

## **Do Australians have equal protection against hate speech?**

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It would be fair to describe Australia's anti-vilification laws as a hotch-potch—whether and how you are protected by law against conduct that generates ill-will towards you depends very much on which part of Australia you are in, what the conduct is, and what the basis for conduct is.

What do you do if you are the subject of race-hate literature in Western Australia? Answer—go to the police. If you are treated with serious contempt because of your HIV/AIDS status in the Australian Capital Territory? Answer—complain to the Discrimination Commissioner. If you are subjected to severe ridicule because of your religion in New South Wales? Answer—bad luck.

As these few examples show, the very language that is used will vary. The usual formulation of the idea of vilification is the incitement of hatred towards, serious contempt for or severe ridicule of someone because of their status—their race, for example. But the federal law sets a lower threshold, prohibiting conduct that is reasonably likely to offend, insult, humiliate or intimidate someone, but only on the ground of their race.

There seems to have been a (different) time in each State or Territory when anti-vilification laws could be made by Parliament with little fuss. More to the point, perhaps, there is certainly a time in the politics of a government when the making of anti-vilification laws becomes impossible. The NSW anti-vilification laws were enacted over

a period of years, each new law protecting an additional group of people who are vulnerable to vilifying conduct. The Queensland laws came all at once, with its new Anti-Discrimination Act in 1991.

**Table 1. Vilification laws in Australia, September 2005**

	<b>Cwth</b>	<b>ACT</b>	<b>NSW</b>	<b>NT</b>	<b>Qld</b>	<b>SA</b>	<b>Tas</b>	<b>Vic</b>	<b>WA</b>
<b>Race</b>	✓	✓+	✓+		✓+	✓-	✓	✓+	✓-
<b>Homosexuality/sexual orientation/sexuality</b>		✓+	✓+		✓+		✓		
<b>Trans-sexuality/gender identity</b>		✓+	✓+		✓+				
<b>Religion</b>			X		✓+	X	✓	✓	?
<b>HIV/AIDS</b>		✓+	✓+						
<b>Disability</b>							✓		

**Key**

- ✓+ Unlawful conduct; criminal conduct if serious
- ✓ Unlawful conduct only – the subject of complaint
- ✓- Criminal conduct only
- ? Currently under consideration
- X Rejected as a matter of current policy

At the time that the ACT felt able to extend the scope of vilification protection in 2004, South Australia rejected a proposal to do the same. While NSW has rejected the possibility of a religious vilification law, WA is deliberating on such a law (although the Consultation Paper is now 12 months old).

While the politics of anti-vilification laws have always been sensitive, they have become particularly so recently around the issue of religion. Indeed, it would seem that the rapidly growing importance of conservative Christians to contemporary politics led the

then NSW Premier, Bob Carr, to declare to the Hillsong congregation in Sydney that there will be no religious vilification laws in NSW.

People of all faiths are liable to be treated with contempt on the ground of their beliefs – and increasingly so it would seem—but two governments have rejected laws to protect against religious vilification and four, including the Federal Government, have done nothing. While Victoria, Queensland and Tasmania have such vilification laws, South Australia and NSW have said recently that they won't, and WA is officially thinking about it.

While State and Territory governments are free to make their political choices, the Federal Government has constitutional constraints on its law-making powers. Yet there is room to move within those constraints: Australia has a clear and unfulfilled obligation to legislate against, at least, racial and religious vilification. Under the *International Covenant on Civil and Political Rights*, Australia is obliged to prohibit 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence', but has not—and it appears will not—enact religious hatred laws.

The federal racial hatred laws were enacted to give effect to obligations under the UN *Convention for the Elimination of All forms of Racial Discrimination*. But that is a half measure—in 1975 Australia told the United Nations that it would act 'at the first suitable moment' to criminalise racial hatred, but the moment has not yet arisen.

Although political pragmatics will dictate the possibility and timing of anti-vilification laws, the issue will always raise an important 'free speech' debate. Quite simply, anti-vilification laws are a constraint on 'free speech'. But the meaning and scope of 'free speech' as some form of right in Australia is not widely understood.

We know and accept many constraints to 'free speech'. A limit on the freedom of expression that is guaranteed by the US Constitution was famously described by Justice

Oliver Wendell Holmes, when he said (in 1919 in *Schenck v United States*) that a person is not free, when there is no fire, to shout ‘Fire!’ in a crowded theatre.

That is merely one way of illustrating John Stuart Mill’s classic libertarian ‘harm’ principle: ‘As soon as any part of a person’s conduct affects prejudicially the interests of others, society has jurisdiction over it’. Put simply, freedom of expression is limited such that it does not harm others.

Our legal system has long recognised this limitation through, for example, defamation laws that allow free speech as long as it doesn’t harm another’s reputation, and criminal laws that allow free speech short of inciting a crime.

The internationally recognised human right of freedom of expression is similarly limited. The freedom is described in Article 19 of the *Universal Declaration of Human Rights*:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.

But that freedom is qualified by Article 29, which recognises that laws may set limits on one person’s freedom in order to secure respect for the rights and freedoms of others. Similarly, the same freedom set out in the *International Covenant on Civil and Political Rights* speaks of the ‘special duties and responsibilities’ that accompany its exercise. The difficult balancing exercise—between the human right of free expression and the obligation to not cause harm—is left to the makers of law and policy, and the systems they establish.

The balancing exercise is an unremarkable one. Such vilification laws as exist around the country incorporate extensive allowance for free speech for purposes of, for example, public, academic or religious debate if conducted in good faith. The laws have been in operation for some years, enabling complaints to be made and resolved in conciliated discussions. The complaints occasionally ‘graduate’ to full blown disputes in a tribunal

where the balance between harm and free speech has sometimes gone one way and sometimes the other, depending on the circumstances.

Despite the unassuming and effective operation of vilification laws over a number of years, the then NSW Premier, Bob Carr said in rejecting religious vilification laws that vilifying attacks were better answered by ‘the commonsense of citizens’ rather than by wasting the time and money of a government tribunal.

It is hard to make sense of this as a position of public policy. There is a wide range of conduct that is prevented by law that blind faith and wishful thinking would leave to ‘the commonsense of citizens’. On that rationale we would repeal a great many of our laws. More curiously, Mr Carr took this position after many years of having created and supported a range of anti-vilification laws. Is there something special about protecting against religious vilification?

Religions will understandably engage in doctrinal criticism of each other, but so too does one ethnic or cultural group engage in criticism of another. The latter do so reasonably and in good faith within the bounds of racial vilification laws; why can religious debate not be conducted within the same confines, consistently with internationally, historically, philosophically recognised constraints on free speech?