



No.79

Regulating Racial Hatred

Sally Frances Reid and Russell G. Smith

Since the 1970s, a perceived increase in racist behaviour has resulted in calls for the introduction of racial vilification legislation; that is laws which seek to prohibit various acts of racial hatred. This Trends and Issues reviews some of the policy issues surrounding the introduction of such laws and provides an overview of the laws which have since been adopted within Australia and how they have been used in recent times to regulate acts of racial hatred.

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Racial vilification is a compendious term which has been used to describe “all acts, conduct, behaviour or activity involving the defamation of individuals and groups on the ground of their colour, race or ethnic or national origins, as well as those which constitute the incitement or stirring up of hatred or other emotions of hostility and enmity against these individuals and groups” (Gibson 1990, p. 709).

A broad spectrum of behaviour is included within this definition ranging from so-called “ethnic jokes” and offensive words, to stereotyping, inflammatory media reporting, historical “revisionism” and racist hate propaganda disseminated by poster campaigns, pamphlets, graffiti and public broadcasts.

The introduction of anti-racial vilification legislation both in Australia and overseas has furthered the debate over two apparently conflicting rights, namely: the right of all citizens to freedom of expression (acknowledged by the High Court of Australia as an implied legal right in relation to political comment in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 and confirmed recently in *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96); and the right of all citizens to live free from harassment and discrimination. Although this may be seen as a false dichotomy in that racial vilification may tend to silence its victims’ free expression, for many of those who seek to affirm the former right, such legislation is seen as the thin edge of the censorship wedge. The fear is that legislation may have a chilling effect on public debate as the line between criticism and abuse is blurred (Freckleton 1994, p. 339) and that these laws may suppress discussion of issues of legitimate public interest.

Such claims in Australia are frequently (although certainly not always) based on two arguments. The first is that racial vilification is no worse than any other form of vilification and leads only to “hurt feelings” involving no demonstrable harm. An increasing body of research, however, has identified the real damage which may be caused by such behaviour. The recent work of critical race theorists, in particular, suggests that such behaviour is harmful not only to individual victims but also to the specific ethnic

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community targeted and thereby society as a whole. The cumulative harm of racial vilification serves to silence and subordinate minority ethnic groups, minimising their participation in society, affecting educational outcomes, career choices and life chances (Stefanou-Haag 1994). Not only does racial vilification of itself cause substantial pain but many argue that it also creates a climate in which more serious racist violence is likely to be carried out.

The second argument is that in tolerant societies such as Australia, there is no real need for such laws. This claim, too, has been challenged, most recently in the findings of the Human Rights and Equal Opportunity Commission's *National Inquiry into Racist Violence* (HREOC 1991), the Australian Law Reform Commission's Report, *Multiculturalism and the Law* (ALRC 1992) and the National Report of the *Royal Commission into Aboriginal Deaths in Custody* (RCADC 1991) which all found significant levels of racism in Australia, and specifically recommended the introduction of regulatory controls to address racial vilification.

The choice of an appropriate and effective regulatory regime is, however, problematic. Some suggest that law is unable to achieve attitudinal change. They argue that the best way to oppose racist views is by tolerating their expression, which are just symptoms of underlying problems (Sadurski 1992) and destroying them in rational debate rather than allowing them to "fester underground" and be disseminated anonymously (Allen 1990). In addition, some suggest that racism in Australia stems from a variety of historical and socio-political factors (for example, Jayasuriya 1989) in which case proscribing it at an individual level may have limited utility.

It has also been argued that harmful behaviour is sufficiently regulated by existing civil and criminal laws regardless of whether the motivation is racist. These include laws of defamation, seditious libel, incitement to commit unlawful acts and intentional infliction of emotional distress (Sadurski 1992, p. 164). Prosecutions under existing laws, however, tend to occur in an ad hoc way which fails to emphasise the gravamen of the conduct which is based on its racist content (Goldberg 1995). In addition, in 1991, the Human Rights and Equal Opportunity Commission (HREOC) suggested that other generalised threats which are characteristic of racial intimidation and harassment, as well as other forms of verbal abuse did not constitute criminal offences either at common law or in legislation (HREOC 1991).

Various international doctrines also require the enactment of legislation in order to safeguard the right to freedom of speech and expression, as well as to protect minority groups from discrimination and harassment. Both the *International Convention on the Elimination of All Forms of Racial Discrimination*, and the *International Covenant on Civil and Political Rights* ratified by Australia on 30 September 1975 and 13 August 1980 respectively, require signatory countries to regulate acts of racial hatred legislatively. In Australia, these conventions have received qualified assent only as the various acts which currently apply do not meet the requirements of the conventions in full.

Regulatory Controls

What, then, are the legislative controls on racial vilification which have been adopted in Australia, and to what extent have these been used? All juris-

dictions in Australia apart from Victoria, Tasmania and the Northern Territory, have legislation dealing with acts of racial hatred.

New South Wales

New South Wales was the first State to introduce legislation. Sub-section 1 of section 20C of the *Anti-Discrimination Act 1977* (NSW), which was inserted in 1989, makes it unlawful, although not criminal for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group. Certain exemptions are provided for in sub-section 2 of section 20C, including fair reporting, absolute privilege, and acts done in good faith or in the public interest. Such conduct may be the subject of a complaint to the Anti-Discrimination Board of New South Wales.

Section 20D of the Act creates a criminal offence for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group by either threatening physical harm towards the person or group or their property or inciting others to threaten such harm. This offence carries a maximum penalty of a fine of \$10 000 or six months imprisonment for an individual or a fine of \$100 000 for a corporation. The Attorney-General must consent to any prosecution under the Act. Since 1989, at least four matters have been referred to the Attorney-General as suitable for criminal prosecution but in no case was prosecution recommended (McNamara 1995, p. 36).

Since 1 October 1989, however, it has been reported that the Anti-Discrimination Board of New South Wales has dealt with a range of complaints

Table 1: Enquiries and Complaints of Racial Vilification and Discrimination made to the Anti-Discrimination Board of NSW, 1989-90 to 1996-97

Year	89-90	90-91	91-92	92-93	93-94	94-95	95-96	96-97
Enquiries to the Board								
All discrimination	12 043	12 915	11 919	13 261	15 513	20 827	20 470	18 000
Racial vilification	306	314	206	232	303	292	235	348
Formal Complaints								
All discrimination	1 124	1 261	1 243	1 390	1 713	1 698	1 939	1 649
Racial vilification	72	94	77	113	86	55	83	62

Source: Anti-Discrimination Board of New South Wales 1989-97, *Annual Reports 1989-90 to 1996-97*

of racial vilification (see Table 1) (Anti-Discrimination Board of NSW 1989-97).

Despite a gradual increase in the number of enquiries to the Board regarding all forms of discrimination over the past seven years, the number of enquiries and complaints regarding incidents of racial vilification has shown no clear trends. There has, however, been a large increase in the number of enquiries to the Board regarding racial vilification over the last twelve months, although over this same period the number of formal complaints of racial vilification has declined. This may be indicative of members of the community showing an awareness of racial vilification issues, even though the particular instances do not warrant formal investigation.

A more detailed analysis of the type of complaint provides a better understanding of how changes have taken place since 1989 (see Table 2).

One of the most important facts to emerge from these data is the recent decline in the proportion of complaints of racial vilification made concerning the media. This is most likely to be due to the commencement of the federal racial vilification law in 1996 which now permits complaints to be made to the Human Rights and Equal Opportunity Commission in addition to the

Board in New South Wales (Anti-Discrimination Board of NSW 1997, p. 22). Other more general local and international social and political considerations involving the representation of various ethnic groups in the media could also be involved.

In recent years, most complaints relating to racial vilification were made by males rather than females, and Aboriginal and Torres Strait Islanders were the most frequently represented ethnic group of complainants.

An indication of the nature of some recent complaints may be obtained by examining the decisions of the Equal

Opportunity Tribunal in New South Wales which is able to deal with unconciliated complaints. Before April 1995, nine such complaints were referred to the Tribunal, some of which resulted in awards of compensation being made (McNamara 1995, p. 38).

Harou-Sourdon v TCN

Channel Nine Pty Ltd ((1994) EOC 92-604), was the first case heard by the Tribunal involving a complaint of racial vilification.

The complaint alleged that a television reporter, Clive Robertson, had made comments which were alleged to constitute racial vilification of persons of French origin in a television programme in 1990. It was alleged that the words "I thought the French had class. I knew they weren't too good on personal hygiene, but I thought at least they had class" were used in introducing a news segment. The complaint was dismissed on the basis that it was misconceived and lacking in substance.

In *Wagga Wagga Aboriginal Action Group v Eldridge ((1995) EOC 92-701)*, a complaint was made about various comments made by a local alderman who addressed a meeting held in Wagga Wagga to launch the

Table 2: Type of Formal Complaints of Racial Vilification made to the Anti-Discrimination Board of NSW, 1989-90 to 1996-97

Year	89-90	90-91	91-92	92-93	93-94	94-95	95-96	96-97
Print media	*20	*38	28	42	30	29	44	16
Electronic media			15	17	12	5	12	5
Public conduct			13	9	23	7	17	24
Public communication			3	19	9	7		
Private dispute	**12	**19	11	14	6	5	3	13
Accommodation#			1					
Employment#	10	10	1	4				
Goods & services#				2				
Education#				1				
Other			5	5	6	2	7	4
	# [30]	# [27]						
Total	72	94	77	113	86	55	83	62

* These figures relate to all forms of media.

** These figures relate to disputes between neighbours only.

Figures for these categories were not always separately analysed.

Source: Anti-Discrimination Board of New South Wales 1989-97, *Annual Reports 1989-90 to 1996-97*

International Year of the Indigenous People. He referred to Aboriginal people as “half-caste radicals” and “savages” and said that white people in Wagga Wagga had been subject to a “reign of terror” for thirty years. The Tribunal upheld the complaint and ordered the alderman to refrain from continuing or repeating the unlawful conduct, to publish an apology and to pay the complainant \$3000 damages.

The most recent case of racial vilification to be heard by the Tribunal involved a young Aboriginal man, Wesley Patten, who was awarded \$25 000 damages in respect of conduct by two officers of the New South Wales Police Service. The majority of the Tribunal found that Mr Patten had been publicly treated with contempt during the course of an incident in which he was referred to as a “coon”. The incident in question had been filmed and was later broadcast on national television as part of the documentary program “Cop it Sweet” (*Patten v State of New South Wales*, NSW Equal Opportunity Tribunal Nos. 90 & 91 of 1995, 21 January 1997).

Western Australia

In Western Australia, the Criminal Code 1913 (WA) was amended in 1989 to regulate acts of racial hatred in direct response to various racist poster campaigns which occurred in that State in the 1980s. The possession of material that is threatening or abusive with intent to publish, distribute or display that material in order for racial hatred to be created, promoted or increased has since 1989 carried maximum penalties of two years imprisonment for an indictable offence and six months imprisonment or a fine of up to \$2000 for a summary offence. No civil remedies exist for this conduct in Western Australia.

As yet, there have been no prosecutions under the Western Australian legislation although the leader of the ANM (the organisation responsible for the racist poster campaign which led to the enactment of the laws) was eventually imprisoned on other criminal charges (Jones 1997).

Queensland

Section 126 of the *Anti-Discrimination Act 1991* (Qld) provides that a person must not, by advocating racial or religious hatred or hostility, incite unlawful discrimination or another contravention of the Act. This carries a maximum fine of \$3500 in the case of an individual and \$17 000 in the case of a corporation. This offence is somewhat different from the legislation in the other states as it explicitly includes “religious hatred” as one of the proscribed forms of behaviour. No civil remedies are provided for in the Act and statistics are only available with respect to complaints involving racial discrimination generally.

Australian Capital Territory

Sections 65 to 67 of the *Discrimination Act 1991* (ACT) mirror closely the provisions of the New South Wales legislation introducing civil remedies for racial vilification (inciting hatred, serious contempt, or severe ridicule) and criminal penalties (a maximum fine of \$2000) for serious racial vilification (that is, racial vilification accompanied by threats to person or property). In the ACT, the Attorney-General’s consent is not required in order to mount a prosecution.

Since July 1992, the Australian Capital Territory Human Rights Office has dealt with three complaints of racial vilification, one in each year, except for 1993-94 when no complaints of this nature were made (Human Rights and Equal Opportunity Commission 1996a, p. 1455).

South Australia

Racial vilification legislation was recently introduced in South Australia following concern about the activities of extremist racist groups. Section 4 of the *Racial Vilification Act 1996* (SA) creates an offence of racial vilification (expressed in the same terms as the offence of serious racial vilification in New South Wales). The maximum penalties for an individual are a fine of \$5000 or imprisonment for three years, or both, and, in the case of a corporation, a fine of \$25 000. The Attorney-General must consent to any prosecution. The Act also amends the *Wrongs Act 1936* (SA) to make racial victimisation unlawful. This is defined in almost exactly the same terms as the civil provision in the New South Wales amendment and permits awards of damages to be made. These provisions have yet to be used in South Australia.

Commonwealth

Finally, the *Racial Hatred Act 1995* (Cwlth) introduced section 18C(1) into the *Racial Discrimination Act 1975* (Cwlth) which makes unlawful public acts which are reasonably likely in all the circumstances to offend, insult, humiliate or intimidate another person or a group of people where the act is done because of the race, colour or national or ethnic origin of the other person or group members. Various exemptions are provided for in section 18D including acts done reasonably and in good faith, such as for genuine artistic, academic, or scientific or public interest purposes or acts which are in the public interest or which are fair comment. The Act permits complaints of such conduct to be conciliated by the Human Rights and Equal Opportunity Commission, but contains no criminal sanctions.

The Commission received 63 complaints alleging racial hatred

between 13 October 1995 and 30 June 1996, and 186 in the financial year 1996-97. Since the commencement of the racial hatred provisions, the two largest categories of complaint have related to neighbourhood disputes and the media, although complaints arising out of public debate, personality conflicts and racist propaganda have been numerous over the preceding twelve-month period. Of the 98 complaints which were finalised during the year 1996-97, 27 were conciliated and seven referred for hearing (HREOC 1996a, p. 78; 1997, pp. 37-41).

An example of the type of complaint received includes one by a woman of West Indian origin that a cafe proprietor had yelled out to her "people like you belong in the jungle" following a disagreement over a luncheon order at a cafe. The complaint was conciliated with the cafe proprietor agreeing to pay \$50 to a charity chosen by the complainant (HREOC 1996a, pp. 78-9).

The Effectiveness of the Legislation

Although there are wide differences in the content and application of these racial vilification laws, it is possible to make some general comments as to their effectiveness.

In choosing either a criminal law or a human rights model to regulate racial hatred, it is important to define the conduct to be regulated with precision. Some jurisdictions have encountered difficulties in this area while some acts have inadequately defined the groups which are protected.

It is also important not to set too low a threshold which may result in freedom of expression being eroded. The threshold of tolerated conduct in the Commonwealth legislation, for example, appears to be lower

than that recommended by various recent reports. In the case of *Bryant v Queensland Newspapers Pty Ltd* (15 May 1997, No. H97/38), however, the HREOC adopted a relatively narrow definition deciding that the use of the expressions "Poms" or "Pommies" to refer to English people in articles published in Queensland's *Sunday Mail*, did not infringe the provisions of the Act. Although the Commission considered that in an extreme case the use of the words "Pom" or "Pommy" could infringe the legislation, it applied an objective test in determining that the material in question was not objectionable. Nevertheless, for the purpose of clarity and to prevent an excessive number of complaints being lodged (particularly in view of the reduction in funding to the HREOC), it may be preferable for a higher threshold to be provided for in the legislation itself.

Although some argue that the existence of racial vilification legislation in some jurisdictions has not resulted in a reduction of free speech (for example, McNamara & Solomon 1996), others suggest that the continuation of acts of racial vilification indicates that the laws have been ineffective. In the absence of long-term evaluative research, however, it is difficult to say how effective the legislation has been. As Twomey (1994) suggests, any such research would need, of course, to determine exactly what the legislation was established to achieve and the extent to which such goals have, in fact, been achieved.

Criminal Sanctions

In evaluating the effectiveness of criminal racial vilification sanctions, one must consider the roots of racism itself. McNamara (1994a) argues that by looking at only the most serious cases, the criminalisation model can have

individualising and marginalising effects as the defendant's actions are viewed as distinct from general societal attitudes and behaviour.

In addition, in the United Kingdom, Twomey (1994) argues that the laws have sometimes been used against the very groups they were designed to protect. Further, she argues that since legislative intervention, racism has become more sophisticated invoking a moderate and persuasive tone.

It is important to note, however, the lack of criminal prosecutions under such legislation both in Australia and overseas. This may be due to the onerous requirement in some jurisdictions that the Attorney-General consents to a prosecution being taken which may not always be achieved through fear of political or social repercussions or, indeed, the fear that a prosecution would give racists a forum for their views (for example, Twomey 1994; McNamara 1994b). More likely, however, are the practical difficulties involved in proving allegations within the framework of the often detailed and unclear legislative provisions, thus deterring police and prosecution agencies from embarking upon such cases (Solomon 1994, HREOC 1991). If these laws are to be of practical utility and more than a statement of the unacceptability of racist conduct, the legislation needs to be clear and not act as an impediment to those intent on taking action.

Civil Remedies

Conciliation has many advantages as a strategy with which to regulate racial vilification. It is inexpensive, flexible and confidential (HREOC 1996b) thus making it more attractive to applicants and less likely to make martyrs of racists and offer them free publicity for their views, a

criticism often levelled at public criminal proceedings. The requirement of confidentiality, unfortunately, makes the task of publicising the operation of the legislation difficult.

Another difficulty with conciliation is that it must be instigated by a complainant who is aware of the availability of the remedy and willing to take action. In the case of those from non-English-speaking backgrounds, this may act as a significant deterrent to effective utilisation of the laws. In addition, there is debate as to whether or not civil sanctions are able to achieve attitudinal change by sending a strong enough message as to the unacceptability of racist conduct. Many of those lobbying for federal Australian legislation (especially in the 1990s) argued that criminalisation was necessary to demonstrate clearly a commitment to the ideal of eradicating racist attitudes, to show racists that their views would not be tolerated and to show minority groups that they are recognised and supported as valuable citizens (see Solomon 1994).

In addition, if a goal of legislative control is to deal with extreme racist behaviour through the deterrent effects associated with having condign sanctions available and actually used, civil sanctions may simply be an inadequate deterrent with which to prevent such activities from taking place.

Conclusions

Racial vilification legislation of various kinds has been adopted in a number of Australian jurisdictions as well as various overseas jurisdictions including Canada, New Zealand and the United Kingdom. In evaluating the effectiveness of racial vilification laws, we must be clear as to

what we expect them to achieve. In terms of providing an avenue by which complaints of racial vilification may be adjudicated, civil remedies have, arguably, been of more practical utility than criminal sanctions. It is questionable, however, whether civil remedies are able to achieve the same symbolic and educative effects as criminal sanctions in providing a clear statement of the unacceptability of racist behaviour.

No matter what kinds of laws are introduced, publicity of those laws and of their use is essential. Whilst some members of ethnic groups have been aware of the existence of legislative remedies to deal with instances of racist abuse, and have taken appropriate legal action, the level of such knowledge amongst target groups could be improved.

The harm which may be caused through racial vilification has, however, been clearly demonstrated throughout the world. The use of education, particularly targeted public education campaigns, civil and criminal remedies all have a role to play in combating such undesirable conduct, and although Australia has taken some steps toward regulating racial vilification in a constructive way, only further evaluative research will show whether or not the steps taken so far have been truly effective in changing attitudes and reducing racist behaviour in the community.

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