

Three reasons the *Marriage Law Survey (Additional Safeguards) Act 2017* is bad law

On 13 September 2017 the *Marriage Law Survey (Additional Safeguards) Act 2017* was introduced into the Senate by the Commonwealth Attorney-General George Brandis. The *Additional Safeguards Bill* passed both Chambers within hours of its introduction, and became law on the same day it was first introduced into the federal parliament.¹

The Act implemented ‘a range of measures relating to public communications in the conduct of the Australian Marriage Law Postal Survey.’²

The Act contains a number of provisions which limit freedom of speech. The fundamental problem is contained in section 15, which reads:

‘a person ... must not vilify, intimidate or threaten to cause harm to another person or persons if the first person engaged in the conduct that vilified, intimidated or threatened the other person or persons because of any of the following:

- (a) the other person or persons have expressed or hold a view in relation to the marriage law survey question;
- (b) the first person believes that the other person or persons hold a view in relation to the marriage law survey question;
- (c) the religious conviction, sexual orientation, gender identity or intersex status of the other person or persons.’³

This IPA Parliamentary Research Brief seeks to explain the problems with this law. Our research demonstrates that the *Marriage Law Survey (Additional Safeguards) Act 2017* is bad law because it uses vague and ambiguous language to restrict freedom of speech, it creates a blasphemy law at the federal level, and it abrogates the rule of law.

While the Act has a sunset provision and ceases to have effect on 15 November 2017,⁴ for the period of its operation the Act constitutes an unreasonable limitation on Australians’ freedoms and it has created a precedent for future governments.

1. The term ‘vilification’ is vague and uncertain

The term ‘vilification’ is characteristically vague and ambiguous. There is no objective test for determining whether a person has been vilified.

The uncertainty inherent in the word vilification makes it an inappropriate term for use in legislative provisions without specific guidance as to its meaning. This was the point that was identified in the legal advice from the Commonwealth Solicitor General when the term was being considered for inclusion in the *Disability Discrimination Act* in 2004: “In our view, the ordinary meaning of the word ‘vilification’ is not sufficiently clear to be relied on in a legislative provision, especially one that imposes liabilities or penalties.”⁵

This ambiguity leaves room for bureaucrats, lawyers and judges to make arbitrary decisions which may place significant restrictions on freedom of speech.

While various pieces of state legislation define the terms ‘vilify’ and ‘vilification’, it is not defined in federal legislation. This is a significant oversight. In any case, there has been very little judicial consideration of the term ‘vilify’ in Australian courts.⁶

It is therefore not clear how the courts will interpret the word ‘vilify’. However, it may set a low threshold, similar to section 18C of the *Racial Discrimination Act 1975*, which makes unlawful behaviour that is likely to ‘offend’ or ‘insult’ a person because of their race, colour or national or ethnic origin.⁷ A number of exemptions exist under section 15(3) which potentially limit the scope of section 15(1). However, following decisions made in applying similar exemptions under section 18D of the *Racial Discrimination Act 1975* it is likely to be applied in very limited circumstances.⁸

The word ‘vilify’ is in practical terms no different from the words ‘offend’ or ‘insult’. Court judgments routinely refer to section 18C, for example, as an anti-vilification provision.⁹

The Macquarie Dictionary defines vilify as ‘to speak evil of; defame; traduce’.¹⁰ The Cambridge Dictionary defines ‘vilify’ as ‘to say or write unpleasant things about someone or something, in order to cause other people to have a bad opinion of them’.¹¹ The Oxford Thesaurus lists ‘insult’ as a synonym of ‘vilify’.¹²

2. The Act covers conduct that goes beyond the scope of the marriage law survey and creates a de facto blasphemy law

Section 15(c) creates a de facto blasphemy law, by including ‘religious conviction’ as a basis on which a vilification complaint can be made.

This means that a person can bring a legal complaint against another person if they have been offended by something that person has said about their religion. This is unprecedented at the federal level,¹³ and it is doubtful whether parliament intended to implement such a draconian and sweeping provision.

The provision is not limited in scope to the marriage law survey matter. The provision has general application until 15 November 2017.¹⁴

3. Power granted to the Attorney-General abrogates the rule of law

The Act gives power to the Commonwealth Attorney-General in the form of a consent which is required under the Act before legal proceedings under the vilification provision can take place.

The power is contained in sub section 19(3) of the Act, which states: ‘In relation to section 15, a person must not take any action under or in relation to Part 4 or 6 of the Regulatory Powers Act without the consent of the Attorney-General.’

The requirement for consent of the Attorney-General is a discretionary power. Discretion is abhorred by the rule of law, which demands that ‘decisions should be based on stated criteria and that they should be amenable to legal challenge.’¹⁵ As stated by the courts, ‘It must be law, not discretion which is in command.’¹⁶

Lord Hewart, in *The New Despotism*, published in 1929, could have been talking about Australia in 2017 when he wrote:

‘It is not, but it ought to be, common knowledge that there is in this country a considerable number of statutes, most of them passed during the last twenty years, which have vested in public officials, to the exclusion of the jurisdiction of the Courts of Law, the power of deciding questions of a judicial nature.’¹⁷

The consent power under the Act is analogous to those included in other pieces of Commonwealth legislation. However the current laws that make use of a consent requirement overwhelmingly relate to very serious criminal misconduct, including crimes which fall under national security and intelligence laws,¹⁸ sedition,¹⁹ genocide,²⁰ the proliferation of weapons of mass destruction,²¹ involvement in a foreign incursion,²² and child pornography.²³

If such a discretionary power is to exist it is arguably justifiable in the context of national security and other very serious criminal laws. The same cannot be said of cases involving the application of anti-vilification laws.²⁴

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- 1 Monica Biddington, ‘The “Think (quickly) before you speak” Bill – the Marriage Law Survey (Additional Safeguards) Bill 2017’ *Flagpost*, Australian Parliamentary Library, 13 September 2017.
- 2 Parliament of Australia, Parliamentary Business, Marriage Law Survey (Additional Safeguards) Bill 2017 <http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s1092>.
- 3 *Marriage Law Survey (Additional Safeguards) Act 2017* (Cth), s 15.
- 4 *Marriage Law Survey (Additional Safeguards) Act 2017* (Cth), s 27; or ‘if statistical information is published before that day for the purposes of the *Census and Statistics (Statistical Information) Direction 2017*—the day the information is published.’ (*Marriage Law Survey (Additional Safeguards) Act 2017* (Cth), s 5).
- 5 Susan Reye, Legal Advice to the Productivity Commission, *Review of the Disability Discrimination Act 1992*, 1 March 2004, 2-6.
- 6 RP Handley, *Mundzic and Minister for Immigration and Citizenship* [2010] AATA 399, [53]; *R v Hoser and Kotabi Pty Ltd* [2001] VSC 443 at [96].
- 7 Chris Berg et al, *The Case for the Repeal of Section 18C* (Institute of Public Affairs, Occasional Paper, 2016) 39.
- 8 See for instance *Eatock v Bolt* [2011] FCA 1103.
- 9 See for instance *Eatock v Bolt* [2011] FCA 1103 at [225]-[226]; *Noble v Baldwin & Anor* [2011] FMCA 283 at [143]; *Bropko v Human Rights & Equal Opportunity Commission* [2004] FCAFC 16 at [32], [95].
- 10 *Mundzic and Minister for Immigration and Citizenship* [2010] AATA 399 [53]
- 11 Cambridge Dictionary Online (Cambridge University Press, 2016) viewed online, <<http://dictionary.cambridge.org/dictionary/english/vilify>>.
- 12 Oxford Dictionary Online (Oxford University Press) viewed online 18 September 2017, <<https://en.oxforddictionaries.com/thesaurus/vilify>>.
- 13 The Australian Capital Territory government introduced laws that criminalise vilification because of a person’s religious conviction in 2016: *Discrimination Amendment Act 2016* (ACT).
- 14 Above n 4.
- 15 Tom Bingham, *The Rule of Law* (2014), 50.
- 16 *D v NSPCC* [1978] AC 171, 239.
- 17 The Rt. Hon. Lord Hewart Of Bury, LCJ, *The New Despotism* (1929), 43.
- 18 For example, *Australian Security Intelligence Organisation Act 1979* (Cth), s 92(3).
- 19 *Commonwealth Criminal Code* (Cth), s 80.5.
- 20 *Commonwealth Criminal Code* (Cth), s 268.121.
- 21 *Weapons of Mass Destruction (Prevention of Proliferation) Act 1995* (Cth), s 20.
- 22 *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth), s 10.
- 23 *Commonwealth Criminal Code 1995* (Cth), s 474.24.
- 24 Such as, for example, *Anti-Discrimination Act 1977* (NSW), s 20D(2).