

Hate Speech and the Australian Legal and Political Landscape

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Any discussion of the controversial policy area constituted by hate speech regulation is required to take into account the context within which such regulation occurs. Does the legal framework protect free speech and, if so, to what extent and in what ways? How has the emergence of hate speech regulation challenged pre-existing presumptions in favour of the speech liberty? Who are the hate speakers, what are their utterances, and how might the law and other forms of policy best be constructed in order to further the aim of deterring or preventing hate speakers and their messages?

In Australia, a discussion of the regulation of hate speech requires taking into account a number of specific, and unique, features inherent in this context. The responses of Australian institutions and people to expressions of hate speech are unique in important ways and these idiosyncrasies warrant particular consideration and examination. It is therefore important to preface discussion of the hate speech phenomenon in Australia with an outline of the landscape within which it takes place.

To this end, I will first discuss the free speech context since Australia, unlike many other liberal-democratic jurisdictions, does not possess an explicit statutory or constitutional free speech protection. Following this, an overview of the laws regulating hate speech at the federal, State and Territory levels is provided. Finally, the broader policy context within which hate speech regulation occurs in Australia is considered. This involves discussion both of the ongoing regularity with which hate speech events occur in contemporary Australia and a newly emerging idea about the particular challenge posed to hate speech regulation when the government, the institution charged with combating hate speech, itself participates in utterances definable as hate speech. This implies the need for broader policy responses which

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Therefore I have argued for a reconceptualisation of the appropriate policy response to hate speech, to allow for a supported response to contradict the message contained within the hate speech and to counteract its effects, in so far as those effects include silencing or marginalisation or disempowerment which prevents targets, their communities and their supporters from speaking back. Thus, we would be asking the state to intervene in a policy sense to provide conditions in which the speech liberty may be practised, not simply asking the state to refrain from taking action and expecting individuals individually and spontaneously to do so for themselves. This is only one potential policy response that does not rely on punitive or restrictive measures against hate speakers. The point here is that if the identity of the hate speakers includes the institutions charged with combating it, and if the enforcement of anti-vilification laws highlights weaknesses in the law's ability to redress the harms occasioned by hate speech, then new approaches to combating hate speech ought to be explored.

Hate speech enacts hatred, not just a psychological dislike for another human being but a manifestation of prejudice; systematic and institutionalised marginalisation which can be identified via considerable historical evidence. The 'hate' in hate speech is shorthand for a broader conception. Thus hate speech enacts prejudice discursively in complex ways, and with concrete negative consequences for its targets. Subjected to an assessment of the operative principle of what it is that an expressive activity *does* in the saying of it, the minefield of whose free speech claims may be regarded as valid, and whose may not, becomes easier to navigate. Difficult cases, and differences of opinion, will always arise. But the primary consideration ought to be a measure of the impact of one's expressive activities on oneself and others.

In Australia, currently a formal commitment to combat hate speech has been expressed at State/Territory and federal levels, and this commitment ought not to be taken for granted. For it is always possible that the understandings we take for granted today may be overturned tomorrow. For those of us who believe that measures designed to combat hate speech ought to be defended, it is important therefore that the terms of the debate be understood as well as possible.

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