

HATE SPEECH IN AUSTRALIA: EMERGING QUESTIONS

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Anti-vilification laws, primarily but not exclusively on the grounds of race, have become an accepted and normal part of the Australian anti-discrimination policy framework. In every state,¹ the Australian Capital Territory,² and federally,³ anti-vilification laws of some kind exist. There are important differences between these laws but, generally, by creating an offence of vilification, they set a standard of behaviour which recognises that the community as a whole finds vilification unacceptable. They support the argument that vilification amounts to more than simply hurting someone's feelings. Rather, vilification is constructed as an act of discrimination or, in some cases, a criminal offence.

The existence of these laws establishes that in Australia, governments and communities view hate speech as an unacceptable form of expression warranting state intervention to minimise its harms and/or its occurrence. For example, the New South Wales Government justified the introduction of Australia's first anti-vilification law in 1989 by arguing that the legislation was necessary to ensure the 'right to a dignified and peaceful existence free from racist harassment and vilification' and 'its attendant harms'.⁴ In Victoria, a government Discussion Paper released prior to the enactment of racial and religious anti-vilification laws stated that 'expressions of racial and religious vilification not only undermine people living in our community, they also threaten the fairness and tolerance of our society' and that 'serious harm is inflicted on people by' hate speech.⁵ In Queensland, Explanatory Notes released with the 2001 Bill which introduced anti-vilification provisions in that state argued that the provisions would 'reinforce the social unacceptability of such conduct'.⁶

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1 *Anti-Discrimination Act 1977* (NSW) ss 20B–D, 38R–T, 49ZS–ZTA, 49ZXA–ZXC; *Anti-Discrimination Act 1991* (Qld) ss 124A, 131A; *Racial Vilification Act 1996* (SA); *Racial and Religious Tolerance Act 2001* (Vic); *Anti-Discrimination Act 1998* (Tas) ss 17(1), 19; *Criminal Code 1913* (WA) ss 76–80H.

2 *Discrimination Act 1991* (ACT) ss 65–7.

3 *Racial Discrimination Act 1975* (Cth) ss 18B–F.

4 New South Wales Government, *Discussion Paper on Racial Vilification and Proposed Amendments to the Anti-Discrimination Act 1977*, Discussion Paper (1988) 1, 3.

5 Victorian Office of Multicultural Affairs, *Racial and Religious Tolerance Legislation: A Discussion Paper and a Model Bill* (2000) 1, 5.

6 Explanatory Notes, *Anti-Discrimination Amendment Bill 2001* (Qld) 1.

In the current climate, however, vilification laws arguably face new challenges on several fronts. I wish to deal with two of them here. The first relates to the scope of anti-vilification provisions, specifically whether groups ought to be protected from vilification on the ground of their religious beliefs. The second relates to the appropriate grounds for restricting freedom of expression – an important individual liberty – in the context of an increased awareness of risks to civil liberties from government intervention.

In this paper, I will outline some idiosyncrasies of anti-vilification laws in Australia in order to provide the context for a discussion on religious vilification. I will then include a consideration of the deliberations in a recent Victorian anti-vilification case which turned on the question of religious vilification. In the final part, I will consider how it is that hate speech laws may be justified in the context of free speech principles, whereas other restrictions ought not.

I CATEGORIES OF VILIFICATION - RELIGION

In all Australian jurisdictions with anti-vilification laws, vilification on the ground of race/ethnicity is prohibited. The concept of ‘race’ in federal anti-discrimination law was derived from the *International Convention on the Elimination of All Forms of Racial Discrimination*.⁷ This Convention uses the conceptualisation, ‘race, colour, descent or national or ethnic origin’.⁸ The statutory definitions relating to this ground are as follows:

NSW	Race includes colour, nationality, descent and ethnic, ethno-religious or national origin
Qld	Race (not further defined)
SA	Race includes nationality, country of origin, colour or ethnic origin
Vic	Race includes colour, descent or ancestry, nationality or national origin, ethnicity or ethnic origin
Tas	Race (not further defined)
WA	Racial group means a group of persons on the basis of race, colour, ethnic or national origins
ACT	Race (not further defined)
Cth	Race, colour or national or ethnic origin

Only three jurisdictions in Australia explicitly include ‘religion’ or ‘religious belief’ as a protected category under anti-vilification laws: Queensland,

⁷ Opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

⁸ Law Reform Commission New South Wales, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report No 92 (1999) 5.9.

Tasmania and Victoria.⁹ In those jurisdictions which do not, some religious groups such as Jews and Sikhs are, nevertheless, considered to be protected under the racial anti-vilification provisions. In New South Wales, a 1994 amendment to the vilification provisions in the *Anti-Discrimination Act 1977* (NSW) added the term 'ethno-religious' in order to clarify the position on this issue. In Parliament, the intention to include Jews, Sikhs and Muslims as ethno-religious groups was clearly stated.¹⁰

Some still argue that these provisions are insufficient. It can be difficult to ascertain whether vilification might be occurring on the ground of a person's race or their religion. With the exception of Queensland, Tasmania and Victoria, vilification which can be perceived as occurring purely on the basis of a person's religious beliefs may not be actionable conduct.¹¹

This is of particular concern in the context of arguments that vilification against Muslims and people of Arab descent has increased in recent years. A report released by the New South Wales Anti-Discrimination Board in 2003 argued that debates in the media about the war on terror, asylum seekers and crime have led to a 'damaging environment of anti-Arabic and anti-Muslim sentiment', and a 'heightened level of racial vilification and discrimination'.¹² The Human Rights and Equal Opportunity Commission has also reported increased levels of discrimination and intimidation against Islamic communities since September 11, 2001.¹³ These reports augment an expectation that Muslims ought to be as protected from vilification as other vulnerable groups in society. Yet anti-vilification laws explicitly on the ground of religion have produced greater levels of opposition than their predecessor laws. Former New South Wales Premier Bob Carr stated in Parliament on 21 June 2005 that the Government would not consider introducing religion as an explicit category because to do so would be 'counterproductive' and confusing since 'just about anyone can have resort to them'.¹⁴ Moreover, the inclusion of religion as an explicit category in anti-vilification laws raises the serious counter-claim of religious freedom.

This tension was exemplified in a recent case handed down by the Victorian Civil and Administrative Tribunal. In *Islamic Council of Victoria v Catch the Fire Ministries Inc*¹⁵ a complaint was brought by the Islamic Council of Victoria

9 Other grounds on which vilification is prohibited include gender in Qld and Tas, HIV/AIDS and transgenderism in NSW and the ACT, sexuality in Queensland, Tasmania and ACT, homosexuality in NSW and a range of categories including age and disability in Tasmania.

10 Law Reform Commission, above n 8, 5.12–5.15.

11 Equal Opportunity Commission and Office of Multicultural Interests, Western Australia, *Racial and Religious Vilification*, Consultation Paper (2004) 16–17.

12 NSW Anti-Discrimination Board, *Race for the Headlines: Racism and Media Discourse* (2003) <http://www.lawlink.nsw.gov.au/lawlink/adb/ll_adb.nsf/pages/adb_raceheadlines> at 26 September 2005.

13 Human Rights and Equal Opportunity Commission, *Isma – Listen: National Consultations on Eliminating Prejudice Against Arab and Muslim Australians* (2004) Ch 2.

14 New South Wales, *Parliamentary Debates, Legislative Assembly*, 21 June 2005, 17085–6 (Bob Carr). See criticism of this view in Simon Rice, *On Religious Vilification and the Law* (2005) New Matilda <<http://www.newmatilda.com/home/articledetailmagazine.asp?ArticleID=805&CategoryID=-1>> at 26 September 2005.

15 *Islamic Council of Victoria v Catch the Fire Ministries Inc (Final)* (2005) ¶EOC 93-377.

against a Christian organisation. During a seminar held in Melbourne in March 2000 and in associated literature, the respondent argued that Muslims in Australia were organising a 'silent jihad' in order to impose Islam on Australians. Muslims were described as rapists, terrorists and prone to violence, and it was claimed that there were 'hundreds and thousands of Muslim people waiting in [a] queue for suicide bombing'. The respondent's defence included the arguments that: people have a right to express their views; Islam is open to interpretation and no-one could say their views were wrong; there is a symbiosis between terrorism and Islam; there is a political debate in Australia about the war on terror of which this group's views were a part; the holding of a religious belief is not illegal; and that they were teaching the Christian gospel.¹⁶ Judge Higgins nevertheless found that the expressions constituted vilification. The Judge ordered the publication of a public apology on the respondent's web site and in newspapers, and that the respondent cease making vilificatory comments.¹⁷ On 19 August 2005, the Supreme Court of Victoria granted leave for an appeal to be heard and a stay of the remedy of the publication of the apology.

Arguably, principles of religious freedom, as with principles of freedom of political expression, do not extend to the protection of vilificatory comments. This is because the right to 'engage in a robust discussion'¹⁸ is not an untrammelled or an absolute right. In Australia, free speech has been described as a somewhat precarious freedom which is, in part, reliant on a doctrine of an implied constitutional freedom of political communication.¹⁹ This doctrine, developed in the High Court since 1992, is limited in its application and scope. It is implied from the form of representative and responsible government established by the Constitution and operates as a freedom from government restraint, rather than a right conferred on individuals.²⁰ It is limited to 'political communication', usually understood as communication relating to matters which might have a bearing on federal politics. The exact parameters of this term remain contested²¹ although it has been held to include non-verbal expression.²² An expression which constitutes political communication is not automatically protected. Governmental restrictions are permitted where they occur as a result of a law which is appropriately adapted to achieving another legitimate government end.²³

16 Ibid.

17 *Islamic Council of Victoria v Catch the Fire Ministries Inc* [2005] VCAT 1159 (Unreported, Higgins J, 22 June 2005).

18 *Islamic Council of Victoria v Catch the Fire Ministries Inc (Final)* (2005) ¶EOC 93-377.

19 Michael Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant* (2000).

20 Haig Patapan, *Judging Democracy: The New Politics of the High Court of Australia* (2000) 51–9; George Williams, *Human Rights Under the Australian Constitution* (2002) 165–97; Adrienne Stone, 'Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication' (2001) 25 *Melbourne University Law Review* 374; Katharine Gelber, 'Pedestrian Malls, Local Government and Free Speech Policy in Australia' 22(2) *Policy & Society: Journal of Public, Foreign and Global Policy* (2003) 22, 23–32.

21 See Michael Chesterman, 'When is a Communication Political?' 14(2) *Legislative Studies* 5.

22 *Levy v Victoria* (1997) 189 CLR 579.

23 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561, 574–5. See also Gelber, above n 20, 31, 44.

In this climate, anti-vilification laws have experienced little, if any, constitutional impairment. Unlike the United States, where attempts to restrict racist speech have typically fallen foul of First Amendment strictures,²⁴ Australian anti-vilification laws have survived resistance from quarters emphasising free speech concerns.²⁵ Even though some have argued that incidences of hate speech may constitute political communication as conceptualised under the implied constitutional freedom,²⁶ this does not render anti-vilification laws constitutionally invalid. They will be valid so long as the laws themselves are regarded as reasonably and appropriately adapted to a legitimate government end, such as that of minimising the attendant harms of vilification and discouraging its practice. Thus, anti-vilification laws in Australia do not infringe the constitutionally secured implied freedom of political communication and attempts to cite the freedom in respondents' defences (for example, in the *Catch the Fire* and *Toben*²⁷ cases) have failed.

II POLITICAL CLIMATE

There are good arguments for the maintenance of anti-vilification laws as a legitimate curtailment of harmful expressive activity, even in the context of an overarching free speech principle. However, the free speech argument at the core of much opposition to anti-vilification laws remains important and ought not be easily or carelessly dismissed. While many would agree that freedom of expression is not an absolute right in liberal democratic polities, important differences of opinion emerge in relation to where the appropriate lines in the sand ought to be drawn. It is not always easy to determine who is deserving of protection and under what circumstances.

I will now discuss several cases on point. On 15 September 2005, US peace activist Scott Parkin was deported from Australia after being declared a 'national security risk'. After having already spent three months in the country taking part in seminars and political protests, Parkin's six month visa was cancelled and he was detained and deported. The federal Attorney-General refused to elaborate on the reasons for Parkin's deportation, but critics argued the government was deporting someone whose political views they disagreed with and who represented no threat of violence to the community.²⁸

24 See, eg, *RAV v City of St. Paul*, 505 US 377 (1992); *Skokie v National Socialist Party*, 373 NE 2d 21 (1978). See also Robert Post, 'Racist Speech, Democracy and the First Amendment' in Henry Louis Gates Jr et al (eds), *Speaking of Race, Speaking of Sex: Hate Speech, Civil Rights and Civil Liberties* (1994) 115–17.

25 Luke McNamara, *Regulating Racism: Racial Vilification Laws in Australia* (2002) 1–5.

26 See Chesterman, above n 19, 16–18; Dan Meagher, 'So Far So Good?: A Critical Evaluation of Racial Vilification Laws in Australia' (2004) 32 *Federal Law Review* 225, 251–3.

27 *Toben v Jones* (2003) 129 FCR 515, 525. In this case, the respondent was held to have breached federal racial anti-vilification laws by publishing Holocaust denial and other material vilificatory of Jewish people on the internet.

28 Mark Dunn, 'Protester Deported to the US', *Herald-Sun* (Melbourne), 16 September 2005, 1.

In September 2005, the Melbourne City Council banned an artwork featuring Islamic terrorist groups from display in Flinders Street station.²⁹ Also in 2005, Blacktown City Council in Sydney's western suburbs removed a commissioned artwork featuring cut-outs of soldiers in fatigues and tagged with the slogan, 'Weapons of Mass Distraction' from exhibition on the grounds that it was 'inappropriate' in the climate of the war on terrorism.³⁰ The federal Parliament proposed amendments to disclosure provisions in the *Public Service Act 1999* (Cth) after a provision which prevented public servants from disclosing information without express permission³¹ was found to be invalid by the Federal Court on the grounds of the implied freedom of political communication.³² The proposed amendment prohibited disclosure where it is 'reasonably foreseeable' that such disclosure could be 'prejudicial' to the effective working of government. Critics of the amendment argued that it was too general, did not specify exemptions where disclosure was to be expressly permitted, and contributed to a government 'pattern' of obscuring accountability.³³

Such incidents raise legitimate free speech concerns, particularly on the ground that these restrictions demonstrate a preparedness on the part of governments at various levels to restrict speech with which they disagree. Critics of such restrictions will undoubtedly call upon free speech principles in opposing such measures, just as opponents of hate speech laws have also called upon free speech principles in their own defence. It becomes possible to find one's way through this maze of competing free speech claims by focussing on what it is that the discursive activities enact in their expression. Hate speech, it is claimed, enacts hatred – not a psychological dislike for another human being but hatred manifested as prejudice; systematic and institutionalised marginalisation which can be identified via considerable historical evidence. The 'hate' in hate speech is shorthand for a broader conception. Thus, hate speech enacts prejudice discursively in complex ways, and with concrete negative consequences for its targets.

By contrast, the other forms of restricted expression listed briefly in this paper are harder to identify as manifestations of prejudice which enact harm. The federal Government, in declaring Parkin a security risk, certainly argued that allowing him to remain in the country could cause harm, but since the reasons for his deportation were not made public this stated belief is impossible to assess in any meaningful way. The artworks which were restricted could not in any tangible sense have been said to cause 'harm' in the sense of (re)enacting systemically identifiable prejudice, even if they may have offended some viewers. The disclosure of public service activities without permission by public servant whistleblowers is designed to assist in transparency and accountability rather than to harm government activities, and the government ought to take care

29 Lauren Martin, 'War on Terrorism is Claiming Victims on the Walls of Art Galleries', *Sydney Morning Herald* (Sydney), 16 September 2005, 5.

30 Interview with Zanny Begg (Sydney, 14 April 2005).

31 Reg 2.1.

32 *Bennett v Human Rights and Equal Opportunity Commission* (2003) 134 FCR 334.

33 Commonwealth, *Parliamentary Debates*, Senate, 16 June 2005, 38–43 (Kim Carr).

not to censure excessively the freedom of public servants to hold government to account.

When subjected to an assessment of what it is that an expressive activity *does* in the saying of it, the minefield of whose free speech claims may be regarded as valid and whose may not becomes easier to navigate. Difficult cases, and differences of opinion, will always arise. But the primary good ought not to be speech for speech's sake, but rather a measure of the impact of one's expressive activities on oneself and others.