Confronting the reality *of* HATE SPEECH

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Racial vilification laws in practice.

Laws concerned with the expression of racial hatred, or other types of vilification, have become a genuine 'news' item in Australia in recent years. Strong views on the merits — or otherwise — of anti-hate laws have become something of a staple in editorials, opinion columns, and letters to the editor in newspapers around the country. Increasing academic energy has also been directed to analysing this particular legal strategy in the fight against racism.[1]

The level of interest is not surprising given that racial vilification has emerged as something of a law reform 'growth area' in Australia in the 1990s. Since 1989, racial vilification legislation has been enacted in New South Wales, the Australian Capital Territory, Western Australia and, in a limited form, in Queensland.[2] Similar legislation has been considered in Victoria.[3] Most recently, the (slow) passage of the *Racial Hatred Act 1995* through the Federal Parliament, has prompted even greater attention to be devoted to the topic. However, while this latest legislative reform initiative has triggered a substantial increase in the volume of commentary on racial vilification laws, it has done little to expand the terms of what, to date, has been a very narrow and limited debate.

The terms of the debate

Two observations can be made about the debate over racial vilification laws in Australia. First, public discussion has tended to be conducted at a relatively abstract level, with little attention to the practical operation of existing laws. Second, by far the most prominent theme of the debate has been the relationship between racial vilification laws and the 'right' of free speech. The existence and nature of such a right in Australia has only recently begun to be examined at the judicial level.[4] That the notion of a constitutionally protected right to free speech is in its infancy has not dissuaded critics from drawing on the rhetoric of absolute rights in order to question the legitimacy of laws designed to provide protection from harassment, abuse and vilification on the basis of race.

These two observations are closely related. One important explanation for the narrow focus to date on free speech arguments is to be found in Australia's short and relatively atypical experience with laws against racial hatred. Some participants in the 'debate' over racial vilification laws have attempted to overcome this limited experience by employing illustrative hypothetical examples which bear no necessary relation to the actual or potential operation of racial hatred laws. These attempts have often failed to do justice to the serious issues surrounding the use of legal sanctions to suppress expressions of racism and racial hatred.[5]

Another source of information has been the experience of other countries where various forms of racial hatred laws have operated for significants periods of time. While potentially of great value, comparative references run the risk of superficiality; they are sometimes misleading, and often self-serving.

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All of this is not to say that Australia has not had an 'experience' of its own. It has — or at least, New South Wales, has. In fact the absence of accessible information on the operation of racial vilification laws belies the fact that since 1989 when the *Anti-Discrimination Act 1977* (NSW) was amended to allow racial vilification complaints to be made to the New South Wales Anti-Discrimination Board, the Board has handled hundreds of complaints. However, because the vast majority of these matters have been dealt with by conciliation — which requires confidentiality — little 'hard' legal data is currently available regarding the way Australia's only 'active' racial vilification laws are working. In the absence of conventional sources of legal information — particularly judicial or quasi-judicial decisions — a superficial 'debate', largely detached from reality, has passed for serious analysis of important questions about law and policy in a multicultural society.

Against this background the recent decision of the New South Wales Equal Opportunity Tribunal in *Wagga Wagga Aboriginal Action Group v Eldridge*[6] is of particular significance. The decision, only the second racial vilification matter to be determined by the Tribunal,[7] was the first time a complaint had been adjudicated in favour of the complainant. While important in its own right, the decision also represents an important contribution to the available information on the operation of racial vilification laws in New South Wales. In this respect, it provides some much-needed 'context' for the ongoing debate over the legitimacy and effectiveness of anti-hate laws in Australia.

The complaint

Several complaints were lodged under s.20C of the *Anti-Discrimination Act 1977* in response to the conduct of Jim Eldridge, a Wagga Wagga City councillor, on three separate occasions in June and July 1993. The matter was dealt with as a complaint under s.88(1A) of the Act, with the Wagga Wagga Aboriginal Action Group acting on behalf of the several complainants. The conduct complained of included comments made by the respondent:

- at the launch of the United Nations International Year for the World's Indigenous People (IYWIP) on 11 June 1993;
- at a meeting of the Wagga Wagga City Council on 28 June 1993; and
- during an interview on the 'Hinch' television program on 2 July 1993.

The Tribunal did not consider the comments made by the respondent on this third occasion, on the basis that there was some dispute about the accuracy of the version of the interview that went to air.

During the IYWIP launch at the Wagga Wagga City Council chambers, Eldridge interrupted the proceedings and made the comments which formed, in part, the basis for the complaint of racial vilification. Apparently angered by a recently lodged land claim involving land in the Wagga Wagga region, Eldridge made a number of comments critical of and offensive to Aboriginal people, including references to 'half-caste radicals [who] have made a claim upon the city . . .' He claimed 'to have a right to speak on behalf [of] the white people in this city, against these radical half-castes . . .' and said 'I refuse to accept the situation and pay over to these half-castes' (at 78,262). During one of the references to 'radical half-castes' he pointed to one of the complainants, Marianne Atkinson.

During a speech at the Wagga Wagga City Council on 28 June 1993, Eldridge made the following comments:

> My people came down the river and established this city when nobody other than savages had been before . . . [F]or 30 years my people have been subject to a reign of terror the like of which has not previously been seen in this city.
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> . . .
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> You say white people are not being terrorised, but I say this Mr Mayor. I consider we have been patient, we have been kind, and have been tolerant. Now that these people have made claim to sovereignty over our land, that is the declaration of war, and you may rest assure[d] that my people understand that this is a war that they dare not lose and which they will win. These people think they are going to win this war. Let me remind you that my people have had their hearts and their arms made of steel, hardened and tempered in battles which were fought in Agincourt, Waterloo and even in modern times at Nui Dat, and they're not going to give away the land that they have fought for . . . I believe, Mr Mayor, that in this war that with God's help my people will win. [at 78,263]

The decision

For the Equal Opportunity Tribunal the main issue to be determined was whether the conduct 'crossed the dividing line' between conduct which conveys hatred towards, expresses serious contempt for, or severely ridicules a person or group of persons on the grounds of race — which may be 'unpleasant and obnoxious' (at 78,266) but would not be unlawful — and public conduct which *incites* others to have hatred towards, serious contempt for, or to severely ridicule a particular person or group of persons on the ground of race, which the *Anti-Discrimination Act* declares unlawful (s.20C). The Tribunal held that the respondent's conduct, both at the launch of the United Nations International Year for the World's Indigenous Peoples and then at the Wagga Wagga City Council meeting on 28 June 1993, crossed the line. In relation to the first incident the Tribunal said:

> It is the view of the Tribunal [that] Mr Eldridge's actions were quite objectionable and unnecessary. His words were insulting (more especially having regard to the nature of the function) and were such as would incite others to have serious contempt for the Aboriginal population. He deliberately raised the issue of race, and the Tribunal is satisfied his actions fall within s.20C(1). [at 78,267]

In relation to the second incident the Tribunal held that 'Mr Eldridge's behaviour was quite objectionable, his comments were unnecessary, and were such that would incite serious contempt of the Aboriginal people' (at 78,267).

The Tribunal ordered that Eldridge:

- refrain from continuing or repeating any unlawful conduct under the *Anti-Discrimination Act* 1977;
- publish an apology in local newspapers; and
- pay one of the complainants, Marianne Atkinson, $3000 damages. (The complainant requested that any damages awarded be contributed to the building of a resource centre in Wagga Wagga for the encouragement of Aboriginal cultural awareness. The Tribunal said it could not do this, and if it were to be done it must be the option of the Party.)

Interpreting section 20C

During the course of its decision, the Equal Opportunity Tribunal considered some important matters of interpretation and application in relation to s.20C of the *Anti-Discrimina-*

tion Act 1977 (NSW). The Tribunal accepted the complainant's submission that under s.20C(1) it need not be established that the respondent intended to incite racial hatred, nor is it necessary for the complainant to prove that any person was incited by the respondent's conduct.

The respondent did not dispute that he made the comments which formed the basis of the complaint. Nor did he dispute that the conduct came within the definition of 'public act'. Eldridge's main arguments by way of 'defence' were that:

- s.20C of the *Anti-Discrimination Act 1977* should be considered invalid on the basis that it derogated from the right to free speech; and
- the comments were made 'in good faith', and therefore, by virtue of s.20C(2) did not amount to racial vilification.

The Equal Opportunity Tribunal rejected both arguments. It held that 'free speech' was not a defence to an action under s.20C. The Tribunal noted that the racial vilification legislation had been drafted so as to avoid the likelihood of interference with freedom of expression, and that, in any event, the right to free expression 'has never been an absolute or unequivocal right' (at 78,266).[8]

The Tribunal was not persuaded by the respondent's evidence that he was 'at all times motivated to bring to public attention [a land claim] to which he was vehemently opposed' (at 78,267). The Tribunal concluded that there were appropriate forums (including the National Native Title Tribunal) for the expression of opposition to the claim.

The significance of the decision

It is appropriate that the first racial vilification matter to be successfully adjudicated in Australia involved a complaint by Aboriginal persons. There is clear evidence that the Indigenous peoples of Australia are all too frequently the victims of such conduct. That is not to say that other racial or ethno-religious groups are not the targets of such conduct — clearly they are. However, in 1991 the National Inquiry into Racist Violence[9] drew a distinction between the level of racist violence on the basis of ethnic identity — which is 'nowhere near the level that it is in many other countries . . . [but] . . . exists at a level that causes concern . . . ' — and racist violence directed at Aboriginal and Torres Strait Islander people which the Inquiry found was an 'endemic problem' throughout the country.[10] While there are important differences between racist violence and racial vilification (for example, the latter need not involve actual violence or even threats of violence), conduct of these different types is clearly related. The decision in *Wagga Wagga Aboriginal Action Group v Eldridge* demonstrates the capacity of the racial hatred laws which are in operation in New South Wales to confront and offer some meaningful protection from the forms of racial vilification which are actually experienced by Indigenous peoples and ethno-religious groups.

In this respect it is significant that the first successful complaint in New South Wales did not involve the sort of extremist or organised racism which is associated with white supremacist and/or neo-Nazi groups. Indeed, it would be naive to assume that the views expressed by Jim Eldridge are all that exceptional. Certainly the conduct complained of cannot be neatly distinguished from the various manifestations of racism which have long been a feature of Australian social and political relations. That the Equal Opportunity Tribunal has effectively sanctioned the application of New South Wales' racial vilification laws to conduct of this type is worthy of note. The decision confirms that s.20C of the *Anti-Discrimination Act 1977* offers a broader and more effective level of protection to target groups than those racial hatred laws which are directed primarily at white supremacist organisations and individuals, and organised hate activity — laws which often ignore the more prevalent, insidious and harmful forms of racial vilification which are experienced by racial and ethno-religious minorities.

It would be erroneous to think that the decision in *Wagga Wagga Aboriginal Action Group v Eldridge* has answered all remaining questions about the operation of racial vilification laws in New South Wales, let alone elsewhere in the country. For example, given Eldridge's position as a member of a local government council, as well as the settings in which the conduct occurred, the decision does raise the interesting question of the latitude to be given to comments made in a political context. On the facts at hand the Equal Opportunity Tribunal did not feel compelled to deliberate long on the 'good faith' defence in s.20C(2). In future cases, the Tribunal may be forced to consider the scope of the defence, and the broader issue of the limits of acceptable political discourse. At this stage, the Tribunal's decision in *Wagga Wagga Aboriginal Action Group v Eldridge* may be considered to support the position that simply 'dressing up' racial vilification as 'political opinion' or 'party policy' will not save offending conduct from the scope of s.20C.

The prospects for an informed debate

One of the wider consequences of the decision of the Equal Opportunity Tribunal in *Wagga Wagga Aboriginal Action Group v Eldridge* is that New South Wales' racial vilification laws are likely to again become a focal point in the debate over the legitimacy of racial hatred laws, including further consideration of the relationship between racial hatred laws and free speech. However, it also offers a valuable opportunity for an improvement in the quality of the debate, which has suffered to date because it has been carried on in the abstract without reference to the actual operation of racial vilification laws, and without reference to the value of the protection afforded to target groups, including the Indigenous peoples of Australia.

As the available evidence about the operation of anti-hate laws grows, free speech advocates who oppose racial hatred laws will be forced to grapple with the uncomfortable practical consequences of their arguments. It is far easier to oppose legal proscriptions of expressions of racial hatred *in principle* than to maintain this opposition when faced with the *reality* of the conduct at which hate laws are directed, and of the harm which such conduct causes. While libertarian opposition to racial vilification laws clearly need not involve approving conduct such as that engaged in by Eldridge (as distinct from his 'right' to so engage — which is defended), it does commonly involve a failure to appreciate the deleterious impact of the offensive, harmful and inflammatory conduct of the type in which Eldridge engaged. Relying on an apparent clash between racial vilification laws and an implied right to engage in hate speech as the basis for condemning one of the few avenues of (imperfect) legal redress available to targets of such conduct simply isn't good enough if 'multiculturalism' is to mean anything for Australia other than as a mere description of the diversity of the Australian population's countries of origin.

Racial vilification laws are not without flaws, but the rhetoric of simplistic and abstract 'free speech' arguments

provides an uncompelling critique. The seriousness of the problems at which racial hatred laws are directed does not justify a ban on critical judgment — it demands well-considered and constructive analysis. The required analysis must include consideration of the practical operation of existing racial vilification laws, drawing on all available sources of information. Future decisions of the New South Wales Equal Opportunity Tribunal will be a valuable source of information, providing much-needed context for an important debate.

References

1. For example, (1994) 1 *Australian Journal of Human Rights*, which contains a 'Symposium on Racial Vilification'.
2. *Anti-Discrimination Act 1977* (NSW), ss.20C-20D (amended in 1989); *Discrimination Act 1991* (ACT), ss.66-67; *Criminal Code 1913* (WA), ss.77-80 (amended in 1990); *Anti-Discrimination Act 1991* (Qld), s.126.
3. *The Racial and Religious Vilification Bill*, introduced by the then Labor Government in Victoria in 1992, has not be supported by the current Coalition Government.
4. See *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 108 ALR 68; and *Cunliffe v Commonwealth* (1994) 124 ALR 120.
5. A pamphlet titled, *The Old Digger On His Soapbox*, recently circulated by the Federal Coalition as part of its opposition to the proposed national legislation, is a good example: see B. Jones, 'Libs "crude" on hate bill', *Sun-Herald*, 28.5.95, p.28.
6. *Wagga Wagga Aboriginal Action Group v Eldridge* (1995) EOC 92-701.
7. In *Harou-Sourdon v TCN Channel Nine Pty Ltd* (1994) EOC 92-604, the Equal Opportunity Tribunal considered a complaint based on comments by Clive Robertson during a television program in 1990 which were alleged to constitute racial vilification of persons of French origin. The complaint was dismissed under s.111(1) of the *Anti-Discrimination Act 1977* (NSW) on the basis that it was misconceived and lacking in substance.
8. The Tribunal relied specifically on the decision of the New South Wales Court of Appeal in *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680.
9. Human Rights and Equal Opportunity Commission (HREOC), *Racist Violence: Report of National Inquiry into Racist Violence in Australia*, AGPS, 1991.
10. HREOC, above, p.387.

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The amendments to the *FLA* over the past 20 years have done little to address the problem in the conduct of children's proceedings. The changes to the *FLA* have seen a march towards uniformity for children's issues. This is without a doubt desirable. But the problem of taking the heat out of children's proceedings cannot be solved simply by changing the legal formulas contained in the *FLA*. It needs a much more sophisticated response.

There needs to be a shift in attitudes so that solutions are found in the interests of the child rather than the interests of the parents. The *FLA* is now starting to play a different role than it has played in the past. The change in concepts and terminology and the emphasis on mediation means that the *FLA* is taking a lead in effecting the attitudinal shift. It is no longer simply reflecting attitudes.

But it would be a mistake to see the *FLA* in isolation. There is no doubt that legislation is important in changing attitudes and influencing behaviour. However, it has its limitations. In 1975, the legislature enacted s.14 requiring both the Court and practitioners to consider reconciliation of the parties at 'every point'. However, it is also accepted that lawyers trained in the adversarial mode of dispute resolution are not necessarily attuned to signals of reconciliation. Indeed, s.14 is a prime example of the limitation of legislation influencing attitudes. We have a blunt tool in legislative change to influence changes in behaviour and the impact may not be immediately apparent.

The family law system has a number of components, each having an important part to play in the overall system. The legislation is but one of those components. On its own we cannot hope that it will shift community attitudes unless we see change in the other elements of the system through judicial education and education of the legal profession and others such as counsellors and mediators.

References

1. Press release by the Attorney-General, 16 December 1993.
2. Senator Murphy, Second Reading Speech, Senate 3 April 1974, p.641.
3. *Family Law in Australia — A Report of the Joint Select Committee on the Family Law Act*, AGPS, July 1980, Vol.1, p.62.
4. Final Report of the Constitutional Commission, Volume 2, AGPS, Canberra, 1988, para.10.242, p.689.
5. *Family Law Act* — Directions for Amendment — Government Response to the Report by Joint Select Committee into Certain Aspects of the Operation and Interpretation of the Family Law Act, December 1993.
6. Family Law Council, Letter of Advice to the Attorney-General on the Operation of the (UK) *Children Act 1989*, 10 March 1994.
7. Section 19C (Admissions made to mediators) and s.19M (Protection of Mediators) of the *Family Law Act 1975*.
8. Family Law Council, Letter of Advice to the Attorney-General on the Operation of the (UK) *Children Act 1989*, 10 March 1994. See also the comments by Nicholson CJ in 'In the Marriage of Forck and Thomas' (1993) 16 *Fam LR* 516 at 522.