

LEGISLATING AGAINST RELIGIOUS VILIFICATION: THE POLICY ISSUES

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On 7 February 2005, the *Serious Organised Crime and Police Bill* received its final reading in the British House of Commons, and at the time of writing the Bill is under consideration by the House of Lords. One of the Schedules to the Bill seeks to amend the *Public Order Act 1986*, which prohibits racial incitement, by simply substituting for the words “racial hatred”, the new words “racial and religious hatred”.

The proposal has raised a storm of opposition. Salman Rushdie, the author condemned by a Muslim fatwa for *The Satanic Verses*, and the comedian Rowan Atkinson, famous for skits on Anglican clergymen, went to see the Minister. Over one hundred writers in PEN, the writers’ union, petitioned the House of Lords. The British government responded by renaming the offence “hatred against persons on racial or religious grounds” to make clear that it is not religious jokes, beliefs or ideas that are being targeted. However the Minister refused to withdraw the proposed amendment or change its provisions.

Significantly for Australia, representatives of the “Festival of Light”, a Christian evangelical organisation, flew from Australia to London to lobby Parliamentarians against the proposed law. This reflected their strong opposition to the judgment on 17 December 2004 in *Islamic Council of Victoria v. Catch the Fire Ministries Inc.* the first contested case applying the Victorian *Racial and Religious Tolerance Act 2001*. On the other hand in a remarkable example of Australian multiculturalism in action, the Roman Catholic and the Uniting churches had actually sought to intervene in that case on behalf of the Islamic Council.

This paper will examine the issues raised by the current controversy, and the options considered by governments in determining whether and how to legislate to protect their citizens against religious incitement and vilification. (It should be noted by way of background that in Common Law jurisdictions the issue is not relevant to anti-semitism, perhaps the classic example of such incitement, since Jews have generally been defined as an ethnic or an “ethno-religious” group for the purposes of anti-

The judgment illustrates an international determination that nobody should be under threat of injury or extermination by reason of their identity. There is an apocryphal story from the Rwandan genocide which illustrates the point precisely - a child crying "Please don't kill me. I promise not to be a Tutsi any more".

However it is often submitted that such laws should have further aims which go beyond public order and safety. The international instruments, for example, call for a prohibition of any incitement of racial or religious discrimination. The dignity of every individual also implies a right to protection against insult and defamation on the ground not of what that person may do, but upon the basis of the identity with which that person is born.

Like obscenity, public vilification affects the quality of life of a society, creating ugly atmospheres which the state should seek to prevent. And above all, the existence of criminal laws, whether frequently enforced or not, represents a public declaration by the State that such public vilification is not to be tolerated.

In all this, religious identity would appear to be as relevant as race as a ground for protection by governments. Religious warfare and hatred are certainly just as much a feature of human history as racial and ethnic antagonisms, and no state wants religious conflict within its territory.

The problem lies in defining the proper limits to freedom of speech to be applied in protecting the citizen against the various forms of group defamation. There is arguably a significant difference between "race" and "religion" in this context. Stereotypes based on race, colour or ethnic origin can never be universally true, and individuals should not be branded by such stereotypes. Religious teaching, on the other hand, is by its nature a matter of opinion. Indeed the discussion and criticism of religious belief could well be regarded as non-negotiable elements of freedom of expression in a democratic society.

The realities are more complex. Ethnic groups are often distinguished by historic cultural backgrounds incorporating customary moral and religious elements which ought quite properly to be the subject of open and civilised discussion. Customs affecting the rights and status of women are just one typical example. At the same

“all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts”.

Article 20.2 of the *International Covenant on Civil and Political Rights 1966*, on the other hand, does include religion as a basis for protection against incitement, although the call for a legal prohibition by its signatories is carefully defined as

“any advocacy of national, racial or religious **hatred** that constitutes incitement to discrimination, hostility or violence.”

Significantly Article 19, which declares the right to freedom of expression, specifically allows for restrictions on such freedom which “are necessary

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (*ordre public*), or of public health or morals.”

A number of governments were nevertheless reluctant to legislate in the terms required by the Conventions. Australia, Belgium, Luxemburg, Malta, New Zealand, the United Kingdom and the United States lodged “reservations” in which they expressly reserved the right not to introduce the relevant legislation. Australia’s reservation to the ICCPR was in identical terms to that of the UK:

“The Government of the United Kingdom interprets article 20 consistently with the rights conferred by articles 19 and 21 of the Covenant and having legislated in matters of practical concern in the interests of public order (*ordre public*) reserves the right not to introduce any further legislation.”

(The reference to article 21 is a little difficult to fathom. It guarantees freedom of assembly.)

In 1989 NSW became the first legislature in Australia to introduce an anti-vilification law. As a ceremonial bi-partisan gesture the Bill was introduced into Parliament by the Leader of the Opposition. The press, which had vociferously opposed the Bill,

dissuaded from proceeding by the prospect of respondents exploiting the defence of public interest to use the Tribunal as a platform for further defamation, and without any serious penalty at the conclusion of the proceedings.

It is true that the Act does provide for criminal prosecution if physical harm is threatened or incited. However the Attorney-general's consent is required for such prosecution, and there have been no prosecutions at all since the law was enacted in 1989.

The definition of "race" in the Act does not include "religion", although a category of "ethno-religious origin" was included after a few years.

Gradually other Australian legislatures have followed the NSW model, providing "civil" remedies and "free speech" defences with similar counter-productive results. As far as protection against religious vilification is concerned **Tasmania** includes "ethno-religious origin" in "race" as a basis for civil protection, the **Commonwealth, ACT, WA and SA** do not include religion, the **Northern Territory** includes "religious belief" as a ground for protection against harassment, and the **Queensland** law is identical to that of NSW except that it includes "religion" in the grounds for protection against vilification.

The Commonwealth "racial hatred" law provides a civil remedy which follows the NSW model, with similar defences, but in terms based on "offensive behaviour" rather than incitement, which are easier to establish:

"It is unlawful for a person to do an act, otherwise than in private, if:
the act is reasonably likely, in all the circumstances, to offend, insult,
humiliate or intimidate another person or a group of people."

Then in 2001 Victoria enacted the *Racial and Religious Tolerance Act*. It includes protection based on "religious belief or activity", and it provides for a civil remedy which is almost identical with NSW with similar defences. Also for the first time in Australia, it creates what could be an effective sanction, creating a criminal penalty for "intentionally inciting serious contempt, or revulsion or severe ridicule", significantly with no defence of public interest or fair comment. It remains to be seen

[However] Mr Lamb is a candidate for election in the federal seat of Moreton. The pamphlet has evidently been published by him in order to persuade electors, by a disclosure of his opinions, that he deserves their vote. One result of acceding to the complainant's application to restrain further publication of the pamphlet would be to deny the voters of Moreton any further knowledge that Mr Lamb holds views of this character. Although his holding those views may persuade some to vote for him, it is equally likely that his holding those views may persuade others to deny him their vote...

In my view it is manifestly in the public interest that candidates' views on issues affecting the electorate be known... That the views are thought by some to be despicable is beside the point.”

On 17 December 2004, Judge Higgins of the Victorian Civil and Administrative Tribunal considered a similar defence of “genuine religious purpose...in good faith” in his judgment in *Islamic Council of Victoria v. Catch the Fire Ministries*.

In dealing with some 13 intensely defamatory assertions about Islam, the Tribunal actually found it necessary to take expert evidence concerning the truth or falsity, as well as the bona fides, of the assertions, resulting in a judgment going to 140 pages.

Judge Higgins engaged in a difficult and sophisticated exercise. He began with the proposition that

“One-sided, selective, literal archaic interpretations of certain teachings of the Qur'an and Hadith in our present day would admittedly induce fear and apprehension – as would one-sided, selective, literal archaic interpretations of some Biblical text...The core issue is not that of the authenticity of the original sources, but of fair and representative selection and interpretation of those sources.”

He came to the conclusion that the defence of genuine religious purpose was not available since it was not exercised “in good faith”, and he found in favour of the complainant on the basis that

identifiable group where such incitement is likely to lead to a breach of the peace” provides for no free speech defence. The second lesser offence, of “wilfully promot[ing] hatred against any identifiable group”, on the other hand, is subject to various defences of truth, religious discussion and public interest.

The principle behind the distinction is that there should be no need to protect freedom of expression if the maintenance of public order is threatened. A similar principle is applied in the British bill. The *Public Order Act* which is to be amended provides for no “free speech” defences and creates an offence only if a person

“uses threatening, abusive or insulting words or behaviour, or display[s] any written material which is threatening, abusive or insulting and if he intends thereby to stir up racial hatred, or having regard to all the circumstances racial hatred is likely to be stirred up thereby.”

It is also significant that the “religious hatred” referred to in the amendment is similar to the Canadian definition in being predicated on identity rather than belief or practice.

The British and Canadian laws obviously cover only the most extreme cases, and it is submitted that such criminal provisions ought to be supplemented by “civil” remedies in terms such as are provided by the Australian Commonwealth law which makes racially offensive behaviour “unlawful”. The difficult question then is whether the “free speech” defences are relevant in such cases. Abuse and insult based on racial identity are never justifiable, and those who seek a civil remedy should not have to go through the demeaning process of contesting any relevant vilification. While religious vilification raises more difficult issues, it is submitted that the same principles should apply. The preservation of social harmony in a multi-religious society requires the maintenance of civility, and governments should consider it their duty to provide their citizens with usable avenues for such protection.