

RELIGION AND ANTI-VILIFICATION LAWS

Are we free
to say what
we think ?

RESOURCE PAPER 8, 2015



Denunciation is necessary in evil times, while vilification is always unpleasant and sometimes be rightly judged to be illegal. Yet they are not the same thing, and tensions between the two are almost inherent. Is more law the answer?

Introduction

None of us enjoys being criticised or insulted, let alone vilified. Yet we also cling to our freedoms to say what we think we have a right to say. We are far more likely to resent unfair criticism of ourselves than we are to own up to our own capacity for engaging in unfair criticism of others. However, we have probably received as much benefit in life from being criticised as being praised. Life is full of tensions. To achieve one thing, we have to forego another. And not every misdemeanour warrants a court case. The cure can easily become worse than the disease. The matter is not simply one of legality, as the whole social health of a society is affected. Bunyan's Mr Valiant for Truth would run the risk today of being re-educated until he had come to appreciate the virtues of being bland and inoffensive.

Unwarranted religious vilification is obviously unjust, yet restrictions on freedom of speech are obviously unwelcome. Anti-vilification laws concerning religion thus have difficulties associated with them. Indeed, it may be possible to argue that they can increase tensions in a multicultural society. Katherine Gelber and Adrienne Stone have provided a suitable working definition of what is at stake: 'Hate speech is 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 including race, nationality, ethnicity, country of origin, ethno-religious identity, religion, sexuality, gender identity or gender.'¹ Such an all-encompassing approach is probably an indicator of difficulties to come, in both interpretation and implementation, of such laws.

The situation in Australia, notably Victoria

At the time of writing, three Australian states - Queensland, Tasmania, and Victoria - have passed such legislation. A proposed extension of the Human Rights and Anti-Discrimination Bill in 2012 would have outlawed conduct that 'offends, insults or intimidates the other person'. Had the proposal been successful, judicial control over the general populace would have been greatly enhanced.

Undoubtedly the most wide-ranging piece of legislation has been the *Racial and Religious Tolerance Act* of 2001 in Victoria (the RRTA). Section 8(1) of the Act provides that 'A person must not, on the ground of the religious belief or activity of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.' The purported objectives of the Act include the promotion of 'racial and religious tolerance', the promotion of 'the full and equal participation of every person in a society that values freedom of expression and is an open and multicultural democracy', the maintenance of 'the right of all Victorians to engage in robust discussion of any matter of public interest', and the promotion of conciliation in order to 'resolve tensions' between those who vilify others and those who are vilified.²

Under this legislation, the most significant case so far has concerned the *Islamic Council of Victoria v Catch the Ministries* which began in 2002, concluded in 2004, only to be followed by a successful appeal in 2006. This case was triggered off when a Christian seminar was held at a Surrey Hills church in Melbourne on 9 March 2002, with the declared intention of equipping Christians so as to be able to reach out to Muslims with the gospel. May Helou of the Equal Opportunity Commission of Victoria tipped off a fellow Muslim friend about the seminar. Three Islamic converts (or reverts, as they prefer) went along at different times, and were duly offended by what they heard. In due time the Equal Opportunity Commission referred the Islamic Council of Victoria's complaint to the Victorian Civil and Administrative Tribunal (VCAT). The Christians were found guilty of vilification and ordered to publish retractions, but the Victorian Court of Appeal overturned the Tribunal's findings.

Predicted to last three days - a little like World War I! - it saw almost six years of legal wrangling, and even Hanifa Deen, who ultimately supports the legislation, has referred to it as 'a nightmare'.³ She lamented that 'The Catch the Fire case polarised everyone who came in touch with it.'⁴

Another case under the RRTA concerned Robin Fletcher, a paedophile serving a ten-year jail term, who claimed that the Salvation Army's Alpha Program in prison caused hatred of his own preferred body of religionists, the Wiccans. The judge rejected this as 'preposterous' - a finding where the judiciary itself might have been possibly viewed as guilty of 'serious contempt'.

Laws are not promulgated in philosophical and social vacuums. The modern cultural context in the West is one where relativism reigns, and any notion of moral absolutes is seen as a form of authoritarianism. Religion is often regarded as a problem. The key virtue is therefore tolerance, with few clearly defined moral boundaries.

What might be said about anti-vilification laws, especially those directed at religion?

1. They can be viewed as unnecessary as the good that they may do is already achievable by other laws.

Hate speech and vilification has real meaning, and daily there are appalling examples of such, but this is not the only issue at stake. We are commanded in both the Law and the Wisdom literature not to be slanderers or tale-bearers (Lev.19:16; Prov.11:13; 20:19). Bearing false witness plays a vital part in the convictions of Naboth (1 Kings 21:10-13) and the Lord Jesus Himself (Matt.26:59-61). The potential for great evil to be done ought not to be minimised.

The tort of defamation already gives people a right of action when they believe that their reputation has been diminished. In fact, in NSW it is illegal to publish anything about a person which is likely to cause ordinary decent folk in the community to think the less of him or her.⁵ In the UK in 1997 it was held to be defamatory to state that an actor was 'horrendously ugly'⁶ Defences in a defamation case include truth; an honest opinion; whether there is an issue of

privilege, even qualified privilege; and triviality. Also, a person has to be personally defamed rather than a part of a group that was allegedly defamed.

In the Victorian Catch the Fire case, truth was not allowed as a defence in that citations from the Qur'an which seemed to advocate violence against non-Muslims were not permitted. Even Hanifa Deen acknowledges of Daniel Scot, that 'a number of his interpretations from the Qur'an and Hadith were within the range of possible interpretations.'⁷ This has been a major difference between defamation and religious vilification laws, and no doubt partly reflects the modern view that faith has no discernible connection with truth claims based on reason.

Nevertheless, the dangers in making a special provision for religious vilification are many and various. There seems to be no inherent reason for making religion a special category.

2. Freedom of expression must be protected. There is no inherent right not to be offended.

This might be regarded as the foundational issue. Sir William Blackstone described freedom of speech and of the press as 'essential to the nature of a free State'.⁸ It is a long-established common law freedom. In recent times the freedom of expression of artists has been more vigorously upheld than that of preachers or public speakers. Offence - whether deliberate, thoughtless or unintended - is almost an inherent part of human discourse. Even Jeremy Waldron, who mounts a careful and at times quite compelling defence of some hate speech laws, recognises that 'Neither in its public expression nor in an individual's grappling aloud with these matters can religion be defanged of this potential for offence.'⁹

Religious freedom carries with it the freedom to offend. This is not the only thing to be said about Christian speech. We are told that a soft answer turns away wrath (Prov.15:1) and that our speech is to be gracious, seasoned with salt, so that we can answer each person (Col.4:6). Flattery and corrupt speech are forbidden for we to aim to build up in an appropriate way all those who hear (Eph.4:29). Nevertheless, Isaiah engaged in what the Victorian Act calls 'severe ridicule' of idolatry and those who are its devotees. A man chops a tree down, and uses

part of it to fashion a figure which he then worships, and another part of it to cook his dinner and warm himself (see Isaiah 44:9-20). A century earlier Elijah had mocked the prophets of Baal, and their prayers to their god: 'Cry aloud, for he is a god. Either he is musing, or he is relieving himself, or he is on a journey, or perhaps he is asleep and must be awakened' (1 Kings 18:27). Moving to the eighteenth century, Jonathan Swift was known for his biting satires. They stung because they were meant to sting. Insult and satire have their place, and are legitimate. George Orwell has been oft-cited, and deservedly so: 'If liberty means anything at all, it means the right to tell people what they do not want to hear.'¹⁰ Indeed, that is precisely what the Lord Jesus Himself did to the scribes and Pharisees in that most virulent of denunciations in Matthew 23.

Even if there are no obvious curbs on freedom of expression, there is every likelihood of self-censorship. People will become fearful and intimidated, which hardly makes for a healthy society. Patrick Parkinson has written:

"The law that impacts upon people's lives is not the law as enacted by parliaments, and not even the law as interpreted by the courts. What matters is the law as people believe it to be. This 'folk law' may have only a tenuous connection with the law as enacted or applied in the courts."¹¹

The Victorian legislation, for example, had a chilling and unhelpful effect on churches in Victoria. As the Canadian writer, Mark Steyn, quipped: 'The process is the punishment.'

3. Criticism of another belief system is easily blurred and confused with an incitement to hatred of persons.

This is one of the main practical criticisms that can be directed against VCAT and, for that matter, the whole Victorian experiment. Criticisms of the doctrines of Islam were taken as equivalent to an incitement of hatred of persons. Debate between religious viewpoints is best left as untrammelled as possible. Because of this, the *Racial and Religious Hatred Act* of 2006 in the United Kingdom distinguishes between hatred stirred up against believers and attacks on beliefs. It specifically protected 'discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or

the beliefs or practices of their adherents'. Neil Foster argues persuasively that so-called 'exemptions' are best regarded as 'balancing provisions' because no rights are absolute, and require counterbalancing for them to be workable in a fair and reasonable way.¹²

In 2013 the Supreme Court of Canada upheld the decision of a lower tribunal to fine a Mr Whatcott, a Christian who had distributed pamphlets which were critical of homosexuality. A primary school curriculum had been introduced which endorsed homosexuality. The Canadian Charter guarantees freedom of expression, but the Supreme Court interpreted homosexuality in terms of orientation rather than behaviour, and disallowed an appeal to truth claims. The Bible itself - Matthew 18:6 to be specific - was declared to be a candidate for hate speech, as the Court stated: 'While use of the Bible as a credible authority for a hateful proposition has been considered a hallmark of hatred, it would only be unusual circumstances and context that could transform a simple reading or publication of a religion's holy text into what objectively be viewed as hate speech.'¹³

Speaking in general terms, D. A. Carson has pointed out that under the older view of tolerance, the freedom to differ was supposed to be in order, whereas the new tolerance insists on the acceptance of all views. In fact, 'the new tolerance argues that there is no one view that is exclusively true.'¹⁴ The focus has shifted from how people treat one another to how they regard another worldview. The UN Declaration of Principles on Tolerance in 1995 made the revealing statement that 'Tolerance involves the rejection of dogmatism and absolutism.' This is itself a dogmatic and absolute statement, and logically implies that the principles of the Ku Klux Klan and Mother Teresa are to be equally respected. To misquote Nathan Hatch, the lamb of toleration is supposed to lie down with the wolf of relativism.

4. In practice, these laws tend to work against Christians.

In Pakistan in 1986 it was decreed that anyone who 'directly or indirectly by word, gesture, innuendo, or otherwise defiles the name of the holy prophet Muhammad will be punished with death or life imprisonment.' Those who support anti-vilification legislation have admitted that the

Pakistani Act has been much misused, and has had the effect of making people more fearful and keeping them further apart.¹⁵ It was this legislation that forced Daniel Scot to flee his native Pakistan, and finally make his home in Australia.

In the West religion and race have often been equated for the purposes of anti-discrimination, and it is not uncommon to hear of a person who is critical of a minority religion being criticised as a racist. What is supposed to be directed at extreme forms of hate speech - what Premier Steve Bracks called 'the most noxious form of conduct' and 'the most repugnant behaviour' - turn out to achieve nothing of the kind. Despite Hanifa Deen's optimistic claim that 'the law is a two-way street',¹⁶ it has become increasingly obvious that such laws are easily used as weapons. There is an arbitrariness about how such laws are implemented. It is revealing, for example, that in 2013 some foul-mouthed racists on a Melbourne train escaped being charged under the RRTA.¹⁷ Where the RRTA might have been expected to achieve something worthwhile, it has not been used. In February 2014 in South Australia there is a *Come Heckle Christ* show, after its run in Melbourne in the previous year. In the present social climate, it is unlikely to confront any legal difficulties.

Anti-vilification laws are almost invariably viewed as part of a larger package, based on a worldview which absolutises the relative and relativises the absolute. Hanifa Deen's chronicle of the Jihad Seminar presents many reasons why such laws are counter-productive at best, yet she concludes with great passion: 'Only someone who has never suffered from racial or religious vilification, sexism, homophobia or rejection because of a disability can say, "wait for attitudes to change".'¹⁸ It is a recipe for success in the modern world of 'identity politics': assume the role of the victim; bypass any claims to directive morality; and mix a number of issues together, so that any opponent of one (say, homosexuality) is portrayed as opposed to others (e.g. those with disabilities). Religion and race, for example, should not be treated in the same way. Religion concerns what we believe; race - or less misleadingly, nationality, for there is only one race - concerns what we inherently are. Laws cannot solve every ill in society, and if they attempt to do so, they become all-encompassing and tyrannous.¹⁹ As Augustine pointed out back

in the 420s: 'although every crime is a sin, every sin is not a crime.'²⁰

5. These invariably turn out to be costly exercises which inflate the bank accounts of lawyers and inflate the importance of bureaucrats.

Of necessity, these laws tend to be convoluted. Even Hanifa Deen writes of the Victorian legislation: 'Reading the Act proved a painful exercise for one who loves the English language.'²¹ No one was quite sure what it meant until after it was tested - and even then, doubts remain. The penalties imposed on the two Daniels were harsh,²² and the financial costs prohibitive. Even Margaret Thornton and Trish Luker commented, in an outburst of common sense, 'What was perverse about *Catch the Fire* was that it involve one religious group using a legal forum against another when disagreement between religions is par for the course.'²³ One can only wonder at the naïve optimism of Douglas Ezzy who contends that 'the religious anti-vilification law in Victoria has ... minimised religiously related conflict in Australia as a product of a more general constructive impact on inter-religious group relations.'²⁴ All in all, Bob Carr had good reason to observe in 2009 that 'More judicial review, or judge-made law, is the last thing Australia needs.'²⁵ As James Allan puts it, with simplicity and with vehemence: 'It transfers power to judges.'²⁶

Conclusions

1. There is such a concept as vilification. Neil Foster rightly concludes that 'Where speech is aimed at producing violence it ought to be punished by the criminal law.'²⁷
2. Nevertheless, religious anti-vilification laws seem at best unnecessary, and at worst an attack on freedom of speech and freedom of religion.²⁸
3. It is grossly misleading to put racial and religious vilification laws in the same general category.
4. Religious vilification laws are likely to do more harm than good.

Addendum on the law in New South Wales

Even though the mood of our culture has swung around to an affirmation of homosexuality, the strong tradition of freedom of speech means that even in a law making "hate speech" on the grounds of homosexuality unlawful, there are still protections that apply to protect freedom of speech. These protections mean that Christians need not fear affirming a Biblical view on sexual behaviour in "religious instruction" and in other contexts of public debate, so long as they do so in a polite and respectful manner.

The following is an extract from the Anti-Discrimination Act of NSW, 1977.

49ZT Homosexual vilification unlawful

- (1) It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the homosexuality of the person or members of the group.
- (2) Nothing in this section renders unlawful:
 - (a) a fair report of a public act referred to in subsection (1), or
 - (b) a communication or the distribution or dissemination of any matter on an occasion that would be subject to a defence of absolute privilege (whether under the [Defamation Act 2005](#) or otherwise) in proceedings for defamation, or
 - (c) a public act, done reasonably and in good faith, for academic, artistic, religious instruction, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter.

Reading List

James Allan, 'Free Speech is Far Too Important to be Left to Unelected Judges' in *The Western Australian Jurist*, vol. 4, 2013, pp.5-22.

N. Aroney, 'The Constitutional (In)Validity of Religious Vilification Laws: Implications for their Interpretation', in *Federal Law Review*, 34, 2006, pp.287-318.

Amir Butler, 'Why I've changed my mind on Victoria's anti-vilification laws' *The Age*, 4 June, 2004.

D.A. Carson, *The Intolerance of Tolerance*, Michigan: Eerdmans, 2012.

Hanifa Deen, *The Jihad Seminar*, Crawley: University of Western Australia Press, 2008.

C. M. Evans, *Legal Protection of Religious Freedom in Australia*, Sydney: Federation Press, 2012.

Douglas Ezzy, 'Minimising Religious Conflict and the Racial and Religious Tolerance Act in Victoria, Australia' in *Journal for the Academic Study of Religion*, 26.2, 2013, pp.198-215.

Neil Foster, 'Defamation and Vilification: Rights to Reputation, Free Speech and Freedom of Religion at Common Law and under Human Rights Laws' in Paul Babie and Neville Rochow (eds), *Freedom of Religion under Bills of Rights*,

Adelaide: University of Adelaide Press, 2012, pp. 63-85.

Neil Foster, 'Anti-Vilification Laws and Freedom of Religion in Australia - Is Defamation Enough?' University of Adelaide Law School, 7-9 June 2013.

Neil Foster, 'Religious Anti-Vilification Laws: Gatekeeping Freedom of Religion and Freedom of Speech in Australia' October 2013, at http://works.bepress.com/neil_foster/71

Neil Foster, 'Legal Pressure Points for Christians in 21st Century Australia' St Andrew's Cathedral, 27 January 2014. For Neil Foster's works, see http://works.bepress.com/neil_foster

Charles Francis, 'The Perils of Victoria's Religious Tolerance Laws' in *National Observer*, no. 68, Autumn 2006, pp.63-68.

Katharine Gelber and Adrienne Stone (eds), *Hate Speech and Freedom of Speech in Australia*, Annandale: The Federation Press, 2007.

Margaret Thornton and Trish Luker, 'The Spectral Ground: Religious Belief Discrimination' in *Macquarie Law Journal*, vol. 9, 2009, pp.71-91.

Jeremy Waldron, *The Harm in Hate Speech*, Cambridge, Massachusetts: Harvard University Press, 2012.

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Endnotes

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- ¹ Katharine Gelber and Adrienne Stone (eds), *Hate Speech and Freedom of Speech in Australia*, Annandale: The Federation Press, 2007, pxiii.
- ² Summary taken from N. Aroney, 'The Constitutional (In)Validity of Religious Vilification Laws: Implications for their Interpretation', in *Federal Law Review*, 34.
- ³ Hanifa Deen, *The Jihad Seminar*, Crawley: University of Western Australia Press, 2008, pp.xi, 7.
- ⁴ Hanifa Deen, *The Jihad Seminar*, p.123.
- ⁵ Cited in Neil Foster, 'Defamation and Vilification: Rights to Reputation, Free Speech and Freedom of Religion at Common Law and under Human Rights Laws' in Paul Babie and Neville Rochow (eds), *Freedom of Religion under Bills of Rights*, Adelaide: University of Adelaide Press, 2012, p.72.
- ⁶ Cited in Foster in *Freedom of Religion under Bills of Rights*, 2012, p.73.
- ⁷ Hanifa Deen, *The Jihad Seminar*, p.97.
- ⁸ Sir William Blackstone, *Commentaries on the Laws of England*, vol.4, 1825 edition, pp.151-152.
- ⁹ Jeremy Waldron, *The Harm in Hate Speech*, Cambridge, Massachusetts: Harvard University Press, 2012, p.129.
- ¹⁰ Cited in William E. Cain, 'Orwell's Essays as a Literary Experience' in J. Rodden (ed), *The Cambridge Companion to George Orwell*, Cambridge University Press, 2007, p.85.
- ¹¹ Cited in Foster, *Freedom of Religion under Bills of Rights*, 2012, p.69.
- ¹² Neil Foster, 'Legal Pressure Points for Christians in 21st Century Australia' St Andrew's Cathedral, 27 January 2014, pp.6, 16. Sex discrimination, for example, is entirely appropriate when someone is involved in fitting out clothing for another.
- ¹³ Neil Foster, 'Anti-Vilification Laws and Freedom of Religion in Australia - Is Defamation Enough?' University of Adelaide Law School, 7-9 June 2013, unpaginated, pp.6-11.
- ¹⁴ D. A. Carson, *The Intolerance of Tolerance*, Michigan: Eerdmans, 2012, p.11.
- ¹⁵ See Hanifa Deen, *The Jihad Seminar*, Crawley: University of Western Australia Press, 2008, pp.145-147.
- ¹⁶ Hanifa Deen, *The Jihad Seminar*, p.86.
- ¹⁷ Herald Sun, 25 May 2013.
- ¹⁸ Hanifa Deen, *The Jihad Seminar*, p.244.
- ¹⁹ Cf. Christopher Brohler, 'Religious Freedom: Christians singled out for discrimination: report' in *News Weekly*, 3 August 2013.
- ²⁰ Augustine, *Enchiridion*, 64.
- ²¹ Hanifa Deen, *The Jihad Seminar*, Crawley: University of Western Australia Press, 2008, p.86.
- ²² See Hanifa Deen, *The Jihad Seminar*, p.239-240.
- ²³ Margaret Thornton and Trish Luker, 'The Spectral Ground: Religious Belief Discrimination' in *Macquarie Law Journal*, vol. 9, 2009, p.88.
- ²⁴ Douglas Ezzy, 'Minimising Religious Conflict and the Racial and Religious Tolerance Act in Victoria, Australia' in *Journal for the Academic Study of Religion*, 26.2, 2013, p.209.
- ²⁵ Bob Carr, 'Rights Charter Like a Dead Parrot' in *Sydney Morning Herald*, 5 June 2009.
- ²⁶ James Allan, 'Free Speech is Far Too Important to be Left to Unelected Judges' in *The Western Australian Jurist*, vol. 4, 2013, p.13.
- ²⁷ Foster, *Freedom of Religion under Bills of Rights*, 2012, p.85.
- ²⁸ Cf. Foster, *Freedom of Religion under Bills of Rights*, 2012, p.85.