



Criminalising Hate Speech: Australia's crusade against vilification

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Executive Summary

There have been calls to introduce federal criminal vilification laws in Australia. Further, most Australian jurisdictions are reviewing and planning amendments to their vilification laws. These initiatives are largely driven by a belief current laws are ineffective and fail to protect minorities.

Vilification laws are a complicated policy area because of political polarisation; a lack of consensus on which speech should and should not be unlawful, and the existence of a vast array of state and federal speech regulations — both criminal and civil.

The speech proscribed by these laws is often referred to as 'hate speech.' However, 'hate speech', as a term, creates confusion. 'Hate speech' defined as inciting or threatening violence has long been against the law. However, over the past 70 years, since the inception of the Universal Declaration of Human Rights (UDHR), the definition of 'hate speech' has continually expanded.

Influential human rights bodies, such as the United Nations, assert that all speech that is potentially, harmful, insulting, or discriminatory towards a person or group who have a protected attribute should be made unlawful. This definition of 'hate speech' is based on the view that, if such speech is allowed to go unchecked, it will lead to violence. Despite this being a commonly held belief, there is little to no evidence to sustain it.

Violence against minorities is highest in authoritarian regimes where individual freedoms are not respected. Conversely, countries that value free speech and individual liberty have been able to combat bad ideas with open and rigorous debate.

This idea was extensively debated throughout the drafting of the UDHR. After having witnessed the twin tragedies of World War II and the Holocaust, more than 50 nations assembled in an attempt to come to a resolution that would prevent such horror ever happening again.

Countries were divided on where to draw the appropriate limitations on speech. However, the liberal democratic view of free speech — that the best way to prevent bad ideas from flourishing is to combat them with better ideas — prevailed.

Nonetheless, in the decades after the UDHR came into effect, attitudes towards free speech started to change. Anti-Semitic vandalism in Germany, apartheid in South Africa, and a push to fight colonialism in South-East Asia and Africa, prompted the UN to implement additional instruments to battle racism and discrimination.

In the 1960s and 1970s, The International Convention on the Elimination of All Forms of Racial Discrimination

(ICERD), and the International Covenant on Civil and Political Rights (ICCPR) were implemented.

The ICCPR is a prohibition on the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. The ICERD requires states to not only criminalise racist, abusive and discriminatory speech, but to take positive steps to eradicate racial discrimination.

These international conventions, along with domestic pressures, have influenced Australia's vilification laws. When the ICERD and the ICCPR were being ratified, Australia was experiencing significant domestic changes towards multiculturalism and diversity. There was pressure to introduce legislation that made racially abusive, insulting, or discriminatory speech unlawful.

The first attempt to introduce federal racial hatred bills was by the Whitlam government in 1973. However, concerns about free speech meant they ultimately failed. But the Keating government successfully introduced racial hatred bills in 1994, under Section 18C of the *Racial Discrimination Act 1975*.

Section 18C has received a considerable amount of attention over the years. A number of high profile cases have raised concern about the impact such legislation has on free speech. However, this focus has often overlooked the extensive network of vilification laws that exist at the state and territory level.

Last year, NSW introduced *The Crimes Amendment (Publicly Threatening and Inciting Violence) Act 2018* (the *NSW Act*), which criminalises "publicly threatening or inciting violence on the grounds of race, religion, sexual orientation, gender identity, or intersex, or HIV/AIDS status."¹ The *NSW Act* sets a high threshold for protecting free speech and minorities from vilification, by focusing on incitements and threats of violence. Further, by moving the offence into the *Crimes Act*, vilification complaints can be investigated with the greater evidence-gathering powers of police — ensuring a more thorough investigative process.

Every state and territory, except the Northern Territory, has a mixture of civil and criminal laws that prohibit vilification. As the *NSW Act* criminalised vilification, this report will focus on the criminal vilification laws that exist in the rest of Australia.

Most Australian jurisdictions are conducting reviews, or proposing amendments to their vilification laws. This report argues those jurisdictions should adopt the model outlined in the *NSW Act*, because it ensures minorities are protected without unduly infringing on free speech.

Introduction

The appropriate restrictions on speech are an endless policy discussion, with both sides of the debate protecting what they see as fundamental freedoms and matters of great importance to society.

The supporters of restrictive speech laws believe they are necessary to prevent racism, violence, and encourage diversity and multiculturalism,² whereas those who oppose greater restrictions are concerned about their negative impact on free speech.³

Australia's vilification laws have been influenced by international covenants to which Australia is a signatory, and by domestic policy changes. Since the United Nations was established in 1945, there have been several human rights instruments and conventions designed to protect fundamental freedoms. Examining the genesis and obligations of these treaties provides a valuable insight into how Australia's vilification framework was formed.

Most of the focus on speech laws has been at the federal level. The Whitlam government unsuccessfully attempted to introduce Australia's first anti-vilification laws in the *Racial Discrimination Bill 1974*. The first federal racial vilification laws were introduced by the Keating government in 1995.

But, in the interim and subsequently, a variety of state and territory laws have been passed that provide civil and criminal penalties for speech that incites hatred, contempt, violence, or threats of violence when directed at an individual or group because they possess a protected attribute.

Understanding the state and territory vilification laws helps us understand the scope of current protections, but will also help answer the question of whether Australia should expand federal vilification laws.

Which speech should be unlawful?

The massacre at two mosques in Christchurch by an Australian extremist inflamed the discussion of vilification laws. Many activists and commentators blamed the rhetoric of particular Australian politicians and media personalities for 'radicalising' alleged shooter Brenton Tarrant.⁴ Although some political commentary deserves to be condemned, claiming such speech is responsible for violence is flawed thinking.

Prohibitions on speech that incites or threatens violence have long existed. However, the scope of vilification laws has slowly been changing; from the initial aim to provide recourse to victims of threats, "to embrace diversity and support the human rights of

all."⁵ The view that discrimination laws are required to support rights and equality has led to the perception that, in order to stop violence and ensure equality, greater restrictions on speech are needed.⁶

However, this thinking represents a fundamental shift in the purpose of anti-vilification law and misunderstands the relationship between words and actions. As Australian legal scholars, Joshua Forrester, Lorraine Finlay, and Augusto Zimmermann discuss, claiming laws are required to stop violence misunderstands the gulf between criticism of ideas and actual threats of bodily harm.⁷ Forrester et. al. go on to say "...there is a material difference between actual or threatened physical violence and hurt feelings."⁸

Australia has an anti-vilification framework outside of s 18C

In the wake of the horrific events in Christchurch, there were specific calls to amend and strengthen s 18C of the *Racial Discrimination Act 1975*. This is unsurprising, given the attention focussed on s 18C in debates on free speech and vilification.

Section 18C makes it unlawful "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" on the basis of "race, colour or national or ethnic origin."⁹

One of the implications of this focus on s 18C has been that Australia's state-based vilification protections have often been overlooked. Proponents of s 18C argue it is a vital protection to ensure racism does not thrive in society.¹⁰ The perception is that if s 18C were repealed, minorities would have no recourse if they were victims of abusive, threatening, or inciting speech. This is incorrect.

Although s 18C cases do warrant attention (which will be addressed in other research), the primary focus of this paper is the criminal vilification framework at the state and territory level.

This paper will first canvas international law and the development of international human rights instruments on racial hatred and vilification. It will examine the laws in NSW, then compare them to both the international legal environment, and protections in other Australian states and territories. This paper recommends, if other jurisdictions want to amend their laws, they should replicate *the NSW Act*. Further, the paper will show that introducing federal vilification laws is unnecessary.

Federal racial vilification protection

When the Whitlam Government introduced the *Racial Discrimination Bill 1973 (RDB 1973)* they argued it was necessary to promote multiculturalism, combat racism, and to fulfil international treaty obligations (which are examined in the following section).¹¹ A general election prevented debate on the *RDB 1973*.¹² After the election, the *Racial Discrimination Bill 1974 (RDB 1974)* was introduced and extensively debated throughout 1974 and 1975.

The debate focussed significantly on the potential consequences for freedom of speech. The *RDB 1974* included clause 28* which would have made the dissemination of material that promoted hostility, ill-will, contempt, or ridicule towards people because of their "race, colour, national or ethnic origin" an offence.¹³

BOX 1 – What is hate speech?

'Hate speech' is not a legal term of art and often captures not only speech that is unlawful (such as inciting violence), but also speech that is hurtful but legally permissible (such as insults). Using the term 'hate speech' to describe lawful and unlawful speech creates more confusion than clarity; especially when people argue 'hate speech' should be made illegal — because it is difficult to determine which speech they are referring to.

The definitions of 'hate speech' provided by government, non-government organisations, human rights bodies, activists and legal scholars, illustrate the variety of interpretations of the term.

The Academy of Social Sciences in Australia defines hate speech as:

...speech or expression which is capable of instilling or inciting hatred of, or prejudice towards, a person or group of people on a specified ground. Hate speech laws are usually directed to vilification on the grounds of race, nationality, ethnicity, country of origin, ethno-religious identity, religion or sexuality.¹⁴

The United Nations, although acknowledging there is not internationally legally agreed upon definition of 'hate speech', has recently defined it as:

any kind of communication in speech, writing or behaviour, that attacks or uses pejorative or discriminatory language with reference to a person or a group on the basis of who they are, in other words, based on their religion, ethnicity, nationality, race, colour, descent, gender or other identity factor.¹⁵

The UN approach to prevent and punish 'hate speech' further confuses the issue, as the ICCPR and the ICERD both offer different definitions. Article 20 of the ICCPR requires states to restrict freedom of expression when it comes to war propaganda and "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence."¹⁶ The ICERD's restrictions on 'hate speech' are more far-reaching, and aim to restrict speech that severely inhibits the freedoms and equality of others and requires states to take positive steps to promote tolerance.¹⁷

Hence, discussion of vilification laws would be aided by removing the use of the term 'hate speech.'

* Clause 28.

A person shall not, with intent to promote hostility or ill will against, or to bring into contempt or ridicule, persons included in a group of persons in Australia by reason of the race, colour or national or ethnic origin of the persons included in that group—

(a) publish or distribute written matter,

(b) broadcast words by means of radio or television; or

(c) utter words in any public place, or within the hearing of persons in any public place, or at any meeting to which the public are invited or have access, being written matter that promotes, or words that promote, ideas based on—

(d) the alleged superiority of persons of a particular race, colour or national or ethnic origin over persons of a different race, colour or national or ethnic origin; or

(e) hatred of persons of a particular race, colour or national or ethnic origin.

Penalty: \$5,000

In 1975, then Attorney-General Keppel Earl Enderby referenced international convention and argued "The penalty provisions, such as clause 28, are required by that convention."¹⁸ Enderby further defended clause 28 when he argued:

One does not have to go to Nazi Germany to see recent examples that perhaps would be in flagrant breach of a clause such as clause 28. Even in the general election campaign of May 1974 there were examples that could well have constituted a breach against a clause of that sort.¹⁹

However, then shadow Minister for Business and Consumer Affairs, John Howard, argued that clause 28 was unacceptable as it made the dissemination of ideas unlawful.²⁰ Clause 28 was ultimately deleted before the Senate passed the *Racial Discrimination Act 1975 (RDA 1975)*.²¹

Racial hatred bills were not meaningfully debated again until the 1990s, after three inquiries suggested amendments to the *RDA 1975*.²²

The *National Inquiry into Racist Violence in Australia* (the National Inquiry) prepared by the Human Rights and Equal Opportunities Commission, the predecessor to the Australian Human Rights Commission, in 1991 concluded there was:

- ambiguity around whether the *RDA 1975* prohibited racial harassment;²³
- a lack of protection for those who supported anti-apartheid and aboriginal land rights causes but were themselves not a member of a racial or ethnic minority;²⁴
- a lack of knowledge and support regarding the civil remedies available for victims of racially motivated violence or harassment – meaning minorities were unable or unwilling to pursue civil remedies;²⁵
- insufficient acknowledgment of the individual and societal harm caused by racist speech and actions;²⁶ and
- no protection against "Incitement to racial hostility."²⁷

The *National Report of the Royal Commission into Aboriginal Deaths in Custody* (The National Report) concluded, that while state and territory offences punished perpetrators, the law did not address:

- conduct that is a precondition for racial violence;
- systemic and institutionalised racism; and
- "indirect discrimination".²⁸

The *Multiculturalism and the Law Report* (the Multiculturalism Report) by the Australian Law Reform Council in 1992, concluded laws:

- Should make "incitement to racist hatred and hostility...unlawful but not a criminal offence";²⁹ and
- inadequately protected against broadcasting which "...is likely to incite hatred and hostility..."³⁰

Even though all three reports recommended the *RDA 1975* needed to be amended, they opposed criminal sanctions for incitement to racial hatred and hostility because of concerns this could unduly impact free speech.³¹ They instead believed civil sanctions would be more appropriate.³² In response to these inquiries, the Keating government introduced racial hatred bills in 1992 and 1994. The 1992 bill proposed creating two criminal offences: publicly fomenting hatred on the grounds of "race, colour or national or ethnic origin" and intending to cause fear of violence, based on the same attributes.³³ The 1994 bill proposed making "incitement to racial hatred" a criminal offence.³⁴ Debate on the 1992 and 1994 bills focussed on free speech and social cohesion.

When debating *The Racial Hatred Bill 1994 (RHB)*, then Member for Werriwa (ALP) Mark Latham, spoke of how Australia had embraced multiculturalism and tolerance in the 1990s and the *RHB* "...entrenches those values into the statute books of the Commonwealth."³⁵

Some members of parliament justified the proposed offences by citing Australia's obligations under international human rights law. For example, Labor Senator Nick Bolkus argued racial hatred bills are necessary because "The world has come to a decision on the need for a measure such as this through the ICCPR."³⁶

However, criminal federal vilification laws were opposed by some in the Liberal Party. Member for Moore (LNP), Paul Anthony Filling was concerned the *RHB* could potentially exacerbate problems by damaging "...the fabric of society by encouraging intolerance and confrontation between different sections of the Australian community..."³⁷

Ultimately, the amendments to criminalise vilification were rejected.³⁸ The unwillingness to criminalise vilifying, offensive, or hateful speech at the federal level has been a consistent position of Australian government since the 1960s. When Australia ratified the ICCPR³⁹ and the ICERD,⁴⁰ it reserved the right to not further legislate against vilification, as it was thought the existing federal- and state-level public order offences were enough to comply with treaty obligations.⁴¹

International Context

An extensive array of human rights instruments designed to eliminate racial discrimination and protect minorities is already in place. Relevant to this report are: The Universal Declaration of Human Rights (UDHR); The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), and the International Covenant on Civil and Political Rights (ICCPR).

The Universal Declaration of Human Rights

The UDHR, adopted by the UN General Assembly on 10 December 1948, was a milestone document as it was the first international agreement setting out inalienable human rights.⁴² The UDHR was the result of an extensive consultation and collaboration process that began in 1946,⁴³ when the United Nations Economic and Social Council (UNESCO) drew up the terms of reference for the creation of a declaration of human rights.⁴⁴ The final UDHR contains 30 articles and was drafted with more than 50 member states; and although eight nations abstained from voting on the final document, there were no dissenters.⁴⁵

During the drafting of the UDHR there was considerable discussion as to whether there should be limitations placed on free speech – a discussion imbued with the memory of World War II and the Holocaust. Article 19 of the UDHR protects “freedom of opinion and expression.”⁴⁶ During the drafting of article 19, there were clear distinctions in attitudes towards free speech from participating countries.

Proposals from the Soviet Union wanted expansive speech restrictions. The Soviets argued free speech should not be extended to “propagating fascism” or “provoking hatred as between nations” and organisations “of a fascist or anti-democratic nature.”⁴⁷ The Soviets claimed their proposals were designed to stop fascism; however their efforts were widely seen as an attempt to quell criticism and internal political dissent. Canadian delegate Lester Pearson noted: “The term ‘fascism’ which had once had a definite meaning was now being blurred by the abuse of applying it to any person or idea which was not communist.”⁴⁸

The United Kingdom was warier of the impact speech restrictions could have, and suggested the prohibition of obscenity, libel or slander, and speech that sought to suppress fundamental rights and freedoms.⁴⁹ The UK representative acknowledged speech restrictions could be interpreted more widely than “necessary or desirable.” However, to overcome unnecessary incursions on speech, the UK emphasised restrictions apply only to advocating violent uprising or denying the enjoyment of “human rights and fundamental freedoms.”⁵⁰

Despite a variety of proposals, and agitation from

the Soviet Union, article 19 was passed without any restrictions because the view of liberal democracies prevailed: a society that highly values free speech is better equipped to repel repugnant ideas.

However, one potential restriction to speech is Article 29 paragraph 2, which outlines that individuals have duties and responsibilities, and justifies limitations on an individual’s freedom when those freedoms negatively impact on the rights of others.⁵¹

The International Convention on the Elimination of All Forms of Racial Discrimination

At the time of its adoption in 1948, the UDHR was widely celebrated for its international commitment to protect and promote human rights. But by the 1960s there was an opinion that the protections outlined in the UDHR were inadequate after several instances of anti-Semitic vandalism in Germany, and increasing international pressure to fight colonialism in South East Asia and Africa, and apartheid in South Africa.⁵²

The ICERD was ratified by the UN General Assembly in 1965 and came into effect in 1969.⁵³ The provisions of the ICERD placed a greater obligation on signatory states to eliminate racism and discrimination. Article 4 (a) obliges all ratifying states, “[to] declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination.”⁵⁴ Although the article states that these obligations must be fulfilled “with due regard” to freedom of expression, it also mandates not only the prohibition of discriminatory or racist speech, but signatory states are required to take positive steps towards eliminating discrimination.⁵⁵

International Covenant on Civil and Political Rights

The second international convention that addressed ‘hate speech’ was the ICCPR. Passed by the UN in 1966 and effective 1976, the purpose of the ICCPR is to recognise the “inherent dignity” and “equal and inalienable rights” of all people and contains 53 articles.⁵⁶

The relevant ICCPR provisions dealing with speech are Articles 19 and 20.⁵⁷ Article 19, paragraph 2, reasserts the right everyone has to free speech “regardless of frontiers”, and paragraph 3 asserts this freedom comes with “special duties” allowing for speech restrictions that are “provided and necessary by law.”⁵⁸ Article 20 of the ICCPR prohibits by law, war propaganda and the “...advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence...”⁵⁹

Human Rights Bodies and the push for expanded 'hate speech' laws

These treaties have influenced vilification laws within signatory states. International and domestic human rights bodies and non-government organisations have argued that Australia needs to expand vilification protections to be fully compliant with international law. However, legislative proposals suggested to make Australia fully compliant are often vague, and target speech and conduct that is already unlawful.

The United Nations Human Rights Committee has long recommended Australia's reservations to the ICCPR and the ICERD be withdrawn.⁶⁰ Additionally, the Committee on the Elimination of Racial Discrimination has recommended Australia expand the *RDA 1975* so that it may "...prevail over all other legislation which may be discriminatory on the grounds set out in the Convention..."⁶¹

Domestic activist groups also believe Australia's vilification laws are inadequate. In 2017, a coalition of Australian non-government organisations produced two reports:

- 1) *Australia's Compliance with the International Covenant on Civil and Political Rights* (Australia's ICCPR Compliance Report)⁶² and,
- 2) *Australia's Compliance with the International Convention on the Elimination of All Forms of Racial Discrimination* (Australia's ICERD Compliance Report).⁶³

Both claimed racism and discrimination were prevalent and increasing in Australian society, and made several identical recommendations on how Australia could 'address discrimination' and comply with both the ICERD and the ICCPR.

One of the recommendations states Australia should: "fully incorporate its international human rights obligations into domestic law by introducing a comprehensive, judicially-enforceable Human Rights Act."⁶⁴ However, beyond stating such an act should be introduced, there are no further details explaining its content or how it would prevent discrimination.

Both reports also recommend Australia should enshrine "the right to non-discrimination and equality"⁶⁵ in the *Constitution*, maintain s 18C and abandon repeal or amendment attempts designed to weaken the legislation.⁶⁶ Australia's ICERD Compliance Report also recommended the government work towards the implementation of a "plan to address online racial vilification."⁶⁷

Australia's ICCPR Compliance Report recommends the government "introduce protections against religious vilification"⁶⁸ and greater vilification and discrimination protections for LGBTI people, "consistent with international human rights standards."⁶⁹

Beyond stating that these recommendations are required to ensure Australia is in full compliance with the ICCPR and the ICERD, both reports put forward recommendations to make unlawful that which is already so.

The conflict between the belief that free speech was the best way to combat harmful ideas, and the belief that it is necessary to restrict speech to protect minorities, remains in the contemporary debate on speech restrictions. Understanding the historical and contemporary international context on how vilification laws developed and exist helps understand how and why Australia developed its network of vilification laws.

BOX 2 The international experience of criminalisation of hate speech

Australia is not the only western democracy intensely debating the appropriate balance between protecting minorities and free speech. Two contrasting approaches can be seen in the US and the UK.

The United Kingdom

The United Kingdom has a variety of offences proscribing certain speech. The *Public Order Act (1986)* makes it a criminal offence to engage in public conduct that is threatening, abusive, or insulting, to a variety of protected categories.⁷⁰ Public Order offences remain relatively uncontroversial. However, cases prosecuted under the *Communications Act 2003* that criminalise using “public electronic communications” to send material that is “grossly offensive” have caused controversy.⁷¹

This legislation has led to policing of social media posts. A Liverpool teenager was fined, issued a community order, and had a curfew imposed, after she posted rap lyrics found to have contained racist language.⁷² The police investigated her after someone anonymously sent a screenshot of her post to the police.⁷³

The involvement of police in regulating online speech has become a controversial aspect of UK ‘hate speech’ laws. In April 2018, London Mayor Sadiq Khan established an Online Hate Crime Hub.⁷⁴ During its first year 711 cases were reported and five were prosecuted.⁷⁵ The unit also works closely with Facebook, Twitter and Google to identify anonymous users.⁷⁶ Despite Khan praising the work and success of the program, it is not without detractors.⁷⁷ Police Federation head, John Apter, expressed his frustration that police were being used to investigate, “trivial social media disputes rather than attending to burglaries and other serious crimes.”⁷⁸

Regardless of whether the *Communications Act 2003* is justified under international treaties, the negative consequences on free speech are significant. When people are investigated or prosecuted for engaging in contentious debates or posting lyrics online, it creates an environment of self-censorship.

The United States

The United States does not have federal vilification laws. The Supreme Court reaffirmed in a 2017 case, that speech deemed to be demeaning, hateful or racist is protected under the first amendment.⁷⁹

Opinion polling has shown Americans are the most tolerant in the world of speech that offends minority groups, religions or beliefs.⁸⁰ However, there are signs of this commitment changing.

When polled, a majority of Democratic voters (51 per cent) and a near majority of Republican voters (47 per cent) support criminalising ‘hate speech’ which the poll described as: “public comments intended to stir up hatred against a group based on such things as their race, gender, religion, ethnic origin, or sexual orientation.”⁸¹ Additionally, there is an ongoing discussion about whether the First Amendment is an absolutist view of free speech, and — in the absence of federal laws — what role states can play in prohibiting racist, violent and threatening speech.⁸²

Further, America is leading a push for tech companies Facebook, Google, and Twitter to prevent ‘hate speech’, disinformation, and fake news.⁸³ Democratic Presidential candidate Bernie Sanders believes tech companies should be regulated “to stop the spread of hate in America.”⁸⁴ Other prominent Democrats: Kamala Harris, Cory Booker, and Pete Buttigieg, have all expressed their belief that tech companies are responsible for the hateful content on their sites.⁸⁵

However, it is unclear what government regulation of online ‘hate speech’ will achieve in the United States. Violence and incitement to imminent violence are already illegal. Facebook already prohibits the sharing and posting of images, videos, and comments that depict or otherwise glorify violence.⁸⁶ Further, Facebook has ‘hate speech policies’ prohibiting the use of dehumanising language, targeted verbal attacks, expressions of contempt or hate based on “race, ethnicity, national origin, religious affiliation, sexual orientation, caste, sex, gender, gender identity and serious disease or disability.”⁸⁷

NSW Model

Prior to serious vilification laws being introduced in the *Anti-Discrimination Act 1977 NSW (ADA 1977)*, NSW had — and still has — public order offences housed in the *Crimes Act 1900* that make unlawful: affray; threatening to destroy or damage property; and intimidation or annoyance by violence or otherwise. Moreover, under the *Crimes (Sentencing Procedure) Act 1999*, an individual can have their sentence

effected if their actions were motivated by hatred or prejudice against a group to which the offender believed the victim belongs.⁸⁸ These public order offences could be used to prosecute instances of racial violence or abuse on public transport. For example in 2013, a woman who allegedly shouted offensive and racist language at school children on a bus was charged with “offensive language.”⁸⁹

Public Order Offences in the Crimes Act 1900			
Offence	Public / Private	Threshold	Penalty
Sect 93 C – Affray	Private and / or public	A person who uses or threatens unlawful violence towards another and whose conduct is such as would cause a person of reasonable firmness present at the scene to fear for his or her personal safety	10 Years imprisonment
Sect 31 – Documents Containing threats		A person who intentionally or recklessly, and knowing its contents, sends or delivers, or directly or indirectly causes to be received, any document threatening to kill or inflict bodily harm on any person	10 Years imprisonment
Sect 545B – Intimidation or annoyance by violence or otherwise		(1) Whosoever: (a) with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, or (b) in consequence of such other person having done any act which the other person had a legal right to do or having abstained from doing any act which that other person had a legal right to abstain from doing, wrongfully and without legal authority: (i) uses violence or intimidation to or toward such other person or that other person’s spouse, de facto partner, child, or dependant, or does any injury to that other person or to that other person’s spouse, de facto partner, child, or dependant, or (ii) follows such other person about from place to place, or (iii) hides any tools, clothes, or other property owned or used by such other person, or deprives that other person of or hinders that other person in the use thereof, or (v) follows such other person with two or more other persons in a disorderly manner in or through any street, road, or public place,	2 years imprisonment or to a fine of 50 penalty units, or both.
Sect 199 – Threatening to destroy or damage property		(1) A person who, without lawful excuse, makes a threat to another, with the intention of causing that other to fear that the threat would be carried out: (a) to destroy or damage property belonging to that other or to a third person, or (b) to destroy or damage the first-mentioned person’s own property in a way which that person knows will or is likely to endanger the life of, or to cause bodily injury to, that other or a third person,	5 years imprisonment

		(2) A person who, during a public disorder and without lawful excuse, makes a threat to another, with the intention of causing that other to fear that the threat would be carried out: (a) to destroy or damage property belonging to that other or to a third person, or (b) to destroy or damage the first-mentioned person's own property in a way which that person knows will or is likely to endanger the life of, or to cause bodily injury to, that other or a third person,	7 years imprisonment
Sect 4 – Offensive Conduct		(1) A person must not conduct himself or herself in an offensive manner in or near, or within view or hearing from, a public place or a school. (2) A person does not conduct himself or herself in an offensive manner as referred to in subsection (1) merely by using offensive language.	3 months imprisonment or 6 penalty units
Sect 4A – Offensive Language		(1) A person must not use offensive language in or near, or within hearing from, a public place or a school.	6 penalty units or community correction order

Anti-discrimination Act 1977

When originally implemented the *ADA 1977* was designed to "render unlawful racial, sex and other types of discrimination in certain circumstances and to promote equality of opportunity between all persons."⁹⁰ The *ADA 1977* also introduced the Anti-Discrimination Board of NSW to administer anti-discrimination law and handle complaints.⁹¹

The NSW Anti-Discrimination (Racial Vilification) Amendment Act 1989 was introduced to amend the *ADA 1977* and led to a two-tiered regulatory system for racial vilification.⁹² The two-tiered system operates as: 1) civil, in which the Anti-Discrimination Board and the Equal Opportunity Division of the NSW Administrative Decisions Tribunal, hear complaints;

and 2) criminal, that, although it is procedurally linked to the complaints-based civil system, allows for alleged offences to be processed through the criminal justice system.⁹³ The reason for the two-tiered system is explained by legal scholars Simon Rice, Neil Rees, and Dominique Allen, who argue the civil provision has a broader aim to prevent incitement generally, whereas the criminal provision protects individuals against harm.⁹⁴ Most states have adopted the 'NSW model' of having a dual regulatory system for vilification. The exceptions being: Western Australia which only has criminal vilification laws; Tasmania which only has civil provisions and the Northern Territory which does not have any vilification legislation.⁹⁵

Reform of anti-discrimination protections

Vilification laws have been the topic of much debate and reformation in NSW. Part of the aim of such legislation is preventative. That is, these laws are introduced to not only punish the perpetrators of vilification, but are designed to provide enough of a deterrent to ensure vilification does not occur. The dual purposes of being punitive and preventative are the major reasons anti-discrimination laws have been amended. The *ADA 1977* has been amended 90 times since inception.⁹⁶ As the instances of reported racism and discrimination have either remained static or increased, and prosecutions for vilification offences are rare, the legislation is seen by many as a failure.

The lack of prosecutions was what led to The Standing Committee on Law and Justice (The Standing

Committee) being asked to review the efficacy of Section 20D of the *ADA 1977*.⁹⁷ Section 20D made it unlawful to "by public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the grounds of the race of the person or members of the groups."⁹⁸ After an extensive review process, in 2013, The Standing Committee tabled the *Racial Vilification Law in New South Wales* report (The 2013 Report).⁹⁹

The 2013 Report asked for submissions on relocating the offence of serious vilification into the *Crimes Act*. Several stakeholders argued relocating the offence to the *Crimes Act* would assist procedural matters by moving the investigative function away from the Anti-Discrimination Board and to the police.¹⁰⁰ Additionally,

Rice argued, serious vilification is “criminal conduct” therefore it is more appropriately located in the *Crimes Act*.¹⁰¹

The Standing Committee did not support relocating s 20D into the *Crimes Act*.¹⁰² Instead it determined the procedural barriers to prosecution could be remedied by: adjusting the time frame for the lodgement of complaints and prosecutions; allowing those of a “presumed or imputed race” to lodge complaints; amending the prosecutorial consent powers; and allowing NSW Police to prepare a brief of evidence.¹⁰³ Further, the Standing Committee recommended the government review the penalty structure.¹⁰⁴

In addition to procedural barriers, the lack of prosecutions under s 20D was, in part, attributed to an “inability to adduce sufficient evidence to prove incitement.”¹⁰⁵ The Standing Committee recommended amending s 20D to make “recklessness...sufficient to establish intention to incite.”¹⁰⁶ The NSW Jewish Board of Deputies¹⁰⁷, the Community Relations Commission for a Multicultural NSW¹⁰⁸, and the Law Society of NSW¹⁰⁹ all recommended ‘recklessness’ be added to s 20D.

After the 2013 Report was tabled, the government issued a response in 2014 advising the Standing Committee they were “considering the important issues raised in the report” and were liaising with relevant departments.¹¹⁰ By 2016, the government had not proposed any new legislation or outlined any reforms to s 20D. Government inaction led to the

formation of the Keep NSW Safe Coalition in August 2016, whose objective was the reformation of s 20D.¹¹¹ Further, to hasten reforms to vilification laws, Shadow Attorney-General Paul Lynch introduced the *Crimes and Anti-Discrimination Legislation Amendment (Vilification) Bill 2016*.¹¹² However, after the first and second reading speeches the Bill was adjourned.¹¹³

These political pressures led the government to enlist Stepan Kerkyasharian AO, a former President of the Anti-Discrimination Board of New South Wales, to conduct a consultation process into serious vilification laws in NSW and the *Report on Consultation: Serious Vilification Laws in NSW* (the 2017 Report) was tabled.¹¹⁴ The consultation wanted to better understand community expectations towards “preserving freedom of speech and protecting people from violence.”¹¹⁵

As the 2017 Report was consultative, Kerkyasharian did not himself make recommendations. However, stakeholders were mostly concerned about similar issues that were raised in the 2013 report and supported similar amendments, such as adjusting the threshold for incitement¹¹⁶ and asking the government to review the penalty structure.¹¹⁷

The 2013 and 2017 Reports were both influential in the creation and final substance of the *NSW Act*. The following section will examine the offences in the *NSW Act* and the recommendations from the 2013 and 2017 reports that were adopted.

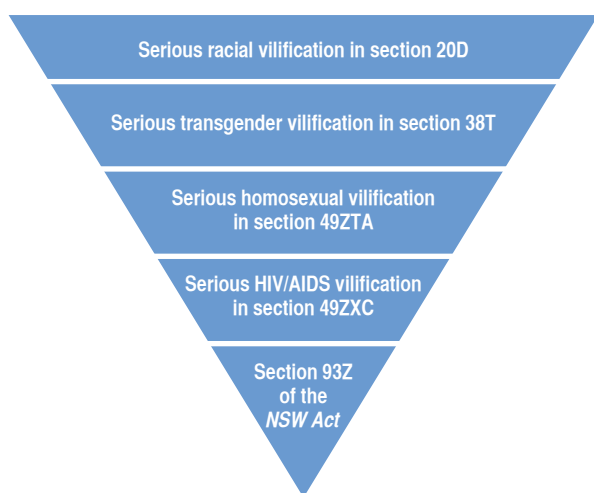
The Crimes Amendment (Publicly Threatening and Inciting Violence) Act 2018

The NSW Act received assent on 27 June 2018.¹¹⁸ The NSW Attorney-General Mark Speakman, during his second reading speech, outlined the four main objectives for *the NSW Act*.

Firstly, to make serious vilification an offence in the *Crimes Act* in order to demonstrate the seriousness of threatening and inciting violence.¹¹⁹ Secondly, to “reflect modern terminology” by inserting the terms ‘sexual orientation’ and ‘gender identity’ to replace ‘homosexual’ and ‘transgendered’, and broadening the scope of protected categories to include religious belief or affiliation and intersex status alongside the existing protected categories of serious racial, homosexual, and HIV/AIDS vilification.¹²⁰ Thirdly, to unify the maximum penalties across the protected groups for serious vilification.¹²¹ Lastly, to increase the maximum penalty.¹²²

Section 93Z of *the NSW Act* makes “publicly threatening or inciting violence on grounds of race, religion, sexual orientation, gender identity, or intersex, or HIV/AIDS status” an offence.¹²³ An alleged offender’s assumptions about an individual or group do not need to be correct for an offence to have occurred.¹²⁴ A person does not need to have carried out an act of violence in order to determine an offence has occurred; “intentionally or recklessly inciting violence” is sufficient (the amending of the threshold for incitement is discussed below).¹²⁵ Finally, the Director of Public Prosecutions needs to give approval before the commencement of a prosecution.¹²⁶

The new law was introduced to replace provisions in the *ADA 1977* (See figure below). The new Act replaced four serious vilification offences: serious racial vilification in section 20D; serious transgender



vilification in section 38T; serious homosexual vilification in section 49ZTA, and serious HIV/AIDS vilification in section 49ZXC.¹²⁷ The new offence is punishable by up to three years in jail, fines, or both, for individuals; and fines for corporations.¹²⁸

One of the most significant changes from the old to new serious vilification laws is moving the offence out of the *ADA 1977* and into the *Crimes Act*. Speakman said relocating the offence would demonstrate “the government does not tolerate threats of violence or incitement of violence.”¹²⁹

Adjusting the threshold: Incitement

The *NSW Act* improves a number of issues with previous vilification offences. The new offence under Section 93Z simplifies and unifies the complicated mixture of vilification offences; vests investigative power to the police; and maintains threats or inciting violence as the threshold to prove an offence.

Nonetheless, key changes made by the new legislation warrant extra attention. Under the new legislation, recklessness is sufficient to prove incitement.

The need for aggravating factors and proof of incitement under state and territory criminal vilification laws is intended to ensure that only conduct amounting to serious cases of racial vilification threatening violence is subject to criminal sanctions. However, this high threshold has been identified as a barrier to successful prosecutions. Several stakeholders in the 2013 Report “expressed the view that if intent is necessary [to prove incitement] it is a unique hurdle to serious vilification offences.”¹³⁰

However, lowering the threshold of incitement could lead to trivial complaints being brought against people and these complaints would have greater potential consequences. President of the International Commission of Jurists Australia, John Dowd, contended jail was not an appropriate punishment

for serious racial vilification due to the negative lifelong consequences a term of imprisonment has.¹³¹ Further, the NSW Bar Association, when explaining the considerations that need to be given before making penalty and sentencing changes, noted “very careful consideration would be needed before ... imprisonment for 5 years of more” is considered for an offence.¹³²

Nonetheless, the standard for proving an offence under s 93Z – either intentionally or recklessly inciting violence – is appropriately high. The introduction of the *NSW Act* was an appropriate response to concerns raised about the function of s 20D. Further, as Speakman outlined in his defence of the *NSW Act*, in addition to being a deterrent, vilification laws “... send a very clear message to offenders that we will not tolerate behaviour which risks people’s safety simply because they belong to a particular group.”¹³³ The *NSW Act* satisfies the requirement that vilification laws are designed to, in part, ensure the community feels safe.

Further, flaws in the *NSW Act* could be overcome. The government would be wise to commit to a review of the laws in line with the 2013 Report’s recommendations.¹³⁴ This would be able to identify and address any potential negative consequences or overreach from having increased penalties and adjusting the threshold. Moreover, moving serious vilification into the *Crimes Act* will allow access to the vast investigative and resource gathering powers of the police — which should mitigate trivial complaints being brought or recommended for prosecution.

NSW racial vilification protections and international obligations

It is important to understand how the interaction between laws passed at the state level, and those at the federal level, impact governments’ rights and obligations to prevent and punish vilification — particularly when examining whether Australia should expand federal vilification protections.

First, under s 109 of the *Constitution*, if the Commonwealth passed legislation validly, that legislation would prevail over state legislation to the extent of any inconsistency between them. Commonwealth legislation would more than likely not prevail over state legislation, because of s 6A (1) of the *RDA 1975*.¹³⁵ This would have the effect of creating greater complexity, because rather than displacing existing legislation, it would add more. However, as civil cases under s 18c of the *RDA 1975* are currently conciliated by the Australian Human Rights Commission (which is not an appropriate body to investigate or handle criminal investigations), it is not clear that the specialised police investigative framework needed to operate such legislation currently exists.

Second, the federal government has power to pass only such legislation as falls under the specific heads

of power in section 51 of the *Constitution*. This limits the powers of the Commonwealth in relation to vilification laws. The Commonwealth may need to ground any proposed legislation in respect to vilification on the external affairs power (which has been interpreted as giving the government the power to incorporate the terms of international instruments into domestic law) in order for it to be constitutionally valid.

Though the High Court has traditionally interpreted the external affairs power very broadly, in practice this restriction may bind the Commonwealth closely to the terms of the ICCPR and ICERD, the meaning of which is not entirely clear. Such a restriction does not apply at the state level.

Third, even though the states do not have to rely on international instruments to pass legislation in this area, this does not mean state legislation would not be enough to satisfy Australia's obligation under international treaties. Indeed, the reservations Australia added into the ICCPR and the ICERD stated "the Commonwealth has relied upon racial vilification legislation in New South Wales and other states and territories to help fulfil its international human rights obligations."¹³⁶ At the state and territory level, this has led to a coherent broad-based criminal and civil

framework which materially reflects international treaties.

The 2013 Report dedicated a chapter to outlining Australia's international obligations to "prohibit racial hatred" as signatories to the ICCPR and the ICERD.¹³⁷ Although the inquiry does not explicitly address the extent to which the NSW laws are consistent with Australia's international obligations, it is clear these obligations are persuasive in framing the NSW law.

Another example of the impact international obligations have on vilification laws came from the Legislation Review Committee's examination of the *NSW Act*.¹³⁸ While acknowledging the *NSW Act* "may be seen to trespass on the right to freedom of speech or expression", the Legislation Review Committee determined the *NSW Act* was a warranted restriction on free speech as it was dealing with public order.¹³⁹ Further, they cited obligations in the ICCPR which they interpreted as being a justification for implementing the speech restrictions in the *NSW Act*.¹⁴⁰ The ICCPR was cited throughout the process of consulting and debating the *NSW Act*. Several stakeholders and parliamentarians argued that amendments to racial vilification laws in NSW were necessary to fulfil our "...international human rights obligations to prohibit racial hatred."¹⁴¹

BOX 3: Should Australia further criminalise 'hate speech'?

This section will focus on three arguments often used to justify why Australia should expand criminal vilification laws. Firstly, the argument the ICCPR and the ICERD covenants require it. Secondly, expansion is necessary to prevent violence. Finally, vilification laws are required to promote tolerance and diversity.

The extent to which the ICCPR and the ICERD justify the expansion of vilification laws is contentious.

Forrester, Finlay, and Zimmermann argue these covenants were designed to prevent "[the promotion of a policy or system which is] a programmatic or systemic set of beliefs based on racial hatred and superiority."¹⁴² Therefore, they interpret these covenants as maintaining a high threshold that requires the prohibition only of serious instances of vilification. A similar argument was used when the *Racial Hatred Bills* were being debated in 1994. Liberal MP Daryl Williams argued the language in the ICCPR and the ICERD was much stronger than what was being proposed, and thus the covenants provided greater protection for freedom of expression.¹⁴³

By contrast, the UN has recommended Australia increase its efforts to combat "racist hate speech" by: removing reservations in international covenants designed to prevent racial discrimination; continuing anti-racism education programs; and reversing "the burden of proof in civil proceedings involving racial discrimination."¹⁴⁴

International covenants have been an influential factor in the drive to expand vilification laws in Australia. But equally influential has been the argument that, in order to prevent violence, certain political speech needs to be prohibited.

During a speech at the University of Sydney, Tim Soutphommasane remarked that all violence starts with words and that to stop racially motivated violence, 'hate speech' must be made unlawful.¹⁴⁵

This view is similarly reflected in the UN Strategy and Plan of Action on Hate Speech, that is designed to address, 'hate speech' which, "lays the foundation for violence."¹⁴⁶

Former Australian Human Rights Commissioner, Gillian Triggs, and human rights lawyer Julian Burnside have argued for the introduction of federal criminal 'hate speech' laws.¹⁴⁷ Triggs and Burnside propose creating a new criminal law which would "prohibit any language which, in the circumstances, would be likely to provoke a person to inflict harm on a person or a group of people because of their race, religion, colour or national or ethnic origin."¹⁴⁸ They state any such provision would have exemptions, but they do not outline what the punishment, exemptions, or exact wording of such a law would be.

There are two main problems with the activist push to expand Australia's vilification laws. Firstly, whatever the requirements of the international conventions, activists need to prove there is a causal connection between political speech and violence — not merely assert such a connection exists. Speech that directly incites violence is already illegal, meaning those calling for the law to be expanded must be referring to currently lawful speech. Such an argument relies on either a far more generalised, indirect connection between speech and violent acts, or a greatly expanded definition of the idea of violence.

Further, author and lawyer Nadine Strossen's research found countries that enact 'hate speech' laws do not experience a decline in discrimination, hateful speech or violence.¹⁴⁹ As Director of the Global Freedom of Expression initiative at Columbia University, Dr Agnes Callamard, noted in 2015, Europe had experienced "rising levels of violence and hate" despite Europe "[producing] more laws prohibit[ing] 'Hate Speech' than any other regions, with the possible exception of the Middle East."¹⁵⁰

Thus, the argument that Australia needs to expand vilification laws to prevent violence does not stand up to scrutiny. Even if activists could prove political speech was a necessary precondition to violence — which they certainly have not — they would then need to explain why more 'hate speech' laws would prevent this violence when they have failed to produce a reduction in violence in other countries where they have been enacted.

Secondly, to criminalise speech that may lead to violence requires an impermissible restriction on free speech; which is why Australia (and 17 other countries, including the United States) made reservations or declarations in international conventions to ensure free speech was protected.¹⁵¹ Not only is transgressing strong traditions of respect for freedom of speech unjustifiable; insisting 'hate speech' laws are needed to prevent violence ignores what has traditionally prevented violence in liberal democracies. Violence targeted against minorities has always been highest in authoritarian regimes who do not respect the rights of the individual. Aryeh Neier emphasised this point when, as head of the American Civil Liberties Union, he defended the freedom of expression rights of Nazis:

I could not bring myself to advocate freedom of speech in Skokie if I did not believe that the chances are best for preventing a repetition of the Holocaust in a society where every incursion on freedom is resisted.¹⁵²

Free speech and open debate is almost always preferable to censorship. Bad, even repugnant, ideas and words can be countered with sound ones. However, government prohibitions on speech can have unintended consequences, such as creating martyrs of those who are censored, and infringing free and open inquiry.

Finally, some argue anti-discrimination and vilification laws exist to not only prohibit discrimination, but provide an educative and symbolic function. As academics Katharine Gelber and Luke McNamara suggest, the existence of 'hate speech laws' may be more important than their "...legal form and parameters..." because 'hate speech laws' are "...[a] potentially useful way of setting a standard for public debate."¹⁵³ Former race discrimination commissioner Tim Soutphommasane takes this argument further by asserting, 'hate speech laws' are required because "Prejudice, bigotry and racism thrive in the absence of public policies that affirm the freedom of citizens to express their different cultural identities."¹⁵⁴

But the use of law (including criminal law) to achieve nebulous social policy aims — such as promoting a more tolerant society — inevitably lead to an expansion of laws that unnecessarily restrict speech. As Centre for Independent Studies Senior Fellow, Robert Forsyth, argues: when the law is viewed as a way to affirm an individual or group's identity and dignity, it is not only actual harm which becomes a problem but the "mere existence of an apparent discrimination."¹⁵⁵

Regardless of domestic and international pressures, Australia would be unwise to expand federal vilification laws. Most states and territories have laws that make unlawful, or criminalise, vilification. Federal anti-discrimination laws, or serious vilification laws — especially if they are criminal — would, for the most part, be duplicating what already exists in other jurisdictions.

How do other jurisdictions compare to NSW?

Current provisions

As the *NSW Act* criminalised vilification this section will focus only on the criminal vilification laws which exist in other states and territories.

Table: Criminal Vilification in other Australian Jurisdictions

State or Territory	Threshold	Protected Attributes	Penalty
ACT CRIMINAL CODE 2002 - SECT 750	Serious vilification (1) A person commits an offence if— (a) the person intentionally carries out an act; and (b) the act is a threatening act; and (c) the person is reckless about whether the act incites hatred toward, revulsion of, serious contempt for, or severe ridicule... “threatening act” means an act carried out by a person only if the person— (a) by the act, intentionally threatens physical harm toward, or toward any property of, the person, or members of the group... or (b) is reckless about whether the act incites others to threaten the harm.	disability, gender identity, HIV/AIDS status, intersex status, race, religious conviction and sexuality	Maximum penalty: 50 penalty units.
Queensland ANTI-DISCRIMINATION ACT 1991 - SECT 131A	(1) A person must not, by a public act, knowingly or recklessly incite hatred towards, serious contempt for, or severe ridicule (a) threatening physical harm towards, or towards any property of, the person or group of persons; or (b) inciting others to threaten physical harm towards, or towards any property of, the person or group of persons.	race, religion, sexuality or gender identity	Maximum penalty— (a) for an individual—70 penalty units or 6 months imprisonment; or (b) for a corporation—350 penalty units.
South Australia RACIAL VILIFICATION ACT 1996 - SECT 4	A person must not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of their race by— (a) threatening physical harm to the person, or members of the group, or to property of the person or members of the group; or (b) inciting others to threaten physical harm to the person, or members of the group, or to property of the person or members of the group.	Race	Maximum penalty: If the offender is a body corporate—\$25 000. If the offender is a natural person—\$5 000, or imprisonment for 3 years, or both.
Victoria RACIAL AND RELIGIOUS TOLERANCE ACT 2001 - SECT 24	Offence of serious racial vilification (1) A person (the offender) must not, on the ground of the race of another person or class of persons, intentionally engage in conduct that the offender knows is likely— (a) to incite hatred against that other person or class of persons; and (b) to threaten, or incite others to threaten, physical harm towards that other person or class of persons or the property of that other person or class of persons.	Race	In the case of a body corporate, 300 penalty units; In any other case, imprisonment for 6 months or 60 penalty units or both.

RACIAL AND RELIGIOUS TOLERANCE ACT 2001 - SECT 25	<p>(1) A person (the offender) must not, on the ground of the religious belief or activity of another person or class of persons, intentionally engage in conduct that the offender knows is likely—</p> <p>(a) to incite hatred against that other person or class of persons; and</p> <p>(b) to threaten, or incite others to threaten, physical harm towards that other person or class of persons or the property of that other person or class of persons.</p>	Religious Belief or activity	<p>In the case of a body corporate, 300 penalty units;</p> <p>In any other case, imprisonment for 6 months or 60 penalty units or both.</p>
Tasmania	(Civil only)		
Western Australia (Criminal only) CRIMINAL CODE ACT COMPILATION ACT 1913 CHAPTER XI — RACIST HARASSMENT AND INCITEMENT TO RACIAL HATRED	77. Conduct intended to incite racial animosity or racist harassment Any person who engages in any conduct, otherwise than in private, by which the person intends to create, promote or increase animosity towards, or harassment of, a racial group, or a person as a member of a racial group, is guilty of a crime	Race	14 years imprisonment
	78. Conduct likely to incite racial animosity or racist harassment Any person who engages in any conduct, otherwise than in private, that is likely to create, promote or increase animosity towards, or harassment of, a racial group, or a person as a member of a racial group, is guilty of a crime and is liable.		5 years imprisonment
	79. Possession of material for dissemination with intent to incite racial animosity or racist harassment Any person who — <p>(a) possesses written or pictorial material that is threatening or abusive intending the material to be published, distributed or displayed whether by that person or another person; and</p> <p>(b) intends the publication, distribution or display of the material to create, promote or increase animosity towards, or harassment of, a racial group, or a person as a member of a racial group, is guilty of a crime and is liable to</p>		14 years imprisonment
	80. Possession of material for dissemination that is likely to incite racial animosity or racist harassment If — <p>(a) any person possesses written or pictorial material that is threatening or abusive intending the material to be published, distributed or displayed whether by that person or another person; and</p> <p>(b) the publication, distribution or display of the material would be likely to create, promote or increase animosity towards, or harassment of, a racial group, or a person as a member of a racial group, the person possessing the material is guilty of a crime and is liable</p>		5 years imprisonment Summary conviction penalty: imprisonment for 2 years and a fine of \$24 000.

	<p>80A. Conduct intended to racially harass</p> <p>Any person who engages in any conduct, otherwise than in private, by which the person intends to harass a racial group, or a person as a member of a racial group, is guilty of a crime and is liable</p>		<p>5 years imprisonment</p> <p>Summary conviction penalty: imprisonment for 2 years and a fine of \$24 000.</p>
	<p>80B. Conduct likely to racially harass</p> <p>Any person who engages in any conduct, otherwise than in private, that is likely to harass a racial group, or a person as a member of a racial group, is guilty of a crime</p>		<p>3 years imprisonment</p> <p>Summary conviction penalty: imprisonment for 12 months and a fine of \$12 000.</p>
	<p>80C. Possession of material for display with intent to racially harass</p> <p>Any person who —</p> <p>(a) possesses written or pictorial material that is threatening or abusive intending the material to be displayed whether by that person or another person; and</p> <p>(b) intends the display of the material to harass a racial group, or a person as a member of a racial group, is guilty of a crime</p>		<p>5 years imprisonment</p> <p>Summary conviction penalty: imprisonment for 2 years and a fine of \$24 000.</p>
	<p>80D. Possession of material for display that is likely to racially harass</p> <p>If —</p> <p>(a) any person possesses written or pictorial material that is threatening or abusive intending the material to be displayed whether by that person or another person; and</p> <p>(b) the display of the material would be likely to harass a racial group, or a person as a member of a racial group, the person possessing the material is guilty of a crime and is liable to imprisonment</p>		<p>3 years imprisonment</p> <p>Summary conviction penalty: imprisonment for 12 months and a fine of \$12 000.</p>

In the ACT,¹⁵⁶ Queensland,¹⁵⁷ South Australia,¹⁵⁸ and Victoria,¹⁵⁹ criminal vilification laws require the aggravating factors of inciting or threatening violence for an offence to be proved. Further, as academics Katharine Gelber and Luke McNamara explain “the words used to describe the harm threshold — hatred, serious contempt or severe ridicule — are based on the common law definition of defamation, with the threshold raised by the inclusion of the adjectives ‘serious’ and ‘severe’ to qualify contempt and ridicule respectively.”¹⁶⁰

Western Australia has no civil racial vilification laws, but also no criminal vilification laws comparable with other states and territories. Chapter XI of the *Criminal Code Compilation Act 1913* (WA) sets out a comprehensive range of criminal offences against racist conduct, including: conduct intended to incite

racial animosity or racial harassment; possession of material with intent to publish and intent to incite racial animosity or racial harassment; conduct intended to racially harass; and possession of material for display with intent to racially harass.¹⁶¹ Western Australia has much higher penalties for vilification offences, with a maximum of 14 years imprisonment and substantial fines.¹⁶²

The Western Australian legislation differs from the other states and territories in that it is not necessary to have violence or threats of violence to bring or prosecute an offence. This could, in part, be responsible for why Western Australia is the only jurisdiction to have successful prosecutions for racial vilification. The absence of the nexus of violence lowers the threshold for an offence and makes it easier to prosecute.

Vilification law reviews

No other Australian state or territory has proposed legislation, amendments, or made remarks that would indicate it is working towards adopting laws similar to the *NSW Act*. However, there are some significant developments in human rights and discrimination law that indicate other jurisdictions are moving away from the NSW approach, and towards a model that could significantly infringe upon free speech.

Queensland

Queensland recently introduced a human rights act.¹⁶³ The *Human Rights Act 2019*¹⁶⁴ (*HRA*) will protect 23 rights⁵ by law that will need to be considered “when debating and passing laws, and ensure public services comply with human rights.”¹⁶⁵ The *HRA* and the *Anti-Discrimination Act 1991* (*ADA 1991*) will work in conjunction to provide training, anti-racism education, and handle complaints.¹⁶⁶

Given that the *HRA* and the *ADA 1991* are to work in conjunction and will serve similar functions, it will likely impact how racial vilification cases are investigated and prosecuted. Comments made by the current Anti-Discrimination Commissioner, Scott McDougall, (who will become the inaugural Queensland Human Rights Commissioner), indicate vilification offences will be of concern to the Commission. Although the *HRA* does protect freedom of expression, McDougall has questioned whether Australia should revisit its implied freedom of political communication “to draw a line around what freedoms society ought to tolerate” — suggesting he believes the implied freedom of political communication should be amended or repealed.¹⁶⁷ McDougall will be discussing the issues of ‘hate speech’, racism and bigotry, with his interstate counterparts, as he is concerned by what he describes as “unchecked free speech.”¹⁶⁸

McDougall did not propose any specific policies, or detail how he intends to combat racism, bigotry, and ‘hate speech’. However, as Queensland has vilification laws, anti-discrimination laws, and now a human rights act which protects minorities, to say free speech is ‘unchecked’ is not accurate.

Western Australia

Western Australia is currently conducting a review into their *Equal Opportunity Act 1984 (WA)* (*The EO Act*).¹⁶⁹ Among the terms of reference, the Law Reform Commission of Western Australia was asked to review and suggest any reforms for “the inclusion of vilification, including racial, religious, sexual orientation and impairment vilification.”¹⁷⁰ Western Australia Attorney-General John Quigley announced the review was necessary because the current *EO Act* was “outdated” and the majority of reforms suggested in a 2007 review were not implemented.¹⁷¹ The review is yet to release a discussion paper or announce a deadline for the delivery of findings and recommendations.

Tasmania

Former Tasmanian Anti-Discrimination Commissioner Robin Banks stated she wants racial vilification to become a criminal act after a number of racially motivated attacks on Tasmanian school children.¹⁷² However, criminal vilification laws have not yet been implemented or proposed, with the last attempt to amend vilification laws occurring in 2016 when the *Anti-Discrimination Amendment Bill 2016* was proposed but defeated.¹⁷³

Northern Territory

The Northern Territory began a consultation process in 2017 into the “Modernisation of the *Anti-Discrimination Act*.”¹⁷⁴ The review was asked to consider: “introducing specific anti-vilification laws prohibiting offensive conduct on the basis of race, religious belief, disability, sexual orientation, gender identity and intersex status.”¹⁷⁵ The Northern Territory Anti-Discrimination Commission supports the introduction of anti-vilification laws, as it believes current protections fail to adequately protect minorities.¹⁷⁶ A spokesperson for the Northern Territory Attorney-General has confirmed that no changes thus far have been made to the *Anti-Discrimination Act*. However, the review process is ongoing.¹⁷⁷

⁵ The Human Rights Act will protect: recognition and equality before the law; right to life; protection from torture and cruel, inhuman or degrading treatment; freedom from forced work; freedom of movement; freedom of thought, conscience, religion and belief; freedom of expression; peaceful assembly and freedom of association; taking part in public life; property rights; privacy and reputation; protection of families and children; cultural rights – generally; cultural rights – Aboriginal peoples and Torres Strait Islander peoples; right to liberty and security of person; humane treatment when deprived of liberty; fair hearing; rights in criminal proceedings; children in the criminal process; right not to be tried or punished more than once; retrospective criminal laws; right to education; right to health services.

Victoria

Victorian upper house MP Fiona Patten has proposed amending the *Racial and Religious Tolerance Act 2001*.¹⁷⁸ The *Racial and Religious Tolerance Amendment Bill 2019 (Amendment Bill 2019)* proposes adding: gender, disability, sexual orientation, gender identity, and sex characteristics, to the already protected attributes of race and religion.¹⁷⁹ Further, the *Amendment Bill 2019* intends to substitute “incites” with “is likely to incite.”¹⁸⁰ The Andrews Government has announced an inquiry into the *Amendment Bill 2019* will be held.¹⁸¹

Other Australian jurisdictions currently do not have any ongoing reviews or amendments proposed to vilification laws.

Why NSW should be the national model for racial vilification

The proposed changes and submissions to vilification reviews in other jurisdictions are indicative of a commonly held belief among many activists, government, and non-government organisations: that current protections for minorities against vilification are either inadequate or non-existent. Therefore, the argument progresses, greater protections are needed to ensure minorities are protected and can fully participate in society. However, as the table above shows, most jurisdictions proscribe vilifying, threatening or abusive speech.

Further, if other jurisdictions want to amend their vilification laws, they should follow the approach adopted by the *NSW Act*. The *NSW Act* not only protects free speech and minorities by maintaining threats and incitement as the threshold but — as the consultation process demonstrated — the *NSW Act* was able to address the concerns that have been raised in other jurisdictions.

The impetus for reforming NSW vilification laws was the lack of prosecutions under existing legislation

— a concern raised in other jurisdictions. The opinion existed that current provisions failed to protect against the harm caused by vilification.¹⁸² A particularly notable case that did not result in a prosecution was that of extremist imam and head of Hizbut-Tahrir in Australia, Ismail al-Wahwah. In 2015 al-Wahwah called for a “jihad against Jews” and described the Jews as a “cancerous tumour — it must be uprooted and thrown back to where it came from.”¹⁸³ In addition to this incident, the neo-Nazi group Antipodean Resistance distributed around schools a number of posters calling for the execution of Jews and gays.¹⁸⁴

Vilification laws are, in part, designed to ensure minorities feel safe. The Keep NSW Safe Coalition praised the passage of the *NSW Act* with Vic Alhadeff (CEO of the NSW Jewish Board of Deputies) tweeting it was “A great day for NSW.”¹⁸⁵ The approval of the *NSW Act*, by those it is designed to protect, indicates that it fulfils the requirement to protect community safety. Further, the incidents that led to the formation of the Keep NSW Safe Coalition would likely result in prosecution under the *NSW Act* — further satisfying the concerns of minorities.

Even though the *NSW Act* lowers the threshold for incitement, as discussed above, there is still a high threshold for the means of violence. Additionally, the *NSW Act* represents a better approach to vilification offences than either creating criminal federal vilification laws, or further lowering the threshold for vilification offences in other jurisdictions.

Further, by relocating the offence into the *Crimes Act*, NSW was able to address a lot of the procedural concerns that were seen to be a barrier to prosecution. By simplifying and harmonising the complaints and investigative process, NSW can overcome criticism that procedure is an impediment to prosecution.

Conclusion

To ensure minorities and free speech are protected, vilification offences should maintain incitement and threats to violence as the threshold for proving an offence. Anti-vilification laws are designed to protect community safety and provide recourse to victims who have been vilified on the basis of a protected attribute. The *NSW Act* satisfies these requirements.

The case for Australian jurisdictions adopting the framework established by the *NSW Act* rests on four main points. The *NSW Act*:

- Makes threatening or inciting violence the threshold for proving an offence;
- Adequately protects free speech;
- Sufficiently protects minorities from harm; and
- Vests investigative powers to the police

The *NSW Act* is the result of a variety of approaches to proscribing threatening and inciting speech, which have been developing over the decades. As attitudes toward multiculturalism, diversity and immigration changed, vilification laws were seen as a way to protect and promote the dignity of minorities.

Internationally, similar developments occurred. There was pressure to fight and eliminate discrimination, with these goals being entrenched in the ICCPR and the ICERD.

During this period, there has also been a shift, in some quarters, about the purpose and function of discrimination and vilification laws. Vilification laws were originally seen — by liberal democracies, at least — as a way to punish and prevent only the most egregious speech that threatened the safety and rights of minorities.

However, activists have been pushing for vilification laws to be expanded so they not only capture violence and threatening speech, but speech that has the 'potential' to cause violence while not directly calling for violence.

This thinking is based on the false belief that, in order to protect minorities from harm, any speech that has the potential to insult, or otherwise harm dignity, must

be proscribed. This expanded view of vilification laws will lead to unacceptable incursions on free speech.

Speech inciting or threatening violence is already — and has long been — a criminal offence. In addition to laws that prohibit incitement, there exists a variety of laws at state and territory level that provide recourse for victims of vilifying speech.

Further, when activists cite the apparent increase in prejudicially motivated violence as a justification for harsher speech restrictions it is important to note: firstly, violence is already unlawful, and secondly, there is no conclusive evidence that restricting speech leads to a reduction in violence.

Vilification laws have always caused controversy because they attempt to prevent and punish certain types of speech without unduly infringing upon free speech. However, this controversy can largely be avoided if vilification laws are restricted to threats and incitement of violence.

Australia currently has several laws prohibiting vilification. Other jurisdictions should adopt the model outlined by the *NSW Act* and federal criminal vilification laws do not need to be introduced.

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