



Racial and Religious Vilification

Consultation Paper
August 2004



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Foreword

There is little doubt that the vast majority of Western Australians are committed to a free and democratic society in which people feel safe and valued, no matter what their background or beliefs.

Nevertheless, racist behaviour including violence, intimidation, and ridicule does occur. Such behaviour may be motivated not just by racial but also by religious intolerance.

Such racial and religious intolerance belittles us as a community and impacts upon the harmony of our society. Real harmony can only be built on the twin pillars of respect and justice.

The State Government is committed to making every effort to remove the concern and fear of people who are the targets of racial and religious vilification.

Accepting that the law can shape relations between and among groups and institutions, and can be a powerful catalyst for change, this consultation paper deals with the legal options to address racial and religious vilification in Western Australia. It forms part of the anti-racism strategy that Government is developing in partnership with the community.

The legislative models proposed in this consultation paper brings together an effective suite of both criminal and civil remedies designed to establish a substantial framework for legislative reform to strengthen the State Government's response to combat instances of racial and religious vilification.

Stronger legislative measures, including broadening and re-defining provisions in the current Criminal Code, particularly strengthening the existing penalties, are needed to enable more effective protection for individuals, and to reflect growing community concerns about the seriousness of such incidents.

As a Government we will not allow a small minority to disrupt and intimidate. Our diversity is our strength. Difference is to be respected rather than ridiculed. An environment free of prejudice is an essential ingredient for our prosperity as a society.

I encourage all Western Australians to take this opportunity to provide input into this process and assist Government to identify the most suitable legislative model for our State and for all Western Australians.



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Introduction

Today, the Western Australian population comprises people from a variety of cultural, linguistic and historical traditions. The diversity of the population is shown in the 2001 Census:

- 3 % are Indigenous¹;
- 27 % are born overseas;
- 12 % are born in a country where English is not the main language
- Over 100 religions are practised by the population.

Western Australia's democratic tradition accords every individual the right to participate fairly and equitably in the State's economic, political and social spheres, without losing their cultural or ethnic identity.

Pluralism, meaning the existence of different groups, institutions and competing values in society, is a vital characteristic that underpins all democracies, enabling contradictory and conflicting views to be represented, negotiated and respected. Cultural pluralism, one dimension of pluralism, enables all people in a democracy to be who they are and who they want to be, within the confines of the law, without fear, harassment, or degradation. Although religion is an intrinsic part of culture, and religious belief is an important defining characteristic for many people, the inclusion of religious freedom and expression has only marginally been included within Australia's multicultural context.

Every West Australian has the right to be treated fairly and equitably. Protecting this right may sometimes require that the ability of another to discriminate on the basis of personal beliefs and convictions, other than in their private life, are limited. In that context no one has an unfettered right to individualism. It is a measure of Western Australia's maturity as a democratic society that we are able to debate matters where divergent views are held, and to create solutions that balance the right to hold personal views in our private lives with the right of all to exist without harm and discrimination.

While democracies are systems in which citizens freely make political decisions by majority rule, the rights of minorities do not depend upon the goodwill of the majority and cannot be eliminated by the majority. The rights of minorities are protected by democratic practices, laws and institutions and apply equally to

¹ Indigenous and Aboriginal are used interchangeably throughout this publication to reflect the colloquial use of terms. For the purpose of this paper, both terms refer to Aboriginal and Islander peoples, including Torres Strait Islanders. These terms however, do not reflect the diversity of Indigenous Australians and it is important to remember that many Indigenous Australians prefer to be known by the specific names, such as Nyungah, Wongi, Yamatji, Koori, Murri, Nunga, Yolngu, Anangu, Kiwi Islanders, Torres Strait Islanders and so forth.

people with disabilities, women, youth, seniors, and – particularly in the context of this paper – Indigenous people and people from culturally and linguistically diverse backgrounds.

The Government is developing an anti-racism strategy that will include both legal and non-legal remedies for addressing racism in Western Australia. This discussion paper is released for comment to provide an opportunity for the Western Australian public to express its views on the development of a legal mechanism to address racial and religious vilification. Non-legal remedies such as community education and awareness raising and specifically targeted non-legal initiatives for addressing systemic racism are also being developed.

The Nature and Character of Racism

Racism is not a new phenomenon, nor is its prevalence confined to Australia. It is often a subtle and complex phenomenon primarily because it has a variety of definitions² and has at least two basic underlying assumptions associated with its occurrence.

The first and longer established of these is that, in any society, there are some people who judge others as being inferior or worthless because of their perceived race and/or religion.³ In the nineteenth century, the now defunct theory of Social Darwinism provided a biological basis for racism by deeming some racial groups to be superior to others. Social Darwinism enabled 'race', itself a concept given social meaning through the interaction of people, to be defined in terms of ascribed or inherited biological characteristics.⁴ These ascribed characteristics were then utilised to form the basis of creating a superior/inferior relationship between racial groups. This basis of racism gave legitimacy to the imperial powers of the nineteenth century, and more recently to the Holocaust against Jews of Europe in the Second World War and the Apartheid system of South Africa.

Although the biological basis of race and therefore racism has been discredited, it still appears to exert strong influence. People continue to categorise people by 'race', or 'racial group', and then assume or suggest that each so-called group has distinct capabilities. This type of thinking runs counter to modern science which shows that there is much more genetic variation within each so-called racial group than between them.

In the modern era the underlying assumption of 'racism' is a belief that differences in the culture, values and/or practices of some ethnic/religious groups are 'too different' and are likely to threaten 'community values' and social cohesion in a particular society.⁵ The focus on incompatible differences have been utilised by majorities to exclude minorities from a society's power and privilege. The basis of racism has thus moved from biological heredity to cultural specificity.⁶ Reference to cultural distinctiveness and difference can contribute to the creation of a strong sense of nationalism which excludes those deemed not to possess the "desirable" or "necessary" cultural characteristics.

This form of racism is described as cultural racism, and has been strongly adopted by political parties such as One Nation, as well as some other organisations, to

2 Markus A. *Race: John Howard and the Remaking of Australia*, Sydney: Allen & Unwin 2001

3 Blumer M & Salomon (Eds.) *Racism*, Oxford: Oxford Universities Press, 1999

4 Sivanandan A(Ed) *The Three Faces of British Racism: A Special Report* Race and Class 43 (2)

5 *ibid.*

6 Jayasuriya, L. *Racism, Immigration and the Law: The Australian Experience*. University of Western Australia Press, 1999, p. 25.

marginalise groups that are deemed not to have the necessary characteristics of the “unique and distinctive” Australian culture. The Australian Nationalists Workers union uses this basis of racism when it argues that “...Europeans have a commonality or racial background, culture, history and ethnical values, while Asians are very different to us. This is why Europeans can assimilate into our mainstream Australian Race/Culture, while Asians and Africans cannot, and this tends to form social divisive ghettos”.⁷ In this context, an ethnicity that is not Anglo-Celtic, religions not of a Judeo-Christian tradition, or skin colour that is not white, can become targets for the manifestation of racist behaviour.

The two bases of racism, inequality and difference, usually co-exist, although depending on the specific historical and socio-political context one basis appears to dominate.

Racism can manifest through both individuals and systems. Individual racism manifests itself in prejudice⁸ resulting from a person’s attitude and behaviour towards others perceived either to be inferior or to be culturally different as to pose a threat to perceived ‘common values’ and social harmony. Although there is a range of behaviour that can be categorised under this form of racism, it is usually a form that is easier to identify because it is generally overt. This form of racism can range from property damage and violence towards an individual to the distribution of inflammatory material about a person’s or group’s culture, from name calling to ridicule or a joke that has racist connotations.

Institutional or systemic racism is usually less direct and less easy to identify, and which results in discrimination⁹. It can exist in rules, practices, and policies of organisations that directly or indirectly operate to sustain the advantages of certain groups above others. It does not require overtly racist behaviour because it is often unconscious and is usually carried within the occupational culture of an organisation and transmitted through its routine everyday practices. Systemic racism is particularly difficult to track and to address because it manifests as part and parcel of an institution’s habitual practice. For example, a company policy that does not allow people to take time off for culturally significant purposes or accommodate the wearing of a turban or head covering in its dress code can be a form of systemic racism.

7 Australian Nationalist Movement, *The Nationalist Alternative to Asianisation*.

8 Jayasuriya, L. *Understanding Australian Racism*, Human Rights and Equal Opportunity Commission, Perth 28 June 2001, p.2.

9 Jayasuriya, L. *Understanding Australian Racism*, Human Rights and Equal Opportunity Commission, Perth 28 June 2001, p.4.

A Historical Context of Racism in Western Australia

In Australia racism is not new. Aboriginal people, the first Australians, have faced racism since European settlement began. Many Aboriginal people were displaced from their ancestral country because European settlers did not recognise their laws about land ownership, under the old English legal doctrine of “terra nullius”, meaning land without owners¹⁰. Although the British acknowledged the presence of Indigenous people, they justified their land acquisition policies by saying the Aborigines were too primitive to be actual owners and sovereigns and that they had no readily identifiable hierarchy or political order with which the British Government could recognise or negotiate.¹¹ The doctrine of terra nullius was overturned in 1992 with the High Court’s Mabo judgement.

By the end of the nineteenth century, many Aboriginal people had been isolated on unfamiliar territory, in reserves. Though they had official “protectors”, they did not enjoy the same rights as other citizens and, between 1860 and 1969, many Aboriginal children were removed from their families under Government policies now considered to be racist, because they were based on the belief that white culture was superior.

That Aboriginal people confronted systemic racism is also borne by the fact that, despite being the first Australians, they gained full legal citizenship rights only in a Constitutional referendum in 1967. The referendum gave the Australian Government power to make laws about Aboriginal affairs and to count Indigenous people in the national Census.¹²

Systemic racism has also been reflected in Australia’s immigration policies. For many years after the first arrival of British settlers Australian immigration policies were racially exclusive. The Immigration Restriction Act of 1901, passed by the newly established Federal Parliament, sought to limit Australia’s immigrant intake, with minor exceptions, to settlers from the ‘home country’. The political justification of this policy, commonly known as the ‘White Australia’ Policy, was the ‘incompatibility of non white settlers, especially Asian races, with the dominant cultural heritage of a British Australia’.¹³ Edmund Barton, Australia’s first Prime Minister, defended the legislation by arguing that the doctrine of equality was never intended to apply to the equality of the Englishman and the Chinaman, and that there was a deep set difference between the two with there being no prospect of it ever being effaced. He stated that ‘nothing we can do by

¹⁰ Council for Aboriginal Reconciliation *Documents of Reconciliation; Policy and Briefing Papers*.

¹¹ *ibid*.

¹² Face the Facts, 1997. Human Rights and Equal Opportunity Commission

¹³ Jayasuriya, L. **Legislating Against Racial Incitement: Strategies and Rationales**. Occasional paper No. 5, University of Western Australia, Department of Social Work and Social Administration. 2001. p.7. Jayasuriya op sit, p.33

cultivation, by refinement, or by anything else will make some races equal to others'.¹⁴

The strict adherence to the White Australia policy changed in the 1930s with the adoption of the policy of assimilation when policy makers believed that, with time and the right environment, people who were not of the Anglo-Celtic background could assimilate. Assimilate in this context meant to give up their own culture and adopt the then dominant Anglo-Celtic culture. Non-British European settlers from war torn Europe were consequently accepted as immigrants.¹⁵

In the 1960s and the 1970s a further concession was made through the policy of 'integration', where there was a preparedness to tolerate some diversity so long as the primary objective of maintaining a homogenous society was largely intact. Despite these changes, multiculturalism as it was then defined did not gain ascendancy until the Whitlam era in the early 1970s when it became the basis for migrant settlement and welfare policy.¹⁶

One of the first tasks of the Whitlam Government was to rescind the White Australia policy, introduce a non-discriminatory policy of immigration, and adopt a policy of ethnic pluralism in relation to settlement in Australia. This was the beginning of the development of the concept of multiculturalism, which was based on the belief that a variety of cultures can flourish peacefully side by side.

Religious discrimination is not new either. The first British settlers brought a history of discrimination against Roman Catholics and 'dissenters' – Protestant Christians who did not accept key doctrines of the Church of England – and a lack of understanding and appreciation of non-Christian religions. The 1901 Australian Constitution prohibited establishing any official religion in the new nation, and State and Territory equal opportunity laws have made it unlawful to discriminate on religious grounds in public life. However, religious discrimination exists even today.

14 E. Barton, Commonwealth Parliamentary Debates, 26 September 1901, p.5233

15 Lopez, M. *The Origins of Multiculturalism in Australian Politics 1945-1975*. Melbourne University Press. P. 2000. p.43.

16 *ibid.* p.163.

Racism today

Australia today is a multi-ethnic, multi-cultural, multi-lingual and multi-religious society. Historically, multiculturalism is a relatively new concept in Australia. Through its establishment, Australia has attempted to engage with social difference, an inevitability that was postponed by the Immigration Restriction Act and the policies that governed Indigenous Australians and early migrants.

While there are many benefits to living in a society with a diverse population, there are also many challenges, racism being one of them. While many Australians recognise racism as a problem of international scope, there appears to be a reluctance to recognise its manifestation in Australia.¹⁷ There can also be a tendency to believe that racists and racism refer largely to extremists. There is evidence to show that many people in Australia today live with prejudice and intolerance. For Aboriginal Australians, who have suffered most, racism continues to be part and parcel of their daily lives. For others, its impact may vary but it often exists under the surface waiting for perceived justifications to manifest, such as adverse economic times, or national or international events.

National consultations on racism by the Human Rights and Equal Opportunity Commission (HREOC) found that Indigenous people continue to be primary victims of racism in Australia. They are still affected by the consequences of years of institutionalised racism and discrimination, and have much lower life expectancies, equivalent to that of the general Australian population back in 1901. Systemic discrimination has left many Indigenous people disadvantaged, for example through limited access to education and lower educational achievement and consequently greater unemployment.¹⁸ Indigenous people are three times more likely to be unemployed than non-Indigenous Australians, and they are grossly over-represented in official records of poverty, homelessness, imprisonment, and child protection. They continue to suffer a greater burden of ill health than the rest of the population.

HREOC receives many complaints under the Commonwealth Racial Discrimination Act 1975 (RDA) from Indigenous people as well as from people of culturally and linguistically diverse backgrounds. In 2002, HREOC received 182 complaints under the RDA. The majority of these complaints involved employment issues or the provision of goods and services. 105 complaints were received from people from culturally and linguistically diverse backgrounds and 51 were received from Indigenous people.¹⁹

¹⁷ *'I want respect and equality: A summary of consultations with Civil Society on Racism in Australia'*, Human Rights and Equal Opportunity Commission, p.2.

¹⁸ Australian Bureau of Statistics, **The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples** 2001.

¹⁹ HREOC, Annual Report 2002-2003, p.72.

Similarly, a quarter of the complaints received by the Western Australian Equal Opportunity Commission (EOC) are 'race' based. In the report for the year ending June 2003, the EOC received 637 complaints. Of these 154 or 24.2% alleged unlawful discrimination on the basis of race.²⁰

In the aftermath of the attacks in the United States on 11 September 2001, the Bali bombing of 12 October 2002, and controversies relating to the handling of asylum-seekers and refugees, vilification against certain identifiable groups has increased²¹. In response to increasing concerns expressed by Arab and Muslim organisations about the rise in anti-Arab and anti-Muslim prejudice, HREOC undertook a series of nationwide consultations, the outcomes of which are set out in the *Ismaḡ Report: National Consultations on eliminating prejudice against Arab and Muslim Australians*.²²

The Report documents experiences of racial and religious vilification, prejudice and discrimination against Muslim and Arab Australians. These experiences range from offensive remarks about race or religion to physical violence. Most experiences were unprovoked incidents from strangers on the street, on public transport, in shops and shopping centres, or on the roads. However, there are also reports of vilification and discrimination in the workplace, at school, universities and colleges. Those most at risk of experiencing vilification or discrimination were people readily identifiable as Arab or Muslim because of their dress, physical appearance, or name. Muslim women who wear traditional Islamic dress were especially vulnerable.

Physical attacks, threats of physical violence and attempted assaults were widely reported during the *Ismaḡ* national consultations including²³:

- Being spat on
- Objects being thrown from passing cars
- Muslim women having their hijab (headscarf) forcibly removed
- Attacks on property including offensive graffiti
- Abusive mail or emails
- Being run off the road by passing cars

20 Equal Opportunity Commission (WA), Annual Report 2002-2003, p.12.

21 *Ismaḡ – Listen: National Consultations on eliminating prejudice against Arab and Muslim Australians*, HREOC, 2004, p.1.

22 *ibid.*

23 *ibid.*, p.47.

Alongside increases in the incidences of vilification and abuse against Muslim and Arab Australians, members of the Sikh community in Western Australia have also experienced increased incidents of racism largely because perpetrators were unable to differentiate them from Muslims. Sikh men wearing turbans were particularly visible. The Sikh temple has suffered severed pigs' heads being left at it, deliberately lit fires, two metal-tipped arrows fired into the prayer hall, and a bomb thrown into the prayer hall during prayer²⁴.

Anti-Semitic attacks are also a major issue. For the twelve years up to 2000, an average of 242 incidents of anti-Semitism were reported annually across Australia. Since September 11 2001 the incidents have more than doubled.²⁵ The recent defacement of a synagogue with the swastika and other racist material has highlighted the prevalence of anti-Semitism.

The recent racist poster and graffiti campaigns against Western Australians of African, Asian, Arab, and Jewish backgrounds, and the fire-bombing of Chinese restaurants earlier this year, are also examples of racist attacks.

While the incidents above give a snapshot of vilification against certain groups, a variety of other forms of racial vilification exist including racist websites, discussion groups, radio broadcasts, and newsletters and other publications of various racist groups in Australia. In addition, it must be emphasised that many incidents of racial and religious vilification go unreported.

²⁴ *Sikhs weather storm of racial strife*, West Australian, 24 January 2004, p.14.

²⁵ Executive Council of Australian Jewry

Racial and Religious Vilification

Vilification is generally any act that happens publicly and that could incite others to hate, have serious contempt for, or severely ridicule a person or group of people. There are many kinds of vilification of which racial and religious vilification are two types.

Racial vilification is vilification of a person or group of people because of their perceived race, ethnicity or national origins. The Western Australian Equal Opportunity Act 1984 (EOA) defines 'race' as colour, descent or ancestry, nationality or national origin, ethnicity or ethnic origin.

Religious vilification is based on a person's or group's religious beliefs. Religious belief is defined in the EOA as holding or not holding a lawful religious belief or view or engaging in, not engaging in, or refusing to engage in a lawful religious activity.

The distinction between religious and racial vilification is not always clear. Many minorities, or even large groups of people, identify themselves by ethnic, cultural and religious aspects. In these cases, it is difficult to determine whether vilification has been motivated by racial or religious grounds when both aspects are crucial parts of an individual's or group's identity. The difficulty in distinguish between racial and religious vilification is a concern, particularly since September 11 because, while racism against Muslims and Arabs has always been prevalent, recent world events have sparked an increase in incidences of racially and religiously motivated vilification. Sikhs, non-Muslim Arabs and people perceived to be of Middle Eastern appearance have experienced increased levels of vilification and abuse since September 11. In these instances, it is difficult to determine if vilification is racially or religiously motivated as the victims are often assumed to be Muslim.

As will be seen in a later section, neither Western Australian laws nor the RDA protect against religious vilification. In instances where individuals or groups have been the victims of vilification, the onus has been on them to show that the vilification was racially, not religiously motivated. Some ethno-religious groups have been able to gain protection under the RDA by being considered a racial group. Jews and Sikhs are considered a racial category under Australia's available legislation on vilification because they possess "a combination of shared customs,

beliefs, traditions and characteristics derived from a common or presumed common past.”²⁶

Other groups such as Muslims are considered a religious rather than racial group and are not covered by the Federal legislation, the main form of legislative redress against vilification currently available to Western Australians. In this situation victims are left with no form of redress for the abuse, humiliation and denigration they have suffered.

Racial and religious vilification includes all acts, conduct, behaviour, or activity involving the defamation of individuals and groups on the ground of their colour, perceived race, ethnicity, national origins or their religious belief or convictions, as well as those acts which constitute the incitement or stirring up of hatred or other emotions of hostility and enmity against these individuals and groups. It is a way of communicating that creates and reinforces discriminatory messages and aggravates inequality, and encourages acts of oppression and intimidation.

People of all backgrounds, but particularly Indigenous people and people from culturally and linguistically diverse backgrounds, have experienced racial and religious vilification. The effects of such vilification on victims include apprehension and fear for personal safety, feeling intimidated, trauma and psychological damage and, as an act of self-preservation, withdrawal from society. Acts of vilification also have a broader effect on society because they can threaten the principles of freedom, dignity, and equality that are valued in and make up our democratic society.

Whatever form it takes, the purpose and effect of vilification is to divide the community and to provoke prejudice and, in extreme cases, violence against certain groups.

²⁶ *King-Ansell v Police* [1979] 2 NZLR 531 as cited in http://www.hreoc.gov.au/racial_discrimination/Erace/islam_rda.html

Vilification and Freedom of Speech and Expression

The introduction of racial and religious vilification laws requires an assessment of the relative merits of two desirable social ideals, the right to free speech on the one hand, and freedom from discrimination and abuse on the other. Both ideals have legal validity and effect in Australia.

Racism whatever its form is ‘... deeply divisive, intolerant of differences, a source of human suffering and inimical to the common sense of belonging lying at the basis of every stable political community.’²⁷ It destroys people’s sense of safety and well-being and their ability to participate in community life. It marginalises some groups and damages our ability to live together as neighbours and the quality of civil society. It limits our chances to be citizens of a free, functional, and fully democratic society.

However, there are a number of arguments against anti-vilification laws: that they do not work and are less effective than community education strategies or that they are misused by persons not acting in good faith. The primary opposition however comes from those who believe that vilification laws may unreasonably restrict ‘free speech’.

The ideal of freedom of expression has always been valued in Australia. Inherent in a democracy such as Australia, freedom of speech is necessary for effective communication so that a community can debate important issues, however complex or controversial they may be, and irrespective of whether they support or oppose the Government of the day. It protects and promotes discussions and exchange of information and ideas among people and between people and their governments.

However, this freedom brings with it important responsibilities and duties to ensure that it is not abused or used to discriminate, particularly against a minority group.

Respect for other cultures does not equate to not questioning culturally based practices that are destructive of vulnerable people and may legitimately be discussed. However, the responsibility that comes with freedom of expression requires that the expression must be based on objectively determined facts and should not incite violence, intimidation, or hatred because of race or religion.

²⁷ Runnymede Trust (2000), *The Future of a Multi-Ethnic Britain: The Parekh Report*. London: Profile Books, p.ix

Racial and Religious Vilification in International Law

The Federal Government has ratified several international treaties and conventions on behalf of all Australians, promising to protect and promote the fundamental rights of all Australian residents. These include the freedom of speech and expression, although this freedom is not without constraint.

Under Australian law, ratification of these instruments does not automatically mean they are enforceable as part of our domestic law. This can only occur through legislation introduced by the Federal Government and enacted by the Federal Parliament. These instruments include the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the UN International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), and the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (DEIDRB).

(a) Freedom of Speech

The UDHR was adopted and proclaimed by the General Assembly of the United Nations on December 10, 1948. The General Assembly called upon all Member countries to publicise the text of the Declaration and “to cause it to be disseminated, displayed, read and expounded principally in schools and other educational institutions, without distinction based on the political status of countries or territories.”

Article 19 of the UDHR states:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 19 of the ICCPR, which Australia ratified in 1980, reflects the intent of the UDHR in similar terms. It states:

1. *Everyone shall have the right to hold opinions without interference.*
2. *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*

Article 5 of the ICERD refers to States Parties undertaking to prohibit and to eliminate racial discrimination and guaranteeing “the right of everyone ... the right to freedom of opinion and expression”.

(b) Limitations

Each of the above international instruments provides limitations on the rights they contain and promote. The UDHR in a number of Articles limits the rights it outlines where they infringe on the rights of others and when the freedom is used to torment and degrade others.

Articles 5 and 7 state respectively that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”, and that “all are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination”.

Article 29 provides that:

Everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and general welfare in a democratic society.

In addition, Article 30 provides that:

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

Article 19 (3) of the ICCPR states that:

The exercise of the [right to freedom of expression] ... carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary for respect of the rights or reputations of others.

Article 20(2) states that “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”.

HREOC has stated that these two Articles set out the appropriate balance between freedom of speech and freedom from racial vilification. In this context, freedom of speech has never been an absolute freedom.²⁸

Australia ratified the ICERD in 1975. Article 2 requires that member states “condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms ... and shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organisation.

Article 4 requires that member states:

- (a) *Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including financing thereof;*
- (b) *Shall declare illegal and prohibit organisations, and also organised and all other propaganda activities, which promote and incite racial discrimination and shall recognise participation in such organisations or activities as an offence punishable by law.*

The preamble to Article 5, referred to above guaranteeing the right to free speech, states that “In compliance with the fundamental obligations laid down in article 2, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms.

Article 6 requires States to provide “effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination”.

In ratifying the ICERD, the Federal Government made a reservation that it was not in a position to specifically treat as offences all of the matters covered by Article 4 of the Convention.²⁹ The Federal Government commenced addressing Article 4(a) with the Racial Discrimination Legislation Amendment Bill in 1992, which lapsed, and subsequently in 1994 by introducing the Racial Hatred Bill 1994.

²⁸ *Article 18 Freedom of Religion and Belief*, by HREOC, 1998, p.134.

²⁹ Twomey Anne, *Racial Vilification and Freedom of Speech Issues*, Brief Number 2. 1993. Parliamentary Research Services Law and Government Group, 2 April 1993, p.9.

In 1993 the DEIDRB was declared by the Attorney-General to be a “relevant international instrument” under section 47 of the Human Rights and Equal Opportunity Commission Act 1986 (Cwlth). The effect of this is to make the provisions of the Declaration “human rights” for the purposes of the Act and thus a part of the prohibitions on discrimination by the Commonwealth.

Article 2 states that “No one shall be subject to discrimination by any State, institution, group of persons, or person on the grounds of religion or other belief”. Article 4 requires all States to “take effective measures to prevent and eliminate discrimination on the grounds of religion or belief”.

While Australian States and Territories are not signatories to international instruments, they are free to observe and advance the principles enunciated in international law by enacting their own legislation, subject to the overriding power of the Commonwealth to legislate on matters over which it has jurisdiction under the Constitution.

Australian Law

(a) Freedom of Speech

It is frequently assumed by the general public and in the media that Australians have a 'right' to free speech on equivalent terms to that conferred by the first amendment of the United States Constitution. There is, however, no provision in either the Commonwealth or State Constitutions that expressly confers any right to freedom of speech.

The High Court has, however, held in a series of cases that a right to freedom of communication in relation to political discourse is implicit in the former.³⁰ It has stated that the Commonwealth Constitution necessarily protects the freedom of communication between people to exercise a free and informed choice as electors. The Constitution does not confer personal rights on individuals. Rather, it precludes the curtailment of the protected freedom by the exercise of legislative or executive power.³¹ The freedom espoused in these cases is specifically restricted to the dissemination of information or opinion that is of public interest in relation to governmental or political matters.

(b) Limitations

The RDA gave effect to Australia's obligations under the ICERD. The central purpose of the RDA is stated in section 9(1), incorporating the definition of 'racial discrimination' from Article 1 of the ICERD, which makes "unlawful any act based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life." The ICERD is a Schedule to, and therefore forms part of, the RDA.

Section 6A of the RDA permits States and Territories to also enact laws that further the objects of ICERD, and which are capable of operating concurrently with the RDA to the extent there is no inconsistency.

For those who would argue that, irrespective of the international instruments that Australia has ratified, freedom of speech is a fundamental right that should not in any way be limited, it should be recognised that, apart from vilification laws, there exists already in Australia an array of civil and criminal sanctions

³⁰ *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Theophanous v Herald & Weekly Times LTD* (1994) 182 CLR 104

³¹ *Lange v Australian Broadcasting Corporation* (1997) 71 ALJR 818, at 826

that regulate verbal and non-verbal forms of public expression. These include laws relating to defamation, civil and criminal libel, obscenity and indecency, censorship, and restrictions on what may be sent through the mail.

Significantly, the NSW Equal Opportunity Tribunal has held that the right to freedom of speech is not a defence to a complaint of racial vilification, and that the right must have some limitations. In the case of *Wagga Wagga Aboriginal Action Group & Ors v Eldridge*³², the Tribunal observed that the right to free expression has never been “absolute and unequivocal”,³³ and that the provisions of the NSW Anti-Discrimination Act dealing with racial vilification had been drafted in such a way so as to reduce the likelihood of impinging on freedom of expression.

Racial vilification laws exist in all Australian jurisdictions except the Northern Territory.³⁴ Western Australia is the only State that provides only criminal remedies and Tasmania only civil remedies. The other jurisdictions, including the Commonwealth, that provide civil remedies do not make it unlawful to debate race or religious issues, even if it might cause offence, but rather seek to strike a balance between free speech and freedom from vilification and discriminatory attacks, through exemptions for:

- performances, exhibitions or distribution of artistic work;
- statements, publication, discussion or debate for a genuine academic, artistic or scientific purpose;
- fair and accurate report of any event or matter of public interest; and
- fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.³⁵

This civil legislation makes it unlawful for a person to do a public act which incites hatred, ridicule, or contempt for another person on the ground of race. The RDA makes it unlawful to do an act “otherwise than in private” if it is

32 (1995) EOC 92-701

33 *Wagga Wagga*, at 78,266

34 RDA (Cth) ss18B-F (amended by the *Racial Hatred Act* 1995; commenced Oct 1995); *Anti-Discrimination Act* 1977 (NSW) ss20B-D (commenced Oct 1989); *Racial Vilification Act* 1996 (SA), *Wrongs Act* 1936 (SA) s37 (amended by the *RVA* 1996); *Discrimination Act* 1991 (ACT) ss65-67 (Jan 1992); *Anti-Discrimination Act* 1991 (Qld) ss124A & 131A (June 2001); *Anti-Discrimination Act* 1988 (Tas) ss19 & 55 (Dec 1999); *Racial and Religious Tolerance Act* 2001 (Vic) (Jan 2002); *Criminal Code* (WA) ss76-80

35 RDA (Cth) s.18D; *Anti-Discrimination Act* 1977 (NSW) s.20C(2); *Racial and Religious Tolerance Act* 2001 (VIC) s.11; *Anti-Discrimination Act* 1991 (QLD) s.124A(2); *Civil Liability Act* 1936 (SA) s.37(1); *Anti-Discrimination Act* 1998 (TAS) s.55; *Discrimination Act* 1991 (ACT) s.66(2)

reasonably likely to offend, insult, or humiliate another person, and is done “because of the race, colour or national or ethnic origin of” a person or group.³⁶ In Victoria, Queensland, and Tasmania, such acts are also unlawful if done on the ground of religious belief.

Western Australia and the Northern Territory are yet to enact laws of this kind in respect to race or religious belief. It is unlawful in both jurisdictions³⁷, as in the others, to discriminate against a person on the ground of his or her race or religious conviction (belief) in a number of areas of public life, including employment, education, accommodation, and in the provision of goods and services. In some jurisdictions, criminal penalties may apply in cases where the public act is found to be of a serious nature.

(c) Unlawful conduct

With the exception of the Victorian Racial and Religious Tolerance Act 2001, all Australian racial and religious hatred legislation requires that, in order to be unlawful, the conduct complained of has to be either a “public act”³⁸ or, in the case of the RDA, an act done “otherwise than in private”.³⁹ The Victorian legislation represents a third approach to the issue of whether or not an act is done in public. The differences between the three approaches are discussed below.

(i) Definition of “public act”

Section 18C of the RDA prohibits unlawful acts done otherwise than in private, which for the purposes of the Act means an act that:

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

³⁶ RDA (Cth) s18C

³⁷ *Equal Opportunity Act 1984* (WA), Part III, *Anti-Discrimination Act 1992* (NT), Parts 3 & 4

³⁸ See definitions of “public acts”: *Anti-Discrimination Act 1977* (NSW), s.20B; *Anti-Discrimination Act 1991* (Qld), s.4A; *Racial Vilification Act 1996* (SA), s.7; *Anti-Discrimination Act 1998* (Tas), s.3; *Discrimination Act 1991* (ACT), s.65

³⁹ *Racial Discrimination Act 1975* (Cth), s.18C(2)

Definitions of the term “public act” vary little between the States and Territories that rely on it. In NSW, s20B of the Anti-Discrimination Act defines the term comprehensively as including:

- (a) any form of communication to the public, including speaking, writing, printing, displaying notices, broadcasting, telecasting, screening and playing of tapes or other recorded material; and*
- (b) any conduct not being a form of communication referred to in (a) observable by the public, including actions and gestures and the wearing or display of clothing, signs, flags, emblems and insignia; and*
- (c) the distribution or dissemination of any matter to the public with knowledge that the matter promotes or expresses 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.*

The Discrimination Act (ACT) and the Anti-Discrimination Act (Tas) have almost identical definitions of a ‘public act’ to NSW, except that the additional element of “knowledge” in paragraph (c) is not included. The Queensland Anti-Discrimination Act definition is the same as paragraphs (a) & (b) above, with the addition of “by electronic means” in paragraph (a). The definition does not apply to the distribution and dissemination of matter by a person who does not know, or could not reasonably know, the content of the matter.

The South Australian Racial Vilification Act 1996 and Civil Liability Act 1936 define a “public act”⁴⁰ as:

- (a) any form of communication with the public; or*
- (b) conduct in a public place*

(ii) The Victorian Approach

The Victorian Racial and Religious Tolerance Act 2001 represents the most recent statutory response in Australia to acts of racial and religious hatred or vilification. It commenced operation at the beginning of 2002.

⁴⁰ *Racial Vilification Act 1996 (SA), s.3; Wrongs Act 1936 (SA), s.37, as amended by s.7 of the Racial Vilification Act*

Section 7 of the Act states:

A person must not, on the ground of the race of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.

The conduct may occur in or outside of Victoria and “engage in conduct” includes the use of the internet or e-mail to publish or transmit statements or other material.

Section 8 of the Act adopts an identical approach to section 7, in relation to religious belief or activity.

The Victorian legislation does not expressly require that the conduct be done ‘in public’. The conduct will not be unlawful if it is established that the parties engaged in it in circumstances that may reasonably be taken to indicate that the parties to the conduct desired it to be heard or seen only by themselves.⁴¹ This exception is qualified where it can be demonstrated that the parties ought reasonably to expect that it may be heard or seen by someone else.⁴²

(iii) Commentary

Under the RDA, an act need only be done ‘otherwise than in private’ in order to come within the meaning of section 18C. The RDA does not require the relevant conduct to have occurred ‘in public’ or in a ‘public place’, only that it took place in a ‘field of public life’.⁴³ Employment, for example, has been held to be a part of public life (see Cases below). Section 18C(2) is not exhaustive, but rather it indicates some examples of acts that may fall within the definition.⁴⁴

The NSW, ACT, South Australian, Queensland, and Tasmanian legislation, on the other hand, all expressly refer to the word “public” in the relevant provisions. Whilst the impugned act does not have to be performed in public, it does have to be communicated to, or capable of being observed by, the public. It is arguable that an act that occurred wholly within the workplace, which was found to be unlawful under the RDA⁴⁵, would not be caught by the legislation in the States and the ACT.

⁴¹ *Racial and Religious Tolerance Act 2001*, s.12 (1)

⁴² *ibid*, s.12(2)

⁴³ *Korczak v Commonwealth of Australia* (2000) EOC 93-056 at 74,175-176, in reference to s.9 of the *Racial Discrimination Act*

⁴⁴ *Korczak*, above, at 74,175

⁴⁵ As was the case in *Korczak*, above

In Victoria, the emphasis is initially on whether the parties intended the conduct to be done in private, that is, ‘heard or seen by themselves.’⁴⁶ Even if an intention for privacy is demonstrated, that intention is overridden if the parties ought reasonably to have expected that the conduct may be heard or seen by another person.⁴⁷ Consequently, an unlawful act of racial or religious vilification could be held to have occurred even in a typically private setting such as a house or car. It is not essential that the conduct is actually heard or seen, only that the parties ought reasonably to expect that it may be.

(iv) Cases

In cases decided under the RDA, acts that are done “otherwise than in private” have been held to occur in the following circumstances:

- racial abuse by an employee against another employee, on the factory floor – *Rugema v J Gadsten Pty Ltd t/a Southcorp Packaging* (1997) EOC 92-887
- broadcasting of a television documentary – *De La Mare v Special Broadcasting Service* (Unreported) [1998] HREOC H97/215 18/08/98
- the distribution of a phone card depicting a WWII German fighter with a swastika on it *Shron v Telstra Corporation Ltd* (Unreported) [1998] HREOC H97/226 10/07/98
- racially offensive statements made during an interview which was later printed in a newspaper, or publishing an article in a newspaper – *McGlade v Lightfoot* (1999) EOC 93-002, [2003] EOC 93-252; *Feghaly v Oldfield & Ors* (2000) EOC 93-090; *Bryant v Queensland Newspapers Pty Ltd* [1997] HREOC 15/05/97
- statements made at a workshop run by a local government shire, which was attended by community representatives – *Jacobs v Fardig* (1999) EOC 93-016
- the writing of a play which is subsequently performed in public – *Bryl & Kovacevic v Nowra & Melbourne Theatre Co.* (1999) EOC 93-022
- racially based comments made between employees whilst at work. – *Korczak v Commonwealth of Australia* (2000) EOC 93-056
- distribution of written material in letterboxes and the sale of such material at a public market – *Hobart Hebrew Congregation & Anor v Scully* (2000) EOC 93-109

⁴⁶ *Racial and Religious Tolerance Act 2001*, s.12 (1)

⁴⁷ *ibid.*, s.12 (2)

- publishing racially offensive material on an internet site which was not protected by a password – *Jones & Ors v Toben* (2000) EOC 93-110
- displaying of racially offensive signs inside and outside a shop – *Warner v Kucera* [2001] EOC 93-137
- broadcast of offensive remarks about Aboriginal people on a radio talk-back program – *Wanjurri & Ors v Southern Cross Broadcasting Ltd & Anor* (2001) EOC 93-147
- publishing an offensive cartoon depicting Aboriginal people in a newspaper – *Corunna & Ors v West Australian Newspapers Ltd* (2001) EOC 93-146
- comments made at an annual general meeting of an incorporated body – *Miller v Wertheim & Anor* [2002] EOC 93-223.

Under the NSW Act, upon which the legislation in Queensland, the ACT, and Tasmania is based, a “public act” has been held to occur in relation to:

- broadcasting of a news or current affair programme – *Harou-Sourdon v TCN Channel Nine Pty Ltd* (1994) EOC 92-604; *Wagga-Wagga Aboriginal Action Group & Ors v Eldridge* (1995) EOC 92-701; *Western Aboriginal Legal Service Limited v Jones & Anor* [2000] NSWADT 102
- comments made at a public ceremony – *Wagga-Wagga*, above;
- racially offensive comments by a councillor at a council meeting – *Wagga-Wagga*, above;
- commentary published in a community newspaper – *Aegean Macedonian Association of Australia & Ors v Karagiannakis & Ors* (2000) EOC 93-070;
- opinion and commentary published in a national daily newspaper – *Kazak v John Fairfax Publications Ltd* [2000] NSWADT 77
- speaking or shouting racial abuse in a stairwell of a block of units – *Anderson v Thompson* [2001] NSWADT 11
- bashing a person by the side of the road whilst shouting racial abuse – *Russell v Commissioner of Police, NSW Police Service & Ors* [2001] NSWADT 32.

(d) Incitement to Racial or Religious Vilification

Commonwealth, State, and Territory legislation differs in respect to the nature of the acts that are declared to be unlawful. There are, broadly speaking, two legislative approaches as to what kind of conduct is regarded as unlawful, that set out in the RDA, and the NSW Anti-Discrimination Act model (adopted also in Tasmania, South Australia, Queensland, Victoria, and the ACT).

(i) Definitions

The RDA was amended in 1995 by the Racial Hatred Act to make it unlawful for a person to do an act, otherwise than in private, if the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or group of people, because of the race of that person or people in the group. The test is an objective one and a question of fact in every case, depending on the context in which the allegedly offensive conduct is done.⁴⁸ The concept of inciting another person to hatred or ridicule is absent.

The NSW approach, set out in s.20C(1) of the Anti-Discrimination Act, makes 'racial vilification' unlawful. Racial vilification occurs when a person, by a public act, incites hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of their race.⁴⁹

The ACT Discrimination Act, Queensland Anti-Discrimination Act, and Victorian Racial and Religious Tolerance Act express 'vilification' in virtually identical terms to that applied in NSW. The Tasmanian Anti-Discrimination Act applies the wording of NSW definition of 'racial vilification', although the term 'inciting hatred' is used instead.⁵⁰ The South Australian Civil Liability Act, as amended by the Racial Vilification Act 1996, refers to 'racial victimisation', which has the same meaning as 'racial vilification' in the other State legislation. In Victoria, Queensland and Tasmania, unlawful vilification on the ground of religious belief or activity is expressed in identical terms to racial vilification.

48 See *Bryant v Queensland Newspapers Pty Ltd* [1997] HREOC 15/05/97 (Unreported), *De La Mare v Special Broadcasting Service* [1998] HREOC 18/08/98 (Unreported)

49 'Race' includes colour, nationality, descent and ethnic, ethno-religious or national origin – *Anti-Discrimination Act 1977*, s.4(1)

50 *Anti-Discrimination Act 1998*, s.19

(ii) Commentary

It is an accepted principle in discrimination law that motive or intent is irrelevant to an inquiry as to whether an unlawful act has occurred.⁵¹ In addition, if an act is done for two or more reasons, and one of the reasons consists of the unlawful discrimination, the act is taken to be done for that discriminatory reason.⁵²

Under all legislation except the Commonwealth RDA, the prohibited conduct must “incite” hatred or contempt. In *Wagga-Wagga* (above), the NSW Equal Opportunity Tribunal held that the word “incite” should not be construed in the same manner as under criminal law, but was to be given its ordinary meaning, and that intent did not have to be shown. It is the effect of the public act that is relevant, not the intention or otherwise of the performer of the act. The act must be capable of “urging”, “prompting”, or “stimulating” another person to action. This view has been firmly adopted in subsequent decisions of the NSW Administrative Decisions Tribunal, which replaced the Equal Opportunity Tribunal in 1998.⁵³

It is not necessary, either, to prove that anyone was in fact incited by the public act. It is the capacity of the public act to incite, or its likely effect upon the ordinary, reasonable person, that is significant.⁵⁴ The ordinary, reasonable person is taken to mean a person not immune from susceptibility to incitement, nor holding racially prejudiced views.⁵⁵ However, racial insults and abuse, or conduct that expresses hatred or contempt for a person or a group of persons on the ground of race, is not unlawful unless the objective element of incitement is identified. This will depend on the circumstances of the particular case.⁵⁶

Cases decided under the RDA do not involve an inquiry into the meaning and application of the word “incite”. Once it is established that a person would be reasonably likely to take offence at the words or conduct of which he or she complains, on the ground of race, the objective test is satisfied. The Federal

⁵¹ *Waters v Public Transport Corporation* (1991) EOC 92-390

⁵² RDA s.18; *Equal Opportunity Act 1984* (WA) s.5; *Anti-Discrimination Act 1977* (NSW) s.4A; *Anti-Discrimination Act 1991* (QLD) s.10(4); *Anti-Discrimination Act 1998* (TAS) s.14(3)(a); *Discrimination Act 1991* (ACT) s.4A(2); *Equal Opportunity Act 1995* (VIC) s.8(2); *Equal Opportunity Act 1984* (SA) s.6(2)

⁵³ *Kazak v John Fairfax Publications Ltd* [2000] NSWADT 77, *Western Aboriginal Legal Service Ltd v Jones & Anor* [2000] NSW ADT 102, *Russell v NSW Commissioner of Police, NSW Police Service & Ors* [2001] NSWADT 32

⁵⁴ *Western Aboriginal, Russell*, above.

⁵⁵ *Harou-Sourdon v TCN Channel Nine Pty Ltd* (1994) EOC 92-604, *Western Aboriginal, Russell*, above.

⁵⁶ *Wagga Wagga Aboriginal Action Group & Ors v Eldridge* (1995) EOC 92-701, *Western Aboriginal*, above, *Aegean Macedonian Association of Australia & Ors v Karagiannakis & Ors* (2000) EOC 93-070

Court has held in recent decisions that such action must have “profound and serious effects, not to be likened to mere slights”.⁵⁷ This, too, depends on the circumstances of each particular case.

In *Corunna & Ors v West Australian Newspapers Ltd*,⁵⁸ above, HREOC determined that the person or persons that were reasonably likely to take offence at a published cartoon depicting a caricature of an Aboriginal man in a racially offensive way, were reasonable Nyungar, non-Nyungar Aboriginal, and many non-Aboriginal people, although only persons belonging to the first two groups has standing to make a complaint. Whether or not persons other than those of Aboriginal background were, or could be, offended or insulted by the cartoon was not relevant to the inquiry.

(e) Defences to Racial or Religious Vilification

(i) Statutory Provisions

All Australian racial vilification legislation provides a number of exceptions to the prohibition against racial vilification. Under the Commonwealth RDA, these exceptions apply to anything said or done reasonably and in good faith:

- (a) in the performance, exhibition or distribution of an artistic work; or
- (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose in the public interest; or
- (c) in the making or publishing:
 - (i) a fair and accurate report of any event or matter of public interest; or
 - (ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.⁵⁹

Section 20C(2) of the NSW Anti-Discrimination Act creates a defence in the following terms:

- (a) a fair report of a public act referred to in subsection (1); or
- (b) a communication or the distribution or dissemination of any matter comprising a publication referred to in Division 3 of the Defamation Act

⁵⁷ *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, 356-57 [16]; *Jones v Toben* [2002] FCA 1150, [92]; *Bropho v Human Rights and Equal Opportunity Commission* [2004] FCAFC 16 [70] (French J)

⁵⁸ (2001) EOC 93-146

⁵⁹ *Racial Discrimination Act 1975*, s.18D

1974 or which is otherwise subject to a defence of absolute privilege in proceedings for defamation; or

- (c) a public act, done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter.

The reference to “absolute privilege” in s20C(2)(b) refers to the privilege that applies at common law to parliamentary, judicial and other proceedings and communications, in order to ensure freedom of speech in certain situations. Typically, these communications include those made in Parliament, in courts and tribunals, and at a high level of government to “secure the free and fearless discharge of high public duty”⁶⁰, for example, between Ministers.

Section 11 of the Victorian Racial and Religious Tolerance Act 2001 creates a defence done reasonably and in good faith in the following terms:

- (a) in the performance, exhibition or distribution of an artistic work; or
- (b) in the course of any statement, publication, discussion or debate made or held, or any other conduct engaged in, for-
 - (i) any genuine academic, artistic, religious or scientific purpose; or
 - (ii) any purpose that is in the public interest; or
- (c) in making or publishing a fair and accurate report of any event or matter of public interest.

Similar provisions appear in the other state and territory legislation.⁶¹

(ii) Cases

In *Kazak*, above, the respondent, Fairfax Publications Ltd, published an article in 1998 on the opinion page of the Australian Financial Review, which made certain observations about Palestinians, including a comment that they “remain vicious thugs who show no serious willingness to comply with agreements.” The NSW Administrative Decisions Tribunal rejected the ‘discussion and debate’ defence available under the Anti-Discrimination Act, because the respondent had not led any evidence to show that the article was published reasonably and in good faith. It found that the facts relied on were one-sided and the opinions expressed extreme.

⁶⁰ J G Fleming *The Law of Torts* (8th ed, Law Book Company, Sydney, 1992) at 536

⁶¹ RDA (Cth) s.18D; Anti-Discrimination Act 1977 (NSW) s.20C(2); Racial and Religious Tolerance Act 2001 (VIC) s.11; Anti-Discrimination Act 1991 (QLD) s.124A(2); Civil Liability Act 1936 (SA) s.37(1); Anti-Discrimination Act 1998 (TAS) s.55; Discrimination Act 1991 (ACT) s.66(2)

In *Wanjurri*, above, HREOC held that a Perth radio host allowed and participated in racist comments made on a talk-back radio program, which breached the RDA. HREOC found that the subject matter, the development of the old Swan Brewery site, was of public interest, but that the offending comments were not reasonable or made in good faith.

On the other hand, the use of a graphic design on a Telstra phone card, depicting a World War II German fighter plane with a Nazi swastika, was held not to breach the RDA⁶². HREOC did not consider that the card was reasonably likely, in all of the circumstances, to offend, insult, or humiliate Jewish people, because it merely identified the plane as a German fighter. Consequently, there was no need to examine whether the defence applied at all.

(f) Criminal Laws

(i) Western Australia

In 1990, following a racially motivated campaign by the Australian Nationalist Movement, the WA Criminal Code was amended to create the offence of incitement to racial hatred. Section 77 makes it an offence to:

- (a) possess written or pictorial material that is 'threatening or abusive';*
and
- (b) have intent to publish, display or distribute the material; and*
- (c) intends hatred of any racial group to be created, promoted or increased by the publication, distribution or display of the material.*

The Code also makes it an offence to actually publish, distribute, or display the threatening or abusive material, where intent to create, promote or increase hatred of any racial group can be shown. Further provisions make it an offence to intend to display, or actually display, threatening or abusive written or pictorial material, intended to harass a particular racial group.

Western Australia's current racial vilification provisions are inadequate because victims can only rely on the criminal law as a means of redress. The Code's offences relate only to the display or possession of material, not to speech or other forms of expression. Further, the reference to 'intends hatred' is in contrast

⁶² *Shron v Telstra Corporation Ltd* (Unreported) [1998] HREOC H97/226 10/07/98

to the approach adopted in other States which, as referred to below, require that a person either knowingly or recklessly commit the offending act, or, in the case of Victoria, requires the person to know that the offending conduct is likely to incite hatred. In NSW, no reference is made to intent or knowledge.

The prosecution process requires that charges be laid and that the criminal standard of proof, which is higher than the civil standard, is required for intent to be proven. However, the Director of Public Prosecutions has advised that it is in fact the very low maximum penalties that primarily make charging an offender with those particular offences inappropriate in serious cases where the evidence often also establishes another offence such as criminal damage. The practice of the Police and the Director of Public Prosecutions has been to charge such offenders with offences other than those related to racial vilification because of the considerably higher penalties which such other offences attract. The number of different elements that have to be established for racial vilification offences is also a factor. In the case of criminal damage, the maximum penalty of 10 years imprisonment makes that offence more appropriate for a prosecution.

Western Australians who consider that they have been racially vilified have no other course of action to take, for example, through a personal application or complaint seeking conciliation, compensation, or injunctive relief.

Although effective as a strong public statement of society's condemnation of racial hatred, criminal sanctions clearly do not provide the victim with adequate remedies. The civil process adopted in the other jurisdictions recognises the value, both socially and economically, of the option of resolving complaints by conciliation. It is a relatively inexpensive, flexible, quick, and confidential process, making it more attractive to applicants, and less likely to draw attention to those who would seek to publicise their views.

(ii) Other States and Territories

In addition to the civil remedies available where racial vilification is established, some jurisdictions also carry criminal offences and penalties for more serious acts of racial vilification.

Section 20D of the NSW Anti-Discrimination Act creates a criminal offence of ‘serious racial vilification’ where the public act inciting hatred, serious contempt, or severe ridicule includes threatening, or inciting others to threaten, physical harm towards a person or group or their property. The Queensland and ACT legislation create similar offences, however, an element of knowledge or recklessness is required to be established in the incitement of hatred.

The Victorian Act also creates a similar offence in relation to inciting hatred, but extends it to where the offender intentionally engages in conduct that they know is likely to incite serious contempt, revulsion or severe ridicule without the requirement of the threat of physical harm.

The South Australian Racial Vilification Act creates the same offence as in NSW, although it is only called ‘racial vilification.’ In addition to creating a criminal offence, it permits an award of up to \$40,000 damages to be made in favour of a person or an organisation formed to further the interests of a group of persons.⁶³

As noted above, Tasmania and the Commonwealth do not have criminal racial vilification provisions.

(g) Remedies and Penalties

(i) Civil Remedies

All jurisdictions with laws relating to racial and religious vilification provide civil remedies, in the form of court or tribunal orders. In all jurisdictions, except the Commonwealth and SA, orders are made by specialist statutory tribunals. These are specifically empowered to hear discrimination and vilification complaints after the relevant statutory agency has referred the complaint for hearing and determination. In addition, each of these tribunals may grant an interim order at an early stage, to preserve the status quo of the parties whilst the complaint is being investigated.

Complaints made under the RDA are heard by the Federal Magistrates Court or a judge in the Federal Court, after termination of the complaint and referral by HREOC. In SA, complaints of racial victimisation can only be brought as an action in the District Court.

⁶³ *Racial Vilification Act 1996 (SA)*, s.6

In NSW and SA, a limit of \$40,000 applies in the case of an order for damages. There is no limit on damages in the other jurisdictions. In WA, damages are limited to \$40,000 where a complaint of discrimination is upheld.

(ii) Criminal Penalties

The penalties for committing an act of serious racial or religious vilification vary across the Australian jurisdictions where it is an offence. All provide for a fine or imprisonment, with South Australia incorporating an additional power to award damages to the victim.

In Victoria, Queensland, and New South Wales, imprisonment for 6 months can be imposed. South Australia and Western Australia provide for prison sentences of up to 3 and 2 years respectively. The ACT legislation does not include an option of imprisonment.

Fines can be imposed on individuals in all jurisdictions. Significantly higher fines apply to corporations in NSW, Victoria, Queensland, and South Australia.

(iii) Relationship between Criminal and Civil sanctions

An important part of racial and religious vilification reform in Western Australia should be the enactment of legislation that contains both amendments to the current criminal sanctions and new civil remedies, either as an amending Act to existing legislation, as a new Act, or a combination of the two, as is the case in South Australia.

In most instances, it is likely that the remedies currently available under WA's existing discrimination law would be sufficient in resolving complaints of racial or religious vilification. The EOA already provides for a range of orders that can be made by the Equal Opportunity Tribunal when a complaint of unlawful discrimination on one or more of the grounds recognised by the Act is upheld. Orders can include compensation of up to \$40,000, to be paid by the respondent, an order stopping the respondent from continuing to do the unlawful act, or acts, and making the respondent do something to redress the loss or damage resulting from the unlawful conduct.⁶⁴

⁶⁴ *Equal Opportunity Act 1984*, s.127

The limited support of criminal sanctions is necessary in cases of serious racial or religious vilification, possibly including the facility to award damages to victims of such crimes, as exists in South Australia. One option would be to retain provisions in the Criminal Code with any amendments considered appropriate. A second would be to incorporate offences for serious vilification into the EOA, in the same way that NSW, Queensland, and the ACT have done. A third option would be the introduction of stand alone racial and religious vilification legislation as exists in South Australia and in particular Victoria.

Whilst it is not anticipated that the number of prosecutions initiated under such laws would be great compared to civil actions, there exists nevertheless an opportunity to review and overhaul the existing provisions of the Criminal Code relating to racial hatred, which, as has been previously mentioned, have until only recently never been utilised.

In summary:

1. There exists a small minority of people who want to deliberately create intolerance, hatred, and division in the community based on race and religion. Most Western Australians oppose and would wish to prevent hate groups seeking to divide the community.
2. The WA EOA, in contrast to other States' anti-discrimination legislation, does not address racial and religious vilification and the Criminal Code is inadequate in doing so. While the RDA applies in WA, complaints of racial vilification have to be made to HREOC, which does not have an office in WA. Under the RDA, complaints that are not resolved through conciliation proceed to the Federal Magistrates Court, where cost considerations may disadvantage complainants.
3. A new racial and religious vilification law providing a civil remedy as well as strengthening the current criminal provisions would make a powerfully symbolic statement about the value Western Australians place on respect for other cultures and our refusal to tolerate discrimination and bigotry. While clearly having a penal role and recognising that legislation cannot be a stand-alone solution to issues such as this, it should also be recognised that laws can have a powerful educative impact.

In addition, such legislation would be part of the State Government's broader anti-racism strategy that is currently under development, and which includes non-legislative approaches to addressing racism, including education and awareness raising.

4. Freedom of speech and expression is not unlimited and should not be protected when it causes fear, harassment, or degradation or incites hatred, serious contempt, or severe ridicule.
5. The stability and efficiency of government depends on interactions and effective communication amongst people, which develops trust and cooperation, and enhances civil society.
6. An important part of any approach to racial and religious vilification in Western Australia should be to give people who experience racial or religious vilification a choice of remedies, criminal and civil, including conciliation and other alternative ways of resolving disputes.

Options for Legislative Reform in Western Australia

Some legislative change is clearly necessary in WA to provide civil and administrative remedies to people who have experienced racial or religious vilification, as well as more effective criminal sanctions. Three options are set out below for consideration and public comment.

Option 1: Amend the Criminal Code and Equal Opportunity Act

Racial vilification is a most serious offence and such criminal conduct needs to be recognised as such and offenders properly punished. Prosecuting authorities should be encouraged to recognise this criminal conduct for what it is and not treat it as a case of, for example, merely criminal damage. This fails to fully recognise the insidious nature of the offending and also fails to attract adequate community condemnation if the offending conduct is wrongly characterised. The following amendments would address this situation.

- Amend the existing provisions relating to incitement to racial hatred in the Criminal Code by inserting an offence of serious racial and religious vilification, which could include engaging in any conduct that incites hatred, contempt or ridicule, not just the possession or publication of threatening or harmful materials as currently exists. Such an offence would also remove the current element of intent.
 - To address the current inadequate penalties, a two-tiered offence structure could be created, on where the element of intention is required to be proven, and a second strict liability offence where there is no element of intent.
 - The intention offence could be used in cases where it can be established that the offender dealt with the relevant material and did so with a proven intention to incite racial hatred. The damage done to our community requires a firm response from the Courts and a penalty which is at least equal to that of criminal damage (10 years) should be used. There is an argument that a penalty higher than that for criminal damage is required, and perhaps a penalty of 14 years imprisonment should be provided for the worst cases.
 - It would also be appropriate to create a lesser offence which removes the requirement to prove intention. This may be used in cases where an offender deals with material which is of a nature that it would objectively incite racial hatred. Such offences should not attract the penalty of the offences which
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require intention to be proven, but a maximum penalty of 5 years may be an appropriate reflection of its seriousness.

- Although the existing provisions do not provide for a fine in addition to or substitution for a term of imprisonment, the WA Sentencing Act allows for a court to do so in relation to an individual. In relation to a body corporate, it can be fined up to five times the penalty for a natural person convicted of the same offence

Rather than amending the Criminal Code, it would also be possible to repeal the existing provisions in the Criminal Code and amend the EOA to include a similar offence to that outlined above. It is, however, the opinion of the Director of Public Prosecutions that these offences should remain in the Criminal Code.

This approach has been adopted, with some variations, in NSW, Queensland, and the ACT, each of which contains the criminal offences in their equivalent of the EOA. It significantly broadens the reach of the criminal provisions by not limiting the kinds of acts that can constitute an offence. In addition, the element of intent is qualified, for example, by introducing the concept of 'reckless' acts of serious vilification, as is the case in the ACT and Queensland, or not referred to at all, as in NSW.

Amending the Criminal Code as outlined above would place Western Australia at the forefront in Australia in recognising the serious and insidious nature of racial and religious vilification offences.

- Add two new civil grounds of racial vilification and religious vilification to the EOA, using the Commissioner for Equal Opportunity's existing investigation and conciliation powers and processes.

This approach has been adopted in NSW, Queensland, Tasmania, the ACT and, to a lesser extent, the Commonwealth. It would provide broad coverage, a complaints process, and could also include specific powers to give complainants an interim remedy that did not depend on a finding of blame or guilt.

The EOA already gives the Equal Opportunity Tribunal (Tribunal) power to make a range of orders to deal with discrimination once a complaint of unlawful discrimination is upheld. They include compensation of up to \$40,000, injunctions, and orders to set things right, such as making apologies,

reinstatement, and educational, information and training programs and activities. The Tribunal can also make interim orders to preserve the status quo while the Commissioner is investigating a complaint.

Option 2: Stand-Alone Racial and Religious Vilification Legislation

- Create a new stand-alone Act, as in Victoria, that sets up a range of administrative civil, and criminal remedies for racial and religious vilification, as for those set out in Option 1, including relevant amendments to the EOA.
- Alternatively, create a new stand-alone Act for administrative and civil remedies only, and amend the Criminal Code to provide for the offence of serious racial vilification, in terms described in Option 1.

There is no material difference in the effectiveness of having a separate Act, as opposed to amending the EOA, other than to raise the profile of the racial and religious vilification within the community through the former. The procedures set out in the EOA for dealing with complaints would apply and be cross-referenced from the new Act.

Option 3: Develop a New Range of Civil Remedies

- Create a new tort or civil wrong of racial or religious vilification, which enables victims (individuals and representative groups) to initiate proceedings in the District Court, and a criminal remedy for the most serious kinds of racial or religious vilification, under a separate Act, similar to the approach adopted in South Australia.
- As for Option 2, a new tort could be created while the Criminal Code continue to provide for the offence of serious racial vilification, in terms described in Option 1.

This use of existing civil and criminal legal processes, conducted through the courts system, is the approach taken in South Australia, where the Civil Liability Act and Racial Vilification Act contain complementary rights to seek damages for civil and criminal vilification, the latter also containing a penalty of imprisonment.

Conclusion

A need clearly exists for Western Australia to put in place new racial and religious vilification legislation. The current provisions in the Criminal Code have not been effective and the Equal Opportunity Act does not address the issue. While the Commonwealth Racial Discrimination Act applies in WA, it does not provide suitable remedies that Western Australians can easily and effectively access.

As previously noted, each of the options outlined above exists in one or more other Australian jurisdictions, with corresponding tribunal and court decisions that provide a guide as to their interpretation and effectiveness. Western Australia has the advantage of being able to draw on the experiences of each of the other Australian jurisdictions in introducing and administering laws dealing with racial and religious vilification.

Your views on the form that racial and religious vilification laws should take in this State are important to the Western Australian Government.

Have Your Say

Make a submission about any or all aspects of this consultation paper to:

Equal Opportunity Commission

PO Box 7370
Cloisters Square
Perth WA 6850

Phone: (08) 9216 3900

TTY: (8) 9216 3936

Country callers: 1800 198 149

Facsimile: (08) 9216 3960

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or

Office of Multicultural Interests

Level 26, 197 St George's Terrace
Perth WA 6000

Phone: (08) 9222 8800

Facsimile: (08) 9222 8801

Email: harmony@dpc.wa.gov.au

The closing date for submissions is Friday, 3 September 2004.

Please mark all correspondence
'SUBMISSION: Racial And Religious Vilification'

THANK YOU FOR YOUR PARTICIPATION

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CLOSING DATE: 3 SEPTEMBER 2004

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