Racial Vilification:
An overview of the issues
Victor Duranti
Social Policy Group
21 September 1994

Parliamentary Research Service

Current Issues Brief No. 18 1994
Racial Vilification: an overview of the issues

Telephone: 06 277 2495
Facsimile: 06 277 2407
This paper has been prepared for general distribution to Members of the Australian Parliament. Readers outside the Parliament are reminded that this is not an Australian Government document, but a paper prepared by the author and published by the Parliamentary Research Service to contribute to consideration of the issues by Senators and Members. The views expressed in this Paper are those of the author and do not necessarily reflect those of the Parliamentary Research Service and are not to be attributed to the Department of the Parliamentary Library.
## CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Executive summary</td>
<td>i</td>
</tr>
<tr>
<td>Introduction</td>
<td>1</td>
</tr>
<tr>
<td>Background</td>
<td>2</td>
</tr>
<tr>
<td>Australia's international obligations</td>
<td>3</td>
</tr>
<tr>
<td>Current racial vilification legislation</td>
<td>5</td>
</tr>
<tr>
<td>Australia</td>
<td>5</td>
</tr>
<tr>
<td>Overseas</td>
<td>6</td>
</tr>
<tr>
<td>The pros and cons of legislation</td>
<td>10</td>
</tr>
<tr>
<td>What are the challenges?</td>
<td>13</td>
</tr>
<tr>
<td>Conclusion</td>
<td>15</td>
</tr>
</tbody>
</table>
Executive summary

The imminent introduction of Commonwealth racial vilification legislation into Parliament promises to generate significant community attention on what many people see as a fundamental gap in Australia's human rights laws. It also promises to renew debate on the role government plays in proscribing what it considers to be appropriate public behaviour.

In 1992, the Commonwealth attempted to introduce both criminal and civil sanctions against public acts of racial vilification. However, the Racial Discrimination Amendment Bill lapsed due to the Federal election the following year. Nonetheless, the impetus for reform has remained, with a number of national inquiries which have dealt with racism and racial violence in Australia recommending that sanctions be introduced. In addition, Australia is party, with certain reservations, to two international treaties which place obligations on member states to limit the expression of racial hatred.

An examination of racial vilification legislation, both in Australia and overseas, reveals that criminal and civil sanctions, though not universal, are used extensively to provide redress for individuals and groups in the community. It is also clear that while legislation might be an effective tool in limiting the public expression of racial hatred, it has had little impact on underlying racism in society or on more subtle forms of discriminatory attitudes and behaviour.

The view is presented that the central issue is the need to strike a balance between two basic tenets in Australia's multicultural society: freedom of speech and expression, on the one hand, and the right of people from all backgrounds to live free from racial vilification and harassment, on the other.

As with most measures which attempt to find the balance between civil rights and social responsibilities, a number of different views have been expressed in an effort to sway opinion on the most appropriate course of action vis a vis legislation.

Proponents of legislative reform argue that it not only has a deterrent value but also plays an educative role in the community. In addition, legislation (and its associated remedies) provides acknowledgement of the suffering which vilification can cause. On the other hand, there are those who consider that legislation would unnecessarily stifle free speech and limit open debate. Further it is argued that placing restrictions on the open expression of views could focus undue attention on the utterances themselves, for example the airing of racist comments in the context of court proceedings.
Any proposal to put in place racial vilification legislation needs to come to terms with a number of potential problem areas. These include the criticism that governments are being too prescriptive and heavy-handed in regulating social attitudes. In addition, there would be a requirement to detail precise definitions and exclusions to the legislation, and to pay attention to the nexus between Commonwealth and any existing State/Territory legislation.

It is concluded that whilst legislation might assist in limiting the public expression of racist views, it must be coupled with public information and education in order to maximise its impact and effect long term changes in racist attitudes within the community.
Introduction

The first half of 1994 has seen Commonwealth racial vilification legislation placed back on the political agenda. Agencies such as the Human Rights and Equal Opportunity Commission and the Australian Institute of Jewish Affairs, as well as leaders from the Italian, Greek, Vietnamese and Chinese communities, among others, have renewed their calls for national legislation to deal with what they see as a fundamental gap in Australia's human rights laws.

The Commonwealth Government has signalled its intention to reconsider the introduction of national racial vilification legislation whilst the Coalition has expressed some caution in committing itself to this course of action, particularly on the question of whether criminal sanctions are an appropriate remedy.

The attempt to introduce legislation is not new. The Racial Discrimination Amendment Bill was introduced in the Commonwealth Parliament at the end of 1992, but lapsed once the 1993 Federal election was called (this is discussed in more detail later).

The debate on whether there is, in fact, a need for racial vilification legislation rests on balancing the relative merits of free speech versus the rights of people not to be subjected to racial slurs. This is particularly relevant to a country like Australia, given that community values/norms are being influenced by the cultural and linguistic diversity of its population.

On the one hand, there are those (such as civil libertarians and most of the media) who argue that there should be few limits on freedom of speech and that full and open debate on all matters should be encouraged. The right to air all points of view, no matter how obnoxious they might be, is considered fundamental to the principles of our democratic society as it allows these views to be subjected to full scrutiny.

On the other hand, there are those, particularly representatives from ethnic community groups and human rights organisations, who assert that there are certain boundaries which should not be crossed and that vilification of people, or groups of people, based on their ethnic

---

1 Speech by the Prime Minister at the 36th Biennial Conference of the Zionist Federation of Australia, Melbourne, 28 May 1994.

background or skin colour, crosses this line, particularly where such comments cause personal grief or incite violence.

This paper considers some of the issues surrounding the proposed national racial vilification legislation. It briefly examines the background to the 1992 attempt to introduce Commonwealth legislation as well as Australia's obligations under international conventions. It then outlines measures currently in place to combat the expression of racial hatred, both in Australia and overseas. The paper also canvasses the major arguments for and against the introduction of legislation and suggests some of the challenges any legislation must face if it is to achieve a balance between the legitimate freedom of expression and protection from vilification.

**Background**

The question of whether Commonwealth legislation should be enacted to deal with racial vilification (or 'hate speech') has been examined by a number of inquiries dealing with racism and racial violence in the Australian community. Whilst the National Inquiry into Racist Violence recommended that criminal penalties should apply (by amending the *Crimes Act 1914*), both the Royal Commission into Aboriginal Deaths in Custody and the Law Reform Commission in its *Multiculturalism and the Law* report concluded that making racial vilification a criminal offence would be too drastic a step and that civil remedies, together with conciliation, would be a more appropriate course of action.


In particular, amendments were proposed to modify:

- the *Crimes Act 1914* (Cth) in order to make it a criminal offence to undertake racially offensive public acts, intended to stir up
hatred or a fear that violence will be committed against a particular person or group of persons on the basis of ethnic origin, colour or race; and

- the Racial Discrimination Act 1975, making it unlawful to commit a public act which would stir up hatred, contempt or ridicule on the grounds of ethnic origin, colour or race (this amendment provided exemptions for certain activities including artistic works, scientific or academic debate and fair reporting on events of public interest, private conversations and jokes).

As noted earlier, the need for legal sanctions to deal with incidents of racial vilification is not universally accepted. One commentator asks:

- Should dedicated legislation be introduced to address racist speech or is it possible to use existing remedies, for example amending existing legislation (criminal or other)?

- What is the most appropriate mechanism to deal with such offences - the criminal law; international law; civil law?

**Australia's international obligations**

In a climate where incidents of racist speech and violence are apparently increasing, Australia is a signatory, with reservations, to two international conventions which impact on attempts by countries to legislate against racial vilification:

- the Convention on the Elimination of All Forms of Racial Discrimination (CERD); and

- the International Covenant on Civil and Political Rights (ICCPR).

Article 4 of the CERD obliges States Parties, *inter alia*, to 'declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all

---

5 Private conversations and jokes would only be exempted to the extent that they were not in public, so jokes made in public, or even private conversations in a public place or recorded and rebroadcast in public, could still constitute offences.


acts of violence or incitement to such acts against any race or groups of persons or another colour or ethnic origin'. Upon ratifying this Convention in 1980, Australia made a declaration that it was not currently in a position to treat all the matters covered by Article 4 as offences and that it was relying on existing criminal law. The declaration went on to say that appropriate legislation would be enacted 'at the first suitable moment'.

With its 1991 signing of the First Optional Protocol to the ICCPR, Australia effectively allowed the UN's Human Rights Committee (set up under Part IV of the Covenant) to consider claims from individuals who consider themselves to have been aggrieved under the Covenant. Article 19, whilst declaring that 'everyone shall have the right to hold opinions without interference', recognizes that the exercise of such a right carries with it special duties and responsibilities in respecting the rights and reputations of others.

It should be noted that recourse to the Human Rights Committee is available only where there are no local remedies or where these have been exhausted.

Article 20(2) declares that 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'. However Australia reserved the right not to pass any further legislation pursuant to this article, declaring that the Commonwealth and States have already legislated with respect to the subject matter of the article 'in the interest of public order'.

Although not legally bound to enact legislation complementary to these two Conventions (these were the nature of the reservations), there is no doubt that its failure to do so has put Australia at odds with the spirit of these important treaties. The fact that these exemptions are noted in a recent Government report on human rights serves only to reinforce this point.


Current racial vilification legislation

In considering whether Commonwealth racial vilification legislation should be introduced, it might be useful to examine the current status of legislation, both within Australia and overseas.

Australia

The past few years has seen a number of States and Territories introduce measures to combat racial vilification.

NSW has sought to utilise existing legislation by the introduction, in 1989, of amendments to the Anti-Discrimination Act 1977, establishing 'racial vilification' as a grounds for complaint (recent changes have seen the legislation amended to afford protection to ethno-religious groups). Upon receipt of a complaint, the Anti-Discrimination Board (ADB) attempts to mediate between the parties in question, as it does with the vast majority of cases. For more serious acts of racial vilification (in particular those involving a threat of physical violence or incitement of it), the ADB can refer the matter to the NSW Attorney-General, with penalties including fines or imprisonment. To date all complaints have been resolved by conciliation.

In Western Australia, criminal provisions apply, with the Criminal Code having been amended in 1990 to outlaw the publication and/or display of racially threatening or abusive material. As has been the case in NSW, no prosecutions have resulted to date.

Queensland's Anti-Discrimination Act 1992 makes it an offence to advocate racial or religious hatred or to incite discrimination. A similar provision exists in the Discrimination Act 1991 of the ACT.

In March 1990, the Attorney-General in Victoria established a committee to consider what measures might be needed to combat racial vilification in that State. The committee's final report was published in March 1992 and it recommended, among other things, that racial vilification be made a criminal offence. The Racial and Religious Vilification Bill was introduced into the Victorian Parliament on 26 May 1992 but lapsed with the calling of the State election later that year. To date no further action has taken place.

It should be noted that at the Federal level, the Racial Discrimination Act 1975 (RDA) prohibits discrimination on the grounds of race,

colour, descent or ethnic origin. The RDA, however, does not address the matter of racial vilification.

**Overseas**

An examination of racial vilification legislation in a number of overseas countries, with similar traditions to Australia in the areas of civil liberties, freedom of speech and the protection of minority groups, might prove useful, particularly when one considers the extent to which their efforts have been successful in limiting racist speech.

**Canada**

Canada turns to both the criminal code, as well as provincial and federal human rights legislation, in dealing with the control of racist language. Under s.319(2) of the *Criminal Code*, statements which wilfully promote hatred of an identifiable community group can result in an indictable offence (with a prison term of up to two years) or a summary conviction.

Human rights legislation (the Canadian *Human Rights Act*) offers prohibitions against physical and verbal harassment as well as the expression of racial hatred.

One feature of the Canadian system is that all human rights legislation is complaint-based and puts the onus on the aggrieved person to pursue the matter, often at considerable personal expense. Further, human rights issues are predominantly a matter of provincial rather than federal jurisdiction and this distinction is reflected in the different penalties which apply across Canada.

Although the criminal law in Canada has had some success in restricting the incidence of racial vilification, one commentator sees the extension of human rights legislation as providing a more appropriate avenue for dealing with the control of incitement of racial hatred, particularly in a country where 'racism has been promoted historically by provincial and federal governments as a matter of public policy'.

---

12 See McKenna, I. 'Legal protection against racial discrimination in Canada'. *New Community*, 20(3), April 1994: 429-430.

13 McKenna, I. 'Legal protection against racial discrimination in Canada'. *New Community*, 20(3), April 1994: 433.
France

In its efforts to put in place measures to combat racism and discrimination, France has adopted a number of statutes and regulations which make reference to the provisions of the CERD\textsuperscript{14}.

Public defamation of a discriminatory nature attracts a prison term of one month to one year and/or a fine of from 300 to 300,000 francs. For public insults, the penalty is imprisonment for between five days and six months and/or a fine of from 150 to 150,000 francs.

The \textit{Press Act} also prohibits the provocation in public places or meetings, either through utterances or by means of printed or audio-visual material, of discrimination, hatred or violence towards a person or group of persons on the basis of their ethnic origin, colour or religion. Penalties range from one month to one year's imprisonment and/or a fine of from 2,000 to 300,000 francs.

Similar penalties are also in place to prevent the justification of war crimes and crimes against humanity, for example justifying the Holocaust.

Although the above sanctions are effective in dealing with specific instances of racist acts, there appears to be little recourse to measures such as mediation and conciliation as a means of preventing or resolving disputes before they become major issues. In addition, community education on anti-discrimination legislation and human rights does not command a high profile.

Germany

Since its reunification, Germany has seen an increase in the number of racially motivated attacks on foreigners, particularly Turks and Greeks, and Jews living and/or working in the country\textsuperscript{15}.

The German constitution presents a dilemma common in many other legal systems where hate speech is discouraged, yet freedom of speech is cherished; on the one hand, section 3 states that no person will be prejudiced because of, \textit{inter alia}, parentage, race, homeland and origin,


\textsuperscript{15} See Kohl, H. 'Freedom of speech and hate expression: the German experience', in \textit{New Community}, vol. 20(1), October 1993: 147-154, for a more detailed description of relevant racial vilification legislation in Germany.
whilst section 5 guarantees free speech and full expression of thoughts and ideas.

Section 2 limits these rights on the basis of commonly applicable laws which the Federal Constitutional Court has interpreted in such a manner as to conform to the spirit of section 5.

In terms of the criminal law, the German Criminal Code contains a range of provisions which punish actions which are capable of disturbing public peace by inciting racial violence. These include publication and distribution of material via the mass media. As was proposed in the 1992 Australian Bill, safeguards are in place to protect the interests of the mass media, academia and other parties for the purpose of fair reporting.

The civil law in Germany is poorly equipped to deal with the expression of racial hatred as it designed to consider claims by and between individual citizens. There is, however, a special provision which allows a citizen of Jewish descent to sue any individual who denies the occurrence of the Holocaust and gain a court judgement stopping such statements being repeated.

**Great Britain**

Although the *Race Relations Act 1976* provides the legislative framework under which anti-discrimination law operates in Great Britain, it is under Part III of the *Public Order Act 1986* that behaviour intended to or likely to result in the stirring up of racial hatred is considered a criminal offence, punishable on conviction or indictment by up to two years' imprisonment or a fine, or both, and on summary conviction by up to six months' imprisonment or a fine, or both.¹⁶

Acts such as the use of words or behaviour or display of written material, the publishing or distribution of written material, public performance of a play, distributing, showing or playing a recording, and the broadcasting of certain programs, are viewed as offences where they are intended or likely to stir up racial hatred.

The possession and dissemination of racially inflammatory material is also deemed to be an offence under Part III of the *Public Order Act*.

One criticism levelled at anti-discrimination legislation in Great Britain is that it treats discriminatory behaviour as an isolated incident rather than as a product of social and cultural influences. The fragmentary

nature of sanctions and remedies currently available in Great Britain (ranging from the educative and monitoring role of the Commission for Racial Equality through to criminal remedies under the Public Order Act) appears to preclude delivery of a comprehensive package of measures to address issues such as racial vilification.

New Zealand

New Zealand's Human Rights Act 1993 came into effect on 1 February 1994. Amalgamating the Race Relations Act and the Human Rights Commission Act, section 61 establishes the civil offence of racial disharmony and makes it unlawful to 'publish or distribute material which is threatening, abusive or insulting' and 'likely to excite hostility against ..... any group of persons'.

Section 63 creates a new offence of racial harassment, making it unlawful for a person to use language, material or behaviour which 'expresses hostility against, or brings into contempt or ridicule any other person on the ground of colour, race, or ethnic or national origins' and 'is hurtful to that other person'. It should be noted that section 63 requires the offence to be repeated, or be of such a significant nature that it has a detrimental effect on the other person (not group of persons, as referred to in section 61). The effect of this provision is that it would 'weed out' trivial instances of harassment.

Section 69 requires employers to take practical steps to ensure that employees do not repeat incidents which might be construed as racial harassment, although one might expect there to be a greater emphasis on measures to ensure that harassment does not take place in the first instance.

'Inciting racial disharmony' is deemed a criminal offence under section 131 of the Human Rights Act, although it has been suggested that police find it difficult to enforce this provision since criminal intent must be shown17.

United States

Much of the debate on this issue in the USA has focussed on the penalties available for hate crime. The majority of states have put in place hate crime legislation, with half of these adopting laws which can extend sentences where it can be shown that the crime was motivated by the victim's race or ethnic origin.

On the question of the expression of racist comments, the situation is less straightforward. There are no federal or state statutes outlaws racial vilification per se. The First Amendment, which guarantees freedom of expression, appears to exert a powerful influence in this area. A number of college campuses have adopted some form of speech code to prevent or limit the expression of racial intolerance, but such measures have not been universally accepted and continue to attract criticism based on their inconsistency with the principle enshrined under the First Amendment.\footnote{See \textit{CQ Researcher}, Vol. 3, No. 1, 8 January 1993: 1-24, for an account of the constitutional debate which this issue is generating in the USA.}

One analysis of anti-discrimination law in the United States\footnote{Goering, J. 'Anti-Discrimination law on the grounds of race in the United States: Enforcement and research concerns'. \textit{New Community}. 20(3), April 1994: 393-414.} notes that the effectiveness of civil rights laws has been limited by the lack of information most minority groups have received about their rights and responsibilities. Coupled with the fact that under the Constitution and most civil rights legislation, state governments and private parties retain a wide range of rights and powers, it is evident that there is little coordinated national effort to deal with incidents involving racial vilification in a uniform way.

**The pros and cons of legislation**

As with most measures which attempt to find the balance between civil rights and social responsibilities, a number of different views have been expressed in an effort to sway opinion on the most appropriate course of action \textit{vis a vis} legislation.\footnote{See 'The Commonwealth Racial Vilification Legislation - the arguments for and against' in \textit{Civil Liberty}, No. 151, March/April 1993: 4-7, and Moss, I. 'Where to from here? - issues in racial vilification legislation'. \textit{AIJA Survey}, Issue No.17, May 1994, for examples of this debate.}

Those who support the introduction of racial vilification legislation traditionally argue along the following lines:

- Legislation has a deterrent value, with its penalties sending a clear message that the government does not condone the expression of racist views and that it is considered a serious, even criminal, offence by society. Further, the absence of racial vilification legislation might contribute to the view that the expression of racist statements is somehow socially acceptable.
• Legislation (and any associated penalties), whilst not of itself undoing the harm that might be done through the words or actions of others, does offer some measure of community acknowledgment of the pain and suffering experienced by victims of harassment and abuse. Victims (or their families) of particularly extreme acts of violence, brutality, torture or other forms of degradation are likely to be traumatised by some racist remarks, despite the fact that no physical attack is being perpetrated, for example comments which deny that the Holocaust took place or which denigrate the experiences of 'boat people'.

• Sanctions play an educative role whether in terms of public apologies, fines, criminal convictions or prison terms. If community education programs are backed by legislation, the message that racial vilification is unacceptable and not condoned will come through strongly and influence behaviours, both in the short and long term. Examples of this effective combination of legislation backed by community education programs are the Sex Discrimination legislation (Commonwealth and State) and the measures to outlaw violence against women.

• There is a greater likelihood that police and others in the legal system will be more vigilant in following up and prosecuting cases of racial vilification, given that they would now be armed with appropriate legislation to enforce any perceived breaches. Without legislation police feel powerless to act or feel that action on their part would be futile.

On the other hand, some commentators, including many from the media, have argued that racial vilification legislation is unnecessary and could, in fact, have a detrimental effect. Their arguments are linked with the following views:

• Free speech would be hindered or obstructed, allowing a wide expression of views and ideas (including political matters and public affairs) to be stifled and limiting full and frank debate of divergent views. This form of censorship is considered unacceptable in a democratic society like Australia.

• Allowing public scrutiny of 'racist' comments will facilitate more open debate on the relative merits of the ideas being put forward, thus exposing these views to critical scrutiny. As an example, a

recent *Canberra Times* editorial\textsuperscript{22} referred to the 'disinfectant of sunlight' in supporting the broadcast of a television program featuring controversial British 'revisionist' historian David Irving.

- Words are not the same as actions and people should not be penalised for expressing their personal view or that of an organisation to which they belong (so long as violence is not advocated). One commentator has pointed out that 'while criminal sanctions can be highly effective in cases of specific racist acts, they are less well suited to dealing with broader social phenomena'\textsuperscript{23}.

- Legal action would allow racists to use the courts as a forum to further promote their views and possibly create 'martyrs' out of people who normally would not receive wide publicity for their extreme views. There is some evidence to suggest that court cases arising from attempts to prosecute racist organisations have resulted only in providing a broader platform for the dissemination of propaganda and 'a million dollars worth of publicity'\textsuperscript{24}.

- Legislation will have little impact on the way people think and act. Murder is a crime, yet there is no evidence that the murder rate has decreased significantly in all the years it has been a criminal offence. As one prominent academic has pointed out, proscribing behaviour may have the opposite effect, as shown by the impact prohibition had in increasing alcohol consumption and criminal violence in the US in the early part of this century\textsuperscript{25}.

- Racist activities will be driven underground, where the potential for more serious and violent repercussions may be greater and where the legal authorities have less chance of monitoring activities. In fact it might be argued that outlawing the expression of alternative points of view, even though they may be racist in nature, is characteristic of many of the totalitarian societies from which many overseas-born Australians have fled.

- Given that legislation, by itself, will not force people to behave morally or to suddenly change their ideological perspective, well

\textsuperscript{22} 'Sunlight on Nazism'. *Canberra Times*, 6 August 1994: 16.


\textsuperscript{24} James, P. 'Legislating Against the Racist Right'. *Without Prejudice*, No. 4, December 1991: 33.

resourced and targeted education campaigns might offer greater prospects for long-term changes in the way people think and act (a course of action some commentators believe governments put in the 'too-hard basket'\(^{26}\)).

- In world terms, Australia is a successful multicultural nation and, by and large, has been spared the racial tensions which have characterised a number of other countries. This success has been achieved without the presence of national racial vilification legislation and, in the absence of any compelling reason, its introduction does not appear warranted.

**What are the challenges?**

There is no doubt that the impending introduction into Federal Parliament of Commonwealth racial vilification legislation will generate some degree of controversy and debate. All groups in the community, but in particular the media, civil liberty groups and ethnic communities, will have much at stake and it is probable that this issue will command a great deal of attention.

Key issues which will be argued during the course of debate on whether legislation is the appropriate response in combating racial vilification are likely to be:

Are racial vilification laws needed at all in order to deter potential perpetrators or would educational programs be sufficient? Incitement to violence, violence itself and other acts such as racist graffiti are criminal offences and the only new area such legislation would cover is expression through mere words or images. It has been suggested that anti-discrimination legislation might be seen as an 'instrument of social engineering [which] reinforces general non-discriminatory attitudes'\(^{27}\). Is this a desirable path down which governments should proceed or might it be more appropriate to allow society to regulate attitudes via the 'marketplace of ideas'?

Is legislation the most effective course of action? Most people agree that the introduction of legislation will not, of itself, eliminate racism, or alter the views some people might hold (however extreme or radical these ideas might appear to be). All that legislation might achieve is

---


to limit the public expression of, and incitement to, racial vilification and violence. Given that Australia is, by and large, a tolerant society and extreme racist views are, in general, few and far between, there is no guarantee that national legislation will see a marked difference in community attitudes or behaviour. It will, however, bring Australia more into line with a number of international conventions and with practices in countries elsewhere in the world.

What exemptions, if any, will there be for statements, programs or other material which might be reasonably construed as racially vilifying? Will newspapers be able to report incidents of racial vilification, or would even the reporting be an offence? As noted earlier, the 1992 Racial Discrimination Amendment Bill provided for certain exemptions, particularly in areas such as artistic performances and the fair reporting of material in the public interest. Legislation will need to ensure that the right balance is struck between, say, minor disagreements, for example schoolyard taunts, and more deliberate acts of vilification, such as public comments intended to incite racial violence.

How will the concept of 'vilification' be defined and how far will it extend? Given that all Australians are equal before the law, what impact will legislation have on indigenous Australians who accuse white Australians of genocide or Australians of non-English speaking background who make statements in relation to other ethnic groups? The legislation will play an important role in articulating societal standards on the nature of acceptable behaviour and it is important that it apply equally to all individuals (this is a basic principle underlying Australia's multicultural policy).

Will precise definitions be contained in the legislation or will this interpretation be left to those charged with judging the merits of each individual dispute? As one commentator has suggested:

It is not enough to say that judges, commissioners, or administrators will work it out in the future on some case by case basis. That approach has far too many problems in this complicated area. In the first place the object of punishment here in question (namely, the vilification) is inherently capable of covering too many things, too great a range of human conduct, and that fact makes it unsuitable without some definition or conceptual restriction. In the second place these concepts are not suited to objective determination in the way other matters

---

28 The media in general is opposed to any legislation which might restrict freedom of expression. An editorial in the Canberra Times on 30 May 1994 argued strongly against the proposed racial vilification legislation whilst a panel of media representatives at the recent national conference 'Racism and Anti-Semitism in Contemporary Australia' were of the view that there was no need for such legislation as it would limit critical examination of controversial issues (exposing 'bad' views destroys them).
Racial Vilification: an overview of the issues

are ..... but when you are talking about concepts such as vilification we are really talking about a so-called objective finding which is much more dependent upon subjective attitudes and subjective beliefs, in a very sensitive and volatile area of human affairs.29

Australia currently has no Bill of Rights and there is no explicit constitutional protection for freedom of expression (although it might be implied, as the High Court ruled when it dealt with the Federal Government's attempt to ban political advertising in 1992). With the debate in recent years on whether Australia should have its own Bill of Rights, which could very well include a guarantee of free speech, its nexus with racial vilification legislation would need to be examined. Quite clearly, the potential for cross-purposes would be quite high and likely to create legal and constitutional dilemmas.

The relationship between proposed Commonwealth legislation and existing State/Territory legislation will need to be clearly outlined. The provisions of the Commonwealth Sex Discrimination Act 1984 and of the State anti-discrimination Acts would provide a useful model. The Canadian experience might also provide a valuable parallel for Australia, where there are differences in remedies and protections not only between provinces and federal jurisdiction, but between the provinces themselves. In Canada, one commentator proposes a constitutional amendment to entrench fundamental human rights within the Federal jurisdiction30. Could Australia go down this path or will this turn into another Commonwealth versus States' Rights debate?

Conclusion

The National Agenda for a Multicultural Australia, which sets out the framework for Australia's multicultural policies, puts forward an important and pertinent point: the right to express one's beliefs involves a reciprocal responsibility to accept the rights of others to express their own views. The dilemma is how to balance these two fundamental, but at times conflicting, democratic principles.

It is often argued that no right is absolute and that with rights come certain responsibilities. As to the matter of freedom of speech, Australia does have libel laws and therefore limits in terms of what we

can say about others (ignoring for the moment the doctrine of parliamentary privilege).

Will legislation reduce the public expression of racial hatred? Many European countries have in place racial vilification laws, including criminal sanctions, yet the incidence of racist speech and violence remains high (although it must be kept in mind that the extreme 'new right', which characterises much of the politics in Europe and, to a lesser extent, the USA, does have a major foothold in these countries). The experience in overseas countries is that whilst criminal and civil sanctions have had an impact in limiting the public expression of racial hatred, they have done little, by themselves, to address more pervasive and deep-seated discriminatory views held by many people in society.

This does not mean that Australia should consider the introduction of legislation as futile, particularly since the experience elsewhere is that these new laws have not resulted in any undue limitations on the freedom of expression.

Racial vilification legislation, of itself, will not guarantee that the incidence of racist speech, and racism in general, will be automatically curtailed. Although it might represent a symbol of society's contempt of racist speech, and serve as a deterrent in countering racism, legislation is not the complete answer. It is in areas such as targeted education, particularly of young people, that long term and lasting gains are to be made.

If this education is combined with Commonwealth and State legislation which outlaws racial vilification, progress such as that already seen in outlawing overt discrimination on the basis of race, ethnic origin, sex, disability, marital status and so on, will be made.