Briefing Note

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Homosexual Vilification

No 003/93

Introduction

The **Anti-Discrimination (Homosexual Vilification) Amendment Bill 1993** would insert new provisions into the **Anti-Discrimination Act 1977** (NSW) to make unlawful the vilification of homosexual men and lesbian women. These provisions are modelled on the racial vilification provisions, inserted into the Act in 1989. Homosexual vilification would occur when a person, by a public act, incited hatred toward, serious contempt for, or severe ridicule of another person or group because of that person's or group's homosexual status.

The purpose of this Briefing Note is not to provide a detailed analysis of the cases for and against the proposal, but to canvass some of the issues and provide some background information to it.

Background Issues

1. Violence

The bill was prompted by the high level of violence directed against gay men and lesbian women because of their homosexuality[1]. According to the New South Wales Police Service's Client Liaison Group, much of this violence went unresearched and unreported until recent years.[2] Various reports and studies have since documented the nature and extent of such violence which takes both physical and verbal forms. A recent survey estimates that during 1990-91, one hospital in the inner-city suburbs was treating an average of 5 victims

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[1] 'In the past 14 months, the lesbian and gay anti-violence project has received 156 reports of assaults on lesbians and gay men. In these incidents, 230 lesbians and gay men were assaulted, and 38% suffered a serious physical injury such as concussion or broken limbs. In 1991 police received reports of 136 homosexual assaults. In that year, 69% of assaults in Surry Hills were gay related... The police lesbian and gay group liaison officer stated last year that 13 homosexual men had been murdered by gay bashers in the past four years.' Second Reading Speech, p 657. It will be noted that 'Gay people have traditionally been reluctant to report crimes with any relation to their sexuality to the police, and although this reluctance is gradually being overcome, most of the incidents which are reported to the Police-Gay Liaison Group have not been formally reported to the police.': Report of the Anti-Discrimination Board for the Year Ended 30 June 1985, p 122.

[2] As a result of the "Stop the Bashings" campaign launched in 1990 by the New South Wales Police Service in co-operation with the lesbian and gay communities of Sydney, there are currently a total of 63 Police/Gay Liaison Officers at patrols across NSW. These police officers act in a voluntary capacity and their function is to encourage the reporting of gay-related violence. The Client Services Group places a high priority on giving their names and particular locations at the relevant police stations.

of gay-related attacks each night.[3]

Since 1987, there have been at least 19 "gay hate murders" in NSW, the common motive being hatred of the victim's (perceived) homosexual status.[4] An initiative[5] by the Gay and Lesbian Rights Lobby found that of a sample group of 67 gays and lesbians in an inner city suburb, 73% had sustained physical injury as a result of being attacked in the preceding six months; verbal abuse occurred in 48% of the incidents.[6] Almost four in five respondents thought they had been attacked purely because of who they are - as gays or lesbians. Out of all the cases where the assailant spoke to the survivor (81% of the total number of incidents), 74% involved anti-gay/lesbian taunts.[7]

In launching the *Streetwatch* report, the then Minister for Police, the Hon E P Pickering MLC stated:

> *This report revealed alarming facts - for example, that most of these bashings were quite definitely 'hate-related', that is, committed by people who hated gays and lesbians and appeared to think they deserved to be bashed for being homosexual/lesbian; and also many of these crimes were committed by young people, often still at school.*[8]

However, few lesbian women responded to the inquiry. The *Streetwatch Report* speculated that the reasons for this might be:

> *Many cases of violent assault on lesbians takes the form of sexual assault by a man. This may not always be interpreted by the survivor as her lesbianism being the cause of the attack, since sexual assault on all women is so prevalent in our society. This fact, added to the different*

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[3] ***Boys on the Beat***

[4] See also, S. Thompson, "Homophobic Violence - A NSW Police Response", paper presented to the Australian Institute of Criminology 2nd National Conference on Violence, Canberra, June 1993, at p 3. Although the reasons for any systematic violence are multifarious, Sue Thompson has commented:
"*Something like gay bashing I think on one hand is a complex issue, and on the other hand, there's something that's very simple I think is important to say ... which is that there is violence in society because we tolerate violence*": *Boys on the Beat,* documentary on anti-gay violence, Sydney, 1991.

[5] G. Cox, *The Streetwatch Report: A Study into Violence Against Lesbians and Gay Men* (Sydney: Gay and Lesbian Rights Lobby, 1990).

[6] Ibid, at pp 15 and 16, respectively.

[7] The report's tabled results categorises such speech as "poofter/dyke etc. abuse": ibid., at p 29.

[8] Report of the Anti-Discrimination Board and Equal Opportunity Tribunal for the Year Ended 30 June 1990, p 40.

nature of the response of the survivor to sexual assault compared to physical assault, which leaves the survivor more loath to discuss the assault in a survey such as Streetwatch, may mean that there was less reporting by lesbians.[9]

A more extensive study of anti-lesbian violence was later conducted by the Gay and Lesbian Rights Lobby and was reported in *Off Our Backs*[10]. It observed that if violence against women was largely ignored in society[11], anti-lesbian violence was even more neglected.

It found lesbian women experience violence in different circumstances compared to gay men. Whilst the largest single group of attacks were still street-based (45%), the assailants were known to the survivors in 38% of all the incidents and almost half of all attacks involved a single attacker.[12] One-third of respondents reported on-going campaigns of harassment. 35% of incidents occurred at the woman's home, workplace or study environment.[13] As with attacks on gay men, though, an overwhelming majority (84%) of attacks were accompanied by anti-lesbian taunts.[14]

Consequently, both *Streetwatch* and *Off Our Backs* recommended that a new ground of complaint of vilification on the basis of (perceived) homosexuality be introduced into the **Anti-Discrimination Act 1977** as well as the creation of a new criminal offence of serious vilification.

The Minister for Police established a Committee chaired by the Anti-Discrimination Board (ADB) to examine ways of implementing the recommendations contained in *Streetwatch*.[15] Although it was acknowledged that *'widespread media coverage of some murder and manslaughter trials of those involved in gay bashings this year has helped shift community attitudes'*,

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[9] Ibid., at p 13.

[10] *A Study into Anti-Lesbian Violence*, GLRL, Sydney, September 1992.

[11] One US lawyer has observed that "*intimate violation of women by men is sufficiently pervasive in ... society as to be nearly invisible*": C.A. MacKinnon, *Sexual Harassment of Working Women* (New Haven: Yale University Press, 1979), at 1.

[12] *Off Our Backs*, op cit., at p 27.

[13] Id., at pp 15 and 17, respectively.

[14] "*Common taunts were 'f---g lezzo' and 'f---g dyke'. There was also abuse such as 'all you need is a good f---' and/or 'I'm the man for you'.*": id., at p 23.

[15] This Committee is chaired by the President of the Anti-Discrimination Board and is made up of representatives from all the departments whose portfolios are covered by recommendations in the report, together with representatives from several gay and lesbian community organisations. See: *Anti-Discrimination Board of NSW & Equal Opportunity Tribunal Annual Report 1990/91*, p 54.

the work of the Committee, it is said, has led to several major shifts in departmental policy and procedures *'which will ensure that this issue is tackled head on and no longer couched in silence'*.[16]

The Police Minister launched the Committee's Report on the implementation of the recommendations in the *Streetwatch* report in February 1992. This listed the Committee's achievements, together with the areas it felt still needed tackling. One issue remaining was 'the need for homosexual vilification laws'.[17]

Anti-Discrimination Law in NSW currently only covers public vilification on one ground, that of race.

> *For some time, members of the gay and lesbian communities - both within the Board's Gay Consultation and Streetwatch Committee - have suggested that it might be useful if the law could be amended to cover homosexual vilification (public incitement to hatred, serious contempt or severe ridicule of gays/lesbians). this would mean that some of the common problems that occur now - for example homophobic coverage of gays and lesbians in the media[18] - would be able to be handled by the Board.*
>
> *While the most extreme version of homophobia - hate-related bashings and murder - can clearly be dealt with by current criminal provisions, it is conceivable that the general climate of homophobia and silence surrounding gay issues could be changed if vilification became unlawful.*

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[16] *Anti-Discrimination Board of NSW & Equal Opportunity Tribunal Appeal Report 1990/91*, p 55.

[17] *Report of the Anti-Discrimination Board and Equal Opportunity Tribunal for the Year Ended 30 June 1992*, pp 50-51.

[18] This reference to the media is by analogy significant given the decision of *Mark v Australian Broadcasting Tribunal*, FCA, unreported, 22 November 1991. In this case, the President of the Anti-Discrimination Board applied for the review of a decision by the Australian Broadcasting Tribunal in relation to complaints about a program broadcast on a Sydney radio station which allegedly contained racist slurs. The relevant Radio Program Standard included expressions as 'likely to incite or perpetuate hatred against' and 'gratuitously vilifies' - expressions common or similar to both the RPS and sections 20C and 20D of the Anti-Discrimination Act 1977.

The Tribunal held that *'...Mr Mark's office as President of the ADB conferred upon him no relevant interest entitling him to challenge in this Court the subsequent decision of the Australian Broadcasting Tribunal...[He] has no function in relation to the way the...Tribunal interprets and enforces its own standards...'* It was later said that *'as the broadcasts were made in New South Wales and were subject to the provisions of the Anti-Discrimination Act, Mr Mark's concern should have been to consider whether those broadcasts offended the Anti-Discrimination Act, not whether the Australian Broadcasting Tribunal's interpretation of its standard RPS 3 was correct'*.

This is in turn might help reduce bashings...."[19]

The Anti-Discrimination Board has suggested consideration be given to vilification laws:

> *The argument for its introduction would be that, as with racial vilification, it would provide a clear statement by the government that the sort of homophobic behaviour that to its extreme can lead to gay bashings and murder is just not acceptable.*[20]

The terms of the bill are modelled directly on the existing racial vilification provisions. The sponsor of the bill has stated that its purpose is to *'change attitudes'* and that this will be realised by 'emphasising *conciliation rather than court action as the means of resolving complaints'*.[21]

2. Violence and Language:

Survey findings suggest language plays a major role in violence against lesbians and gay men. Overseas empirical data supports such a view.

North American findings suggest that the language used by perpetrators generally disparages homosexuality and boasts about heterosexuality, with more women (43%) subjected to offensive anti-gay language than men (21%).[22] Anti-feminist comments were integral to 36% of attacks on women.[23]

The perceived need for anti-vilification laws also stems from the related but separate issue of what is known about the markedly young ages of perpetrators of violence. Young people are greatly influenced by the language of their

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[18] "*The Gay Consultation, run by the [Anti-Discrimination] Board, was aware that there was divided opinion amongst the gay and lesbian communities about the need for and value of introducing homosexual vilification into the law*": *Anti-Discrimination Board of NSW & Equal Opportunity Tribunal Annual Report 1990/91*, Sydney, NSW Government Printer, 1991, at p 56.

[20] *Report of the Anti-Discrimination Board and Equal Opportunity Tribunal for the Year Ended 30 June 1990*, p 41.

[21] Second Reading Speech, p 658.

[22] G.D. Comstock, *Violence Against Lesbians and Gay Men* (Columbia University Press: New York, 1991), at p 67.

[23] Id., at p 68. Where no language has been used by perpetrators, Comstock has suggested: "*Although language most commonly signals the anti-gay/lesbian orientation of attacks, the Winnipeg study finds that the location of incidents, such as parks used after dark almost exclusively by gay men; the apparent lack of another motive, such as robbery; and characteristics common to attacks upon lesbians and gay men, such as the age of and advantages used by perpetrators, are reliable indicators too.*"(p 69).

surroundings, both at home and at school, while adults tend to be a little more circumspect when expressing ideas. It is such behaviour-influencing language which is said to foster hatred toward gays and lesbians, often taking the form of (anti)-gay jokes.[24]

By way of example, one of the most brutal gay murders, that of Richard Johnson, was committed in 1990 by eight teenage schoolboys.[25] In the subsequent education campaign on homophobia and anti-gay violence conducted jointly by the NSW Police Service and school authorities, it emerged that ridiculing gays and lesbians was entrenched in school culture and that "gay jokes" began in kindergarten.[26]

Proponents of anti-vilification laws argue that violence and crimes against lesbian and gay citizens have real and tangible links to daily behaviour as a result of the messages which are imprinted in the cultural psyche by such language. Opponents of legislative measures argue that "gay jokes" and ridicule are ideas not violence; that speech conveys ideas rather than creates violence.

3. Language and the Bill: What is 'ridicule?

Violence against gay men and lesbians is condemned by all sides.

There is some uncertainty about the operation, though, of the anti-vilification provisions if they are enacted. What does the term "ridicule" mean, for instance, and how is this to be distinguished from "severe ridicule"?[27] As a

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[24] Sue Thompson (Gay/Lesbian Client Services Group, NSW Police Service) in a discussion with the writer.

[25] The young men had been playing basketball in the schoolyard and lured the murder victim to a nearby toilet block at the adjacent park. The victim was ambushed, struck to the ground and sustained multiple injuries as result of being hit, kicked and having his head and abdominal area stomped on. He eventually died from a ruptured liver.

All perpetrators were apprehended, convicted and sentenced (four on charges of murder, the remaining four on charges of manslaughter). The New South Wales Court of Criminal Appeal subsequently granted leave to three applicants to appeal against their convictions and to one against the severity of his sentence; all appeals were dismissed: *R v Howard; R v Mihailovic; R v Morgan; R v J* (1992) 29 NSWLR 242, per curium.

[26] Ibid.

[27] Similar arguments arose when the City of Minneapolis enacted an Ordinance which defined pornography ("the graphic, sexually explicit subordination of women") as a violation of women's civil rights and hence made certain uses of it actionable as sex discrimination. Also passed and signed into law in Indianapolis, Los Angeles, Cambridge, and Bellmingham, the Ordinance was found unconstitutional early in two decisions: *American Booksellers v Hudnut*, 598 F Supp 1316 (S D Ind 1984, per Barker J); *Hudnet v American Booksellers*, 771 F 2d 323 (7th Cir 1985, per Easterbrook J).

matter of law, it seems unlikely that such a term is able to be more specifically defined: to others, clearer statements of what is to be proscribed and clearer statements of how the law would apply in practice would be desirable to the situation of awaiting a "test case".

There are a number of possible explanations for the ambiguity surrounding words such as "ridicule". Much of the language targeted by anti-vilification legislation is arguably entrenched in the cultural psyche, to an extent that may prevent the rigid and practical assessment of what is ridicule and what is "normal". As the Anti-Discrimination Board has suggested:

> *Our research into discrimination against homosexuals highlighted the fact that much of the discrimination experienced by homosexuals takes the form of general and often subtle harassment that could not easily be dealt with under the Anti-Discrimination Act - ostracism, ridicule, sneering remarks, expressions of distaste or disgust, and various other manifestations of social disapproval.*[28]

A separate but related argument is that the line distinguishing "ridicule" from humour is finely drawn. Rendering humour unlawful, indeed actionable as sex discrimination, is not novel.

This was established by the NSW Equal Opportunity Tribunal in 1984 when it held that sexual harassment is sex discrimination[29], ie. less favourable treatment of a complainant on the basis of her sex within the meaning of section 24(1) of the Anti-Discrimination Act 1977. Sexual harassment in the workplace, according to the Tribunal, could include the telling of crude jokes, innuendoes, and references to sexual activity.

Commentators have noted the way in which humour has been a means of

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The Supreme Court of the United States summarily affirmed Judge Easterbrook's decision: 475 US 1001 (1986).

Much criticism of the Ordinance, as in the case of proposed anti-vilification provisions, centred on the alleged imprecision of terms such as "subordination" and "abasement": R Graycar & J Morgan, *The Hidden Gender of Law* (Sydney: Federation Press, 1990), at p 389. An immediate legal response is that many statutory terms have historically been left for judicial interpretation. Courts regularly interpret contentious or ambiguous terms as the need arises in the course of resolving issues between disputing parties. There is an entire body of legal doctrine devoted to statutory construction. Words are generally read in their context and if still ambiguous, preambles and dictionaries may be used to determine their meanings: A I MacAdam & T M Smith, *Statutes* (Sydney: Butterworths, 1993).

[28] The New South Wales Anti-Discrimination Board, *Discrimination and Homosexuality* (Sydney: ADB, June 1982), at p 34.

[29] *O'Callaghan v Loder & Anor* (1984) EOC ¶92-023.

underrating and trivialising problem.

> *Trivialisation of sexual harassment has been a major means through which its invisibility has been enforced. Humour, which may reflect unconscious hostility, has been a major form of that trivialisation. As Eleanor Zuckerman has noted, "Although it has become less acceptable to openly express prejudices against women, nevertheless, these feelings remain under the surface, often taking the form of humour, which makes the issues seem trivial and unimportant."*[30]

Furthermore, the EOT stipulated in *O'Callaghan* that any attempt at an exhaustive list was impossible "as human inventiveness would almost certainly find **other activities or approaches,** equally unwelcome and unpleasant, which might then be denied the label of harassment".[31] On this basis, it may well be argued that sexual harassment law is even more "vague" and "ambiguous" than the proposed anti-vilification provisions.

4. The Standard

The establishment of vilification claims, though, may well turn on the appropriate legal standard that is applied. This has already been demonstrated in the context of media vilification of women in NSW.

In 1988, Ron Casey broadcast comments on the Sydney radio station 2UE where he expressed disapproval at radical feminists, whom he equated with "dykes", but said he liked women. Mr Casey continued:

> *but I've always found whenever I've worked at various stations before getting the sack, that if you are nice to ugly girls, it sort of helps them - it boosts their day - it makes them feel good. And I've always made a practice wherever I work, of selecting the ugliest girls and as they walk by, give them a backhand pelvic flick.*
>
> *Now - this has one or two reactions. Either they turn around and slap my face, or they glow - and their ugliness melts away, and they think 'ah at last somebody wants me', and I think to myself - for the little backhand pelvic flick, I have made someone ecstatically happy. And they mightn't have been touched there for years.*

Amongst others, complaints were lodged by the Communications Law Centre to the Australian Broadcasting Tribunal on the basis that the broadcasts contravened the Radio Program Standards, No 3 of which provides that:

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[30] MacKinnon, op. cit., at p 52.

[31] Ibid

> A licensee may not transmit a programme which:
> (a) is likely to incite or perpetuate hatred against;
> (b) **gratuitously vilifies** any person or group on the basis of ethnicity, nationality, race, gender, sexual preference, religion or physical or mental disability.

The Centre initially commented:

> *It is our submission that the broadcast complained of gratuitously vilified and perpetuates hatred against women on the basis of their gender, and of some women, on the basis of their sexual preference.*[32]

The complainant also argued that Mr Casey's distinction between support for women on the one hand, but disapproval of feminists ("dykes") on the other, was misconceived:

> *Feminism is the position that supports sex equality, ie, equality between women and men. To say that one is not against women, but is against feminism, is to say that one supports women only to the extent that they remain not equal to men. We understand Mr Casey's remarks as indicating that though he "likes" women, he resents those who have, or aspire to having, equal status with men.*[33]

The Tribunal held that this Standard had not been breached by Mr Casey's remarks. In interpreting "program" and applying the standard of proof in deciding whether women (or lesbians) have been vilified, the Tribunal held that the test was whether the *reasonable listener* would in the circumstances have thought women had been vilified:

> *In this regard the yardstick should not be a person peculiarly susceptible to being roused to enmity, **nor one who takes an irrational or extremist view of the relations among groups.** The hypothetical listener should in the Tribunal's view, be described as an ordinary, reasonable person not immune from susceptibility to incitement, not holding prejudiced views on the topic in question.*[emphasis added][34]

In other words, the test is an objective one under law. Would the reasonable person have perceived the program as vilifying women on the basis of their sex? "Vilification" has occurred in the relevant sense (ie. making the programme

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[32] *Broadcast by Ron Casey on 2UE of Comments about a Sexual Harassment Case and Radical Feminists*, Australian Broadcasting Tribunal, unreported 4 December 1989, at p 2 (all references are to page numbers of the typescript). Note, though, that the Tribunal adopted "vilify" as meaning "to speak evil of, defame, traduce": at p 3.

[33] Id., at p 7.

[34] Id., at p 19.

unlawful under Standard No 3) only if it has occurred from the ordinary, unprejudiced person's standpoint, not from an "irrational or extremist view".

This proposition presents legal procedural difficulties if the homosexual anti-vilification provisions are to operate in the same manner. If the Tribunal in the above case was not using the reactions of women (or lesbians) to see if vilification had occurred, it is possible that a conflict of viewpoints may occur[35].

It may be argued that what is (severe) ridicule from the viewpoint of gays and lesbians is often not so by general community ie. heterosexual standards.[36] If the yardstick employed for deciding whether vilification has occurred is a strictly objective standard, common law may not take into account the viewpoint of the very group the proposed legislation is designed to support.

In its final comment, the Australian Broadcasting Tribunal summarised its position, recognising the clash between the yardstick the complainants (the CLC) were urging, and the "objective" test which was actually applied in deciding the case:

> *The comprehensive submission of the CLC argues a number of philosophical and legal propositions against which it analyses Mr Casey's broadcast and finds it in breach. The Tribunal, however, as it is required, assessed the broadcast in terms of the Radio Program Standards and current societal conventions as held by the ordinary, reasonable person.*
>
> *The Tribunal's view is that the ordinary, reasonable listener is not conversant with, and as such, does not hold the positions advocated by the CLC. Therefore, the finding by the Tribunal that the broadcast in question, whilst offending some listeners, did not breach RPS 2 and/or 3, should not be construed as a rejection by the Tribunal of the validity of all CLC propositions. Rather, it should be acknowledged that* ***the broadcast***

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[35] Many legal scholars have now rejected the possibility of true objectivity, universality and neutrality in law and its application. Catherine MacKinnon, for instance, described what feminist lawyers see as the male standpoint from which law operates as its purported "point-of-viewlessness": See R Graycar and J Morgan, op. cit., at 56-8. The suggestion is that neutrally-phrased legal doctrines and practices (like the "reasonable person" test) are very much coming from a particular point of view, but that such inherent subjectivity remains unarticulated.

Criminal law, for instance, largely employs openly subjective standards for liability; one must have the intent to perform a particular unlawful act before one is guilty of having committed a crime. This is sometimes imported into other areas of law, which is what makes the use of it problematic in an offence like "serious vilification": ridicule to the hypothetical reasonable, or ridicule to the person at whom the conduct is directed?

[36] In a sense, if there was no conflict of standards, there would probably be no perceived need for such legislation.

> ***was assessed against difference criteria reflecting the variances of sensitivity which exist to the issue of sexual equality.*** [emphasis added][37]

It could be argued that if the standard to be applied does not adopt the view of the group it seeks to protect, the effect of the legislation is narrowed. This issue may be subject to further examination when cases are taken under the proposed laws to the courts.

5. Free Speech

Free speech concerns often arise when any laws are proposed or enacted to circumscribe what is considered to be a fundamental human right.

However, no Western democracy provides for absolute freedom of speech under law. This includes the United States of America where the First Amendment to the Constitution[38] protects a citizen's right to freedom of speech.[39] Australian law and politics share this emphasis on rights, and especially the right to free speech.

Yet rights are not absolute and may often appear to be in conflict. Mary Ann Glendon has commented:

> *Our rights talk, in its absoluteness, promotes unrealistic expectations, heightens social conflict, and inhibits dialogue that might lead toward consensus, accommodation, or at least the discovery of common ground.*[40]

In this way, any right claimed by one citizen or group can be countered with an equal claim to do precisely the opposite. Thus, the right to free speech and freedom from State censorship in the context of reading or viewing pornography has recently been subjected to a systematic and detailed challenge from women's right to be free from the degradation, debasement and physical injury, and indeed not to have materials depicting such behaviour forced upon them.[41]

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[37] Supra n 43, at p 26.

[38] This provides in part that "Congress shall make no law ... abridging the freedom of speech or of the press".

[39] M.A. Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: The Free Press, 1991), at p 7.

[40] Id., at 14.

[41] A. Dworkin & C.A. MacKinnon, *Pornography & Civil Rights: A New Day in Women's Equality* (Minneapolis: Organising Against Pornography, 1988).

In the Australian context, the Equal Opportunity Commission has held that "entitlement to quiet employment" (that is, employment free from sexual harassment as discrimination) included the right to be free from:

> *the display on notice boards or in other places at work which employees of both sexes are expected or likely to see, of sexually explicit or implicit cartoons, display photographs of naked women or men, and publications featuring such photographs or containing such lewd or sexually suggestive printed material.*[42]

As already mentioned, sexual harassment provides an example of the type of speech which the law has said no-one has the right to utter.

Even under United States constitutional law, exceptions to the First Amendment right have been developed over the years. Certain categories of speech are recognised as not entitled to constitutional protection. One example is where the interest of the State in preventing tangible harm to a group or individual in society outweighs the interests of protecting someone else's right to free speech. Hence, the United States Supreme Court has held:

> *The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance ... [Child pornography] is not entitled to First Amendment protection.*[43]

Likewise, the Canadian Supreme Court has held that although the national obscenity laws infringed on the freedom of expression, it was legitimate to outlaw pornography that was harmful to women[44]:

> *Degrading or dehumanising materials place women (and sometimes men) in positions of subordination, servile submission and humiliation. They run against the principles of equality and dignity of all human beings.*[45]

In summary, regulating harm - even through the curtailment on freedom of speech - has always been accepted even in jurisdictions which give citizens

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[42] *Bennett v Everitt* (1988) EOC ¶92-244, per Einfeld J.

[43] *New York v Ferber* 458 US 747 (1982). In a similar way, one study demonstrated that segregation and segregative language in the United States harmed black children and created "... a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown v Board of Education* 347 US 483, 494 (1954).

[44] *R v Butler* [1992] 1 SCR 452.

[45] Ibid.

Constitutional guarantees to speak freely.[46]

If this proposition is applied to gay anti-vilification laws, the question becomes whether the "right" of gay men and lesbian women to be free from ridicule (as defined) outweighs the right of persons to exercise their "right" to free speech, no matter how offensive, degrading or indeed injurious it may be to homosexuals. Concern has been expressed that the legitimate views of individuals will be censored under the proposed legislation. (Another related concern, accepting that no right is absolute, has been whether such laws impinge on free speech "rights" more than they need to.)

In this context, it may be observed that racial vilification is already unlawful in New South Wales. If the argument is that homosexual anti-vilification laws are objectionable on free speech grounds, this argument may be applied to current NSW anti-discrimination law.

Nevertheless, the New South Wales Bill is targeted at "public" acts, which will often, if not almost always, involve speech.

6. Anti-Vilification Laws as "Special Treatment" for One Group

Laws directed at a particular identifiable group in society are always problematic. They raise the issue of why one group should receive special measures under law.[47]

It is argued that gay men and lesbian women undeniably find themselves in "special" circumstances where they are frequently attacked because of their sexual orientation. This peculiar situation is emphasised by the NSW Police Service: in a survey of 300 lesbian women conducted by police in 1991, 15% of respondents had been the victims of assault in the preceding 12 months. This means lesbian women are 7 to 30 times more likely to be the victims of assault than the remainder of the general population.[48] American studies demonstrate a victimisation rate at least twice as great and often up to, or more than, four times greater than the general population at large.[49]

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[46] J. Feinberg, *Offense to Others: The Moral Limits of Criminal Law* (New York: Oxford University Press, 1985).

[47] There was similar argument raised when the *Affirmative Action (Equal Opportunity for Women) Act* 1986 (Cth) was introduced.

[48] By comparison the Australian Bureau of Statistics Crime Victim Survey for 1990 indicates only 2.1% of the NSW population are victims of assault, threatened or actual, in a twelve month period.

[49] Comstock, op. cit.

At a local level, NSW Police Service data show that gay-related assaults accounted for 46% of all assaults dealt with by the Surry Hills police patrols in 1990. In 1991, this figure was 60 per cent.[50]

Connecticut, Massachusetts and Minnesota have specific authorisation to collect data on hate crime activity[51], and hence more extensive research is being generated on such comparative statistics in the United States. In February 1989, Connecticut issued its first statewide report, *Racial, Religion, Ethnic, and Sexual Orientation Crimes Annual Report, 1989.*

This Briefing Note was prepared to assist Members and, although every effort has been made to ensure its accuracy, it should not be taken as a complete guide to the subject area. It has no official status. This Briefing Note was prepared by Ryan Takach and Tony Clark. The views expressed are those of the authors. Should Members or their staff require further information about this Note, please contact Mr Tony Clark, Parliamentary Research Service, NSW Parliamentary Library (phone ext 2003).

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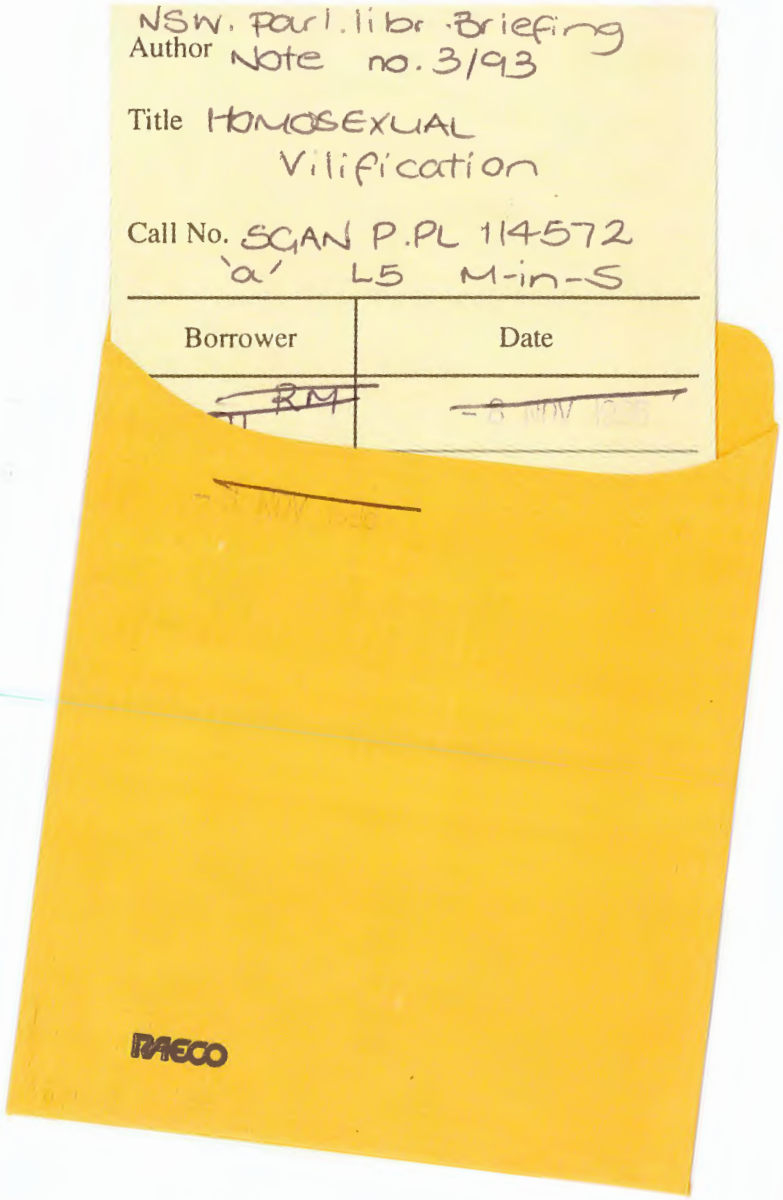
[50] New South Wales Police Service, Client Services Division. Sue Thompson, the Police Gay/Lesbian Client Liaison Officer, has suggested that it would interesting to do similar comparisons between the homicide rates for homosexuals and the general population in light of the increase in "gay murders" over recent years.

[51] See The Association of State Uniform Reporting Programs and The Center for Applied Social Research, *Hate Crime Statistics, 1990: A Resource Book* (US Department of Justice, FBI: Washington, 1992).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