Chapter 3
Racial Discrimination Legislation and Racial Hatred

'*Equality legislation on grounds of race or gender* [has] *generated a fundamental change in what kinds of conduct and language towards one's fellow citizens are acceptable or right*'.

– Stephen Smedley (1997)

Introduction

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, mainly based on the law, that have been tried over the years to deal with racism. One major concern of the law in dealing with racism has been the concern with 'racial harassment, intimidation and violence against, especially visible minorities and against anti-racist activists' (Wilkie 1994: 439). In considering how the law has endeavoured to deal with the issue of racism, we need to first clarify what we understand by the terms 'race' and 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 in common sense parlance is to provide a unit of classification for categorising the world's population in terms of inheritable biological characteristics, e.g., physical features, descent, blood type, etc., which are presumed to determine human abilities and other aspects of group culture. This accords with the popular view that human beings can be classified by racial characteristics which determine human abilities which are also of a permanent and enduring nature.

The populist understanding of the term 'race', as a biological or pseudo-biological notion has undergone many changes as a result of scientific theorising about racial classifications and the inheritance of human characteristics. The current state of informed opinion is best expressed in a UNESCO statement (Eide 1987) and is critical of a strictly biological view of 'race'. This is mainly because the differences in genetic structures within a population group are as great, or even greater, than those between two population groups. Therefore, whatever the differences observed, the biological theorising affords little justification for establishing a hierarchy between individuals or population groups as no group possesses a consistent genetic inheritance.

The term 'race' as a purely biological variable has no scientific validity; nor judicial significance It is best understood as 'a social construction based on the perceptions of some combination of pigmentation, physique, descent, historical or geographical origin, dress, language and cultural norms' (Reeves 1983: 7). The ideas and beliefs about 'race' are of a socio-political nature and have reference to a particular perspective of portraying the underlying social reality of a specific human group identified as a 'race'. These meanings and interpretations are prescriptive and purposive in that they give legitimacy to particular forms of use and delimit the boundaries of meaning (Smith 1989). In this sense, the concept of 'race' is a social construct which people in a given situation can easily identify with; it is *real*, in that—whatever its connotations, positive or negative evaluations—people can recognize what is meant by the term.

Consequently, the term 'race', as suggested in Chapter 2 is best understood in terms of the beliefs systems and ideas which underlie the usage of the term 'race' at any given point of time, i.e., as a historically determined social construction manifest in the domain of socio-political action. As Miles puts it, this construction is basically a process by which the 'Other' is constructed, and racism is the 'process of "racial" categorisation, whereby distinct cultural or ethnic groups are racially categorised by being presented as phenotypically different (Miles 1989). 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.

Importantly, racism as an ideology, as noted in Chapter 2, operates according to two logics—the logic of inferiority and/or logic of differentiation. This differentiation leads to different kinds of *racialism*, one which advocates the dogma that some groups will always be inferior/superior; and the other that groups are different and excluded on the grounds of 'race'. One form of racist ideology emphasises the notion of racial inequalities: the view that some races are superior/inferior in terms of hierarchic ordering; and the other, the way in which racial differences in everyday experiences are perceived and acted upon (Simkin and Nicholson 1987). The doctrine of racism characterises groups that are essentially the result of social and historical processes as biological or pseudo biological groupings. Furthermore, depending on the preferred logic of racism, racist ideology ascribes negatively evaluated characteristics in a deterministic manner to these biological or pseudo-biological groups, and asserts that abilities and other cultural features are determined by 'race'. These perceptions, all of which are 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 beliefs and indulge in racist behaviour such as incitement to hostility and hatred on account of one's 'race.

Sometimes the term 'vulgar racism' is used to characterise the extreme forms of racialism which involve the dissemination of violent propaganda with a view to inciting racial hatred and violence (Radis 1979). It is these 'public acts' of racism such as racial harassment, vilification and violence, e.g., hate crime that have been matters of public concern in Australia and elsewhere as warranting social interventions at various levels, i.e., preventative strategies, protection of victims and imposition of legal 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 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 each person as well as 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 and slander, assault, spreading falsehood etc.

These strategies which endeavour to use existing laws or to bolster existing laws are fraught with difficulty (Jones 1993). 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; this is problematic for individualistic notions of jurisprudence 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, e.g., the Universal Declaration of Human Rights, the International Covenant for the Elimination of All Forms of Racial Discrimination (CERD) or the International Convention on Civil and Political Rights (ICCPR)—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 (Ronalds 2008). Considering that in Australia, existing common law remedies 'do not provide a definite enough remedy for the harm caused by words and actions of a racist nature' (HREOC 1991: 278), there was a need for having 'dedicated legislation'.

In order to examine how Australian society has responded with legislative safeguards to deal with the harmful manifestations of racism in its extreme forms of racial violence, we first consider Federal and State-based legislation relating to racial discrimination. This is followed by a brief review of legislative initiatives concerning racial vilification, incitement to racial hatred and acts of religious intolerance and concludes with some general observations on the role of the law in dealing with racism.

Racial Discrimination Legislation: Federal and State

The Commonwealth Racial Discrimination Act of 1975 (RDA)

The recent history of the Australian experience in dealing with racism as a social issue and a matter of public concern dates back to the time of the introduction of anti-discrimination legislation in the 1960s. But in Australia since not all acts of discrimination are 'unlawful', we need to specify what conduct or decisions are acts of 'unlawful discrimination'. Furthermore, all discrimination laws in Australia are 'complaint-based systems which [are initially] dealt with through methods of investigation and conciliation' (Ronalds 2008: 5).

The first statute in Australia dealing with discrimination on the ground of race as being unlawful was the landmark legislation of the Dunstan Government in South Australia (SA) entitled *Prohibition of Discrimination Act* 1966. The impetus for Commonwealth legislation dealing with racial discrimination came only after Australia became a signatory to the CERD in 1966 (Lippman 1975). The 1975 *Racial Discrimination Act* (herein after referred to as RDA)—a landmark piece of Australian legislation—enacted by the Whitlam Labor Government in fulfilment of Australia's treaty obligations arising from CERD was the 'first discrimination law enacted' by the Commonwealth of Australia (Ronalds 2008). The RDA, like the UK *Race Relations Act* 1975, is a 'comprehensive code against racial discrimination' which:

> prohibits both direct and indirect discrimination on the ground of race, colour, descent or national or ethnic origin having the purpose or effect of impairing 'any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life'. (section 9(1) and (1A), RDA)

Until the end of 1990s the complainant had to establish that the dominant reason for the allegedly discriminatory act or practice was the race of the complainant. An amendment to the RDA in that year removed the requirement and it is now sufficient to establish that race was one of the reasons for the act, even if it was not a substantial reason (section 18, RDA).

The RDA was destined to have a seminal influence on Australia's social and political life because the Act was, in addition to the Federal Government and its agencies, held to be binding on all governments. The need for making the law binding on all governments arose mainly through the Australian Government's reliance on the 'external affairs' power of the Australian Constitution (Section 52: xxix) to implement the government's Treaty obligations into domestic law such as the RDA. In the case of *Kioa* vs. *West*, 1985, it was argued that Treaties do not have the force of law unless they have been given that effect by statute. Hence the need to enact the RDA as a Statute based on the CERD. Subsequently, several High Court decisions have affirmed the constitutional validity of the RDA, and State governments were expected to bring their laws and practices into conformity with this Act as part of Australia's international commitment to implement the CERD (Ronalds 2008).

In satisfying the obligation cast upon the Commonwealth Government to ensure the implementation of the provisions of the RDA throughout the country, the Australian Government conferred this responsibility on the Human Rights and Equal Opportunity Commission (HREOC) which replaced the Human Rights Commission (HRC) in 1986. The most contested issue relating to the RDA, even prior to its formal enactment in 1975, was the reluctance of the Federal and also State governments to act on the specific issues of incitement to

racial hatred and *defamation of racial groups* (Jones 1993). This relates to Article 4 (a) of the CERD which states that the dissemination of ideas based on racial superiority, hatred or incitement to racial discrimination, as well as all acts of racial violence or incitement to racial hatred should be made offences punishable by law. The provisions of the RDA Bill 1973 relating to *racial vilification* (hate speech) (Clauses 28 and 29) dealing with incitement to racial hatred and hostility and the dissemination of ideas based on racial superiority, attracted considerable opposition and were vehemently opposed by the Liberal/National parties.

One of the main changes made to the original 1973 Bill was with respect to Clause 29 dealing with incitement to racial disharmony. But the changes made to Clause 28, dealing with the dissemination of ideas based on racial superiority were far more significant and relates directly to Article 4(a). This requires that all states endorsing the CERD should declare as an offence:

> All dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or 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 the financing thereof. (Article 4(a) CERD)

The grounds on which Clause 28 was opposed were succinctly expressed, on behalf of the Liberal/National Parties, by the Member for Bennelong, John Howard who stated that:

> prohibiting the dissemination of ideas is something which is so dangerous, in the Opposition's view, that in no circumstances could we agree to the inclusion of the clause. On the one hand, there is the demand to eliminate acts of racial discrimination. On the other hand, there is the demand for preservation of a completely free society in which it is proper and reasonable for people to have freedom to disseminate ideas. (House of Representatives, *Hansard* 6 March 1975: 1408-9)

In view of the strong opposition to these provisions, the RDA was subject to several amendments in order to gain its

successful passage through Parliament (Whitlam 1985; Kalin 1978). This opposition also resulted in the Australian Government entering a reservation on Article 4(a) when it ratified the CERD, and instead preferring to deal with these acts (e.g., dissemination of 'race' hate material) simply as civil wrongs which are subject to conciliation. Furthermore, it was argued that Article 4(a) would be met by the existing criminal law provisions such as those relating to public order, riot assault, criminal libel, etc. At the same time, Australia agreed that it would consider enacting suitable legislation at the 'first suitable moment'. (This moment arrived only in 1995 after nearly two decades!).

From the foregoing discussion, it is clear that the opposition to Article 4 (a) of the CERD was based largely on the need to uphold the priority of the right to free speech as against other competing claims; the restrictions placed on this right as well as the right to freedom of expression have been a recurring theme in the continuing opposition to this particular provision. In fact, an early review of the operation of the Act 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' (Trlin 1984).

Proposals for the RDA to include Racial Vilification

Whilst other countries have established laws to deal with the dissemination, or the purveying, of race hatred in official circles, Australia's rejection of such legislation was mainly on the civil libertarian grounds of not wanting to interfere with the sacrosanct right to freedom of speech and expression. Questions of free speech clearly took precedence over the right of individuals (the victims of racism) and groups to freedom from discrimination and racist abuse. As a result

> these reservations [to Article 4(a)] led to significant gaps in our armoury and ability to attack and prevent racism and racial conflict . . . We possess neither shield nor sword to

> prevent the worst excesses of unbridled race hatred. (Stein 1982)

In 1983, following a review of the issue of racial vilification, the HRC maintained that, while it stood firmly committed to the fundamental right of freedom of expression, it questioned the conventional view that this right should prevail over other rights. For instance, the HRC pointed to the need to protect racial groups whose very existence may be threatened or denied by giving free rein to those who had racist intentions. In defending its proposals for the reform of the RDA, the HRC proceeded to examine some complex issues of principle which had to be analysed before embarking on a practical model of legal intervention (see HRC, 1982-84).

The HRC argued cogently (but without persuading the policymakers) 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. A prime consideration 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. (HRC 1983)

The HRC also suggested 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. The legislative approach recommended by the HRC sought to amend the RDA by making racial hatred and racial defamation identifiable offences by amending S 53 and S 54.

The amendments to the RDA 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. These carefully thought-out and eminently reasonable proposals were not acted upon by successive Federal Governments; but they continued to be a major influence on the thinking about this issue for well over a decade.

Despite recommendations from the HRC, Australia's stand on Article 4 (a) remained inflexible for many years and in fact was further strengthened in 1980 when Australia entered a similar reservation on Article 20 of ICCPR (see Appendix A Table 1) which states that:

> 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.

Here again, the main reason given by Australia for this reservation was that it was opposed to any legislation prohibiting the right to freedom of speech and expression.

Amendments to the 1975 RDA

Influenced by the 'Great Immigration Debate' of 1983, and community concern expressed in the late 1980s by the spate of anti-Asian racist statements in the media and more blatantly in the form of graffiti, all State governments embarked on a range of strategies to counter the growth of racism and prejudice against Aboriginal people, Jews, and Asian settlers. Additionally, there has been continuing international criticism of Australia's failure to respect its international obligations, arising from the reservations entered with respect to Article 4 (a) of the CERD and Article 20 of the ICCPR. As a result, there were important shifts with regard to both these reservations at the Commonwealth level in the 1990s.

In the matter of the 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 Optional*

Protocol to the ICCPR (from 25th September 1991). As a result of Australia accepting this Protocol, the UN Human Rights Committee 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 UN Human Rights Committee, an individual must first exhaust available and effective domestic remedies. 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 activities. These new initiatives indicate the extent to which international law has influenced the development of Australian legal practices in combating racism and discriminatory practices (Malcolm 1996).

The Australian Government, after vacillating for decades, finally indicated in 1992 that it would take action to amend the RDA so as to remove the reservation on Article 4 (a) and introduce statutory offences relating to racial vilification. These moves were no doubt influenced by international and domestic pressures, the latter coming from bodies such as the Royal Commission into Aboriginal Deaths in Custody (Muirhead 1991) and the Report of the Australian Law Reform Commission (ALRC 1992). The ALRC on a majority vote was in favour of making incitement to racist hatred and hostility a civil wrong susceptible to conciliation and civil remedies. The Aboriginal Deaths in Custody Report (Muirhead 1991) also rejected criminal sanctions and recommended conciliation as a means of dealing with racial vilification offences which were classified as civil offences.

The most significant impetus for change, however, came from the 1991National Inquiry into Racist Violence (NIRV) chaired by Federal Discrimination Commissioner, Irene Moss, This Report documented the widespread community concern about the growing incidence of racism in Australian society and made several recommendations dealing with racist violence (HREOC 1991) such as the need to distinguish between incitement to racial hostility and acts of outright racist violence. The NIRV argued strongly for two important

changes to the RDA:

> 1. to prohibit racial harassment, and incitement of racial hostility with civil remedies as in the case of other RDA offences; and
>
> 2. to amend the Crimes Act of 1914 to create two new criminal offences, viz. one of racist violence and intimidation, and the other of incitement to racist violence and racial hatred which is likely to lead to violence.

No doubt, influenced by the recommendations emanating from these Reports, the former Labor Attorney-General, Michael Duffy, moved to amend the RDA with the *Racial Discrimination Amendment Bill* 1992 (hereinafter identified as the 1992 RDA) One of the main objects of this Bill was to repeal the reservations entered by Australia on Article 4 (a) of the CERD in 1975 and Article 20 (2) of the ICCPR—the former dealing with incitement to racial hatred and the latter with the advocacy of racial or religious hatred. The proposed RDA amendments relating to racial vilification made it 'unlawful for a person to knowingly or recklessly commit 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 (Parliamentary Research Service 1994; Jureidini 1997).

The 1992 RDA also required amendment to *The Crimes Act* of 1914 to make incitement to racial hatred a criminal offence (see Appendix A: Table 3). Racial Incitement was understood to refer to the execution of *public acts* which were offensive to a group identified by 'race', colour, national or ethnic origin and likely to stir up racial hatred. These 'public acts' may refer to words, or conduct, including threats of violence and require proof of intention to incite racial hatred or cause harm against the specified group. The offence of incitement to racial hatred incurs a maximum penalty of twelve months imprisonment and threats of violence a maximum penalty of two years. In addition to several exceptions for acts done in good faith there were several exclusion clauses, inserted to ensure that 'certain valid activities are not brought within the scope, of the RDA. These

refer to such items as 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' (Stein 1982).

This 1992 RDA amendment, however, lapsed with the dissolution of Parliament in 1993, and, after extensive public consultations, was re-introduced by the new Attorney-General, Michael Lavarch as the *Racial Hatred Bill* 1994 (the 1994 RDA). The thinking and rationale behind the Lavarch Bill was similar to that of the earlier 1992 RDA as it also contained offences to cover racial vilification within the provisions of the RDA. Likewise, incitement to racial hatred with hostility and violence was to be regarded as a criminal offence in terms of the *Crimes Act*, and the amendments to the *Crimes Act* proposed by the 1992 and 1994 RDA were broadly similar except for the intent requirement. Whereas the 1992 RDA specified a requirement of intent and likelihood of consequences, the 1994 RDA chose to omit this requirement of intent in relation to public acts of racial incitement to hostility and hatred (see Appendix A: Table 2 for a comparison of the two Draft Bills, the 1992 and 1994 RDA) .

Under the proposed changes the 1994 RDA, racial vilification as a *public act*, was also 'intended to cover racist statements or propaganda of a 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. Complaints coming within this category were to be processed by the HREOC and subject to procedures of conciliation. But there were only civil remedies available if and when the conciliation processes were to fail.

This Draft Bill had to undergo major amendments to obtain the support of the Liberal/National parties and some Independents in the Senate. The most significant changes relate to the deletion of amendments to the *Crimes Act* 1914 and to the removal of all criminal sanctions (see Appendix A: Table 3). The new Part II S18 of the RDA introduced by the *Racial Hatred Act* 1995 (RDA 1995) has three essential

components. The Act makes it unlawful to commit: i) a *public act* which is ii) *reasonably likely* in all circumstances to offend, insult, humiliate or intimidate' another person or group of people, and, iii) on the *basis* of race, colour, or national or ethnic origin.

More importantly, for political reasons (mainly to obtain a broad-based consensus) the amendments to the RDA made by the RDA 1995 were enacted without criminal sanctions. Consequently, the amendments in the new Part II of the RDA would be administered according to the complaint-based conciliation procedures of the RDA. The unwillingness to impose criminal sanctions on incitement to racial hatred and acts of racial violence, as in the original amending draft meant that this legislation 'did not implement the requirements of CERD and ICCPR . . . and was unlikely to remove Australia's reservations to these instruments' (Akmeemana and Jones 1995).

This legislation also provided for, as in the case of the 1992 RDA wide range of exemptions. Sec.18D of the RDA recognises such exemptions as artistic works and genuine academic or scientific publication which are 'done reasonably and in good faith'. In addition, protection is given to the right to freedom of expression, as in the law of defamation, by affording privilege to fair and accurate reporting of material (e.g., in the media) of matters of public interest (Akmeemana and Jones 1995; Jureidini 1997).

The provisions of the Federal legislation of the RDA 1995 were similar to State legislation that had been enacted in NSW (AD Act), Qld (AD Act) and ACT (DA) making racial vilification and racial hatred unlawful but not a crime (Ronalds 2008). It should also be noted that the Australian legislation both at Federal and State levels makes 'no specific statutory provisions to make racial or race-based harassment unlawful (Ronalds 1998). An exception to this, as we shall see, was the provisions relating to 'discrimination involving racial harassment' inserted in 1992 into the *WA Equal Opportunity Act* 1984. Acts of racial harassment were hereafter to include direct discrimination involving, for instance, abuse or assault directed against an individual on the basis of race.

State-based Dedicated Legislation on Race Hatred

The first State government in Australia to publicly address issues relating to racial vilification and incitement to racial hatred, and introduce legislation prohibiting racial vilification and harassment was the Greiner Liberal/National government in NSW. Considering that it was the conservative political parties at the Federal level which opposed the proposal to amend the RDA to include racial vilification and the inclusion of a statutory prohibition on racial vilification and incitement to racial hatred, this action of the NSW Greiner Government in 1989 was somewhat surprising, but nevertheless of considerable significance. Admittedly, this decision of the Greiner Government was markedly influenced by the actions taken by the previous Wran and Unsworth governments in NSW to introduce a Draft Bill to make racial vilification unlawful (Mathews 1988; Wilkie 1994).

The NSW *Anti Discrimination* (*Racial Vilification*) *Amendment Act*, passed in 1989, with bipartisan support had considerable symbolic significance in that it signalled a strong community stand against hate-propaganda (Lacey 1990). The NSW legislation presents an interesting viewpoint on thorny issues of legal principle and social practice that are inherent in dealing with this complex social issue (Stein 1982; HREOC 1991). The following highlight some of the key features of this pioneering Australian legislation:

1. Makes incitement to racial hatred a civil offence, and is therefore less punitive, and requires less stringent standards of proof.

2. Adopts a conciliatory approach in dealing with less serious infringements relating to racial incitement. This opens up complaints to all and involves an informal (administrative) investigative process.

3. Provides for more serious acts of incitement to racial hatred, such as those involving threat, or incitement, of physical harm to be referred to the Attorney-General for possible prosecution as a criminal offence, and involving

a maximum penalty of six months imprisonment or a fine of $5000.

4. Allows cases not handled to the satisfaction of the complainant, or those that should be differently to be handled as a matter of public interest, and referred to the Equal Opportunity Tribunal.

5. Restricts Act to 'public acts' in public places which are likely to incite racial hatred or contempt for another on the grounds of 'race', but does not include racist display offences and possession of such material.

6. States that where questions of intent or *mens rea* is not required and all that is needed is proof of the *likelihood* of racial hatred.

7. Permits exclusion of several defences of reasonable excuse such as a fair report or comment on matters of 'public interest', or for purposes of 'discussion and debate' to ensure rights of freedom of expression.

Besides NSW, the State Government of WA—following the incidence of racism as a result of the racist activities of the Australian Nationalist Movement (ANM) in Perth, made a reference to the Law Reform Commission (LRC) to report on changes to the Law that may be necessary to deal with incitement to racial hatred and racial vilification. The WA Government, as a sequel to the LRC Report, introduced in 1990 the *Racial Harassment and Incitement to Racial Hatred Bill* to deal with racial vilification and harassment as a criminal offence (Jayasuriya 1989a).This legislation prohibits the publication, distribution or display of material which is threatening or abusive, or the possession of such material for publication, distribution or display, where there is an intention to, promote, or increase hatred.

The WA legislation, unlike in NSW, is based on amendments to the Criminal Code and is framed in the mould of the criminal law, i.e., as a criminal offence. This is however restricted to the possession, publication and display of racially threatening or abusive material, and each offence carries a

penalty of imprisonment of six months or a fine of $2000). Importantly, this requirement proof of intent or *mens rea*, contrasts sharply with similar legislation in NSW and also in the UK which only requires evidence of the *likelihood* that these acts would lead to racial hatred or promote racial hatred. The intent requirement in the WA legislation makes it very restrictive in the determination of an offence, and for this reason, ineffective and likely to defeat its very purposes. It would seem that the WA legislation was loosely modelled upon similar UK legislation with the most relevant sections being drawn from the UK 1986 *Public Order Act* (POA) (see Jayasuriya 1999a).

The UK legislation, POA 1986 was itself an outcome of amendments to previous UK legislation dealing with race relations such as the UK *Race Relations Act* of 1965 which included an intent requirement in respect of the publishing and distribution of racially offensive material. It was these amendments to the UK legislation that made racial incitement an offence punishable under the POA (1936) superseding the UK *Race Relations Act* of 1965. 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' [Emphasis supplied].

Unlike NSW and WA, two other States and Territories (ACT and QLD) chose not to enact special legislation to deal with racial hatred and vilification, and instead proceeded to regard racial vilification and racial harassment as coming within the jurisdiction of the existing anti-discrimination legislation (HREOC 1991 and ALRC 1992). In the ACT, acts of racial hatred refer to Sections 65-67 of the ACT *Discrimination Act* 1991, which are similar to those in NSW. The main difference with the NSW legislation is that the ACT imposes only a fine of $2000 and also the consent of the Attorney-General is not required for prosecutions. Likewise, in Queensland S126 of the *Anti-Discrimination Act* of 1992 also makes it unlawful to advocate racial or religious hostility subject to the proviso that incitement to racial hatred involves 'unlawful discrimination'. Thus, 'it does not prohibit words or actions which may incite hatred or hostility, but not discrimination' (Parliamentary Research Service 1994).

The State government of Victoria which had no legislative provisions for dealing with racial vilification, contrary to the recommendations of Racial Vilification Committee Report, in its Draft 1992 legislation on racial vilification chose not to establish new criminal offences for racial incitement and racial hatred, These included the possession and display of any threatening or abusive material intended to incite racial or religious hatred. As Grimm (1992) notes, the Victorian Government Bill established offences 'which may only be prosecuted by the State' at the instigation of any citizen, but are subject only to 'civil remedies'. But with the fall of the Cain Labor government in Victoria, no action was taken on this 1992 Draft Bill.

Racial Vilification Legislation and Religion

An interesting feature of the proposed 1992 Victorian legislation, however, was the specific reference to religion in defining 'race'. This is most unusual because the RDA and the NSW legislation make no specific reference to religion alongside 'race'. Whereas in the NSW Act, religious hatred, in terms or by judicial interpretation, is subsumed under 'ethnicity', the QLD legislation specifically refers to religious hatred. Other than this specific reference to religion, the QLD Act defines 'race' in terms of colour, descent or ancestry, nationality or national origin and ethnicity or ethnic origin. This is very similar to the definition of 'race' in NSW where, following an amendment in 1994, 'race' includes 'colour, nationality, descent and ethnic origin, ethno-religious or national origin. The only difference between the NSW and QLD definition is that NSW makes reference to 'ethno-religious' origin in order to include religious groups.

Australian reports as a rule in dealing with race discrimination and relevant anti-racist legislation have tended to subsume religious affiliation of victims under the generic category of ethnicity or ethnic origin. The Explanatory Memorandum to the Commonwealth's 1992 RD Act states that 'it is intended that Australian courts would follow the definition

of ethnic origin set out in the New Zealand case of *King-Ansell v Police* in the hope that this would provide the broadest protection for peoples such as Sikhs, Jews and Muslims' (House of Representatives 1992).

There is no doubt that the relationship between race, ethnicity and religion has been a continuing source of difficulty for anti-discrimination legislation in Australia. The main problem with these definitions is that, while identification of race/ethnicity is ascribed, religious group membership is more a matter of personal choice (Antonios 1995; and Ronalds 2008) for a discussion of the relevant judicial decisions relating to these definitions). In general, 'race' is understood as including religion because 'race' is defined –following the CERD—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 Freedom (1982) (hereinafter referred to as 'the Canadian Charter') identifies religion, specifically in referring to religion among the 'identifiable groups' against which the Canadian Charter forbids the willful promotion of racial hatred.

The exclusion of religion as a ground for invoking the provisions of the RDA was examined by NIRV which recommended that:

> discrimination against or harassment of a person on account of that person's religions belief is commonly associated with persons of a particular race or races or a particular ethnic group or groups and used as a surrogate for discrimination or harassment on the basis of race or ethnicity. (HREOC 1991)

In general the anti-discrimination legislation of the States/Territories (e.g., in Victoria, *The Equal Opportunity Act* of 1995, and in Queensland *The Anti Discrimination Act* 1991) makes it unlawful to discriminate on the grounds of religion or religious beliefs on the basis that 'race' includes 'religion' (HREOC 1997). However none of these Acts contains a definition of religion or religious belief, and interestingly, the Anti-Discrimination legislation of Tasmania (the only State which provides for religious freedom in a State Constitution), also has 'no provision

for the prohibition of discrimination on the grounds of religion' (HREOC 1997).

Following a comprehensive review of the 1981 UN *Declaration on the Elimination of All Forms of Intolerance and Discrimination based on Religion or Belief* which is nearly identical with Article 18 of ICCPR, the HREOC issued a Report entitled '*Freedom of Religion and Belief' in 1998* as a sequel to its earlier Report *Free to Believe?* (HREOC 1997; 1998). The 1998 Report recommended the adoption of the Religious Freedom Act to comply with provisions in Article 20 of ICCPR and the 1981 UN Declaration relevant to legislation on religious intolerance and discrimination.

This recommendation was summarily dismissed by the Attorney General Daryl Williams in the Howard government. The Shadow Attorney General Michael Duffy, in supporting the HREOC Human recommendation gave an assurance that he would be proposing to declare the 1981 UN Declaration on religious tolerance and religious discrimination be brought within the purview of the HREOC Act of 1986. This would certainly have helped to overcome a long standing difficulty of much of the Australian anti-discrimination legislation, including the 1975 RDA, which makes no specific reference to religious groups or ethno-religious groups (Akmeemana and Jones 1995), and where there is any legislative provision against incitement to religious hatred it covers only 'ethnically-based religions'.

It was only in 2001 that the first piece of legislation specifically dealing with religious vilification was introduced by the Bracks Labor government in Victoria with the passage of the *Racial and Religious Tolerance Act* 2001. The Victorian Act does not define 'vilification', but 'makes hatred against, serious contempt for, or revulsion or severe ridicule of person or class of persons on the grounds of religious belief or activity, unlawful' (Ronalds 2008). The Act also has provision for conciliation by the *Equal Opportunity Act*, and if unsuccessful, there is provision for a hearing by the Victorian Civil and Administrative Tribunal. The churches' objection to this Bill and legislation on religious vilification was made generally on the grounds of freedom of speech relating to preaching and possible criticisms of other

faiths.

These objections to the Victorian Act were highlighted by the *Catch the Fire Ministries vs Islamic Council* (Mortenson 2007) where it was alleged that the inflammatory and derogatory comments made about Muslims breached the provisions of the Victorian Act relating to the utterance of religious hate. The Court however rejected the argument that the acts were in violation of the freedom of speech and political communication. In a non legal account of this Victorian case, Deen (2008) offers an interesting account which focuses on the personalities, and motives of the litigants and hidden agendas rather than the finer legal points of the court decision.

The Victorian legislation led to similar legislation in Queensland, the *Anti Discrimination Act of 2001*, which specifies religion as one ground for legislative action. Beside Victoria, Tasmania was the only other State or territory to, legislation to include 'a person's religious belief or affiliation or religious activity' (Ronalds 2008) as coming within the provisions of the existing anti-discrimination legislation. A major development in this regard was the Report following the *Isma-Listen* Project conducted by HREOC to assess the extent of Arab-Muslim hostility since 9/11 (HREOC 2006). In its Report on the *Isma-Listen* project the Commission renewed its recommendations in the Article 18 Report but once again there has been no response from the Federal government.

In Western Australia the government no doubt influenced by the *Isma-Listen* Project of HREOC launched a Consultation Paper in 2004 on racial and religious vilification, but decided against implementing proposed legislation on racial and religious vilification in response to strong opposition from Christian church groups. But, as Mortensen (2007) rightly observes, in a comprehensive study of the recent experience with anti religious discrimination legislation, religious freedom in Australia is secured principally by the tradition of parliamentary self-restraint and a political consensus that governments should not interfere in the religious life of the people.

Conclusion

The central and overriding issue relating to the use of legal remedies for dealing with racial hatred 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 that ultimately 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 made provision for a constitutional guarantee of the right of freedom of expression. In the USA this fundamental right is protected under the First Amendment of the Constitution and epitomised in the liberal theory of free speech (see Akmeemana and Jones 1995 for an exposition of the philosophical rationale of free speech). The Canadian situation is more revealing because, unlike the USA, the Canadian Charter contains in Section 1 an express limitation clause on the rights of free speech and expression (Nevitte and Kornberg 1985). Accordingly, it is stated in Section 1 of the Canadian Charter. This 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 (Montigny 1992). The relevant freedoms set out in the Canadian Charter include a specific reference to: Freedom of thought, belief, opinion, and expression, including freedom of the press and other media of communication; and as Montigny (1992) points out, Section 1 of the Canadian Charter 'places limits on the guaranteed rights without being required to give them an unnecessarily restrictive scope' (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 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 *collectivised goals of fundamental importance*. (quoted by Montigny 1992: 52)

Thus, in the end, it is a question of principle and definition which has 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 for expression which jeopardises national security, sedition, or legal rules protecting trade secrets.

Likewise, there are laws concerning blasphemy, copyright, obscenity, official secrecy, sedition, consumer protection 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. Or, as an Australian jurist, Paul Stein, remarks:

> 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. (1982: 13)

In Australia, the concept of freedom of speech has always been regarded as one of the most respected democratic values of Australian society. However, in a series of cases the Free Speech cases—the High Court of Australia has treated 'freedom of speech' as an implied right guaranteed by the Australian Constitution, but only in relation to the political sphere. But, this has led to 'considerable divergence among members of the Court as to the nature and extent of the implied right' (Akmeemana and Jones 1996: 102).

Another issue on which there has been some difference of opinion among legal theorists is whether 'injunctive relief is preferable as against criminal procedures' (Goldberg 1990). By and large, policy makers, relying on the effectiveness of the law to be acting as a deterrent rather than being seen as a punitive measure, have been reluctant to adopt criminal procedure except in extreme forms of racist conduct. Over and above the legal niceties surrounding the 'use' of criminal procedures of the law for dealing with these offences, 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.

Stated 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 (1989-90) 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 remedial measures such as criminal and human rights legislation and rest confident with such measures. The law does and can play a useful and constructive role; 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, an educative vehicle embodying the values 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 to 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 remedies refer, in particular, to a community relations strategy (see the Lippman Report 1975). 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, and particularly towards 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 organization, institution, or group structure, if it is to achieve the desired changes. For the convenience of analysis and development of strategies of change, it is important to recognise that there are three levels at which change may take place. The first is at the level of the *individual* and relates to personal discriminations against individuals, usually members of a racial or ethnic minority group. The legal remedies currently available to deal with such discrimination and racism assume that these behaviours are a manifestation of deviant, pathological individual behaviour. The next level relates to *structural* or *institutional racism* whereby the rules and practices of an organisation directly or indirectly discriminate against persons from particular groups. 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 relations strategies to deal effectively with changes at many levels, but one particular

valuable approach applicable to all levels is through programmes of 'community education' ranging from the school to adult education. As the 1975 Report on Community Relations states:

> 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 advertisement. The battle to be fought and won is against prejudice and ethnocentricity and for the adoption of tolerant attitudes towards the miscellany of ethnic communities which are not an integral part of Australian society. (Lippman 1975: 62)

As a rule, these community education strategies are surprisingly absent in the Australian scene. This is despite the fact that Part V of the RDA as endorsed in 1975 requires consideration of measures to combat racism. The Community Relations Council recommended in 1975 RDA has never been established and regrettably it has been proposed (see 1998 *Human Rights Legislation Amendment Bill* No. 2 that this provision in Part V of the RDA be deleted Bill. Furthermore, the Review of the RDA (Antonios 1995) acknowledges that the RDA has invested the 'Commissioner of Community Relations' (later termed 'Race Discrimination Commissioner') with authority to undertake research, education and other programmes to promote understanding and tolerance between racial and ethnic groups. However, the work carried out in this regard has been minimal, and in fact, the RDA Review document fails to evaluate this aspect of the RDA (Antonios 1995).

This only serves to highlight the policy of successive Australian governments on race relations—'doing good by doing little', and stands in marked contrast to the community relations and anti-racism strategies pursued in other Commonwealth countries such as Canada and the UK. Admittedly, the community education strategy in itself provides no panacea but needs to be pursued along with other strategies to combat racism. The object of a community education strategy in endeavouring

to change attitudes and behaviour of all groups in the community cannot succeed without generating institutional support for such attitudinal changes; the changes in the law to protect those vulnerable to racist attacks is one such institutional support. But as Peter Rosenthal expresses succinctly:

> . . . 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. (Rosenthal 1989-90: 166)

Furthermore, according to Rosenthal (1989-90), 'the concerns of some civil libertarians for an abstract notion of 'free speech' fail to provide a sufficient justification for maintaining a 'right' of racists to harass members of minority groups'.