Racial Vilification Laws: A Solution for Australian Racism?

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In 1993, David Irving, internationally renowned for the virulence of his racist views, attempted to visit Australia. His apologia for Nazism and his association with groups regarded by a range of democratic governments as threatening to communal harmony had led to a criminal conviction in Germany, the removal of the exemption from a visa generally granted to British visitors to South African, and the refusal of the Italian government to permit him entry. He had also been deported form Canada and boasted in speeches of his lack of respect for laws designed to protect minority groups.[1] This record meant that Irving's visa application could have been rejected regardless of what he intended to say or do in Australia. However, the vast majority of journalists reporting on the visa application and refusal were concerned only with Irving's claims regarding the infringement of his freedom of speech.

Under the guise of being an "historian", Irving had signalled that he intended to use a tour to Australia to challenge scholars from the perspective of a person who claims "no evidence" exists of the Nazi genocide of European Jewry. He had been enthusiastically promoted by individuals and organisations on the racist fringe of the far right-wing. "Holocaust Denial", alternatively known as "Holocaust Revisionism", is a particularly nasty form of anti-Semitism,[2] and despite the fact that the international community has been working for many years to encourage nation states to proscribe racial vilification, once Irving was able to present the debate as one concerning his views, and not his record, the decision to deny him entry to Australia was controversial. The issue that was raised was the extent to which a democracy such as Australia, which purports to

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1 Further, because of this Austria, the US, New Zealand and Russia have all indicated difficulties in allowing Mr Irving free entry.

2 Dr Frank Knopfelmacher wrote Holocaust 'revisionism' is a "group-libel against an easily identifiable and traditionally stigmatised section of the population, which exceeds in ferocity and depth of malice anything that has happened in the field of ethnic animadversion in this country at least since World War II" (*The Age* 29 March 1979). The judgement of the 17th Chambre Correctionelle of Paris, 3 July 1981, in the case of French 'denial activist' Robert Faurisson, noted "In accusing the Jews publicly of being guilty of a particularly odious lie and of a gigantic swindle . . . Faurisson could not be unaware that his words would arouse . . . feelings of contempt, of hatred and of violence towards the Jews in France . . .". The European parliament, in Resolution A3-0127/93 (21 April 1993), said, inter alia, it was "essential" for Member States to adopt "appropriate legislation condemning any denial of the genocide perpetrated during the Second World War and any justification and attempt at rehabilitaiton of the regimes and institutions which were responsible for and parties to it", if they wished to combat the rise of racist extremism.

uphold values such as freedom of speech, can be justified in silencing extremist political views.[3]

Irving's proposed visit followed close on the heels of a renewed attempt by the federal government to introduce national laws dealing with racial vilification. It is noteworthy that the possibility of national racial vilification legislation has been on and off the political agenda since 1970. The original Racial Discrimination Bill 1973 contained clauses 28 & 29 which created the offences of incitement of racial disharmony and dissemination of ideas based on racial superiority or hatred. The first of these was omitted from the 1974 Bill, and neither clause was contained in the 1975 Bill which became law.

From 1989 until 1991 the Human Rights and Equal Opportunity Commission conducted the *National Inquiry into Racist Violence*. Certain types of behaviour were considered to constitute racist violence, intimidation and harassment: these included vandalism, arson, assault, assault through graffiti and dissemination of offensive literature to verbal abuse, hate mail and threatening telephone calls. The volume of instances of this type is enormous. For example, the Executive Council of Australian Jewry has logged a total of over three incidents per week over the last three years. When this is multiplied by the number of community groups, the extent of the problem becomes very clear. The *National Inquiry into Racist Violence* reported that racist attitudes pervade Australian institutions, both public and private, and that racist violence including intimidation and harassment is an endemic problem for Aboriginal Australians and for people from non-English speaking backgrounds.

The *Royal Commission into Aboriginal Deaths in Custody* and the Australian Law Reform Commission's *Report on Multiculturalism and the Law* both noted the extent of the problem of racism and racial vilification in this country and recommended law reform in this area. In the last 5 years State parliaments have introduced legislation in an attempt to deal with the problem of racist speech: *Anti-Discrimination Act 1977* (NSW) ss 20B-22; *Discrimination Act 1991* (ACT) ss 65-67; *Criminal Code* (WA) ss 76-80; and *Anti-Discrimination Act 1992* (Qld) s 126.

In December 1992 the Federal Government introduced legislation into Parliament to address the problem of the expression of racist ideas. The Racial Discrimination Legislation Amendment Bill 1992 proposed to amend the *Racial Discrimination Act 1975* (Cth) to make racial vilification unlawful. It also proposed to amend the *Crimes Act 1914* (Cth) to create an offence of racial incitement. That legislation lapsed, but the Government introduced another bill, the Racial Hatred Bill, into Parliament as we go to press.

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3 For a defence of the proposed visit see L Maher 'Migration Act Visitor-Entry Controls and Free Speech: The Case of David Irving' (1994) 16 *Sydney University Law Review* 358, for support of the decision to exclude Irving, see M Jones 'Extremist Speech & Australian Democracy' (1994) *Cross-Examiner* (forthcoming).

This symposium is designed to address the issues raised by the spectre of racism and racial vilification laws. The problem of racism, which the law will seek to contain, goes beyond holocaust denial to deal with all forms of racism directed at disempowered political groups — be they indigenous Australians, of Asian or Arabic descent, Jews, or members of any of the many ethnic groups coexisting within Australia's multicultural society. The reality and extent of racism in Australia is addressed in two preliminary pieces, by Ian Hazeldine and Jeremy Jones. In the first, *Aspects of Racism in the Australian Context: Issues of Definition & Action,* Hazeldine points to a range of factors which have been significant in the development of both individual and institutional racism in this country, including nationalism, sexism and the maintenacne of economic power relations. He notes that because racism in Australia is both structural and significant it is crucial that an integrated response to the problem of racism, involving both law and education, is adopted. Jeremy Jones' article, *Holocaust Denial: 'Clear and Present' Racial Vilification,* focusses on the sophistocated racism of holocaust deniers, such as David Irving. He looks at the problem caused by the racism and at the range of extremist groups in Australia which adopt holocaust denial as part of their ideology. He argues that Australian law should be drafted so as to take account of holocaust denial, which he takes to be clear and present racial vilification of Jewish Australians.

Having established the serious nature of the threat of racism, the symposium turns to an examination of some existing attempts to deal with racism. It is generally agreed that law is, at best, only a partial solution to the problem — a solution which is concerned primarily to address symptoms rather then causes. For that reason we begin this part of the discussion with an analysis of the South Australian Department of Education's Anti-Racist curriculum. In her article, *Antiracism: From Legislation to Education,* Efrosini Stefanou-Haag outlines the importance of the development of school-based programmes which deal with curriculum issues and which address the need to remove the structural barriers to a racist-free learning environment. She further notes that, from an educationalist perspective, law plays an invaluable role in challenging racism, as it is law which provides the imputus for anti-racist programme development. Similar approaches to that of the South Australian Department have been taken by education departments in other States, and we can hope that in the near future Australian society is able to reap the benefit of these programmes.

The controversy surrounding racial vilification laws is multi-layered. At the heart of the debate is the question of whether freedom of speech can accommodate a limitation on the protection of racist speech. As a traditional small-l liberal society it is assumed that Australians are committed to freedom of speech. The doctrine of freedom of speech has a long history. It has been seen to be a basic ingredient in a democracy, where at the very least voters need the opportunity to distinguish between elites competing for their support. Where democracy is assumed to involve more than the choice of government, and it is assumed that governments have a responsibility to represent the interests of electors, freedom of speech is the essential means by which the requirements of electors can be

communicated to the governors. If a pluralist model of democracy is subscribed to, then democracy would come to a stand still if a prohibition on speech resulted in groups loosing the means of participating in debate and lobbying for the adoption of any given policy. In each of its manifestations, then, democratic theory incorporates the protection of freedom of speech. But there is certainly no requirement that there be unlimited or absolute freedom of speech.

The speech of most value to the democrat, political speech, has also been the focus of proposals for Australian law reform. For example in 1987 the Constitutional Commission recommended that the Commonwealth Constitution be amended to include a new section 116A: "Subject to Section 51 (vi) the Commonwealth or a State shall not ... (ii) restrict freedom of expression concerning government, public policy and administration, and politics".[4] The Commission was concerned to protect speech with respect to the political process, the nature of government, or government policy. This clearly would protect the speech of political dissenters, such as communists, who may disagree with some aspects, or even with the whole, of our political structure. However, the Commission was adamant that there would remain a wide degree of freedom to regulate speech. Specifically, speech such as proscribed by the laws of contempt and defamation would remain untouched, as would the potential to interfere with obscene speech or speech which constituted incitement to racial hatred.[5] The concern for political speech is the concern of the democrat. Liberal theorists, on the other hand, are as worried about interference with acts of self-expression as they are with political speech.

John Stuart Mill's famous account, *On Liberty*, includes a spirited defence of freedom of expression.[6] Mill considers it unnecessary to restate the political function of freedom of speech in protecting citizens from the operations of corrupt or arbitrary government. Instead Mill is concerned with the problem of democracy which de Tocqueville[7] called the "tyranny of the majority". The tendency towards conformism within the masses was seen by Mill as posing a threat to individualism and thereby to the potential for society to progress. Freedom of speech, including the right to maintain and express an unpopular opinion, is seen by Mill to be a fundamental requirement of a free society.

Modern liberal scholars have moved away from Whig notions of man (sic) as a progressive being and from a focus on autonomous individuals. Ronald Dworkin is one who takes rights seriously, and in so doing is concerned to promote the principle of equality.[8] Dworkin accords free speech the status of a right because it is seen to be an essential means of treating people with equal

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4 Constitutional Commission *Report of the Advisory Committee to the Constitutional Commission on Individual and Democratic Rights* (1987), 53.
5 Constitutional Commission n 4, 54.
6 JS Mill *On Liberty* (1859) in *On Liberty: Representatives Government: The Subjection of Women: Three Essays* (1971) OUP.
7 A de Tocqueville *Democracy in America* (1835).
8 R Dworkin *Taking Rights Seriously* (1977) Duckworth.

concern and respect. Again, the protection of speech he proposes is not absolute. Where freedom of speech does not operate to provide individuals with equal concern and respect, then it is permissible to adopt legal rules which interfere with free speech.[9]

There have been two recent historical events, both involving racism, which have effected the development of thought about freedom of speech.[10] First, there was the sophisticated use of anti-Semitic propaganda in the rise of Hitler to power, and the subsequent Holocaust — the genocide of European Jewry. The effect of this event, and the recurrence of "swastika daubing" in the late 1950s and 1960s, was for the international community (and many individual nations) to pass laws prohibiting incitement to racial hatred and insisting upon a limit to the operation of the principle of freedom of speech. In fact, it could be seen that this was a recognition of the fact that freedom was a policy designed to promote equality. Freedom of speech was not absolute — but needed to be read down in order to promote and protect equality.

Secondly, in the United States from the late 1950s there was a newfound recognition of the systematic mistreatment of American blacks, who were denied their constitutional right to vote and who were subject to extreme forms of discrimination. It was the civil rights movement which, through the ACLU, co-opted the principle of freedom of speech to left wing causes. For example, the famous case of *New York Times v* Sullivan[11] which heralded the expansion of the Constitutional protection of free speech by limiting defamation actions, was in fact a case involving an attempt by a white Southern mayor to suppress the publication of commentary in a liberal pro-black newspaper. The US experience inclined the Supreme Court and First Amendment scholars to take an absolutist view of the principle of freedom of speech. This is a position distinct from that taken in the rest of the world, which has as a matter of both international and domestic law taken freedom of speech to be a qualified principle.

The general right to freedom of speech is recognised in Article 19 of the *Universal Declaration of Human Rights*. When this right is spelt out in Article 19(3) of the *International Covenant on Civil and Political Rights* (ICCPR), it provides that the exercise of the right to freedom of speech "carries with it special duties and responsibilities" which do not apply to the other rights protected by the Covenant. These special duties and responsibilities mean that the right may be restricted by law to protect public health or morals, the rights or reputations of others or, more significant for current consideration, to protect national security or public order. Further, Article 20(2) of the ICCPR states that "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence

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9 See R Dworkin 'The Rights of MA Farber: An Exchange' *New York Review of Books* (7 December 1978), 39.

10 SJ Roth in C Greenspan and C Levitt *Under the Shadow of Weimar: Democracy, Law and Racial Incitement in Six Countries* (1993) Praeger.

11 376 US 254 (1957).

shall be prohibited by law". In similar fashion, Article 4 of the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD) obliges states parties to the Convention to: "(a) declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin." Although the international community places considerable value on freedom of speech, then, the protection of individuals from racial hatred is of overriding concern. The full text of these basic documents are extracted at the end of the symposium.

The legal response to the propagation of racial hatred has been dependent on the history of racism in various jurisdictions, as well as that jurisdiction's perception of the role of freedom of speech in representative government. Most countries in the world have adopted some sort of legal regime to deal with the problem of racial vilification; in most cases the response has been to invoke the criminal law. In this symposium we examine in detail the experience of law in the United Kingdom, Canada and the United States in order to gain an appreciation of the similaritites and differences between Australia and these countries with respect to their legal systems, their understanding of freedom of speech and the reality of racism in their midst.

Luke McNamara, *Criminalising Racial Hatred: Learning from the Canadian Experience;* David Knoll, *Anti-Vilification Laws: Some Recent Developments in the United States and their Implications for Proposed Legislation in the Commonwealth of Australia;* and Anne Twomey, *Laws Against Incitement to Racial Hatred in the United Kingdom* each note the limitations of law, and the potential to learn from another jurisdiction. One point that arises in all three contributions, but argued particularly strongly by Twomey, is the necessity of communities and legislators being clear as to what the law can achieve and as to how that fits with the aims of introducting racial vilification laws.

In New South Wales racial vilification laws have been in operation for 6 years, so an assessment of those laws is timely. In *Have We Got It Right? NSW Racial Vilification Laws Five Years On,* Nancy Henessey and Paula Smith argue that the NSW experience has been generally satisfactory, and that freedom of speech has not been unduly hampered by the operation of hate laws. They comment that while the research to establish the value of the law to individual complainants has yet to be undertaken, there is considerable evidence of the success of the law. In particular, the law has served as a focal point for the Anti-Discrimination Board to carry out education strategies designed to alert the media and the community about the law and its rationale. From Henessey and Smith's point of view, the biggest problems with the New South Wales law have been issues of drafting — questions of scope and application, rather than issues of rights.

Whatever legal strategy is adopted, there are a range of alternative terms and provisions which may be incorporated into the law. If the right combination is not achieved, then the law will create a new range of problems and will be unable

to solve the mischief it was designed to address. Getting legislation right is the focus of the contributions by Tamsin Solomon and Kate Eastman. Solomon argues that those drafting the law will be able to come up with suitable provisions if they are appropriately informed about the mischief which the law is designed to address. Of particular importance is the need for law to be sufficiently broadly drafted to catch all expressions of hatred based on 'difference', and for the terms of the law to be directed at rectifying inequality rather than reinforcing it. Eastman's paper, *Drafting Vilification Laws: Legal and Policy Issues,* examines the provisions of the *Racial Hatred Bill.* She argues that those who have drafted the Bill have failed to appreciate what is at stake, and have failed to consider the problems of prosecution and enforcement. Eastman makes the point that there is much to be learnt from the relationship between hate speech legislation and freedom of speech as it has been understood in the international legal arena. The questions of technical legalities are over and beyond questions of the legitimacy of law in terms of freedom of speech, but the two are often conflated in the debate. Even where freedom of speech is not an issue, it is not self-evident that law will provide much of a solution to racism.

The fact that racist speech has not been dealt with by Australian law is not the result of an American-style commitment to freedom of speech or even of a considered view that the anti-racist laws were too difficult to draft. Governments have not until recently believed that racism was an issue in this country. In 1938 Australia refused to take more than a token number of Jewish refugees from Nazi Germany on the ground that "Australia has no racial problem and is not desirous of importing one". Aboriginal Australians were not counted in the census and were excluded from the Australian electorate until 1967, and the White Australia policy was not finally abandoned until 1972. However, the last 25 years have witnessed a move away from xenophobic monoculturalism towards an understanding of the value and advantage of cultural diversity. Both the community and the law have come to accept that British colonisation of Australia involved an invasion of the property and rights of the Aboriginal people, and that the subsequent treatment of the original inhabitants has been based on overt racial discrimination or invidious racial stereotyping. Furthermore, there is now an official recognition of the inappropriateness of assimilation for both Aborigines and for any of the other ethnic groups which have come to Australia in the massive waves of immigration to this country. Multiculturalism requires that members of all the diverse groups be treated equally. The rights of both individuals and the community at large are threatened by the spread of racist ideas and values. Freedom in Australia is predicated upon the ability of the state to provide protection from victimisation and discrimination for all members of the community.

On the other hand, Australian history and experience indicates a very low political valuing of freedom of speech.[12] Beyond the myriad of incursions into

12 See generally E Gaze and M Jones *Law Liberty & Australian Democracy* (1990) Law Book Co.

freedom of speech which we accept in terms of laws relating to defamation, sub judice, blasphemy, privacy, there was little concern for freedom of speech in the treatment of communists who, in the 1950s and 1960s, were felt to pose a threat to the political integrity of Australia. It would seem, then, that freedom of speech should pose no barrier to the introduction of racial vilification laws. However, the issue of freedom of speech has assumed greater significance in the Australian debate about racial vilification laws than would seem to accord with our historical valuing of free speech. This is consistent with the result in a number of recent High Court decisions, known as the 'free speech' cases, which have caused great excitement among constitutional lawyers and proponents of an Australian Bill of Rights.[13] It is generally believed that we have, for the first time, an implied constitutional guarantee of freedom of speech — or at least of political speech. The question arises, then, whether the constitutional protection of freedom of speech would invalidate any legislation outlawing racist speech. Because the constitutional implication of freedom of communication is a manifestation of representative government as found in the Constitution, the answer to this question lies both in constitutional interpretation and on the view taken of the role, function and limits of the doctrine of freedom of speech.

The final three contributions to the symposium consider these issues. In my own contribution, *Empowering Victims of Racial Hatred By Outlawing Spirit-Murder*, I examine the need for law from the victim's perspective. Asking what the victim of racism wants of law leads to an investigation of potential legal strategies for combatting racism. Approaching the subject from the victim's point of view not only raises different legal possibilities but suggests a different approach to the notion of freedom of speech. As such it is argued that racial vilification laws are entirely consistent with the constitutional implication of freedom of political communication and discussion Further, when the question is broached from a victim-perspective, it becomes apparent that the use of both civil and criminal law to address the issue of racial hatred is not only justified, but is a matter of responsible government.

Ian Freckleton's contribution to the debate, *Censorship and Vilification Legislation*, considers the problem of racial vilification laws, which he takes to inherently interfere with freedom of speech, in two distinct contexts: that of criminal law and penalties; and that of civil law and remedies. He argues that the use of criminal law to outlaw speech is dangerous, even though the problem of racism is serious. He argues that civil remedies are far more suitable for the task of tackling racist speech. Freckelton is most concerned that the significant role that freedom of speech plays in our society is not overlooked, and that there is very careful thought before that principle is detracted from.

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13 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth (No 2)* (1992) 177 CLR 106; *Theophanous v Herald & Weekly Times Ltd & Ors* (1994) 124 ALR 1; *Stephens v Western Australian Newspapers Ltd* (1994) 124 ALR 80; *Cunliffe v Commonwealth* (1994) 124 ALR 120.

Kathleen Mahoney concludes the symposium with her article *Hate Vilification Legislation and Freedom of Expression: Where is the Balance?* She argues that while freedom of speech is a value to be cherished, it also involves special responsibilities. The use of law to limit freedom of speech is considered to be legitimate, on even the most extreme version of the free speech principle, where what is involved constitutes incitement. In multicultural democratic Australia, and in line with developments in Europe, Africa and Canada, racist speech is appropriately considered to be vilification which incites to hatred. Mahoney argues that action taken by governments to limit the spread of racist ideology is not only unproblematic from the perspective of freedom of speech, but is mandated by the democratic commitment to treat all people with equal concern and respect.

Because the matters at stake in this debate are very high, and because the risks of getting it wrong could have profound consequences for Australian society, it it crucial that in striking the balance between the containment of racism and freedom of speech we strike it right. In undertaking this exercise it is crucial to bear in mind that law cannot, on its own, solve the problem of racism. Even the most draconian law will be unable to change the behaviour of most racists or elevate victims to the status of treasured member of society. There is general agreement that a solution to racism, if it is to be found anywhere, is in anti-racist education — for in this area the idea that ignorance breeds contempt is fundamental. Nonetheless, racial vilification laws can play an educative, as well as a punitive and remedial role in the nightmare of racism, and should not be discounted because they only offer a partial solution to the problem of racism in Australia. This symposium alerts you, the reader, to the pitfalls of enacting legislation and to the benefits to be gained from invoking the law. It allows you to take freedom of speech seriously, at the same time as appreciating the significance to victims of the unrestrained and irresponsible exercise of freedom of speech. It is left to you to decide what is the right thing to do, and then lobby the government so they, too, can strike it right.