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# DRAWING THE LINE – BALANCING RELIGIOUS VILIFICATION LAWS AND FREEDOM OF SPEECH<sup>1</sup>

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Tolerance has become part of the language of human rights, the antithesis of discrimination, persecution, and vilification. In a culturally diverse society like Australia, it is essential for social cohesion. Legislators have considered it a sufficiently desirable social outcome to justify anti-discrimination and anti-vilification laws. However, legislating for tolerance is not without controversy. In recent years, the most controversial laws have been those prohibiting speech that vilifies another because of his or her religious beliefs. A tolerant society also needs to balance the competing public interests of social cohesion with that of freedom of speech, and this has been a challenge for legislatures and the judiciary alike.

In late 2005, the publication of a series of cartoons depicting the Islamic prophet Mohammed caused international controversy that resulted in some violent protests, particularly against Danish interests. Using this controversy as the focal point, I analyse the debate surrounding the publication of these cartoons and compare the legislative responses to religious vilification in Australia and Denmark. Would publication of the cartoons in Australia have amounted to religious vilification under current legislation? Should they? Consideration is also given to the self-imposed limits of the press in the publication of material that is critical of or offensive to a segment of society.

## The Background to the Controversy

On 15 September 2005, *Politiken*, a Danish newspaper, published an article entitled *Profound Fear of Criticism of Islam*,<sup>3</sup> discussing the difficulty of an author, Kåre Bluitgen, in finding an illustrator willing to work on a planned children's book on the life of Mohammed.<sup>4</sup> The *Politiken* article alleged that artists refused to undertake the work out of fear of offending Muslims.<sup>5</sup> Shortly thereafter *Jyllands-Posten*, another Danish newspaper, owned by

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<sup>1</sup> This article is drawn from a larger research project currently being undertaken into the state of freedom of speech in Australia in the first years of the 21st century

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<sup>3</sup> *Dyb Angst For Kritik Af Islam*, *Politiken*, September 15, 2005.

<sup>4</sup> Koranen og profeten Mohammeds liv fortælling efter islams ældste kilder, translated as *The Quran and the Life of the Prophet Muhammad*.

<sup>5</sup> *Dyb Angst For Kritik Af Islam*, *Politiken*, September 15, 2005.

the same media corporation as *Politiken*,<sup>6</sup> invited a number of cartoonists to submit works depicting Mohammed to accompany an article on self-censorship. On 30 September 2005, *Jyllands-Posten* published an article entitled *The Face of Mohammed*,<sup>7</sup> critical of self-censorship imposed out of a fear of a backlash from Muslims. In the introduction to the article, the author, Culture Editor for *Jyllands-Posten*, Flemming Rose wrote:

The fact is that the fear does exist and that it leads to self-censorship. The public space is being intimidated. Artists, authors, illustrators, translators, and people in theatre are therefore steering a wide berth around the most important meeting of cultures in our time – the meeting between Islam and the secular society of the West, which is rooted in Christianity.<sup>8</sup>

Accompanying the article were twelve cartoons. Included among the cartoons were the face of a man, drawn within a crescent moon and star; the face of a bearded man with a turban shaped like an ignited bomb; five female figures wearing headscarves, with facial features depicted as a star and a crescent moon, the caption reading: “*Prophet! You crazy bloke! Keeping women under the yoke!*”; a man with beads of sweat on his brow, sitting under a lighted lamp and looking over his left shoulder as he draws a man’s face with a head covering and beard; two bearded men wearing turbans carrying a sword, a bomb and a gun, running towards a third man wearing a turban reading a sheet of paper, who motions them to stop, with the words “*Relax folks! It’s just a sketch made by an unbeliever from southern Denmark!*”; and a bearded man wearing a turban and standing on clouds with arms outspread, facing a row of men in tattered clothes with rising smoke over their heads, saying: “*Stop, stop, we ran out of virgins!*”<sup>9</sup>

In mid-October 2005, several thousand people demonstrated peacefully in Copenhagen against the publication. After a refusal by the Danish Prime Minister, Anders Fogh, to intervene and censor *Jyllands-Posten*, a number of organizations representing Muslims lodged a complaint with the Danish Police, alleging a breach of the Danish Criminal Code.<sup>10</sup> Starting in November 2005, newspapers throughout Europe, Asia, and North America re-published the images, triggering more protests throughout December 2005 and January 2006.<sup>11</sup> The protests continued throughout February and were overwhelmingly peaceful. However, on 3 February, the Danish Embassy in Jakarta was attacked by protesters, and in the following days

the Embassies of Denmark and other countries where the cartoons had been republished were also attacked.<sup>12</sup>

### Comparing the Legal Responses

Freedom of speech is a fundamental right under Danish law. Section 77 of the *Danish Constitution* provides that “*Any person shall be entitled to publish his thoughts in printing, in writing, and in speech, provided that he may be held answerable in a court of justice. Censorship and other preventive measures shall never again be introduced.*” This provides a procedural protection of speech, a prohibition of prior restraints, and dates from 1849 when freedom from censorship was perceived as the primary issue in freedom of speech.<sup>13</sup> However, the wording expressly indicates an intention by the framers of the Constitution that speech is subject to other laws, including the Criminal Code (*Straffeloven*). As a member of the European Union, Denmark’s obligations arise under the European Convention on Human Rights (ECHR). Article 10 (1) of the Convention provides that “*Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.*” Under Article 10 (2), the exercise of the Convention’s freedoms are subject to “*duties and responsibilities*” necessary for a legitimate purpose, including the protection of the reputation or rights of others.<sup>14</sup> Therefore, neither of these protections of speech is absolute, enabling the Danish legislature to restrict speech where it is considered necessary. For that reason, Danish Courts have considered freedom of expression to be an important individual right when assessing the validity of laws restricting speech, but, at the same time, have acknowledged a legal obligation to restrict speech or expressive conduct that is gratuitously offensive to others and that in no way contributes to public debate.<sup>15</sup>

In October 2005 a complaint was lodged with Danish police, claiming that *Jyllands-Posten* committed an offence under the Danish Criminal Code, alleging an infringement of sections 140 and 266. Section 140 is contained

6 J/P/Politikens Hus.

7 *Mohammeds Ansigt*, *Jyllands-Posten*, September 30, 2005.

8 Ibid.

9 The cartoons were widely distributed on the Internet, e.g. <<http://blog.newspaperindex.com/2005/12/10/un-to-investigate-jyllands-posten-racism/>>.

10 *Possible Criminal Proceedings in the Case of Jyllands-Posten Article “The Face of Mohammed”*, The Director Of Public Prosecutions (Denmark), File No. RA-2006-41-0151, 15 March 2006, available at <[http://www.rigsadvokaten.dk/media/bilag/afgorelse\\_engelsk.pdf](http://www.rigsadvokaten.dk/media/bilag/afgorelse_engelsk.pdf)> accessed 28 September 2006.

11 *Timeline: The Muhammad Cartoons*, The Times Online, 6 February 2006 at <<http://www.timesonline.co.uk/article/0,,3-2021760,00.html>>.

12 On 4 February 2006 the Norwegian, Danish, Swedish, and Chilean Embassies in Damascus were firebombed, and on 5 February the Danish General Consulate in Beirut was set on fire. See <[www.smh.com.au/articles/2006/02/06/1139074137551.html](http://www.smh.com.au/articles/2006/02/06/1139074137551.html)> accessed 28 September 2006; and *Timeline: The Muhammad Cartoons*, The Times Online, 6 February 2006 at <<http://www.timesonline.co.uk/article/0,,3-2021760,00.html>> accessed 29 September 2006. Interestingly, international media coverage of this issue appeared to focus on the violent protests, with little reporting of the majority of protests conducted peacefully.

13 Peter Germer, *Ytringsfrihedens væsen*, Juristforbundets Forlag, Copenhagen, 1973, 209 as cited in Brief on Freedom of Expression, The Danish Institute for Human Rights, 29 September 2006, available at <[http://www.humanrights.dk/news/briefs/briefs\\_01/](http://www.humanrights.dk/news/briefs/briefs_01/)> accessed 29 September 2006.

14 *The Sunday Times v The United Kingdom*, European Court of Human Rights, Application No. 6538/74, 26 April 1979; (1979) 2 EHRR 245.

15 Response by the Danish Government to UN Special Rapporteur on Freedom of Religion or Belief, 26 January 2006, available at <<http://www.um.dk/NR/rdonlyres/00D9E6F7-32DC-4C5A-8E24-F0C96E813C06/0/060123final.pdf>> accessed 28 September 2006.

in Chapter 15 of the Code, which is sub-headed “Crimes against the public order and peace,” and provides that:

Any person who, in public, mocks or scorns the religious doctrines or acts of worship of any lawfully existing religious community in this country shall be liable to imprisonment for any term not exceeding four months.

The use of the phrase “mocks or scorns the religious doctrines or acts of worship” indicates that the interest protected is religious feeling, in as far as it is connected to the doctrines and worship of the religion.<sup>16</sup> Section 266b(1) provides that:

Any person who, publicly or with the intention of wider dissemination, makes a statement or imparts other information by which a group of people are threatened, scorned or degraded on account of their race, colour, national or ethnic origin, religion, or sexual inclination shall be liable to a fine or to imprisonment for any term not exceeding two years.

The investigation stemming from the October 2005 complaint was discontinued in January 2006, after the Regional Public Prosecutor for Viborg deemed that there were no grounds for considering the publication of the cartoons to be in violation of either section 140 or 266 of the Code.<sup>17</sup> The Regional Prosecutor’s decision resulted in a number of complaints being lodged with the Director of Public Prosecutions (DPP), who also dismissed them, finding that there were insufficient grounds to attach criminal liability under either provisions of the Criminal Code.<sup>18</sup> The difficulty faced by the DPP in determining whether an offence had occurred arose partly from the fact that there was little, if any, judicial reasoning to apply. “Only three prosecutions have been brought for violation of this provision and the most recent of these cases from 1971 led to acquittal.”<sup>19</sup>

Central to the DPP’s decision was the definition of mockery and scorn within the framework of the statute. In reviewing section 140 of the Code, the DPP stated:

The concept “mockery” covers ridicule and is an expression of lack of respect or derision of the object of mockery. “Scorn” is an expression of contempt for the object that is scorned. It must be assumed that these words imply ridicule or contempt with a certain element of abuse, just as it appears from the legislative material of the Criminal Code that punishment can be incurred only in “serious” cases. Depending on the circumstances, a caricature of such a central figure in Islam as the Prophet Mohammed may imply ridicule or be considered an expression of contempt of Islamic religious doctrines and acts of worship. An assessment of whether this is the case must be seen in the light of the text accompanying the drawings . . . Based on this text, the basic assumption must be that *Jyllands-Posten* commissioned the drawings for the purpose of in a provocative manner to

debate whether, in a secular society, special regard should be paid to the religious feelings of some Muslims.<sup>20</sup>

Accordingly, the DPP found that, in context, the publication of the cartoons was not to be considered in breach of section 140, concluding that eight of the cartoons were either “neutral” in their expression or did not appear to represent an expression of “derision or spiteful ridiculing humour” towards Muslims or Islam.<sup>21</sup> The DPP acknowledged that the cartoon depicting two armed men with beards and turbans who chased a third man could, at first sight, be understood “to be an illustration of an element of violence in Islam or among Muslims.”<sup>22</sup> However, he emphasised that the caption attributed to the man being chased, who could be taken to represent Mohammed, speaks to calm the others, “which must be taken to be a rejection of violence”.<sup>23</sup> Two other cartoons, both depicting women wearing headscarves in apparent subordinate roles, were found to deal with the position of women in Muslim societies and was an issue concerning social conditions rather than religious doctrines or worship.<sup>24</sup>

One of the most controversial of the cartoons depicted a man with a bomb shaped turban. The DPP reasoned that a cartoon of a man wearing a bomb shaped turban could be understood as a contribution to the discussion about religious fanaticism motivating terrorist acts. The DPP explained:

The drawing can therefore be seen as a contribution to the current debate on terror and as an expression that religious fanaticism has led to terrorist acts. Understood in this way, the drawing cannot be considered to express contempt for the Prophet Mohammed or the Islamic religion, but as an expression of criticism of Islamic groups who commit terrorist acts in the name of religion.

This reasoning follows that of the DPP in 1976 to refuse to prosecute a film director after complaints from Christian groups about the depiction of Christ’s disciples engaging in criminal activities in a published film script, “*The Jesus Movie by Thorsen*”. The then DPP stated, “It will also be of importance that the aim of the film is not directed against Christian communities or their worship, but at exposing problems to debate and illustrate them.”<sup>25</sup> Interestingly, in the *Jyllands-Posten* matter, the DPP accepted that the cartoon could be interpreted to depict Mohammed as a violent person, which could be understood to be an “affront and insult to the Prophet who is an ideal for believing Muslims,”<sup>26</sup> however, this failed to qualify as an offence under section 140 of the Code.

In the complaints lodged against *Jyllands-Posten* it was alleged that the

16 Above n 10.

17 Ibid 1.

18 Ibid.

19 Ibid 5. The last conviction was in 1938 for anti-Jewish magazines and posters - U. (Danish Weekly Law Reports) 1938.419Ø

20 Ibid 5.

21 Ibid 8.

22 Ibid 7.

23 Ibid.

24 Ibid.

25 Ibid.

26 Ibid.

mere depiction of Mohammed caused the cartoons to be mocking and scornful of Muslims' beliefs because of a doctrinal prohibition against drawing pictures of Mohammed. The DPP rejected the contention that this prohibition was contrary to the religious doctrines and acts of worship of Islam:

The basic assumption must be that, according to Hadith (the written narratives of the life of the Prophet and guidelines for the conduct to be shown by Muslims) in Islam, there is a prohibition against depicting human figures, which also includes depicting the Prophet Mohammed. Not all Muslims comply consistently with the ban on depiction, as there are pictures of Mohammed dating from earlier times as well as the present.<sup>27</sup>

While the purpose of section 140 is the protection of religious beliefs connected with religious doctrines, the rationale behind section 266b of the Code is the protection of groups of people who are threatened, scorned, or degraded because of their religion. In deciding that there were insufficient grounds to pursue a prosecution under section 266b, the Prosecutor found that, taken in context, the article did not refer to Muslims generally, but expressly referred to *some* Muslims:

i.e. Muslims who reject the modern, secular society and demand a special position in relation to their own religious feelings. The latter group of people must be considered to be comprised by the expression "a group of people" as mentioned in section 266 b, but the text in the article cannot be considered to be scornful or degrading towards this group – even if seen in the context of the drawings . . . Furthermore, there is no basis for assuming that the intention was to depict Muslims in general as perpetrators of violence or even as terrorists.<sup>28</sup>

In reaching the decision not to proceed with a prosecution of *Jyllands-Posten*, considerable weight was attached to the fact that the article concerned a matter of public interest "which means that there is an extended access to make statements without these statements constituting a criminal offence."<sup>29</sup>

Unlike Denmark, blasphemy laws are not relevant to Islam in Australia. Blasphemous libel prohibits the publication of material that exposes the Christian religion to vilification, scurrility, ridicule, and contempt. In most Australian jurisdictions<sup>30</sup> it remains a common law misdemeanour, punishable by fine or imprisonment, to publish words concerning the Christian religion "which are so scurrilous and offensive as to pass the limits of decent controversy and to be calculated to outrage the feelings of any sympathiser with or believer in Christianity".<sup>31</sup> The material must

have the tendency to shock and outrage the feelings of Christians, it not being a blasphemy to vilify a non-Christian or member of the Jewish faith.<sup>32</sup> However, Victoria, Queensland and Tasmania have all introduced or amended legislation in the past decade to outlaw the vilification of people because of religious beliefs.<sup>33</sup> In Queensland and Tasmania, the prohibition on religious vilification is contained within general prohibitions of race, religion, or sexuality,<sup>34</sup> whilst Victoria specifically prohibits conduct which occurs "on the ground of" the religious belief or activity. The scope of the requisite harm required under these provisions mirrors the harm requirement in racial and other anti-vilification provisions: engaging in activities in public that incites hatred towards, serious contempt for, or revulsion or severe ridicule of, a person or group of persons because of their religious beliefs or activities.<sup>35</sup> The exceptions to liability also mirror those contained in other anti-vilification provisions.

In contrast with Denmark and other Western nations, where freedom of speech has been given some degree of protection through constitutional or statutory protection of individual rights,<sup>36</sup> free speech in Australia is merely a residual right. That is, the freedom to speak exists only to the extent that it is not restricted by operation of the common law or statute.<sup>37</sup> The operation of anti-vilification laws is thus only limited by statutory exceptions and the breadth of interpretation of the legislation given by the courts. However, courts and tribunals have attempted to take the impact of the legislation on free speech into consideration, generally by applying a narrow reading to the meaning of the requisite harm and a broader reading of the exceptions to liability.

Would publication of the *Jyllands-Posten* cartoons violate these provisions? The prohibitions on religious vilification require that the action "incites" others to cause the requisite harm, but there has been a

<sup>32</sup> *R v Gathercole* (1838) 2 Lewin 237.

<sup>33</sup> Queensland – s.124A *Anti-Discrimination Act 1991*; Tasmania – s. 19 *Anti-Discrimination Act 1998*; Victoria – s.8 *Racial And Religious Tolerance Act 2001*. Private member bills introduced into the New South Wales and South Australia Parliaments in 2004 to amend anti-discrimination legislation to make religious vilification unlawful were defeated. In 1994, the New South Wales *Anti-Discrimination Act* was amended to expand the definition of race to include "ethno-religious" group. However, the scope of this provision has been limited to "a strong association between a person's or a group's nationality or ethnicity, culture, history and his, her or its religious beliefs and practices": *Khan v Commissioner, Department of Corrective Services & anor* [2002] NSWADT 131

<sup>34</sup> The Queensland legislation also prohibits vilification because of gender identity: s. 124A.

<sup>35</sup> The South Australian legislation includes the added requirement that the incitement must "threaten physical harm": s. 4 *Racial Vilification Act 1996 (SA)*.

<sup>36</sup> Including USA, Canada, UK, NZ, South Africa.

<sup>37</sup> This is modified to an extent by the implied constitutional freedom to discuss matters of political and governmental concern recognised by the High Court: see *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, [1997] HCA 25; *Coleman v Power* (2004) 220 CLR 1; [2004] HCA 39. However the impact of the implied freedom on extending or guarding free speech "rights" has, in practice, been minimal and anti-vilification laws have been found to not be invalidated by that implied constitutional freedom: *Kazak v John Fairfax Publications Ltd* [2000] NSWADT 77.

<sup>27</sup> *Ibid* 6.

<sup>28</sup> *Ibid* 9.

<sup>29</sup> Above n 15.

<sup>30</sup> In New South Wales and the Australian Capital Territory the offence has been statutorily modified to provide that prosecutions cannot proceed where there is no purpose of scoffing or reviling or violating public decency.

<sup>31</sup> *Ogle v Strickland* (1987) 71 ALR 41 per Fischer J at 71, citing *R v Gott* (1922) 16 Cr App R 87.

lack of consistency in defining the requisite degree of fault. A number of decisions have applied a subjective test, requiring an intention to achieve the requisite harm.<sup>38</sup> However, the weight of recent decisions indicates that the test to be applied is an objective one. In *Islamic Council of Victoria v Catch the Fire Ministries Inc.*,<sup>39</sup> Higgins J, in considering section 8 of the *Racial And Religious Tolerance Act* (Vic), applied the reasoning of the NSW Administrative Decisions Tribunal (ADT) in *John Fairfax Publications Pty Ltd v Kazak*,<sup>40</sup> where the Tribunal reasoned that:

in the context of vilification provisions the question is, could the ordinary reasonable reader understand from the public act that he/she is being incited to hatred towards or serious contempt for or serious ridicule of a person on the grounds of race? The question is not, could the ordinary reasonable reader reach such a conclusion, only after his/her own beliefs have been brought into play by the public act.<sup>41</sup>

Could publication of the cartoons be considered incitement under this objective view? The legislative requirement of hatred, serious contempt, or revulsion or severe ridicule indicates an intention by legislatures to address only the most serious forms of vilifying speech. In *Kazak v John Fairfax Publications Pty Ltd*,<sup>42</sup> the NSW ADT considered not only Australian authorities, but also looked to New Zealand and Canadian authorities for the meaning given to the words “hatred” and “contempt”. The ADT quoted with approval the Canadian Human Rights Tribunal in *Nealy v. Johnston*:<sup>43</sup>

With “hatred” the focus is a set of emotions and feelings which involve extreme ill will towards another person or group of persons. To say that one “hates” another means in effect that one finds no redeeming qualities in the latter. It is a term, however, which does not necessarily involve the mental process of “looking down” on another or others. It is quite possible to “hate” someone who one feels is superior to one in intelligence, wealth or power . . . “Contempt” is by contrast a term which suggests a mental process of “looking down” upon or treating as inferior the object of one’s feelings. This is captured by the dictionary definition relied on in Taylor . . . in the use of the terms “despised”, “dishonour” or “disgrace”.<sup>44</sup>

Would the *Jyllands-Posten* cartoons meet this threshold? While it is expected that many Muslims would find the cartoons offensive, would they incite the “ordinary reasonable person” to hatred towards, serious contempt for, or revulsion or severe ridicule of Muslims? Religious vilification is not a recent phenomenon in Australia’s history. Reflecting the dominance of

38 *Hellenic Council of New South Wales v Apoleski and Macedonian Youth Association* (No 1) [1995] NSWEO (25 September 1997); *Hellenic Council of New South Wales v Apoleski* (No 2) [1995] NSWEO (25 September 1997); *Malco v Massaris* [1996] NSWEO (12 February 1998).

39 [2003] VCAT 1753.

40 [2002] NSW ADTAP 35.

41 *Ibid* 16.

42 [2000] NSWADT 77.

43 (1989) 10 C.H.R.R. D/6450.

44 *Ibid* D/6469.

Protestantism in colonial Australian society, Catholicism was a popular target,<sup>45</sup> and anti-Semitism remains a serious problem. However, in the aftermath of the terrorist attacks in the United States in September 2001, the divide between Islam and Christianity became a major issue in Australian society, with an undercurrent of anger against, and contempt for, Muslims sweeping through public opinion and the mainstream media in Australia and most Western nations. The cartoons present a portrayal of Islam and Mohammed that arose in the context of a debate in Denmark on intolerance and self-censorship, accompanied by comment on an issue that was a matter of local public debate. However, taken out of that context, and looked at from the perspective of Australian society, the cartoons could be considered to be reinforcing a misinformed and stereotypical view of the relationship between Islam and terrorism.

Liability for a vilifying act can be avoided if the act was done, or thing said, reasonably and in good faith for, inter alia, artistic, academic, or scientific purposes or for purposes seen to be in the public interest, including public debate about matters of public concern.<sup>46</sup> The exemptions aim to prevent the restriction of speech that, although likely to offend, is done reasonably and in good faith.<sup>47</sup> Is a cartoon an artistic work within the scope of anti-vilification legislation? *Bropho v Human Rights & Equal Opportunity Commission*<sup>48</sup> involved the consideration of whether the publication of a cartoon vilified indigenous Australians under Commonwealth legislation. The Court considered the outcome of the initial inquiry conducted by HREOC into the complaint of racial vilification. In that inquiry, Commissioner Innes reasoned that cartoons were artistic works:

it seems to me that there is no doubt that a cartoon is an artistic work in the sense intended by the legislators. Putting aside for the moment any views as to the content of the cartoon, the drawings and words relating to them are works of artistic merit . . . Cartoons, as with paintings, drawings and sculpture are widely accepted by society as works of art.<sup>49</sup>

The Commissioner, however, acknowledged that difficulties would arise where a court or tribunal attempted to consider whether artistic merit was a necessary element of the exception, distinguishing between “real” and

45 Over 75% of the population of the colonies in the early 19th century were Protestant. The Catholic Church in Australia was subject to colonial government control during the early 19th century. The first public Mass was not permitted until 1803, and were again prohibited in 1804 following the Castle Hill uprising by Irish convicts. The prohibition remained until 1820. See generally P O’Farrell, *The Catholic Church and Community in Australia: A History* (1985).

46 Queensland – s.124A (2) *Anti-Discrimination Act 1991*; Tasmania – s. 55 *Anti-Discrimination Act 1998*; Victoria – s.11 *Racial And Religious Tolerance Act 2001*.

47 *Albert Corinna v West Australian Newspapers* (2001) HREOC 8.1.4.

48 [2004] FCAFC 16.

49 *Albert Corinna v West Australian Newspaper Ltd*, Decision 117, 12 April 2000. Cited in *Bropho v HREOC* [2004] FCAFC 16 by French J, para 40. The appellant had not appealed that aspect of the Commissioner’s decision, so the Federal Court found it unnecessary to consider this matter further. Also see *Judeh v Jewish National Fund of Australia Inc* [2003] VCAT 1254, para 47.

“pseudo” artistic works.<sup>50</sup> Leaving the determination of artistic merit to the court’s discretion would suggest that artistic merit is a measurable quantity able to be discerned by the judiciary, a questionable assumption.<sup>51</sup> In *Bryl v Melbourne Theatre*,<sup>52</sup> Commissioner Johnston, referring to the artistic purpose exception under the Victorian legislation, said:

As I understand the import of section 18D, it is not intended as a charter for governmental bodies like the [Human Rights and Equal Opportunity] Commission to draw up standards or a rule book laying down what is acceptable in the way an artistic work is produced . . .<sup>53</sup>

If the artistic purpose exception can be seen as encompassing works such as cartoons, the question then turns to whether the publication of the *Jyllands-Posten* cartoons would have been reasonable and in good faith. In *Bropho*, French J stated

An act is done reasonably in relation to statements, publications, discussions or debates for genuine academic, artistic or scientific purposes, if it bears a rational relationship to those purposes. The publication of a genuine scientific paper on the topic of genetic differences between particular human populations might, for one reason or another, be insulting or offensive to a group of people. Its discussion at a scientific conference would no doubt be reasonable. Its presentation to a meeting convened by a racist organisation and its use to support a view that a particular group of persons is morally or otherwise ‘inferior’ to another by reason of their race or ethnicity, may not be a thing reasonably done in relation to para (b) of s.18D.<sup>54</sup>

French J went on to explain that a person will act reasonably if they, viewed objectively, have conscientiously acted in a way designed to minimise the offence or insult, humiliation or intimidation suffered by people affected by it.

On the other hand, a person who exercises the freedom carelessly disregarding or wilfully blind to its effect upon people who will be hurt by it or in such a way as to enhance that hurt may be found not to have been acting in good faith.<sup>55</sup>

Although cartoons may be considered a form of artistic expression, where the purpose of a cartoon is the making of a political statement or comment, its reasonableness will be judged by reference to the circumstances of publication. Applying this reasoning, the publication of the cartoons, removed from the context of the public debate on self-censorship that occurred in Denmark, would not likely meet the requisite standard of reasonableness. However, the reasonableness of publication of the cartoons in Australia would have changed once the controversy over their publication by *Jyllands-Posten* became a matter of public discussion.

International media coverage of the publication, and the subsequent protests, would have arguably changed the context of publication, with public debate of issues concerning freedom of speech and religious intolerance creating a “rational relationship” between the cartoons and the public interest.

An interesting issue arising from this is whether a finding of unreasonableness could, in itself, change the context of publication. Using the reasoning in *Bropho*, it is arguable that, if the cartoons had been published in Australia and had been found to amount to a vilifying action that was not reasonable in the circumstances, a subsequent republication could be defended on the basis that the refusal made the cartoons a matter of public interest.

If the international protests would have made the publication of the cartoons “reasonable,” why didn’t the Australian media publish them? In contrast with Europe, Australian media outlets were generally restrained in republishing the *Jyllands-Posten* cartoons. Media coverage in Australia was, in general, limited to the reporting of, and commentary about, the publication of the cartoons and the subsequent controversy, although this did seem to focus disproportionately on incidences of violence. Only two newspapers<sup>56</sup> chose to republish any of the offending cartoons.<sup>57</sup> The restraint shown by the media ultimately resulted in the lawfulness of the cartoons under religious vilification provisions not being tested. However, was this self-censorship itself an unreasonable burden on free speech? Ultimately, it is necessary to distinguish the motives for self-censorship. Since the primary purpose of the news media is to provide information, self-censorship is likely a rare occurrence. Where it does occur, the exercise of editorial discretion in determining whether to publish or report, whether based on a cultural or religious sensitivity, or on other considerations, freedom of speech is burdened. Like anti-vilification laws, this burden can be justifiable, within limits, if its purpose is the achievement of such ideas as the promotion of social equality and tolerance. However, the reasonableness of the burden must be measured by the motive. Self-censorship imposes an unreasonable burden where it arises from uncertainty in the law, or occurs in response to pressure applied from those with an interest in preventing publication, the so-called “heckler’s veto,” which occurs when an individual’s, or a group’s, right to freedom of speech is curtailed due to a reacting party’s conduct. The common example is that of demonstrators causing a public speech to be disrupted. Or the threat of retaliatory violence.<sup>58</sup>

<sup>50</sup> *Bropho v HREOC* [2004] FCAFC 16 by French J, para 40.

<sup>51</sup> J Robb, “Censor and be Damned!” 18(3) *Artlink* 15–16, 16.

<sup>52</sup> [1999] HREOCA 11, 21 June 1999.

<sup>53</sup> *Ibid* para 4.3.

<sup>54</sup> *Bropho v HREOC* [2004] FCAFC 16, 80.

<sup>55</sup> *Ibid* 102.

<sup>56</sup> The *Rockhampton Morning Bulletin* and Brisbane’s *Courier-Mail* each published one of the offending cartoons. See <<http://www.theage.com.au/news/world/second-australian-paper-publishes-cartoon/2006/02/08/1139074274027.html>> accessed 29 September 2006.

<sup>57</sup> However, the twelve cartoons were easily accessible via the Internet from web sites located outside of Australia, for example <<http://blog.newspaperindex.com/2005/12/10/un-to-investigate-jyllands-posten-racism/>>.

<sup>58</sup> Media reports indicate that the Australian government was itself guilty of attempting

Although some research<sup>59</sup> suggests that Australia's anti-vilification laws have, for the most part, been successful, the extent to which these laws have produced a long-term change in the nature or extent of vilification of minorities is yet to be determined. But anti-vilification laws are a fact of life. The extent of debate about the necessity or desirability of anti-vilification laws is itself an indicator of the health of some aspects of free speech in Australia. But because of the delicate position of free speech, it is essential that governments and courts ensure that the burdens imposed on free speech by these laws are not unreasonable.

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to impose a heckler's veto by warning the media that they threatened Australia's economic security by putting international trade at risk if the Jyllands-Posten cartoons were published. See <<http://www.asiamedia.ucla.edu/article-pacificislands.asp?parentid=38493>> accessed 29 September 2006

59 Mandy Tibbey, "Developments in Anti-Vilification Law" *Australian Bar Review* 8 August 2001; Nancy Hennessy and Paula Smith, "Have We Got it Right? NSW Racial Vilification Laws Five Years On" *Australian Journal of Human Rights*, 1994/1.

## REGULATING HATE SPEECH

Asaf Fisher\*

In *New York Times v Sullivan*<sup>1</sup> Justice Brennan, who delivered the opinion of the United States Supreme Court, held that the First Amendment of the *Constitution of the United States* embodies a "commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials".<sup>2</sup> Justice Kirby would, some three and a half decades later, echo these remarks in *Roberts v Bass*<sup>3</sup> observing that whilst the philosophical ideal may be that "political discourse should be based only upon objective facts, noble ideas and temperate beliefs,<sup>4</sup> in reality, rationality often gives way to "passionate and sometimes irrational and highly charged interchange". Extending the shield of the First Amendment, and, in the Australian context, the implied freedom of political communication, to offensive, subversive and even outrageous speech is a measure as well as a test of our commitment to the cardinal principle that, in an open and democratic society, freedom of speech or political communication should be uninhibited.

Hate speech directed at racial or ethnic groups is a particularly pernicious form of speech, manifestations of which include racial epithets such as "nigger" and "kike". The underlying message of hate speech is that members of particular racial or ethnic groups are inferior. Hate speech causes emotional as well as psychological distress and, in extreme cases, incites violence against members of the racial or ethnic groups at which it is targeted. Many liberal democracies, including Australia, have proscribed hate speech. Racial vilification is unlawful in most of the states and territories of Australia.<sup>5</sup> Critics opposed to the regulation of hate speech adopt the logic of First Amendment jurisprudence, albeit selectively, to argue that the proscription of hate speech is a threat to freedom of speech or, in the Australian context, political communication. In the United States, statutes regulating hate speech have twice been struck down by the Supreme Court.<sup>6</sup> However, the issue of the constitutionality of racial vilification statutes has not yet come before Australia's High Court.

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1 *New York Times v Sullivan*, 1 376 U.S. 254, 1964, 270 per Brennan J delivering the opinion of the court.

2 (2002) 212 CLR 1.

3 *Roberts v Bass* (2002) 212 CLR 1, 62-63 per Kirby J.

4 *Ibid.*

5 Refer to the *Anti-Discrimination Act 1977* (NSW), the *Racial Vilification Act 1996* (SA), the *Discrimination Act 1991* (ACT), the *Anti-Discrimination Act 1991* (Qld) and the *Criminal Code* (WA).

6 *R.A.V v City of St. Paul*, 505 U.S. 377, 1992 and *Virginia v Black* 538 U.S. 343, 2003.

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# **Racism, Religious Intolerance and the Law**



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