INCITEMENT TO HATRED AND POLICY CONFUSION: SOCIAL COHESION OR COUNTERING TERRORISM?

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Summary

In 2006 in the United Kingdom and in 2010 in Australia new incitement to religious and racial hatred provisions were enacted. To date, scholarly analysis of these provisions has suggested their primary purpose is to protect vulnerable communities. Analysing the justifying discourse of key policymakers during debates, I argue by contrast that their primary purpose was as a counter-terrorism measure. I argue further that the public debate and the provisions themselves evince and entrench an epistemic confusion that is likely to be unhelpful in countering the real threats posed by terrorist extremist speech.

Keywords: Australia, counter-terrorism, extremism, racial hatred, religious hatred, United Kingdom

In 2006 in the United Kingdom and in 2010 in Australia new incitement to hatred provisions were enacted. In the United Kingdom the provision prohibits the incitement of religious hatred; in Australia the provisions prohibit the incitement of violence against members of the

community defined, among other things, on the grounds of race and religion. They were promoted by policy makers and analysed in secondary literature as providing protection to vulnerable communities. However, they were initiated and enacted in the context of far-reaching policy reform to counter terrorism, a context in which they were intrinsically enmeshed.

I will argue that these provisions are best understood as designed for, and a vital component of, these states' counter-terrorism efforts. I argue further that this rationale has been insufficiently appreciated in the scholarly literature to date, and that because, and to the extent to which, the two problems of countering racial and religious hatred[1] and countering terrorist extremist speech are distinct from one another, linking them in this way has caused epistemic and policy confusion.

The article proceeds as follows. First, I outline the provisions as introduced. Second, I review the secondary literature to show that in it, discussion of the rationales for these policies has emphasised their role in protecting vulnerable communities from harm. Third, I show that where there is some discussion in the secondary literature of a counter-terrorism rationale, this has been brief and demonstrates an epistemic confusion. Fourth, I examine primary sources on the context in which the provisions were introduced and enacted to show both that a counter-terrorism rationale was core to their introduction, and that the debate evidenced this epistemic confusion. I conclude by drawing out the implications of this confusion for the provisions' likely efficacy.

[1] The range of conduct defined as racial or religious hatred in law is wide indeed (Brown 2015: 19-38). For the purposes of this article, such conduct is treated as equivalent to 'hate speech' and is defined as discourse 'directed against a specified or easily identifiable individual … based on an arbitrary and normatively irrelevant feature' associated with historically identifiable, systemic discrimination, that 'stigmatizes the target group' and views them 'as an undesirable presence' (amending Parekh 2012: 40-41).

I adopt a comparative, historical case study[2] method that analyses these two countries' policy enactment and justifications. Case studies allow a depth that is not possible using other research methods (Willis 2007: 240). The comparative case study approach is particularly apt in relation to 'social research about practice and policy', and research that reflects on how 'policy profoundly shapes our view of the world' (Bartlett and Vavrus 2017: 1-2). The United Kingdom and Australia were chosen on the basis of a 'most similar' research design (Barasko et al. 2014: 179) because they have Westminster systems of government, share a commitment to policies that counter racial and religious hatred, and are close allies and members of the Five Eyes Alliance in counter-terrorism efforts. These similarities render the comparison valid, while also permitting the explication of differences in how the policies were achieved.

I. New incitement to hatred provisions

In the United Kingdom, the incitement to hatred provision enacted in 2006 was the last in a series of attempts to enact such an offence that began in 2001 (Bleich 2011: 23).[3] The *Racial and Religious Hatred Act 2006* introduced a new offence of inciting religious hatred into the *Public Order Act* (Pt 3A) (Ekaratne 2010: 212; Brown 2008: 3; Cumper 2006: 254-5; Goodall 2009: 90-91). In contrast to the pre-existing offence of racial hatred on which it was initially modelled (Nash and Bakalis 2007: 350-2), the new provision requires words, behaviour or written material to be threatening, and not merely abusive or insulting, and requires that the speaker intend thereby to stir up hatred (McNamara 2007: 171; Cumper

[2] Case study is an 'approach that uses in-depth investigation of one or more examples of a current social phenomenon, utilizing a variety of sources of data' (Jupp 2006: 20). Case studies 'illuminate the reader's understanding of the phenomenon under study. They can bring about the discovery of new meaning, extend the reader's experience, or confirm what is known' (Merriam 1998: 13, cited in Willis 2007: 239).
[3] E.g. as a component of the *Anti-Terrorism Crime and Security Bill* 2001; a component of the *Serious Organised Crime and Police Bill* 2004, and the topic of a Select Committee report on *Religious Offences in England and Wales* (2002-2003) HL95-1, 10 April 2003 which failed to reach agreement (Ekaratne 2010: 212; Hare 2006: 523-524; Bleich 2011: 23-25).

2006: 254-255; Goodall 2007: 90; Hare 2006: 524). These qualifications were introduced in response to the considerable parliamentary and community opposition, on free speech grounds, that mobilised in response to the proposal (Bleich 2011: 25; Brown 2008: 3-4; Cumper 2006: 255; Hare 2006: 524; Barendt 2011: 42-43). The enacted offence contains a wide-ranging exemption that protects, 'discussion, criticisms or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions' or their beliefs or practices, as well as proselytizing.

In Australia policy reform that began in 2005 eventually resulted in an incitement to hatred provision being introduced in 2010. In 2005 the Australian government, in the context of its broader counter-terrorism response to the London bombings, revived the concept of 'sedition'. One sedition provision criminalised the urging of violence against a group or groups distinguished by race, religion, nationality or political opinion, where the force or violence threatened the government (Meagher 2006: 290; Saul 2005: 876).[4] An exemption was included for attempting, in good faith, to change law or policy, fair reporting and industrial disputes. This is clearly not a straightforward religious (or other ground) incitement of hatred offence. First, it relied on a variety of grounds including race, religion and political opinion. Second, this offence connects the urging of violence to a threat to the government, which is why it was posited as a sedition offence. I have critiqued the contradictory rationales for this offence elsewhere (reference redacted for anonymity).

In 2010 the sedition offences were converted into incitement to racial and religious (and other grounds) hatred offences. They were renamed 'urging violence' offences, a requirement of

[4] *Anti-Terrorism Act (No. 2) 2005*, amending the *Criminal Code*, s 80.2(5).

intent that force or violence will occur was added, and they were disaggregated. Two offences retained a connection between the urging of violence against groups, or members of groups, and a threat to government. Two other offences were created of urging force or violence against groups, or members of groups, on any of the specified grounds, disconnected from a threat to government (Gelber 2016: 91). These two latter offences therefore introduced a criminal prohibition of the incitement of hatred. That the ground of political opinion remained in these two provisions continues to raise serious questions about their coherence. An argument could be made that free speech protections would likely render the criminalisation of incitement to hatred on the ground of political opinion illegitimate. However, I will leave that obvious problem to one side here.

II. Rationales in the literature

A review of the secondary, scholarly literature on these policies suggests they were motivated by a rationale of protecting vulnerable communities. The three most common rationales suggested are that the laws: 1) remedy pre-existing gaps in coverage of the law; 2) were a response to increases in anti-Muslim hate speech after the 2001 terrorist attacks; and 3) were needed as a counterpoint to the fact that counter-terrorism policy was impacting disproportionately on the Muslim community.

2.1 Coverage

The provisions in the United Kingdom were argued to be a response to gaps in the laws' coverage that did not provide protection to followers of all religions equally. There were three ways this occurred. First, the racial hatred provisions in the *Public Order Act* had been interpreted to mean some religious identities were covered but others were not. Where a case could be made that a religious identity was also an ethnic identity, in other words that a faith

was mono-ethnic (Goodall 2007: 93, 96, 98; Goodall 2009: 225; Nash and Bakalis 2007: 351-352), the incitement of hatred against that group was actionable as incitement of racial hatred. This meant that Jews and Sikhs were covered by racial hatred provisions, whereas Muslims, Hindus and other multi-ethnic faiths were not. This problem is contestable on the basis that, in the United Kingdom, Muslims are primarily South Asian and the terms can at times be used interchangeably (Goodall 2007: 96, 98). Nevertheless it gained significant traction in the public debate (Hare 2006: 525; Ekaratne 2010: 24; Thompson 2012: 216; Barendt 2005: 895), with 'pressure brought to bear on government by Muslim organizations that campaigned vigorously' on this ground (Cumper 2006: 253-254). Moreover, some claimed that hate speakers such as the British National Party were aware of, and exploiting, this gap in the law by tailoring their discourse to avoid direct reference to racial identities (Nash and Bakalis 2007: 356; Jeremy 2007: 197; Goodall 2007: 94).

In Australia, this same gap exists in relation to national racial hatred laws and in the states and Territory in which religion is not an explicit ground for protection under such laws (Evans 2012: 171-176). The same debate has occurred over the application of racial vilification provisions to some ethno-religious identities, such as Jews and Sikhs, but not others (Evans 2012: 65-67; Gelber 2011: 100-101). However, this was not an explicit component of the public debate over the introduction of sedition laws in 2005, or the creation of the incitement offences in 2010.

Secondly, a common law blasphemy provision extant at the time in the United Kingdom granted protection to Anglican Christians but did not protect other Christian denominations, or other faiths (Nash and Bakalis 2007: 352, 360-4; Hare 2006: 525; Cumper 2006: 2532; Brown 2008: 2). This argument is not entirely straightforward since the offence of blasphemy

had been interpreted in diverse ways in the courts (Jeremy 2007: 193). In 2008 UK blasphemy laws were abolished (House of Commons 2008). The same problem applies in Australia with blasphemy remaining an extant offence, which raises the same issues of coverage.

Third, other provisions can be, and have been, used to prosecute the conduct captured by the new incitement to religious hatred offence (Bleich 2011: 26). In the United Kingdom, possible alternatives include glorifying or encouraging terrorism, inciting terrorism or soliciting murder (Ekaratne 2010: 213-214), religiously aggravated abuse or violence, criminal harassment, incitement to crime or aggravated breach of the peace, as well as penalty enhancements if an offender is seen to be motivated by religious (or other) bigotry (Goodall 2007: 91-93). There is also an extant public order offence of engaging in conduct that is threatening, abusive or insulting that is likely to cause harassment, alarm or distress. Existing law therefore covered incitement to religious hatred in all but name (Bleich 2011: 26) and some questioned whether the gap in this respect was genuine, or a problem not with the law but with its enforcement (Goodall 2007: 92-94). In Australia, the same argument was made during debate over the 2005 provisions; that they were unnecessary because other laws existed that could be used to prosecute this kind of conduct including incitement to commit a crime, criminal harassment, and aggravated offences (Chong et al 2005).

Since the incitement to hatred offence was introduced as a hatred offence in the United Kingdom and not, as in Australia, under the aegis of sedition, arguments about coverage predominate in the literature on the United Kingdom. In relation to Australia, there is much less explicit consideration of the question of coverage, although the same arguments can be made in relation to extant law. The nomenclature of sedition inevitably framed the new

provision's justification. In 2005 the then Attorney-General emphasised that the new offences were aimed at modernising sedition laws (cited in Bronnitt and Stellio, 2006: 929), in response to a 1991 review of federal criminal law that had recommended their updating (Meagher 2006: 289). As Saul points out, this review had recommended a narrowing of the offence and the repeal of some provisions, which was not what occurred (2005: 872, 874). When the 2010 amendments were announced, the then federal Attorney General continued this discursive frame of the problem which the provisions were addressing (see e.g. McClelland 2009b; McClelland 2009c) – as one of updating sedition laws – and the issue of coverage was only mentioned in so far as the new offences covered 'individuals' as well as 'groups'.

2.2 An increase in anti-Muslim hate speech

The second rationale posited in the literature is that the provisions give protection to a community facing increased hate-motivated abuse after the 2001 terrorist attacks. In the United Kingdom, this rationale was explicitly connected to the enactment of the new provision (Bleich 2010: 70, 79; Cumper 2006: 253; Nash and Bakalis 2007: 352, 356, 365; Thompson 2012: 216; Rumney 2003: 138; Walker, 2011: 382). In Australia, numerous community and academic reports noted ongoing abuse and hatred towards Muslims, with a concomitant recognition that the 2001 terrorist attacks had led to an increase in such activities (Cahil et al. 2004: 79, 81, 84-5, 90; Dunn, Klocker and Salabay 2007: 568, 570; Dreher 2005; Briskman 2015).[5] Muslim community members interviewed for an empirical study into hate speech supported these findings (Gelber and McNamara 2015: 645). A parliamentary inquiry

[5] See also the special issue in which Brinkman (2015) is published, 'Islamophobia and Crime – Anti-Muslim Demonising and Racialised Targetting'.

into the draft legislation that introduced the 2005 provisions also explicitly raised this concern (PJCIS 2006: 23-24).

2.3 The disproportionate impact of counter-terrorism policy on the Muslim community

A third rationale in the literature is that incitement to hatred provisions were introduced to ameliorate the disproportionate impact of the enforcement of counter-terrorism policy on the Muslim community (Walker 2011: 382). In both countries, counter-terrorism laws were written in facially neutral ways. In both countries, it was recognised as unhelpful to the agenda of countering violent extremism to treat all members of the Muslim community as potential terrorists, and necessary to involve the Muslim community in counter-terrorism efforts. Thus, in the United Kingdom and other European countries, Bleich argues that anti-violence policies adopted as part of the counter-terrorism framework deliberately avoided explicit mention of Islam (Bleich 2010: 67, 70, 72). Yet at the same time the Muslim community was disproportionately affected by policies such as increased surveillance, tracking and scrutiny (Bleich 2011: 26; Bleich 2010: 69-71). In this context, the new religious incitement provision was 'meant to show that the state is not just listening but also acting upon Muslim concerns' (Bleich 2010: 79.). Other commentators also recognised the disproportionate impact of counter-terrorism policy on Muslim communities (Nash and Bakalis 2007: 365; Brown 2008: 3), and of the symbolic importance of the law in response to those concerns (Cumper 2006: 249.).

In Australia, governments also presented counter-terrorism policy in facially neutral terms. Yet it was also documented, including by a report of the Parliamentary Joint Committee on Intelligence and Security, that counter-terrorism policy enforcement was impacting disproportionately on the Muslim community, 'who feel under greater surveillance and

suspicion' and were becoming increasingly alienated (PJCIS 2006: 23-38; see also Michalis 2009; Spalek 2010; Islamic Council of New South Wales 2004).

These three rationales, then, were extant in both countries. In the United Kingdom, the incitement to religious hatred law was explicitly considered to be a remedy for gaps in the law's protection, a response to anti-Muslim attacks, and a response to the disproportionate impact of counter-terrorism policy on the Muslim community. In Australia the provision that developed into incitement to religious and racial (and other) hatred laws in 2010 was enacted in the context of a recognised increase in anti-Muslim hate speech, and the disproportionate impact of counter-terrorism policy on the Muslim community. Therefore, in both countries the secondary literature suggests that the provisions were designed to protect vulnerable communities from harm.

2.5 *A counter-terrorism rationale?*

What, then, has been made in the secondary literature of the possibility of a counter-terrorism rationale? I have suggested that this argument is brief, and where I draw below from secondary sources I am emphasising a small component of the authors' arguments. I also show that the literature exhibits a confusion in suggesting that the provisions are capable of capturing both phenomena – that of inciting hatred against vulnerable communities inside Western democratic states and that of inciting hatred against the West. This conflation, as I will argue below, is problematic.

Scholarly recognition of the counter-terrorism rationale has included that, in the United Kingdom the incitement to religious hatred provision was noted – very briefly – to be capable of targeting the kinds of incitement to religious hatred that might be engaged in by radical

Islamic preachers including, 'radical Muslim clerics … [who] stir up hatred against Christians and Jews' (Brown 2008: 2). This view argues that the incitement provision might in practice be used to target radical Muslim extremists who could contribute to an atmosphere in which people might be encouraged to be involved in terrorism, instead of being used exclusively to target incitement to religious hatred *per se*. Hare also suggested that the law might be used more frequently against radical Muslim preachers than against other speakers engaging in religious hatred (2006: 533).[6] Brown suggested that the Blair government in proposing a religious hatred offence, among other things, wished to 'eliminate the sort of climate of hatred which … might give rise to suicide bombers' (2008: 3). Countervailingly, Goodal argued that, 'terrorism and religious debate should not be carelessly compared' (2007: 109).

In the literature on the Australian provisions, Saul argued that the 2005 sedition provision 'falsely stigmatizes group-based violence as terroristic' and that 'collapsing these categories [of group based violence and terrorism] can only reinforce the stereotyping of certain ethnicities or religions as terrorists' (Saul 2005: 877). Meagher described the 2005 sedition provision was a type of 'racial vilification *and* sedition law', which was a seriously flawed 'seditious form of group racial incitement' (Meagher 2006: 290, 300). Both these analyses occurred shortly after the 2005 sedition laws were introduced, and with the exception of my

[6] This prediction has proved incorrect – there have been two successful prosecutions under the United Kingdom provision. One was a 2011 conviction of G Bilal Ahmad on a range of terrorism offences, an offence of soliciting to murder, and an offence of publishing written material with intent to stir up religious hatred. He had engaged in discussion online about a college that had prohibited Muslim students from wearing headscarves, and described Hindus in ways that vilified and incited violence against them (CPS 2011). The second was a 2015 conviction of three Sikh men (Satinderbir Singh, Harjinder Singh Athwal, and Damanpreet Singh) who engaged in an online discussion alleging risks to Sikh women who dated Muslim men. This conviction also took place in the context of other violent offences including conspiracy to commit, and occasioning, bodily harm (CPS 2016).

own contribution questioning the coherence of the provisions (reference removed for anonymity) no further scholarly analysis of the Australian provisions has occurred.[7]

There has, then, been very brief recognition of the existence of a counter-terrorism rationale in the scholarly literature. This has occurred first, in a recognition of the dual purpose of the provisions, which conflate preventing the incitement of hatred against the vulnerable with preventing terrorist extremism. Second, there has been (again brief) criticism of the connection between the two types of speech. However, this criticism did not occur on epistemic grounds, but instead in the more limited sense of critiquing the treatment of racist violence as terroristic violence. Additionally, none of these contributions suggests that the provisions are a core component of the counter-terrorism apparatus of the United Kingdom and Australia.

III. The policy making context: a central counter-terrorism rationale

Below, I provide evidence from primary sources to corroborate my argument that the counter-terrorism rationale is far more important than has been recognised to date, and that epistemic confusion existed in the policy debate.

In both the United Kingdom and Australia the terrorist events of September 2001 and July 2005 led to a flurry of counter-terrorism policy making (Barendt 2005; Cole 2003; Gearty 2013; Gelber 2016: 56-62; Roach 2011: 238-360; Smith 2007; Scheinin 2010; Walker 2011). An important component of this counter-terrorist law making in both countries after the 2005 London bombings was a desire to devise policy that would enable the government to

[7] There have been no prosecutions to date under the Australian provisions. The reasons for this are complex and myriad, and beyond the scope of this article's remit to explore.

intervene against, and prevent, the indirect enablers of violent extremism. This was because the London bombings had been perpetrated by three young men born and raised in the United Kingdom.[8] The kinds of policies enacted to try to address the indirect enablers of violent extremism included in the United Kingdom, criminalising the encouragement of terrorism, banning organisations that encourage or glorify terrorism, and banning displaying clothing or articles that symbolise prohibited groups.[9] Control orders were introduced for people who encouraged terrorism,[10] and publications that encourage terrorism were banned.[11] In Australia, similar measures included banning organisations that advocate terrorism,[12] banning terrorist-related publications,[13] and criminalising the advocacy of terrorism.[14]

Policy makers were explicit about their desire to establish new laws that would allow them to prevent terrorist radicalization at much earlier stages than the planning or commission of a terrorist act. In the United Kingdom, Home Secretary John Reid stated in 2006 that he was, 'determined to act against those who, while not directly involved in committing acts of terrorism, provide support for and make statements that glorify, celebrate and exalt the atrocities of terrorist groups' (cited in Bleich 2010: 74). In Australia, Prime Minister John Howard stated in 2005 that, 'there is a concern in the Australian community … [that] there are some who do encourage violence and hatred, and there are some who do give comfort and aid and encouragement and succour to terrorism' (Howard 2005a) and that the government needed to be able to prevent that. This view is supported in the scholarly literature. Bleich,

[8] Sidique Khan, Hassib Hussain and Shehzad Tanweer. A fourth, Jermaine Lindsay, was born in Jamaica (House of Commons 2006: 13-18).
[9] *Terrorism Act 2000*, ss 11, 12, 13; *Terrorism Act 2006* Cl. 21.
[10] *Prevention of Terrorism Act 2005*, s1(9); *Terrorism Prevention and Investigation Measures Act 2011*, s 4.
[11] *Terrorism Act 2006*, s 2; *Counter-Terrorism Act 2008*, s2(1).
[12] *Anti-Terrorism Act (No. 2) 2005*; *National Security Legislation Amendment Act 2010*, Sch. 2; *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014*.
[13] *Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Act 2007*; *National Security Legislation Amendment Act 2010*, Sch. 2.
[14] *Counter-Terrorism Legislation Amendment (Foreign Fighters Act) 2014*.

for example, cites Saggar in emphasizing how counter-terrorism policy in the United Kingdom targeted the 'circle of tacit support' around terrorists that 'helps to enable the perpetrators to carry out their acts' (2010: 69). Bronitt and Stellios point to the Australian government's shift to a focus on the perceived 'root causes' of terrorism (2006: 924).

Analysis of public debates attests to recognition of a counter-terrorism rationale in debates around the incitement to hatred provisions. The quotations cited below are representative of the public discourse in national security speeches, statements and press conferences by the Prime Ministers, Attorneys-General and Home Secretaries in the United Kingdom and Australia between September 2001 and September 2011.[15] A qualitative analysis of these texts was undertaken as a type of discourse analysis that sought to categorize language use. The political elites were chosen as the site for the study due to their authority in public discourse, especially their authority in justifying the chosen policy responses (Breuning 2011: 492; van Dijk 1997: 2; Chilton and Schäffner 1997: 211).

In the United Kingdom, political leaders linked racist and religious hatred and extremist terrorist speech very soon after 9/11. On 15 October 2001, Home Secretary David Blunkett's statement to the House of Commons on steps the government intended to take to counter terrorism said,

> there are those who are prepared to exploit the tensions created by the global threat. Racists, bigots, and hotheads, as well as those associating with terrorists, are prepared to use the opportunity to stir up hate. It is therefore my intention to introduce new laws to ensure that incitement to religious, as well as racial, hatred

[15] UK PM *n*=599, UK HS *n*=193, Aust PM *n*=701, Aust AG *n*=426. For the full study, see (reference removed for anonymity).

> will become a criminal offence. Fair comment is not at risk, only the incitement to hate … justice for the majority and the security of our nation will be secured (2001b).

He directly connected the need to protect some members of the community against religious hatred with the need to protect the community as a whole against terrorist threats. In justifying the unsuccessful attempt to introduce a religious hatred offence only weeks later, he stated that he hoped, 'that the provision will protect all those who have deeply held religious beliefs from having that faith used to incite hatred against them', while at the same time giving 'public reassurance and calm in our communities following the hatred and associated dangers arising from the events of 11 September' (Blunkett 2001c). In the House of Commons debate around a proposal to introduce such a law in 2001, then Home Secretary David Blunkett stated that introducing a religious hatred provision was done 'to try and meet genuine concerns at a time when reassurance and increased security and surveillance were judged to be necessary' (2001a: 1113-14, cited in Hare 2006: 523), thereby connecting reassuring the Muslim community with the effects of counter-terrorism policy.

In 2005, Prime Minister Tony Blair stated that, 'time and again over the past few weeks I've been asked to deal firmly with those prepared to engage in … extremism'. He announced that the government was developing a 'comprehensive framework for action in dealing with the terrorist threat' that was to include the addition of 'fostering hatred, advocating violence … or justifying such violence' as grounds for deportation, adding that people who tried to 'incite hatred or engage in violence against our country' had no place in the United Kingdom (Blair 2005). The treatment of religious hatred and extremism as analogous was marked. In a later statement on national security to the House of Commons, Prime Minister Gordon Brown continued this close discursive positioning of racial and religious hatred, and terrorist

extremism. He talked about new ‘dedicated regional counter-terrorism units’ which were ‘responsible for overseeing investigations into those who recruit terrorists and promote hate’, and of the need to ‘disrupt the promoters of violent extremism [and] … to counter online incitement to hatred’ (2007).

After the election of the Cameron government in 2010, then Home Secretary Theresa May signalled that she was aware of problems with this juxtaposition, saying the previous government had ‘muddled up work on counterterrorism with the normal work that needs to be done to promote community cohesion’ (2010). Six months later she reiterated the problem, saying the previous government had, ‘confused government policy to promote integration, with government policy to prevent terrorism’ (May 2011). However, her Prime Minister continued to warn against ‘preachers of hate’, meaning terrorist extremists.

In Australia, a connection between racial and religious hatred and terrorist extremist speech also emerged after 9/11. In October 2001 then Prime Minister John Howard was pressed in an interview on the question of whether Australia should introduce laws preventing terrorist propaganda, and he responded that although such a law would raise free speech concerns, a line was crossed when people incited violence. He added, ‘the difference between inciting violence and inciting hatred is very blurred’ (2001).

When the sedition laws were created in 2005, Prime Minister Howard wavered in this view, saying, ‘I do not think religious and racial vilification laws work, and we as a party have opposed them in the past … you can’t graft racial vilification laws into the law relating to sedition’ (2005b). However his Attorney General Phillip Ruddock contradicted him by stating that introducing such a law would constitute ‘in part implementation of Article 20 of

the ICCPR which requires State Parties to prohibit advocacy that incites violence, discrimination or hostility' (Ruddock 2005c, cited in SLCLC 2005). Ruddock conceded that the new offences criminalised incitement to hatred, when he stated that the new sedition offence would, 'address problems with those who incite directly against other groups in our community' (2005a repeated in Ruddock 2005b). One year after the 2005 sedition laws were introduced, and during a review of those laws undertaken by the Australian Law Reform Commission, the Attorney General made a submission that claimed there was a 'common theme between sedition and terrorism offences, that being, violence between racial groups' (Ruddock 2006: 3).

In 2009 the federal Labor government seemed to become aware of this confusion when it embarked on a 'Lexicon of Terrorism' project which cautioned against the counter-productive use of certain words that, 'can cause anxiety among Australians and create divisions' in the community, and encouraged words that were 'conscious of not alienating broad ethnic and religious groups by labelling them in a way that causes prejudice or leads to misunderstanding' (McClelland 2009d). However, this was later contradicted when the amendments that created the incitement to hatred provisions were being considered, and Attorney General Robert McClelland stated that 'countering violent extremism' was a top priority of the government, and that doing so required both security responses *and* measures to enhance social cohesion. He stated that it was in this context that the government was planning to implement a new offence of,

> inciting violence against an individual on the basis of race, religion or nationality … this would expand the opportunity for prosecuting those who attempt to induce others, including vulnerable youths, to commit acts of politically motivated violence (2009a).

In justifying the creation of the incitement to hatred offences, he elided incitement to racial and religious hatred and incitement to terrorist extremism, in the same way as in the United Kingdom. When the proposal to create the incitement to racial and religious hatred provision was put to the parliament in March 2010, the Attorney General reiterated the need for an 'effective legal framework' that is 'suited to the achievement of a just and secure society' (McClelland 2010), the same colocation of social cohesion and counter-terrorism measures as occurred in the United Kingdom.

I suggested earlier that treating the prevention of racial and religious hatred and responding to terrorist extremist speech in the same way amounts to epistemic confusion. In the past a connection between the kinds of extremist speech that could be captured by a racial hatred provision, and an atmosphere likely to give rise to terrorism, has been successfully made out. Rumney makes a persuasive case that right-wing terrorist extremists (such as Timothy McVeigh, responsible for the Oklahoma bombing in 1995, and David Copeland, who carried out nail bombings in London against black targets in 1999) were inspired by right-wing extremists tracts and that the racial hatred provisions in the United Kingdom were successfully used to suppress some of this material. He concluded that the counter-terrorism argument 'may provide a key justification for the regulation of the most provocative racist material' (2003: 143). Clearly, the kind of right-wing terrorism threat embodied by McVeigh's and Copeland's actions remains an extant threat.

However, another component of the terrorism threat today is based on a different ideology; an anti-Western ideology, which, while it is virulent in encouraging and inciting hatred against innocent targets in the West, nevertheless arguably requires a different explanatory framework. Deloughery, King and Asal argue that hate crimes and terrorism ought to be

'treated as distinct conduct for both theoretical and analytic purposes', and moreover that acts of terrorism tend to *increase* hate crimes against vulnerable communities (2012: 680-1). The two – the incitement of hatred[16] against vulnerable minorities, and the incitement of violence against Westerners – are not synonymous. I have also argued that hate speech directed at vulnerable minorities is phenomenologically to be distinguished from speech directed against Western governments (reference removed for anonymity). Yet when the United Kingdom government analogised the incitement of hatred against a vulnerable community with the incitement of hatred against the West by extremist radicals, it did not consider important differences between them that ought to be taken into account in forming policy.

Interestingly, the difficulty of analogising the protection of the vulnerable and a counter-terrorism rationale was recognized by a very small number of policy makers, but these actors did not achieve significant traction in the debate. In the United Kingdom, in response to the unsuccessful 2001 attempt to introduce a religious hatred law in the *Anti-Terrorism, Crime and Security Act*, some members of the House of Lords objected to the proposal (Hare 2006: 523). Sir Oliver Letwin in the House of Commons opined that 'there was never a place' in a 'Bill about terrorism' for 'a clause on incitement to religious hatred' (2001). This view did not prevail. For example, Labour MP Frank Dobson stated his support for outlawing discrimination on the ground of religious beliefs, and said he supported the government's proposal 'even though it was included in a Bill that relates to terrorism' (2001). In Australia, as has been noted, Prime Minister John Howard opined that, 'you can't graft racial vilification laws into the law relating to sedition' (2005b) while legislating to do just that.

[16] This is why I do not, in principle, support the use of the term 'hate' to categorize 'hate speech'. It implies that any expression of antipathy or dislike towards any target is substantively the core of the phenomenon. By contrast, 'hate speech' is better understood as a discursive act of harm in the sense of an act of exclusion, marginalization and discrimination targeted at those able to be identified as systemically vulnerable within the context in which the speech occurs (Reference removed for anonymity).

IV. Conclusion

The evidence substantiates my argument that the counter-terrorism rationale ought to be given primary emphasis in our understanding of the incitement to hatred provisions in both the United Kingdom and Australia. It also shows that the incitement of hatred against the systemically vulnerable and the incitement of hatred against Westerners were treated in policy debate as epistemically synonymous, and that the scholarly literature has not recognised this problem. This raises serious questions about the likely efficacy of these policies in achieving either, let alone both, of these policy objectives.

This epistemic confusion has become persistent. The use of the term 'hate preachers' to describe terrorist extremist preachers has become routine in the United Kingdom, Australia and other Western countries as shorthand to describe extremists who are capable of inciting terrorism. In August 2016 UK Prime Minister Theresa May announced new plans to combat extremism by 'hate preachers' (*The Telegraph* 2016). In Australia, the Immigration Minister stated in June 2016 that 'we won't tolerate people who are preaching hate in our country' (ABC News Radio 2016). In August 2016, former Australian Prime Minister Tony Abbott stated that he had abandoned an ill-fated 2014 attempt to reform federal racial hatred laws due, in part, to the fact that he was 'seeking ways to limit jihadi hate preachers' (Sydney Morning Herald 2016: 3). The countervailing, even incompatible, rationales underpinning the introduction of the incitement to hatred provisions in the United Kingdom in 2006 and in Australia in 2010 have contributed to the use, today, of a term that treats all incitement to 'hatred' as synonymous. While this is no doubt useful in harnessing civil society support to justify new counter-terrorism policies, it may not be helpful in combatting the very real threats posed by all kinds of terrorist extremist speech.

Reference list

ABC News Radio (2016, 14 June) 'Government reviewing visa for visiting Islamic preacher', 18:05:00.

Barasko, M.; Sabet, D. and Schaffner, B. (2014) *Understanding Political Science Research Methods,* New York, Routledge.

Barendt, E. (2005) 'Threats to Freedom of Speech in the United Kingdom?', *University of New South Wales Law Journal: Forum* **28,** 3: 895-899.

Barendt, E. (2011) 'Religious Hatred Laws: Protecting Groups or Belief?', *Res Publica* **17**, 41-53.

Bartlett, L. and Vavrus, F. (2017) *Rethinking Case Study Research: A Comparative Approach,* New York, Routledge.

Blair, T. (2005) 'Monthly Press Conference', 5 August, accessed at http://webarchive.nationalarchives.gov.uk/20061004051823/http://number10.gov.uk/page8041 on 22 June 2016.

Bleich, E. (2010) 'Faith and State: British Policy Responses to "Islamist" Extremism' In: Eatwell, R. and Goodwin, M. (eds.) *The New Extremism in 21st Century Britain,* London: Routledge, pp. 67-84.

Bleich, E. (2011) *The Freedom to be Racist? How the United States and Europe Struggle to Preserve Freedom and Combat Racism,* Oxford, Oxford University Press.

Blunkett, D. (2001a) 'House of Commons Hansard', 13 December, Columns 1113-1114.

Blunkett, D. (2001b) 'House of Commons Hansard: Statement to House of Commons on Legislative Steps to Counter Terrorism', 15 October.

Blunkett, D. (2001c) 'House of Commons Hansard: Second Reading Speech, Anti-Terrorism, Crime and Security Bill 2001', 19 November.

Breuning, M. (2011) 'Content Analysis' In: Ishiyama, J. and Breuning, M. (eds.) *21st Century Political Science: A Reference Handbook*, Thousand Oaks, Sage, pp. 490-496.

Briskman, L. (2015) 'The creeping blight of Islamophobia in Australia', *International Journal for Crime, Justice and Social Democracy* **4**, 3, 112-121.

Bronitt, S. and Stellios, J. (2006) 'Sedition, Security and Human Rights: "Unbalanced" Law Reform in the "War on Terror', *Melbourne University Law Review* **30**, 923-960.

Brown, A. (2008) 'The Racial and Religious Hatred Act 2006: A Millian Response', *Critical Review of International Social and Political Philosophy* **11**, 1, 1-24.

Brown, A. (2015) *Hate Speech Law: A Philosophical Examination*, New York, Routledge.

Brown, G. (2007) 'House of Commons Hansard: Statement on National Security', 14 November.

Cahill, D.; World Conference on Religion and Peace; Monash University; Australian Multicultural Foundation; RMIT University; Department of Immigration and Multicultural and Indigenous Affairs (2004) *Religion, Cultural Diversity and Safeguarding Australia*, Canberra, Department of Immigration and Multicultural and Indigenous Affairs.

Cameron, D. (2011) 'Speech at Munich Security Conference', 5 February, accessed at http://webarchive.nationalarchives.gov.uk/20111004142240/http://www.number10.gov.uk/news/pms-speech-at-munich-security-conference/ on 22 June 2016.

Chilton, P. and Schäffner, C. (1997) 'Discourse and Politics' In: van Dijk, T. (ed.) *Discourse as Social Interaction*, Thousand Oaks, Sage, pp. 206-230.

Chong, A., Emerton, P., Kadous, W., Petitt, A., Sempill, S., Sentas, V., Stratton, J. and Tham, J. (2005) 'Laws for Insecurity? A Report on the Federal Government's Proposed Counter-Terrorism Measures', accessed at http://www.amcran.org/images/stories/Laws%20for%20Insecurity%20Report.pdf on 1 September 2006.

Cole, D. (2003) *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism*, New York, New Press.

Crown Prosecution Service (2011) 'CPS Statement on Bilal Ahmad', 29 July.

Crown Prosecution Service (2016) 'The Counter-Terrorism Division of the Crown Prosecution Service (CPS) – cases concluded in 2015. Report for the CPS', 19 July.

Cumper, P. (2006) 'Outlawing Incitement to Religious Hatred – a British Perspective', *Religion and Human Rights* **1**, 249-268.

Deloughery, K.; King, R. and Asal, V. (2012) 'Close Cousins or Distant Relatives? The Relationship between Terrorism and Hate Crime', *Crime and Delinquency* **58**, 5, 663-688.

Dobson, F. (2001) 'House of Commons Hansard', 13 December, Column 1118.

Dreher, T. (2005) *Targeted Experiences of Racism in NSW After September 11, 2001*, Ultimo, University of Technology Sydney Press.

Dunn, K.; Klocker, N. and Salabay, T. (2007) 'Contemporary Racism and Islamaphobia in Australia – racializing religion', *Ethnicities* **7**, 4, 564-589.

Ekaratne, S. (2010) 'Redundant Restriction: The UK's Offense of Glorifying Terrorism', *Harvard Human Rights Journal* **23**, 205-221.

Evans, C. (2012) *Legal Protection of Religious Freedom in Australia* Sydney, Federation Press.

Gearty, C. (2013) *Liberty and Security*, Cambridge, Polity Press.

Gelber, K. (2011) 'Religion and Freedom of Speech in Australia' In: Hosen, N. and Mohr, R. (eds.) *Law and Religion in Public Life: The Contemporary Debate*, London, Routledge, pp. 95-111.

Gelber, K. (2016) *Free Speech After 9/11*, Oxford, Oxford University Press.

Gelber, K. and McNamara, L. (2015) 'The Effects of Civil Hate Speech Laws: Lessons from Australia', *Law and Society Review* **49**, 3, 631-664.

Goodall, K. (2007) 'Incitement to Religious Hatred: All Talk and No Substance?', *Modern Law Review* **70**, 1, 89-113.

Goodall, K. (2009) 'Challenging Hate Speech: Incitement to Hatred on Grounds of Sexual Orientation in England, Wales and Northern Ireland', *The International Journal of Human Rights* **13**, 2-3, 211-232.

Hare, I. (2006) 'Crosses, Crescents and Sacred Cows: Criminalising Incitement to Religious Hatred', *Public Law*, Autumn, 521-538.

House of Commons (2006) 'Report of the Official Account of the Bombings in London on 7th July 2005', Report no. HC1087, London: House of Commons.

House of Commons (2008) 'The Abolition of the Blasphemy Offences, Report no. SN/PC/04597', 9 May, London: House of Commons.

Howard, J. (2001) 'Radio Interview with Alan Jones 2UE', 8 October, accessed at http://pandora.nla.gov.au/pan/10052/20020221-0000/www.pm.gov.au/news/interviews/2001/interview1369.htm on 20 June 2016.

Howard, J. (2005a) 'Opening Remarks at the Meeting of Islamic Leaders', 23 August, accessed at http://pandora.nla.gov.au/pan/10052/20051121-0000/www.pm.gov.au/news/speeches/speech1517.html on 15 July 2016.

Howard, J. (2005b) *Interview with Laurie Oakes*, Channel 9, 30 October.

Islamic Council of New South Wales (2004) *Challenges for Australian Muslims: Discrimination, Anti-Terrorism, and the Media*, Chullora, ICNSW.

Jeremy, A. (2007) 'Practical Implications of the Enactment of the Racial and Religious Hatred Act 2006', *Ecclesiastical Law Journal* **9**, 2, 187-201.

Jupp, V. (ed.) (2006) *The Sage Dictionary of Social Research Methods*, London, Sage.

Letwin, Sir O. (2001) 'House of Commons Hansard', 13 December, Column 1115.

May, T. (2010) 'Speech to Royal United Services Institute: Our Response to the Terrorist Threat', 3 November, accessed at http://webarchive.nationalarchives.gov.uk/20110109132028/http://www.homeoffice.gov.uk/media-centre/speeches/terrorist-response on 22 June 2016.

May, T. (2011) 'House of Commons Hansard: Statement to the House on the Review of PREVENT' 7 June.

McClelland, R. (2008) 'Speech to "Security in Government Conference"', 16 September, accessed at http://pandora.nla.gov.au/pan/21248/20081120-1617/www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/Speeches_2008_16September2008-SecurityinGovernmentConference2008.html on 26 August 2016.

McClelland, R. (2009a) 'Speech to Australian Strategic Policy Institute', 21 July, accessed at http://pandora.nla.gov.au/pan/21248/20100723-1500/www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2009_ThirdQuarter_21July2009-SpeechtotheAustralianStrategicPolicyInstitute.html on 20 June 2016.

McClelland, R. (2009b) 'Media Release: National Security Legislation Discussion Paper', 12 August, accessed at http://pandora.nla.gov.au/pan/21248/20100723-1500/www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2009_ThirdQuarter_12August2009-NationalSecurityLegislationDiscussionPaper.html on 27 July 2016.

McClelland, R. (2009c) 'Ministerial Statement: Reforms to National Security Legislation', 12 August, accessed at http://pandora.nla.gov.au/pan/21248/20100723-1500/www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2009_ThirdQuarter_12August2009-MinisterialStatementReformstonationalSecurityLegislation.html on 27 July 2016.

McClelland, R. (2009d) 'Media Release: Lexicon of Terrorism Project', 6 July, accessed at http://pandora.nla.gov.au/pan/21248/20100723-1500/www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2009_ThirdQuarter_6July2009-LexiconofTerrorismProject.html on 26 August 2016.

McClelland, R. (2010) 'Hansard: Second Reading Speech – National Security Amendment Bill', 18 March.

McNamara, L. (2007) *Human Rights Controversies: The Impact of Legal Form*, Routledge Cavendish, Oxon.

Meagher, D. (2006) 'Inciting Racial Violence as Sedition: A Problem of Definition?', *Criminal Law Journal* **30**, 289-301.

Michalis, M. (2009) 'Australia's Handling of Tensions between Islam and the West under the Howard Government', *Asian Journal of Political Science* **17**, 1, 45-70.

Nash, D. and Bakalis, C. (2007) 'Incitement to Religious Hatred and the "Symbolic": How Will the Racial and Religious Hatred Act 2006 Work?', *Liverpool Law Review* **28**, 349-375.

Parekh, B. (2012) 'Is There a Case for Banning Hate Speech?' In: Herz, M. and Molnar, P. (eds.) *The Content and Context of Hate Speech*, Cambridge, Cambridge University Press, pp. 37-56.

Parliamentary Joint Committee on Intelligence and Security (2006) *Review of Security and Counter Terrorism Legislation*, 4 December, Canberra, Parliament of Australia.

Roach, K. (2011) *The 9/11 Effect: Comparative Counter-Terrorism*, Cambridge University Press, Cambridge.

Ruddock, P. (2005a) 'Hansard: Second Reading: Anti-Terrorism Bill (No. 2) 2005', 3 November.

Ruddock, P. (2005b) 'Hansard: Response to Questions in Writing', 29 November.

Ruddock, P. (2005c) 'Attorney General's Submission No. 190A to the SLCLC Inquiry into Provisions of the Anti-Terrorism Bill (No. 2) 2005. Attachment A, Canberra, Parliament of Australia.

Ruddock, P. (2006) 'Attorney General's Submission No. 92 to the Australian Law Reform Commission's Fighting Words: A Review of Sedition Laws in Australia', Canberra, Attorney General's Office.

Rumney, P. (2003) 'The British Experience of Racist Hate Speech Regulation: A Lesson for First Amendment Absolutists?', *Common Law World Review* **32**, 117-160.

Saggar, S. (2009) 'Boomerangs and Slingshots: Radical Islamism and Counter-terrorism Strategy', *Journal of Ethnic and Migration Studies* **35**, 3, 381-402.

Saul, B. (2005) 'Speaking of Terror: Criminalising Incitement to Violence', *University of New South Wales Law Journal* **28**, 868-886.

Scheinin, M. (2010) *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, A/HRC/16/51, 22 December.

Senate Legal and Constitutional Legislation Committee (2005) 'Provisions of the Anti-Terrorism Bill (No. 2) 2005', Canberra, Parliament of Australia.

Smith, A. (2007)' Balancing Liberty and Security? A Legal Analysis of United Kingdom Anti-Terrorist Legislation', *European Journal on Criminal Policy and Research* **13**, 1-2, 73-83.

Spalek, B. (2010) 'Community Policing, Trust and Muslim Communities in Relation to "New Terrorism"', *Politics and Policy* **38**, 4, 789-815.

Sydney Morning Herald (2016, 13-14 August) 'Abbott Revisits Debate Over Free Speech Law', p. 3. (Massola 2016).

The Telegraph (2016, 17 August) 'Ministers Looking at Banning Hate Preachers From Mosques and Universities to Curb Radicalisation after Anjem Choudary Conviction'.

Thompson, S. (2012) 'Freedom of Expression and Hatred of Religion', *Ethnicities* **12**, 2, 215-232.

Van Dijk, T. (1997) 'The Study of Discourse' In: van Dijk, T. (ed.) *Discourse as Structure and Process*, Thousand Oaks, Sage, pp. 1-34.

Walker, C. (2011) *Terrorism and the Law*, Oxford, Oxford University Press.

Willis, J. (2007) *Foundations of Qualitative Research*, Thousand Oaks, Sage.