

## **Hate Speech and the Law**

Professor Luke McNamara, Centre for Criminology Law and Justice, Faculty of Law and Justice,  
UNSW

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I would like to acknowledge the Gadigal people of the Eora Nation, the traditional custodians of this land and pay my respects to Elders past and present, and to Aboriginal and Torres Strait Islander people who are here today.

In 1982 a high school teacher, Jim Keegstra, in a small town in Alberta, Canada, taught his students that the Holocaust perpetrated by the Nazis was a hoax. In his lessons, he told students that Jews were "treacherous", "sadistic", "money-loving", "power hungry" and inherently evil. In short, he communicated antisemitic statements to his students.

Keegstra was convicted of the crime of unlawfully promoting hatred against an identifiable group (in this case Jews) – an offence that had been added to the Canadian Criminal Code in 1970.

He appealed his conviction all the way through the courts, but in 1990 the Supreme Court of Canada rejected his appeal and confirmed his conviction. His punishment was a one-year suspended sentence, one year of probation, and 200 hours of community service work.<sup>1</sup>

In 1993, a year after the landmark *Mabo* native title decision,<sup>2</sup> a local councillor, Jim Eldridge, in a small town in NSW, Australia, stood up at an event that had been organised to mark the United Nations International Year for the World's Indigenous People. He interrupted proceedings, and made a speech that described local Aboriginal people as 'half-caste radicals [who] have made a claim upon the city of Wagga Wagga. He claimed 'to have a right to speak on behalf [of] the white people of Wagga Wagga against these radical half-castes ...'. At a council meeting two weeks later the same man said, 'My people came down the river and established this city when nobody other than savages had been here before.'

The NSW Equal Opportunity Tribunal (as it was then called)<sup>3</sup> found that Eldridge's conduct was unlawful because he had engaged in a public act that incited hatred towards, serious contempt for, or severe ridicule of a group of persons on the ground of race (in this case, Aboriginal people). Such behaviour had been made unlawful in NSW in 1989, via an amendment to the *Anti-Discrimination Act 1977*.

The Tribunal ordered that Eldridge print an apology in two local newspapers and pay \$3000 to the lead complainant in the proceedings, Marianne Atkinson, who had requested that the money be donated to an Aboriginal Cultural Awareness Centre for the people of Wagga Wagga.<sup>4</sup>

We would now call these 'hate speech' cases although the term was not in common usage at the time. In Canada, the *criminal* laws that were applied to sanction Keegstra were known as

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<sup>1</sup> *R v Keegstra* [1990] 3 SCR 697.

<sup>2</sup> *Mabo v Queensland* (1992) 175 CLR 1.

<sup>3</sup> Now Administrative and Equal Opportunity Division of NSW Civil and Administrative Tribunal (NCAT).

<sup>4</sup> *Wagga Wagga Aboriginal Action Group v Eldridge* [1995] EOC 92-701.

‘hate propaganda laws’. In NSW, the *civil* laws that were applied to sanction Eldridge were known as ‘racial vilification laws’.

These two examples illustrate, I think, the essential meaning of what we now call ‘hate speech’: words or symbols or conduct that ‘expresses or incites hatred [or other ill-feeling] toward people on the basis of some aspect of their identity’.<sup>5</sup> Note that there is a difference between ‘hate speech’ and a ‘hate *crime*’ – which refers to unambiguously criminal behaviour (such as assault or arson) made more serious because motivated by hatred towards an aspect of the victim’s identity.

When it comes to hate speech, the technologies of communication have changed much over the years. For example, old fashioned wall and telegraph pole posters were used widely by right-wing racist organisations in the 1980s. Today, social media posts are a preferred method.

But the essence of hate speech is the same. As political theorist Bhikhu Parekh has put it: hate speech ‘stigmatizes the target group by implicitly or explicitly ascribing to it qualities widely regarded as highly undesirable’.<sup>6</sup>

As a young lecturer at the University of Wollongong in the early 1990s, recently returned from postgraduate study in Canada (where I first heard about the Jim Keegstra case), I decided I needed to better understand this new tool in the legal toolbox for fighting racism. My studies to date – particularly about the experiences of First Nations peoples in the criminal justice systems of Australia and Canada – had taught me how law and legal systems can *inflict* racism. I was keen to learn more about a new model for *alleviating* the burden of racism. And so, a student of hate speech laws I became. The decision of the NSW Tribunal in the Jim Eldridge case was the first Australian hate speech decision I read.

I mention this personal ‘origin story’ because I want to emphasise that my knowledge of hate speech is a product of research and scholarship – of academic inquiry – not lived experience. I am an Australian-born, white, straight, cis-gender man who does not live with a disability who, though raised a Catholic, is now an atheist. Even during my Catholic childhood, religious sectarianism in Australia was largely a thing of the past.

I’ve no doubt been hated from time to time over the course of my life (maybe by a student angry about a mark I awarded on a university assignment, or a boss hostile to the work I have done as a union delegate), but I have never been on the receiving end of words said about me or groups to which I belong that disparage my identity – that express hatred towards me or my people for who I am.

Many many people are not so lucky. They have experienced being hated for their appearance, their Aboriginality, their ethnicity, their accent, their country of origin, their religion, their socio-economic status, their sexuality, their gender identity, their disability.

So I have never given myself the luxury of approaching the topic of hate speech laws in an abstract or ivory tower academic way. With apologies to the authors of the many books and articles on the topic (when I did a library catalogue search at the University of New South Wales recently, 50,000 entries popped up!) I am not mainly interested in philosophical or

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<sup>5</sup> NSW Department of Education, <https://racismnoway.com.au/about-racism/hate-speech/>.

<sup>6</sup> B Parekh, ‘Is there a case for banning hate speech?’ in M Herz & P Molnar (eds), *The content and context of hate speech: Rethinking regulation and responses* (Cambridge University Press, 2012) 37 at 41.

constitutional debates about the theoretical legitimacy of hate speech laws. I am interested in what hate speech *do* – and what they *don't do*.

Before I tell you the 5 things about hate speech laws that I have learned over 30 years, I want to make a couple of topic-related shout outs.

First, a lot of what I have learned has been learned through the gift of collaboration. From a long list, I want to single out the wonderful Professor Kath Gelber, an internationally regarded politics and public policy scholar from the University of Queensland, with whom I spent several years researching the impact of hate speech laws.

Second, I have learned *even more* from people who know what it is like to be on the receiving end of hate speech, and who have been actively involved in trying to enforce hate speech laws – not for their own personal benefit, but to protect their communities and ours because of their commitments to anti-racism and equality.

### **No 1. The harms done by hate speech are real.**

I was a bit dismissive earlier of the many books that have been written on hate speech, and making the case for or against hate speech laws. But I want to make a special exception for what we can learn about the harms of hate speech from a group of African-American and Hispanic legal scholars who were the pioneers of critical race theory. Much mischaracterised and maligned, especially in the US lately, Critical Race Theory played an important role in voicing the real harms done to minority individuals and communities by hate speech unchecked by law.

Up against the enormous weight of US First Amendment free speech constitutional doctrine and political ideology, that was deeply hostile to the very idea of hate speech laws, books like *Words That Wound: Critical Race Theory, Assaultive Speech, And The First Amendment* (1993) by Charles Lawrence, Kimberle Crenshaw, Mari Matsuda and Richard Delgado; and *The Alchemy of Race and Rights: Diary of a Law Professor* (1991) by Patricia Williams, were instrumental in giving voice to those encumbered by the effects of racist hate speech in their daily lives. It was Williams who coined the evocative phrase 'spirit murder' to describe the experience of being fundamentally disregarded and the existential harm of hate speech.

When Kath Gelber and I conducted a study that involved interviews with Australians from culturally and linguistically diverse communities,<sup>7</sup> we learned that people experience what academics refer to as *constitutive* (what Williams described as spirit murder) and *consequential* harms; that is, harms that are occasioned in the performing of a hate speech act, and harms that occur as a result of it. The point is that hate speech is not only a problem because it might result in *future* discrimination or violence, but because it can cause harm *now* to the people who are subjected to it.

Our research confirms what many people already know: hate speech incidents occur in a range of environments - at school, at university, at work, during sporting activities, in service environments (e.g. supermarkets, banks), on the street, in the workplace, at cultural and political events, on public transport, on stickers and posters and graffiti, in media reporting and commentary and, of course, on the internet and social media. In our interview work, one

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<sup>7</sup> K Gelber & L McNamara, 'Evidencing the Harms of Hate Speech' (2016) 22(3) *Social Identities* 324-341.

participant said, ‘I think for me . . . every day I get vilified’. Another described the effect of being subjected to hate speech as ‘crushing, emotionally and spiritually’. Other words we heard in interviews used to describe the impact of hate speech include: hurt, upset, anger, distress, fear, intimidation, exclusion.

While it is important to be sensitive to all of these effects, it is also true that not all forms of objectionable or upsetting speech are ‘hate speech’ for legal and regulatory purposes. For example: criticisms of the actions and inactions of the Catholic Church may hurt some Catholics, but do not inherently constitute anti-Catholic hate speech; criticisms of the actions and inactions of the state of Israel may distress some members of the Jewish community, but they do not inherently constitute antisemitic hate speech. In my view we show disrespect to victims of religious and racial vilification, and we risk undermining the legitimacy and authority of hate speech laws, if we collapse the categories of upsetting and uncomfortable speech and hate speech, or too readily allow the lines to be blurred.

We can respect lived experience and subjective perspectives on these things, but it doesn’t necessarily follow that state laws and sanctions should fall in behind.

## **No 2. A democratic society can have laws that sanction hate speech and still be committed to freedom of expression.**

Most countries around the world get this – and we shouldn’t let the outlier example set by the United States and its First Amendment derail sensible debate about what types of hate speech laws we should have, and an evidence-based assessment of pros and cons. One of the reasons the phrase ‘hate speech’ came into existence was to challenge the idea that hatred directed at a group defined by race, or another inherent identity characteristic, should be tolerated and beyond law’s reach because all speech should be free.

It is abundantly clear that all speech has never been ‘free’. In addition to social conventions and informal rules about what we should and shouldn’t say, and the social power disparities that mean that not everyone enjoys the same access to the classic liberal ‘marketplace of ideas’, there are lots of laws that sanction speech – including defamation laws, public order offensive language laws, laws on misleading advertising, and laws on deceptive statements that perpetrate fraud. Some of these laws have their controversies, but in my view there is nothing controversial about the idea that hate speech is sufficiently serious that there should be laws about it. The more important question is: what *sorts* of laws? – a question I will return to later.

When the bill for Australia’s first racial hate speech law was introduced into the NSW Parliament a little over 36 years ago, then Attorney General, Mr John Dowd said:

“Legislation against racial vilification must involve a balancing of the right to free speech and the right to a dignified and peaceful existence free from racist harassment and vilification.”

It was true then, and it remains true today.

**No. 3. Hate speech laws don't make racism or other forms of prejudice magically go away, but generally they do *more good than bad*.**

Racist hate speech laws now have a 36-year long history in NSW. 30 years at the federal level – in the form of s 18C of the *Racial Discrimination Act*, which was added in 1995.<sup>8</sup> Over that time, hate speech laws have been expanded to offer protection to a range of other groups targeted by hate speech. The brand new and improved statutory regime introduced in Victoria just last month is illustrative.<sup>9</sup> When it comes fully into operation, the new legislation will make unlawful hate speech based on race, religion, disability, sex, sexual orientation and gender identity (referred to in the legislation as 'protected attributes'). But there are gaps. For example, Muslims are not protected by s 18C at the federal level,<sup>10</sup> and the protections of the NSW *Anti-Discrimination Act 1977* (NSW) were only extended to Muslims in 2023, when religion was added as a ground of unlawful vilification.<sup>11</sup>

Hate speech hasn't disappeared as a result of hate speech laws, but there is evidence that, over time, some forms of blatant hate speech have reduced.

Has free speech been diminished over the last three decades? That is a tricky and very big question that is beyond me to fully answer today. What I *will* say is that to the extent that the right to freedom of expression has been diminished, this is *not* because of hate speech laws.

Media concentration and restrictions on the right to protest are likely to have played a bigger role. Overall, hate speech laws leave plenty of room for robust public discourse on all manner of topics – immigration and refugee policy, the rights of Aboriginal and Torres Strait Islander people, same-sex marriage and global conflicts, to name just a few.

**No. 4. Not all hate speech laws are the same – and each legal regime should be assessed on its merits.**

Understandably, the *criminalisation* of hate speech is usually regarded as the most serious and controversial form of hate speech law. And fair enough. Criminal punishment is the most serious sanction that the state can impose. The social stigma of conviction is high. It is to Australia's credit that our law-makers have mostly resisted the urge to criminalise hate speech – I say mostly because there are exceptions. 35 years ago, Western Australia steered its own unique path – relying exclusively on criminal laws to address racist hate speech. The risk of over-criminalisation has been managed by sensible policing and prosecutorial decisions about what sorts of conduct fall within the bounds of their criminal offences.

Until recently, most states and territories have adopted a different approach – one that focuses on creating a *civil* wrong of hate speech, with the *criminal* law reserved only for hate speech that threatens or urges or advocates *violence* – violence being precisely the sort of conduct with which the criminal law is typically concerned. Even when the Australian Parliament

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<sup>8</sup> *Racial Hatred Act 1995* (Cth).

<sup>9</sup> *Justice Legislation Amendment (Anti-vilification and Social Cohesion) Act 2025* (Vic).

<sup>10</sup> K Gelber & L McNamara, 'Anti-vilification Laws and Public Racism in Australia: mapping the gaps between the harms occasioned and the remedies provided' (2016) 39(2) *UNSWLJ* 488.

<sup>11</sup> *Anti-Discrimination Amendment (Religious Vilification) Act 2023* (NSW).

introduced a raft of new hate speech offences earlier this year, it respected this boundary, choosing only to expand the reach of existing criminal offences on *violent* hate speech.<sup>12</sup>

There is a *catch*, however, in relying on civil wrongs defined in anti-discrimination statutes as the main vehicle for addressing hate speech. Unlike criminal offences, that are investigated and enforced by the state's police officers and prosecutors, civil hate speech laws require a person or organisation from the affected group to come forward and do the heavy lifting of formally complaining to a human rights body (like the Australian Human Rights Commission or Anti-Discrimination NSW). And then, if conciliation fails, commencing litigation in a tribunal or court. That it is a heavy burden to impose on victims of hate speech. Not every community has a Marianne Atkinson or Wagga Wagga Aboriginal Action Group – without whom Jim Eldridge would never have been found by a Tribunal to have engaged in unlawful racial vilification.

And it can take a very long time. For example, the late Jeremy Jones worked hard to ensure that antisemitic Holocaust deniers like Frederick Toben and Olga Scully were sanctioned under s 18C of the federal Racial Discrimination Act. He told me once that civil hate speech laws are hard to use, and recognised that he'd had the advantage of organisational resources and expertise that many communities targeted by hate speech just don't have. You have to be patient and dogged. It took almost 10 years for Keysar Trad to achieve and defend a tribunal ruling that Alan Jones had engaged in unlawful racial vilification under the NSW Anti-Discrimination Act when, during Sydney radio broadcasts in 2005, he referred to Lebanese Muslims as 'mongrels' and 'vermin', who 'hate our country and our heritage', and 'simply rape, pillage and plunder a nation that's taken them in'.

Our system of civil hate speech laws is an imperfect one, but valuable nonetheless. Many of the people from targeted communities that we interviewed said that although they could never imagine lodging a hate speech complaint or pursuing litigation, they saw hate speech laws as a precious symbol: they said that simply 'knowing there is something there to protect you' made them feel less vulnerable.

Hate speech laws were seen by those we interviewed as the government setting a 'standard', making a statement about what is 'not right' in public behaviour, acting 'as a deterrent', and allowing 'us all to be treated with respect'.

In recent times, however, we are seeing some signs that the balance that has held for over 30 years is starting to shift.

In February this year, the NSW Parliament created a brand new racist hate speech criminal offence. It is now an offence to do a public act that 'intentionally incites hatred towards another person or a group of persons on the ground of race.'<sup>13</sup> There are some other legal requirements but that is the gist of it. There is no need to prove that the hate speech encouraged or threatened violence.

For the first time in the three decade history of NSW racial hate speech laws it is a crime to incite hatred. That is a big deal. To be honest, I am not sure what to make of it because much will depend on how the new law is operationalised over the years to come. I trust that the NSW Police and the NSW Director of Public Prosecutions will exercise the same sort of careful

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<sup>12</sup> *Criminal Code Amendment (Hate Crimes) Act 2025* (Cth).

<sup>13</sup> *Crimes Act 1900* (NSW) s 93ZAA, as amended by the *Crimes Amendment (Inciting Racial Hatred) Act 2025* (NSW).

judgment and restraint that has prevented overuse of Western Australia's criminal hate speech laws all these years.

And this will be important in the current climate. As you will be aware, there has been a lot of attention this year on antisemitism which is, of course, a form of racism. At the same time that there is genuine and well-founded concern about unambiguously antisemitic crimes, including property damage, arson and the display of Nazi symbols, there is an ongoing debate – very prominent in the university world of which I am a part – about what the definition of antisemitism is, and whether it extends to some forms of criticism of the state of Israel or the actions of the IDF. With a brand new crime of inciting racial hatred on the statute books in NSW (and in Victoria, as of last month) the stakes are now especially high. The maximum penalty for the new crime is two years imprisonment.

Of course, it is not for me to tell members of the Jewish community (or their allies) that they are right or wrong when they suggest that statements made or slogans chanted at a Palestinian solidarity rally are antisemitic. I respect their lived experience position. However, with further respect, I *do* get a say – we all get a say – on whether the law created by our elected politicians has drawn the line in the right place, and whether the most appropriate regulatory approach has been adopted.

As a general rule, good laws are not made in a hurry. It took Victoria some 5 years to gather evidence and consult widely on its recent overhaul of hate speech laws (which does include a new inciting hatred crime). The new NSW offence was announced, drafted and enacted in haste, partly in response to the caravan of explosives plot – which turned out be something quite different to original reports. The bill that created the new crime was introduced to Parliament on the 18<sup>th</sup> of February, and passed by both houses three days later.

#### **No 5. Periodic spikes in hate speech directed at a particular group are not Australia's biggest racism problem**

I do not underestimate the impact on members of Australia's Jewish communities of the increase in antisemitic incidents since October 2023. Nor do I underestimate the impact on members of Australia's Muslim communities of the increase in Islamophobic incidents over the same period. As an evidence-based researcher, I value the work done by the Executive Council of Australian Jewry's Anti-Jewish Incidents reports, and the reports of the Islamophobia Register Australia.

But while history tells us that particular groups will come in for an outsized and unfair share of hate speech at different times, we also know that, over time, the peaks reduce. That is not a reason to be complacent, but it does invite some perspective.

It is important not to make the mistake of treating public racist hate speech as synonymous with racism or other forms of identify prejudice. Hate speech is *one* form or manifestation – the tip of an iceberg for some communities in Australia. There are many other forms of insidious, systematic and destructive racism (and the same is true of other forms of prejudice, including that experienced by our transgender siblings). Other forms of racism and prejudice may be less visible, and so less amenable to legal redress. But they are real.

Even more importantly, Aboriginal and Torres Strait Islander peoples and communities have been on the receiving end of hate speech and other forms of racism for almost 240 years. Recently, Professor Lindon Coombes and the Jumbunna Institute for Indigenous Education and Research at UTS released a report called, *If You Don't Think Racism Exists Come Take a Walk*

*With Us*.<sup>14</sup> Drawing on information provided to the ‘Call It Out’ Register, the report confirms that racism – in multiple forms, including hate speech – is a common experience for Aboriginal and Torres Strait Islander people. One woman who reported to the Register said that ‘she had enough experiences of racism to fill a book’. Another entry recorded the following, shortly after the unsuccessful Voice to Parliament referendum, in October 2023:

My 12 year old nephew was involved in a group chat with his school ‘friends’ last night, they made comments including ‘ur a monkey’, ‘no wonder why everyone voted no’, ‘at least I have a voice’, ‘Proud to be the one who stole ur land’, ‘Why are u talking, i thought everyone voted no for u to not have a voice’.

When I reviewed the ‘Call it Out’ report in preparation for today, and read this entry in particular, I recognised three things, which I’ll close with.

First, that not nearly enough has changed. In 1993 a Wagga Wagga local councillor stood up and spewed nasty racism at an event that was intended to be a celebration of the survival and unique rights of Indigenous people around the world. 30 years later, a 12 year old First Nations child was mocked and racially abused on a day that we should have been celebrating a referendum win, and a small step in the direction of coming to terms with Australia’s colonial past.

Secondly, that hate speech laws seem ... well ... *small* ... in the face of an enormous task; including an unfinished national project on recognition and self-determination, and the intensification of hate through technology.

Finally, however, and more positively, I reflected on the legacy of organisations and collective efforts like the Wagga Wagga Aboriginal Action Group, who took on Jim Eldridge back in the 1990s. Their legacy is large, and the ‘Call It Out’ Register is a proud and strong 21<sup>st</sup> century incarnation. It defiantly resists the marginalisation and silencing that the hate speakers seek to produce.

So, I plan to keep walking in the direction of calling out and confronting racism and hate speech. And making the case for balanced hate speech laws as I go.

Thank you for listening.

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<sup>14</sup> L Coombes et al, *If You Don’t Think Racism Exists Come Take a Walk With Us*. Call It Out Racism Register 2023-24 (Jumbunna Institute for Indigenous Education and Research, UTS, 2025).