Katharine Gelber & Adrienne Stone (eds), *Hate Speech and Freedom of Speech in Australia* (Federation Press, 2007, ISBN 9781862876538, AUS$49.95, xvii+238 pages)

REVIEWED BY DAN MEAGHER*

The title of this excellent collection of essays hits on something important about hate speech in Australian political and legal culture. 'Hate Speech *and* Freedom of Speech in Australia' implicitly recognises that the former — whilst clearly a form of speech — is a distinct phenomenon that mostly undercuts rather than promotes the public and personal good said to flow from freedom of speech more generally: truth discovery, self-government and personal autonomy.[1] In other words, to 'get serious about freedom of expression'[2] does not necessarily entail political tolerance of and legal protection for hate speech.

This legal conception of the hate speech/free speech relationship may stem from Australia standing 'somewhat apart from many other jurisdictions with which we share legal and political traditions'[3] in that it 'does not possess an explicit statutory or constitutional free speech protection'.[4] And without a judicial Sword of Damocles forever threatening invalidation on free speech grounds, Australia's legal and political landscape has provided fertile ground for the flourishing of hate speech laws.[5] The upshot, as Katharine Gelber points out, is that Australia can move — philosophically and empirically — beyond the standard 'do hate speech laws impermissibly infringe on the free speech principle' aspect of the debate.[6] It is into this more fruitful territory that *Hate Speech and Freedom of Speech in Australia* takes the reader with a series of thoughtful and informative essays on the historical, cultural, political, legal and even linguistic aspects of hate speech in Australia.

It begins with an introduction by the editors that briefly outlines the content and scope of the book's three parts and also helpfully provides the following definition of hate speech:

---

* PhD LLM B Ec, Senior Lecturer, School of Law, Deakin University.

1 See generally Eric Barendt, *Freedom of Speech* (2nd ed, 2005) at 6.

2 Grant Huscroft, 'Defamation, Racial Disharmony, and Freedom of Expression' in Grant Huscroft & Paul Rishworth (eds), *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (1995) at 212, cited in Luke McNamara, 'Does a Bill of Rights Matter?: Comparing Australia and New Zealand' in Katharine Gelber & Adrienne Stone (eds), *Hate Speech and Freedom of Speech in Australia* (2007) at 197.

3 Katharine Gelber, 'Hate Speech and the Australian Legal and Political Landscape' in Katharine Gelber & Adrienne Stone (eds), *Hate Speech and Freedom of Speech in Australia* (2007) at 4.

4 Id at 2.

5 Id at 4.

6 Id at 5.

> [It] is speech or expression which is capable of instilling or inciting hatred of, or prejudice towards, a person or group of people on a specified ground including race, nationality, ethnicity, country of origin, ethno-religious identity, religion, sexuality, gender identity or gender.[7]

This gives the reader an idea of the breadth of the hate speech phenomenon and frames the analysis and discussion that is undertaken in each part. In chapter one, Gelber outlines how Australia's free speech context has informed the volume and shape of existing hate speech laws. They now exist in 'every State, the Australian Capital Territory, and federally'[8] and 'in the current political climate moves to repeal such laws altogether are…extremely unlikely to find purchase'.[9]

That political climate was fundamentally reshaped by the cataclysmic events of 11 September 2001 and the ongoing War on Terror it triggered. It is the prism through which we now view events such as the divisive 2001 federal election campaign, the race riots that erupted on Cronulla Beach in December 2005 and the sustained attacks on multiculturalism. But appreciating the contemporary significance of these events requires that they be placed in a historical context. This is the purpose of Ann Curthoys' excellent chapter on 'The Volatility of Racism in Australia'. In it she provides a timeline of sorts that charts significant moments in Australia's race relations history. It demonstrates the ebb and flow of racist thinking in Australia but also that those on the 'outside' of Australian society'[10] — the targets of racial hostility — generally, in time, have come to assume their rightful places as accepted and respected members of the Australian community.[11] For some, this history may confirm their suspicions that Australians are inherently racist. But I must say that on the contrary it makes me cautiously optimistic about the future of race relations in Australia and in particular the acute challenges and tensions that have arisen in the context of the ongoing War on Terror.

Part One is rounded out with two very different but equally fascinating contributions. Gail Mason examines the modern phenomenon of hate groups such as the Australia First Party and the Knights of the Klu Klux Klan couching their messages in the language of care, concern and love rather than hate and hostility.[12] But Mason suggests that this re-branding of 'hate' may not simply be a cynical marketing ploy designed to ensure their message flies below the legal radar. She draws upon the psychological insights of Gordon Allport and Hannah Arendt to make the fascinating (and frightening) observation that this discourse of care by hate groups may not only be genuine but is

7 Katharine Gelber & Adrienne Stone (eds), *Hate Speech and Freedom of Speech in Australia* (2007) at xiii.

8 Gelber, above n3 at 5.

9 Id at 4.

10 Ann Curthoys, 'The Volatility of Racism' in Katharine Gelber & Adrienne Stone (eds), *Hate Speech and Freedom of Speech in Australia* (2007) at 29.

11 Ibid.

12 See Gail Mason, 'The Reconstruction of Hate Language' in Katharine Gelber & Adrienne Stone (eds), *Hate Speech and Freedom of Speech in Australia* (2007) at 41 for examples which include the following from the Australia First Party: 'Despite the labels the media like to pin upon "fair dinkum" Australians, we — as a people — are not haters; it is not in our bones — even when our country is being demographically taken over by millions of Third Worlders, we do not hate them — we hate the situation and wish that they were not here — but we do not hate them as individuals'.

capable of 'render[ing] the policies of white supremacist groups not just more palatable but also more seductive to a middle-class, 'respectable' audience'.[13] Adrienne Stone on the other hand re-examines the orthodoxy that the constitutional free speech traditions of the United States and Canada are underpinned by the values of individual liberty, and equality and multiculturalism, respectively. After giving a brief but invaluable synopsis of the fundamentals of American and Canadian free speech law, Stone then makes the compelling argument that both traditions in fact share a commitment to furthering these constitutional values through freedom of speech but differ as to *how* they might be realised. Specifically, the American constitutional free speech tradition is underpinned by a deep-lying mistrust in the character and competence of the State to pursue these values through law which contrasts with the Canadian 'confidence in government as a constructive force [that] has been evident from the early days of Charter interpretation'.[14] As Stone notes, thinking carefully about the proper role of the State is critical in developing policies to regulate and combat hate speech and will become increasingly important as 'Australia moves towards a more legalised culture of rights'.[15]

Part Two looks at the regulation of hate speech in practice. Lisa Hill examines the homophobic attack made in Parliament by Senator Bill Heffernan on Justice Michael Kirby. She demonstrates how such an irresponsible use of parliamentary privilege not only diminishes the political discourse so vital to the health of a democracy but betrays its fundamental purpose: 'to protect the vulnerable from the powerful'.[16] In the three chapters that follow the content and administration of Australian racial and religious vilification laws are critically examined. Kate Eastman, a leading human rights barrister, identifies a number of serious problems with the content of Australian hate speech laws and the procedures used for their administration. The lack of legal presentation in many cases, the range of different jurisdictions, an absence of proper pleadings and the haphazard application of the rules of evidence have resulted in a jurisprudence that, so far, lacks the rigorous legal analysis required for the development of 'clear guiding principles'.[17] Simon Bronitt meanwhile makes a compelling argument that Australia has made a regulatory mistake in creating a new criminal offence[18] that makes the urging of intra-group violence a form of sedition. It 'is caught between two different and competing rationales — security and anti-discrimination'[19] — and consequently does

13 Id at 51.

14 Adrienne Stone, 'How to Think about the Problem of Hate Speech: Understanding a Comparative Debate' in Katharine Gelber & Adrienne Stone (eds), *Hate Speech and Freedom of Speech in Australia* (2007) at 76.

15 Id at 78.

16 Lisa Hill, 'Parliamentary Privilege and Homosexual Vilification' in Katharine Gelber & Adrienne Stone (eds), *Hate Speech and Freedom of Speech in Australia* (2007) at 102.

17 Kate Eastman, 'Problems with Evidence in Hate Speech Cases' in Katharine Gelber & Adrienne Stone (eds), *Hate Speech and Freedom of Speech in Australia* (2007) at 127.

18 See *Criminal Code Act* 1914 (Cth) s 80.2(5): A person commits an offence if: (a) the person urges a group or groups (whether distinguished by race, religion, nationality or political opinion) to use force or violence against another group or other groups (as so distinguished); and (b) the use of the force or violence would threaten the peace, order and good government of the Commonwealth. Penalty: Imprisonment for seven years.

19 Simon Bronitt, 'Hate Speech, Sedition and the War on Terror' in Katharine Gelber & Adrienne Stone (eds), *Hate Speech and Freedom of Speech in Australia* (2007) at 130.

justice to neither. Moreover, the requirement that the violence urged must 'threaten the peace, order and good government of the Commonwealth'[20] makes it unlikely that the offence will do anything to address the 'increase in racist violence against minority groups'[21] that has occurred since the events of 11 September 2001, as most 'hate crime' is unlikely to reach this seriousness threshold.[22]

Part Two concludes with Lawrence McNamara's thoughtful and nuanced analysis of religious vilification laws that is centred on *Islamic Council of Victoria v Catch the Fire Ministries* case,[23] which wound its way through the Victorian tribunal and court system over nearly six years. It was fascinating to observe that the 'discourse of care' discussed by Mason[24] was interwoven through the communications which were the subject of the civil complaint, for example, '[w]e are learning here how we can love Muslims and help them to see the truth'.[25] This language, in the view of Nettle JA in the Victorian Court of Appeal, 'changed the complexion of the conduct to such an extent that there was much doubt about whether [the law] had been breached.'[26] McNamara also notes the invidious position that courts are in '[w]hen religious hate speech occurs as part of the practice of religion'.[27] A determination whether this constitutes religious vilification requires 'judgments about believers and beliefs that will inevitably be contentious'.[28] And a religious vilification law that is perceived — rightly or wrongly — to not afford adequate protection to genuine religious speech runs the risk of repeal once the "discursive' power of religion'[29] feeds into our political discourse and parliamentary processes.[30]

The third and final part of the book looks at what the emerging human rights framework in Australia might mean for the regulation of hate speech. The introduction of statutory Bills of Rights in the Australian Capital Territory and Victoria and the consideration of something similar in Western Australia, Tasmania and federally suggest that the legal protection of human rights in Australia will be pursued through a parliamentary rights model.[31] This provides for rights consideration before, during and after the legislative process but reserves the final word on contested rights issues to democratically-elected parliaments not the courts. In this model parliament has *the*

20 Ibid.

21 Id at 142.

22 Id at 139.

23 The litigation generated multiple judgments: *Islamic Council of Victoria Inc v Catch the Fire Ministries Inc* [2003] VCAT 1753; *Islamic Council of Victoria Inc v Catch the Fire Ministries Inc (Final)* [2004] VCAT 2510; *Islamic Council of Victoria Inc v Catch the Fire Ministries Inc (Anti Discrimination — Remedy)* [2005] VCAT 1159; *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* [2006] VSCA 284.

24 Mason, above n12 at 34.

25 CTFM submission to Court of Appeal, Appendix 1 at 33, cited in Lawrence McNamara, 'Salvation and the State: Religious Vilification Laws and Religious Speech' in Katharine Gelber & Adrienne Stone (eds), *Hate Speech and Freedom of Speech in Australia* (2007) at 157.

26 Ibid.

27 Lawrence McNamara, 'Salvation and the State: Religious Vilification Laws and Religious Speech' in Katharine Gelber & Adrienne Stone (eds), *Hate Speech and Freedom of Speech in Australia* (2007) at 166.

28 Ibid.

29 McNamara, above n27 at 150.

30 Id at 166.

central role in rights protection. In their chapter, Simon Evans and Carolyn Evans undertake important empirical work that considers the capacity of parliaments to provide a forum for meaningful rights deliberation. They do so by tracing the passage of the *Racial and Religious Tolerance Act 2001* (Victoria) through the Victorian Parliament and conclude that whilst the debates on the Bill demonstrated 'that a Bill of Rights is not necessary in order for legislators to identify and accept human rights as a constraint on legitimate legislative action',[32] the rights deliberation undertaken displayed a disappointing lack of depth, sophistication and rigour.[33] This suggests that if parliaments are to properly perform their central rights-protective role in Australia's emerging rights framework then the parliamentary processes and procedures capable of producing meaningful rights deliberation are in need of renovation.

In the final chapter Luke McNamara explores the fascinating and important question of whether the legal form for recognising and protecting human rights matters. He does so through an analysis of how freedom of speech is protected in New Zealand (express statutory recognition in a Bill of Rights)[34] compared to Australia (common law and a weak implied constitutional right to freedom of political communication).[35] This revealed a trend towards a narrower construction of hate speech laws in New Zealand, particularly by its Human Rights Commission, since freedom of speech was formally recognised in its Bill of Rights.[36] However, McNamara convincingly argues that the adoption of an equivalent legal form in Australia would not suddenly render its hate speech laws vulnerable to invalidity as '[f]ree speech sensitivity has long been a significant constraint on the shape'[37] of these laws. So legal form may not be decisive for the content, scope and operation of hate speech laws but it does — at least to some extent — matter.[38]

Hate Speech and Freedom of Speech in Australia makes good on its promise to move 'the debate into more philosophically and empirically interesting territory'.[39] It provides a wealth of thoughtful analysis, interesting insights and valuable policy suggestions on a social ill that is universal, intractable and insidious. It will prove an invaluable resource for any citizen interested in and concerned about the history, context and institutional treatment of hate speech in Australia and should be required reading for Australian policy and law makers.

---

31 See generally Stephen Gardbaum, 'The New Commonwealth Model of Constitutionalism' (2001) 49 *American Journal of Comparative Law* 707; Janet Heibert, 'Parliamentary Bills of Rights: An Alternative Model?' (2006) 69 *Modern Law Review* 7.

32 Simon Evans & Carolyn Evans, 'Parliamentary Deliberation About Religious Vilification Legislation' in Katharine Gelber & Adrienne Stone (eds), *Hate Speech and Freedom of Speech in Australia* (2007) at 178.

33 Ibid.

34 *Bill of Rights Act* 1990 (NZ) s 14.

35 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

36 Luke McNamara, 'Does a Bill of Rights Matter?: Comparing Australia and New Zealand' in Katharine Gelber & Adrienne Stone (eds), *Hate Speech and Freedom of Speech in Australia* (2007) at 198.

37 Id at 213.

38 Ibid.

39 Gelber, above n3 at 5.