

TRANSCRIPT

LEGISLATIVE ASSEMBLY LEGAL AND SOCIAL ISSUES COMMITTEE

Inquiry into Anti-Vilification Protections

Melbourne—Thursday, 12 March 2020

MEMBERS

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Mr James Newbury—Deputy Chair

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WITNESS

Mr Nicholas Butler.

The CHAIR: Just for protocol, I will go through the process for today. All evidence taken by this Committee is protected by parliamentary privilege. Therefore you are protected against any action for what you say here today, but if you go outside and repeat the same things, including on social media, those comments may not be protected by this privilege. All evidence given today is being recorded by Hansard, to my right, and is also being broadcasted live on Parliament's website. Please note any footage can only be rebroadcasted in accordance with the conditions set out in standing order 234.

You will receive a proof version of the transcript for you to check and make any amendments as soon as it is available. Any transcripts, PowerPoint presentations and handouts will be placed on the Committee's website as soon as possible. I now invite you to proceed with a 5- to 10-minute opening statement, which will be followed from questions by the Committee. Welcome, Nicholas Butler.

Mr BUTLER: Thank you, Chair. I will begin by listing arguments against anti-vilification laws, then briefly respond to some arguments in favour of them and conclude with some responses to other submissions. I am completely against all hate speech—I do not want to see it—but that is what inspires my opposition to most anti-vilification laws, not a belief that hate speech is harmless, because, firstly, anti-vilification laws, with the exception of laws against making threats of violence, advocating violence and abusing people to their face, are morally unjustifiable forms of aggression. Law enforcement against a citizen is always aggressive, and the onus is always on the State to justify it. Without such justification the path to totalitarianism is paved. Speech that falls outside those three categories may be offensive or nasty, but it is not aggression and it is therefore unjustifiable to respond to such speech with aggression.

Secondly, anti-vilification laws make hateful extremists more hateful, not less. Such people already believe they are victims of a plot to persecute them. If they are prosecuted or see fellow extremists prosecuted for vilification, this will only confirm their pre-existing beliefs. They will likely blame the minority groups they hate for their prosecution and come to hate them even more.

Thirdly, anti-vilification laws make hateful extremists more inclined to political violence. If they are allowed to speak, then they at least know they have a chance of having their grievances redressed by speech. Of course that does not mean we should give them what they want. But if this right is removed, then they have been told that a redress of grievances through speech is impossible. Someone in their mindset could thus easily conclude that resorting to violence is necessary to have their grievance addressed.

Fourthly, anti-vilification laws rely on the power of the State to be implemented, and once the State has this power it can use it for other forms of censorship too, including forms that would appal this Government. Some people might claim in response that vilification is morally uniquely problematic, and I agree, but this is not the point. No individual is the only political player. Other people have political influence as well, and they also have opinions as to what is offensive and immoral. And if the prevailing culture and ethos is that offensive and immoral speech should be made illegal, this sets the precedent and gives them the opportunity to make illegal speech that they find offensive and immoral.

Fifthly, anti-vilification laws cause a cycle of censorship in society where ideological opponents retaliate against each other with attempts at censorship. They cause both sides to be suspicious that the other side wants to destroy their freedom, and they thus come to see destroying the other side's freedom as a justified measure of self-defence, both sides bending over backwards to explain why speech they like should be allowed yet speech that they do not like should be banned. This makes society more hostile and adversarial.

Sixthly, as you will see in my submission, there are many examples of anti-vilification laws being used to censor the minorities they are ostensibly supposed to protect.

Seventhly, anti-vilification laws can harm the mental health of people they are supposed to protect. This may sound counterintuitive, because obviously hate speech can also harm mental health, but anti-vilification laws tell people that the right response, if they are able to, is not to ignore it and move on but to dwell on it and seek

legal redress. Thus, some people may conclude that it is a more serious matter than they otherwise would have concluded. Logically, the worse someone thinks it is the more likely they are to be harmed by it.

Eighthly, anti-vilification laws can actually assist in the spread of hateful ideas. Even if they are effective in preventing public hate speech, they are not effective in preventing private hate speech. If speakers of hate speak only privately, then people with the ability to refute their arguments will not have the opportunity to do so because they are simply unaware that it is being spoken. As a result those hearing hateful ideas will not be exposed to any counterargument. This has two effects: one, it could lead to more people being convinced that such hateful ideas have merit due to lack of refutation; and, two, it could make already hateful people more radical due to the phenomenon of group polarisation, where one becomes more extreme in their views after spending time in echo chambers. Finally, anti-vilification laws can amplify the spread of hateful messages. When a legal case is launched media coverage of the case will likely repeat the message, causing more people to encounter it than otherwise would have.

I will now respond to some arguments for anti-vilification laws. One such argument is that no-one ever says that they are grateful for an experience of racial vilification because it allowed for hate to be combated and exposed, and I do not doubt this at all. I want to reiterate in response that I do not believe that making threats of violence or advocating violence or abusing people in person is free speech, and we should absolutely consider their personal perception of what happened to them as important. We should take it seriously, we should deal with them sensitively and compassionately when hearing their story, but when it comes to legislating, that perception is outweighed by the implications that anti-vilification laws have for all of society.

Another such argument is that to not have anti-vilification laws is to surrender to bigots. I completely reject the idea that fighting against hate in justified and practical ways is to not fight at all. There are many measures that are available to us to fight hate. We can and should use hate crime laws in prosecutions more often than we do. We should record hate crime data more precisely. We should have mandatory comprehensive ethics and anti-hate education in all public schools, to which mandatory Holocaust education is a fantastic start. We should condition public funding of all organisations strictly on those organisations being non-discriminatory. Not censoring speech does not mean not fighting hate.

Another such argument is that to not have anti-vilification laws licenses hate speech. This is incorrect. Licence is giving explicit permission to something without which it is forbidden. Liberty is merely not banning something. I agree we should not have a law saying you may speak hate, but we should not have a law prohibiting it either. There is also a trend of people arbitrarily describing anything they do not like as licensed in order to justify banning it.

I would like to conclude by bringing to the panel's attention other submissions arguing in favour of anti-vilification laws that I would say inadvertently make my arguments. The submission of the Islamic Council of Victoria, on page 9, says the following of anti-vilification cases in the courts:

There was disproportionately negative media reporting of these law cases and about Muslim Victorians in general and this likely contributed to the rising tide of Islamophobia.

I completely agree. They recognised that when citizens see fellow citizens prosecuted for speech they get more resentful and bigoted, not less. The submission of Mr Michael Mazur, which was a racist diatribe, confirms this. Unfortunately the Council does not recognise that this makes such laws a bad idea.

The submission of the Catholic Archdiocese of Melbourne, on page 2, says that:

The *Racial and Religious Tolerance Act 2001* (the Act) has been successful in providing appropriate provisions against vilification.

But it then laments that the amending Bill

...expands the grounds or attributes on which vilification may be based.

The submission of the Hindu council of Australia says:

The Racial and Religious Tolerance Act ... has underpinned our multicultural harmony in Victoria for the past two decades ...

but then says that:

All the new attributes proposed to be added are religiously neutral and should not be added ...

Both organisations seek the censorship of speech that they dislike but the protection of speech that they do.

The submission of Ms Nicole Shackleton, Dr Laura Griffin and Ms Danielle Walt, on page 17, recommends that:

... police and investigative agencies must have sufficient powers to access information. This may include powers to apply to a court or tribunal for an order compelling social media companies and other online platforms to hand over relevant information.

They recognise that for the enforcement of anti-vilification laws online to be effective the State must be handed both massive powers and personal information. This would be utterly destructive to liberty in so many ways, not just with freedom of speech. Their submission, on page 18, says that:

... laws against GHS could be used by men to silence ... debates, for instance regarding toxic masculinity or male violence.

Once again, I completely agree. But their solution, on page 20, is that laws against gendered hate speech are:

... explicitly framed as targeting misogyny and protecting women (or other genders) rather than men.

The notion that men are simultaneously so impressionable and susceptible to sexism that hearing a sexist remark will turn them into wife-beaters yet at the same time so enlightened and noble that they will somehow become less sexist by seeing fellow men get prosecuted for what women get away with is beyond fanciful.

Finally, their submission, on page 20, notes the risk:

... that such laws will be used in over-policing already marginalised and criminalised communities ...

which they define as those:

... from racial or religious minority, refugee or non-English-speaking immigrant backgrounds ...

I completely agree that overcriminalising people is a problem, but why are men from other backgrounds somehow immune to the negative effects of being made into a criminal for speech? If the effects of doing that to a person are so harmful that they necessitate massive qualifiers or exemptions applied to enforcement, maybe that is a sign we should not be making such a law to begin with. That concludes my opening statement. Thank you.

The CHAIR: Thank you, Nicholas. We will go to the first question.

Mr TAK: Thank you, Mr Butler, for your presentation. The Committee has heard from other stakeholders, as you already mentioned, that anti-vilification laws are designed to strike a balance between free speech and freedom from vilification. What is your view on that?

Mr BUTLER: My view is that freedom from vilification extends to where a person who is vilified is being forcibly exposed to it, forced to look at it. There is no freedom, of course, to force someone to listen to you abuse them. So if any of us are walking down the street and someone is yelling stuff at us, or on public transport or in a public service where we cannot not look at it—we are forced to be exposed to it—that is not freedom of speech. If they were to repeat those remarks on social media, then that could be something that should not be made illegal, as long as it is not threatening or advocating violence, but not when they are speaking to your face, because they have the right to say it, but they do not have the right to force you to listen to it, and I think that we need to make sure people are not forced to listen to it.

The CHAIR: I just have one question: do you think the current laws are effective?

Mr BUTLER: I think that the submissions of other stakeholders have pointed out that the laws have been used very infrequently with legal cases or prosecutions. I think that if we are seeing the laws not be as potentially harmful as I am concerned they might be, that is probably why, they are not being used in all corners of society. The prosecutions and the lawsuits are infrequent, which is helping to keep alive an ethos or a view in

the community that their freedom of speech is not in danger. I do believe that if the law was expanded too broadly, that comfort would start to erode.

Mr SOUTHWICK: Thanks for your submission. Can I just begin by asking—you obviously have a real interest in this; where does that stem from?

Mr BUTLER: Basically, when the Liberal-National Government at the federal level was elected in 2013 and the first attempt to repeal the *Racial Discrimination Act* was commenced then, that was the first time I had heard of section 18C. I looked up the statute on AustLII and I read it, and I saw the word ‘offend’ in there. The mood at the time in the community was very pro-18C—it has changed a bit now—and I was trying to go along with that mood, but something just instinctively struck me as silly to have the words ‘offend’ and ‘insult’ in there. That kicked off my investigations as to what the consequences of anti-vilification laws are—between 2014 and now.

Mr SOUTHWICK: In your presentation—and I am trying to kind of work it through in the submission as well—you talked about those that deliberately go about inciting violence as those that merely try to offend and when there are those that are inciting hate and violence, that there should be laws that protect them and court proceedings effectively to really show that this is not right. Can you elaborate a bit further about that component of it?

Mr BUTLER: As in the practical need for it or the philosophy behind it?

Mr SOUTHWICK: Both. The practical need for it and—

Mr BUTLER: So basically I would say, regarding the practical need for it, there comes a point where the harm from a particular behaviour becomes so overwhelming, so direct, so tangible and so destructive that whatever concerns we may have about passing a criminal law or punishing someone, we need to nonetheless punish them in those instances because we just cannot tolerate that. For example—to use an extreme example—we obviously would not legalise murder for fear that criminalising murder drives it underground and makes it worse. Whatever the effects are of applying long prison sentences to it, the behaviour is so destructive we have absolutely no choice.

Regarding the philosophy behind why inciting violence is a different matter, what I would say is that because violence is a behaviour that we cannot tolerate, that is the reason that the incitement is prohibited. It is not prohibited necessarily because the violence is done through speech. For example, it is possible to incite violence against someone in a way that is done without speaking. So if you lead an angry mob on a march—and they are carrying pitchforks and torches—to the community centre of a minority group and you do not say anything during the march, you are not speaking but you are still inciting violence against that minority group. So it is for the effect of what you are doing—that we absolutely cannot tolerate—that it is being made illegal. It is not being made illegal because it is speech, but just because that same behaviour is expressed through speech, that should not make what would otherwise be illegal legal.

Mr SOUTHWICK: You mentioned somewhere in the submission the fact that giving, effectively, somebody their day in court gives them the opportunity to further promote their hatred, if you like, particularly if they are successful in fighting the charge. Could you elaborate a bit further on that?

Mr BUTLER: So basically one very sad example of this—and obviously to your community, Mr Southwick, as a Jewish man—would be that of Nazi Germany itself. There is a quote from Flemming Rose, the Danish journalist, who has done a lot of research into Nazi Germany, and he said in an interview with the *New Yorker* magazine in 2015:

... contrary to what most people think, Weimar Germany did have hate-speech laws, and they were applied quite frequently. The assertion that Nazi propaganda played a significant role in mobilizing anti-Jewish sentiment is, of course, irrefutable. But to claim that the Holocaust could have been prevented if only anti-Semitic speech and Nazi propaganda had been banned has little basis in reality. Leading Nazis such as Joseph Goebbels, Theodor Fritsch, and Julius Streicher were all prosecuted for anti-Semitic speech. Streicher served two prison sentences. Rather than deterring the Nazis and countering anti-Semitism, the many court cases served as effective public-relations machinery, affording Streicher the kind of attention he would never have found in a climate of a free and open debate. In the years from 1923 to 1933, *Der Stürmer* ... was either confiscated or editors taken to court on no fewer than thirty-six occasions. The more charges Streicher faced, the greater became the admiration of his supporters. The courts became an important platform for Streicher’s campaign against the Jews. In the words of a present-day civil-rights campaigner, pre-Hitler

Germany had laws very much like the anti-hate laws of today, and they were enforced with some vigor. As history so painfully testifies, this type of legislation proved ineffectual on the one occasion when there was a real argument for it.

So it does give it a bigger audience when you submit it to a court, and an audience to which you cannot necessarily respond and show that audience the arguments against hate speech. When you do not give it that audience you can keep it more under wraps, and where it is spoken you are more likely to be able to reach the audience to whom it is spoken with counterargument.

Mr SOUTHWICK: So, I suppose, in kind of extending that point, the issue is about when something is not black and white—and I know the law in many cases is not black and white—where it gives somebody the opportunity of a stage to be able to argue their point and ultimately build people to support them. That is part of the argument you are suggesting. What about when you have got somebody that is vulnerable, that is being targeted and that does not have an opportunity to, if you like, combat hate with their own free speech? I take again a Holocaust survivor or a Muslim person that is being targeted. What is your view in terms of how that person, particularly if it is a deliberate attempt to attack, to target these individuals—what is your view in terms of how that should be managed?

Mr BUTLER: Would this be an online or in-person example?

Mr SOUTHWICK: Either/or; it could be both.

Mr BUTLER: If it is online, unless they are sending threats or advocating that the person be violently attacked, I do not think it should be criminalised. I am nonetheless still very, very sensitive to the concerns that you have raised; I do not wish that for them. But if I was to speak about my concerns with pointing to mental health as a justification for anti-vilification laws, what I would say is that if we are going to establish legal causality between what a person has said and how someone else has felt, mental health damage generally—well, almost always—occurs when you are exposed to accumulative expressions of hate by many, many different people over a long period of time. So no one individual is responsible for the hurt that you would be feeling, and what that means is it is not fair to hold them legally accountable for that.

I think we also need to keep in mind that when mental health is cited as a justification for censoring speech, it is not just going to be cited as in response to hate speech. There is very legitimate political debate that some people would claim to have mental health concerns over. For example, in 2016 an academic in Kuwait—her name is Sheikha al-Jassem—defended secularism in a TV interview and was charged with blasphemy. The complainant against her said that he had been ‘psychologically damaged’ by her comments. Back here in Australia last year, artist Abdul Abdullah had work pulled from a Queensland exhibition because it explored the theme of war, and the RSL in the area supported the removal, citing concerns for the mental health of soldiers. That is not to say that we should do nothing about this issue. I am very much in favour of—having seen some of the earlier appearances today from Gender Equity Victoria and the Online Hate Prevention Institute, they do very good work in supporting people online who are targeted for hate. I would think that is a much better approach for this Government to pursue. I think we should make available counselling for people who are exposed to this kind of hate, but I think these are effective but less radical measures we should resort to first before resorting to anti-vilification laws.

Mr SOUTHWICK: So let me just take this little bit further. I am trying to eliminate the greyness in all of this. A couple of examples we had were the Blood & Honour group, which was a group of white supremacists that wrote lyrics for songs telling people that they should be shipped off to where they came from in a body bag and all that kind of thing, and those who also deliberately raised a Nazi flag effectively in the backyard of a Holocaust survivor. In both of those instances we could have laws that would not allow that type of concert to go ahead, which is effectively trying to promote hatred and recruit people in terms of a type of viewpoint that is obviously very much targeting vulnerable communities, and also a flag that is being flown in the backyard of a Holocaust survivor, for which we could have laws that are pretty much black and white to ensure that that does not happen. I understand the grey element in terms of somebody who may feel offended by a whole range of different things, but when people are being targeted, what is your view on those that are absolutely being targeted—or a Muslim person that is being called a terrorist because they are Muslim, with banners being put outside the front of their house saying, ‘You are a terrorist; go back to where you came from’? What is your view in terms of that, which is not, ‘I feel offended’, but is black and white someone being targeted because they are of a different race?

Mr BUTLER: One hundred per cent, Mr Southwick, I agree that that would be an example of forcing people to look at clear vilification, clear targeting, that they should not have to look at, and so I would have no problem at all in saying that you cannot fly that banner or that flag in that person's backyard. In regard to the Blood & Honour concert, I am very familiar with that. Those are the lyrics, they are accurate and they are advocating violence, and I would have no problem with a law saying you cannot sing those lyrics.

Mr SOUTHWICK: So in those instances you have no problem in terms of having laws to protect individuals on that basis?

Mr BUTLER: Yes.

Mr SOUTHWICK: Great. Thank you.

The CHAIR: Thank you very much for taking the time and in particular for coming a bit earlier for us today. The next steps will be that we will continue with our public hearings and hearing submissions, and then once we conclude that process we will deliberate on all of the evidence and the submissions and put forward a report with some strong recommendations to Government. I am sure you will be able to keep up to date on the Committee's website. Thank you again.

Mr BUTLER: Thank you very much, Ms Suleyman, Mr Tak and Mr Southwick.

Mr TAK: Thank you.

Mr SOUTHWICK: Thank you, Nicholas.

The CHAIR: Thank you, Nicholas.

Committee adjourned.