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No. 42 2003–04

Protection of Australian Flags (Desecration of the Flag) Bill 2003

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I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

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No. 42 2003–04

Protection of Australian Flags (Desecration of the Flag) Bill
2003

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Law and Bills Digest Group
3 October 2003

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Protection of Australian Flags (Desecration of the Flag) Bill 2003

Date Introduced: 18 August 2003

House: House of Representatives

Portfolio: Private Members Bill¹

Commencement: Royal Assent

Purpose

To amend the *Flags Act 1953* in order to criminalise the desecration, dishonouring or destruction of the Australian National Flag (or ‘the Flag’), the Australian Merchant Navy Ensign, the Royal Australian Navy Ensign and the Royal Australian Air Force Ensign.

Background

The Background section of this Digest describes the Flags Act, some of the proposals that have been made previously to prohibit flag burning in Australia, other criminal laws that may be relevant if a person burns the Flag, and some of the responses to the Protection of Australian Flags (Desecration of the Flag) Bill 2003.

Flags Act 1953 (Cwlth)

There is no head of power in the Commonwealth Constitution dealing with flags. However, the Commonwealth Parliament’s ability to make laws about flags appears securely grounded in the executive power (section 61) combined with the express incidental power [section 51(xxxix)]. The implied nationhood power may be another source of constitutional power to make laws about flags.

The Commonwealth Parliament did not use its power to make laws about flags until 1953. In his Second Reading Speech for the Flags Bill 1953, Prime Minister Robert Menzies commented:

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The bill will set out legislatively something that represents common practice and a common view in our country. It declares the Australian Blue Ensign to be the Australian National Flag. It re-designates the Australian Red Ensign to be the Australian marine flag. It gives the Governor-General power over certain matters of detail. ... Finally, the bill preserves the right of any person, if that is necessary, to fly the Union Jack.²

As Prime Minister Menzies indicated, the Flags Act:

- gives legislative recognition to two flags—the Australian National Flag³ and the Australian Red Ensign⁴
- enables the Governor-General, on the advice of Federal Executive Council, to proclaim ‘other flags and ensigns of Australia’.⁵ The Royal Australian Navy Ensign, the Royal Australian Air Force Ensign, the Aboriginal Flag, the Torres Strait Islander Flag and the Australian Defence Force Ensign are the flags and ensigns that have been proclaimed under the Flags Act, and
- enables the Governor-General, on advice of the Federal Executive Council, to make and publish guidelines for flying and using flags or ensigns.

There have been few substantive amendments to the Flags Act. Most recently, the Act was amended to provide that the Australian National Flag can only be changed if the Flag and a new flag or flags are submitted to the Australian electors and a majority of all electors who actually vote agree on a new flag.⁶

Proposals for flag desecration laws in Australia

The issue of flag protection has been raised in Parliament on a number of occasions. For example, during the Second Reading Debates on the Flags Bill 1953, Arthur Calwell (ALP) called for legislation modelled on US laws, remarking:

The Americans will not permit their flag to be defaced. The Stars and Stripes is honoured in America and nobody is allowed to place upon it a superscription of any kind or to do anything to interfere with the approved design.⁷

In 1967, in answer to a question about whether the Government would legislate to criminalise flag burning, Attorney-General Nigel Bowen (Lib) replied:

It is not an offence against the law at the present time to burn an Australian flag. Whether any change should be made in the law is perhaps a matter of policy, but one could express the view that in the past we have been able to count on the good sense of the Australian people and their sentiment for their flag to ensure that the flag is given proper respect. Isolated acts that may have been committed recently do not seem to constitute a case at the moment for making a specific law about this matter.⁸

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In 1989, a private member's bill was introduced by Michael Cobb MP (Nat) to make it an offence to desecrate, dishonour, burn, mutilate or destroy the Australian National Flag or an Australian Ensign, without lawful authority.⁹ An 'Australian Ensign' was defined as the Australian White Ensign, the Australian Red Ensign or the Royal Australian Air Force Ensign. The maximum penalties were 2 years imprisonment or a fine of \$5,000 or both. Mr Cobb re-introduced his Bill in 1990, 1991 and 1992.¹⁰ On each occasion, the Bill lapsed.

In 1996, Roger Price MP (ALP) said in Parliament that he had 'earlier developed a private member's bill ... [preventing] the burning or defacing of the Australian flag'.¹¹ He continued:

... but I regret that circumstances prevented me from proceeding with that bill. On my side of the House, a lot of people would probably object very vigorously to that provision, so great do they hold this democracy of ours in Australia. They believe that people have an inalienable right to protest and that a test of that protest even comes when symbols of our country are damaged in that way ...¹²

In November 2002, Deputy Prime Minister Anderson called for anti-flag burning laws after an anti-war protest in Melbourne during which Australian and United States flags were burned.¹³ In March 2003, there were further calls for flag protection laws after another anti-war protest, this time in Perth, involved the burning of the Australian Flag.¹⁴ United States flags were also reportedly burned in protests in Sydney, Melbourne and Canberra in March 2003.¹⁵

On 16 April 2003, a Flag Protection Bill was introduced into the Western Australian Parliament by Opposition Leader Colin Barnett. As introduced, the Bill contained offences of burning, damaging, or otherwise physically mistreating the Australian National Flag, the Western Australian State Flag or a reproduction¹⁶ of either flag in a manner that:

- is intended to cause offence to any person or persons; or
- could reasonably be expected to cause, and which in fact causes, offence to any other person or persons.

The penalty is a fine of \$6000.

Suggestions have sometimes been made that an offence of burning a foreign flag should be created. For example, when the Indonesian flag was burnt in Darwin in 1995 and then in Melbourne by protesters, the Defence Minister, Senator Robert Ray (ALP), suggested that the Government might have to consider outlawing the burning of foreign flags.¹⁷ This suggestion was rejected by other ALP members, such as then ALP President, Barry Jones. The Shadow Minister for Foreign Affairs, Alexander Downer (Lib), said he regretted that the Indonesian flag had been burned but thought that prohibiting the burning of foreign

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flags would be impractical, generate substantial publicity and could be counter-productive.¹⁸

Other criminal offences that may be relevant if a Flag is burned

The absence of flag burning laws from Australian statute books does not mean that, in appropriate cases, no charges are available. For instance, Commonwealth, State and Territory criminal law includes public order offences and offensive or disorderly conduct offences. In answer to a question asked in Parliament in 1989, following an incident where the Flag was burned in the forecourt of Parliament House, Madam Speaker said:

It would appear that the only offences available are as follows: offensive behaviour contrary to section 546a of the Crimes Act 1900 of New South Wales in its application to the Australian Capital Territory; behaving in an offensive or disorderly manner contrary to section 12 of the Public Order (Protection of Persons and Property) Act; and malicious damage to property by fire under section 128 of the Crimes Act 1900 if it could be established that the flag was burnt without the owner's consent.

In the context of the above offences, offensive behaviour has been held by the courts to be conduct calculated to wound feelings, or arouse anger, resentment, disgust or outrage in the mind of a reasonable person. While I personally think that the burning of an Australian flag was offensive, the nature of any response in such circumstances must be left to the discretion of the law enforcement officers in attendance, who are always mindful of the need not to provoke confrontation or violence. However, the offences I have just detailed may be of assistance to them if there is a similar occurrence in the future.¹⁹

When the Flag was burned in Perth early in 2003, a charge of 'disorderly conduct by creating a disturbance in St Georges Terrace, Perth, contrary to section 54 of the Police Act' was laid against a youth who participated in setting fire to the flag.²⁰

Responses to the Protection of Australian Flags (Desecration of the Flag) Bill 2003

It has been reported that the Bill has the support of a number of Government members.²¹ The Deputy Prime Minister, Peter Costello, Opposition Leader, Simon Crean, and Australian Democrats Leader, Senator Andrew Bartlett are all reportedly opposed to banning flag burning.²²

Initially, it appeared that the Bill would be debated and Government members allowed a conscience vote. However, recent reports indicate that the Prime Minister does not support the Bill and that it is unlikely to be considered by Parliament.²³

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Main Provisions

Item 1 of the Schedule inserts **proposed section 7A** into the *Flags Act 1953*. It appears that the reference in the Bill to ‘section 27’ of the Flags Act should be a reference to ‘section 7’ of that Act.

Proposed subsection 7A(1) will create offences of:

- desecrating or otherwise dishonouring the Australian National Flag or an Australian Ensign, or
- burning, mutilating or otherwise destroying the Australian National Flag or an Australian Ensign, without lawful authority.

The application of Chapter 2 of the Criminal Code [**see proposed subsection 7A(5)**] means that fault (or mental elements) will need to be proved for the physical element of each offence. For instance, the prosecution will need to show that the desecration or dishonouring was an intentional act.

The maximum penalty is set at 100 penalty units (\$11 000).

The ‘Australian National Flag’ is the dark blue flag described in Schedule 1 of the Flags Act and reproduced in Schedule 2 of that Act.²⁴ Its distinguishing features are the Union Jack, the Federation Star and the Southern Cross.

The expression, ‘Australian Ensign’, is defined in **proposed subsection 7A(2)** of the Bill to mean the ensigns of the Australian Merchant Navy (the Australian Red Ensign²⁵), the Royal Australian Navy (the Australian White Ensign²⁶) and the Royal Australian Air Force.²⁷

Two defences are set out in **proposed subsections 7A(3) and (4)**. Thus, it will not be an offence if:

- an image of an ‘Australian Flag’ or an Australian Ensign is reproduced on an ‘item or article’ and that image is damaged as a result of ‘ordinary use’ of the item or article, or
- a person disposes of an ‘Australian Flag’ or an Australian Ensign because it is ‘worn, soiled or damaged’.

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Concluding Comments

Offences

The proposed offences raise some definitional and other issues.

Desecrating or otherwise dishonouring

The offence proposed in paragraph 7A(1)(a) involves ‘desecrating or otherwise dishonouring’. The *Macquarie Dictionary* defines ‘desecrate’ as:

To divest of sacred or hallowed character or office; divert from a sacred to a profane purpose; treat with sacrilege; profane.

Among the meanings of ‘dishonour’ found in the *Macquarie Dictionary* are:

to deprive of honour; disgrace; bring reproach or shame on.

A wide range of behaviours might conceivably come within the ambit of ‘desecrating’ or ‘dishonouring’ protected flags and ensigns, including cutting them up, trampling on them and spitting on them. However, the offences are not strict liability offences. Because Chapter 2 of the Criminal Code applies, the prosecution will need to prove an intention to desecrate or dishonour. The Criminal Code says that a person will have intention ‘with respect to conduct if he or she means to engage in that conduct.’²⁸

As well as covering conduct involving the Flag itself and protected ensigns, the Bill appears to extend to conduct involving reproductions and images of the Flag and protected ensigns. If the relevant physical and fault elements are proved by the prosecution might there be circumstances where a person could be convicted of an offence of desecrating or dishonouring the Flag because of the way that it is reproduced or where it is reproduced? Further, does the reach of the Bill extend beyond physical objects to poems, songs or other words that intentionally dishonour the Flag and protected ensigns?

How easy it will be for the prosecution to prove an intention to desecrate or dishonour the Flag or a protected ensign is another matter.

Burning, mutilating or otherwise destroying

The second offence contained in the Bill is that proposed in paragraph 7A(1)(b). This does not require an intention to ‘desecrate’ or ‘dishonour’ but rather an intention to burn, mutilate or otherwise destroy, without lawful authority. The *Macquarie Dictionary* defines ‘mutilate’ as ‘to injure, disfigure, or make imperfect by removing or irreparably damaging parts’. It defines ‘destroy’ as ‘to reduce to pieces or to a useless form; ruin; spoil, demolish’.

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The wording of the second offence raises a number of questions. For example, would an artist who cuts up a protected Flag for an artwork, such as a collage, be caught by the offence? Further, while the Bill attempts to protect ‘ordinary uses’ of reproduced flags, some ‘reproductions’ may not be protected. Because the words ‘mutilate’ and ‘destroy’ are not expressly restricted to physical mutilation of a Flag, might they extend to disfiguring or spoiling an image of the Flag—for instance, as part of a campaign to change the Flag itself? In 1992, the following question was asked in Federal Parliament:

Senator PARER—My question is directed to the Minister for Administrative Services. I ask the Minister, as the custodian of national symbols, whether his office is promoting the desecration and denigration of our flag by selling T-shirts imprinted with the national flag but with the Union Jack removed and in its place the words ‘Jack Off’.²⁹

The Minister for Administrative Services, Senator Nick Bolkus, replied:

I think it is fair to say that a lot of people in Australia—an overwhelming, and a growing, number of people in Australia—are, in one way or another, getting into the debate on the flag. One of my staff has, at no cost to the Government or the public, been selling T-shirts for some time now as a fund-raiser. I am glad to see that last week she sold out, but she will be getting more. She has raised an enormous amount of money as a fund-raiser, as I have said. In response to the first part of Senator Parer’s question, my office is not desecrating the flag.³⁰

Might producing the fund-raising T-shirt described above give rise to an offence under **proposed paragraph 7A(1)(b)** of intentionally mutilating or destroying the Flag? Might there be circumstances where a producing a mutilated image of the Flag would result in a person being charged with intentionally desecrating or dishonouring the Flag under paragraph 7A(1)(a)?

‘Without lawful authority’

Proposed paragraph 7A(1)(b) creates an offence of burning, mutilating or otherwise destroying a protected flag or ensign ‘without lawful authority’. It is not clear whether ‘without lawful authority’ is an element of the offence, which would need to be proved by the prosecution or whether it is a defence, which would place an evidential burden on the defendant.

Defences

The defences found in **proposed subsections 7A(3) and (4)** are designed to protect innocent disposal of protected Flags and ensigns, and innocent damage to images of those Flags and ensigns. However, they raise a number of questions.

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Proposed subsection 7A(3) seeks to cover the situation where an image of a protected flag is reproduced on an item like a tea towel or quilt cover and the image is damaged through ‘ordinary use’. In these circumstances, criminal liability will not be incurred. ‘Ordinary use’ might include such things as washing or ironing or wear and tear over time. But what are the outer boundaries of ‘ordinary use’? Is ordinary use defined by way of an objective or a subjective test? Further, what happens if damage occurs not as a result of ‘ordinary use’ but because the person no longer has any need for the item? And, it would seem that this defence would not extend to the image on the T-shirt produced for Senator Bolkus’ office or other ‘altered’ or ‘distorted’ images of the Flag or protected ensigns that might be reproduced in a wide range of contexts.

Proposed subsection 7A(4) provides that if a person disposes of a flag ‘because it has been worn, soiled or damaged’, they will not have committed an offence. Again, what happens if a person disposes of a flag simply because they no longer need it or want to retain it?

The defences in **proposed subsections 7A(3) and (4)** refer to ‘an Australian Flag or an Australian Ensign’. The expression ‘Australian Flag’ is not defined either in the Bill or in the Flags Act. It is unclear whether what is meant is a reference to the ‘Australian National Flag’ or whether it is to other official or unofficial flags and, if so, what flags might be included.

Penalty

The penalty provided for an offence against **proposed subsection 7A(1)** is 100 penalty units. Based on the current value of the penalty unit (\$110), this translates to \$11 000.

Unlike earlier private member’s bills banning flag desecration, this Bill does not include a custodial option. Questions might be raised, however, about the size of the maximum penalty. It should also be noted that this is the maximum penalty for individuals. The effect of subsection 4B(3) of the *Crimes Act 1914* (Cwlth) is that a court has a discretion to impose a penalty of up to five times this amount if the offender is a body corporate.³¹

Protected flags and ensigns

The Flags Act refers specifically to the Australian National Flag and the Australian Red Ensign. It also empowers the Governor-General, who would act on Federal Executive Council advice, to ‘appoint ... other flags and ensigns of Australia’. Such appointment is done by Proclamation. As indicated above, proclamations have been made declaring the Royal Navy Ensign and the Royal Australian Air Force Ensign to be ‘ensigns of Australia’. There is also an Australian Defence Force Ensign.

Other proclamations have been made under the Flags Act. In 1995, the Governor-General proclaimed the Aboriginal Flag³² and the Torres Strait Islander Flag under section 5 of the

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Act. The Proclamations stated that the flags were the flags of the ‘Aboriginal peoples of Australia’ and the Torres Strait Islander people of Australia’, respectively and that they were ‘flag[s] of significance to the Australian nation generally.’

There are other official flags and ensigns. Some are ‘derivatives’ of the Australian National Flag. For instance, the *Civil Aviation Act 1988* provides for a Civil Air Ensign of Australia.³³ The Civil Air Ensign is a light blue flag with a dark blue cross, the Union Jack, the Federation Star and the South Cross.

The Bill draws a line between some official flags and ensigns (the Australian National Flag, the Australian Merchant Navy Ensign, the RAN Ensign and the RAAF Ensign) and other official flags and ensigns. Thus, it is not proposed to create offences in relation to the dishonouring, desecration or destruction of the Aboriginal Flag, the Torres Strait Islander Flag, the Civil Air Ensign or the Australian Defence Force Ensign.

Public and private behaviour

The objects of the Bill include ensuring that the Australian Flag is treated with ‘dignity and respect’ and protected against ‘vandalism’.³⁴ In doing so, it reaches beyond activities in the public arena and into the private sphere—for example, the home. Thus, if the physical and fault elements of the proposed offences are proved and relevant defences are not made out, it will be immaterial that the proscribed conduct took place in private.

Freedom of speech

US cases

The High Court of Australia has indicated that US First Amendment³⁵ jurisprudence should be treated with some caution by Australian courts.³⁶ However, US Supreme Court decisions about flag burning laws may be of interest to readers of this Digest.

In 1989 the US Supreme Court, in *Texas v. Johnson*³⁷, found that a Texas law criminalising the desecration of venerated objects in a manner that ‘the actor knows will seriously offend one or more persons likely to observe his action’ was unconstitutional as applied to a protester who burned a US flag during a demonstration against the policies of the Reagan Administration. The judgment affected similar laws in some 47 other US States. Brennan J, for the majority³⁸, stated:

If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.

And he continued:

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We never before have held that the Government may ensure that a symbol be used to express only one view of that symbol or its referents. ...

To conclude that the government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries. Could the government, on this theory, prohibit the burning of state flags? Of copies of the Presidential seal? Of the Constitution? In evaluating these choices under the First Amendment, how would we decide which symbols were sufficiently special to warrant this unique status? To do so, we would be forced to consult our own political preferences, and impose them on the citizenry, in the very way that the First Amendment forbids us to do.

In the minority, Chief Justice Rehnquist said that the constitutionally protected freedom was not absolute. He also remarked:

The flag is not simply another “idea” or “point of view” competing for recognition in the marketplace of ideas. Millions and millions of Americans regard it with an almost mystical reverence regardless of what sort of social, political, or philosophical beliefs they may have. I cannot agree that the First Amendment invalidates the Act of Congress and the laws of 48 of the 50 States, which make criminal the public burning of the flag.³⁹

In response to the decision in *Texas v. Johnson* the US Congress repealed an existing federal flag burning statute⁴⁰ because of fears that it might be unconstitutional and replaced it with new legislation designed to avoid the constitutional problems identified in *Texas v. Johnson*. The Flag Protection Act 1989 made it an offence to knowingly mutilate, deface, physically defile, burn or trample the US flag.⁴¹

In 1990 the US Supreme Court held in two cases that the Act was unconstitutional because it violated the free speech right guaranteed by the First Amendment to the Constitution. The cases were *US v. Eichman*⁴² and *US v. Haggerty*.⁴³ In both cases, the defendants were charged with offences against the *Flag Protection Act 1989*.

Implied freedom of political communication in Australia

Protected flags or reproductions of those flags might conceivably be dishonoured, destroyed or mutilated as a political protest or as part of a campaign for a new Australian flag. Part of the debate about flag destruction laws has centred on whether such laws would impermissibly infringe the implied freedom of political communication contained in the Commonwealth Constitution. For instance, in her tabling speech, Mrs Draper stated:

I expect during this debate to hear the argument that this bill infringes on the right to protest. I categorically reject that argument. There is nothing in this bill which would take away the rights [of] Australians to air their views and grievances, either privately or publicly. The freedoms of speech, assembly and association are in no way

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diminished by this bill and nor would we seek to undermine these cornerstones of our democracy. But you can protest without burning our flag, you can speak your mind without desecrating our national symbol and you can criticise the system without humiliating the people.⁴⁴

Contrasting legal opinion was cited in debates on the Flag Protection Bill 2003 in the Western Australian Parliament. The WA Opposition quoted the Dean of Law at the University of Notre Dame, Professor Greg Craven, as saying:

... under the Constitution there is an implied freedom of political speech, but I don't think that would protect flag burning. The reality is you could have free political speech without having to set fire to a flag as an accompaniment.⁴⁵

On the other hand, the WA Attorney-General, Jim McGinty, said that advice from the WA Solicitor-General was that the Bill 'would be very likely to be found to be invalid for infringing the implied freedom of political communication.'⁴⁶

Two High Court judgments—*Lange* and *Levy*—may be relevant in the context of flag burning laws. Both were decided in 1997.

The High Court agreed unanimously in *Lange v Australian Broadcasting Corporation*⁴⁷ that two questions must be asked when deciding whether a law infringes the implied freedom. They are:

- does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?
- if it does, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of representative and responsible government as set out in the Constitution?

A law will only be unconstitutional if the answers to these questions are 'Yes' and 'No', respectively.⁴⁸

*Levy v Victoria*⁴⁹ also considered the implied freedom. In this case, an animal rights activist wanted to enter a duck shooting area and retrieve and display dead and injured animals. However, the Wildlife (Hunting Season) Regulations prohibited anyone who did not hold a game licence from entering a 'permitted hunting area'. Levy asked the High Court for a declaration that one of the regulations (regulation 5) was invalid because it infringed his constitutionally protected freedom of political communication.⁵⁰

The Court held that regulation 5 was valid as a reasonable restriction in the interests of public safety because it was appropriate and adapted to one of its stated objectives ('to ensure a greater degree of safety of persons in hunting areas during the open season for duck in 1994'). The Court re-stated its earlier position that the implied freedom is not an absolute one. However, a number of things are important about the decision. It re-affirmed

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the implied freedom. It said that expressive conduct was protected by the implied freedom.⁵¹ Further, although Levy lost, it appears that the Court's decision was made in the absence of argument (which had earlier been abandoned) that the purpose of the regulation was stifling protest rather than protecting human safety.⁵²

It is interesting to note that when the youth who had burned a flag in Western Australia early in 2003 was charged with disorderly conduct under section 54 of the Police Act, his lawyer argued that his actions were an exercise of his implied freedom of political communication and that section 54 should not be construed as abrogating that freedom.⁵³ In that case, notices were served on each Australian Attorney-General under section 78B of the *Judiciary Act 1903*, indicating that the case raised a constitutional question.⁵⁴ Newspaper reports indicate that the charge was dropped after legal advice from the WA Solicitor-General.⁵⁵

Overseas laws

Flag protection laws in some overseas jurisdictions are set out in the Appendix. One of the consistent features of similar provisions in overseas laws is that destruction or dishonouring must be done 'publicly' before it is an offence.

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Appendix

Overseas flag desecration laws⁵⁶

Austria

Penal Code (StB), Besonderer Teil (Special Part), Vierzehnter Abschnitt (Fourteenth Section), Hochverrat und andere Angriffe gegen den Staat (*High treason and other Attacks against the State*)

§ 248 Herabwürdigung des Staates und seiner Symbole (*The denigration of the State and its symbols*)

(1) Wer auf eine Art, daß die Tat einer breiten Öffentlichkeit bekannt wird, in gehässiger Weise die Republik Österreich oder eines ihrer Bundesländer beschimpft oder verächtlich macht, ist mit Freiheitsstrafe bis zu einem Jahr zu bestrafen. (*Whosoever, in such a manner that the act becomes known to the general public, in a malicious way, insults and brings into contempt the Austrian Republic and its States, is liable for imprisonment for up to one year.*)

(2) Wer in der im Abs. 1 bezeichneten Art in gehässiger Weise eine aus einem öffentlichen Anlaß oder bei einer allgemein zugänglichen Veranstaltung gezeigte Fahne der Republik Österreich oder eines ihrer Bundesländer, ein von einer österreichischen Behörde angebrachtes Hoheitszeichen, die Bundeshymne oder eine Landeshymne beschimpft, verächtlich macht oder sonst herabwürdigt, ist mit Freiheitsstrafe bis zu sechs Monaten oder mit Geldstrafe bis zu 360 Tagessätzen zu bestrafen. (*Whosoever, in the manner described in Paragraph 1, in a malicious manner and at a public occasion or a function open to the public, insults, brings into contempt or belittles the flag displayed for official purposes or the national or state anthems of the Austrian Republic or its States, is liable for imprisonment of up to 6 months or a fine of up to 360 times the fixed daily rate.*)

Canada

Canada currently has no legislation but there have been attempts by private members to introduce flag burning legislation.

Bill C-330 was introduced by Mr Speller on 4 April 2001 to amend the Criminal Code⁵⁷, while a similar bill (Bill C-426) was introduced by Mr Bailey on 30 January 2002.⁵⁸ The bills did not proceed to a second reading.

China

Under the Criminal Code the penalty for insulting the national flag is up to three years imprisonment. An extract from an unofficial translation of the Code reads:

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Chinese Criminal Code. Article 299. Whoever purposely insults the national flag, national emblem of the PRC in a public place with such methods as burning, destroying, scribbling, soiling, and trampling is to be sentenced to not more than three years of fixed-term imprisonment, criminal detention, control or deprived of political rights.⁵⁹

Hong Kong

A similar penalty was introduced into Hong Kong after its return to China. Although it was challenged in the Hong Kong courts, the appeal court stated that the law was necessary for national cohesion despite its conflict with international human rights instruments. The American Civil Liberties Union commented:

In urging senators to reject the proposed amendment, the ACLU also stressed the parallels between China, a country known for its violations of human rights, and congressional efforts to adopt flag protection legislation. In one of its first actions after coming to power last year, the China-appointed Hong Kong legislature made defacing the Chinese and Hong Kong flags a crime punishable by up to three years in prison or a fine of more than \$6000.⁶⁰

Hong Kong's *National Flag and National Emblem Ordinance*, Chapter 2401, Section 7 states:

Protection of national flag and national emblem

A person who desecrates the national flag or national emblem by publicly and wilfully burning, mutilating, scrawling on, defiling or trampling on it commits an offence and is liable on conviction to a fine at level 5 and to imprisonment for 3 years.⁶¹

The following summary of a case on desecrating the flag appeared in a report to the European Parliament by the European Commission on the Special Administrative Region of Hong Kong.⁶²

A further legal test case with individual freedom implications relates to the interpretation of provisions on the desecration of national and regional flags. The Court of Appeal⁶³ ruled in March 1999 that certain parts of the National Flag and National Emblem Ordinance enacted on 1st July 1997 were contrary to Art. 39 of the Basic Law in that they restricted rights and freedoms enjoyed by Hong Kong residents under the provisions of the International Covenant on Civil and Political Rights (ICCPR). The Government argued that the limits to freedom of speech introduced by the Ordinance were justifiable and not contrary to the Basic Law or the ICCPR. The Hong Kong SAR Government requested the Court of Final Appeal to review its judgement.

On 15 December, the Court of Final Appeal issued its judgment.⁶⁴ The CFA overruled the Court of Appeal's decision and upheld the consistency of the Ordinance with both

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the Basic Law and the International Covenant on Civil Rights. The Court stressed in its reasoning that the type of restrictions on the freedom of speech contained in the Ordinance were limited and justified by the need to protect other values, which were also worthy of constitutional protection. The CFA cited as reference decisions of Italian and German courts upholding the constitutionality of laws which protect the national flag and punish, by imprisonment or imposition of fines, the non-respect of their provisions.

France

According to the London *Times*, France passed a law in 2003 which makes it an offence to insult the national flag or anthem. The penalty is a fine or up to 6 months imprisonment. It is possible that the new French law would not be upheld if a complaint is made to the European Court of Human Rights. The article from the *Times* is reproduced below:

"French face jail for insulting the flag. By Charles Bremner in Paris.

The *Times*, 15 February 2003, p.25.

ANYONE who jeers at the Marseillaise or insults the Tricolour may be jailed or fined for "offending against the dignity of the Republic" under a new law that symbolises President Chirac's promise to impose order in France. The legal protection for the national anthem and flag is part of a package of "internal security" measures that will become law next week amid strong public support but criticism from civil rights groups and intellectuals.

The move to ban abuse of the Republican symbols was a response to national anger last year, when youths booed the Marseillaise at a France v Algeria football match, causing M Chirac to leave his box in the stadium until an apology was made. Police say that the law, which provides for fines of up to £6,000 and six months in jail, will be unenforceable. Also included in the security law, drafted by Nicolas Sarkozy, the tough minded Interior Minister, are fines and imprisonment for youths who intimidate by congregating in stairwells; for beggars, squatters, travellers who trespass and women deemed to be "passively soliciting" for prostitution. Weakly defined, this offence can apply to any woman who dresses provocatively, rights activists say.

Insulting anyone who serves the public, from firemen and bus conductors to teachers and housing estate caretakers, also becomes a punishable offence. In another measure, police will no longer be required to advise criminal suspects of their right to remain silent. The crackdown is the centrepiece of M Sarkozy's campaign to reinstate the authority of the State and to calm the anxiety over crime and antisocial behaviour that dominated the presidential and general elections of last spring. Most of the measures are so popular that the Socialist Opposition voted with the Government on Thursday's final passage through Parliament. However, the Socialist and Communist groups from the Senate and National Assembly have lodged an appeal with the Constitutional Council, asking it to strike down as a "breach of the exercise of liberty" the clauses in the Security Bill dealing with prostitution, travellers and congregating youths.

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They also asked it to rule that the penalties for insulting national symbols were excessive. As the ultimate legal authority, the council may annul laws that it deems breach the Republic's Constitution. The law on the flag and anthem have raised a chorus of ridicule from the intellectual world, including some right-wing thinkers, on the grounds that it smacks of American or Third World practices and reflects an attempt to impose a "new moral order" on France.

More than 100 university teachers have signed a petition: "Among other measures that have already provoked justified criticism, the law on the flag and anthem inspires particular concern," they said. "This forced obedience to the symbols of the nation evokes unhappy past times. Respect is earned. It cannot be imposed." Alain-Gerard Slama, a conservative commentator who normally backs M Chirac, said that the flag and anthem law was a mistake."

Germany

Section 90(a) of the *Criminal Code* (Strafgesetzbuch, StGB) states as follows:

Disparagement of the State and its Symbol

(1) Whoever publicly, in a meeting or through the dissemination of writings (Section 11 subsection (3)):

1. insults or maliciously maligns the Federal Republic of Germany or one of its Lands or its constitutional order; or
2. disparages the colors, flag, coat of arms or the anthem of the Federal Republic of Germany or one of its Lands,

shall be punished with imprisonment for not more than three years or a fine.

(2) Whoever removes, destroys, damages, renders unusable or unrecognizable, or commits insulting mischief upon a publicly displayed flag of the Federal Republic of Germany or one of its Lands or a national emblem installed by a public authority of the Federal Republic of Germany or one of its Lands shall be similarly punished. An attempt shall be punishable.

(3) The punishment shall be imprisonment for not more than five years or a fine if the perpetrator by the act intentionally gives support to efforts against the continued existence of the Federal Republic of Germany or against its constitutional principles.⁶⁵

India

Section 2 of the *Prevention of Insults to National Honour Act of 1971* provides for a maximum jail term of three years and a fine.

2. Insults to Indian National Flag and Constitution of India.

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Whoever in any public place or in any other place within public view burns, mutilates, defaces, defiles, disfigures, destroys, tramples upon or otherwise brings into contempt (whether by words, either spoken or written, or by acts) the Indian National Flag or the Constitution of India or any part thereof, shall be punished with imprisonment for a term which may extend, to three years, or with fine, or with both.⁶⁶

In January 2003 a newspaper reported that amendments were being considered to strengthen the Act.

The Union Cabinet today approved the decision to impose strong punishment, including imprisonment, for showing any disrespect to the National Flag. The Cabinet decided to bring about an amendment to the Prevention of Insults to the National Honour Act, 1971. Briefing newsmen after the Cabinet meeting, which met under the chairmanship of the Prime Minister here, an official spokesperson said the amendment would also define “insult” in broader detail. A minimum imprisonment of one year was proposed in case of second or subsequent offence of deliberate insult to the Tricolour. ...

The changes in the Flag Code were in accordance with the recommendations of a high-level committee of the Home Ministry headed by then Additional Secretary P.D. Shenoy. High Court and Supreme Court judges are now permitted to fly the Tricolour on their car. The high court had also passed certain orders on the issue of the National Flag in 2001, but Home Ministry sources said the government had initiated action in October, 2000, when the Shenoy Committee was set up. The Centre had also included in the new Flag Code stringent punishment and penalty of fine for deliberate insult, as recommended by the Shenoy Committee in its report in April, 2001.⁶⁷

Iraq

According to a speech made in the US House of Representatives in June 2003 during a debate on a Congressional proposal to make flag burning an offence in the United States, flag desecration under the regime of Saddam Hussein was a criminal offence punishable by up to 10 years imprisonment.⁶⁸

Italy

The Italian *Penal Code* states:

[Codice Penale](#) (Penal Code of Italy)

LIBRO Secondo - Dei Delitti In Particolare (VOLUME II Particular Crimes in Detail)

TITOLO I - Dei Delitti Contro La Personalità Dello Stato (Title 1 – Crimes Against the State)

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Capo II - Dei Delitti Contro La Personalità Interna Dello Stato (Heading II – Crimes Against the State Internally)

Art. 292 - Vilipendio alla bandiera o ad altro emblema dello Stato (Publicly insult or vilify the flag or any other emblem of the State)

Chiunque vilipende la bandiera nazionale o un altro emblema dello Stato è punito con la reclusione da uno a tre anni. Agli effetti della legge penale, per "bandiera nazionale" s'intende la bandiera ufficiale dello Stato e ogni altra bandiera portante i colori nazionali. Le disposizioni di questo articolo si applicano anche a chi vilipende i colori nazionali raffigurati su cosa diversa da una bandiera.

This can be translated as:

Anyone who publicly insults or vilifies the national flag or other emblem of the State is punished by imprisonment from one to three years. The effects of the criminal law are intended for the “national flag” the official flag of the State and for every other flag bearing the national colours. The provisions of this article also apply to those who publicly insult or vilify the symbols of the national colours as something distinct from the flag.⁶⁹

Japan

There is no law against damaging the Japanese flag however there are laws that prevent the burning of foreign flags as this may be offensive to the foreign country.⁷⁰

New Zealand

Section 11 of the *Flags, Emblems, and Names Protection Act 1981* provides:

11. Offences involving New Zealand Flag

(1) Every person commits an offence against this Act who,

(a) Without lawful authority, alters the New Zealand Flag by the placement thereon of any letter, emblem, or representation:

(b) In or within view of any public place, uses, displays, destroys, or damages the New Zealand Flag in any manner with the intention of dishonouring it.⁷¹

Portugal

Portuguese Penal Code provides:

Código Penal , Artigo 332º, (estado : 01/01/99)

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Art. 332º Ultraje de símbolos nacionais e regionais

1 Quem publicamente, por palavras, gestos ou divulgação de escrito, ou por outro meio de comunicação com o público, ultrajar a República, a bandeira ou o hino nacionais, as armas ou emblemas da soberania portuguesa, ou faltar ao respeito que lhes é devido, é punido com pena de prisão até 2 anos ou com pena de multa até 240 dias.

2 Se os factos descritos no número anterior forem praticados contra as regiões autónomas, as bandeiras ou hinos regionais, ou os emblemas da respectiva autonomia, o agente é punido com pena de prisão até um ano ou com pena de multa até 120 dias.⁷²

Article 332(1) of the Portuguese Penal Code is translated as:

Anyone who by words, gesture, in writing or by any other means of public communication, desecrates the Republic, national flag or the national anthem the symbols or emblems of the Portuguese sovereignty, or in any other way fails to pay them their due respect, shall be punished with a prison sentence of up to 2 years or with a pecuniary penalty of up to 240 days.

Norway

There is no law relating to the desecration of Norway's own flag but there is a law protecting the flag or national coat of arms of a foreign country.

The *General Civil Penal Code* with amendments to 1 July 1994 provides:

§ 95. Any person who in the realm publicly insults the flag or national coat of arms of a foreign State, or who is accessory thereto, shall be liable to fines or to detention or imprisonment for a term not exceeding one year. The same penalty shall apply to any person who in the realm offends a foreign State by committing violence against or by threatening or offensive behaviour towards any representative of that State, or by intruding into, causing damage to, or soiling any building or room used by any such representative, or who is accessory thereto.⁷³

Taiwan

Article 160 of the Criminal Code prohibits desecration of the national flag as well as that of Taiwan's founding father Sun Yat Sen. Article 118 criminalises desecration of foreign national flags and emblems.⁷⁴

Turkey

Information from guides, written for travellers to Turkey, state that it is against the law to insult the Turkish nation in any way. This includes defacing or destroying Turkish

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currency or the national flag and insulting the founder, Atatürk, or the president of the Republic of Turkey.

United States

Proposals are still being pursued in the US Congress for a constitutional amendment enabling the Congress to prohibit the physical destruction of the US flag. The latest of these attempts (H. J. RES. 4) is for a joint resolution by both Houses of Congress. It passed the House of Representatives on 3 June 2003. On the 4th June, the Senate referred it to the Committee on the Judiciary.⁷⁵

Should a proposed constitutional amendment pass both Houses with the required majorities, three-quarters of the States would then need to ratify it in order for the amendment to succeed.

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Endnotes

- 1 The Bill was presented by Mrs Trish Draper MP (Makin). Her co-sponsor is Mr Don Randall MP.
- 2 House of Representatives, *Hansard*, 20 November 1953, p. 367.
- 3 Subsection 3(1), Schedule 1 and Part 1 of Schedule 2, Flags Act.
- 4 Section 4, Schedule 1 and Part II of Schedule 2, Flags Act.
- 5 Section 5, Flags Act.
- 6 Subsections 3(2) and (3), Flags Act—inserted by the *Flags Amendment Act 1998*.
- 7 House of Representatives, *Hansard*, 2 December 1953, p. 817.
- 8 House of Representatives, *Hansard*, 28 February 1967, p. 157.
- 9 Crimes (Protection of Australian Flags) Bill 1989.
- 10 *Crimes (Protection of Australian Flags) Bill 1992*. Introduced for the fourth time on 5 March 1992 (House Hansard, page 783).
- 11 House of Representatives, *Hansard*, 11 December 1996. p. 8193.
- 12 *ibid.*
- 13 ‘Outlaw flag burning, Anderson urges’, *The Age*, 5 November 2002.
- 14 It was reported that charges of disorderly conduct brought against the flag burner were dropped on advice from the State’s Solicitor-General that flag burning was protected as an expression of political communication under the Commonwealth Constitution. ‘Flag burning sparks rights row’, *West Australian*, 14 June 2003; ‘Flag flies for all our freedoms’ (editorial), *West Australian*, 11 June 2003.
- 15 ‘Frenzied protest flares in Sydney’, *Canberra Times*, 27 March 2003; ‘Protesters’ anger fuels flag burning at Canberra rally’, *Canberra Times*, 22 March 2003.
- 16 It appears that this provision appeared in error. The Leader of the Opposition indicated his intention that the clause relating to reproductions would be deleted so that the Bill only applied to a flag and not a reproduction of a flag. See WA Legislative Assembly, *Hansard*, 4 June 2003.
- 17 ‘Minister advocates that the burning of national flags should be illegal but the President of the ALP is not so sure’, *AM*, 18 August 1995.
- 18 Alexander Downer MP, ‘Flag burning bill’, *Media Release*, 18 August 1995.
- 19 House of Representatives, *Hansard*, 2 March 1989, p. 328.
- 20 WA Legislative Assembly, *Hansard*, 4 June 2003. The case was *Lockwood v. Kraus* and was set down to be heard in the Children’s Court of Western Australia.
- 21 The *Canberra Times* reported that those in favour of the Bill include the following Coalition MPs—Paul Neville, De-Anne Kelly, Ken Ticehurst, Sophie Panopoulos, Joanna Gash, Don

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- Randall and Jim Lloyd. 'Push to legally protect Aust flag', *Canberra Times*, 20 August 2001. Deputy Prime Minister, John Anderson, is also said to support the Bill—'Bill to protect flag in pipeline', *West Australian*, 20 August 2003.
- 22 'Flag burners' (editorial), *Herald Sun*, 23 July 2003; 'RSL joins flag burn crime push', *Herald Sun*, 22 July 2003.
- 23 'PM kills flag-burn ban', *West Australian*, 17 September 2003; 'PM halts bid to ban burning of flag', *Canberra Times*, 17 September 2003.
- 24 Subsection 3(1) and Schedule 1, Flags Act.
- 25 The Australian Red Ensign is the ensign of the Australian Merchant Navy and is given legislative status by section 4 of the Flags Act. The Australian Red Ensign is described in Schedule 1 of the Flags Act and reproduced in Schedule 2 of that Act.
- 26 The Royal Australian Navy Ensign is a white ensign which was officially adopted by a Proclamation made on 16 February 1967 by the Governor-General under section 5 of the Flags Act.
- 27 The Royal Australian Air Force Ensign is a light blue ensign to be the official ensign for the RAAF. The Governor-General signed the Proclamation for the RAAF ensign on 29 April 1982.
- 28 Subsection 5.2(1), Criminal Code.
- 29 Senate, *Hansard*, 4 May 1992, p. 2031.
- 30 *ibid.*
- 31 Subsection 4B(3) of the Crimes Act applies 'if the contrary intention does not appear and the court thinks fit'.
- 32 Proclamations made on 27 July 1995, with effect from 14 July 1995.
- 33 Section 19, *Civil Aviation Act 1988*—until an ensign is proclaimed under section 5 of the Flags Act. It is an offence to fly or display the Civil Air Ensign except in the circumstances specified in section 19 of the Civil Aviation Act.
- 34 See Mrs Trish Draper, First Reading Speech, Protection of Australian Flags (Desecration of the Flag) Bill 2003, House of Representatives, *Hansard*, 18 August 2003, p. 18432.
- 35 The First Amendment reads 'Congress shall make no law ... abridging the freedom of speech, or of the press.'
- 36 See *Levy v. Victoria* (1997) 189 CLR 579 per Brennan CJ at 594 and *Theophanous v. Herald & Weekly Times* (1994) 182 CLR 104 at per Mason CJ, Toohey & Gaudron JJ at 125.
- 37 <http://laws.findlaw.com/us/491/397.html>.
- 38 Marshall, Blackmun, Scalia and Kennedy JJ. Rehnquist CJ, White and O'Connor JJ in dissent.
- 39 *Texas v. Johnson* 491 US 397 (1989).

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- 40 That Act [former 18 USC 700(a)] made it an offence to ‘knowingly cast contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it.’
- 41 18 USC 700. The penalty was a fine or one year’s imprisonment, or both. The ‘flag’ meant ‘any flag of the United States, or any part thereof, made of any substance, of any size, in a form that is commonly displayed.’ An exception was created in the case of disposal of worn or soiled flags.
- 42 <http://laws.findlaw.com/us/496/310.html>.
- 43 731 F.Supp. 415, 416 (WD Wash). 1990.
- 44 House of Representatives, *Hansard*, 18 August 2003, p. 18432.
- 45 WA Legislative Assembly, *Hansard*, 16 April 2003.
- 46 WA Legislative Assembly, *Hansard*, 4 June 2003.
- 47 (1997) 189 CLR 520.
- 48 N. Hancock, ‘Terrorism and the Law in Australia: Legislation, Commentary and Constraints’, Department of the Parliamentary Library, *Research Paper No. 12 2001-2002*, p. 48.
- 49 (1997) 189 CLR 579.
- 50 For a summary, see Tony Blackshield & George Williams, *Australian Constitutional Law. Commentary and Materials*, 3rd ed, 2002.
- 51 In *Levy*, Brennan CJ said that the constitutional protection covers not only political speech but also deeds and conduct and that it:

... denies legislative or executive power to restrict the freedom of communication about the government or politics of the Commonwealth, whatever be the form of the communication, unless the restriction is imposed to fulfil a legitimate purpose and the restriction is appropriate and adapted to the fulfilment of that purpose. In principle, therefore, non-verbal conduct which is capable of communicating an idea about the government or politics of the Commonwealth and which is intended to do so may be immune from legislative or executive restriction so far as that immunity is needed to preserve the system of representative and responsible government that the Constitution prescribes. (1997) 198 CLR 579 at 594.

For further discussion see Max Spry, ‘[What is political speech? Levy v. Victoria](#)’, *Research Note No. 2*, 1997/98.

- 52 Blackshield & Williams, op.cit.
- 53 Mr JA McGinty, WA Legislative Assembly, *Hansard*, 4 June 2003. Mr McGinty said that notices under section 78B of the *Judiciary Act 1903* were served on each Attorney-General in this case, giving notice that it raised a constitutional matter.
- 54 WA Legislative Assembly, *Hansard*, 4 June 2003.
- 55 ‘Flag flies for all our freedoms’, *West Australian*, 11 June 2003.

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- 56 Information about overseas flag desecration laws compiled by Roy Jordan and Ann Rann, Department of the Parliamentary Library.
- 57 http://www.parl.gc.ca/PDF/37/1/parlbus/chambus/house/bills/private/C-330_1.pdf
- 58 http://www.parl.gc.ca/PDF/37/1/parlbus/chambus/house/bills/private/C-426_1.pdf
- 59 Source: Unofficial translation at: <http://www.qis.net/chinalaw/prclaw60.htm>
- 60 Proposed Flag Amendment Rejected Once Again; ACLU Says the Measure Dead for the Year. Wednesday, October 7, 1998: <http://archive.aclu.org/news/n100798a.html>
- 61 Source: <http://www.justice.gov.hk/blis.nsf/E1BF50C09A33D3DC482564840019D2F4/DEDB4F3439C677DE4825650A00250E2D?OpenDocument>
- 62 Commission Of The European Communities, *Report From The Commission To The Council And The European Parliament, Second Annual Report by the European Commission on the Special Administrative Region of Hong Kong*, Brussels 18.05.2000, p. 5.
- 63 Hksar V. Ng Kung Siu And Another HCMA000563/1998 - [1999] HKCFI 292 (23 March 1999), <http://www.hklii.org/hk/cases/HKCFI/1999/292.html>.
- 64 Hksar V. Ng Kung Siu And Another FACC000004/1999 - [1999] HKCFA 87 (15 December 1999): <http://www.hklii.org/hk/cases/HKCFA/1999/87.html>.
- 65 Source: <http://www.iuscomp.org/gla/statutes/StGB.htm>.
- 66 Explanation 1. - Comments expressing disapprobation or criticism of the Constitution or of the Indian National Flag or of any measures of the Government with a view to obtain an amendment of the Constitution of India or an alteration of the Indian National Flag by lawful means do not constitute an offence under this section.
- Explanation 2. - The expression "Indian National Flag" includes any picture, painting, drawing or photograph or other visible representation of the Indian National Flag, or of any part or parts thereof, made of any substance, or represented oil any substance.
- Explanation 3. - The expression "public place" means any place intended for use by, or accessible to, the public and includes any public conveyance. "
- Source: <http://www.indialawinfo.com/bareacts/nathon.html>.: See also the *Flag Code* which incorporates this Act at: <http://www.outlookindia.com/specialfeaturem.asp?fodname=20020125&fname=flagcode&sid=1>
- 67 Tribune Online 21 January 2003, <http://www.tribuneindia.com/2003/20030122/main1.htm>
- 68 Source: Republican Ron Paul in the US House of Representatives, June 3, 2003. His full speech against flag burning laws is at: <http://www.lewrockwell.com/paul/paul99.html>
- 69 Source: <http://www.usl4.toscana.it/dp/isll/lex/cp.htm>

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- 70 Source: The Economist reports on recent legislation reaffirming free speech, *The Economist*, 1 July 1989, p 29.
- 71 Source: <http://www.legislation.govt.nz/>
- 72 Source: <http://www.cea.ucp.pt/lei/penal/penal332.htm>
- 73 Source: <http://www.cea.ucp.pt/lei/penal/penal332.htm>
- 74 Source: 1999 email from Mr Bing Ling, Associate Dean (Teaching & Research) and Associate Professor, School of Law, City University of Hong Kong.
- 75 Further information can be found by going to the Library of Congress site [THOMAS](#) and typing the word 'desecration' in the appropriate box.

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