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The law and racism: some reflections on the Australian experience

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Department of Justice Studies

Discussion Paper No. 1


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DISCUSSION PAPER NO 1

THE LAW AND RACISM:

SOME REFLECTIONS ON THE AUSTRALIAN EXPERIENCE

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Laksiri Jayasuriya is an Emeritus Professor of the University of Western Australia. He is currently Senior Visiting Fellow in Development Studies at Edith Cowan University. Until his retirement in 1992 Professor Jayasuriya held the Foundation Chair in the Department of Social Work and Social Administration. He has carried out research in the fields of ethnic minority studies, racism and Australian multiculturalism.
I have great pleasure in writing this foreword for the first discussion paper presented by the Department of Justice Studies of Edith Cowan University by Emeritus Professor Laksiri Jayasuriya. Professor Laksiri Jayasuriya has wide experience in dealing with ethnic and multicultural issues in Australia and has been involved in research and writing since the early seventies.

It is important that issues such as racism and the law be discussed extensively in the wider community and this paper provides the impetus for such discussion. The spirit of multiculturalism is greatly enhanced by the detailed analysis contained in this paper. Further, the timely release of this discussion paper which coincides with recent developments in Racism Laws in Australia merits wide consideration both among practitioners in the field as well as the general community.

Edith Cowan University is committed to the encouragement of academic and practical discussion on a variety of issues which affects the lives of people in Australia.

I introduce and welcome this paper, the first to be published in the series.

Professor Rod Underwood
Dean
Faculty of Health and Human Sciences
Message from the Ethnic Communities Council of WA

The Ethnic Community Council of Western Australia congratulates the Department of Justice Studies at Edith Cowan University and its Chairperson Mr Nara Srinivasan, on their decision to publish this occasional paper on Law and Racism.

It is indeed a very timely and important initiative given the imminent introduction of the Commonwealth's proposed Racial Vilification legislation in the Senate.

The public debate to date has unfortunately been skewed largely as a result of the Freedom of Speech lobby and other vested political interests. It is essential that this emotionally charged issue is debated on the basis of factual information.

Emeritus Professor Jayasuriya has done an excellent job in pulling together national and international experiences as well as providing an excellent framework and information base for debating these matters initially.

This together with his numerous other achievements makes us proud to acknowledge the significant efforts of this notable ethnic Australian, to make our culturally diverse nation a more just and harmonious society.

It is also pleasing to note that a leading academic institution has recognised the significance of addressing issues which are of importance to ethnic communities within the framework of a mainstream department ie. Department of Justice Studies.

We wish Edith Cowan University every success in promoting this publication.

Russell Raymond OAM
President,
Ethnic Communities Council of Western Australia
1. Introduction - an Overview of 'Race' and Racism.

Racism in Australian society is not something new and surprising. For a variety of historical and socio-political reasons it has existed from the earliest days of colonisation, and there have been a variety of strategies tried over the years to deal with racism as a social problem. One strategy most frequently resorted to, especially in recent years, has been to use the law as a means of combating racism. Before considering the questions of law and racism, we need first to clarify what we mean by the term racism.

Definitions of racism abound, some are helpful, and others less so. 'Race' and Racism are in short highly contested issues. What the term 'race' does is to provide a unit of classification for categorising the world's population in terms of inheritable characteristics (e.g., physical features, descent, blood type etc.) and these in turn are presumed to determine human abilities and other aspects of group culture. These accord with the popular view that human beings are separable into racial types which are permanent and enduring, and that human abilities are determined by 'race'.

The concept of 'race' itself has undergone many changes in scientific theorizing and the current state of informed opinion is best expressed in a UNESCO statement (quoted in Jayasuriya 1991). This statement is quite critical of attaching too great a biological meaning to the concept mainly because the difference in genetic structures within a population group are as greater or even greater than those between two population groups. Therefore, whatever the differences observed, the science of human biology affords little justification for establishing a hierarchy between individuals or population groups, since no group possesses a consistent genetic inheritance.

What this UNESCO statement does is to assert the basic biological unity of humanity. So what we end up with is the view that 'race' like ethnicity is a 'social construction' which subsumes a set of beliefs and resulting social practices such as negative attitudes, prejudice, discrimination and criteria for inclusion/exclusion in a given society. Consequently, what we have are racial ideologies; in short, as
Miles puts it, in the popular consciousness this construction is basically a process by which the 'Other' is constructed. According to Miles (1982), racism is the 'process of "racial" categorisation, whereby distinct cultural or ethnic groups are racially categorised by being presented as phenotypically different'. Thus, from the earliest days in Australia, according to Humphrey McQueen, the notion of 'race' came to mean any cultural or linguistic group which was popularly labelled in this manner. As a result, we had an Irish 'race', a German 'race', and even an 'Anglo-Celtic race' (!) depending on the location and politics of the speaker.

Whatever it is, or however we use the term, the distinctive feature of racism as an ideology lies in the notion of racial inequalities: the view that some races are superior/inferior in terms of a hierarchic ordering. To be more precise, what the doctrine of racism does is to characterise groups that are essentially the result of social and historical processes as biological or pseudo biological groupings. Furthermore, racism as an ideology ascribes negatively evaluated characteristics in a deterministic manner to these biological groups that abilities and other cultural features are determined by 'race'. These perceptions as inaccurate and derogatory stereotypes have an effect on our behaviour and the way in which we view the world; and the net result of this is that we engage in advocating or espousing racist belief and indulge in racist behaviour such as: incitement to hostility and hatred on account of one's 'race'. In other words it leads to a racialism which advocates the dogma that some 'races' will always be inferior/superior for biological or pseudo biological reasons.

Sometimes the term 'vulgar racism' is used to characterise these extreme forms of racism, involving the dissemination of violent propaganda with a view to inciting racial hatred and violence (Radis). It is these 'public acts' of racism, such as racial harassment, vilification and violence, that have been matters of public concern in several countries as warranting social interventions at various levels e.g., preventative strategies, protection of victims and imposition of sanctions against perpetrators of violence and discrimination.

It may be asked why racism in whatever form it is manifest, e.g. as racial vilification or 'hate speech' and in incitement to racial hatred is considered to be an issue of social and legal concern. An obvious and direct answer is that in a free and democratic society which guarantees basic individual rights and freedoms one needs to invoke the protection of the law to safeguard the inherent dignity of the human person as well to maintain public order. In this regard, one could argue against the need for special legislation or 'dedicated legislation' covering racial hatred or group hostility by subsuming these kinds of conduct under existing laws such as the law of defamation or law of sedition, blasphemy, assault, spreading falsehood etc. However, as Melinda Jones (1993) explains, these strategies which endeavour to use existing laws or to bolster existing laws, are fraught with difficulty. For instance, in the case of invoking a charge of seditious libel for making racial vilification a punishable criminal offence, one needs to be able to show that the
offensive language or utterance was 'calculated to promote public disorder'. Another possibility is to extend the law relating to defamation to cover groups; but this becomes problematic because it involves invoking some notion of 'group rights' to cover defamation of an individual as a member of a group.

While these legal strategies, whether through the criminal or civil law, are still available, significant developments in international law - such as the enactment of international conventions relating to human rights and the wide community acceptance of the values and principles of a multicultural society, such as equality of respect, tolerance and understanding, have led to the introduction of 'dedicated legislation' dealing with racial discrimination harassment and violence as a special category of law. As the recent Human rights and Equal Opportunity Commission (HREOC) Report on Racist Violence (1993) points out, existing common law remedies do not provide a definite enough remedy for the harm caused by words and actions of a racist nature (p. 278). Hence the need for 'dedicated legislation'.

This paper examines the way in which Australian society has responded with legislative safeguards to deal with the harmful manifestations of racism such as disharmony, hatred, conflict discrimination and in its extreme, forms of racial violence. In the first part, the paper considers Federal and State based legislation up to 1990; the second part reviews briefly some more recent initiatives, and concludes with an overview of the role of the law in dealing with racism.


_The Racial Discrimination Act of 1975_

The history of the Australian experience in dealing with racism as a social issue and a matter of public concern goes back a long way but its recent history dates mainly from the time of the introduction of the _Racial Discrimination Act_ in 1975 (RD Act). This was a sequel to the fact that Australia was a signatory to the _International Convention for the Elimination of All Forms of Racial Discrimination_ in 1975 (CERD). In fulfilment of our treaty obligations we placed on the statute book the _Racial Discrimination Act_ of 1975 - a landmark piece of Australian legislation. This Act which was destined to have a seminal influence on Australia's social and political life was also binding on all governments.

Thus, state Governments were expected to bring their laws and practices into conformity with this Act as part of Australia's commitment to meeting its international treaty obligations. In fact, in satisfying this Convention an obligation was cast upon the Commonwealth Government to ensure that the provisions of this Act were implemented throughout the country and this task was entrusted to the Human Rights Commission (HRC) (19481-1986). Currently, following an amendment to the RD act in 1980, these are performed by the restructured Human Rights and Equal Opportunity Commission (HREOC) which replaced the HRC in 1986.
Ever since the passage of the R D Act (1975) there has been in informed circles considerable degree of concern about the reluctance of Federal and State governments to act on the specific issues of incitement to racial hatred and defamation of racial groups. Much of the difficulty, as we know it today, has arisen because the RD Act, as passed in 1975, was subject to several amendments in order to gain its successful passage through Parliament. The strong opposition expressed by the Liberal/National Parties to two Clauses of the Draft Racial Discrimination Bill in 1973, viz Clause 28 & 29 (one dealing with incitement and the other with dissemination) was a key element in the 1975 debate surrounding the racial discrimination legislation. Eventually, this opposition led to the Australian Government entering a reservation on Article 4 (a) of CERD.

This Article, i.e. Article 4(a), states that the dissemination of ideas based on racial superiority, hatred or incitement to racial hatred, as well as all acts of racial violence or incitement to racial hatred are offences punishable by law. In other words, these provisions pertain to offences relating to racial vilification (hate speech) and incitement to racial hatred. Australia opted to delete the provisions of this Article from the provisions of the Racial Discrimination Act, preferring instead to deal with these acts (e.g. unlawful dissemination of 'race' - hate material) simply as civil wrongs, which are subject to conciliation. At the same time, Australia agreed that it would consider enacting suitable legislation at 'the first suitable moment'. (This moment may have arrived after nearly two decades!)

In an early review of the operation of RD Act of 1975, Trlin observed 'that the most serious defect of the Act is the absence of provisions to deal with the publication and dissemination of racist material and ideas. Nor does the Act include the provisions prohibiting discrimination by private voluntary associations on the use of derogatory terms'. The opposition to Article 4(a) of the International Convention was largely on grounds of the need to uphold the priority of the right to free speech as against other competing claims; any restriction on this right, and right to freedom of expression, has been a recurring theme in the continuing opposition to this particular provision.

Whilst other countries have established laws to deal with the dissemination, or the purveying, of race hatred in official circles, Australia has tended until very recently to reject any such move on the civil libertarian grounds of not wanting to interfere with the sacrosanct right to freedom of speech and expression. In this debate the right of individuals (the victims of racism) and groups to freedom from discrimination and racist abuse are often overlooked. But, even if we were to agree that such a law was needed, there remain some complex issues of principle that need to be examined before embarking on a practical model of legal intervention.

In 1983 the HRC cogently argued that, while it stood firmly committed to the fundamental right of freedom of expression, it challenged the conventional view that this right should prevail over other rights such as the rights of racial groups
whose very existence may be threatened or denied by giving free rein to those who had racist intentions. In defending its proposals the HRC felt that, the question it had to decide was whether to support the right of free speech, if it is used to advocate the destruction of the rights of another racial group; and equally whether free rein should continue to be allowed to those who argue for the destruction of a society where everyone has the same human rights.

Accordingly, the HRC maintained that there were no grounds for continuing Australia's reservation on Article 4(a) and recommended that action be taken to amend the legislation, making racial incitement a statutory offence. Furthermore, the HRC observed that:

important reasons for incorporating these amendments into the Racial Discrimination Act are the declaratory and educational effects they would have. The amendments should establish that community opinion now holds such statements to be unacceptable and unlawful. Whatever else their impact, they should serve to restrain the statements of persons in public employment. One quarter of all complaints of racial defamation made to the Commissioner of Community Relations have been made against such persons as police, welfare officers and local council employees. The education would come through public discussion and through the conciliation process itself (→).

Australia's stand on Article 4(a) remained inflexible for many years and was further strengthened in 1980 when Australia entered a similar reservation on Article 20 of the International Covenant on Civil and Political Rights (ICCPR). Here again, the reasons given by Australia for this reservation were that it was opposed to any legislation prohibiting the right to freedom of speech and expression. Article 20 of ICCPR states:

1. any propaganda for war shall be prohibited by law; and that

2. any advocacy of national, racial or religious hatred that constitutes incitement to discrimination hostility or violence shall be prohibited by law

Clearly as Paul Stein QC pointed out as far back as 1982:

these reservations have led to significant gaps in our armoury and ability to attach and present racism and racial conflict ... We possess neither shield nor sword to prevent the worst excesses of unbridled race hatred.11

As previously indicated, one of the first pieces of legislation proposed to remedy this state of affairs was the amendments to the RD Act recommended by the HRC in 1983 to make racial hatred and racial defamation as identifiable offences. These along with the legislative approach recommended are given below:

The Proposed Amendments12

53. It is suggested that new provisions should be included in the law to outlaw certain kinds of racist statements, and that these should take the form of two
additional provisions and one definition to be incorporated into the Racial Discrimination Act:

(1) **Incitement to racial hatred.** A provision to make it unlawful for a person publicly to utter or publish words or engage in conduct which, having regard to all the circumstances, is likely to result in hatred, contempt or violence against a person or persons, or a group of persons, distinguished by 'race', colour, descent or national or ethnic origin: this provision should be drafted so as to ensure that certain valid activities are not brought within its scope, e.g., the publication or performance of bona fide works of art; genuine academic discussion, news reporting of demonstrations against particular countries; or the serious and non-inflammatory discussion of issues of public policy.

(2) **Racial defamation.** A provision to make it unlawful publicly to threaten, insult or abuse an individual or group, or hold that individual or group up to contempt or slander, by reason of 'race', colour, descent or national or ethnic origin.

(3) **Defamation of publication.** A definition clause to make it clear that publication is to be taken in a very broad way to cover the print and electronic media, sign boards, abusive telephone calls etc. and that both the individual making the statement and, where publication implies endorsement, the publisher would be covered by the two provisions above.

**Approach**

54. The Commission has considered more than twenty other legislative options, but prefers those specified above for the reasons set out below:

**Reasons for Amending the Racial Discrimination Act**

(a) An amendment to the Racial Discrimination Act is a relatively simple matter, clearly within the jurisdiction for the Commonwealth, and justified by the Racial Discrimination Convention (particularly Article 4)

(b) Setting the provisions within the ambit of the Racial Discrimination Act makes it possible to retain the very considerable advantage of adopting conciliation procedures and educational activities in such cases.

(c) Avoiding a criminal law approach maintains the parallel with the defamation of individuals and increases the educative role of the law.

(d) The advantages of instituting a form of action for group defamation are in large part achieved without having to go into the very complex issues related to groups defamation in general.
New Zealand experience with both a criminal law provision and a race relations conciliation provision suggests that the latter approach is both more used and more effective.

After two years of consideration of possible amendments to New South Wales legislation, the New South Wales Race Relations consultative Committee decided to recommend an amendment to the federal Racial Discrimination Act.

These amendments, as enumerated above, proposed a general prohibition on 'public acts' considered likely to incite racial hatred and/or be considered defamatory of racist groups or individuals associated with these groups as well as an exclusion of certain activities from these restrictions. Although these carefully thought out and eminently reasonable proposals were not acted upon by the Commonwealth, they have continued to be a major influence on thinking around this issue for nearly a decade.


Somewhat surprisingly, considering that it was the conservative political parties that opposed the inclusion of a statutory prohibition on racial vilification and incitement to racial hatred in 1975 at the Federal level, the Liberal/National government of Nick Greiner in NSW became the first State government in Australia to address these issues publicly.13 Admittedly, the Greiner government benefited from the groundwork laid by the previous Wran and Unsworth governments in NSW which had introduced a Draft Bill to make racial vilification unlawful.14

It is noteworthy and particularly significant that the NSW legislation was enacted as a bipartisan measure. This in itself was of considerable symbolic significance in indicating the strong community stand against hate-propaganda. The NSW Anti Discrimination Racial Vilification Amendment Act, passed in 1989 presents an interesting viewpoint on thorny issues of legal principle and social practice that are inherent in dealing with this complex social issue.15 The following highlight some of the key features of this pioneering Australian legislation:

• Contrary to much of the overseas precedents the NSW legislation avoids a criminal law approach and is less punitive. This enables, among other things, in particular, the acceptance of less stringent standards of proof.

• By placing the Act within the scope of the NSW Anti Discrimination Act, the NSW legislation also adopts, as with the HRC amendments of 1983, a conciliation approach. This Act opens up complaints to all and involves an informal (administrative) investigative and consultative process.
However, there is provision for more serious matters, such as those involving threat or incitement of physical harm, to be referred to the Attorney-General for possible prosecution as a criminal offence. Furthermore, cases not dealt with to the satisfaction of the complainant, or those that should be differently handled as a matter of public interest, are referred to a quasi-judicial body, the EO Tribunal.

The extent of behaviour covered by the Act is limited to 'public acts' in public places which are likely to incite racial hatred or contempt for another on the grounds of 'race' (excluding matters such as those of public order which are automatically dealt with by the existing criminal code). Importantly, this does not include racist display offences and possession of such material.

The question of intent or mens rea is not included in the legislation on the grounds that proof of intention was unduly complicated. Instead, as with similar UK legislation all that is required is proof of the likelihood of racial hatred. The simple question posed was 'why should a person not be responsible for the natural and reasonably expected consequences of his or her behaviour?' In the UK and elsewhere, it is correctly assumed, that a person may reasonably be expected to be held responsible for the consequences of that person's conduct in matters of this nature. It has been argued the inclusion of intent would seriously incapacitate the legislation and make it unenforceable.

Following practices elsewhere to ensure that other rights such as freedom of expression were not interfered with, the NSW legislation allowed for several defences of reasonable excuse such as a fair report or comment on matters of 'public interest', or for purposes of 'discussion and debate'. These exclusions permit a balancing of the rights of freedom of expression and the freedom of the press, in such matters as academic reports, public discussions, media comment, etc.

The increasing incidence of racism in Western Australia, as a result of the racist activities of the Australian Nationalist Movement (ANM) in Perth, led to the Law Reform Commission of Western Australia being requested by the Western Australian Government to investigate possible changes to the Law to deter acts which incite racial hatred. In 1989 the WA government, following the release of the Law Reform Commission Report, introduced legislation to deal with racial vilification and harassment. Its provisions were influenced by previous legislation in Australia and elsewhere.

The WA legislation of 1990 (Crime Code Amendment - Racial Harassment and Incitement to Racial Hatred) is based on amendments to the WA Criminal
Code. This act makes it a criminal offence to possess and/or publish material to harass a racial group or to make racial hatred. However, these offences are of a limited value because they are material restricted only to 'written or pictorial nature'. The provisions in the WA Bill are also more stringent than the NSW and current UK legislation because the determination of an offence requires proof of intent or mens rea (cf the 1976 UK legislation). The need to include intent in the WA legislation clearly exaggerates the danger of the possible misuse of this type of offence. The intent requirement makes this legislation hopelessly ineffective and defeats its very purposes.

The WA legislation warrants comparison, in particular, with the pioneering NSW legislation as there are some important points of difference. The WA legislation is, unlike the NSW Legislation, based on amendments to the criminal code and is framed in the mould of the criminal law ie., racial incitement is regarded as a criminal offence; but these are restricted to the possession, publication and display of racially threatening or abusive material. Additionally, it requires the proof of intention; this contrasts sharply with the NSW and also UK legislation which only requires evidence of the likelihood that these acts would lead to racial hatred or promote racial hatred.

In many respects, the WA Bill appears to be loosely modelled upon similar UK legislation with the most relevant sections being drawn from the Public Order Act (UK) 1986. It is also clear that the General Public Order offences in S5 and S4 of the UK18 have inspired the second tier offences in the WA Bill (i.e., S78 and S80 dealing with harassment of the constituent group). The 1986 UK legislation itself is an outcome of amendments to previous UK legislation, and these highlight the changes in the UK legislation that have taken place over the past two decades.

In Britain S6 of the Race Relations Act (UK) 1965 included an intent requirement in respect of the publishing and distribution of racially offensive material. This intent requirement was cited as a major obstacle to obtaining an effective prosecution under the Act, and in 1976 an amendment was passed by the Labor Government in Britain to remove this requirement. Hereafter racial incitement was made an offence punishable under the Public Order Act (POA) and changes effected to POA 1936. Section SA of POA superseded S6 of the Race Relations Act 1965, and at the same time removed the element of intent from the offence of incitement to racial hatred. Hereafter it was sufficient - for purposes of establishing that an offence has been committed - to show that 'having regard to all the circumstances hatred [was] likely to be stirred up'.

The removal of 'mens rea' from the law in the UK (in 1976) - heavily influenced by the Scarman Report - was controversial but it was argued in its defence that 'the deterrent effect of the law justified its departure from normal principles of law making'. It should be noted however, that a list of defences was included in S5A to ameliorate the potential breadth of this Section, not the least of which entitled the defendant to raise any defence open to him/her in the event of a prosecution thereunder.
The Conservative Government of Margaret Thatcher reinstituted the intent requirement, in S18 of the Public Order Act (1986) and at the same time stated that, where intent cannot be proved, the likelihood of racial hatred being stirred-up constitutes sufficient grounds upon which to bring a prosecution. However, the ostensibly wide scope of S18 must be examined in the light of the defences provided in S18(5). Where no intent can be made out, it is a complete defence for the Accused to claim ignorance of the threatening abusive or insulting nature of the material. The onus is then on the prosecution to show that the Accused did in fact have such knowledge. Thus the burden of this onus is comparable with having to prove intent in the first instance.


State Developments

Unlike NSW and WA two other States and Territories (ACT and Qld) have decided against introducing special legislation to deal with racial vilification. They have regarded racial vilification and racial harassment as coming within the jurisdiction of the existing anti-discrimination legislation. In the ACT this refers to s65-67 of the ACT Discrimination Act of 1991, and in Qld to S126 of the Anti Discrimination Act of 1992. These Acts - as is characteristic of anti-discrimination legislation - provide statutory prohibitions on racial discrimination. As a rule, this legislation provides civil remedies for discrimination on the grounds of 'race', ethnic or national origin, in relation to public matters of employment, housing, education and provisions of goods and services.

In 1990, the Victorian State government appointed a Committee to report on issues of racial vilification, and this Committee reported in March 1992. The Committee, in its report, described racial vilification as a 'statement which expresses or promotes hatred, contempt or ridicule of a person or group of people on the basis of the person's or the group's race'; and recommended the introduction of special legislation to deal with racial vilification. Adopting the procedures of the Victorian Equal Opportunity Act of 1984, this Report too, defined 'race' broadly by reference to colour, nationality, and ethnic or national origin. But, more importantly, the Report is unique in the Australian context because it makes specific reference to religion alongside 'race'.

In general, Australian reports and relevant anti-racist legislation (e.g., Federal Racial Discrimination Act, Racial Vilification legislation of NSW and WA) have tended to subsume religious affiliation of victims under the generic category of ethnicity or ethnic origin. 'Race', includes religion, because 'race' is defined following CERED - as a broad and inclusive term. This is, by and large, consistent with practices overseas, in particular the UK. However, the Canadian Charter of Rights and Freedoms (see 319 [2]) identifies religion, specifically in referring to 'identifiable groups' against which the Charter forbids the wilful promotion of hatred. On this question of religion, it is worthwhile noting that recently the former Australian Attorney General (Mr M. Duffy) took a somewhat
different stand when he stated quite explicitly that the Racial Discrimination Act is not 'the appropriate place' for making 'inciting religious hatred and vilification of religious groups' unlawful acts.20 But, without making specific reference to religion, Duffy went on to suggest that 'vilification on the ground of "race", colour, national or ethnic origin covers everybody', and therefore, that the provision of Racial Discrimination Act includes invariably, religious groups.

Interestingly, the Racial and Religious Vilification Bill of 1992, proposed by the Victorian Labor government in June 1992, contrary to the Victorian Government Committee's recommendations, chose not to establish new criminal offences for racial vilification and incitement to racial hatred, including the possession and display of any threatening or abusive material intended to incite racial or religious hatred. As Grimm (1993) notes, the Victorian Government, Proposal established offences 'which may only be prosecuted by the State' at the instigation of any citizen, but are subject only to 'civil remedies'.

The first two offences in the proposed Victorian Bill dealt with racial vilification or hate speech and racist incitement on the grounds of 'race' or religion. The second group of offences in the Victorian Bill relate 'to possession, display or distribution of threatening or vilifying material with the intention of thereby creating racial hatred or intimidating a social or religious groups' (p. 23). These offences - as in similar WA legislation - refer to written or pictorial material excludes any reference to audio-video material, and require proof of intention or mens rea. In other words, the mere fact of possession or distribution does not create an offence. Unlike the WA legislation as the Victorian legislation as proposed specifically empowered local authorities - without making it obligatory - to remove offensive material from display.

A noteworthy feature of the Victorian proposal was the provision made for certain forms of racial or religious harassment, e.g., conflict between neighbours, to be dealt with by civil courts. The purpose of this, as in many other aspects of the legislation, was to de-emphasise the punitive aspects of the legislation and stress that the legal remedies were really 'a second string to educational programs at all levels' (Grimm 1993, 24).

Federal Government Initiatives

Influenced by the 'Great Immigration Debate' of 1983, and community concern expressed in the late 1980s by the spate of anti-Asian racist statements expressed in the media and more blatantly in the form of graffiti all governments have embarked on a range of strategies to counter the growth of racism and prejudice against aboriginal people, Jews, and Asian settlers.21 Additionally, there has been continuing international criticism relating to Australia's failure to respect its international obligations. These largely relate to the reservations entered with respect of Article 4 (a) of the CERD and Article 20 of ICCPR and there have been important shifts of thinking in the 1990s with regard to both these reservations.
In the matter of the *International Convention for the Elimination of All Forms of Racial Discrimination* (CERD), Australia has made a declaration under Article 14 of the Convention which permits Australian citizens to lodge complaints with the CERD. As regards the ICCPR Reservation, the most important development has been Australia's accession to the First Option Protocol to the ICCPR (from 25th December 1991). As a result of Australia signing this Protocol, the Human Rights Committee, of ICCPR is now competent to receive and consider communications from individuals who claim that their rights under the Covenant are being violated. But before such a complaint is entertained by the Human Rights Committee of ICCPR, an individual must first exhaust available and effective domestic remedies. In fact, the first successful Australian case in terms of the First Option Protocol has been that of the Tasmanian Gay Activist who complained against Tasmanian State laws proscribing homosexual sexual activities.

These new initiatives indicate the extent to which international law is influencing the development of Australian legal practices in combating racism and discriminatory practices. The most recent evidence of this is the undertaking given by the former Attorney General, Michael Duffy in relation to the *UN Declaration on the Elimination of All forms of Intolerance and Discrimination based on Religion or Belief*. Duffy stated in Parliament that Australia fully supported this Declaration and assured Parliament that he will be declaring it to be an Instrument relating to human rights and freedoms, coming within the purview of the *Human Rights and Equal Opportunity Act of 1986*. According to Duffy, the effect of this move will be to bring complaints made on the grounds of being discriminated on the a basis of religious beliefs under the HREOC Act provisions and not under the RD Act of 1975.

Concurrently, the Australian government has, after vacillating for over decades, finally indicated that it will take action to amend the RD Act so as to remove the reservation on Article 4(a) and introduce statutory offences relating to racial vilification. These moves have no doubt been influenced by international and domestic pressures, in particular, the widespread community concern about the growing incidence of racism. The latter has been documented by the HREOC National Inquiry into Racial Violence (see HREOC Report 1991). The proposed Federal legislation is also to a large measure due to the existence of state legislation indicating clearly that the Commonwealth legislation is lagging behind in this regard.

The HREOC Report of 1991 on Racist Violence, among its several recommendations for dealing with racist violence, argued strongly for changes to the RD Act of 1975. It is recommended that:

1. the Racial Discrimination Act should be extended to cover racial harassment, and

2. the *Crimes Act* be amended to create two new Federal Offences, viz. racial violence and intimidation; and incitement to racial vilification, and racial hatred.
These recommendations have been acted upon by the Australian Government with the introduction of *Racial Discrimination Legislation Amendment Bill* of 1992 which has lapsed. The main object of these amendments was to repeal the reservation entered by Australia on Article 4(a) of the CERD in 1975. As noted earlier, Article 4(a) required that racial incitement to hostility and hatred as well as the dissemination of racial hostility through publication be regarded as a punishable statutory offence.

Following the recommendations of the Royal Commission into Aboriginal Deaths in Custody and the Australian Law Reform Commission Report on 'Multiculturalism and the Law', the changes to the RD Act makes racial vilification unlawful but not a crime. The proposed amendment to the Racial Discrimination Act in the lapsed Bill of 1992, makes it unlawful for a person to do an act that is likely in all the circumstances, 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 amendment also made it unlawful to incite the doing of unlawful acts. Complaints with regard to racial harassment, were to be processed by the HREOC and subject to procedures of conciliation. Only civil remedies were available if and when the conciliation processes fail.

In addition, there were several exclusion clauses for acts done in good faith. This was, as in the NSW legislation, inserted to ensure that 'certain valid activities are not brought within its scope, e.g., the publication of bona fide works of art, genuine academic discussion of any matter of public interest, making or publishing a fair report of any event or matter of public interest.

At the same time, the Australian Government sought to amend the Crimes Act of 1914 to make incitement to racial hatred a criminal offence. Racial Incitement, is understood to refer to the doing of a public act which is offensive to a group identified by 'race', colour, national or ethnic origin. These public acts may refer to words, or conduct, including threats of violence and require proof of intention to incite hatred or cause harm against the specified group. The offence of incitement to hatred incurs a maximum penalty of twelve months and threats of violence a maximum penalty of two years. The law, as Attorney-General Duffy explained in Parliament in 1992 was also 'intended to cover racist statement or propaganda of serious and damaging kind', such as the dissemination of printed matter, calling for the repatriation of certain ethnic groups or purporting to inflict violence on a particular group of people.

These proposals are more like the WA Legislation which involves the criminalisation of these offences.

5. Conclusion

It is clear that the central and overriding issue relating to the use of legal remedies for dealing with racial harassment and racial vilification surrounds the
importance and significance attached to the democratic values enshrined in the right to freedom of expression. There is no doubt ultimately that it is a question of balancing of rights, i.e., the need to give equal consideration to the rights of the individual for protection from racial harassment and the right to freedom of expression.

Nowhere is the conflict more vividly and dramatically portrayed than in the USA and Canada, which unlike Australia and the UK, have enshrined a Bill of Rights which enforces as in the USA First Amendment the right of Free Speech. The Canadian situation is more revealing because, unlike in the USA Constitution of the Canadian Charter of Rights and Freedoms (1982) (hereinafter referred to as the Charter), contains in Section 1, an express limitation clause on the rights of free speech and expression. Accordingly, it is stated in Section I of the Charter that it guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The relevant freedoms set out in the Charter include a specific reference to freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

As Montigny (1992) point out, Section I of the Charter 'places limits on the guaranteed rights without being required to give them an unnecessary restrictive scope' (p. 35). The Canadian courts, in interpreting this section have emphasised that no protection would be accorded to 'violent forms of expression such as threat of violence, destruction of property, or other "unlawful conduct"'. Admittedly, the exclusion of hate propaganda from the scope of the freedom of expression raises thorny issues of principle and legal definition. But at the same time, there is growing consensus in the USA and Canada of the need to interpret this fundamental right flexibly. As the Canadian Chief Justice Dickson (quoted by Montigny) put it tersely and wisely:

The rights and freedoms guaranteed by the Charter are not, however, absolute. It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance.

Thus, in the end, it is a question of principle, and definition which has have to be measured and judged against community values and standards in a free and democratic society.

In considering the apparent conflict between the right to free speech and right of protection from racial harassment, it needs to be borne in mind that there has never been an absolute right to free speech or freedom of expression in both civil and criminal law. For example, there is no freedom for expression which jeopardises national security, sedition, or legal rules protecting trade secrets. Likewise there are laws concerning blasphemy, obscenity, and also libellous and defamatory statements against individuals. As one Canadian theorist expressed it,
adding one more restriction to this list would not necessarily interfere with the advocacy of justice. To quote Paul Stein QC:

Crucial as freedom of speech is, there is an equal basic need for society to avoid group hostility, violence and conflict. It is therefore a question of balancing a rather abstract view of freedom of expression against the serious loss to society arising from racial tension caused by group defamation.25

The other issue on which there has been some difference among legal theorists is whether 'injunctive relief is preferable as against criminal procedures' (Alan Goldberg).26 By and large, policy makers have been reluctant to adopt criminal procedure except in extreme of racist conduct, relying on the effectiveness of the law to be in acting as a deterrent rather than being seen as a punitive measure.

Over and above the legal niceties surrounding the 'use' of legal procedures for dealing, we need to pose the more critical question as to whether legislation is the most appropriate way to proceed in dealing with a complex social issue such as racism.27 Put simply, are legal remedies effective and entirely satisfactory in combating racism? Those who have advocated some form of legislative intervention to deal with racism have clearly recognised that the law has only a limited role in this regard.

One Canadian authority, Rosenthal,28 has stated that the criminal law is not the most effective weapon against expressions of racism but adds that 'it is however necessary to deal with the problems of hate literature and racial harassment' on the crudest forms which can and should be controlled by the criminal law. It may serve to deter most violent and extreme forms of racism, e.g., vulgar racism; but it can never eliminate other more subtle and often pernicious forms of racism in society, especially indirect discrimination and prejudice which are more widespread and insidious.

We, therefore, need to be careful not to exaggerate the importance of the legal and other remedial measures such as human rights legislation and rest confident with such measures. The law does and can play a useful and constructive role, if it is seen primarily as providing the social foundations needed for altering deep-seated values, social attitudes and belief systems. Law is effective primarily as a moral exemplar, a declaratory statement, embodying the value and norms and standards of acceptable behaviour in society.

Effective legal remedies which range from the common law to different forms of dedicated legislation require that they be concurrently associated with other forms of social intervention. Instead of adopting a 'fire-brigade' approach in dealing with racism, we need to pursue a multi-faceted strategy of legal and social action. In short, we need to consider the adequacy of current machinery and
procedures for handling community and 'race' relations nationally and also at the local level.

Finally, it is relevant to make some brief comment on the need for non legal remedies to exist alongside legal strategies for an effective overall strategy for dealing with all forms of racism, pervasive institutional racism to acts of individual racism. The non-legal strategies refer in particular to a community relations strategy. The main thrust of any community relations strategy should lie in bringing about changes in individuals and the wider society. These changes may take place at different levels and are fundamentally those which will make all persons act fairly, justly and equitably towards each other, particularly members of ethnic minority groups. The desire for change may stem from different causes, external or internal, but we need to focus on the change process. In this respect, what is particularly important is to define the goals of this change process in concrete fashion. These goals will define what needs to happen to specific aspects of an organisation, institution or group structure if it is to achieve the desired changes.

We may, for the convenience of analysis and development of strategies of change, identify three levels. The first of these is at the level of the individual and relates to personal discriminations against particular members, usually members of a racial or ethnic minority group the legal remedies currently available are applicable at this level and regards racism as a manifestation of deviant, pathological individual behaviour. The next level relates to 'structural racism' whereby the rules and practices of an organisation directly or indirectly discriminate against persons from particular groups; and the third level is what may be called 'cultural racism', where the racism and discrimination stems from the culture or climate of the group or organisation rather than the individual or organisational structure.

We require a variety of community relation strategies to deal effectively with changes at many levels, but one particular valuable approach is through programmes of 'community education' ranging from the school to adult education. As the 1975 Report on Community Relations (Lippman Committee Report)\textsuperscript{29} states that:

the main thrust of the community relations program should be towards the Australian community and generally effected through the schools, colleges and universities, continuing education programs for adults, in the workshops and on the factory floor, and through the intelligent use of the media including broadcasting, the press and public advertisements. The battle to be fought and won is against prejudice and ethnocentricity and for the adoption of tolerant attitudes towards the miscellanea of ethnic communities which are not an integral part of Australian society.

As a rule these community education strategies are surprisingly absent in the Australian scene. Admittedly this strategy provides no panacea but needs to be pursued along with other strategies; and it has to be located within a truly educational context. At all times the object of the exercise must be to endeavour to change attitudes and behaviour of all groups in the community.
I concur with Peter Rosenthal\(^\text{30}\) that:

...in the short run, however, criminal laws against racist propaganda and racial harassment may be the only effective means of protecting members of minority groups from the most visible forms of racial abuse. Moreover, criminalising such expressions of racism may contribute to teaching that racism is immoral.

Furthermore, according to Rosenthal

> The concerns of certain civil libertarians for an abstract notion of free speech 'do not provide sufficient justification for maintaining a 'right' of racists to harass members of minority groups'.

Notes

1. Revised text of an address given to the Law School, University of WA, Perth, in May 1992.


7. See several HRC (1982-84) Occasional Papers 1-3, and 7; and also the NSW document: 'Preventing Racial Conflict, published for the Anti Discrimination Board, by the Dept of Adult Education, University of Sydney in 1982. More recently, the HREOC (1991) 'Report OD Racist Violence' has examined this issue and the current status is reviewed fully in Chapters 2 & 11.


9. See e.g. page 11 of the WA Equal Opportunity Commission Report (1984) submitted to the WA Government for an account of the explanation given by the Australian government justifying its reservation to this Article.


18. The HRC Report of 1982 Occasional Paper No. 2 provides a comparison of the legislative enactments on racial harassment and incitement to racial hatred. This Table shows the main points of similarity and difference on seven criteria, viz consistency, provisions of Act, nature of the Act, defences permitted and the sanctions provided. Recent Australian legislation warrants comparison on these criteria.


21. See A. Matheson's Annual review, for the ACTU, entitled: Racism in Australia: More or Less? 1989, 90-92, for the incidence of racism; and also the documentation provided by HEROC (1991) 'Report on Racist Violence'.


30. Op cit. p.27.