Religious Discrimination Bill – Exposure Draft

Your Submission

This is a submission in relation to the Religious Discrimination Bill 2019 (the "Act").

Objects and Purpose

Pursuant to s.3 (1)(a) the Objects of the Act include to eliminate, so far as is possible, discrimination against persons on the ground of religious belief or activity in a range of areas of public life. It is respectfully submitted that the Act does not achieve this in one important area, and in that respect is deficient. This is so in relation to serious religious vilification, and in particular, the misuse of social media technology and its capacity to seriously discriminate against persons on the ground of religious belief or activity in a way which is especially harmful.

Christchurch Aftermath

On Friday 15 February 2019, within hours of the horrific Christchurch massacre, Queensland Senator Fraser Anning published and distributed a one-page public release on his Senate letterhead. Media reports of what he said, by and large described the thrust of his statement as blaming the massacre on Muslim immigration. Grossly offensive and fallacious as this was, it was very much a diluted summary. In the following lines of his media release he expanded his message of hate in a savage tone rarely seen in this country:

"The real cause of bloodshed on New Zealand streets today is the immigration program which allowed Muslim fanatics to migrate to New Zealand in the first place.

Let us be clear, while Muslims may have been the victims today, usually they are the perpetrators. World-wide Muslims are killing people in the name of their faith on an industrial scale.

The entire religion of Islam is simply the violent ideology of a sixth century despot masquerading as a religious leader, which justifies endless war against anyone who opposes it and calls for the murder of unbelievers and apostates.

The truth is that Islam is not like any other faith. It is the religious equivalent of fascism. And because the followers of this savage belief were not the killers in this instance, does not make them blameless."

This is a stark example of what is commonly called ‘hate speech’, or for the purposes of this submission, ‘serious religious vilification material’.

The media release was published widely on a number of social media websites which in turn triggered a wave of ‘copycat’ statements also published on social media platforms. In the majority of cases contributors used untraceable self-assigned code names to maintain anonymity.
A Serious Shortcoming of the Act

It is submitted that the Act suffers from a structural deficiency — it fails to deal with a grave vice to emerge from Christchurch, namely what is here described as ‘serious religious vilification material’, whether by use of the internet or other means to publish or transmit offending statements.

Published words do matter. Some commentary is as divisive as it is dangerous, particularly when it emanates from an authority figure. Legitimising extreme thought legitimizes extreme action. The conduct contributes to an environment where the production of religious hate speech by ‘copycat’ contributors is encouraged. Acting in an atmosphere of contagion ‘following the leader’, an exponential and rapid spread of the offending message is achieved. The potential for the powerful social media platforms of today, now freely available to be utilised by actors seeking to spread such material, is a phenomenon which calls to be addressed.

The proposition advanced in this submission is that a new federal offence of serious religious vilification should be introduced. It could be designed to supplement the provisions of the presently proposed Act, thereby providing a comprehensive suite of human rights protections to guard against some of the vices facilitated by technology evidenced by Christchurch, at least as far as it is presently possible to do so. It could adopt the approach of direct action aimed at the authors of published material which amounts to serious religious vilification. An example of this approach is to be found in the Victorian Racial and Religious Tolerance Act 2001 (Vic).

What is the Need? And the Capacity and Duty to Introduce a Remedy

The following 6 factors in this submission point to the need for such legislation and the capacity and duty to introduce a remedy:

1. International treaty obligations to which Australia is a party;
2. Powers under the Australian Constitution to pass a federal law dealing with religious vilification;
3. The technical limitations in current technologies to effectively screen and block serious religious vilification material before it is loaded to social media and process delay in the administration of regulation;
5. The wide divergency of approach in state and territory legislation dealing with discrimination on the ground of religion, leading to a weak level of protection by international standards; and
6. Reports of the Australian Human Rights Commission which have consistently advocated for some 20 years the creation of a new federal offence of serious religious vilification.

International Treaty Obligations

The International Covenant on Civil and Political Rights 1966 (‘ICCPR’) was adopted by the United Nations General Assembly in that year. Australia ratified the ICCPR on 13 August 1980.

Freedom of religion is protected by art 18 of the ICCPR, supported by the right to equality before the law and to human rights and fundamental freedoms without discrimination on the basis of religion or belief (arts 2 and 26) and the right to freedom from religious hatred (art 20).

Articles 26–7 support these basic protections.

Importantly for present purposes, art 20 of the ICCPR requires state parties to prohibit by domestic law any ‘advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence’. As a signatory to the ICCPR, Australia, in the absence of any binding reservation, would have been obliged to enact laws prohibiting such conduct.
However, at the time of ratification of the ICCPR, Australia made a reservation in relation to art 20 that states: ‘Inquiry into the status of the human right to freedom of religion or belief Australia interprets the rights provided for by articles 19 [freedom of expression], 21 [freedom of assembly] and 22 [freedom of association] as consistent with article 20.’

Based on this reservation, Australia has been able to avoid introducing Commonwealth law which regulates religious vilification, leaving it to the states to cover the field to the extent that they are minded to do so.

Australian Constitution

Section 116 of the Australian Constitution provides only limited protection of the right to freedom of religion and belief. The section restricts only the legislative power of the federal Parliament to pass laws relating to religion, and in one respect only, the executive power of the Commonwealth. It does not apply to the states or territories. As such, s 116 it is not a positive guarantee of freedom of religion.

However, the Australian Constitution does give the Commonwealth power to make laws with respect to external affairs. This head of power enables the Commonwealth to make a law implementing an international treaty ratified or acceded to by Australia, provided the law gives effect to the terms of the instrument in a reasonably appropriate and proportional way.

Accordingly, the Commonwealth has power under the Constitution to pass legislation to ensure freedom from religious vilification in a form which accords with art 20 of the ICCPR, provided the reservation to this article is revoked, which is well within the executive power of the Commonwealth to achieve.

Technical and Process Limitations

The enemy of media platform control of prohibited content is delay.

Technical limitations in current technologies mean there is limited capacity to effectively screen and block serious religious vilification material before it is loaded to social media. Further, process delay presents another challenge to effective administration of regulation in this area.

Present platform technologies, which provide for immediate public access to posted material once loaded, far outstrip available technologies to detect and remove all offending material before it is available to end users of the service.

First, is there is the problem of sheer volume. The platforms can and are used by some actors on a mass scale and in enormous volume and with great speed to promote, publish and disseminate abhorrent violent material and serious religious vilification material. Facebook’s live streaming capability allows its contributors to share live video with their followers and friends on Facebook, simply and immediately at the press of a button. Facebook, for example, has almost 2 billion users.

Second, are the present technical difficulties in automatically detecting and blocking content which is prohibited on the ground of religious vilification. Development of algorithms which can automatically and accurately detect and block text material having these characteristics is difficult. This is exacerbated when the offending material is represented in pre-recorded video, audio, or audio-visual material or pictorially by drawing, cartoon, animation and the like. The capacity to edit and reshape this content to evade automated detection is unlimited.

The definition of content falling within the description of serious religious vilification material in itself poses unique challenges. The rub lies in the process of judgment. It is contended that making a delicate judgment of this kind can only be undertaken by humankind. Successfully assigning the task to a computer algorithm is likely to be beyond present technology. Further, community acceptance has not yet developed to the point where a judgment of this kind may happily be assigned to artificial intelligence.

This is well illustrated by ‘Charlie Hebdo’, the French satirical magazine which regularly publishes irreverent and provocative religious and political content. A number of controversial Muhammad cartoons have been published. The difficulty in drawing the sometimes all too fine line between acceptable satire and contravening serious religious vilification material,
will rarely be an easy task. In this context, computers, not known for their sense of humour, are ill-equipped to make the call.

Nevertheless, and despite the acknowledged technical challenges, owners and providers of interactive services which are accessible to the public as social media platforms should be encouraged to develop efficient technical processes for automatically blocking material which contains offensive discriminatory material from being published online.

Another set of limitations emanate from issues of delay in the process of management of abhorrent violent material and serious religious vilification material published on social media platforms. The processes contemplated in Australia by the Abhorrent Violent Material Bill and the steps which are being taken internationally to deal with the problem, invariably contemplate significant process delay between the time of the initial posting of offensive material to a social media platform and removal of the material following completion of the processes.

Shortcomings of Commonwealth Law (Racial Discrimination Act Cth & Criminal Code Cth)
The Racial Discrimination Act Cth (‘RDA’) is an inadequate structure to deal with the problem of serious religious vilification material, particularly that which is directed at and experienced by Muslim Australians.

The RDA renders unlawful discrimination on the basis of race, colour, descent or national or ethnic origin and in some circumstances, immigrant status. Racial hatred, defined as a public act/s likely to offend, insult, humiliate or intimidate on the basis of race, is also prohibited under this Act, unless an exemption applies.

The RDA is severely limited in its capacity to extend protection from discrimination on the ground of religion. Religious identity is not an attribute that is dealt with by the Act and consequently, it does not specifically prohibit discrimination on the ground of religious identity or belief. However, in some circumstances, religious groups may be regarded as being covered by the RDA where they can establish a common ‘ethnic origin’.

Macabenta v Minister for Immigration and Multicultural Affairs was one such example. Here the Full Court of the Federal Court listed a number of questions which are relevant when considering ‘ethnic origin’: for example, is there a long shared history; is there either a common geographical origin or descent; is there a common language; is there a common literature; is there a common religion or a depressed minority? Based on this approach, the Federal Court in Macabenta accepted that Jewish Australians have a common ‘ethnic origin’ and can thus be afforded protection under the RDA.

However, there is no Australian jurisprudence determining whether Muslim people are a group of common ‘ethnic origin’ for the purposes of the RDA.

The problems of proof in addressing questions such as these are obvious. It appears that currently, complaints made to the Commission about racial discrimination by Muslim people will not be accepted unless there is some racial or ethnic element to the complaint. By the same token, if a complainant can show that he or she is part of a group with a sufficient combination of shared customs, traditions and beliefs derived from a shared history, this may be sufficient for them to constitute an ethnic group, and receive the protection of the RDA.

Further, although the RDA renders discriminatory conduct on the ground of race unlawful, it does not create any criminal offence in the event of its provisions being breached, even if the contravening conduct amounts to a breach of the controversial s 18C.

Finally, the telecommunication sections of the Criminal Code do not satisfactorily deal with the problem of serious religious vilification material, and were never designed to address the issue.

Laws of Australian States
State/territory laws display a unique and wide divergence of approach in relation to discrimination and vilification on the ground of religion. There is a wide variety in the ways that the laws apply and there are gaps in the protection offered between different states and territories.

Principal differences appear in whether or not there is provision to prohibit serious religious vilification material; whether serious religious vilification is made a criminal offence; and whether statutory defences are provided for a charge of serious
Only the laws of Queensland, the ACT and Victoria provide for a criminal offence of serious religious vilification, and then in different, although similar, terms.

Victorian Racial and Religious Tolerance Act 2001

The Victorian Racial and Religious Tolerance Act 2001 provides a lead as to what can be potentially achieved at the federal level. It arguably provides the most comprehensive code for the protection of religion of all the laws in Australia.

Of importance in the Victorian Act for present purposes is the creation of the criminal offence of serious racial vilification (s 24) and serious religious vilification (s 25). Section 25 is in the following terms:

Offence of serious religious vilification

(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 —
(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.

Penalty: In the case of a body corporate, 300 penalty units;
In any other case, imprisonment for 6 months or 60 penalty units or both.

(2) A person must not, on the ground of the religious belief or activity of another person or class of persons, knowingly engage in conduct with the intention of inciting serious contempt for, or revulsion or severe ridicule of, that other person or class of persons ... 

Penalty: In the case of a body corporate, 300 penalty units;
In any other case, imprisonment for 6 months or 60 penalty units or both.

... 

(4) A prosecution for an offence against subsection (1) or (2) must not be commenced without the written consent of the Director of Public Prosecutions.

It is notable that no statutory defence is provided to either s 24 or s 25. Indeed, it is provided by s 26 that:

In determining whether a person has committed an offence against section 24 or 25, it is irrelevant whether or not the person made an assumption about the race or religious belief or activity of another person or class of persons that was incorrect at the time that the offence is alleged to have been committed.

If similar provisions are adopted in like federal legislation, consideration also needs to be given to creating an offence which carries a maximum penalty for individuals of at least 12 months’ imprisonment. The object of this penalty provision would be to act as a particular deterrent for federal members of Parliament, who may be disqualified from office upon being convicted of an offence which carries a penalty of 12 months or more under s 44 of the Constitution.


The Australian Human Rights Commission has long recognised the gap in federal law in protecting Australian citizens from serious religious vilification material. Reports of the Commission have consistently advocated the creation of a new federal offence of religious discrimination and vilification.

In 1998 the Commission delivered a report arising from its inquiry into freedom of religion and belief in Australia. The report was entitled: Article 18: Freedom of religion and belief. The Commission received extensive submissions detailing experiences of discrimination and vilification on the basis of religion and belief which it found infringed the rights of individuals and groups. It reported, for example:
'Many Australians experience vilification or incitement to hatred on the basis of their religion or belief. However, current legislative protection against that behaviour is incomplete. Acts of violence are dealt with by the criminal law. A remedy for vilification on the basis of religion may be available in situations where religion is linked to ethnicity or race. However, there is no comprehensive protection against vilification on the basis of religion or belief.'

The report noted that ‘the level of protection afforded to the right to freedom of religion and belief in Australia is relatively weak compared to a number of other comparable countries’ and further found in its Findings and Recommendations that:

- Vilification, harassment and incitement to religious hatred on the basis of religion or belief occur in Australia;
- Current laws in Australia proscribing vilification on the basis of religion lack uniformity and are inadequate;
- Uniform federal legislation proscribing incitement to religious hatred is necessary to ensure that Australia complies with its obligations to ensure that the advocacy of ... religious hatred that constitutes incitement to discrimination, hostility or violence is proscribed by law (quoting ICCPR article 20.2).

On the basis of the evidence before it, the Commission concluded there is a need for comprehensive federal legislation proscribing discrimination on the basis of religion or belief. To this end, it recommended the enactment of a federal Religious Freedom Act. The proposal included provisions based on the racial vilification provisions contained in the RDA, but stopped short of recommending a criminal offence.

However, the 1998 deliberations of the Commission found a dust ridden shelf and to date have come to nothing.

The question is whether the time has now come for legislative action based on the findings made in 1998, and indeed whether the time has now come for the imposition of a criminal sanction beyond the civil remedies contemplated by the Commission.

Need for Direct Action Criminal Law Deterrence

It is contended that there is a pressing need for the deterrence of direct action in the form of imposing criminal liability on persons who advance serious religious vilification.

If implemented, this could provide an important supplement to the more sophisticated automatic blocking technical processes as they are being developed, and operate in support of the proposed, and potentially amended, Criminal Code Amendment (Sharing of Abhorrent Violent Material) Bill 2019.

The particular value of this approach would be to add a valuable piece to the armoury of offensive content regulation governing social media platforms. It would do this by imposing a deterrent, not on the platforms themselves, but on the persons who author the offending content. The deterrent effect would be designed to operate at a point prior to upload of the offending material to the platforms, thereby avoiding issues of process delay earlier discussed. Authors of such material falling within the jurisdiction of Australia would be discouraged from loading it in the first place.

A number of aids to enforcement, and hence deterrence value, could be added by way of Regulations made under the umbrella of the proposed new Act, and it is submitted, should be considered:

- as an aid to enforcement, consideration may be given to prohibition of publication on social media platforms of all content from public contributors without the platform first automatically registering and retaining the verifiable contact details of the contributor (which can then be accessed by law enforcement agencies to prosecute an offending contributor for offences). This would work to remove the protection provided to offenders by anonymity add considerably to the deterrence value of the proposed criminal legislation; and
- as part of the suggested package, legislation may be considered which requires social media platforms to act on a notice served by the eSafety Commissioner of such other appointed authority, either immediately or in accordance with the notice, to remove or otherwise deal with serious religious vilification material in accordance with the notice, failing which a criminal penalty should be imposed.

Conclusions
The people of contemporary Australia come from a wide range of diverse ethnic and Indigenous backgrounds and observe many different religious beliefs and practices.
As stated in the Australian Law Reform Commission report of December 2015: ‘Religious freedom encompasses freedom of conscience and belief, the right to observe or exercise religious beliefs, and freedom from coercion or discrimination on the grounds of religious (or non-religious) belief.’

The hate speech which accompanied the Christchurch massacre and which vilified Muslims on the grounds of their religious belief or activity, demonstrates how vulnerable the ideal of freedom from discrimination on the grounds of religious belief, and hence freedom of religion, has become in this country in the age of technology.

Dissemination of abhorrent violent material and hate speech on social media platforms is a relatively new phenomenon — it can be swift, widespread and devastating in effect.

For this reason, deterrence provided by the criminal law against conduct which seriously vilifies others on the grounds of religious belief or activity is manifestly justified in the current environment.

Equally justified is the extent to which this would limit free speech in a free and democratic society. For victims of abuse of such conduct, if freely allowed, causes harm. It diminishes their dignity, sense of self-worth and belonging to the community. It also reduces their ability to contribute equally to society and reduces the benefit that diversity brings to the community.

In the interests of supporting these values, there is a clear case for deterring publication of both abhorrent violent material and serious religious vilification material on social media platforms and other forms of mass media publication, supported by the full force of the criminal law.

This may be achieved in significant part by direct action through federal legislation which makes it a criminal offence for an author to engage in serious religious vilification, as provided for example in the Victorian Racial and Religious Tolerance Act 2001. An effective deterrent of this kind would be assisted by the aids to enforcement by Regulation advanced in this submission.

In this way, a serious structural gap in the proposed Act identified in this submission has a prospect of being remedied.

Hon. Peter Vickery QC
1 October 2019