant - was convicted of a charge of knowingly engaging in conduct with the intention of inciting serious contempt for, or revulsion or severe ridicule of, another person or class of persons, namely Muslims, on the ground of their religious belief or activity, contrary to section 25(2) of the *Racial and Religious Tolerance Act 2001* ('RRT Act')[1]. The appellant was convicted and fined $2000.

2 The appellant has appealed against his conviction in relation to this charge.[2]

3 The respondent's case was that the conduct engaged in, with the relevant intent, was the participation by the appellant in an 'Islamic style' mock-beheading involving a mannequin, while being videoed. The mock execution occurred outside the Bendigo City Council offices on 4 October 2015.

4 This video was published on the Facebook page of the United Patriots Front ('UPF'). The appellant was a leader of this organisation at the relevant time. The video was used to promote a rally or protest, which was to be held approximately a week later, against a proposal of the Bendigo City Council for a Mosque to be built in Bendigo.

5 The appellant acknowledges that he did participate in the mock execution knowing that it was being filmed and would be published on the internet. However, the appellant's case was that he did not participate in the filmed mock-execution with the requisite intention under s 25(2). It is perhaps more accurate to characterise the appellant's case that the respondent has failed to prove, beyond reasonable doubt, that he had the requisite intention.

6 Further, the appellant also contends that s 25(2) of the RRT Act is

1 Charge 3 on this appeal.

2 Pursuant to s254 of the *Criminal Procedure Act 2009*.

constitutionally invalid because it infringes the implied freedom of political communication.

7 The Attorney-General of Victoria ('the Attorney') intervened in relation to this constitutional question and in relation to questions which have been raised under the *Charter of Human Rights and Responsibilities 2006* ('The Charter').

8 For the reasons which follow, I have found that s 25(2) of RRT Act is constitutionally valid.

9 Having considered all of the evidence, I have also found the charge brought by the respondent under s 25(2) of RRT Act is proved against the appellant.

10 I publish my written reasons.

PART 1 - LEGISLATIVE CONTEXT AND PURPOSE

Overview

11 The text, context, purpose and scope of s 25(2) of the RRT Act bear upon a number of issues which require resolution in this hearing.

12 I am required to construe s 25(2) for the purpose of determining the appellant's criminal liability. Of course the starting point for the construction of s 25(2) is the text of the provision itself, but this must be considered in light of its context and purpose, including the legislative context.[3]

13 I must also construe s 25(2) of the RRT Act having regard to the rights protected under the Charter.

14 The constitutional argument in relation to the implied freedom of political communication also require me to construe the operation and effect of s 25(2) and to identify its legislative purpose. That is to be arrived at by the ordinary processes of statutory interpretation[4] 'and therefore according to the text of the statute considered in context, informed by the mischief to which it is directed

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3 *Project Blue Sky Inc & Ors v Australian Broadcasting Authority* (1998) 194 CLR 355, [69].
4 *Unions NSW v New South Wales* (2013) 252 CLR 530, [50].

and having regard to relevant extrinsic materials'.[5]

15 It is therefore convenient to first examine the legislative context, the extrinsic materials and some central construction issues.

Legislative context

16 The RRT Act's Preamble states that:

> 1 The Parliament recognises that freedom of expression is an essential component of a democratic society and that this freedom should be limited only to the extent that can be justified by an open and democratic society. The right of all citizens to participate equally in society is also an important value of a democratic society.
>
> 2 The people of Victoria come from diverse ethnic and Indigenous backgrounds and observe many different religious beliefs and practices. The majority of Victorians embrace the benefits provided by this cultural diversity and are proud that people of these diverse ethnic, Indigenous and religious backgrounds live together harmoniously in Victoria.
>
> 3 However, some Victorians are vilified on the ground of their race or their religious belief or activity. Vilifying conduct is contrary to democratic values because of its effect on people of diverse ethnic, Indigenous and religious backgrounds. It diminishes their dignity, sense of self-worth and belonging to the community. It also reduces their ability to contribute to, or fully participate in, all social, political, economic and cultural aspects of society as equals, thus reducing the benefit that diversity brings to the community.
>
> 4 It is therefore desirable that the Parliament enact law for the people of Victoria that supports racial and religious tolerance.

17 The express purposes of the RRT Act are to 'promote racial and religious tolerance by prohibiting certain conduct involving the vilification of persons on the ground of race or religious belief or activity' and to 'provide a means of redress for the victims of racial or religious vilification'.[6]

18 The RRT Act also sets out its objects in s 4(1) as follows:

> (a) to promote the full and equal participation every person in a society that values freedom of expression and is an open and multicultural democracy;
>
> (b) to maintain the right of all Victorians to engage in robust discussion of any matter of public interest or to engage in, or comment on, any form of artistic expression, discussion of religious issues or academic debate where such discussion, expression, debate or comment does not vilify or marginalise any person or class of persons;
>
> (c) to promote dispute resolution and resolve tensions between persons who

5 *Clubb v Edwards* (2019) 93 ALJR 448, [257].

6 Section 1 of the RRT Act.

> (as a result of their ignorance of the attributes of others and the effect that their conduct may have on others) vilify others on the ground of race or religious belief or activity and those who are vilified.

19 The RRT Act states that it 'is the intention of the Parliament that the provisions of this Act are interpreted so as to further the objects set out in [s 4(1)]'.[7]

20 The RRT Act provides a scheme for addressing racial and religious vilification, with escalating seriousness of consequences to address escalating seriousness of conduct. The Act provides for a non-criminal statutory remedy for certain conduct amounting to 'unlawful vilification' where proof of intent is not required (Part 2 and Part 3, which includes s 8) and for criminal sanctions for 'serious vilification offences' where the perpetrator intends to engender extreme feelings in their audience (Part 4, including s 25(2)).

Extrinsic materials

21 During the parliamentary debates concerning the *Racial and Religious Tolerance Bill* in 2001 ('the Bill'), the then Premier observed that the Bill had a 'long gestation' that commenced with a (different) Bill in 1992.[8]

22 The Discussion Paper and Model Bill that was published by the state government in December 2000 (which was directed to both racial and religious vilification) stated that:[9]

> Serious harm is inflicted on people by racial and religious vilification. The Government will develop a community education campaign about this issue and intends to legislate to promote racial and religious tolerance by making it unlawful to vilify people on the basis of their race or religion.
>
> The proposed legislation will recognise that freedom of speech carries with it a responsibility to respect the rights of other people, such as the right to participate in the community without harassment.

23 The Discussion Paper to the Model Bill[10] noted that religious (and racial) vilification is 'seriously undermining cohesion in our society'[11] and harms:

> Individuals and their ethnic and religious communicates. For some people the emotional distress and psychological damage caused by such acts can manifest in

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7 Section 4(2) of the RRT Act.

8 Victoria, Legislative Assembly, *Parliamentary Debates*, 5 June 2001, 1667 (Mr Bracks). See also, Victoria, Legislative Council, *Parliamentary Debates*, 13 June 2001, 33 (Hon C. A. Furletti).

9 *Racial and Religious Tolerance Legislation: A Discussion Paper and a Model Bill* December 2000, (Vic) p.8.

10 *Racial and Religious Tolerance Legislation: A Discussion Paper and a Model Bill* December 2000, (Vic).

11 *Racial and Religious Tolerance Legislation: A Discussion Paper and a Model Bill* December 2000, (Vic) p.6.

> physiological symptoms such as post-traumatic stress disorder.
>
> For others, the results of experiencing racial or religious vilification can undermine important elements of how they conduct their daily life. [12]

24 It noted it was the Government's intention 'to strike a balance between freedom of speech and freedom from harassment and intimidation'.[13] The Discussion Paper foreshadowed the possibility of criminal offences[14] that 'would only be applied to vilifying conduct of a particularly serious nature'.[15] It noted that criminal sanctions was one way to respond to such vilification, additional to civil proceedings and conciliation.[16]

25 In the second reading speech of the Bill, the Premier stated that the Victorian Government took 'particular care' in relation to the 'implications for free speech', and that the Bill was not intended 'to target trivial comment, impolite remarks or legitimate discussion'.[17]

26 The then Premier acknowledged the importance of freedom of expression in our democratic society and 'the operation of democratic values such as the equal participation of every citizen in our society'.[18]

27 The then Premier stated that the Bill is 'confined to prohibit only the *most noxious* form of conduct which incites hatred or contempt for a person or group on the basis of their race or religion'.[19] The intention being that the appropriate balance with freedom of expression was struck by the imposition of liability upon 'the most repugnant behaviour which actively urges and

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12 *Racial and Religious Tolerance Legislation: A Discussion Paper and a Model Bill* December 2000, (Vic) p.6.

13 *Racial and Religious Tolerance Legislation: A Discussion Paper and a Model Bill* December 2000, (Vic) p.17.

14 The Model Bill attached to the Paper, included an offence for vilification on the ground of race (cl 4) and an offence for vilification on the ground of religious belief or activity (cl 5).

15 *Racial and Religious Tolerance Legislation: A Discussion Paper and a Model Bill* December 2000, (Vic) p.20.

16 *Racial and Religious Tolerance Legislation: A Discussion Paper and a Model Bill* December 2000, (Vic) p.20. Many of these findings, and conclusions and recommendations can be found in the earlier *Racial Vilification in Victoria: Report of the Committee to advise the Attorney-General on Racial Vilification* (March 1992). While this earlier report was directed to racial vilification, it is plain, when all these materials are read together, that there is an obvious overlap between racial and religious vilification.

17 Victoria, Legislative Assembly, *Parliamentary Debates*, 17 May 2001 (Mr Bracks),p. 1285.

18 Victoria, Legislative Assembly, *Parliamentary Debates*, 17 May 2001 (Mr Bracks), p.1285.

19 Victoria, Legislative Assembly, *Parliamentary Debates*, 17 May 2001 (Mr Bracks), p.1285 (Emphasis added).

promotes hate'.[20]

28 The then Premier later observed that it is 'important that the Parliament state that extreme behaviour which has no regard for the rights of others to participate in society is unacceptable'.[21]

29 In the Second Reading Speech to the Bill in the Legislative Council, the Minister for Industrial Relations made similar observations. She said, when discussing the impact of abuse against ethnic or religious groups in Victoria:

> The effect of this abuse is substantial. Victims feel the loss of reputation and a sense of not belonging to the broader community. Society, as a whole, is the loser from their reduced participation.[22]

30 The Minister emphasised that care had been taken to limit the impact of the legislation on freedom of expression by confining the prohibition to the most serious conduct:[23]

Specific constructional issues on s25(2)

31 Section 25(2) of the RRT Act provides that:

> A person must not, on the ground of the religious belief or activity of another person or class of persons, knowingly engage in conduct with the intention of inciting serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.
>
> Note
>
> **Engage in conduct** includes use of the internet or email to publish or transmit statements or other material.

32 'Religious belief or activity' is defined in s 3 of the Act:

> **religious belief or activity** means—
>
> (a) holding or not holding a lawful religious belief or view; engaging in, not engaging in or refusing to engage in a lawful religious activity.

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20 Victoria, Legislative Assembly, *Parliamentary Debates*, 17 May 2001 (Mr Bracks), p.1286.

21 Victoria, Legislative Assembly, *Parliamentary Debates*, 17 May 2001 (Mr Bracks), p.1286.

22 Hon. M M Gould, Minister for Industrial Relations, Second Reading Speech, Racial and Religious Tolerance Bill, Legislative Council, Hansard (7 June 2001) pp. 1215-1216.

23 Hon. M M Gould, Minister for Industrial Relations, Second Reading Speech, Racial and Religious Tolerance Bill, Legislative Council, Hansard (7 June 2001) pp. 1215-1216.

33 In its constituent elements, s 25(2) requires that the person must not:

- on the ground of the religious belief or activity of another person; or class of persons;[24]
- knowingly engage in conduct;
- with the intention of inciting;
- serious contempt for, or revulsion or severe ridicule of;
- that other person or class of persons.

34 The argument before me has raised several discrete points of construction which warrant examination.

35 On an ordinary and plain reading of s 25(2), its operation is limited to serious vilification. This corresponds with the heading to Part 4 of 'Serious Vilification Offences'.

36 The words 'serious contempt[25] for, or revulsion[26] or severe ridicule[27] of' should be given their natural and ordinary meaning. The words and phrases describe the strongest possible (or extreme) feelings of dislike.[28] In this way, the criminal offence is 'specified to apply only to the most extreme behaviour' intended to cause those extreme feelings.[29]

37 Importantly, contempt is preceded by the qualifying words 'serious' and

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24 In this case the intended incitement is alleged to have made against a class of persons. For the sake of ease of comprehension, I shall hereafter refer only to the class of persons.

25 Contempt is defined in the New Shorter Oxford English Dictionary, Oxford University Press (1993) as: **1** The action of scorning or despising; the mental attitude in which something or someone is considered as worthless or of little account. **2** The condition of being held worthless or of being despised; dishonour, disgrace. … **4** A scornful or disrespectful act; *esp.* an act in contempt of a court of law. **5** An object of contempt.

26 Revulsion is defined in the New Shorter Oxford English Dictionary, Oxford University Press (1993) as: … **3** A sudden violent change of feeling; a strong reaction in taste; abhorrence, repugnance; a sense of loathing.

27 Ridicule is defined in the New Shorter Oxford English Dictionary, Oxford University Press (1993) as: **1** A ridiculous or absurd thing, characteristic, or habit; an absurdity. Now *rare*. **2** Subjection to mocking and dismissive language or behaviour; the action or practice of ridiculing a person or thing; mockery, derision. **3** Ridiculous nature or character (*of* a thing), ridiculousness; that which is ridiculous. **4** A piece of derisive mirth or light mockery. **ridicule** / *v.t.* Subject to ridicule or mockery; make fun of, deride, laugh at. Formerly also (rare), make ridiculous.

28 Confirmed by Explanatory Memorandum of the Racial and Religious Tolerance Bill 2001 (Vic), 2, 9.

29 Confirmed by Explanatory Memorandum of the Racial and Religious Tolerance Bill 2001 (Vic), 3.

ridicule is preceded by the word 'severe'. Unlike the emotional response of 'ridicule' and 'contempt', there is no modifier for the emotion 'revulsion'. It seems to me that this recognises that the severity or level of feelings of 'ridicule' or 'contempt' might vary, from slight to extreme. The emotion of 'revulsion' is different. By its very nature, 'revulsion' is already an extreme form of emotional response.

38 In my view, it follows that the offence does not capture mere contempt, distaste and ridicule. I reject the appellant's suggestion, for example, that the section will capture 'seriously unkind' conduct or 'bad thoughts'. Such arguments ignore the plain words of the statutory text, and the relevant legislative context.

39 The main construction point which received attention at the hearing of this appeal concerned the meaning of 'on the ground of the religious belief or activity of another person or class of persons' under s 25(2) and how this interacts with the element of intention to incite one of the emotions.

40 The respondent argued that I should give the same meaning to the phrase 'on the ground of the religious belief or activity of the person or class of persons' when construing s 25(2) as it has been given in relation to s 8 of the RRT Act.

41 To prove a contravention of s 8 it is unnecessary for a complainant to show that the alleged inciter *intended* to vilify or set out with that motivation and purpose.[30]

42 It has been held that the 'on the ground of...' requirement for s 8 relates to the ground on which *the audience* is incited to hatred (or other relevant emotion), rather than to the alleged inciter's motive in engaging in the relevant conduct. It follows that under s 8 the intention of the inciter to incite is irrelevant to the question of liability.

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30 *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* (2006) 15 VR 207 ('*Catch the Fire Ministries*').

43 As Neave J said in *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc*[31]:

> …s.8 of the *Racial and Religious Tolerance Act* determines whether the words or conduct are unlawful ***by reference to their effect on the relevant audience***. To put it another way, the Victorian legislation is not concerned with whether the alleged inciter has been actuated by the religious belief of a person or class of person, ***but with whether the audience was incited to hatred (or other relevant emotion) of another group, because of that groups' religious beliefs***.[32]

44 It remains that the mischief which s 8 is directed towards concerns the effect of incitement on the relevant audience (albeit judged objectively), and not on the intention or motives of the alleged inciter (or person intending to incite). [33] Section 8 is a provision concerned with a resultant harm.

45 Section 9(1) was seen to give statutory force to this construction. It provides - for the purposes of s 8 - that the inciter's motive in engaging in conduct which incites hatred (or other relevant emotion) is irrelevant.[34]

46 There are also good policy reasons for this approach. As Kirby J in *IW v City of Perth*[35] said in relation to anti-discrimination legislation:

> ...it is unsurprising that the weight of authority supports the proposition that it is unnecessary for a complainant to show that the alleged discriminator intended to discriminate or set out with that motivation and purpose. Some doubts have been expressed concerning this opinion....But much discrimination occurs unconsciously, thoughtlessly or ignorantly. It would subvert the achievement of the purposes of the Act if it were necessary for a complainant to establish that the alleged discriminator intended, or had the motive, to discriminate.[36]

47 I turn now to s 25(2).

48 The respondent submits, that as the element 'on the ground of the religious belief or activity of the person or class of persons' is referrable to the impact on the mind of the audience under s 8, the same phrase under s 25(2) should be referrable to the *intended* impact on the mind of the audience.

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31 *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* (2006) 15 VR 207.
32 *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* (2006) 15 VR 207 [141] (emphasis added).
33 *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* (2006) 15 VR 207 [23]-[24], [144].
34 *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* (2006) 15 VR 207 [23]-[24], [144].
35 (1999) 91 ALJR 943.
36 *IW v City of Perth* (1999) 91 ALJR 943, 995.

49 I agree. Intent under s 25(2) requires that the perpetrator *intended* to encourage the audience to be moved by his conduct to serious contempt (or other relevant emotion) *by reason of* the religious beliefs of the victim group.

50 The respondent submitted further (at least initially) that what actually moved or actuated the offender is likely to be irrelevant under s 25(2), just as it is under s 8, and for the same reasons. During the course of oral argument, counsel for the respondent retreated somewhat from this position, acknowledging the conceptual difficulties with attributing the same meaning to common components in s 8 and s 25(2) - given that s 8 is to be approached objectively and attracts civil sanctions, whereas s 25(2) requires proof of subjective intention and attracts criminal liability. Counsel for the respondent also recognised there was an apparent overlap between intention and motive under s 25(2).

51 It seems to me that once it is established that the perpetrator *intended* to encourage the audience to be moved by his conduct to serious contempt (or other relevant emotion) *by reason of* the religious beliefs of the victim group, it almost inevitably follows that the perpetrator was also so moved or actuated to engage in the conduct *by reason of* the religious beliefs of the victim group.[37] It is hard to conceive of a case where that does not follow. The actuating connection is self-evident.

52 If I did need to make a separate determination, I would be minded to say that it was a requirement. Support for this conclusion is found in the structure and purpose of the legislation.

53 Civil liability under s 8 is determined by reference to the (objective) effect on the relevant audience. It is concerned only with the mind of the audience, not the perpetrator's state of mind.

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37 Of course, motive does not require proof that the accused possessed personal feelings of malevolence or animus towards the victim group or their beliefs (though such sentiments will almost always accompany the requisite intention under s 25(2)). The question would be whether the accused set out or was moved to act as he did *because of* the religious beliefs of the victim group. It is this causal link which would matter.

54 By contrast s 25(2) determines whether the words or conduct are criminal not by reference to their effect on the relevant audience (as required by s 8), but by reference to the *state of mind* of the perpetrator.

55 The absence of an equivalent provision to s 9 (which provides that motive is irrelevant in relation to liability under s 8) in relation to s 25(2) further tends to the view that motive is relevant to liability under s 25(2).

56 In this case, I have no doubt that the appellant set out to act as he did *by reason of* the religious beliefs of Muslims. In other words, there is a causal connection between his engaging in the conduct in question (with the intention to incite) and his attitude towards Muslims. It is therefore not really necessary for me to decide if motive must always be elementally attributed to the perpetrator under s 25(2). In this case it is made out.

57 Incite means 'urges, spurs on, stirs up, animates or stimulates', or 'encourage'[38]. There can be no incitement in the absence of an audience.[39] While actual incitement is not required here – *intention to incite* is sufficient – an intent to incite could only be proved if there was an intended audience.

58 I have considered whether s 25(2) requires that the conduct engaged in be capable of inciting the targeted audience to the emotional responses stipulated. In my view, this is not a requirement, given that s 25(2) is concerned with the purported inciter's state of mind or intention, and not with the consequential impact (of the conduct) upon the target audience.

59 That said, in determining whether the purported inciter held the relevant intention to incite, an assessment of whether the conduct was capable of inciting the intended audience might still have some role to play in the consideration of what inferences about intent are available. The more likely that the audience *would have been* incited by the conduct, the easier it may be to infer an intention to incite. The converse is also true. The nature of the

38 *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* (2006) 15 VR 207 [14]-[19], [132], [154]-[159].

39 *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* (2006) 15 VR 207 [14]-[16].

audience will provide the evidential context to the assessment of the intention to incite element. Ultimately, it is the alleged offender's subjective intention which must be proved.

60 'Class' is not defined in the RRT Act. The natural or ordinary meaning of the phrase is that of a 'collection or group of persons who are regarded as having certain common attributes or traits'.[40] The RRT Act contemplates that a class of persons may hold a religious belief or engage in religious activity.

61 The appellant has argued that Muslims are not a class of persons. I disagree.

62 I disagree. In my opinion Muslims are clearly a group of people having an attribute in common, that is, people who follow or practice the religion of Islam. They hold religious beliefs and engage in religious activity.

63 There is direct authority which recognises that persons identified as Muslims are relevantly a class of persons who hold a religious belief or engage in religious activity under the RRT Act.[41]

Some conclusions

64 The following conclusions may be drawn from the legislation itself, and from the extrinsic materials:

- The legislature considered there was a genuine need to address the issue of racial and religious vilification and the harm caused by that conduct in Victoria.

- The social benefits which the legislation seeks to achieve can be readily discerned. Section 25(2) is calculated to:

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40 Explanatory Memorandum of the Racial and Religious Tolerance Bill 2001 (Vic), 9. This accords with the ordinary meaning of the phrase. See also the definition in the *New Shorter Oxford English Dictionary*, Oxford University Press (1993): class / n. …. 4 gen. A group of people or things having some attribute in common; a set, a category.

41 *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* (2006) 15 VR 207.

- Promote religious tolerance;
- Prevent demonstrably harmful conduct that causes physical and psychological harm;
- Prevent the marginalisation of persons on religious grounds and promote the full and equal participation of every person in society;
- Proscribe conduct that diminishes the dignity of members of the community.

- The legislation reflects an earnest and considered attempt by the legislature to balance or weigh the policies of preventing vilification and allowing appropriate avenues of free speech. On its face, it has sought to ensure that any restriction occasioned by s 25(2) on the freedom of expression would be limited only to the extent necessary to prevent that harm (serious vilification), and to achieve those social benefits. In that sense the legislature has strived to tailor s 25(2) to its purpose. I accept the arguments advanced by both the respondent and by the Attorney that the relevant legislative context and Parliamentary Debate reflects that much consideration was given to 'freedom of expression' and 'freedom of speech' before the enactment of the RRT Act.
- The field of operation of s 25(2) is narrow, it being directed only towards the most extreme, obnoxious and intentional forms of vilifying conduct.

65 I will return to these matters when addressing the Constitutional point.

PART 2 - THE CHARTER

Overview

66 I now turn to address the Charter arguments.

67 The Charter Notice was given by the Attorney. It states that a question arises as to the interpretation of s 25(2) of the RRT Act in accordance with the Charter.

68 The Notice further explained that the question that arises is whether the terms 'serious contempt', 'revulsion' and 'severe ridicule' bear their ordinary, or some other narrower meaning, having regard to the 'relevant' Charter rights.

69 The relevant Charter rights identified by the Attorney and the appellant as possibly engaged by s 25(2) of the RRT Act are:

- the right to freedom of expression (s 15);
- the right to freedom of thought, conscience, religion and belief (s 14);
- the right to participate in the conduct of public affairs (s 18).

70 Section 32(1) of the Charter provides that '[s]o far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights'.

71 Where a Victorian legislative provision engages a human right referred to in the Charter, s 32(1) must be considered in conjunction with other relevant principles of statutory interpretation in the process of construing the provision in question.[42] It applies such that '[w]here more than one interpretation of a provision is available on a plain reading of the statute, then that which is compatible with rights protected under the Charter is to be preferred'.[43]

72 Importantly, s 32(1) does not allow the reading in of words which are not explicit or implicit in a provision, or the reading down of words so far as to change the true meaning of a provision.[44] Consequently, if the words of a

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42 *Momcilovic v The Queen* (2011) 245 CLR 1, [50], [684]; *Victoria Police Toll Enforcement v Taha & Ors* (2013) 49 VR 1, [27], [190].

43 *Nguyen v DPP* (2019) 368 ALR 344, [103].

44 *Slaveski v Smith* (2012) 34 VR 206, [20]-[24], [45].

statute are clear, the court must give them that meaning.[45]

73 Section 32(1) thus applies to the interpretation of statutes in the same way as the principle of legality, but with a wider field of application.[46]

74 The appellant does not specifically argue for a particular construction of s 25(2), on the basis of s 32 of the Charter. His principal argument is directed towards the constitutional point involving the implied freedom of political communication.

75 The appellant seems to contend more generally that the ambit of s 25(2) is broad and there is scope to construe it more narrowly to give greater expression to human rights, including the freedom of expression. The appellant's arguments have at least implicitly raised the possibility of the engagement with the relevant Charter rights.

76 More specifically, I have taken the appellant's case to be that the relevant emotions stipulated in s 25(2) should be given a narrower meaning than their ordinary meaning. I have also taken his case to be that s 25(2) should be read down or narrowed so as to exclude political communication or speech, having regard to the Charter rights, though again this seemed to find greater voice within the context of the constitutional argument.

77 Alternatively the appellant argues that the construction of s 25(2), in the light of the Charter, gives the conduct proscribed by the provision a broad ambit. He then appears to base his arguments of unconstitutionality on this purported broad operation of s 25(2)

78 In any case, before I can assess whether s 25(2) effectively burdens the implied freedom in its terms, operation or effect, I am required to construe the ambit of its operation and effect, in the light of the Charter rights.

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45 *Slaveski v Smith* (2012) 34 VR 206, [20]-[24], [45].

46 *Momcilovic v The Queen* (2011) 245 CLR 1, [51], [146](vi), [170], [280], [545]-[546], [565], [574], [684]. In *Slaveski v Smith* (2012) 34 VR 206, [45] the Court of Appeal stated that s 32 applies in the same way as the principle of legality, but has a wider operation.

Section 32 and the threshold question

79 I commence by observing that my ultimate task here is not to assess if the Charter rights have been affected (or to make a finding about compatibility between the impugned legislation and the Charter).

80 My central task rather is to construe the legislation in question (s 25(2) of the RRT Act) having regard to the Charter rights and to the terms of s 32(1) in particular.

81 I have concluded below that s 25(2) of the RRT Act does not engage any Charter rights. If some restrictions on the Charter rights are occasioned by s 25(2) of the RRT Act any such limits are at the very margins, and they are reasonable and justified in law.

82 My most important conclusion is this: even if limits or restrictions on some Charter rights are occasioned by s 25(2) of the RRT Act, this does not result in the narrowing of the operation of s 25(2). In the end, I have concluded that s 32 of the Charter effectively has no bearing on the interpretation which I must give s 25(2).

83 The plain meaning of s 25(2) of the RRT Act is clear. There is no ambiguity. I am already driven to the narrowest construction of s 25(2) having regard to its plain and ordinary meaning, and to its legislative context and purpose. I am further satisfied that the plain construction of s 25(2) gives the greatest operation to the relevant rights (such as the freedom of expression) consistent with its purpose.

84 As the appellant does not specifically argue for a particular construction of s 25(2), on the basis of s 32 of the Charter, the exercise I am engaged in is a little artificial or theoretical. Even allowing for that, there is just no apparent (alternative) constructional choice available here.

85 More specifically, in my view the legislature can be taken to have intended

that s 25(2) would capture only the most serious type of religious vilification speech. As I have indicated above at [35] to [38], the expressions 'serious contempt', 'revulsion' and 'severe ridicule' bespeak of the *strongest* emotional responses which can be anticipated. The provision is narrow in scope, narrowed further by the requirement that intention be proved. In my opinion, it has been deliberately crafted to capture a very narrow range of (intentional) vilifying conduct.

86 It is difficult to identify any meaningful room within which to (further) constrict the meaning of the stipulated emotions, or the provision as whole. Still less is it possible to do this without fundamentally changing the true meaning of provision, or its constituent parts.

87 In my view, to narrow the operation of the provision, so that less conduct is prohibited, would rob s 25(2) of much of its utility, and subvert its intended purpose, namely to punish and deter behaviour which is intended to constitute serious religious vilification.

88 As for a possible suggestion that the provision should be read down to exclude serious vilification, when occurring in furtherance of political expression, this too would involve a re-writing of the provision and an undermining of the legislative purpose. Parliament plainly intended the prohibition of the *extreme* conduct captured by s 25(2) would be without exception. This can be contrasted with s 8 where exceptions are explicitly provided (under sections 11 and 12).

89 To the extent that the appellant argues for a broad interpretation in the light of the Charter rights, that too would, in my view, equally involve a fundamental re-casting of the legislative words and intent, which is impermissible.

90 My conclusion on the construction of s 25(2) effectively disposes of the Charter arguments.

91 In the circumstances, it is not strictly necessary for me to consider the relationship between s 15(2) and (3) or between s 15(3) and s 7(2) of the Charter.

92 Nor is it strictly necessary for me to consider whether s 7(2) of the Charter is relevant to a court's task in construction under s 32(1).[47]

93 However given the overlap between these Charter arguments and the Constitutional arguments, I will express some conclusions I would have reached had I been required to.

Section 15 of the Charter

94 Section 15(2) of the Charter[48] provides that:

> 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.

95 In my view, 'expression' that constitutes religious vilification – especially serious or extreme religious vilification - is excluded from the concept of 'expression' protected by s 15 of the Charter.

96 The concept of 'expression' protected by s 15(2) of the Charter is not unqualified and absolute. As Kyrou J observed in *Magee v Delaney*[49]:

> The very width of the expressive conduct that is potentially capable of falling within s 15(2) of the Victorian Charter suggests that what constitutes a protected form of exercise of the right to freedom of expression must be informed by public policy considerations inherent in the nature of a free and democratic society.[50]

97 His Honour went onto conclude that:

> … public policy considerations are inherent in s 15(2) of the Victorian Charter and limit its application to some forms of expressive conduct, independently of s 15(3). If this were not the case, there would be endless debates about whether acts which

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47 Four members of the High Court in *Momcilovic* (2011) 245 CLR 1 held that s 7(2) was relevant to the process of interpretation under s 32 of the Charter. However, in *Noone v Operation Smile (Australia) Inc* (2012) 38 VR 569, [142], Nettle JA expressed the view that there was no majority view of the High Court on the issue (because Heydon J ultimately found that ss 7(2) and 32(1) were invalid). In Nettle JA's view— in these circumstances it was appropriate to follow the approach adopted by the Court of Appeal in *R v Momcilovic* (2010) 25 VR 436, that s 7(2) only became relevant *after* the meaning of the provision had been established.

48 Section 25(2) of the RRT Act does not purport to interfere with the right to hold an opinion under s 15(1). Section 15(1) of the Charter provides that '[e]very person has the right to hold an opinion without interference'.

49 *Magee v Delaney* (2012) 29 VR 50, [89].

50 *Magee v Delaney* (2012) 29 VR 50, [86].

> are unquestionably antithetical to freedom, democracy and the rule of law that sustain our society fall within the specific terms of s 15(3).[51]

98 In my view, racial and religious vilification speech - especially of an extreme kind – 'is antithetical to the fundamental principles of equality, democratic pluralism and respect for individual dignity which lie at the heart of the protection of human rights'.[52] Such legislation positively promotes people of different religions to participate in public life and discourse, free from vilification.[53]

99 In any event, s 15(3), makes clear that the freedom of expression right is 'not absolute, but is conditional and qualified'.[54]

100 The substantive right to freedom of expression in s 15(2) is subject to reasonable limits or restrictions under s 15(3).

101 If some conduct captured by s 25(2) of the RRT Act is protected expression for the purposes of s 15(2) of the Charter, such conduct would fall at the margins of the concept of 'expression'.

102 Section 15(3) provides that special duties and responsibilities are attached to the s 15(2) right to freedom of expression. It may be subject to lawful restrictions reasonably necessary for the purposes listed in s 15(3)(a) and (b).

103 Any limits or restrictions on the freedom of expression occasioned by s 25(2), are, in my view, reasonably necessary under s 15(3)(a) to respect the rights and reputation of other persons, namely those persons who are victimised by religious vilification. Their rights, which also must be respected, include the Charter right to freedom of expression (s 15(2)), the Charter right to freedom of religion (s 14), the Charter right to take part in public life (s 18) and the

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51 *Magee v Delaney* (2012) 29 VR 50, [89].

52 Alastair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook Co, Second Edition, 2019), p.145-146.

53 See the judicial statements made in support of the proposition that anti-vilification legislation *enhances* and *promotes* the implied freedom of communication. *Sunol v Collier (No 2)* (2012) 289 ALR 128, [89]; *Durston v Anti-Discrimination Tribunal* (No 2) [2018] TASSC 48, [36]-[46], [49]; *Owen v Menzies* (2012) 293 ALR 571, [72].

54 *Magee v Delaney* (2012) 29 VR 50, [103].

Charter right to enjoy his or her culture and to practice his or her religion (s19). Section 15(3)(a) of the Charter is not also confined to restrictions necessary to respect the individual rights conferred by the Charter.[55] Importantly, for present purposes, it extends to rights held by a group.[56]

104 Further, in my view, any limits are also reasonably necessary under s 15(3)(b), for the protection of public order.

105 As to the breadth the concept of the protection of public order, Kyrou J expressed the following views about this in *Magee v Delaney*:[57]

> Section 15(3)(b) contemplates that individual rights may need to be subordinated to the needs of society for the greater public good. This theme is consistent with the preamble, which refers to 'a democratic and inclusive society that respects the rule of law' and states that 'human rights come with responsibilities and must be exercised in a way that respects the human rights of others. [58]
>
> ……..
>
> Without limiting the lawful restrictions that may be reasonably necessary for the protection of public order, they obviously include laws that enable citizens to engage in their personal and business affairs free from unlawful physical interference to their person or property. [59]

106 It seems to me that the concept of protection of public order is sufficiently broad to encompass the discord between various groups in society caused by religious vilification.

107 This means that if the specific internal limitation in s 15(3) operates to reduce the substantive scope of the s 15(2) Charter right, then I would conclude that s 25(2) of the RRT Act does not impose any limits on the freedom of expression under s 15 of the Charter.[60]

108 It may be that the specific internal limitation in s 15(3) does not operate to reduce the substantive scope of the s 15(2) right, but is seen as an indication

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55 *Magee v Delaney* (2012) 29 VR 50[126].

56 *McDonald v Legal Services Commissioner (No 2)* [2017] VSC 89, [43].

57 *Magee v Delaney* (2012) 29 VR 50.

58 *Magee v Delaney* (2012) 29 VR 50, [150].

59 *Magee v Delaney* (2012) 29 VR 50, [151].

60 My primary position is that s 25(2) of the RRT Act does not impose any limits or restrictions on the protected freedom of expression under s 15(2), so there is no need to have resort to s 15(3) of the Charter.

of what might be considered in determining whether any limitations are reasonable and justified under the general limitations provision in s 7(2).[61]

109 Section 7(2) of the Charter provides that:

> A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors….

110 In my view, any limits imposed by s 25(2) of the RRT Act would be justified under s 7(2) of the Charter. I find below, in the context of the constitutional validity argument, that s 25(2) is appropriate and adapted to its legitimate purpose. For the same reasons, any limits or restrictions on the freedom of expression occasioned by s 25(2) are reasonable limits that are demonstrably justified for the purposes of s 7(2).

Sections 14(1) and 18 of the Charter

111 The focus at the appeal hearing was really upon the right to freedom of expression under section 15 of the Charter. I will deal with the rights under sections 14 and 18 of the Charter very briefly.

112 Section 14(1) of the Charter provides that:

> [e]very person has the right to freedom of thought, conscience, religion and belief.

113 Section 14(2) requires that:

> [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.

114 Section 25(2) of the RRT Act is protective of the rights to hold and to practise one's religion or religious belief.

115 Section 25(2) seems to be a provision intended to protect the s 14 Charter right given that it protects freedom of religious expression and observance.

116 I do not accept that conduct that is captured by s 25(2) would be protected by s 14.

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61 *McDonald v Legal Services Commissioner (No 2)* [2017] VSC 89, [36].

117 Respect and tolerance for those of different faiths lies at the heart of s 14.[62] Religious vilification is inimical to these concepts. Far from limiting the rights protected under s 14 of the Charter, s 25(2) of the RRT Act is designed to promote and enhance such rights.

118 It is true that s 14 also embraces beliefs of any kind. In my view, conduct involving serious religious vilification could not be considered a demonstration of a belief that would be protected by s 14. For a belief to come within the scope of s 14 it must, 'be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with fundamental rights of others'.[63] This includes the freedom of religion, centrally protected by s 14 itself, as well as other cultural and religious rights protected by s 19 of the Charter. The concept of "conscience" under s 14 should be understood in the same way.[64]

119 There was some suggestion by the appellant that s 18 of the Charter is relevant to the question of construction of s 25(2) of the RRT Act.

120 Section 18(1) provides that:

> [e]very person in Victoria has the right, and is to have the opportunity, without discrimination, to participate in the conduct of public affairs, directly or through freely chosen representative.

121 The term 'public affairs' is not defined in the Charter, but it is a concept concerned with the exercise of legislative, executive and administrative powers.

122 It may include participation in meetings and other affairs of a local council,[65] and attendance in the public gallery during the conduct of court proceedings.[66]

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62 Alastair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook Co, Second Edition, 2019), 129.
63 *R v AM* (2010) 5 ACTLR 170, [44(v)]. Alastair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook Co, Second Edition, 2019), p.132.
64 Alastair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook Co, Second Edition, 2019), p.132.
65 *Slattery v Manningham City Council (Human Rights)* [2013] VCAT 1869.
66 *R v Chaarani (Ruling No 1)* [2018] VSC 387.

123 Section 18(1) guarantees a person's right to participate in public debate, but this guarantee is not absolute – it is subject to reasonable limitations.[67] It does not protect a right to say or do anything in the course of public debate. Section 25(2) is intended to promote and enhance participation in public affairs of persons or groups who might otherwise be shut out.[68] Further, the reasons which drive me to conclude that freedom of expression (s 15) and freedom of thought, conscience, religion or belief (s 14) do not protect serious religious vilification, equally support the conclusion that the concept of participating in 'public affairs' would not encompass a right to engage in such vilifying conduct.[69]

124 If s 25(2) does limit or restrict the rights under s 14 or s 18 of the Charter, it does so at the very margins. I would find that any limits or restrictions are reasonable limits that are demonstrably justified for the purposes of s 7(2), essentially for the same reasons which have driven me to conclude (within the context of the constitutional argument) that s 25(2) is appropriate and adapted to its legitimate purpose.

PART 3 - THE CONSTITUTIONAL ISSUE

Overview

125 The appellant has challenged the validity of s 25(2) of the RRT Act on the basis that it impermissibly burdens the implied freedom of political communication protected by the Constitution.

126 The respondent and the Attorney both contend that s 25(2) does not impermissibly burden that implied freedom and is valid.

127 The implied freedom of communication on political and governmental matters

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67 Alastair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook Co, Second Edition, 2019), p.172.

68 This is discussed at length below when considering the question of the burden on the implied freedom of political communication.

69 Alastair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook Co, Second Edition, 2019), p.172.

is well-established. It is an incident of the system of representative government established by the Constitution. It places limits on legislative and executive power. It operates as a limitation on the legislative power of the States and of the Commonwealth Parliament.[70]

128 However, the freedom is not absolute and, as a consequence, the limit on legislative power is not absolute.[71]

129 The freedom can be limited by legislation which passes the test for constitutional validity, which has most recently been authoritatively re-stated in *Clubb v Edwards*.[72]

A threshold question

130 There is a threshold question which I must address before I consider whether s 25(2) of the RRT Act burdens political communication.

131 The question is whether the conduct engaged in by the appellant in this case actually involved political communication. I should not be drawn into a consideration of a Constitutional issue, where the facts do not raise it, and where the outcome does not depend upon it. If there was no actual political communication in this case then constitutional adjudication is unnecessary.[73]

132 I am satisfied that the facts in this case sufficiently enliven the constitutional issue. The alleged vilification occurred question in connection with garnering or rallying support for a protest against a decision made by local government. Neither the respondent nor the Attorney suggested I should refrain from addressing the constitutional issue.

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70 For example, *Clubb v Edwards* (2019) 93 ALJR 448, [35].
71 *Monis v The Queen* (2013) 249 CLR 92, [103].
72 *Clubb v Edwards* (2019) 93 ALJR 448, [5].
73 *Clubb v Edwards* (2019) 93 ALJR 448, [131], [328]-[330].

The test

133 Under the test for constitutional validity[74] it is necessary to consider:

(a) Whether s 25(2) of the RRT Act effectively burdens the implied freedom in its terms, operation or effect (the question of **burden**);

(b) If so, whether its purpose is legitimate in the sense that it is compatible with the maintenance of representative government as prescribed by the Constitution (the question of **legitimate purpose**); and

(c) If so, whether s 25(2) is reasonably appropriate and adapted to advance that legitimate object (the question of proportionality). It is, in turn, necessary to consider three aspects of proportionality:

(i) Does s 25(2) have a rational connection to its purpose (**suitability**)?

(ii) Are there other less restrictive means of achieving its purpose (**necessity**)?

(iii) Is there a balance between achieving the purpose of s 25(2) and the negative effect of its limits on political communication (**adequacy on balance**)?

134 Having considered all the written and oral arguments from the parties and the Attorney, I have concluded that s 25(2) of the RRT Act is constitutionally valid.

135 It will become apparent that I have largely adopted the submissions of the Attorney and the respondent (which very substantially overlapped).

136 Rather than addressing each step of the constitutional validity test separately, the appellant mounted a holistic argument as to constitutional invalidity. It is convenient for me to address those arguments in the same manner after I

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[74] Referred to as the '*McCloy* test' after *McCloy v New South Wales* (2015) 257 CLR 178; *Clubb v Edwards* (2019) 93 ALJR 448, [5].

have addressed my findings with respect to each step of the test. It should be then apparent why I have rejected the appellant's arguments.

Question 1 – Does s 25(2) burden the implied freedom?

137 The first question is whether s 25(2), insofar as it prohibits conduct engaged in with the intention to incite one or more of the relevant emotions, effectively burdens the implied freedom in its terms, operation or effect.

138 In *Catch the Fire Ministries*[75] the Court concluded that s 8 of the RRT Act did not effectively burden the freedom of communication about political matters.[76]

139 A question arises as to whether this necessitates the same conclusion with respect to s 25(2).

140 Looked at through a wide lens, the religious vilification conduct captured by s 8[77] is, on its face, broader than the serious religious vilification conduct captured by s 25(2)[78]. Section 8 thus catches a broader range of communications.

141 The Attorney submitted that if s 8 does not burden the implied freedom I am bound to conclude that s 25(2) does not burden the freedom. The reasoning in *Catch the Fire Ministries* applies with even greater force, the Attorney said.

142 Certainly, while sections 8 and 25 are different provisions, the close proximity in subject matter proscribed by each and their similar overall purpose lead me to conclude that it is difficult to see how one would burden the implied freedom, but not the other.

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75 *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* (2006) 15 VR 207.

76 *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* (2006) 15 VR 207. Although not necessary to decide in that case, Nettle JA at [113] considered that s 8 did not effectively burden the implied freedom and Neave JA expressed similar views at [203]-[208].

77 It only needs to be objectively proved, to the civil standard.

78 Liability under s 25(2) depends upon proof of intent, and, as it attracts criminal sanctions, it must be established beyond reasonable doubt. In some collateral respects, however, s 25(2) is wider. Unlike s 8, there does not need to be actual incitement, or impact upon the audience, for liability under s 25(2), and there are also no express justifications under s 25(2).

143 At the very least, *Catch the Fire Ministries* is highly persuasive authority in support of the proposition that s 25(2) does not burden the implied freedom.

144 There are additional reasons to conclude that s 25(2) does not burden the freedom.

145 There are some judicial statements to the effect that vilification legislation of a similar kind in other jurisdictions imposes a burden.[79] However, the preponderance of views in the authorities support the position that anti-vilification or anti-discrimination legislation of this kind does not burden the freedom of communication about government and political matters, but rather promotes civil political discourse.[80]

146 McMurdo P said in *Owen v Menzies*[81] of the impugned anti-vilification provision in that case:

> [It] sets parameters *to enhance communications about government and political matters* in a civilised, diverse democracy which values all its members, irrespective of race, religion, sexuality or gender identity.[82]

147 I would adopt McMurdo P's reasoning, which, in my opinion, applies with even greater force to serious vilification legislation, directed, as it is, to the most extreme forms of vilification conduct. Serious vilification has the capacity to intimidate people from participating in political discourse. Section 25(2) promotes political discourse by allowing those people, who might otherwise be shut out, to engage.

148 I allow that communications involving serious religious vilification may or may not contain political communication. If the preferred mode of political communication is through religious vilification, it may further be accepted this amounts to some theoretical restraint. Nevertheless it does not follow that this

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79 *Sunol v Collier (No 2)* (2012) 289 ALR 128, [42]-[45], [55]; *Jones v Scully* (2002) 120 FCR 243, [239].

80 *Sunol v Collier (No 2)* (2012) 289 ALR 128, [89]; *Durston v Anti-Discrimination Tribunal* (No 2) [2018] TASSC 48, [36]-[46], [49]; *Owen v Menzies* (2012) 293 ALR 571, [72]; *Eatock v Bolt* (2011) 197 FCR 261, [239] where Bromberg J extracts *R v Keegstra* [1990] 3 SCR 697, 764 (iii)

81 *Owen v Menzies* (2012) 293 ALR 571.

82 *Owen v Menzies* (2012) 293 ALR 571, [72] (emphasis added).

amounts to a relevant burden on political communication.

149 As Nettle J stated in in *Clubb v Edwards*[83]:

> The question of whether a law imposes a burden on the implied freedom is thus to be determined according to the law's effect on political communication as a whole rather than on an individual or group's preferred mode of communication. Where a restriction is limited to a preferred mode of communication, it will not infringe the implied freedom unless it significantly compromises the ability of affected persons to engage in political communication and, even then, only if and because it has a significant effect on political communication as a whole.[84]

150 In *APLA Ltd v Legal Services Commissioner (NSW)*[85] Gleeson CJ and Heydon J considered the issue of the preferred mode of communication when determining the constitutional validity of a law prohibiting legal practitioners from advertising:

> The possibility that an advertisement of the kind prohibited by the regulations might mention some political or governmental issue, or might name some politician, does not mean that the regulations infringe the constitutional requirement. The regulations do not, in their terms, prohibit communications about government or political matters. They prohibit communication between lawyers and people who, by hypothesis, are not their clients, aimed at encouraging the recipients of the communications to engage the services of lawyers.[86]

151 In a similar vein, Hayne J observed in the same case:

> …in deciding whether the freedom has been infringed, the central question is what the impugned law does, not how an individual might want to construct a particular communication or (in this case) advertisement. [87]
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> …
>
> But demonstrating that an advertisement which contravenes the impugned regulations can be constructed in a way that contains political commentary, does not show that the regulations constitute a burden on the freedom of communication about government or political matters. The political point can be made if it is shorn of reference to the subjects with which the impugned regulations deal. [88]

152 This reasoning was adopted by Neave JA in *Catch the Fire Ministries*[89] where she stated:

> The mere fact that legislation is capable of restricting communications which

83 *Clubb v Edwards* (2019) 93 ALJR 448.
84 *Clubb v Edwards* (2019) 93 ALJR 448, [247].
85 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322.
86 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, [28].
87 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, [381].
88 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, [382].
89 *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* (2006) 15 VR 207.

> contain some political material is not sufficient to invalidate it. As was made clear in *Cunliffe*, the question of invalidity is not answered 'merely by fastening on to particular instances unless they are of such a nature as to impugn [the legislation] in its entirety or to require the reading down of the legislation or severance of any part'. In my view s.8 does not infringe the implied freedom.[90]

153 Section 25(2) is directed at prohibiting serious vilifying conduct; it is not aimed at stifling political discussion. Therefore, s 25(2) has a very confined operation.

154 Moreover s 25(2) captures only extreme forms of conduct. Section 25(2) deals with *serious* vilification offences. The words and phrases 'serious contempt', 'revulsion' and 'severe ridicule', each describe the strongest possible feelings of dislike.[91] Additionally, the proscription is limited to conduct *intended to incite* the relevant extreme emotions. Significantly, for conduct to be captured by s 25(2), the perpetrator must *intend* that his or her audience develop the one or more of the extreme emotions stipulated in the provision.

155 This leaves 'a very wide ambit of freedom remaining, which permits legitimate comment and robust debate without resorting to conduct of the nature prohibited by the section'.[92]

156 Outside of serious religious vilification, people are otherwise free to communicate with each other and representatives about political matters, and hold governments to account, including in relation to government corruption.

157 Section 25(2) leaves people free to express their views about the religious beliefs or activities of others in any way whatsoever (provided they do so in a manner that is not intended to incite serious contempt, revulsion or severe ridicule). As Nettle JA said in *Catch the Fire Ministries*[93] in relation to s 8 of the RRT Act (which would apply with equal force to s 25(2)):

> …, s.8 does not prohibit statements about religious beliefs *per se* or even statements which are critical or destructive of religious beliefs. Nor

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90 *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* (2006) 15 VR 207, [208].

91 Explanatory Memorandum of the Racial and Religious Tolerance Bill 2001 (Vic), 2, 9.

92 *Durston v Anti-Discrimination Tribunal* (No 2) [2018] TASSC 48, [61], where the Court was dealing with a similar civil prohibition.

93 *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* (2006) 15 VR 207.

> does it prohibit statements concerning the religious beliefs of a person or group of persons simply because they may offend or insult the person or group of persons.[94]
>
> …
>
> … People are free to follow the religion of their choice, even if it is averse to other codes. One need only think of the doctrinal differences which separate the several Christian denominations or the Muslim sects in order to see the point. Equally, people are free to attempt to persuade other people to adopt their point of view. Street corner evangelists are a commonplace example.[95]

158 The individual facts here are illuminating, as to what s 25(2) burdens. The parts of the video dealing with political matters and the call to arms to join the political protest against a decision of the local government are not of themselves prohibited by s 25(2). Those communications are not burdened. The appellant and the others on the video were free to communicate about the local government proposal concerning the Bendigo mosque. What is prescribed is the extent to which the conduct in the video seriously vilifies people based upon their religion. Only those communications are burdened.

159 A law only burdens the implied freedom if it imposes a 'meaningful restriction' on political communication.[96] I accept the arguments advanced by the respondent and the Attorney that if s 25(2) does operate to capture communication which can be described as political, the effect on political communication is incidental, insubstantial and not meaningful.

160 I have concluded that s 25(2) does not burden political communication under the first question.

161 If am wrong about that, I consider that the remaining components of the constitutional test for validity are very plainly satisfied.

Question 2 - Does s 25(2) have a legitimate purpose?

162 The second question is whether the purpose of s 25(2), and the means

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94 *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* (2006) 15 VR 207, [15].

95 *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* (2006) 15 VR 207, [34].

96 *McCloy v New South Wales* (2015) 257 CLR 178, [127].

adopted to achieve that purpose, are compatible with the maintenance of the constitutionally prescribed system of government and the implied freedom of political communication that is an incident of that system. Both the purpose and the manner in which the purpose is achieved must be compatible.[97]

163 An essential step in the compatibility analysis is to identify the purpose of the relevant prohibition in s 25(2). This is to be determined by applying the ordinary principles of statutory interpretation.[98]

164 I have already identified above at [11] to [34] and at [65] the purpose of s 25(2) according to the text, the legislative context and the extrinsic materials.

165 In summary, the purpose of s 25(2) is to promote religious tolerance and prohibit religious vilification[99] to prevent the marginalisation of persons on religious grounds and promote the full and equal participation of every person in in society[100] and to proscribe conduct that 'diminishes the dignity' of members of the community.[101]

166 Section 25(2) gives effect to a judgment on the part of legislature that that there was a genuine need to address the issue of religious vilification. The legislative judgment was made that religious vilification causes psychological and physical harm to individuals, to religious groups and to societal cohesion as a whole in Victoria. It recognises the establishment of criminal sanctions is one way to respond to and supress serious religious vilification.

167 I am able to readily discern the public or social benefits in the legislation, confirmed in extrinsic materials.[102]

168 It seems plain to me that seeking to prevent religious vilification is a legitimate

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97 *Coleman* v Power (2004) 220 CLR 1, [92].
98 *Monis v The Queen* (2013) 249 CLR 92, [95].
99 Section 1(a) of the RRT Act.
100 Sections 4(1)(a) and (b) of the RRT Act.
101 Preamble [3] of the RRT Act.
102 *Clubb v Edwards* (2019) 93 ALJR 448, [71].

end of government.[103] The likely social harm or costs of religious vilification and the likely benefits of religious vilification legislation are self-evident. The sentiments expressed by Bathurst CJ in relation to anti-discrimination legislation in *Sunol v Collier (No 2)*[104] apply with similar force to religious vilification legislation:

> It does not seem to me that debate, however robust, needs to descend to public acts which incite hatred, serious contempt, or severe ridicule of a particular group of persons.[105]

169 The purpose of, inter alia, promoting religious tolerance and prohibiting religious vilification is plainly compatible with the maintenance of the system of representative and responsible government.[106]

170 Preventing the marginalisation of persons based on their religious beliefs and promoting their participation in society through anti-vilification legislation *enhances* that system of representative and responsible government (and is thus compatible with it), by enabling the full and equal participation of members of society as equals.[107]

171 Section 25(2) criminalises conduct which 'diminishes the dignity' of members of the community. Such a purpose is also compatible with our system of government.[108] Recently, the High Court re-emphasised the importance of the dignity of the people within the context of the implied freedom.[109]

172 Having expressed the view that s 8 did not burden the implied freedom, Nettle JA in *Catch the Fire Ministries*[110] went on to conclude:

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103 I discern this just as Bathurst CJ considered it plain to him that seeking to prevent homosexual vilification is a legitimate end of government *Sunol v Collier (No 2)* (2012) 289 ALR 128, [51].

104 *Sunol v Collier (No 2)* (2012) 289 ALR 128.

105 *Sunol v Collier (No 2)* (2012) 289 ALR 128, [52].

106 In relation to religious vilification legislation, namely s 8 of the RRT Act: *Catch The Fire Ministries* (2006) 15 VR 207, [113], [210]. By analogy with anti-vilification legislation generally: *Jones v Scully* (2002) 120 FCR 243, [239]; *Sunol No 2* (2012) (2012) 289 ALR 128, [52], [94]; *Owen v Menzies* (2012) 293 ALR 571, [4], [77], [156]-[157], *Durston v Anti-Discrimination Tribunal* (No 2) [2018] TASSC 48, [53].

107 *Sunol v Collier (No 2)* (2012) 289 ALR 128, [89]; *Durston v Anti-Discrimination Tribunal* (No 2) [2018] TASSC 48, [36]-[46], [49]; *Owen v Menzies* (2012) 293 ALR 571, [72]; *Eatock v Bolt* (2011) 197 FCR 261, [239] where Bromberg J extracts *R v Keegstra* [1990] 3 SCR 697, 764 (iii).

108 *Eatock v Bolt* (2011) 197 FCR 261, [212].

109 *Clubb v Edwards* (2019) 93 ALJR 448, [49]-[51], [60], [82], [85], [98]-[99], [101], [128], [258]-[259], [499].

110 *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* (2006) 15 VR 207.

> But if it did then, based upon the observations of Gleeson, C.J. in *Coleman v. Power*, I consider that it would be appropriate and adapted to serve a legitimate end, namely, the prevention of religious vilification, in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.

173 Neave JA in *Catch the Fire Ministries*[111] reached the same conclusion:

> Even if s.8 does burden political communications (which in my view it does not), it is compatible with the requirements of a representative democracy to place reasonable limits on the freedom to communicate views which incite hatred or other relevant emotions against people because of their religious beliefs.[112]

174 I also so conclude that s 25(2) is compatible with the requirements of our system of representative government.

175 I have reached this conclusion, without the requirement to have specific recourse to the evidence of Professor Paradies.

176 I received the Professor's evidence over objection from the appellant. I determined that that I would receive the evidence under the relevant principles which apply to the reception of sources of material for constitutional adjudication.[113]

177 In the end I found the evidence of the Professor to be merely confirmatory of some of the underlying conclusions I would otherwise have reached under questions 2 and 3. The Professor confirmed there was an overlap between religious vilification and race vilification, the social ills relating to both and the social utility in legislating against both.[114] While in cross examination and re-examination he acknowledged he was not an expert in religion (*per se*), or as expert in religious vilification as he was in race vilification, he maintained there

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111 *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* (2006) 15 VR 207.

112 *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* (2006) 15 VR 207, [210]

113 *Maloney v The Queen* (2013) 252 CLR 168, [351]-[353]; *Thomas v Mowbray* (2007) 233 CLR 307, [620]-[621].

114 Professor Paradies stated that religious vilification causes physical and psychological harm and reduces social cohesion and trust, and stated that legislative reforms are one of many means by which racial and religious vilification can be addressed. Further, anti-vilification laws set community standards for behaviour, by sending an important message to the community about what is unacceptable in society. The Professor said such laws play a 'significant role in preventing religious vilification, in ameliorating its impacts on those targeted through the provision of consequences for perpetrators and in preventing, ameliorating and addressing the wider public harms and social implications that may flow vicariously from acts of religious vilification.

was a relevant overlap between the issues involving both.[115]

178 I wish to emphasise that I would have reached my conclusions anyway, based upon what can be plainly inferred from the legislation (and the extrinsic materials), the Court's knowledge of the society of which it is a part, and the many weighty judicial statements available in relation to like legislation.

Question 3 – Proportionality?

179 In order for s 25(2) to be valid, it must be reasonably appropriate and adapted to its purpose. [116]

180 The answer to that question is assisted by asking three further questions, namely whether the impugned law is:[117]

(a) 'suitable';

(b) 'necessary'; and

(c) 'adequate in its balance'.

181 If each of these further questions is answered 'yes', then the answer to the third question of the Constitutional validity test will be 'yes', and the law will necessarily be valid.

Suitability

182 Whether a law is 'suitable' will depend upon whether there is a rational connection between the legitimate purpose and the means chosen to achieve

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115 In cross examination, he accepted he was not as expert in religious vilification as he was in race vilification. There were no studies which measured the success of legislation to combat vilification. He made allowance for the fact that while race and religion were increasingly being treated in the same way, religion still does not have the same sense of immutability as race. He allowed for the possibility that imprisonment as a sanction might result in a backlash. In re-examination, he clarified that his expertise in racial vilification was relevant to religious vilification, in the sense that religion is increasingly treated as an identity (like race) that is a target of vilification. He confirmed that he was not an expert in religion per se.

116 *Clubb v Edwards* (2019) 93 ALJR 448, [6].

117 *Clubb v Edwards* (2019) 93 ALJR 448,[6], [266].

it.[118]

183 A law will have such a connection where the means adopted by the law are capable of realising the purpose of the provision.[119] The requirement of suitability is almost always satisfied because identification of legislative purpose proceeds on the basis that the legislature is a body that acts rationally and not without any rhyme or reason.[120]

184 In my view, the prohibition of serious religious vilification has a rational connection to the purposes and objects identified in sections 1 and 4 of the RRT Act.[121]

185 Section 25(2) is, therefore, suitable.

Necessity

186 A law may be judged unnecessary in the relevant sense where there is an obvious and compelling alternative, reasonably practicable means of achieving the same purpose that has a 'significantly' less restrictive effect upon the freedom.[122]

187 The means chosen by the legislature to meet a legitimate purpose consistent with the system of representative and responsible government are not to be considered unnecessary, just because the court thinks there is another way of achieving the same objective with arguably less impact on the implied freedom of communication. The Court should not engage in any nuanced assessment of the relative merits of competing legislative models.[123]

188 It is only open to find that a measure selected by the Parliament goes too far in pursuit of its legitimate purpose where there is an obvious and compelling

118 *McCloy v New South Wales* (2015) 257 CLR 178, [2].
119 *Tajjour v New South Wales* (2014) 254 CLR 508, [81].
120 *Clubb v Edwards* (2019) 93 ALJR 448, [472].
121 *Durston v Anti-Discrimination Tribunal* (No 2) [2018] TASSC 48, [56].
122 *Clubb v Edwards* (2019) 93 ALJR 448, [6].
123 *Levy v Victoria* (1997) 189 CLR 579, 598; *Coleman v Power* (2004) 220 CLR 1, [100].

alternative.

189 I have concluded the legislation is necessary.

190 The appellant raises the alternative of the (non-criminal) provision of s 8 of RRT Act.

191 I have concluded that s 8 is not an obvious and compelling alternative to s 25(2).

192 The extrinsic materials show that the legislature considered a number of options to respond to racial and religious vilification. These options included civil sanctions and criminal offences.[124]

193 The apparent policy objectives which supported the selection of a criminal sanction were exposed in the materials[125]:

- The establishment of a criminal offence could provide an additional way of responding to acts of vilification.
- Criminal sanctions would only be applied to vilifying conduct of a particularly serious nature.
- Some individuals or groups are beyond the reach of effective conciliation.
- Offence provisions would allow Police to respond immediately, where civil action is not an effective tool.
- Criminal convictions carry a stigma not usually associated with an adverse decision in a civil case.
- The more severe penalties associated with criminal offences could act

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124 *Racial and Religious Tolerance Legislation: A Discussion Paper and a Model Bill* December 2000, (Vic) p. 20-21 (see under the heading 'Option Two – Civil and Criminal Proceedings').

125 *Racial and Religious Tolerance Legislation: A Discussion Paper and a Model Bill* December 2000, (Vic) p. 20-21.

as a deterrent (specific and general) against possible future offending.

194 In the end, the legislature established a scheme under the RRT Act for an escalating level of response to religious (and racial) vilification of escalating levels of seriousness, no doubt for these very policy reasons.

195 Parliament decided that some vilification conduct warranted a criminal sanction, namely serious vilification, accompanied by intent.

196 It is evident that the criminal penalty or sanction was deliberately chosen in order to achieve a number of objectives that would not be achieved by a civil provision.

197 A criminal sanction (including the level of the punishment) expresses society's disapproval and denunciation of the conduct, and those who perpetrate it, in a manner which cannot always be achieved through civil remedies. Use of a criminal sanction serves the purposes of both specific and general deterrence. It dissuades the offender from repeat offending and aims to discourage potential offenders who are minded to commit similar offences. The purpose is to supress the conduct prescribed, with the result being that the community is better protected.[126]

198 It is generally for Parliament to determine what is necessary for the achievement of the purpose. Parliament gauged that criminal sanctions were necessary - I am unpersuaded that such a sanction is be beyond the range.

199 While there is an overlap between sections 8 and 25(2), there are some meaningful differences. Section 8 concerns religious vilification,[127] whether or not the unlawful vilification was intended, and provides for certain exceptions. The consequences for this conduct are tailored non-criminal statutory remedies only.

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126 Arie Freiberg, *Fox & Freiberg's, Sentencing, State and Federal Law in Victoria*, (Thomson Reuters, 3rd ed, 2014) [3.40]-[3.45], [3.100].

127 Including the incitement of 'hatred'.

200 I accept the arguments of the respondent and the Attorney that s 8 cannot be considered an alternative means of achieving the same objects as the criminal offence created by s 25(2).

201 In any case, I doubt whether s 8 has a less restrictive effect than s 25(2) upon the freedom, let alone a 'significantly' less restrictive effect.

202 I find there is no obvious and compelling alternative to s 25(2) of the RRT Act.

Adequacy on balance

203 To determine whether s 25(2) is adequate in its balance requires:

> a judgment, consistently with the limits of the judicial function, as to the balance between the *importance of the purpose served by the law* and *the extent of the restriction* it imposes on the implied freedom.[128]

204 For the reasons which I have already given above at [137] to [161] (when addressing the question of burden) if s 25(2) does burden the implied freedom, it barely does so. Any burden is insignificant and incidental.

205 Further, for the reasons which I have already given above at [162] to [178], (when addressing the question of legitimate purpose) the purpose served by the law is important.

206 It certainly cannot be said of s 25(2) that it is 'grossly disproportionate'[129] or goes 'far beyond' [130] what was necessary to achieve a legitimate end, or 'manifestly excessively'.[131]

207 The balance is enhanced to some degree by s 25(4) which requires that the Director of Public Prosecutions to act as a gatekeeper in respect of the commencement of any prosecution under s 25(2). The Director is bound to exercise her discretion to prosecute under s 25(4).[132] That is so whether the

128 *Clubb v Edwards* (2019) 93 ALJR 448, [6] (emphasis added).
129 *Clubb v Edwards* (2019) 93 ALJR 448, [266(4)].
130 *Clubb v Edwards* (2019) 93 ALJR 448, [266(4)].
131 *Clubb v Edwards* (2019) 93 ALJR 448, [270]-[272]
132 See the *Policy of the Director of Public Prosecutions for Victoria* (27 March 2019), which assists to ensure that prosecutorial decisions are made according to principled standards.

Director is a public authority for the purposes of the Charter[133], or because of her general prosecutorial function and duties. Section 25(4) does not say anything about the reach of s 25(2), on its face. Section 25(4) provides a protection against improper or indiscriminate prosecutions being brought. If improper or indiscriminate prosecutions were brought, this might have the practical effect of deterring people from engaging in communication. It is one factor – though far from a decisive one – to be weighed in the balance. To some extent this addresses the point that arose in *Brown v Tasmania.*

208 I am satisfied that s 25(2) is adequate in its balance. The purpose of s 25(2) is plainly important and the restriction, if there is one, is limited.

Appellant's holistic constitutional arguments

209 I now turn to more specifically address the appellant's arguments.

210 The appellant placed particular reliance upon *Coleman v Power[134],* especially some statements made by Kirby J. In submitting, that s 25(2) does indeed burden the implied freedom of political communication, the appellant contended that the starting point is that there is a common law right of freedom to do anything, unless it is otherwise regulated by the law, relying upon the following statement of Kirby J

> Because of the common law rule that 'everybody is free to do anything, subject only to the provisions of the law', there is a general freedom of speech under the common law in so far as it has not been lawfully restricted [135].

211 It was argued, by counsel for the appellant, that political discourse of the kind engaged in by the appellant was something which could have been done before the regulation of s 25(2). It followed, therefore, counsel for the appellant argued that the common law freedom concerning political discourse had been significantly burdened.

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133 *Momcilovic v The Queen* (2011) 245 CLR 1, [128] [280]; *Baker v DPP* (2017) 270 A Crim R 318, [54], [132]. Section 38(1) of the Charter makes it unlawful for public authorities to act in a way that is incompatible with human rights or to make a decision that fails to consider relevant rights.

134 *Coleman v Power* (2004) 220 CLR 1, [81], [102], [105], [190], [191], [193], [198]-[199], [226], [238]-[239], [254].

135 *Coleman v Power* (2004) 220 CLR 1, [253].

212 As I apprehend the appellant's case, he also argues that the conduct prescribed by s 25(2) is akin to the proscription of mere insult, which so troubled the High Court in *Coleman v Power*[136]. Specifically, he places reliance on what Kirby J said in further highlighting the extent to which s 25(2) burdened the implied freedom:

> From its earliest history, Australian politics has regularly included insult and emotion, calumny and invective, in its armoury of persuasion. They are part and parcel of the struggle of ideas.[137]

213 To illuminate the effect of the operation of s 25(2), counsel for appellant submitted that, as in the case of *Brown v Tasmania*[138], I should look to how s 25(2) has operated in the case of the appellant and how it has burdened the appellant.

214 Further, it was argued by counsel for the appellant that I should give a construction to s 25(2) of the RRT Act which ensures that it does not capture political speech where it touches on religion. More specifically, the appellant contends that racial identity is an immutable fixed characteristic, whereas, a person's religious identity is, at least to some degree, a matter of choice.[139] I apprehended the appellant to contend that religion intrinsically cuts across political discussion in a way that race does not. This affects the construction I must give s 25(2), which, according to the appellant's argument, involves greater intrusion into political communication than race vilification laws.

215 In effect, I should read s 25(2) to have a political discourse exception. I think the appellant was suggesting that I should read it narrowly in a similar vein to the approach taken in *Coleman v Power* in relation to the prohibition on the use of offensive and insulting words.

216 It was submitted, by counsel for the appellant, that the burden of s 25(2) in the

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136 *Coleman v Power* (2004) 220 CLR 1.

137 *Coleman v Power* (2004) 220 CLR 1, [239].

138 *Brown v Tasmania* (2017) 261 CLR 328.

139 When cross-examined Professor Paradies gave evidence that the general consensus in the community is that there is more choice in relation to religion then race.

appellant's case was 'gross and manifest'. The legislation burdens, in particular, those who wish to 'exercise their political rights in the street, onsite protests, talking politics about the things they want to object to'. The appellant's conduct falls into this category of political discourse, it was argued.

217 The remainder of the appellant's arguments seemed to focus upon the question of whether s 25(2) was reasonably appropriate and adapted to the legitimate purpose it sought to achieve.

218 It was submitted by counsel for the appellant that s 25(2) was not reasonably appropriate and adapted. In effect, this provision was not a proportionate response and did not strike an appropriate balance between the legitimate purpose and the implied freedom. It was argued that the scope of s 25(2) was very broad both geographically and thematically - it silenced within Victoria a general topic, being discourse about religion.

219 Counsel for appellant contrasted this with the law struck down in *Brown v Tasmania*, which was narrower than s 25(2) RRT Act because it was 'site specific'. Section 25(2), therefore, went much further than it needed to. As a consequence, it would be hard for people engaging in discussion on religion to draw the line between commentary which was not excluded by s 25(2) and conduct which was criminalised as vilification. It would have a disproportionate effect on 'ordinary people' who wanted to engage in discourse on the streets, about religion. Considered in this way, counsel for the appellant submitted that I should find that the balance struck between the need to protect against religious vilification and the extent of the burden on the implied freedom of political communication was wrong.

220 I turn now to deal with these global arguments.

221 *Coleman v Power*[140] deals with a prohibition on the use of offensive and insulting words. Broadly read, and without qualification, such a proscription

140 *Coleman v Power* (2004) 220 CLR 1.

was highly intrusive, impinged upon mere civil public discourse and significantly overlapped with 'robust' political debate.

222 Unlike the prescription of insulting or offensive words, the operation of section 25(2) is already inherently and significantly qualified. The speech captured is narrower by the fact it is directed to extreme conduct, designed to incite serious contempt, revulsion or severe ridicule on the basis of religion, and committed with intent to that incitement.

223 I think there is a real qualitative distinction between the restriction or suppression of language that people might find offensive or insulting and the restriction or suppression of intentional serious religious vilification.

224 Further, *Coleman*[141] supports the constitutional validly of s 25(2). When the provision in *that case* was construed or read to apply only to insults or words which meant words that might result in a breach of the peace or provoke an unlawful response, it was found to be valid. [142] As I have said, s 25(2) is by its terms already qualified. It is concerned with protecting the community from parts of society being provoked into experiencing extreme vilifying emotions. Such a purpose is plainly concerned with more than the 'civility' or 'seemliness' of discourse.

225 In any event, as Gageler J said in *Clubb v Edwards*[143]*:*

> *Coleman* and *Monis* should *not* be understood as authority for the proposition that a purpose of curtailing unsolicited, unwelcome, uncivil offensive speech is incompatible with the constitutionally prescribed system of representative and responsible government.[144]

226 The argument that s 25(2) should be read narrowly to exclude political discourse misconceives *Coleman v Power*[145]. The High Court in that case did not construe the relevant provision to exclude the capturing of political

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141 *Coleman v Power* (2004) 220 CLR 1.
142 *Fraser v County Court of Victoria* (2017) 265 A Crim R 421 [59]-[64], Emerton J.
143 *Clubb v Edwards* (2019) 93 ALJR 448.
144 *Clubb v Edwards* (2019) 93 ALJR 448, [196] (emphasis added).
145 *Coleman v Power* (2004) 220 CLR 1.

discourse. The provision in question was susceptible to alternative constructions; a broad interpretation (which would infringe the implied freedom), and a narrow one (which would not infringe the implied freedom). The word insulting was construed narrowly to protect political insults from being criminalised, but not where they would provoke a breach of the peace. In those circumstances, narrowly construed, it was valid.

227 By contrast, s 25(2) does not offer a constructional choice. Its natural and ordinary meaning is inherently narrow, and sufficiently narrow so as not to infringe the implied freedom. If I am wrong about that, it is invalid on its face. The construction exercise cannot involve me re-writing the provision, but I have found it to be valid.

228 I do not think *Coleman v Power*[146] helps the appellant's case for invalidity.

229 Further, the appellant's arguments seem to be conditioned upon the proposition that s 25(2) prescribes discourse about religion. I have already found above at [157] to [158], that this is not so. It leaves a wide field of robust debate available. Section 25(2) captures only a slender field of discourse; that which concerns serious and intentional religious vilification.

230 As for the specific point that religious vilification law is by nature broader and more intrusive in scope than race vilification (given that religion is less immutable than race), this does not address the constitutional validity question. At best, it might demonstrate that religious vilification laws (in theory) may involve a greater burden on the implied freedom than race vilification laws. Having addressed the constitutional questions, I have concluded that this religious vilification provision does not burden the implied freedom, but if it does it is reasonably appropriate and adapted to a legitimate purpose.

231 It is apparent that the appellant calls in aid the approach taken by the High

146 *Coleman v Power* (2004) 220 CLR 1.

Court in *Brown v Tasmania*[147] in support of his contention of invalidity. In my view, *Brown v Tasmania*[148] is relevantly distinguishable and does not, in the end, assist the appellant.

232 Section 25(2) does not suffer from the same deficiencies which attended the legislation in *Brown v Tasmania*[149]. In that case it was the uncertainty created by the terms of the *Workplaces (Protection from Protesters) Act 2014* (Tas) which resulted in its broad operation and ultimately its invalidity.[150]

233 Liability under the legislation depended upon, inter alia, a protester being located within a defined area, and then refusing to comply with a direction from a police officer to leave.

234 The plurality in *Brown v Tasmania*[151] found that the elemental requirements upon which liability was conditioned were vague and uncertain:

> The principal problem, practically speaking, for both police officers exercising powers under the Protesters Act and protesters is that it will often not be possible to determine the boundaries of 'business premises' or a 'business access area'. That problem arises because the term 'business premises' is inapt for use with respect to forestry land. The definition of 'business premises' with respect to forestry land does not provide much guidance. The question simply becomes whether a protester is in an area of land on which forest operations (a widely defined term) are being carried out. The vagueness of the definition of 'business access area' compounds the problem.[152]

235 The plurality went on to conclude that this had some significant consequences in relation to the wide reach of the provisions:

> In summary, an exercise of the powers given under [the relevant sections]; and the powers of arrest and removal …. are likely to have significant deterrent effects on protesters. Their effects will extend to protesters undertaking protest activities of a kind and in a place which would not affect forest operations and whose presence would not be excluded by the FMA. Their effects will extend beyond individual protesters to entire groups, because of the operation of [the relevant

147 *Brown v Tasmania* (2017) 261 CLR 328.
148 *Brown v Tasmania* (2017) 261 CLR 328.
149 *Brown v Tasmania* (2017) 261 CLR 328.
150 *Brown v Tasmania* (2017) 261 CLR 328, [37].
151 *Brown v Tasmania* (2017) 261 CLR 328.
152 *Brown v Tasmania* (2017) 261 CLR 328, [67].

sections].[153]

236 The uncertainty which attached to the protest legislation was inherent in the terms of the legislation. The legislation in question in *Brown v Tasmania*[154] was also explicitly directed to capture political protest. The broad effect of the legislation meant that it would have a great effect on political communications.

237 The conclusion that the relevant prohibitions in *Brown v Tasmania*[155] were, in their operation, invalid because they impermissibly burdened the implied freedom of political communication, needs to be seen in the above light.

238 By contrast, section 25(2) of the RRT Act is not directed at political protest – it is aimed at serious religious vilification. There are no facts that indicate s 25(2) is difficult to apply in its operation on the ground. Indeed, there is evidence which suggests the contrary. In re-examination, the appellant estimated that he had posted roughly 20 videos in the lead up to 4 October 2015 which concerned local government corruption, without being charged with a serious religious vilification offence. In this case, if the mock-beheading scene had been omitted, the appellant would have been able to lawfully engage in public comments to drum up support to attend a rally against the Bendigo mosque.

239 *Brown v Tasmania*[156] does not make good the appellant's argument that s 25(2) is invalid.

Conclusion on constitutional question

240 For the reasons outlined above, I have concluded s 25(2) does not burden the implied freedom of political communication. If it does burden the freedom, it does so at the very margins. It is reasonably appropriate and adapted to a legitimate purpose and therefore the law is valid.

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153 *Brown v Tasmania* (2017) 261 CLR 328, [84].
154 *Brown v Tasmania* (2017) 261 CLR 328.
155 *Brown v Tasmania* (2017) 261 CLR 328.
156 *Brown v Tasmania* (2017) 261 CLR 328.

Admissibility of evidence from appellant and informant

241 As I understood it, counsel for the appellant wanted to lead evidence from the appellant about his own personal difficulty in complying with the legislation. He also wanted to lead evidence as to the deterrent effect that the purported uncertainty had on the appellant to engage in political protest, or at least the effect observed by the appellant in others.

242 Counsel for the appellant wanted to adduce evidence from the former informant Ross about her difficulties with determining whether to charge the appellant with this offence. To that end, he sought to question her about the delay of almost 12 months between the offending conduct and charge and wanted to rely on this as illuminating the uncertainty.

243 In relation to both the appellant and Ross, counsel for the appellant was, in effect, seeking their subjective opinion as to an aspect of the constitutional validity of the legislation.

244 In support of his argument that I should receive this evidence, the appellant relied upon the use made by the High Court in *Brown v Tasmania*[157] of the facts of the individual case on the ground in its determination of the constitutional validity of the provisions in that case.

245 I determined not to receive this evidence. The rules of evidence do not apply to a question on a constitutional matter. I should only receive evidence if it is sufficiently probative of the constitutional fact to be found. [158] In my view, the foreshadowed evidence is not probative at all in relation to the constitutional question which I must determine. I consider the appellant's reliance upon *Brown v Tasmania*[159] is misconceived.

246 As I have sought to explain above at [231] to [239], the conclusion reached in

157 *Brown v Tasmania* (2017) 261 CLR 328.
158 *Maloney v The Queen* (2013) 252 CLR 168, [351]-[353]; *Thomas v Mowbray* (2007) 233 CLR 307, [611]-[621].
159 *Brown v Tasmania* (2017) 261 CLR 328.

Brown v Tasmania[160], that the legislation was uncertain its operation, was a conclusion that was reached on the face of the law. It so happened that this conclusion was also borne out by the circumstances on the ground. This included the fact that the criminal charges which had been laid against the plaintiffs were ultimately dismissed when no evidence was tendered by the prosecution with respect to them. But the circumstances on the ground were not the basis for reaching the conclusion that the legislation had that effect. Those circumstances were merely confirmatory.

247 It is also one thing for a Court to make observations about the construction of the law with the facts of a case which has enlivened the constitutional argument, but it would be quite another for the Court to seek out facts and opinions to assist with the construction of the law. The Court in *Brown v Tasmania*[161] engaged in the former, not the latter.

248 Next, it is also one thing for the Court to receive evidence of facts in relation to the individual case which gives rise to the constitutional question, it is quite another to invite wide ranging (and potentially self-serving) opinions as the appellant sought to do.

249 It also needs to be recalled, as I have sought to explain above at [148] to [152], that an enquiry into constitutional validity is an enquiry not into the individual facts of a particular case, but into whether the limit on communication is generally impermissible.

250 For these reasons, I refused to allow the evidence of appellant. Further, I refused to allow the informant Ross to be cross-examined.

PART 4 - SUBSTANTIVE APPEAL

251 As I have mentioned at the outset, at the Melbourne Magistrates' Court on 5 September 2017, the appellant was convicted of a charge of knowingly

160 *Brown v Tasmania* (2017) 261 CLR 328.
161 *Brown v Tasmania* (2017) 261 CLR 328.

engage in conduct with the intention of inciting serious contempt for, or revulsion or severe ridicule of, another person or class of persons on the ground of religious belief or activity, contrary to section 25(2) of the RRT Act.

252 That conviction followed a contested hearing, where three alternative charges were struck out, being one charge of defacing property[162], one charge of wilful damage[163] and one charge of behave in an offensive manner in public[164].

253 The learned Magistrate imposed a fine of $2000, with statutory costs of $79.50, for the charge on which the appellant was convicted.

Reinstatement of charges on appeal

254 On the first day of this appeal the respondent sought an order to reinstate the three summary charges which were struck out in the Magistrates Court.

255 Counsel for the appellant did not object to making such an order to reinstate those charges.

256 On 11 November 2019, I reinstated the three alternative summary charges[165].

257 Once reinstated, counsel for the respondent made an application to withdraw the charge of behave in an offensive manner in public. On 11 November, that charge was withdrawn.

258 Therefore, this appeal proceeded on the basis of three charges, being a charge of serious religious vilification[166], a summary offence of defacing property and a summary offence of wilful damage.

The respondent's evidence on substantive appeal

259 The evidence in the substantive appeal was relatively confined.

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162 Charge 1 on this appeal - Contrary to section 10 of the *Summary Offences Act 1966*.
163 Charge 2 on this appeal - Contrary to section 9(1)(c) of the *Summary Offences Act 1966*.
164 Charge 4 on this appeal - Contrary to section 17(1)(d) of the *Summary Offences Act 1966*.
165 Pursuant to section 256(2)(c) of the *Criminal Procedure Act 2009.*
166 Contrary to section 25(2) of the RRT Act.

260 These charges all arise from an incident that occurred on 4 October 2015 outside the Bendigo City Council offices.

261 In relation to the most serious charge, the respondent's case against the appellant is that he took part in the making of a short video on 4 October, with a particular intention, being an intention to incite serious contempt for, or revulsion or severe ridicule of Muslims on the ground of their religious belief or activity.

262 The respondent tendered, without objection, a copy of the video.

263 The video depicts the appellant and several other male participants standing at the front of the Bendigo City Council offices. One of the other participants is holding a mannequin.

264 Shortly after the video commences, the appellant addresses the camera and says words to the effect of:

> Just here at the local Bendigo Council. Just want to say our thanks for building a mosque for us. The potential diversity that we can bring to your culture it's going to be unbelievable. Trust me. Just to prove that this is true, we're going to give you a taste of our own religious culture. Carry on brother.

265 After the appellant has said these words, some of the other participants in the video use a toy sword to behead the mannequin. The appellant is standing in close proximity watching the mock beheading. As the mannequin's head is removed a red coloured liquid squirts from its neck and is spread over the footpath in front of the Bendigo City Council offices, and on to the walls of a garden bed.

266 Whilst the beheading of the mannequin is occurring one or more participants are shouting, 'Allah Akbar' in a raised loud voice. And another participant is wearing a white cloth with a band around it over his head, which the respondent says is an imitation of a Middle Eastern headdress.

267 After the mannequin has been beheaded, the appellant picks up the head and

throws it at the window of the Bendigo City Council offices, causing some fake blood to be left on the windows.

268 After this, the video cuts to various shots of people, including the appellant, walking and driving around Bendigo, including holding Australian flags.

269 There is a banner along the bottom of the video stating that a rally will be held on 10 October 2015. The video also has music incorporated.

270 This video was subsequently posted on the Facebook Page of the United Patriots Front ('UPF') on 4 October 2015. When posted on this page it was entitled 'Cultural Diversity Comes to Bendigo'.

271 An admission of facts, signed by the appellant on 11 November 2019, concerning a number of different matters was tendered.[167] That document included admissions by the appellant that:

- He was 'a leader' of the UPF in 2015;
- He 'participated' in the video containing the alleged offending of 4 October 2015[168];
- His participation in that video included that he can be heard to say certain words (which have already been reproduced above at [264]) and that he can 'be seen picking up the head of the mannequin and throwing it at the window of the City of Greater Bendigo offices. That this has caused some fake blood to be left on the windows at the City of Greater Bendigo offices'.
- On 4 October 2015, this video was uploaded to the UPF Facebook page and entitled 'Cultural Diversity Comes to Bendigo';
- 'As uploaded, that video includes images of [the appellant] and up to

167 Exhibit 8 on this appeal.
168 Exhibit 1 on this appeal.

seven others carrying Australian and UPF flags around the streets of Bendigo with a text banner at the bottom of the video which states 'BENDIGO 10-10-15'.

- On 5 October 2015, screenshots were taken of the UPF Facebook page, showing that UPF had more than 30,000 followers. They screenshots also showed that the video filmed on 4 October 2015 was viewed more than 28,000 times and also shared and liked hundreds of times.

- The City of Greater Bendigo organised for cleaning to occur at the Bendigo City Council offices. Cleaning occurred on 4 and 5 October 2015 using a high-pressure washer and other cleaning equipment 'to clean up the fake blood';

- The cost incurred by City of Greater Bendigo 'in cleaning up the fake blood' totalled $638 (including GST);

- Photographs were taken of the footpath with the red liquid 'in situ' outside the Bendigo City Council offices on 4 October 2015[169] and of the footpath and garden bed after being cleaned on 8 October 2015[170].

- On 19 October 2015, the appellant declined to be interviewed by police in relation to this matter.

- On 4 April 2018, he posted a video to his personal Facebook page[171] in which he stated 'If you don't know, a couple of colleagues and myself made a fake dummy, a dummy out of pillows and we have cut its head off in an Islamic style beheading in order to draw attention to the fact that the local council in Bendigo, a town just north of Melbourne, was planning on building the biggest mosque in Australia'.

- On 19 February 2019, he posted a further video to his personal

169 Exhibit 3 on this appeal.
170 Exhibit 4 on this appeal.
171 Exhibit 6 on this appeal.

Facebook page in which he stated that 'we filmed a mock beheading after we were approached by locals in Bendigo who informed us the country's largest mosque was going to be built in that city'. He also stated that in addition to the mosque there was going to be other new developments 'All relating to Islam and Islamic Migration'.

- In the 19 February 2019 video, the appellant stated, about the mock beheading, that 'we did this in order to encourage, first of all to alert people in the area that the mosque development was being built and also to encourage people to attend a protest against that development…'

272 The respondent tendered a number of exhibits on the plea, in addition to the notice to admit. These included:

- the video of mock-beheading of 4 October 2015 and two still images of that mock-beheading video;[172]
- screenshots from 5 October 2015 of that video on the UPF Facebook page, including comments, shares and likes;[173]
- photographs taken of the front of Bendigo City Council offices on 4 and 8 October 2015; [174]
- videos of the appellant of 6 April 2018 and 19 February 2019.[175]

273 Evidence was led that on 19 October 2015 the appellant declined to be interviewed in relation to this incident.

274 The respondent also tendered two written consents of the Director of Public Prosecutions ('DPP') dated 31 August 2016 and 14 September 2016, authorising the filing of a charge contrary to section 25(2) of the RRT Act to be

172 Exhibits 1 and 2 on this appeal.
173 Exhibit 5 on this appeal.
174 Exhibits 3 and 4 on this appeal.
175 Exhibits 6 and 7 on this appeal.

filed against the appellant.[176] The consent of the DPP, which I accept has been provided here, is required in order to commence a proceeding in relation to a charge under section 25.[177]

275 The respondent called two witnesses on the appeal – the current police informant Detective Leading Senior Constable Smith ('DLSC Smith') and the original police informant Ms Erin Ross.[178] Ms Ross no longer works for Victoria Police.

276 DLSC Smith also agreed that the person responsible for providing the cleaning services, Mr Garlick, had previously given evidence[179] that the cleaning amounted to 'just a wash down' and that there was no permanent stain left by the red liquid.[180]

277 At the conclusion of the respondent's case, the appellant made a no case submission in relation to the charges, which I rejected.

The appellant's evidence on substantive appeal

278 The appellant gave evidence in this appeal.

279 In evidence in chief, the appellant stated that his intention in participating in the mock-beheading video was:

> to be absurd and humorous in order to help the community understand [the Bendigo mosque] planning development was in the process of being decided because we believed it was deliberately being kept from the public…understanding.

280 The appellant denied, in evidence in chief, that he intended to incite thoughts of revulsion or severe ridicule with respect to Muslims, instead he stated that he was 'protesting the government not Muslims'.

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176 Exhibit 9 on this appeal.

177 Pursuant to section 25(4) of RRT Act.

178 Ms Ross gave very short evidence in chief confirming that she had been the original informant in this matter. This was effectively the extent of her evidence, as I did not allow counsel for the appellant to cross-examine Ms Ross about a matter relating to the charging of the appellant, on the ground of relevance.

179 Presumably during the summary hearing at the Magistrates' Court.

180 DLSC Smith's evidence as to what Mr Garlick had given evidence about previously amounts to hearsay. However, no objection was taken by the respondent.

281 During cross-examination, when asked about what the primary or driving issue being protested was, the appellant denied that the mosque development was the driving issue, instead stating 'It was local government corruption'. His evidence was that in conducting the mock-beheading he and other participants had chosen a location at a local government building and were 'attempting to be humorous and draw people's attention'.

282 Initially, the appellant denied in participating the video that he was pretending to be Muslim. When counsel for the respondent put to the appellant that the comments he made during the video were made as though he was pretending to be a Muslim, he stated he was not pretending to be a Muslim, but 'just whimsically putting on a voice in order to be absurd and humorous'. The appellant gave evidence that the video was a 'parody' and 'supposed to be a protest'.

283 When cross-examined further, the appellant accepted that in using the words 'for us' he thought that meant 'for Muslims'. However, he qualified that he was referring to 'perhaps an extremist Muslim'.

284 The appellant was challenged by counsel for the respondent that in fact, in the video, he was representing that what was happening (beheading) was part of ordinary Muslim culture. He denied that and stated 'no…we drew a specific distinction between extremist Muslims and non-extremist'. When asked why he or the other participants did not say in the video that they were drawing that distinction, the appellant's evidence was '…we were very whimsical and impulsive in the early days and that's unfortunate for me now isn't it'. When it was put to him that if he had been intending to protest Muslim extremists there would have been no need to protest against the mosque, he stated that 'I suppose we drew a parallel between the danger of having such a mosque project and potentially drawing extremist Muslims…into the area'.

285 In making the video on 4 October 2015, the appellant's evidence was that he

'thought [he was] doing as much as possible to get people to the rally [this video] was probably the most practical method'. The appellant 'believed people needed to see something out of the ordinary to be interested…or to take further interest in what's really happening. So really it was just like a precursor'. Further, he hoped and so the purpose of this video was to have other people 'watch more of the videos explaining what was happening in the local government'. However, he reiterated that in relation to the video, 'I intended to be absurd…I didn't intend [to] get up in the morning and think I'm gonna go incite to kill Muslims'. He denied that the video was intended to generate strong feelings in people.

286 The appellant's evidence was that in making the video they were 'mocking the act of beheading people'. He accepted that as it was an 'Islamic style beheading' it was a reference to members of the Islamic faith.

287 When asked about the other parts of the video also filmed on 4 October 2015, which follow the mock-beheading scene, where the participants were marching or walking, including with Australian flags, the appellant stated that 'I don't know what my intent was there in that part of the video'. He gave evidence that he thought it was an expression of patriotism and solidarity with the Bendigo locals.

288 The appellant stated that at the time of this offending in 2015, the UPF predominantly spread their message through Facebook. He stated that the mock-beheading video was 'posted [on Facebook] as a demonstration against local government and to encourage people to attend a protest against the planning development and local government corruption on 10 October [2015]'. The appellant gave evidence that the video was created and posted on Facebook by one of his colleagues, in the UPF.

289 In relation to whether or not he read comments people made on Facebook videos posted by himself personally or on the UPF Facebook page, the

appellant's evidence was that he would read some of the comments, some of the time. He 'never read all of the comments', in part because 'much of them were abusive so it just wasn't something I regularly did'.

290 Later, in cross-examination, counsel for the respondent asked the appellant about the comments posted in relation to the mock-beheading video and whether they accurately portrayed his intention in participating in the video. One such comment stated 'ah we glimpse into the future if we let this madness [Islam] spread through this nation'. The appellant denied that this comment reflected his intention in participating in the video, he stated that the reaction he intended was 'for people to laugh and that's it'. Another comment, which the appellant agreed was in strong terms, stated 'No mosques in Australia…They would decapitate you on the spot and your family…it makes me sick I breathe the same air as those scum buckets'. The appellant stated that this comment definitely was not consistent with the reaction he actually intended in making the mock-beheading video. He gave evidence that 'my intention was to make people laugh and to be absurd enough to get people's attention. I didn't intend for people to be saying these things'.

291 When it was put to him specifically, the appellant:

- disagreed that he was representing Islamic culture as revolting;
- denied that he intended to mock Muslims on the basis of their beliefs;
- disagreed that he intended to deliver a strong underlying message that Muslims generally conduct beheadings and would do so in Bendigo;
- denied that he intended to incite severe contempt for or revulsion or severe ridicule of Muslims on the ground of their religious belief;
- denied that he intended to incite extreme feelings against Muslims for the purpose of gaining a large turnout for the rally on 10 October 2015.

292 In re-examination, the appellant estimated that he had posted roughly 20 videos in the lead up to 4 October 2015 which concerned local government corruption.

293 In relation to the defacing and wilful damage offences, the appellant gave evidence that he insisted that the red liquid be water soluble, so that it could be washed away. He further gave evidence they took a garden hose with them to the Bendigo City Council offices so they could 'clean up ourselves', but they could not do so because the tap handles had been removed. He stated that 'it definitely wasn't our intent to cause any damage'.

Submissions of respondent on the substantive appeal

294 The respondent's case was that I could be satisfied beyond reasonable doubt that the appellant had committed an offence, contrary to s 25(2) of the RRT Act.

295 As to the contentious element, the respondent submitted that the mental element of this offence - that the accused engaged in that conduct with the intention of inciting serious contempt or revulsion or severe ridicule because of the religious belief or activity of a person or class of persons – was proven beyond reasonable doubt. It was submitted that the only rational inference available to be drawn from the appellant's participation was that he did so with the relevant criminal intention. The respondent's case is that I could be satisfied of the appellant's intention in relation to each of serious contempt, revulsion and severe ridicule, but to find the appellant guilty I only need to be satisfied of the appellant's intention in relation to one of those extreme feelings.

296 The respondent submitted that I should look at the appellant's conduct in participating in the video, and the surrounding circumstances to determine what, if any, inferences I am able to draw beyond reasonable doubt regarding the appellant's intention.

297 In support of this submission, the respondent relies on the following:

- The participants in the video, including the appellant, were intending to represent themselves to be Muslims having regard to the words used by them and their clothing.

- The appellant was intending to represent that the conduct in the video was referrable generally to Muslims, including to ordinary Muslims, not simply to extremist Muslims. The words used by the appellant do not seek to circumscribe the portrayal of the mock-beheading to extremist Muslims.

- The video was clearly intended to stir up or animate one or more of the extreme feelings for Muslims, and by means of those strong feelings draw a large turnout at the political rally on 10 October 2015.

- For all the reasons above, the video was calculated, and not intended to be absurd or a light mockery.

298 The respondent also relied upon the comments section of the UPF Facebook page related to the mock-beheading video as being a relevant surrounding circumstance, from which I might draw an inference as to the mind of the accused in participating in the video.

299 The respondent submitted that I should reject the evidence of the appellant that he did not read the comments section. It was argued that the appellant did read the comments section, and being aware of those comments the appellant did not publicly seek to correct the comments as being not consistent with his intention in participating in the video.

300 Counsel for the respondent relied on the statements made by the appellant in the appellant's videos of 6 April 2018 and 19 February 2019 about Islamic immigration and the building of a mosque in Bendigo, as surrounding circumstances which demonstrate that the video of 4 October 2015 involved a

protest against mosques and a protest against Muslims.

301 The respondent submitted that I should find the appellant to be an evasive witness, who was reluctant to accept propositions put to him which were overwhelmingly supported by documentary and other evidence, such as the denial that he was pretending to be a Muslim.

302 Given my finding about the religious vilification charge (charge 3) I do not need to rehearse all the arguments advanced in relation to the defacing property charge or the wilful damage charge.

Submissions of appellant on the substantive appeal

303 On this appeal, the appellant's case was that he disputes that the mental element of the serious religious vilification offence can be proven beyond reasonable doubt. However, he admits that he appeared and participated in the video filmed on 4 October 2015 in front of the Bendigo City Council offices.[181]

304 Essentially, the appellant raised three possible defences regarding the serious religious vilification offence. Counsel for the appellant submitted that because of those defences, I could not be satisfied beyond reasonable doubt of the mental element of this offence. In summary those defences were that:

- The mock-beheading was intended to be a joke – it was about the absurd and humour;
- The video was directed towards the conduct of a tenent of Islam observed only by extremist Muslims, not the general Muslim community; and
- The video was concerned with political comment and was not discriminatory commentary.

[181] In relation to the defacing property offence, the appellant disputes that property was defaced. In relation to the wilful damage offence, the appellant disputes that any property was damaged.

305 In relation to the first argument, counsel for the appellant submitted that the appellant's evidence was that he was making a joke about something horrendous as a way of dealing with the horror of such conduct. Counsel for the appellant relied on the appellant's evidence that he was intending to make people laugh and that he did not intend the strong or extreme views that may have been expressed by members of the UPF Facebook page. It was argued that the other evidence did not exclude that that was the appellant's intention.

306 In relation to the second argument, counsel for the appellant submitted that the appellant's participation in the mock-beheading was a reference to a specific tenent of Islam, held only by those with extremist views, not Muslims generally. It was the appellant's clear evidence, it was argued, that it was not targeted to Muslims as a huge, broad class of people, but those who shout Allah Akbar while beheading real people. Therefore, it was argued that the respondent could not prove beyond reasonable doubt that the appellant was intending to incite the target audience about the entire class of people, being Muslims generally. Further, any revulsion that may have been felt was in relation to the act of beheading, not intended to be directed towards all Muslims. Counsel for the appellant also argued that s 25(2) only protects the class of people from vilification on the basis of *lawful* religious behaviour and beheadings, which form part of a tenent of some forms of Islam, would not constitute lawful behaviour.

307 In relation to the third argument, counsel for the appellant submitted that appellant's participation in the mock-beheading video was an example of the appellant's political activism. The video was not directed towards Muslim people generally, but was directed towards bringing to light the corruption, perceived by the appellant, regarding the Bendigo City Council. It was argued that the video should be seen against the background of the 20 or so videos the appellant gave evidence he had made and posted in the lead up to 4 October 2015, which were concerned with local government corruption and

political activism. There is some overlap with this argument and the constitutional argument. Counsel for the appellant contended that because this is political activism or commentary by the appellant, he cannot be criminally liable. This argument rests on a construction of s 25(2) which excepts political discourse from being criminally sanctioned. I have already dealt with why this construction fails earlier in my reasons.

308 Further, counsel for the appellant submitted that in determining whether to find the appellant had the requisite intention, I must consider what was in the mind of the appellant at the time of participating in the scene of the mock-beheading. It was submitted that the footage which followed the mock-beheading scene, including the marching scene and the effects, including the music, do not assist me to draw an inference as to his mind at the time.

Findings as to guilt on charges

309 I am satisfied beyond reasonable doubt that the appellant has committed the charged offence contrary to section 25(2) of the RRT Act.

310 It is clear from the video that the appellant's acts, in the mock-beheading scene, are deliberate and voluntary and that the appellant was aware that his participation was being filmed. My finding that the appellant knowingly engaged in conduct beyond reasonable doubt relates only to the conduct engaged in by the appellant in the mock-beheading scene of the video of 4 October 2015. I have not found that the appellant's participation in the scenes that follow in the video form part of the conduct for the purposes of the offence. However, I will return to these aspects of the video in considering the intention of the appellant.

311 I am also satisfied that the mental element of this offence is proven beyond reasonable doubt. That is, I am satisfied beyond reasonable doubt that the appellant knowingly engaged in conduct with the intention of inciting the target audience (people who viewed the UPF Facebook page) to experience serious

contempt for, or revulsion, or severe ridicule of, another class of persons (namely Muslims) on the ground of their religious belief or activity. To be clear, I find that the appellant intended that his target audience would be moved or actuated to those extreme emotions about Muslims by reason of their religious belief or activity.

312 I am also satisfied, to the criminal standard, of a causal connection between the conduct engaged in by the appellant on the one hand, and the religious beliefs of the victim group (Muslims) on the other hand. He too was relevantly moved or actuated to engage in the conduct (with the intention to incite) *by reason of* the religious beliefs of the victim group.

313 I need only find that the appellant possessed an intention to incite one of the three extreme responses – serious contempt, revulsion or severe ridicule. In this case, I am satisfied beyond reasonable doubt that the appellant intended to stir up each of those extreme feelings.

314 I turn now to explain why I have reached these conclusions.

315 The evidence, which I accept, establishes that the appellant participated in the mock beheading video, so as to galvanise attendance at a political rally to protest the decision to allow the building of a mosque.

316 His conduct was thus plainly calculated to animate, provoke, or stir up the target audience (people who viewed the UPF Facebook page).

317 There is banner at the bottom of the video of 4 October 2015, advertising the political rally proposed for 10 October 2015. This clearly links the mock-beheading scene with the upcoming rally.

318 The substance of the evidence of the appellant in this appeal also establishes this.

319 He variously said that in participating in the mock-beheading video, the

appellant wanted to create something which would engage his target audience (people who viewed the UPF Facebook page).

320 Initially, the appellant's evidence was that in making the mock-beheading video he 'thought [he was] doing as much as possible to get people to the rally [this video] was probably the most practical method'. It was 'something out of the ordinary be interested…or to take further interest in what's really happening', he said.

321 Further, in a video made by the appellant on 19 February 2019, the appellant also confirms the mock-beheading video was done 'also to encourage people to attend a protest against that [mosque] development'.

322 It is patently clear that the function of the video was to drum up support for the rally or protest. The mock-beheading video was purposeful. It was calculated to achieve a result. It was pre-meditated and involved a degree of planning. It was undertaken with serious intent. This is the important context to my other findings.

323 It may be, that at times in his evidence, the appellant 'walked back' from accepting the connection between the participation in the video and the encouragement of the target audience to attend the rally. For example, at one point he characterised the mock-beheading video as a 'precursor', to capture the audiences' attention to watch other videos posted about local government corruption. When I consider all of this answers (and the other evidence outlined above) the only conclusion available is that the video was plainly designed to galvanise attendance at the rally.

324 The intensity of emotion which the appellant intended to incite is illuminated by his objective. He set out to so excite his target audience that they would be moved to actively attend and participate in the forthcoming rally. In my view the appellant intended that the emotions he would incite would be visceral, impactful and lasting. Put another way, the fact that the appellant felt that he

needed to do something out of the ordinary to excite attendance at that rally points strongly to the fact that he must have intended an extreme emotional response.

325 Consistent with the appellant's intended objective, the mock-beheading scene of video itself was clearly intended provoke a significant emotional response from the target audience.

326 The words used by the appellant suggested that the mock-beheading was just a 'taste' of the violence which would attend the building of a mosque in Bendigo. The appellant's tone could be fairly described as derisive, disdainful and disgusted. This fits fairly with the message being delivered by the appellant in the video - that Bendigo was at risk of shocking and gratuitous violence being inflicted against it should Muslims move in. The message was that this is the natural consequence of the 'potential diversity' that building a mosque in Bendigo could bring. Of course, this message is followed by a graphic demonstration of mock-decapitation with fake blood spurting out.

327 The only inference available is that the mock beheading scene was intended to whip up extreme negative feelings in the audience about Muslims, including fear, loathing, disgust and alarm.

328 The violent pantomime, coupled with the stated desire of the appellant to ensure attendance at the rally all drive me to conclude that the appellant intended that the target audience feel serious contempt for, revulsion, and severe ridicule for Muslims as a result.

329 The appellant's evidence that he intended to be absurd and humorous in participating in the mock-beheading is inconsistent with all of the evidence.

330 The short and complete answer to this is that mock-beheading (even on the appellant's own evidence) was not undertaken for entertainment or for frivolity – rather it was undertaken, with *serious* motivation, to stir up or galvanise

people to attend a rally.

331 This was never intended to amount to a piece of innocuous or meaningless artistic theatre. Nor was it ever intended to be a playful act of buffoonery. It was never intended to engender a fleeting emotion. This was never intended to be light mockery. It was carefully planned and crafted act, calculated to achieve a maximum impact.

332 Further, the tone and violent nature of the video intrinsically tells against this innocent or frolicsome explanation.

333 It is true that some of the participants can be heard laughing after the mock decapitation, but this needs to be considered within the context of all the evidence. Assessed in this way, it says more about their contemptuous attitude towards Muslims than about humour.

334 I reject, as lacking in all credibility, the appellant's claim that this video was about the mere absurd, or intended to be humorous. It is a patently disingenuous characterisation, and is self-contradictory. I do not believe him.

335 Next, I have concluded, beyond reasonable doubt, that it was the appellant's intention to incite these extreme feelings against Muslims because of their religious beliefs. That is, that the appellant intended that the strong feelings be stirred up in his target audience, towards Muslims, because of the religious beliefs of Muslims.

336 With this context I want to deal with two explanations or so called defences advanced by the appellant. The appellant gave some evidence that he was highlighting on the video that having a mosque would 'potentially draw extremist Muslims…into the area'. He was not protesting or inciting protest generally against drawing in Muslims to Bendigo. Relatedly it is also said the evidence shows that the appellant was simply intending that the audience would feel extreme feelings for the (unlawful) act of beheading. In short, it is

the appellant's case that the conduct was not about inciting any feelings about Muslims as a group.

337 I reject these explanations, and I do so beyond reasonable doubt.

338 The appellant makes a number of references to Islam and Muslims in the introduction he gives to the mock-beheading scene. He refers to the building of a mosque, which is an Islamic place of worship, for Muslims in general. It is not only a place for worship for a sect or section of Muslims, or extremist Muslims.

339 In giving this evidence that his comment about the mosque was to highlight that having a mosque would 'potentially draw extremist Muslims…into the area', not to protest generally against drawing in Muslims to Bendigo, the appellant sounded uncertain and qualified his explanation by stating he '*suppose[d]*' that was the reason for referring to a mosque generally. There were no qualifications apparent in the video which support this explanation for the use of the word mosque.

340 The appellant also accepted that the mock-beheading was intended to be an 'Islamic style beheading' and amounted to a reference to members of Islam.

341 It was the evidence of the appellant that he was pretending to be a Muslim in participating in the mock-beheading. Several times in the video, the appellant uses the words 'us' and 'our'. For example, 'just want to say *our* thanks for building a mosque for *us*'. During cross-examination, the appellant accepted that the *us* in that sentence was a reference to Muslims, although he sought to qualify this evidence by asserting that he was pretending to be '*perhaps* an extremist Muslim'. The appellant's evidence became more certain. The effect of his later evidence was that the participants in the video were acting as extremists and they had intended a clear distinction be drawn between extremist Muslims and non-extremist Muslims. Again, there were no qualifications apparent in the video which support this explanation – either in

the words used or the conduct of the appellant or the other participants.

342 The words, 'we're going to give you a taste of *our own religious culture'*, used by the appellant just prior to the mock-beheading, again involve the appellant pretending to be a Muslim. In my view, this is intended to connect Muslim religious culture with the act which follows – an act of (mock) beheading – in the mind of the audience. The implication is beheading is a part of general Muslim religious culture. Other language used in the video was in general terms, such as 'religious culture' and 'Allah Akhbar', being an expression of faith used by Muslims in prayer.

343 No qualifying words are used by the appellant to indicate that 'religious culture' is being used in a more narrow way, than general Muslim religious culture, for example, extremist Muslim religious culture.

344 Further, I do not accept that the appellant was simply intending that the audience would feel extreme feelings for the (unlawful) act of beheading. By stating that he wanted to give the audience a 'taste' of the Muslim religious culture, the appellant intended to use beheading as an example of the kind of horrible and violent conduct which he wanted the audience to associate generally with the religious culture of Muslims. The appellant intended the audience to have extreme negative feelings towards the religious culture of Muslims, not the act of beheading.

345 Additionally, in a video filmed of the appellant on 4 April 2018, the appellant describes that the mock-beheading video was filmed in response to the planned development of 'the country's largest mosque' in Bendigo, with associated developments 'all relating to Islam and Islamic Migration'. Again, these comments show that in participating in the mock-beheading scene, the appellant was concerned with whipping up extreme emotions about general Muslim or Islamic religious culture, not extremist Muslims or extremist behaviour.

346 This whole episode was calculated to promote rank and demeaning stereotyping of Muslims.

347 I reject completely the many explanations advanced by the appellant that this was not directed to engendering extreme feelings about Muslims in general. His explanations smack of a manufactured post facto rationalisation and are lacking in credibility. I do not believe the appellant.

348 The appellant gave some evidence that he was protesting local government, not Muslims. It is true that the location for the mock-heading was at the Bendigo City Council offices and the appellant's first words in the video make reference to that location. I also accept that the ultimate goal of the appellant was to protest a decision of the local government in relation to the building approval for the Bendigo Mosque.

349 The fact that the appellant may have wanted to incite extreme feelings against Muslims (because of their religion) for a political purpose to attend a political rally, does not cure the vilification intended. That is, even if the ends were political, the means remain vilifying. Having a political end is not a defence to the charge. The prohibition does not provide such a justification or excuse.

350 Finally, I do not accept the appellant's bare denial in his evidence that he did not intend to stir up strong feelings. It does sit with the weight of all of the other evidence.

351 If this video were directed to the world at large I would have found the charge proved. That said, I find the nature of the target audience further reinforces the inference of intention. The appellant was aware that the material would be accessed by those who viewed the UPF Facebook page. His knowledge of who the target audience would be strengthens the inference that his intention was to incite a response from them. Those accessing the Facebook page may have been members of UPF, members of the UPF Facebook page or people who otherwise shared the opinions of the UPF or were interested in their

ideas or the issues they discussed. Given the likelihood of shared views or interests, these people would be more likely to be stirred up by the content.

352 In drawing the above conclusions, I have not taken into account the somewhat sinister music which was overlayed in the video. I do not need to resolve whether the appellant had knowledge of the music.

353 I have also put to one side the Facebook comments, and the question of whether the appellant had knowledge of them at the time.

354 As for the other scenes filmed on the same day as the mock-beheading also in Bendigo involving the appellant marching on the streets, which accompanied the mock-beheading on the video, I take those into account in a limited way. The appellant seemed to suggest that he was not sure at the time whether this would accompany the video. Without needing to resolve this, the fact of the marching and its recording (which was to the knowledge of the appellant), on the very same day as the making of the mock-beheading scene, also in Bendigo, reinforces in my mind the appellant's strong commitment to the success of the forthcoming rally. This clearly sheds light on the seriousness with which he approached the mock-beheading task.

Conclusion

355 In short, it is the appellant's participation in the mock beheading, within the broader context of his goal of drumming up support for and attendance at the rally, which convicts him.

Findings

356 I find that s 25(2) of the RRT Act is valid.

357 I find charge 3[182] proved.

358 As charges 1 and 2 were relied upon only in the alternative, I dismiss them.

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182 Section 25(2) of the RRT Act.

Penalty

359 In relation to s 25(2) of the RRT Act, I convict and fine the appellant $2000.

360 I grant a stay of 6 months to pay that fine.