

## **Free Speech, Hate Speech and Human Rights in Australia** **Adrienne Stone and Katharine Gelber**

The workshop “Free Speech, Hate Speech and Human Rights in Australia” was co-convened by Prof. Adrienne Stone and Dr Katharine Gelber, and held at the ANU on 8-9 September 2006.

The idea for the workshop emerged during discussions between the two convenors, both of whom had interests and research work in the area, and in recognition of the fact that there had as yet been no opportunity for scholars working in this field around Australia to meet and discuss their mutual interests and research findings. This lack of opportunity was ideally remediable through hosting an ASSA-sponsored workshop. The workshop was also supported by the Law Program, Research School of Social Sciences ANU; the Centre for International and Public Law, ANU College of Law; The Freilich Foundation; the National Europe Centre; and The ANU Culture of Human Rights Network.

‘Hate speech’ is a phenomenon that encompasses a wide variety of vilifying expression including vilification directed as race, religion, ethno-religious status, sexuality and gender. Although the central problem posed by hate speech laws is their apparent inconsistency with free speech principles, a worldwide consensus has emerged that hate speech poses an important human rights problem. The Australian legal response to hate speech is unusual and thus warrants further investigation. The first purpose of the workshop was to discuss cutting edge research in the field of hate speech regulation in Australia.

To this end, the workshop brought together established and emerging scholars from a number of legal disciplines (including constitutional, international, anti-discrimination and criminal law), history, psychology, geography, political and legal theory and empirical political science. A further objective of the workshop was to establish an interdisciplinary network amongst Australian scholars (who had never before had an opportunity to meet together to discuss their research synergies) that will support the future development of other research projects in this field.

The workshop was divided into four sessions, in each of which several related papers were presented. There was ample time for discussion, which workshop participants noted as one of the most useful aspects of the event.

The first session, “Foundations” began with a paper by Katharine Gelber which outlined the legal and political landscape within which hate speech events take place and are (attempted to be) regulated in Australia. This paper also raised some important emerging issues in the field, including the idea that the institution charged with acting to counter the effects of hate speech (the state) can itself be involved in perpetrating (more subtle and pervasive forms of) hate speech. Where and when this may be the case, it presents new challenges to those who wish to rely on the state to combat the problem of hate speech, and raises the possibility among policy makers of considering alternative methods of response other than state intervention and/or punishment.

The second paper in the “Foundations” session was presented by Adrienne Stone and it backgrounded the specific issue of hate speech regulation versus free speech protection in a broader discussion about the principles on which both outcomes are sought. In a comparative piece, Stone argued that a dominant explanation for the difference between US and Canadian approaches to free speech protection versus hate speech regulation is that the US prioritises liberty whereas Canada prioritises equality. The liberty versus equality debate is, argued Stone, an insufficient explanation for the differences between these jurisdictions since it insufficiently acknowledges the extent to which US First Amendment jurisprudence relies on equality considerations, and the extent to which Canadian jurisprudence reflects the importance of individual liberties. Thus, the debate ought to be characterised in another manner in order to take account of the richness of First Amendment and Canadian jurisprudence, and to recognise the complexity of claims to liberty and equality. This first session generated interested discussion concerning the frameworks within which later papers might be considered.

The second session, “Challenges for the Legal Regulation of Hate Speech” was introduced by a paper from Dan Meagher arguing weaknesses in existing criminal law models responding to virulent forms of hate speech, and in favour of an alternative model based on penalty enhancement. Simon Bronitt examined the effectiveness of specialised ‘hate speech’ offences (including the new federal offence of sedition inserted into the *Criminal Code* that makes it an offence to urge inter-group violence on racial or religious grounds) and compared them with general public order laws relating to offensive behaviour. Gail Mason’s paper addressed the nature of hateful expression that hate speech laws target. It considered recent attempts by some far right organisations to civilise their hate language in a bid to achieve greater respectability in the mainstream. A comparison of the policies and propaganda of these organisations revealed a denial and displacement of hate as a motivating factor. She argued this reconstruction of hate language has implications more broadly for the consideration of contemporary manifestations of hate speech. Mason’s paper was particularly enlightening in its characterisation of some contemporary forms of hate speech, and in highlighting some of the problems faced by regulators in combatting hate speech in all its forms. New forms of hate speech as they manifest in contemporary debate thus became an important theme of discussion.

The third session, “Understanding Hate Speech: Perspectives from History, Psychology and Geography” provided an opportunity for perspectives to be presented from a wide variety of disciplines, fulfilling the workshop’s aim to be interdisciplinary. Ann Curthoys provided a historical overview of the character of racism in Australia, arguing it has a particularly volatile character which helps to explain events such as the recent Cronulla race riots as neither aberrations nor symptomatic of a permanent underlying racism. Rather, Australia has throughout its history since white settlement experienced a racism which can flare and retreat. The reasons for this volatility were explored further during discussion. Kevin Dunn, a geographer, presented some results from the UNSW Racism Project noting that in his surveys of incidences of racism, ‘hate talk’ was the most commonly experienced manifestation. This empirical data thus substantiates the idea that vilification is a persistent problem and helps to explain the ways in which hate speech manifests and is experienced by targetted communities. Hate talk is a prominent, locally-immediate and palpable manifestation of contemporary racism. It generates non-belonging, apartness, and nudges separatism. Craig McGarty, a psychologist, presented

perspectives from a psychological viewpoint on stereotype formation and the existence of hate.

The fourth session, “Hate Speech in Courts and Tribunals” heard from Kate Eastman, a barrister with practical experience in hate speech cases. She presented a range of practical considerations to do with vilification cases being presented in court, including pre-trial investigation and conciliation. This practical perspective assisted participants in understanding the extent to which anti-vilification laws are (or are not) able to be of assistance to those communities whom its proponents claim to want to protect. Lawrence McNamara reported on the deliberations during a recent religious vilification case in Victoria, using the case to highlight the broader question of whether religious vilification ought to be treated in the same way by regulatory bodies as other grounds for vilification. The judgment in this case is yet to be handed down, but participants noted that religion as a basis for anti-vilification laws raises particular issues not extant on other grounds; notably the reliance in religious talk on faith as opposed to ‘science’ or ‘fact’, and the centrality of faith to an individual’s identity. Given that several states are currently debating whether to introduce religion as an anti-vilification category, and in the context of increasingly identifiable hate speech against Muslims, this issue is topical and crucial to the debate.

The final session “Hate Speech Laws and Institutional Structure: Comparative Perspectives” allowed participants to consider the regulation of hate speech within the broader phenomenon of human rights discourse. Simon Evans discussed the enactment of religious vilification laws in the Victorian parliament as a case study of how human rights discourse affects parliamentary and legislative outcomes. He argued that where issues being debated in parliament are highly controversial, legislative deliberation is not ideal and outcomes may not reflect human rights priorities. This is an important counter-argument to opponents of bills of rights and judicial review as mechanisms for human rights protection, who tend to argue that a democratically elected legislature is the right place to make human rights judgments. Luke McNamara reflected on whether the domestic human rights environment, including the presence or absence of a bill of rights, exerts an influence on the way in which decision-makers approach and resolve hate speech controversies. He argued that legal form was not decisive in determining the manner in which complaints were raised and mediated, and their outcomes.

The workshop was opened by Prof Hilary Charlesworth, FASSA. A number of attendees participated in discussion but did not present papers; indeed one of the purposes of the workshop was to open up possibilities for such rich discussion. Other participants included Amelia Simpson, Elisa Arcioni, James Stellios, Jennifer Clarke, Kim Rubenstein, Peter Bailey, Peter Cane, Renata Grossi and William Buss (Uni Iowa). Representatives from the Department of Immigration and Multicultural Affairs also attended. Breaks during the official program as well as the workshop dinner provided ample opportunity for informal discussions.

Most of the draft papers presented at the workshop will be reworked into chapters for a book entitled “Hate Speech and Freedom of Speech in Australia”. A contract for publication of this book has been secured with Federation Press, Sydney. The book is expected to be published in 2007.