



Blasphemy and the right to hate religion

David Hines © 3 June 2018

1. Intro. What makes it an issue again?

There are two law changes being proposed in New Zealand this year, and it seems to me they are heading for a collision. What do you think?:

- The first is a move by the government to get rid of our law on blasphemy. That seems to be very sensible. It is a law that has only been used once, and even then it didn't lead to a successful prosecution.
- Then the second move for a law change came from Race Relations Conciliator Susan Devoy: She wants to toughen our law on hate speech. The most controversial part of it is she wants to make it illegal to encourage hatred of religion. Now that sounds sensible, too. Who wants to live in a community where people are hated because of their religion?
- But (I owe this insight to the WhaleOil blog site) These two ideas are going in opposite directions. Isn't Susan Devoy's law against religious hatred, just a blasphemy law by another name? Isn't that what blasphemy is - hatred of religion?

So I'd like to look at those two requests for law change.

And the sting of it is that I myself was caught up in this over the past week. A school principal asked me to remove some anti-religious remarks from a web page. And I realised I could get punished if I got it wrong. I didn't know we had a law about religious hate on the internet.

2. When was blasphemy made illegal?

Let's look at the blasphemy law first. This is a well-studied issue going back 700 years.

Well there were **religious** laws against blasphemy even before that, way back to the time of the 10 commandments. But in western Europe, where our laws got started blasphemy was not a crime, but there was demand in England for it to become a crime, prosecuted by the government.

It began when an Oxford professor John Wickliffe was criticising the Catholic church for being too wealthy. They owned a third of the land in England; priests were often wealthy, and rose to top political jobs, and had huge influence. Monasteries were also wealthy. And John Wycliffe wrote pamphlets criticising this.

He was supported by the acting monarch of the day John of Gaunt, and he was part of a negotiation with the pope, trying to stop the pope charging even more taxes on England to fight a war.

The pope hit back at Wycliffe, and in 1377 he wrote an edict calling on Oxford University, and the Bishop of London, and others to arrest him, for 18 statements that

were dangerous to the church and state. Note those words; this was not what we would call blasphemy, but it became the ancestor of our law on blasphemy.

Wycliff managed to avoid arrest; thanks to his many powerful friends.

- When he was called to answer questions by a Bishop, his supporters arrived in large numbers. There was a riot and the hearing was called off.
- The University then put Wycliffe under house arrest, but his friends got him released.
- Later a group of bishops tried to pass a sentence on him, but the queen mother forbade them. They were divided on the subject anyway. Some of the bishops supported him.
- The clergy were more united than other critics, and got a law passed that **heresy** was a crime. But Wycliffe was never put on trial. Why not?

Well, a few months later the pope died. Six years later Wycliffe died. Wycliffe was very lucky.

So it was 1400 before the law against heretics was put into force, a much stronger law, including burning people at the stake. And William sawyer was arrested by **the archbishop of Canterbury**, and burned, before the law was even passed. (Note the injustice of this Quite apart from killing him before there was such a law; they actually created a law which was retrospective. He hadn't done his alleged crime when the law was made.

Fifteen years later Wyckliffe was declared a heretic; this was **after** he died. His writings were banned and burned. And in 1428 his corpse was dug up, and burned and the ashes were thrown into the River Swift... But his followers celebrated and said his ashes were now spreading round the world, like his ideas.

Many people were hanged and burned for heresy over the next 100 years, and many were branded heretics up till the mid 19th-century.

These first victims were not burned for **blaspheming** in the sense of swearing. They were burned for challenging the church, and having heretical beliefs. In fact the first clear legal statement about **blasphemy** as such was in 1656.

A Quaker James Naylor also criticised the church, but he claimed to be guided by an inner light.... And it seems this was regarded as blasphemy, because it seemed to imply he was claiming to be divine.

But the judge refused to have him burned. He said heresy is just an erroneous opinion; not that serious. But his more serious crime was blasphemy, which is reviling the name and honour of god.

But he refused to give the death sentence. He said there was no law that even blasphemy should be punished by death, and it would be wrong to create a new law, which was in force when the offence was committed. So Naylor was sentenced to flogging, branding, and had his tongue pierced by a red hot poker.

I note in passing that all these victims were Christians.

In 1732 later, in rex v Woolston, a court ruled that only people who were were **totally** opposed to Christianity could be found guilty of blasphemy; you could not be charged

with blasphemy for “disputes between learned men”. But Woolston was still found guilty because he said the miracles of Jesus were not meant to be taken literally,. He said even the very existence of Christ was just a story. And **that** was regarded as totally undermining Christianity, which was seen as more serious.

In 1838, a man was convicted of criminal libel for publishing an attack on a Catholic nunnery. And the judge said a person could not be convicted for an attack on Judaism or Mahomedanism, nor even for any sect of Christianity, except the established religion of the country.... i.e, for it to be libellous you had to attack the **church of England**. So Woolston’s attack on Catholic practices was OK because he attacked the right religion.

Rather ironic – the blasphemy law was first introduced by Catholics, to guard the pope; but later England became Protestant, so it failed to protect Catholics!! I think this showed a fatal lethal shortcoming of the idea of blasphemy – as far 300 years ago. Blasphemy was an unjust law, because religion was a shifting target.

And also arising from this case - the reason for protecting the Church of England, was it was part of the constitution of the country,. So if you undermined the church of England, you were seen as undermining the state as well.

So a series of legal principles was gradually developing of why blasphemy should be a crime; it was undermining the current church and the current state of England.

Later that very principle was seen as wrong. But this wasn’t till the late 20th century.

In 1988 Salman Rushdie published a novel the Satanic Verses which attacked Islam. The British government was petitioned to prosecute Rushdie for blasphemy. No charges were laid, because the House of Lords select committee said the law only protects Christian beliefs as held by the church of England. That was the same principle a court had pronounced in 1838, but in 1988 that principle itself was questioned – what’s so special about the C of E.

3. Turning of the tide against blasphemy law

So that was a real watershed. Was it right for the law to favour one religion. No; it was patently unfair.

But that was not the end of the matter. The logical next question for Britain, and a number of other countries was: Should **the blasphemy law be extended to cover all religions**, to make it fairer. **Or should it be abolished**. The issue was not resolved at that stage, but the insight had been accepted by fair minded people.

Overlapping that discussion: In 1985 the British Law Commission recommended the abolition of all blasphemy offences. Its reasons were significant:

- It said there is no one agreed definition of blasphemy and blasphemous libel, so it would scarcely be practicable to amend the common law by statute. It said
- “Moreover, we have no doubt that **any replacement offence** which might be devised would in practice prove to be unacceptably wide in ambit.
- So it concluded the common law offences of blasphemy and blasphemous libel should be abolished **without replacement**.

Finally these Acts were repealed in the year 2008. And a delightful footnote, is that this change was supported by the Archbishop of Canterbury, and the National Secular Society. The archbishop congratulated the secular society leader for his work on this project.

So Britain took 23 years to do it, but they did finally resolve the issue. Meanwhile 10 years later in New Zealand we are still just thinking about it.

4. Meanwhile in other countries that adopted it from Britain

A similar group of objections were raised in commonwealth countries who had adopted the British blasphemy laws.

In Australia in 1992 the Law Reform Commission said the International covenant on civil and political rights said everyone should be given equality before the law in rights to freedom of thought, conscience and religion.

And the blasphemy law protected only the Christian religion, with specific reference to the rituals and doctrines of the Anglican church,. This is not consistent with Australia's human rights obligations.

So it said two things:

- It said existing provisions on offensive behaviour and other public order offences are sufficient (to deal with harm arising over religion)
- So it said the references to blasphemy should be removed without replacement. Those same words used in England seven years earlier.

In NZ the only prosecution for blasphemous libel was for three lines of a poem about good Friday morning; which were only mildly sceptical of Christianity. The publisher was found not guilty, but there was a recommendation that similar publications should be discouraged.

Two works of art were considered for prosecution, but the crown decided not to prosecute. These were a menstruating virgin mary statue in a TV show, and a virgin in a condom in the papa museum.

The article says the attorney general usually refuses to pursue blasphemy prosecutions, on the basis of free speech objections, as the right of free speech is protected within the Bill of Rights Act 1990.

So our attorney general got the point that blasphemy laws were contrary to the Bill of Rights, but he didn't put it into the law.

5. First conclusion

So my main conclusion is that the law against blasphemy is discriminatory, and should be repealed, without replacement.

- The principle has been made a number of times over 100 years, that it favours Christianity, and that's discriminatory.

- And if you extended it to protect all religions, that would be impracticable, because there are so many of them, and so many shades of opinion within each religion. How could you work out which viewpoint was blasphemous?

6. This doesn't apply only to blasphemy

These principles don't apply only to blasphemy.

I know of two court cases in the last 20 years, where the courts have refused to give a verdict on what are the true principles of Christianity.... They both involved gay people being turned down from employment by the church,

- one was in the Methodist church, and I was involved in that.
- the other was in the Anglican church and Clay was involved in that.

So this is a third reason why we shouldn't have a blasphemy law It would give the state too much control over religion.

7. Susan Devoy's call re hate speech

So with all this evidence against a blasphemy law. What, do we think, then, about our race relations conciliator Susan Devoy calling for a tougher law about hate speech about religion? Wouldn't that be another kind of blasphemy law???

Ms Devoy originally made this suggestion last year (2017) as part of a report to the United Nations on New Zealand's race relations. She said she had four high-level issues she would like the committee to review. The third was:

The importance of better data collection about hate crimes, and the scope of the current "hate speech" legislation that is in place.

8. Current hate speech law in HRA

Our so-called hate speech law is sections 61 and 131 of the Human Rights Act. Section 61 says it is unlawful to publish or broadcast or distribute written material which is threatening, abusing or insulting, or to use insulting words in public places, if they are likely to excite hostility against, or bring into contempt any group of persons on the **ground of colour, race or national or ethnic origins** of that group of persons.

Section 131 is similar but refers to an intent **to excite hostility or ill will** ... against those groups,.

As an example of religious hate speech, Ms Devoy referred to cartoons in several newspapers that were likely to bring Maori and Pasifika people into contempt. The Human Rights Review Tribunal agreed these were offensive, but said they didn't reach the threshold the amount of harm required.

Ms Devoy also complained that these laws could not be used to address hate speech directed against Muslims, for instance, because Muslims in New Zealand are not a single ethnic group, and religion is not specifically mentioned in these laws.

9. Hate speech in Harmful Digital Communications Bill

Susan Devoy also referred to the new Harmful Digital Communications Bill, 2015. So this is now a third law affected by the idea of blasphemy. This law refers to the internet and says digital communications should not denigrate an individual by reason

of his or her colour, race, ethnic or national origins, religion, gender, sexual orientation, or disability.

So we do already have a law that covers hatred of religion. We've had it for three years and didn't even notice.

And this law creates Netsafe, an advisory group who are able to investigate complaints. And if that doesn't resolve the situation, they may complain in the District Court, and seek orders including removing the digital communication.

- To me, this would seem to cover what used to be called blasphemy. And it also has stronger penalties than the old blasphemy laws. The old blasphemy law provides for imprisonment up to one year. The HDC Act can sentence someone up to two years.
- This law was criticised by civil rights people because it protected religious people, but didn't protect humanists or other non-religious people. This is exactly the kind of inflation of the law that people have been warning about for over a hundred years.
- After the new law had been in force for a year, Judge David Harvey reviewed it for the Auckland Law Society, and he said it was too vague in describing what was harmful. The original law suggested by the law commission dealt with material that is grossly offensive, indecent, obscene, or menacing character, or knowingly false. That seemed very fair, but this precision was lost when the law was implemented. It didn't focus on the harmful actions; it focussed on the emotional distress that was caused. That raises the objection: Just how unhappy do you have to be before your religion is protected. What makes one person happy may not make someone else unhappy, and so on. What makes a Catholic unhappy may not make a Protestant or Muslim unhappy and vice versa. (To call Jesus son of God may make a Jew unhappy, but not to call him son of God may make a Christian unhappy.)
- My main complaint is that the Harmful Digital Communications law has no balance between freedom of speech and the harm that is done. If you compare this with the law against defamation, a publisher can argue in his or her defence that the criticism it was in the public interest; or that it was substantially correct; or that it was fair comment; or that it balanced both sides of a debate. As a journalist I was constantly making those kinds of decisions, and getting legal advice. The new Digital Communications law has no defences for the critic -
- And it has no defences for the internet publisher.
- The new law also has no distinction on the different circumstances of the speech. Under the defamation law, a statement is privileged if it is said in court or in parliament You can say more painful things there, because they have to get to the nitty gritty, before all the evidence is all in. So free speech is vital to the course of justice.
- Similarly, if you say indecent things in a movie, or a play, that may be OK, because people choose to go there; they can find out in advance that it includes nudity, so they can't complain as much as they would if you waked nude down the street. You can't complain that a movie is indecent, if you specifically went to see it so you could be shocked by it.
- The new Harmful Digital Communications law lacks this kind of protection for people chatting on the internet, with other likeminded people; if someone listens in on their conversation they can sue you. And people do sue us. I've been threatened with defamation three times, because of things I said among friends on the internet. People are specially cruising the net to look for nasty things about them, so they can get upset and sue them.

- Instead, the Harmful Communications Bill sets up a Netsafe Agency, and Safe Harbour Guidelines. Under the guidelines, a person can complain to a network publisher and ask them to remove something. And the publisher can then go to the person who said it and ask them to withdraw their remarks. Alternatively, the publisher can decide to withdraw the remarks themselves, or refer it to the Agency But they have to do that in 48 hours, and all those steps are loaded in favour of suppressing contentious words.
- If you are a blog host, you still have a right to ignore the guidelines – if you are prepared to face the risk of court proceedings. But this blog host does not have the backup defences, that newspapers have used for decades, like saying it was fair comment, that it was said in a privileged discussion, that it was an issue of public concern, and so on. So without these defences, the publisher, or defendant, end up fighting someone who only has to say – I was hurt by this statement. The feelings of the hurt person seem to be all powerful, and to me that seems unfair.

10. My position as a web moderator

- I have been in that very position myself over the past week as a web moderator.
- Two parents of school children were protesting on the Secular Education Network that two schools in East Auckland were using a chaplain who was praying with the children in private sessions, against their parents' wishes.
- Somebody told the school principal about this and he emailed a protest letter to **me**, saying this was incorrect. And he said it could seriously harm the school's reputation. I don't know why he picked me to complain to but he did. I am one of seven moderators of the site, but he didn't cite that as a reason.
- And since I was doing this research on Netsafe at the same time, I realised I could be taken to Netsafe and asked to remove this material. But I couldn't check it thoroughly in the 48 hours.
- I did check it, and found that the parents' fears were well founded. It did seem their children were getting religion rammed down their throats. I didn't have watertight proof that it happened, but there were well-based fears about it.
- I also didn't have the permission of the two parents to name them. They wanted to remain anonymous, but I would have to name them if I wanted to avoid a Netsafe inquiry.
- So I went to the other six moderators (A) To check my views and see if I was taking an unacceptable risk. And also to get their backup in case it went to court. The other moderators supported me taking a tough line against the principal, and also accusing him of bullying. And trying to suppress a reasonable discussion.
- But this research and consultation took me a week. No way could I have done it in 48 hours.
- And it was scary. I've been involved in defamation threats, which are very similar, and I survived; I was never taken to court ... but this time, with the Harmful Digital Communications Act, I didn't feel the law was fair. It had a list of principles that favoured the accuser, but there was no list of principles that favoured the person who posted a remark on the internet, and no principles that defended the moderator. This law is stacked in favour of suppressing free discussion.
- My main hope is that our discussion was not as over the top as the worst offenders, so the school would probably fail in any prosecution.

11. Penalties

What about penalties? Ms Devoy asked the United Nations Committee to investigate whether our remedies for hate speech are adequate.

- I note that the old blasphemy law had a maximum sentence of one year's jail.

- I note that the Human Rights Act is a civil law, so you can't be sent to jail for it, though you can be ordered to pay damages.
- I note that the penalties under the Harmful Communications act go up; to two years jail.

Judge Harvey, who did the review of the Harmful Communications Act after its first year said he was surprised how many cases there were - 38 of them. The highest sentence was one year, another was six months and another three months.

The largest group of convictions were for revenge acts by people whose relationships had broken down ... one partner smashing up things in his ex-partner's house, and sent some indecent videos of her to her mother. They really were heavy offences. He was sentenced to one year.

Of the cases where they pleaded not guilty, not one of them had yet come to trial, so Judge Harvey said this was another matter for concern. People who were accused took years before their cases came up.

But none of the cases Judge Harvey quotes were for religious reasons. Whereas, it was religious hate speech that Susan Devoy was mainly concerned about.

So I'd say the law is suitably tough for hate speech in general; if anything it is too tough. But there's still no indication that it was ever used against religious hatred; even though religious hatred is on its list of kinds of hate speech.

So I think this hate speech is fair to different religions, though it does seem to favour the complainant..

So I think the law is probably doing more good than harm.

But equally I think there is no justification for Susan Devoy to say religious people need more protection. The fact that no religious cases came up suggests **not** that the law is too soft (after all, several people were sent to jail because of it). But rather, it suggests that the reason no religion haters were prosecuted is that very few people who hate religion cause enough harm to match the jealous lovers who the law has caught and punished. There may be people who paint graffiti, or say indecent things about religion on the net. I have received some of these emails myself, but they are not damaging enough to send someone to jail.

No doubt some day one of our religious people will come in for shocking treatment, as Ms Devoy fears. But it seems that when it happens, this law will be strong enough to catch them.

- But meantime this law is doing a lot of harm on the freedom of speech side. It is penalising people who have genuine grievances about religion, and stopping them from complaining.
- And it is penalising web hosts including myself Who are fair minded, but also believe in free discussion.

Do we need to toughen our laws on religion. **No**. I believe we need to lighten them to respect freedom of speech,. The reasons for lightening them are not new ... they have been slugged out for 500 years. But those lessons have been forgotten in some sections of our society.

12. Finale

They have forgotten about -

John Wycliffe - he was not a blasphemer, but a Christian who reckoned the church was too powerful. And the clergy were so annoyed they wanted bishops to have the power to arrest him.

James Naylor, a quaker who thought his inner light was God I suspect Quakers may still think this. In Naylor's case the judges clearly said this was blasphemy but they also had the sense to say didn't have the power to kill him.

And I think the most telling is the man in 1838 who criticised the Catholic church, but was **not** convicted, because blasphemy at that time - only protected the church of England. We too are in danger of a law that protects religion, more than it protects the population in general. And it's a protection that shifts with changing views on religion.

In 1400 the law protected the Catholic church; in 1838 it protected the Anglican church.

Susan Devoy has good reason to be concerned about hate speech on the internet....

But we've already got it.

She's upset because it didn't catch any religion haters, just caught a bunch of jilted lovers ... But that is the wrong question The question is whether it is strong enough to apply to harmful religious hate. I think it is.

Meanwhile, there is a lot of religious hatred on a lower scale, that this law will not catch. But we can address that in non-legal ways. By using the internet and other media to promote tolerance. By personally and as groups campaigning to change public opinion.

By supporting people who are being victimised.

We should do those things.

But also support freedom of speech, for people who hate religion, but do not cross the line into crime.