

A Democracy's Dilemma: Reconciling the Right to Free Expression with Protection from Hate-Speech

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Introduction

Australia is a proudly multicultural society and it is uncontroversial to assert that it is internationally highly regarded as a functioning and tolerant democracy. Social cohesion is generally good, even if various cultural groups habitually live in pockets within larger urban centres. There have been mercifully few examples of serious public disorder triggered by cultural disharmony by comparison to Northern Hemisphere jurisdictions.

Western Australia mirrors the broader Australian 'orderly democracy' status. However, recent tragic events in Israel and the Gaza Strip have triggered expressions of prejudice and hate-based conduct of an intensity sufficient to cause significant public and media concern. The inflammatory speech has been limited to the relevant diasporas. Both Canberra and some state legislatures are reflecting on the efficacy of their respective 'hate-expression' legislation. One example is the current review in New South Wales of Section 93Z of the *Crimes Act*, given that all attempts to bring prosecutions under it have failed.¹

This article examines Western Australia's approach to 'hate-expression', examining whether the internationally recognised right to freedom of expression is adequately protected here, and whether expressions of prejudice, hatred and/or incitement to criminal conduct against certain societal groups here are effectively proscribed.

Relevant Law

At an international level, the International Covenant on Civil and Political Rights (ICCPR),² to which Australia is a signatory, contains two relevant provisions. Article 18 grants 'everyone the right to freedom of thought, conscience and religion...[including]... freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching'. Additionally, ICCPR Article 19 provides that 'everyone shall have the right to hold opinions without interference' and that, 'everyone shall have the right to freedom of expression; this

right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice'.

As with many internationally recognised human rights, there are express permissible circumstances wherein legislatures may constrain these rights. In respect of Article 19 ICCPR, signatory states can do so only 'in accordance with law' (meaning there needs to be a publicly available law informing the polity of what the restrictions actually are), and such restriction must be 'necessary' to 'respect of the rights or reputations of others' (think defamation laws) or 'for the protection of national security or of public order...or of public health or morals'.

Given that the maintenance of public order falls to individual states by virtue of Australia's constitutional settlement, Western Australia constrains Article 19 rights on the grounds of 'public order necessity' and 'in accordance with law' by enacting suitable constraining provisions in the *Criminal Code (WA)*.³ However, other rationales can be used to explain why expressions of prejudice, intolerance or hatred can be outlawed while still enabling Articles 18 and ICCPR.

RATIONALES FOR CURBING PREJUDICE-BASED EXPRESSION

Public Order

The ICCPR's 'protection of public order' qualification is traceable to when race-based characteristics became deemed worthy of protection by Western liberal democracies. In 1936, increasing racial tensions led to the enactment of a Public Order Act that proscribed the use of 'words or conduct that abused threatened or insulted a target group'.⁴ This reflects Professor Eric Barendt's 'public order rationale', one of three he posits as justifying the enactment of legislation proscribing the expression of hatred, or expression likely to incite or otherwise 'stir up' hatred for racial or *religious* motives.⁵ States have however moved much more slowly in intervening to protect religion-adherents from prejudice, hatred and intolerance, despite Article 18 ICCPR. Barendt's public

order rationale continues to, at least partially, underpin regulation of prejudice-motivated offending in the UK and Scotland, both at common law, and in statutes such as the Race Relations Act 1965 (UK), Part III of the Public Order Act 1986 (UK) and the Hate Crime and Public Order (Scotland) Act 2021, which came into effect on 2 April 2024. Not dissimilarly, our *Criminal Code (WA)*, at Chapter XI, contains, *inter alia*, provisions outlawing conduct 'inciting racial hatred'.⁶ Chapter XI sits within a Part II expressly entitled 'Offences Against Public Order'.

Abhorrence

Barendt's alternative, or supplementary rationale, is founded on the view that 'it is right for a society to indicate its *abhorrence* of hate speech and the attitudes it reveals and to discourage the spread of racist views, the acceptance of which will, in the long run, be seriously harmful to good race relations'. He struggles with his own theory however, noting that it 'runs counter to the principle that speech should not be inhibited because the government fears that it will affect popular attitudes or that individuals will act in response to it in disapproved ways - thinking less well of different ethnic groups and refusing to mix with them'. He asserts that 'free speech guarantees that listeners will generally be able to make rational assessments of the credibility of the claims made to them, whether in the course of election campaigns or in other contexts', arguing that 'proponents of hate speech laws must show why this is not the case with respect to attacks on racial, ethnic or other groups'. This aligns with the modern American approach, where their courts have been 'consistently hostile to regulation of "hate speech", applying the First Amendment with vigour and insisting that the solutions to the harm that such speech causes is not in suppression but in more speech countering the hateful messages'. Despite the US approach however, Barendt's 'abhorrence rationale' is clearly evident in the EU,⁷ UK⁸ and Scottish⁹ approaches to prejudice-based offending.

Protecting Identifiable Societal Groups

Barendt also posited that racist hate speech should be proscribed because 'it is "highly

wounding" to members of the targeted group, in some cases inflicting psychological injury or causing fear of isolation or physical attack...[and]...more generally...[lowering]... the self-esteem of those affected, particularly where there has been historical oppression'. This is supported by Herz and Molnar who asserted the existence of a 'definitional challenge' for governments seeking to intervene to proscribe certain forms of hate speech, acknowledging that the preferred approach has been based on the 'general understanding that the problematic speech must be directed at a group, or an individual on the basis of membership in a group, as opposed to being merely personal'.¹⁰ This appears to be the justificatory rationale at EU level, where, as regards racism, the legislature explicitly states that 'racism and xenophobia constitute a threat against groups of persons which are the target of such behaviour'. The UK and Scottish approaches also use the group-focused approach. WA's Criminal Code expressly protects 'racial groups'.¹¹

WESTERN AUSTRALIA'S CURRENT APPROACH

Western Australia's *Criminal Code* contains a range of standalone offences in Chapter XI, with provisions for enhanced penalties relative to a range of offences when committed in 'circumstances of racial aggravation', wherein the perpetrator is required to have been proved to have 'demonstrated hostility' based on the complainant's membership of a 'racial group' or to have been motivated by hostility. Section 76 defines 'racial group' as 'any group of persons defined by reference to race, colour or ethnic or national origins'. This is a clever and expansive interpretation of 'race' and is at odds with anthropological theory on the same construct. Interestingly, and in light of recent publicity surrounding anti-Semitic prejudice-based expression, in WA's Supreme Court, on the basis of expert evidence tendered in lower proceedings, Jewish people (intuitively perhaps a 'religious' group) were held as falling within the ambit of section 76. Whilst a good result and an example of section 76 effectiveness, on another view, the finding weakens the argument for introducing additional Criminal Code provisions protecting religious groups.¹²

Despite the title reference in Chapter XI of the *Criminal Code (WA)* to 'racial hatred', its constituent offences do not use the term. The proscribed offences include: conduct intentionally inciting 'racial animosity' or racist harassment, conduct likely to incite racial animosity or racist harassment, possession of material for dissemination with intent to incite racial animosity or racist harassment, and possession of material for dissemination that is likely to incite racial animosity or racist harassment. Rather than requiring any threat to the public peace or disruption of public order, section 76 states that 'animosity towards' means 'hatred of or serious contempt for' a 'racial group' as earlier defined. 'Racial hatred' is thus reached circuitously.

IS THERE A CASE FOR CHANGE?

Given the decision in *O'Connell*, legitimate questions arise as to whether any change to WA's 'hate-expression' provisions is in fact required, and if Barendt's 'group' and 'public order' rationales are to be expanded as in the UK and Scotland, which societal groups in WA merit protection?

As scholars have observed, this is a vexed question, and different principled approaches have been advocated. Schweppe observes that 'by singling out specific groups, the legislature is sending a clear message that these groups are deserving of more protection than others. This means that the legislature is classifying distinct victim types as more worthy of legal protection – legal protection which has an enormous impact on the offender during the sentencing stage. When the legislature chooses to discriminate between offenders, placing certain offenders into a category, any offence against which automatically requires an enhanced sentence, it must do so carefully, and with the principle of equality for offenders and victims in mind'.¹³

Leverick and Chalmers opine that incorporating a particular group into hate crime legislation may send a message to members of that group that they are worthy of protection, but by implication also a message to excluded groups that they are not worthy of protection... additionally labelling the offender who has targeted a protected group specifically as someone who has committed a "hate crime". For these reasons, consistency is important.¹⁴ They go on to explore the various methods by which societal groups can be categorised, such as by immutable characteristics; a history of discrimination or oppression, perceived vulnerability, or (most logically) unjustly marginalised. All categorisation methods are not without problems however, and there remains a question of intersectional vulnerability.

Whatever the preferred method of categorisation, the current reality is that, unlike comparable jurisdictions such as those already mentioned, WA currently offers no dedicated statutory protection from prejudice-based expression or conduct targeting member groups broadly accepted in such jurisdictions as being marginalised, vulnerable, or having a history of oppression, such as religious groups, the diverse sexuality and gender community, or persons with a disability. There is no provision for aggravation of particular offences by prejudice against these groups. It appears that the political culture in WA has not, and is not, progressing towards demarcation of persons experiencing prejudice-based expression or conduct into societal groups. Indeed, WA Police's most recent published crime statistics do not break down offences against the person into groups of persons in any way.¹⁵

Conclusion

There is however something refreshing and honest about this in 'rule of law' terms. Whilst

there exist strong arguments to punish crime motivated by prejudice or hatred more severely than 'normal' assault, homicide etc., there exists also an oft-forgotten concept known as the rule of law, where every individual, regardless of any inherent characteristic (immutable or otherwise) requires equal treatment in law. It is to the credit of Western Australian society that offending based on prejudice seems mercifully rare, and that politicians and activists have not seen fit to 'group' Western Australians in the manner now so common in other jurisdictions. There exists adequate protections, remedies and sentencing in Western Australia for criminal offending, and the Criminal Code's disregard for motive reflects a principally healthy, tolerant democracy. ■

EndNotes

1. [New South Wales Government, Review of State's laws on threats and incitement to violence.](#)
2. [See generally United Nations Office of the Commissioner for Human Rights, 'International Covenant on Civil and Political Rights.'](#)
3. *Criminal Code (WA)*, Chapter XI.
4. *Public Order Act 1936* (UK) (1 Edw 8 & 1 Geo 6 c6) s5.
5. Eric Barendt, *Freedom of Speech* (2nd ed, OUP, 2007) 177.
6. *Criminal Code (WA)*, Chapter XI.
7. See, for example Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law [2008] OJ L 328/55, Recital 1. The European Agency for Fundamental Rights, Ensuring Justice for Hate Crime Victims: Professional Perspectives, foreword states that 'hate crime is the most severe expression of discrimination and a core fundamental rights abuse. It demeans victims and calls into question an open society's commitment to pluralism and human dignity'.
8. Home Office, 'Action against hate: the UK government's plan for tackling hate crime' (gov.uk, July 2016). The home secretary's foreword reflects the abhorrence rationale stating, inter alia, 'it is utterly unacceptable that people should suffer abuse or attacks because of their nationality or ethnic background. we must stand together against hate crime and ensure that it is stamped out'.
9. Scottish Government, 'Action to tackle Hate Crime and Sectarianism' (Scottish Government, June 2015) <https://www.gov.scot/policies/crime-prevention-and-reduction/hate-crime/>. The abhorrence rationale is reflected in the statement 'Hate crime has no place in Scotland and will not be tolerated. Our justice system is equipped to effectively .
10. Michael Herz and Peter Molnar, *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge University Press 2012).
11. *Criminal Code (WA)*, Chapter XI, Section 76.
12. *O'Connell v Western Australia* [2012] WASCA 96.
13. J Schweppe, 'Defining characteristics and politicizing victims: a legal perspective' (2012) 10 *Journal of Hate Studies* 178.
14. James Chalmers and Fiona Leverick, *A Comparative Analysis of Hate Crime Legislation: A Report to the Hate Crime Legislation Review* (2017) <https://eprints.gla.ac.uk/147020/1/147020.pdf>.
15. [See generally Western Australia Police Force, Crime Statistics 2023-34 Year to date.](#)