

"Vilification legislation: is it worth the trouble?"

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INTRODUCTION

The perspective from which I give this paper is that of a practitioner. I have attempted to confine my observations to some aspects of how state and federal vilification legislation appears to be working in practice, in terms of who is using the legislation, what kinds of claims are being brought and what outcomes are being achieved. I am unable to refer to claims that have produced a mediated outcome. I have used the Commonwealth *Racial Discrimination Act* 1975 and the Victorian *Racial and Religious Tolerance Act* 2001 as examples.

MY BASIC PROPOSITIONS

We should not approach this legislation any more from the “free speech” perspective. First, it is a red herring. In the one legal system, you cannot maintain defamation as a civil cause of action and continue to argue about this kind of legislation interfering with rights to free speech. Our legal system, common law and statutory, well and truly interferes with free speech already. Second, the legislation itself has undertaken an appropriate balancing exercise by reason of broad exemptions or defences. That balancing exercise will continue as courts construe the defences as expressed in the legislation. The debate about this kind of legislation should move on from this issue.

However, there are some real practical disadvantages to this kind of legislation. The risks of inflaming racial and religious intolerance, rather than assisting racial and religious tolerance are real.

Despite the disadvantages, the governing consideration which in my opinion makes this legislation worthwhile is the protection it affords – both theoretical and practical - to the position of minority groups in Australia. Australia cannot continue to proclaim adherence to notions of multiculturalism and tolerance without this kind of legislation.

THE COMMONWEALTH RDA

In 1995, the Commonwealth enacted the *Racial Hatred Act*, which introduced amendments, through a new Part IIA of the RDA, providing for certain conduct and statements to be unlawful, but not criminalising such conduct or statements.

The key concepts in the Cth RDA (s 18C) are:

- It is restricted to conduct in public – or more accurately, not in private
- It takes as its governing criteria notions of offence, insult, humiliation or intimidation.
- The attributes it nominates as being the causes of the conduct are race, colour or national or ethnic origin.
- The assessment it calls for is whether the conduct was “reasonably likely” to offend, insult, humiliate or intimidate.

The legislation allows significant exemptions for conduct done “reasonably and in good faith”

- in the performance, exhibition or distribution of an artistic work; or

- in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or
- there is a fair and accurate reporting and fair comment exemption.

VICTORIAN LEGISLATION

The *Racial and Religious Tolerance Act* was enacted in 2001, amidst some controversy. It provides for both civil complaints and for criminal offences. The key concepts it employs are:

- It is also restricted to public conduct (s 12)
- The criteria it focuses on are the incitement of hatred against someone, incitement of serious contempt for someone, incitement of revulsion or severe ridicule of someone.
- The attributes it nominates are
 - race (being broadly defined to include colour; descent or ancestry; nationality or national origin; and ethnicity or ethnic origin; and
 - religious belief or activity (which is defined in the same way as it is in the Victorian *Equal Opportunity Act 1995*, namely the holding or not holding a lawful religious belief or view; and the engaging in, not engaging in or refusing to engage in a lawful religious activity.
- It also contains significant defences, again with the qualifier that conduct be done “reasonably and in good faith”
 - in the performance, exhibition or distribution of an artistic work; or
 - in the course of any statement, publication, discussion or debate made or held, or any other conduct engaged in, for-
 - any genuine academic, artistic, religious or scientific purpose; or
 - any purpose that is in the public interest; or
 - There is also a fair and accurate reporting and fair comment defence.

KEY DIFFERENCES BETWEEN THE TWO PIECES OF LEGISLATION

The state legislation extends to religion. The state legislation criminalises certain conduct – inciting hatred, or inciting or threatening physical harm (Part 4). The Commonwealth legislation operates from the perspective of the victim – for example by the criterion of whether someone would be offended or humiliated. In contrast, the state legislation operates from the perspective of the effect of the conduct on third parties – for example, by the use of the word incitement.

Further, one might say the state legislation imposes a higher threshold in terms of the nature of the conduct – concepts such as offence and humiliation might be seen to set a lower threshold than revulsion and ridicule.

WHAT CAN WE GLEAN FROM THE DECIDED CASES?

Who is using the legislation in Victoria

- The one published decision (decided on a strike out only, which was successful) has involved a Palestinian claimant against a Jewish publication: *Judeh v Jewish National Fund of Australia Inc* [2003] VCAT 1254.

- I know of another complaint made by a woman who was a Wicca, against a Victorian local councillor. That matter went to hearing, but then settled and there was a public apology. There was a separate but related complaint by the Pagan Awareness Network, which was also settled.
- VCAT is presently reserved on a complaint by the Islamic Council of Victoria against two pastors accredited with the Assembly of God Church and an incorporated association called Catch the Fire Ministries¹.

Who is using the Commonwealth legislation

- Aboriginal people : see *Bropho v HREOC* [2004] FCAFC 16– a case against a WA newspaper over the publication of a cartoon; *Kelly Country v Beers* [2004] FMCA 532 – complaint about a comedian who portrays a purportedly aboriginal character called “King Billy Cokebottle”.
- Jewish people : see *Toben v Jones* [2003] FCAFC 137 – the Full Court decision being the last in the series so far in this case . The cases concerned publications by Mr Toben (in this case on the internet) about the Holocaust. See also the *Jones v Scully* litigation (Hely J’s judgment is at (2002) 120 FCR 243) about the publication of pamphlets in Tasmania about the Holocaust and about Jewish people.
- White people: *Gibbs v Wanganeen* [2001] FMCA 14, in which a white prison officer complained about insults from an aboriginal prisoner; *De La Mare v Special Broadcasting Service* [1998] HREOCA, in which a white person complained about an SBS program he said vilified white people and western countries.
- A member of the Jewish Orthodox community, complaining against the then president of the NSW Jewish Board of Deputies about remarks made at an AGM about the Orthodox Jewish community: *Miller v Wertheim* [2002] FCAFC 156.
- A Chinese person: see *Zheng v Beamish* [2004] FMCA 61. This case appears to have been some kind of retaliatory claim by the applicant who had faced a claim for sexual harassment by the person he named as a respondent.
- In reviewing the federal cases, I think it is probably fair to say that this legislation is often invoked in the context of a racial discrimination claim.

Are many succeeding?

The answer is no. The two obviously successful cases have both been brought by Jeremy Jones, a member of a national Jewish organisation – one might say in substance if not form, as representative proceedings².

If we ask why many cases are not succeeding, some possible explanations might include:

- Some of the claims are just ill founded on the facts. As in discrimination law, the jurisdiction can attract complainants who, although genuinely upset or offended, misunderstand these laws. There is no doubt that if one looks over the facts of the cases, some appear to be at the extreme in the

¹ Since this paper was delivered VCAT has handed down a decision in this matter, upholding all of the complaints: see *Islamic Council of Victoria v Catch the Fire Ministries Inc (Final)* [2004] VCAT 2510 (22 December 2004)

² To that list of successful cases can now be added the Islamic Council case.

sense of being brought in circumstances a person seems to have a point to prove or a position to defend or advance. In my view, this factor is unimportant in assessing the worth of this kind of legislation. In every jurisdiction, cases are brought that are ill founded on the facts or misunderstand the law. This area should not be singled out for criticism on this basis. Since currently there may be numerically less cases in this area than some other jurisdictions, perhaps the ill founded ones are just more noticeable.

- Establishing causal nexus is difficult. A good example of this is the case of *Hagan v Trustees of the Toowoomba Sports Ground Trust* (2000) 105 FCR 56– a complaint about the naming of the “ES Nigger Brown” stand at the Athletic Oval in Toowoomba. The Full Federal Court held that the words “because of” in s 18C required consideration of the reason or reasons for which the relevant act was done – and here, the naming of the stand including the use of the word “nigger” was because the name on it was the name by which the footballer intended to be honoured was known, and because the Trustees formed the opinion that the general view of the local indigenous community was that maintenance of the sign was not offensive to them on any ground, racial or otherwise. This is notwithstanding the Court accepted that Mr Hagan was offended by the name.
- The construction of some of the key concepts remains somewhat unsettled. I think it is fair to say that the Courts are being relatively conservative about this legislation, and requiring high thresholds in terms of the level of conduct that will fall within the legislative prohibitions. *Jones v Toben* and *Jones v Scully* remain two of the few successful cases, and they both dealt with conduct which the Court could relatively easily recognise as highly offensive – bringing into question, as it did, the Holocaust, and extreme conspiracy theories about Jewish people and their role in society.
- The defences, or exemptions, are considerable. They are being widely construed – this was especially apparent in the Full Federal Court decision in *Bropho*, which examined the meaning of the terms “reasonably” and “good faith”. French J said, of good faith, at [95]

“It requires a recognition that the law condemns racial vilification of the defined kind but protects freedom of speech and expression in the areas defined in paras (a), (b) and (c) of the section. The good faith exercise of that freedom will, so far as practicable, seek to be faithful to the norms implicit in its protection and to the negative obligations implied by s 18C. It will honestly and conscientiously endeavour to have regard to and minimise the harm it will, by definition, inflict. It will not use those freedoms as a “cover” to offend, insult, humiliate or intimidate people by reason of their race or colour or ethnic or national origin.”
- Contrast Lee J (dissenting) at [114] who put the meaning more highly

“The words “good faith” as used in s 18D involve more than the absence of bad faith, dishonesty, fraud or malice. Having regard to the context provided by the Act, the requirement to act in good faith imposes a duty on a person who does an act because of race, an act reasonably likely to inflict the harm referred to in s 18C, to show that before so acting that person considered the likelihood of the occurrence of that harm and the

degree of harm reasonably likely to result. In short the risk of harm from the act of publication must be shown to have been balanced by other considerations. The words “in good faith” as used in s 18D import a requirement that the person doing the act exercise prudence, caution and diligence, which, in the context of the Act would mean due care to avoid or minimize consequences identified by s 18C”

There are real practical disadvantages to this kind of legislation

The main disadvantage I want to identify is that the statutory provisions are complicated – they contain many elements, and the defence or exemption provisions contain even more. In the urge to define vilification, Parliaments have resorted to a series of verbs – and having such a spectrum can make proof difficult for a complainant, especially as the decision maker (encouraged by a respondent) searches to attribute a different yet precise meaning to each verb. Thus, compartmentalising the effects of conduct means it is easier for applicants to fall between compartments.

Respondents are, I think, overprotected and complainants are disadvantaged by the number of issues they are required to prove. Notwithstanding the reasonable consensus that exists now that the respondent bears the onus in relation to the exemption or defence provisions, those provisions are so qualified that they unduly favour respondents. The constructions given by Courts to the defence provisions in this legislation will be critical to the effectiveness of the legislation – too conservative a construction could make successful proceedings under this legislation highly unlikely.

The risks of inflaming racial and religious intolerance, rather than assisting racial and religious tolerance are real.

The fact situations giving rise to complaints are likely to be inflammatory. Unlike many discrimination claims, claims under this legislation may tend to involve – or be brought on behalf of - communities, or groups of people rather than individuals. Once the complaints get into an adversarial setting, the actual conduct of the proceeding can result in further vilification of the very kind being complained of. In other words, a complainant may feel subjected to the same sorts of statements and conduct – this time under the cover of privilege. Media reporting of these proceedings can contribute, in a damaging way, to rising tensions. Some of the reporting I have seen of these cases has been very disappointing. I think the media has a special responsibility in this area to exercise its powers responsibly.

The value of this legislation in protecting minority groups, endorsing and encouraging changes in attitude to those groups

If the provisions prove incapable of successful application because thresholds are set too high, this is a problem that can be fixed by legislative reform. At the moment the courts seem to have enthusiastically embraced another excursion into the intricacies of statutory construction and this may create more difficulties than it solves in the use of this legislation. Intricate statutory construction, and too many divisions of judicial opinion, are unhelpful for

practitioners and disastrous for the communities whose rights are supposed to be protected by these provisions. In my opinion, complicating the construction of human rights legislation like this can make it nugatory.

The unwelcome practical consequences for complainants of invoking the protection this legislation sets out to afford can be minimised by responsible behaviour by legal practitioners and the media.

So, in my view, these present weaknesses are far from insurmountable. However without this kind of legislation, some of the problems in our community of racial and religious intolerance may indeed be insurmountable. Anti-discrimination law has brought about real and lasting modifications to behaviour within our community – it has taken more than 20 years. Anti-vilification legislation is capable of bringing about similar modifications. It does not ask much of people in Australia – moderation, understanding, respect, tolerance, careful consideration of the impact of what we say and do – these are hardly radical or extreme concepts.

Minority groups need this legislation. Others may use it, but minority groups need it. While acknowledging that I refer here to all minority groups, I make special mention of indigenous Australians and of Muslims. Stereotyping, prejudice and fear continue to have a significant daily impact on the lives of people in these two groups. That must change. I remain optimistic that vilification legislation can make a positive contribution to effecting that change.