

## THE COMMONWEALTH RACIAL HATRED ACT 1995: ACHIEVEMENT OR DISAPPOINTMENT?

### INTRODUCTION

**W**HILE the Racial Hatred Bill 1994 was considered by many commentators to represent a serious threat to the very foundations of Australian democracy when it was first introduced into Parliament in November 1994, the passing of the *Racial Hatred Act 1995* (Cth) by the Senate on 24 August 1995<sup>1</sup> attracted very little media attention.

The most obvious explanation for the drop-off in popular media interest is that the final version of the legislation was considerably more limited than the version originally contained in the 1994 Bill - although the Act still contained the racial vilification provisions derided as limiting freedom of speech and of thought. Specifically, whereas the original Bill would have created three new criminal offences relating to the promotion of racial hatred, the *Racial Hatred Act 1995* (Cth) simply amends the *Racial Discrimination Act 1975* (Cth) to allow victims of racial vilification to lodge a complaint with the Human Rights and Equal Opportunity Commission (HREOC) for conciliation, or where necessary adjudication. Presumably the removal of criminal sanctions (and therefore also of consequential police powers to investigate the offences covered by the legislation) was sufficient to allay the fears of many opponents of racial hatred laws that Australia was on the brink of decline into the free speech-less and "intolerant" world of a (thought) police state.

Despite its relatively limited scope, the enactment of the *Racial Hatred Act 1995* (Cth) is an achievement which deserves to be applauded. Victims of certain types of racist conduct now have available to them a means of legal redress irrespective of their state or territory of residence. In addition, the new racial vilification provisions of the *Racial Discrimination Act 1975* (Cth) can be expected to play a useful educative role in the fight against racist speech and behaviour.

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1 The *Racial Hatred Act 1995* (Cth) commenced operation on 13 October 1995.

In addition to providing an overview of the *Racial Hatred Act* 1995 (Cth) (including a brief background to the legislation and a summary of its key features) this article will present a short analysis of the arguments which were pivotal to the erosion of the original Racial Hatred Bill 1994 on its way to becoming the *Racial Hatred Act* 1995 (Cth). While appreciative of the significance of the enactment of national racial vilification legislation, we argue that any effort to portray the enactment of the *Racial Hatred Act* as the paradigm liberal democratic case-study in the “balancing of competing rights” must be resisted. Of particular concern is the manner in which both outright opponents of the legislation and advocates of its watering-down (both inside and outside the Parliament) employed the language of “free speech” and “tolerance” in support of their positions. We conclude that the story of the passage of the *Racial Hatred Act* is a disturbing story of unjustified deference to poorly articulated “fundamental democratic principles”, which are borrowed heavily from American libertarianism, and which are patently inadequate for a society such as Australia’s which purports to be seriously multicultural.<sup>2</sup> It is a story which tends to undermine rather than restore faith in the capacity of the Australian political and legal systems to respond effectively and justly to the various harmful manifestations of racial hatred which are a very real feature of social relations in Australia.

## BACKGROUND

The introduction of national racial hatred legislation in Australia has been a long and protracted process stretching over more than two decades from the time of the enactment of national racial discrimination legislation. Racial hatred provisions had been contained in the early drafts of the race discrimination legislation in the early 1970s but were excluded when the *Racial Discrimination Act* (Cth) was enacted in 1975. Proposals to add provisions with respect to incitement to racial hatred and racial defamation to the *Racial Discrimination Act* 1975 (Cth) were considered in the early 1980s<sup>3</sup> but no such changes were implemented. Throughout this period, the expectation that Australia should fulfil both the letter and the spirit of its obligations under international human rights law provided a consistent source of pressure.

Australia has ratified the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD). Article 4(a) of ICERD places an obligation on State parties to:

- 2 There is a distinction here between multicultural as a mere description of the diversity of a population (in which sense the term applies equally to the USA and Australia) and multiculturalism in the form of political commitment to the promotion and protection of cultural diversity. It is in the latter respect that libertarian principles represented a significant constraint on the capacity of the legal system to afford protection to victims of racial hatred. See below, fn 31.
- 3 See Aust, Human Rights Commission, *Proposal for Amendment to the Racial Discrimination Act to Cover Incitement to Racial Hatred and Racial Defamation* (Report No 7, 1984); also Pettman, *Incitement to Racial Hatred: Issues and Analysis* (Human Rights Commission Occasional Paper No 1, 1982).

declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin.

In addition, article 20(2) of the *International Covenant on Civil and Political Rights* (ICCPR), to which Australia is also a signatory, provides that “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”.

However, Australia’s ratification of both treaties includes a reservation with respect to the provisions relating to the prohibition of racial vilification (ostensibly due to a perceived conflict with the right to freedom of expression protected by article 20 of the ICCPR). Australia’s maintenance of this reservation has been a subject of domestic criticism and international attention. For example, at its 1067th meeting on 18 August 1994, the United Nations Committee on the Elimination of Racial Discrimination (which monitors compliance with the obligations of state parties under the ICERD) recommended that Australia “adopt appropriate legislation with a view to withdrawing its reservation to article 4(a) of the Convention”.<sup>4</sup>

In addition to persistent lobbying by ethnic and Indigenous community organisations, and the creation of racial vilification laws at the state/territory level (commencing with the passage of the *Anti-Discrimination (Racial Vilification) Amendment Act 1989 (NSW)*),<sup>5</sup> pressure for the creation of national racial vilification legislation was also generated by the release of the reports of the Human Rights and Equal Opportunity Commission’s National Inquiry into Racist Violence (1991),<sup>6</sup> the Royal Commission into Aboriginal Deaths in Custody (1991),<sup>7</sup> and the Australian Law Reform Commission’s reference on

4 *Report of the Committee on the Elimination of Racial Discrimination to the General Assembly, A/49/18* (1995) para 549. This recommendation followed the Committee’s consideration of Australia’s ninth periodic report (CERD/C/223/Add.1) at its 1058th and 1059th meetings, on 11 and 12 August 1994. It might be argued that the enactment of the *Racial Hatred Act 1995* (Cth) constitutes an implicit revocation of the reservation, although it is doubtful whether the legislation is sufficiently broad in its scope to constitute full compliance with article 4(a).

5 This Act added racial vilification provisions to the *Anti-Discrimination Act 1977 (NSW)* ss20C-20D. Legislation was subsequently enacted in Western Australia (see *Criminal Code 1913 (WA)* ss77-80); the Australian Capital Territory (*Discrimination Act 1991 (ACT)* ss66-67); Queensland (*Anti-Discrimination Act 1991 (Qld)* s126); and South Australia (*Racial Vilification Act 1996 (SA)*).

6 Aust, Human Rights and Equal Opportunity Commission, *Racist Violence: Report of National Inquiry into Racist Violence in Australia* (1991).

7 Aust, Royal Commission into Aboriginal Deaths in Custody (Johnston, Commissioner) *National Report Volume 4* (1991).

Multiculturalism and the Law (1992).<sup>8</sup> Each of the reports identified racial vilification as a sufficiently serious problem in Australia to warrant the making of such conduct unlawful.

The National Inquiry into Racist Violence found that “[r]acist violence is an endemic problem for Aboriginal and Torres Strait Islander people in all Australian States and Territories”.<sup>9</sup> It also found that:

Racist violence on the basis of ethnic identity in Australia is nowhere near the level that it is in many other countries. Nonetheless it exists at a level that causes concern and it could increase in intensity and extent unless addressed firmly now.<sup>10</sup>

In the National Report of the Royal Commission into Aboriginal Deaths in Custody, Commissioner Johnston noted that verbal abuse constituting racial vilification was a persistent feature of the systemic discrimination suffered by Aboriginal people in the criminal justice system, particularly at the point of contact with police.<sup>11</sup>

While there was general agreement as to the nature and extent of the problem of racial vilification in Australia, views as to the most appropriate form of legal intervention differed. The most extensive proposals came from the National Inquiry into Racist Violence. It recommended:

3. That any qualification on Australia’s obligations under Article 4(a) of the *Convention on the Elimination of All Forms of Racial Discrimination* be removed.
4. That the Federal Parliament enact in the Federal *Crimes Act* 1914 a new criminal offence of racist violence and intimidation.
5. That the Federal *Crimes Act* be amended to create a clearly identified offence of incitement to racist violence and racial hatred which is likely to lead to violence.
6. That the Federal *Racial Discrimination Act* 1975 be amended to prohibit racist harassment.

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<sup>8</sup> Australian Law Reform Commission, *Multiculturalism and the Law* (Report No 57, 1992).

<sup>9</sup> Aust, Human Rights and Equal Opportunity Commission, *Racist Violence: Report of National Inquiry into Racist Violence in Australia* (1991) p387.

<sup>10</sup> As above.

<sup>11</sup> Aust, Royal Commission into Aboriginal Deaths in Custody (Johnston, Commissioner) *National Report* Vol 4 (1991) p71.

7. That the Federal *Racial Discrimination Act* be amended to prohibit incitement of racial hostility, with civil remedies similar to those already provided for racial discrimination.

8. That Federal and State Crimes Acts be amended to enable courts to impose higher penalties where there is a racist motivation or element in the commission of the offence.<sup>12</sup>

The Royal Commission into Aboriginal Deaths in Custody recommended that "governments which have not already done so legislate to proscribe racial vilification".<sup>13</sup> However, the Royal Commission did not support the enactment of criminal laws, concluding that conciliation-based laws along the lines of s20C of the New South Wales *Anti-Discrimination Act* 1977 were preferable.<sup>14</sup> Similarly, in its report on *Multiculturalism and the Law*, the Australian Law Reform Commission recommended that incitement of racist hatred and hostility be made unlawful, but (by majority) considered it inappropriate to create any criminal offences.<sup>15</sup>

The then Labor Government's initial legislative response to these reports was the Racial Discrimination Amendment Bill 1992 which was introduced into the House of Representatives in December 1992. The Bill proposed amendments to both the *Racial Discrimination Act* 1975 (Cth) and the *Crimes Act* 1914 (Cth), reflecting a preference for the combined criminal law/conciliation approach advocated by the National Inquiry into Racist Violence.

The 1992 Bill proposed that the *Racial Discrimination Act* 1975 (Cth) be amended to make racial vilification unlawful and a basis for complaint to the Human Rights and Equal Opportunity Commission. Racial vilification was defined as knowingly or recklessly doing a public act which was likely to stir up hatred, serious contempt or severe ridicule against a person or a group of persons on the ground of race, colour or national or ethnic origin. The Bill also proposed the addition of two racial incitement offences to the *Crimes Act* 1914 (Cth): intentionally stirring up hatred on the ground of race, colour or national or ethnic origin; and inspiring fear that violence may be used against persons because of their race, colour or national or ethnic origin.

The Bill was circulated for public discussion and comment. However, when a federal election was called for March 1993 the Bill lapsed. When the Bill was not reintroduced

12 Aust, Human Rights and Equal Opportunity Commission, *Racist Violence: Report of National Inquiry into Racist Violence in Australia* (1991) pp389-90.

13 Aust, Royal Commission into Aboriginal Deaths in Custody (Johnston, Commissioner) *National Report* Vol 4 (1991) p75.

14 At pp74-75.

15 Australian Law Reform Commission, *Multiculturalism and the Law* (Report No 57, 1992) para 7.47. The Law Reform Commission did support the creation of a separate offence of racist violence: paras 7.33-7.39.

into the new Parliament following the election, concerns were raised about the Labor Government's commitment to national racial hatred legislation. However, in November 1994 a revised Bill (the Racial Hatred Bill 1994) was introduced into the House of Representatives.

Like its predecessor, the 1994 Bill was based on a two-pronged approach to the proscription of racial vilification, proposing changes to both the *Crimes Act 1914* (Cth) and the *Racial Discrimination Act 1975* (Cth). The 1994 Bill proposed that three new criminal offences be created. The first would have prohibited specific threats to persons where motivated by the race, colour or national or ethnic origin of the person or persons threatened, while the second would have prohibited racially-motivated threats to property. The third amendment to the *Crimes Act 1914* (Cth) proposed by the 1994 Bill was the offence of intentionally inciting racial hatred, which was similar in terms to the offence of stirring up racial hatred proposed in the 1992 Bill.

The amendment to the *Racial Discrimination Act 1975* (Cth) proposed by the 1994 Bill was substantially different from the change proposed by the 1992 Bill. Where the 1992 Bill had essentially adopted the wording of s20C of the *Anti-Discrimination Act 1977* (NSW) (albeit with an additional subjective *mens rea* component) the wording contained in the 1994 was unique among Australian racial hatred laws. It would be unlawful to do a public act which was likely to "offend, insult, humiliate or intimidate", a definition which appears to be considerably wider than the 1992 Bill's reference to "hatred, serious contempt or severe ridicule". No evidence of intention, knowledge or recklessness would be required, but the proposed section contained a long list of exemptions or defences.

The Racial Hatred Bill 1994 was passed in the House of Representatives on 16 November 1994. However, progress was slowed in the Senate when the Bill was referred to the Senate Legal and Constitutional Legislation Committee. In March 1995 the committee recommended (by a party-lines majority) that the Bill be enacted as introduced.<sup>16</sup> In the Senate the Bill was supported by both the ALP and the Australian Democrats. It was opposed in its entirety by the Liberal/National Coalition, while the Western Australian Greens (hereafter "WA Greens") refused to support the inclusion of criminal sanctions. As a result of amendments introduced in the Senate by the WA Greens, the provisions which would have added three new offences to the *Crimes Act 1914* (Cth) were deleted from the legislation before it was passed on 24 August 1995. Consequently, in its final form, the *Racial Hatred Act 1995* (Cth)<sup>17</sup> is a considerably narrower piece of legislation than was envisaged when the Racial Hatred Bill was first tabled in Parliament late in 1994.

16 Aust, Parl, Senate Legal and Constitutional Legislation Committee, Report, *Racial Hatred Bill 1994* (PP 487, 1995) p28.

17 The *Racial Hatred Act 1995* (Cth) received assent on 15 September 1995 and the amendments to the *Racial Discrimination Act 1975* (Cth) came into force on 13 October 1995.

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## **THE LEGISLATION: KEY FEATURES**

### **Part IIA of the *Racial Discrimination Act 1975* (Cth)**

The main effect of the *Racial Hatred Act 1995* (Cth) is the addition of the following provisions to the *Racial Discrimination Act 1975* (Cth):

#### **PART IIA - PROHIBITION OF OFFENSIVE BEHAVIOUR BASED ON RACIAL HATRED**

##### **Reason for doing an act**

18B. If:

- (a) an act is done for 2 or more reasons; and
- (b) one of the reasons is the race, colour or national or ethnic origin of a person (whether or not it is the dominant reason or a substantial reason for doing the act);

then, for the purpose of this Part, the act is taken to be done because of the person's race, colour, national or ethnic origin.

##### **Offensive behaviour because of race, colour or national or ethnic origin**

18C.(1) It is unlawful for a person to do an act, otherwise than in private, if:

- (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
- (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

(2) For the purposes of subsection (1), an act is taken not to be done in private if it:

- (a) causes words, sounds, images or writing to be communicated to the public; or
- (b) is done in a public place; or
- (c) is done in the sight or hearing of people who are in a public place.

(3) In this section:

“*public place*” includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.

### **Exemptions**

18D. Section 18C does not render unlawful anything said or done reasonably and in good faith:

(a) in the performance, exhibition or distribution of an artistic work; or

(b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or

(c) in making or publishing:

(i) a fair and accurate report of any event or matter of public interest; or

(ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

### **Vicarious liability**

18E.(1) Subject to subsection (2), if:

(a) an employee or agent of a person does an act in connection with his or her duties as an employee or agent; and

(b) the act would be unlawful under this Part if it were done by the person;

this Act applies in relation to the person as if the person had also done the act.

(2) Subsection (1) does not apply to an act done by an employee or agent of a person if it is established that the person took all reasonable steps to prevent the employee or agent from doing the act.



## Structure

In his speech introducing the Second Reading of the Racial Hatred Bill in the House of Representatives, the then Attorney General, Michael Lavarch, pointed out that the format of the racial vilification provisions was similar to the model used in other Commonwealth legislation, such as the *Sex Discrimination Act* 1984 (Cth). It was:

- based upon the availability of a remedy in specified circumstances,
- judged against the objective criteria of what is reasonably likely in all the circumstances to give rise to a valid complaint, and
- limited and targeted through the use of exemptions.<sup>18</sup>

## Scope of the Legislation

In comparison with the racial vilification provisions contained in the *Anti-Discrimination Act* 1977 (NSW) and the 1992 Federal Bill, the threshold for unlawfulness under s18C of the *Racial Discrimination Act* is relatively low. The Act renders unlawful conduct which is likely to *offend, insult, humiliate or intimidate*, whereas s20C of the *Anti-Discrimination Act* 1977 (NSW) makes it unlawful to *incite hatred, serious contempt or severe ridicule*. The rationale for the adoption of this wording in the final version of the federal legislation was a desire to achieve consistency between the racial vilification provisions of the *Racial Discrimination Act* and the sexual harassment provisions contained in the *Sex Discrimination Act* 1984 (Cth).<sup>19</sup>

Another more subtle indication of the relative breadth of the definition of unlawful racial vilification under the Act is the definition of public conduct contained in ss18C(2)-(3). While debate is likely to continue on the justifiability of focusing only on public acts, the inclusion of a reasonably wide definition of public conduct is a significant advance on the situation in New South Wales where the absence of statutory guidance as to the meaning of “public place” has created difficulties for the Anti-Discrimination Board in determining the limits of the racial vilification provisions.

In further contrast with the 1992 Bill (but in line with the New South Wales legislation), there is not a subjective *mens rea* component: it is not necessary that the person performing the relevant act intends to cause, or is reckless about whether his or her conduct may cause, a member of the relevant group to be offended, insulted, humiliated or intimidated. In assessing whether conduct amounts to racial vilification, s18C requires HREOC to apply

18 Aust, Parl, *Debates*, (1994) Vol 198 at 3341.

19 The phrase, “offend, insult, humiliate or intimidate” is taken from the definition of sexual harassment in s28 of the *Sex Discrimination Act* 1984 (Cth).

an objective test, so that community standards of behaviour are determinative, rather than the subjective views of the respondent (or indeed, the complainant). However, the legislation provides for a number of “genuine belief” and “good faith” defences which substantially undermine the objective nature of the inquiry as to the unlawfulness or otherwise of the respondent’s conduct. These exemptions are discussed further below.

### **Emphasis on Conciliation**

Consistent with the dominant model of legal intervention prescribed by human rights laws throughout Australia, the *Racial Hatred Act* 1995 (Cth) provides for private and confidential conciliation by HREOC as the preferred mechanism for the resolution of racial vilification complaints lodged. If resolution by conciliation is unsuccessful, the matter may be the subject of a public hearing and determination by the Commission. The Commission can immediately dismiss frivolous or vexatious complaints.

Tagged as a form of *alternative* dispute resolution, conciliation has come in for a considerable amount of criticism recently. While it is widely accepted that it represents a cheaper and quicker alternative to traditional litigation, concerns have been raised about its effectiveness (in a variety of contexts)<sup>20</sup> and its appropriateness as a means of achieving the particular objectives of human rights law.<sup>21</sup>

We do not propose to canvass the various arguments here,<sup>22</sup> except to recommend that before final judgement is passed on the adequacy of conciliation-based resolution of racial vilification disputes, it is important to determine what is actually going on in the name of “conciliation”, rather than to generalise or make assumptions as to the nature of the process. For example, the extent of the problem of “power imbalance” as between the parties (a commonly cited weakness in the conciliation process) will depend heavily on the role assumed by the facilitator (in the present case, a HREOC Conciliation Officer).

### **Motivation and the Relevance of the Victim’s Characteristics**

The requirement that the offending act be done “because of” specific characteristics of the victim or members of the target group may create difficulties.<sup>23</sup> First, the list of characteristics is limited; it does not include religion, despite evidence that religious differences are a major source of “racist” conflict. Second, s18C appears not to cover the

20 See, for example, Lederman, “A dangerous interloper” (1994) 29 *Aust Law* 21.

21 See, for example, Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, Melbourne 1990) Ch 5; Fraser, “It’s Alright Ma, I’m Only Bleeding” (1989) 14 *Leg Serv Bull* 69 at 70.

22 For some preliminary observations on the use of conciliation in the resolution of racial vilification complaints, see McNamara, “The Merits of Racial Hatred Laws: Beyond Free Speech” (1995) 4 *Griffith LR* 29 at 53-60.

23 This issue is examined in greater detail in Solomon, “Problems in Drafting Legislation Against Racist Activities” (1994) 1 *Aust J Hum Rts* 265 at 277 ff.

situation where the perpetrator mistakenly believes that the target of his or her conduct belongs to a particular group (defined by race, colour, national origin or ethnicity). Such situations, in which the harm to the victim may be no less serious than if he or she had been a member of the target group, will only be covered if the legislation is amended to refer to the perceived, implied, imputed, presumed or supposed characteristics of the victim.

Another potential problem in the application of the legislation is that in many circumstances it may not be entirely clear why the perpetrator has vilified the victim, and specifically, whether it was “done because of the race, colour or national or ethnic origin” of the victim. Section 18B offers a partial solution to this problem: it is not necessary that the victim’s race, colour or national or ethnic origin be the dominant or substantial reason for the perpetrator’s act, provided it is part of his or her motivation.

### **Exemptions and the defence of genuine belief**

Before the Senate Standing Committee the Australian Arabic Council observed that:

Exemptions under s18D present many problems, as the effects of the actions exempted are no less serious than the racist actions, and the grounds for exemptions do not mitigate the effect that the Bill is ostensibly trying to address.<sup>24</sup>

The Committee recognised the validity of the argument in terms of the harm caused to victims of racial vilification but supported the exemptions on the basis that they were “necessary to support the constitutional validity of the Bill”.<sup>25</sup> The constitutionality of racial vilification legislation was presumably considered to have been placed in some doubt by the recent recognition by the High Court of Australia that certain individual rights, including a right to freedom of communication in certain circumstances, are implicit in the Australian Constitution. This matter is discussed at greater length below. At this point it is simply noted that the inclusion of extensive exemption provisions in the original 1994 Bill is further evidence of the extent to which “free speech sensitivity” has remained a core feature of the evolution of “acceptable” racial hatred legislation from the time of the Bill’s original drafting to the time of the Act’s passage.

Section 18D of the Act limits the scope of the proscription of racial vilification by providing that 18C does not render unlawful anything said and done “reasonably and in good faith” where the act can be considered to belong to one of the specified categories (s18D(a)-(c)). The final category is the most problematic. Section 18D(c)(ii) provides that s18C does not render unlawful anything said or done reasonably and in good faith which

<sup>24</sup> Aust, Parl, Senate Legal and Constitutional Legislation Committee, Report, *Racial Hatred Bill 1994*. (PP 487, 1995) p23.

<sup>25</sup> As above.

can be characterised as a “fair comment on any event or matter of public interest if the comment is an expression of a *genuine belief* held by the person making the comment”.<sup>26</sup>

The inclusion of a “genuine belief” defence seriously undermines the capacity of the *Racial Hatred Act* to achieve the key objective of extending protection to victims from the harm caused by racist speech and conduct. “Genuine” and widely accepted scientific theories have been used to justify the genocide of European Jews, the enslavement of Blacks in the Americas and the oppression, dispossession and extermination of indigenous peoples in almost every region of the world. The inclusion of a genuine belief defence would seem to be based on the erroneous assumption that there is a relationship between “sincerity” and social acceptability, or between “genuine” motivation and minimisation of harm to the victims. Yet, when it comes to the promotion of racial hatred or myths of racial inferiority there is no correlation between the sincerity of the perpetrator’s beliefs and either the harm suffered by the target group or the value of the speech to the wider community.

The “belief in truth” exemption constitutes a possible escape route for respondents that is both unnecessary and open to abuse. Preoccupation with the respondent’s subjective state of mind is both inconsistent with the objective nature of the primary inquiry required by s18C (“reasonable likelihood”) and incompatible with the overall aim of the legislation. It is disappointing that legislation which purports to be primarily concerned with addressing the harm caused to targeted persons or groups by public acts of racial hatred has gone to such lengths to offer immunity to perpetrators, regardless of how evil-intentioned or reckless they may have been in engaging in the conduct under scrutiny. A more appropriate test would be to consider whether the perpetrator knew or *should have known* that his or her act was likely to bring about one of the nominated consequences.<sup>27</sup>

### **Vicarious Liability**

The introduction in s18E of culpability for one’s employee’s or agent’s racist actions, where those actions were done in connection with the person’s employment or agency, was considered by some commentators to be an outrageous imposition upon employers, but seems to be rather a reasonable requirement for employers to establish their own systems to prevent racial vilification in the workplace. In other regulatory contexts, such as trade practice and corporations law, it is a defence to otherwise strict liability offences to demonstrate that the alleged offender (say, a company) has established internal systems which are designed to prevent, as far as possible, the prohibited behaviour or event occurring (such as the publication of misleading representations about the company’s profitability). If the institutionalisation of racism is to be combated, it is logical that such

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26 Emphasis added.

27 On the question of whether the inquiry should be subjective or objective, see further, Solomon, “Problems in Drafting Legislation Against Racist Activities” (1994) 1 *Aust J Hum Rts* 265 at 276-77.

systems should equally be established to protect not only people's money but their dignity and right to be free from racist abuse. If this provision is enforced, it could have a very positive effect in discouraging racial vilification in the Australian workplace, just as legislation has increased workplace awareness that neither sexual harassment nor discrimination on the grounds of gender or sexuality is acceptable behaviour.

### THE DEBATES: "WHOSE SIDE ARE YOU ON?"

*We know that racism appears in many forms and not always as malevolent violence. Here it poses as democratic liberalism and humanism.*<sup>28</sup>

The debate over the Racial Hatred Bill 1994 (as conducted in both the popular media and in the Federal Parliament) was both lengthy and voluminous. Unfortunately, the intensity of the debate was a function of quantity rather than quality. Debate was characterised by a serious failure by many participants (particularly those who opposed the legislation) to engage in an adequate level of detailed analysis of the relevant issues. Of particular concern is the manner in which certain "principles" (the content and value of which appear to be assumed knowledge) were employed by those who opposed the legislation or recommended its curtailment. The excision of the proposed additions to the *Crimes Act* 1914 (Cth) prior to the Bill's passage as the *Racial Hatred Act* 1995 (Cth) was portrayed as a "victory" for two fundamental democratic principles: *free speech* and *tolerance*. However, in our view, the terms "free speech" and "tolerance" were frequently used as *slogans* to justify opposition to racial hatred laws, rather than as part of a rigorous and accurate assessment of the arguments.

### Media Treatment

The argument that racial vilification laws should be opposed because they represent a threat to the "right of free speech" was articulated on numerous occasions by media commentators during the time in which national racial hatred legislation was emerging between 1994 and 1995. Free speech-based opposition expressed in the media has had a strong influence on the shape of the recent debate despite a number of significant weaknesses including:

- denial or underestimation of the harm caused by racist speech and behaviour;
- failure to appreciate the extent of the problem of racial vilification;

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28 Tatz, *Reflections on the Politics of Remembering and Forgetting* (Centre for Comparative Genocide Studies, Macquarie University, Sydney 1995) p39.

- ignorance of the evidence on the operation of racial hatred laws, and a tendency to make self-serving assumptions about the nature and effect of such laws;
- reliance on inappropriate criteria for assessing the effectiveness of racial vilification laws;
- use of absolutist rhetoric in relation to the concept of free speech; and
- a simplistic preference for reliance on education and more speech rather than regulation as the solution to the problem.<sup>29</sup>

Unfortunately, the same weaknesses were echoed in parliamentary debates on the Racial Hatred Bill 1994 by those who opposed the legislation.

### House of Representatives Debate

Debate over the Racial Hatred Bill in the House of Representatives revealed both considerable knowledge and depths of ignorance about the issues relevant to the creation of racial vilification legislation. While speakers both for and against the Bill displayed humanitarian concern for the victims of racist speech and behaviour, the Bill's supporters also analysed the nature of racism, discussed its cultural and historical causes and its context in multicultural societies, referred to studies on the extent of racist violence in Australia, and considered the social, emotional and economic effects of racist speech and behaviour. They spoke of the disabling effect that racism has on its victims' ability and willingness to participate in public debate or other forums of democratic government.

Opponents of the Racial Hatred Bill 1994 in the House frequently echoed the "free speech" arguments of media commentators, making regular references to the need to resist government "thought police" and the forces of "political correctness". A number of parliamentarians drew heavily on the contents of newspaper articles in support of their position. Not surprisingly, therefore, the core themes of media opponents (denying or minimising the harms of racism, arguing that legislation would cause greater harm and concluding that public education is the only answer) featured prominently in the House. Arguments against the legislation ignored the history and context of racism in Australia.<sup>30</sup>

29 For further elaboration on these flaws see McNamara, "The Merits of Racial Hatred Laws: Beyond Free Speech" (1995) 4 *Griffith LR* 29 at 40-53.

30 Charles Lawrence has pointed out that to consider legislation against racism either in an idealised situation or out of context is to consider such legislation in a theoretical world characterised by equal opportunity and the absence of culturally ingrained and socially supported racism: Lawrence "If He Hollers Let Him Go: Regulating Racist Speech on Campus" in Matsuda, Lawrence, Delgado and Williams Crenshaw, *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Westview Press, Boulder 1993) p58.

“Libertarian”<sup>31</sup> American ideas that regulation of racist hate speech is generally inconsistent with the First Amendment, and thus with free speech per se, were followed in preference to the concept expressed in American critical race theory,<sup>32</sup> Canadian Supreme Court decisions<sup>33</sup> and civil jurisdictions:<sup>34</sup> that legislative regulation of hate speech is necessary and appropriate to protect the victims of that speech, including protecting their own rights of free speech and their own rights to participate as equals in a democracy.

Opponents were quick to disclaim any racism on their own part, referring to their personal friendships, family relationships and overseas travel as evidence, but often displayed unconscious condescension or an inability to recognise the nature or real harms of racism. One member referred fondly to his “fruit salad” of constituents from different ethnic backgrounds. Many opponents confused disagreement with the actions or views of a person from another background with racial vilification, failing to understand that racism is about abusing or discriminating against someone because of their mere existence. Others called for victims of racism to be more “tolerant”, in the sense of “putting up with” racist harms.

Liberal MHR Mr Abbott commented that it would be quite inappropriate for the Racial Hatred Bill to allow the making of a complaint to HREOC if, for example,

a World War II veteran protesting against a Japanese development somewhere in our country should make the throw-away line, “Well, you know, the Japs were just as bad during the war and they haven’t got any better in all these years,”

31 To call opposition to legislation against racism “libertarian” is actually a misuse of that term. The definition of libertarianism in the *Fontana Dictionary of Modern Thought* refers to “an extreme form of political liberalism, *hostile to all forms of social and legal discrimination between human beings* and favouring the absolutely minimal constraint by society on individual freedom of action” (emphasis added): Bullock and Stallybrass, *Fontana Dictionary of Modern Thought* (Fontana, London 1979). Thus “libertarianism” has two equally important limbs: the favouring of minimal societal constraints, and opposition to all forms of social and legal discrimination.

32 For a sample of the valuable contributions of critical race scholars to the debate over the regulation of hate speech, see Matsuda et al, *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment*.

33 See, for example, the majority judgment in *R v Keegstra* (1990) 61 CCC (3d) 1.

34 Civil law jurisdictions invariably possess a written constitution which almost always includes a set of human rights guarantees: see Kinley, “Casting an Australian Eye to European Human Rights in the United Kingdom: The Political Dimensions of a Legal World” (1995) 2 *Aust J Hum Rts* 91 at 95. See generally Centre for Human Rights, *Second Decade to Combat Racism & Racial Discrimination* (United Nations, Geneva 1991) which contains texts of legislation which regulates racism and racial discrimination.

describing such a statement as a “relatively harmless throw-away line”.<sup>35</sup> Mr Abbott failed to distinguish between comments which oppose specific *actions* (development of an area that should be conserved, or the acquisition of land by non-Australians) and comments which oppose a group *as such*, purportedly on the basis of past actions, but actually in a manner which ignores the behaviour of individual members of the group today.<sup>36</sup> A similar propensity to confuse the intended targets of the legislation was evident in the comments of the several MPs who erroneously argued that the legislation would stifle debate on such topics as immigration and foreign policy.<sup>37</sup>

Many *opponents* of the legislation employed the language of “tolerance”, not in the sense of freedom from bigotry, but in the sense of endurance of suffering.<sup>38</sup> Thus, it was *victims* of hate speech who were expected to be more “tolerant” of the harms done to them! Opponents denigrated those who feared being hurt by racists as weak or oversensitive, as opposed to the normal robust “true Aussie”. Assumptions were made about how members of minority groups aren’t so easily hurt as other people, or about how they are “paralysed” by any offensive words and should learn to cope with psychic harm.<sup>39</sup> “We are so easily offended” commented one politician, and “when we get offended, we are likely to use whatever recourse is provided to us for compensation or recompense”.<sup>40</sup> In the words of the Member for Warringah:

We in Australia are insulting our migrant people by saying that they are not capable of tolerating the same robust standards of debate as the rest of us can tolerate. This Bill says that we have to put our migrant communities in glasshouses, in humidicribs. We cannot touch them because they are not capable of acting in the same way that ordinary Australians act.<sup>41</sup>

The obvious implication of such statements is that victims of racist abuse and assaults should rise above the taunts and blows they receive, and “endure erroneous claims and vile invective”, unless such speech breaches existing legislation (in which case legal response is apparently acceptable), in order “to allow such words to self-destruct in the crucible of informed public debate”.<sup>42</sup> The intimidated should learn to be tolerant of their

35 Aust, Parl, *Debates* (1994) Vol 198 at 3493.

36 See Lawrence, “If He Hollers Let Him Go: Regulating Racist Speech on Campus” in Matsuda et al, *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* pp 74-75.

37 Aust, Parl, *Debates* (1994) Vol 198 John Forrest at 3429.

38 The various ways in which the term tolerance has been used (and misused) in this context are discussed below.

39 Maher, “Migration Act Visitor Entry Controls and Free Speech: The Case of David Irving” (1994) 16 *Syd LR* 358 at 384.

40 Aust, Parl, *Debates* (1994) Vol 198 John Forrest at 3430.

41 Aust, Parl, *Debates* (1994) Vol 198 Tony Abbott at 3493.

42 Freckleton, “Censorship and Vilification Legislation” (1994) 1 *Aust J Hum Rts* 327 at 352.



intimidation, the abused to be tolerant of their abuse. To allow racist speech is “to promote right attitudes of tolerance”.<sup>43</sup> To legislate against racist speech is to “anaesthetise experience”.<sup>44</sup>

The disturbing consequence of this (ab)use of the value of tolerance is that it is the *victims*, rather than the perpetrators of racial vilification or the wider society, who are expected to bear the burden of hate speech.

## Senate

As in the House of Representatives, the threat to free speech/political correctness/tolerance theme was a recurring feature of speeches made in the Senate opposing the Racial Hatred Bill 1994. The Coalition’s rejection of the Bill was expressly stated, by the then Shadow Attorney-General, Amanda Vanstone, to be based on a concern that the legislation represented a threat to free speech.<sup>45</sup> This was given as the Coalition’s primary reason for opposing the criminal provisions contained in the Bill,<sup>46</sup> and was perhaps implicit in the Coalition’s refusal to support the amendments to the *Racial Discrimination Act 1975* (Cth) on the stated basis that they were poorly drafted and overbroad.<sup>47</sup>

Speeches made in the Senate contain numerous statements which would support the conclusion that a perception that free speech was under threat was the determinative reason for the erosion of the Racial Hatred Bill in the Senate. Supporters of the Bill in the Senate were certainly of the view that “free speech” arguments had ultimately been fatal to the passage of the Bill in its original form. For example, following the amendments to the Racial Hatred Bill 1994 introduced by the WA Greens, Democrat Senator Sid Spindler described the Bill as a “gutted ruin”. Senator Spindler lamented that:

This parliament will actually be saying to the community that we place greater value on protecting the free speech of those, who, on racial grounds, ... threatened personal violence, damage to property and

43 See Sadurski “Offending with Impunity: Racial Vilification and Freedom of Speech” (1992) 14 *Syd LR* 163 at 175-76 and 194-95, referring to Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America* (Oxford University Press, New York 1986); See also Grace, “Legislation the wrong path for a liberal society”, *Sydney Morning Herald* 4 April 1995 p15.

44 Adams, “Agree to Disagree”, *The Weekend Australian* 27-28 May 1995, *The Weekend Review* p2.

45 The Coalition’s formal position during debate on the Racial Hatred Bill 1994 was that it would introduce its own legislation which would criminalise the incitement of violence, but would not create a separate offence of inciting racial hatred, and would not provide for the making of complaints to the Human Rights and Equal Opportunity Commission, or any other civil sanctions: see Aust, Parl, *Debates* S (1995) Vol 173 at 169-170.

46 At 168-69.

47 At 169-70.

incitement to hatred, rather than those who are likely to be the victims of those actions. I think that is rather regrettable.<sup>48</sup>

Then ALP Senator and Minister for Immigration and Ethnic Affairs, Nick Bolkus, expressly shared the concerns of Senator Spindler.<sup>49</sup>

However, for WA Green Senator Christobel Chamarette (whose party's position was to have a decisive impact on the form in which the *Racial Hatred Act* 1995 (Cth) was ultimately enacted) the threat to free speech, though a relevant argument, was apparently not the primary motivation for her (ultimately successful) motion that the Bill be amended to remove the proposed amendments to the *Crimes Act* 1914 (Cth):

If this legislation is passed it will create a crime of words. This will take the legislation across a certain threshold into the realm of thought police - the most commonly voiced concern in the community and one which I share.<sup>50</sup>

My major concern lies elsewhere. I do not believe that we will become a less racist, more tolerant society by passing a law that imitates exactly the type of intolerance that we are trying to readdress - that is, intolerance of people expressing racial sentiments. We would be guilty of doing just what we are accusing racists of doing - singling out groups of people by labelling them unacceptable. It is a them and us adversarial way of thinking that underlies this Bill. It is the same them and us attitude that underlies racism within our community.<sup>51</sup>

Senator Chamarette introduced a relevant and potentially very constructive critique of the effectiveness of criminalisation as a means of social regulation and of incarceration as a means of reforming offenders. However, this valuable contribution was undermined by Senator Chamarette's attempt to justify her party's opposition to criminal sanctions by reference to the value of tolerance. Her equating of the intolerance inherent in expressions of racial hatred with the supposed "intolerance" associated with the sanctioning (via criminal laws) of those who engage in such conduct is simply incorrect. The criminal provisions of the Racial Hatred Bill 1994 did not single out groups of people by virtue of their inherent, unchangeable, personal characteristics and label them as "unacceptable". Instead, the proposed legislation targeted *behaviour* which was unacceptable, whoever the perpetrator might be. In any case, "tolerance" does not require absolute acceptance of all and any behaviours, and the abrogation of all forms of regulation. The concept of

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48 At 360.

49 As above.

50 At 315.

51 As above.

“tolerance” is not content-neutral, nor value-neutral. “Tolerance” has never meant being obliged to accept practices that are harmful to others.

Those who are the common targets of racist attacks (and in particular Aboriginal and Torres Strait Island peoples) could be forgiven for finding Senator Chamarette’s argument a little difficult to swallow. Faced with overwhelming evidence of the way in which law and regulatory regimes generally work to their disadvantage, Indigenous peoples are effectively being told that laws can protect the majority (their land and their capital) but have no role to play in protecting them from racial vilification because such protection would involve using legislation to overcome aversion for otherness. On this analysis, law, long a vehicle for manifesting this “aversion”, is presented as having no potential for alleviating its harmful effects, nor any potential for deterrence, protection, or education. An Indigenous response to such arguments was expressed in the slogan of Aboriginal and Torres Strait Islander Week, July 1995: “Justice, not tolerance”.

Senator Chamarette’s argument that society should tolerate the promotion of racial hatred in the interests of a just society suggests that the appearance of a fresh perspective on the legitimacy of racial hatred laws on the part of the WA Greens may have been illusory. In fact her position appears to be heavily derived from the classic liberal philosophy of a just and democratic society which, following American free speech jurisprudence, elevates the right to free expression to a position of priority and promotes the concept of a “free market” of ideas in which “truth will out”. Despite Senator Chamarette’s express rejection of the suggestion that the WA Greens’ support for the deletion of criminal provisions from the legislation indicated that “the freedom of speech supporters had won”<sup>52</sup> the assertion appears well-founded. Certainly, Senator Chamarette’s “tolerance-based” opposition to the Racial Hatred Bill shares with the more conventional “free speech-based” opposition voiced by numerous Coalition parliamentarians a crucial failure to appreciate the inadequacy of an unsophisticated conception of liberal individual rights which fails to take account of the demands of social justice in a society of enormous cultural diversity.

The slogan-like manner in which arguments purportedly based on the values “free speech” and “tolerance” have influenced the shape of the *Racial Hatred Act* 1995 (Cth) suggests that these “fundamental democratic principles” must be the subject of greater scrutiny.

#### **“FREE SPEECH” AND “TOLERANCE”: SEEING THROUGH THE SLOGANS**

*Even though members of the self-appointed liberal elite would never dream of stooping to racist speech, neither, it seems, would they ever dream of taking legal steps to stop it.*<sup>53</sup>

52 At 364-365.

53 Lee, *The Cost of Free Speech* (Faber, London 1990) p42.

During the course of Senate debate on the Racial Hatred Bill 1994, one supporter of the legislation perceptively noted with disapproval that “free speech” had been “used like a club as an absolute, self-evident truth and a more than sufficient reason to reject the Bill”.<sup>54</sup> We share this disapproval, and are also concerned about the manipulation of the concept of “tolerance” in ways which actually disadvantage those who are entitled to be valued in a tolerant society. A lesson that must be taken from the story of the passage of the *Racial Hatred Act* 1995 (Cth) is that it is imperative that the very idea of principles such as “free speech” and “tolerance” in Australia be unpacked, analysed, and effectively articulated rather than uncritically accepted as “universal”, the content of which is “assumed knowledge”, and the value of which is beyond question.

The recent decisions of the High Court which recognise an implied right to freedom of communication in certain circumstances offer one convenient starting point for a “fleshing out” of the content of “free speech”.

### **Freedom of Communication in Australia**

As noted earlier, free speech arguments raised in opposition to the original Racial Hatred Bill were articulated in various ways. One influential component of free speech-based opposition to the legislation was the assertion that the proposed laws were constitutionally invalid by virtue of infringing the implied right to free political speech as recognised by the High Court of Australia in a series of recent decisions including *Australian Capital Television Pty Ltd v Commonwealth*,<sup>55</sup> *Nationwide News Pty Ltd v Wills*,<sup>56</sup> *Theophanous v Herald & Weekly Times*,<sup>57</sup> and *Cunliffe v Commonwealth*.<sup>58</sup>

The Australian Constitution does not expressly grant any specific right to freedom of expression. However, the High Court has

distilled from the provisions and structure of the Constitution, particularly from the concept of representative government which is enshrined in the Constitution, an implication of freedom of communication [which] does not extend to freedom of expression generally.<sup>59</sup>

The right, which a majority of the High Court has found to exist, is a right to freedom of expression in a political context.

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54 Aust, Parl, *Debates* S (1994) Vol 173 Senator Spindler (Democrat) at 213.

55 (1992) 177 CLR 106; 108 ALR 577.

56 (1992) 177 CLR 1; 108 ALR 681.

57 (1994) 182 CLR 104; 124 ALR 1.

58 (1994) 182 CLR 272; (1994) 124 ALR 120. See also *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; 124 ALR 80.

59 *Theophanous v Herald & Weekly Times* (1994) 182 CLR 104, 121 per Mason CJ, Toohey and Gaudron JJ.

In *Theophanous* the majority noted that the limited scope of the right had been expressed in the 1992 decisions in various ways:

as “freedom of communication, at least in relation to public affairs and political discussion”, “freedom ... to discuss governments and political matters”, “freedom of communication about the government of the Commonwealth” which “extends to all political matters”, including “matters relating to other levels of government”, “freedom of political discourse” and “freedom of participation, association and communication in relation to federal elections”.<sup>60</sup>

The forms of participation in the political process which the High Court identified as covered by the guarantee included “nominating, campaigning, advertising, debating, criticising and voting” and hence a “right to convey and receive opinions, arguments and information concerning material intended or likely to affect voting”.<sup>61</sup>

Shortly after the Racial Hatred Bill was passed by the House of Representatives (16 November 1994) *The Australian* newspaper sought a legal opinion as to the constitutionality of the Bill from Sir Maurice Byers, a former Solicitor-General who had appeared before the High Court in the case of *Australian Capital Television Pty Ltd v Commonwealth*. Sir Maurice concluded that the Bill was unconstitutional on the basis that it infringed the implied freedom of communication.<sup>62</sup> In the opinion of Sir Maurice the High Court’s designation of the implied freedom as a freedom to engage in *political* communication did not act as a limit on its scope because, given the range of matters over which governments may legislate, every area of life is political. On this approach the freedom implied by the High Court is effectively translated into a full-blown right to free speech: “the freedom of communication on public affairs and political discussion is, in truth, no different from freedom of speech”.<sup>63</sup>

Sir Maurice’s broad conception of political (and therefore, protected) speech finds little support in the various High Court judgments. The expansive interpretation of “political speech” was specifically rejected by the majority in *Theophanous*. While Mason CJ, Deane, Toohey and Gaudron JJ held that Victorian defamation legislation was invalid because it unacceptably limited the implied constitutional right to freedom of communication in relation to government and political matters, the implied right was clearly limited in scope and far from synonymous with an absolute right to freedom of expression. The chief rationale for the implied right (the demands of a system of

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60 As above.

61 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 232 per McHugh J.

62 Byers, “Free speech a certain casualty of race law”, *The Australian* 21 November 1994 p11.

63 As above.

representative democracy) cannot simply be assumed to apply with equal veracity to all types of speech, including racist speech.

Of the various formulations of the scope of the freedom advanced by the judges of the High Court, the view expressed by Mason CJ in *Cunliffe* raises the most serious doubts about the validity of racial vilification legislation. In *Cunliffe*, a majority of the High Court rejected the argument that certain provisions of the *Migration Act 1958* (Cth) were invalid by virtue of infringing the implied right. In a dissenting judgment Mason CJ suggested that “a law which targets information or ideas or which prohibits or regulates the content of communications ... would require compelling justification to sustain its validity”.<sup>64</sup> The Chief Justice noted that “the court must determine whether the burden or restriction on the freedom is reasonably appropriate and adapted to the relevant purpose”.<sup>65</sup> A similar test was endorsed by Gaudron J, who indicated that limits on free speech in areas “in which discussion has traditionally been curtailed in the public interest as, for example, with the law of sedition” would be most likely to be acceptable. However, she suggested that beyond the point of such “traditional” restrictions, “some pressing public interest would have to be shown for the law to be valid”.<sup>66</sup>

In our view there is no philosophical nor legal justification for framing the test of “reasonable or appropriate” restriction by reference to “traditional” restrictions. As Kathleen Mahoney has noted, social and political functions of speech have changed, and the principle of free speech may require new content and meaning from that which it was given in the nineteenth century.<sup>67</sup> “Traditional” restrictions on free speech have not been imposed in accordance with any consistent ideal, but have developed in a piecemeal manner over the centuries. Restrictions initially protected the government (sedition, treason) and the church (blasphemy), and individuals whose reputation was injured (the common law action of defamation). Only more recently have restrictions on speech been aimed at protecting those who through inequalities in wealth or access to information might suffer from fraudulent or misleading speech (trade practices legislation, corporations legislation). Even more recent is the development of protecting not only individuals as such but also individuals identified through group membership from the effects of undesirable speech, demonstrated in sex discrimination legislation and, most recently, legislation against racial and homosexual vilification. As Brennan J recognised in *Australian Capital Television*, it is necessary to look at the political conditions in which free speech operates to determine the nature of the link between free speech and

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64 *Cunliffe v Commonwealth of Australia* (1994) 182 CLR 272 at 299.

65 At 300.

66 At 389.

67 Mahoney, *Hate Vilification Legislation With Freedom of Expression: Where is the Balance?* (Ethnic Affairs Commission of NSW, Ashfield, NSW 1994) p20.

democracy.<sup>68</sup> The decision to extend protection will depend upon an assessment of the desired political goal at the time of protection.<sup>69</sup>

In our view there is no basis for concluding that racial vilification is “political speech” in terms relevant to the implied constitutional freedom recognised by the High Court. Certainly, there is a clear distinction between vilification which occurs as part of the “rough and tumble” of politics and vilification which promotes “hatred” because of a group’s very *existence*, irrespective of the activities of its members.<sup>70</sup> Even if racist speech is regarded as predominantly political (because of the ideological nature of racist beliefs and the tendency of racists to attempt to encourage a racist viewpoint in others) there remains a compelling case for regulation of such speech, which can survive the application of tests of necessity, reasonableness and proportionality. At the core of this justification is a recognition of the harms caused by racist speech and behaviour, not only to certain individuals and particular groups,<sup>71</sup> but to society generally and to the democratic process itself.

Assertions that the High Court’s implication of a right to freedom of political speech seriously jeopardises the validity of racial vilification legislation are, in our view, seriously over-stated. On the definition of “political” speech endorsed by a majority of the judges, public expressions of racial hatred should generally be considered to fall outside the scope of the protection. Even on the broader formulation preferred by Mason CJ and Gaudron J, the regulation of racial vilification is, we argue, justified. However, both of these positions have been based, for the sake of argument, on an acceptance of the correctness of the High Court’s reasoning. In our view, some of the reasoning in the freedom of communication cases is based upon erroneous assumptions about, inter alia, the nature of free speech and the appropriate limits of free speech in Australia.

Tom Campbell has identified several unexamined assumptions made by various members of the High Court in the case of *Australian Capital Television* which, he argues, demonstrate “a limited, negative, property-oriented and unimaginative approach to the

68 (1992) 177 CLR 106 at 158-59.

69 Bloustein, “The Origins, Validity and Interrelationships of the Political Values Served by Freedom of Expression” (1981) 33 *Rutgers L Rev* 372 at 396.

70 See *R v Keegstra* (1990) 61 CCC (3d) 1 at 99 (SCC).

71 It has been suggested, most forcefully by critical race theory scholars, that the harms associated with racial vilification are such that the conduct may usefully be understood as a form of assault rather than mere speech: see Williams, “Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law’s Response to Racism” (1987) 42 *U Miami L Rev* 127; and generally, Matsuda et al, *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment*. We endorse this harm-based analysis of the character of racial vilification, but the argument which we present here is that even if racial vilification is characterised as speech, prohibitions on such conduct should not be seen as incompatible with the constitutional guarantee of freedom of political communication recognised recently by the High Court.

articulation of fundamental rights”<sup>72</sup> which may lead the High Court to strike down “genuinely democratically led human rights developments”.<sup>73</sup> He concludes that for the High Court it is formal, negative freedom that counts when fundamental rights are at stake.<sup>74</sup>

In *Australian Capital Television* the High Court held that prohibitions of political advertising on radio or television during an election period, which allowed politically oriented radio programs and the allocation of free television time for political parties, were entirely invalid because of their severe impairment of the freedoms previously enjoyed by citizens to discuss public and political affairs and to criticise federal institutions.<sup>75</sup> Paid political advertising was thus characterised as a substantial part of “freedom of discussion by citizens”. The plaintiff media owner(s) submitted that the provision of free time was a violation of its/their property rights, and although this issue was not explicitly addressed by the court, it seems (as Campbell suggests) that the Court was probably receptive to the argument.<sup>76</sup> The Court held that there is implicit in the Australian Constitution a right of free political communication, as being indispensable to representative government, and that right was unacceptably infringed by Part IIID of the *Broadcasting Act* 1942 (Cth). However, the Court failed to define the nature or content of the implied right of free political communication which it discovered, apparently merely equating the implied right with the *status quo* prior to the introduction of Part IIID. In Campbell’s words: “the assumption is made that *existing* laws and practices represent a bundle of free speech rights which are the measure of what is justified in this sphere”.<sup>77</sup> The Court disregarded the corruption of the political process which is inherent in existing inequalities in access to public political advertising arising from the enormous cost of that advertising. This was so even though the removal or diminution of such inequalities would be in the interests of both the electorate and of potential political candidates and, therefore, a contribution to, rather than a detraction from, the effective functioning of representative democracy in Australia.

The Court failed to consider the best possible resolution of the sometimes conflicting but often coinciding interests of prospective political candidates (whose access to the public is limited by the high costs of public advertising, particularly television advertising, and whose free speech rights are thereby limited) and of the electorate (which wishes to receive a maximum amount of political information and which at the same time requires some degree of government regulation to ensure that the information it is given is not deceptive or misleading). Deborah Cass has pointed to the High Court’s failure to appreciate that

72 Campbell, “Democracy, Human Rights, and Positive Law”(1994) 16 *Syd LR* 195 at 195.

73 At 212.

74 At 208. See also Omar, “Darkness on the Edge of Town: The High Court and Human Rights in the Brandy Case” (1995) 2 *Aust J Hum Rts* 115 at 125.

75 (1992) 177 CLR 106 at 129 per Mason CJ.

76 Campbell, “Democracy, Human Rights, and Positive Law”(1994) 16 *Syd LR* 195 at 208.

77 As above (emphasis original).



advertising restricts, rather than enables, effective dissent, and that restrictions on the access of wealthy groups which dominate the political process could enable dissenting voices to be heard during election campaigns.<sup>78</sup> Cass has identified the unstated assumptions of the High Court as being that the “free market” of political speech is an essential aspect of democracy, that the free market and therefore democracy is best served by “more speech” rather than by regulation, and that a free market of political speech aids the voters’ choice by facilitating truth.<sup>79</sup> As Cass suggests, all of those assumptions are highly debatable.

Tom Campbell has described, accurately in our view, the decision in *Australian Capital Television* as a victory of assumptions over analysis:

The case therefore nicely illustrates the way in which, when articulating the content and form of fundamental rights, courts permit their own unargued assumptions to fill the epistemological vacuum surrounding the discourse of human rights.<sup>80</sup>

This observation highlights the true extent of a “gap” in rights discourse in this country which, until effectively addressed, will continue to hinder Australia’s capacity for the just resolution of the variety of conflicts which arise from the realities of cultural diversity, particularly where such conflicts are framed in the language of “competing rights”. The free speech jurisprudence which the High Court has begun to develop in recent years needs to examine the various unstated assumptions of “free speech” discourse if it is to offer a solid foundation for challenging the unsophisticated and slogan-like manner in which opponents of racial vilification laws have appropriated the language of “free speech”.

### **The Obligations of a “Tolerant” Society**

*It is easy to bear the misfortune of others - Proverb*

“Tolerance” is commonly portrayed as a universal value, the desirability of which is beyond question. The designation of 1995 by the United Nations as the International Year for Tolerance is illustrative of this sentiment. The story of the *Racial Hatred Act 1995* (Cth) offers a very stark reminder that things are not so simple. The employment of tolerance-based arguments by *opponents* of the Racial Hatred Bill 1994 (which appears to have had the practical effect of promoting tolerance for racists, and intolerance for the rights of victims to be free from racist abuse and racist attack) suggests that there is a clear need to clarify the meaning of “tolerance”.

78 Cass, “Through the Looking Glass: the High Court and the Right to Speech” (1993) 4 *PLR* 229 at 243.

79 At 239-240.

80 Campbell, “Democracy, Human Rights, and Positive Law” (1994) 16 *Syd LR* 195 at 204.

The terms tolerance, toleration and tolerate are commonly used to describe both:

- a disposition to be patient, fair, and free from bigotry; not unduly severe in judging or reacting to opinions or practices of others (for example, tolerance of other religions or cultures); and
- endurance of something which has a directly harmful effect (such as pain or hardship), or “putting up” with behaviour of which one does not approve (eg. noisy neighbours).

In the debate over the Racial Hatred Bill 1994 there was considerable confusion of these meanings. It was commonly assumed that a person can validly “tolerate” harm done to others; that “tolerance” requires total acceptance or forbearance from responding to, judging, opposing or regulating the behaviour or speech in question; and that the act of “tolerance” is beneficial and a social value, even if that which is to be tolerated is harmful.

Calls for a society to “tolerate” harm to some of its members for the “greater good” might at first sound reasonable. However, this use of the language of tolerance ignores the fact that it is the victims of the harm, and not the rest of society, who are called upon to bear the burden.<sup>81</sup> There is no evidence that tolerance of racist behaviour leads to its diminution, the evidence being rather that “tolerance” of racist behaviour encourages racism.<sup>82</sup> When victims of racist speech are left without the support of a legal remedy or other form of support from the society of which they are a part, a specific class of society, the members of which are the common victims of discrimination, are effectively being asked to pay a disproportionate share of the costs of speech promotion. Tolerance of hate speech thus creates the situation where those least able to pay are the only ones “taxed” for this tolerance.<sup>83</sup> There is no personal burden involved in the rest of society tolerating harm caused to that limited class.

As Charles Lawrence has argued in the context of the United States, whenever it is decided that racist hate speech must be tolerated because of the importance of tolerating unpopular speech, subordinated minorities are being asked to bear a burden for the good of society; to

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81 Matsuda, “Public Response to Racist Speech” in Matsuda et al, *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* pp17, 25, 47-48; also Lawrence, “If He Hollers Let Him Go: Regulating Racist Speech on Campus” in Matsuda et al, *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* pp80-82.

82 See Leonard, “Why tolerance is a wonderful thing - for other people”, *Sydney Morning Herald* 9 June 1995 p15.

83 Matsuda, “Public Response to Racist Speech: Considering the Victim’s Story” in Matsuda et al, *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* p48.

pay the price for the social benefit of free speech.<sup>84</sup> To the extent that other members of society can also be considered to be exercising “tolerance”, they are merely tolerating the suffering of others. Tolerance or indifference of this type is at best meaningless, and at worst in danger of amounting to complicity. Such tolerance “can only be exercised by those who are in power, and is often nothing but a means of protecting that power”: a mechanism of repression.<sup>85</sup>

The assumption that society benefits from the exercise of tolerance in relation to all kinds of behaviour, including the expression of offensive or undesirable “opinion”, was a staple feature of media and Parliamentary debate over the Racial Hatred Bill. For example, this assumption was implicit in WA Greens Senator Christobel Chamarette’s description of the legislation as being “intolerant about people who have different views”.<sup>86</sup> A related argument is that by allowing hate speech to be heard we are reminded of how undesirable it is, our commitment to “tolerance” is reinforced, and we are theoretically forced to combat hate speech as a community.<sup>87</sup> Our concern with analyses of this type is that they are based on the use of “tolerance” as synonymous with non-responsiveness and non-regulation. In this way, the tables are turned on victims of hate speech and advocates of regulation in a manner which labels the act of regulation as “intolerant” rather than the undesirable behaviour itself. In our view, this process is an unacceptable distortion of the notion of tolerance. It is flawed by a tendency to ignore the nature of the conduct which, in the name of tolerance, is to be free from regulation.<sup>88</sup> In the context of racial vilification and hate speech this involves ignoring the harms associated with the conduct. The more appropriate inquiry is whether the conduct is sufficiently harmful or otherwise undesirable to warrant regulation.

Two additional problems with the manner in which the need for “tolerance” was cited as a justification for opposing the Racial Hatred Bill are: 1) that it involves erroneously

84 Lawrence, “If He Hollers Let Him Go: Regulating Racist Speech on Campus” in Matsuda et al, *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* p80.

85 Spender, *Man Made Language* (Routledge & Kegan Paul, London 1980) p104. See also Otto, Morgan and Walker, “Rejecting (In)Tolerance: Critical Perspectives on the United Nations Year for Tolerance” (1995) 20 *MULR* 190.

86 Interview on ABC’s *7.30 Report* 29 May 1995.

87 In practice, communities and free speech proponents appear reluctant to combat hate speech with more speech or with the good and true ideas that are meant to drive out the bad, reacting rather by ignoring the harmful speech: see Lawrence, “If He Hollers Let Him Go: Regulating Racist Speech on Campus” in Matsuda et al, *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* p83.

88 This content-blindness mirrors the way in which the content of speech is ignored as a precondition to arguing that all speech should be free or unrestricted. A variation on this theme is that all ideas should be tolerated, especially if they are undesirable, as if this is some measure of society’s commitment to liberalism and its opposition to censorship: see Adams, “Agree to Disagree”, *The Weekend Australian* 27-28 May 1995, *The Weekend Review* p2.

classifying racial vilification and hate speech as merely “ideas”; and 2) that it reflects an unsophisticated understanding of the nature of social dialogue (relying heavily on the language of “the market”).

The depiction of acts of racial vilification as the expression of “mere ideas” seriously distorts the nature of the impugned conduct, and disingenuously seeks to undermine the case for regulation. As critical race theorists in the United States have effectively demonstrated, racism, like other justifications for discrimination, uses language to encourage the institutionalisation of the idea of white (as well as male/heterosexual) supremacy.<sup>89</sup> Racism is a form of subordination that achieves its purposes through group defamation.<sup>90</sup> Racist speech is inextricably linked with racist conduct, and the aim of both is the exclusion of non-whites from full participation in the body politic.<sup>91</sup> It is the harmful consequences of racist speech which offer the most compelling justification for societal intervention in the form of regulation. To disengage these consequences or the social context in which “opinion” resonates from the act of speech itself is to fail to address the reality and extent of such harms.

Finally, the notion that all opinions should be “tolerated” and allowed to circulate in the “marketplace of ideas” ignores the very real barriers to wide participation in public forums, including mass media, which currently exist, particularly for the very groups which are likely to be the victims of hate speech. In fact, it is not the mechanisms for the regulation of hate speech but the nature of the “market” itself (a rigged game<sup>92</sup>) which is more likely to have the effect of “chilling” potential speakers from participating actively and effectively in public discourse, and which devalues valuable speech, particularly the speech of minorities.<sup>93</sup> As Marcuse has argued, “tolerance” of all views is a false ideal which is inevitably grounded in, and maintains, existing inequalities of power.<sup>94</sup> Where conditions of tolerance are loaded in favour of some groups over others, it may be necessary to restrict access to free speech for some, in order to increase opportunities for others.

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89 Lawrence, “If He Hollers Let Him Go: Regulating Racist Speech on Campus” in Matsuda et al, *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* p61. See generally, Matsuda et al, *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* .

90 Lawrence, as above p75.

91 At p79.

92 At pp78,79 & 83.

93 See further, McNamara, “The Merits of Racial Hatred Laws: Beyond Free Speech” (1995) 4 *Griffith LR* 29 at 47-48.

94 Marcuse, “Repressive Tolerance” in Wolff, Moore and Marcuse (eds), *A Critique of Pure Tolerance* (Cape, London 1969) pp44-46.

### THE IMPACT OF THE RACIAL HATRED ACT 1995 (CTH)

The most important result of the enactment of the *Racial Hatred Act* 1995 (Cth) is that, for the first time, racial vilification is the subject of national legislation. All victims of racial vilification (as defined under the Act), regardless of state or territory of residence, are now entitled to seek redress through a conciliation-based complaint mechanism facilitated by the Human Rights and Equal Opportunity Commission.<sup>95</sup>

The most obvious impact of the *Racial Hatred Act* 1995 (Cth) will be felt in those jurisdictions (Victoria, Tasmania and the Northern Territory) where no comparable state/territorial legislation currently exists. Existing racial vilification laws in other states are not superseded by the *Racial Hatred Act*. Section 18F clearly states that the racial vilification provisions now contained in the *Racial Discrimination Act* 1975 (Cth) are "not intended to exclude or limit the concurrent operation of any law of a State or Territory". In Western Australia and Queensland the Act will represent a significant addition to existing state racial hatred laws, adding the option of a human rights complaint process to the *Criminal Code's* racial incitement provisions in the former case, and expanding the reach of limited racial vilification laws in the latter. In New South Wales, the impact of the *Racial Hatred Act* 1995 is likely to be less dramatic, although there are sufficient differences between the scope of the new s18C of the *Racial Discrimination Act* 1975 (Cth) and s20C of the *Anti-Discrimination Act* 1977 (NSW) that the national provisions will not be redundant. In fact, victims of racial vilification may be faced with a difficult choice as to the most appropriate forum in which to lodge their complaint: the state Anti-Discrimination Board or the federal Human Rights and Equal Opportunity Commission.<sup>96</sup>

Given the nature of the debate over the legitimacy of criminal sanctions, it is somewhat ironic that the practical effect of the exclusion of this form of regulation from the legislation may be negligible. Considering the manner in which criminal racial hatred laws in other jurisdictions have operated, and bearing in mind the onerous proof requirements of the offences originally proposed by the *Racial Hatred Bill* 1994, it should not simply be assumed that the current *Racial Hatred Act* will provide a lesser degree of protection than if the *Racial Hatred Bill* had been enacted in full. An examination of the New South Wales experience, where both conciliation-based proceedings and criminal prosecution have been available since 1989, reveals that the considerable barriers to prosecution are such that existing criminal laws, in practice, offer little in the way of redress to victims of racial vilification. In seven years there has been no criminal prosecution under s20D of the *Anti-Discrimination Act* 1977 (NSW).

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95 *Racial Discrimination Act* 1975 (Cth) s22.

96 The dilemma may actually need to be resolved by the Anti-Discrimination Board if the ADB and HREOC reinstitute the reciprocal complaint-handling agreement which the two agencies have previously utilised but which, at the time of writing, was under renegotiation.

It is not suggested that the non-use of criminal laws in the fight against racial vilification should simply be accepted at face value. Relevant decision-makers in the criminal justice system (in New South Wales, the Director of Public Prosecutions and the Attorney General) should not be let off the hook that easily. That no-one has been prosecuted for serious racial vilification may say as much about the persistence of systemic racial discrimination in the criminal justice system as it does about the incidence of serious racial vilification in the community. The nature of existing barriers, including explicitly acknowledged procedural barriers (eg insufficient evidence or onerous proof requirements) and possible unacknowledged attitudinal barriers (such as ambivalence about the role of the criminal law as an anti-racism mechanism), requires further attention.

## CONCLUSION

While the terms of the *Racial Hatred Act* will be a disappointment to many who were seeking from the Federal Parliament a strong message and a multi-pronged attack on the promotion of racism and racial hatred, the Act does have the potential to change existing attitudes by increasing public awareness of the unacceptability of public racist behaviour, including through the vicarious liability it imposes upon employers for racial vilification in the workplace. However, the fact that the *Racial Hatred Act 1995 (Cth)* does not criminalise the incitement of racial hatred is not the most disappointing aspect of the recent enactment of national racial vilification legislation. More troubling are the implications of the *way* in which this erosion was justified. We have criticised the “watering down” process which preceded the enactment of the legislation because it proceeded on the basis of an uncritical acceptance of “universal” principles of “free speech” and “tolerance”, and a failure to appreciate the obligations associated with a multicultural society. We argue that both the content and the claim to universality of these principles must be explained and established rather than simply promoted as shared and unchallengeable assumptions about the minimum requirements of a democratic society.