Laws Against Incitement to Racial Hatred in the United Kingdom

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Introduction

The experience of the United Kingdom in enacting and attempting to implement laws dealing with incitement to racial hatred is most instructive for Australia. Every time there is a review of these laws, the allegation is made that they are not achieving their functions, and should be amended.[1] Although the problems are easy enough to identify, the solutions have been elusive, and the Westminster Parliament is still struggling to find the best approach. The United Kingdom's experience, therefore, will not provide a template for Australia to copy, but Australia can at least profit from the lessons which have already been learnt in other countries.

The first part of this article reviews the development of the law concerning incitement to racial hatred in the United Kingdom. The second part of the article considers some of the problems that have arisen in the application of these laws.

Part 1: The Law

The State of the Law Prior to Specific Racial Hatred Legislation

Prior to enacting legislation which relates specifically to racial hatred, the law of the United Kingdom dealt with words or acts which were intended, or likely, to lead to violence or public disorder.

The Common Law

The common law crime of sedition prohibited the oral or written publication of words with an intention to raise discontent or disaffection amongst Her Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of such subjects.[2] The words had to amount to a direct incitement to violence or public disorder before they would be punished.

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1 For the most recent criticisms see: United Kingdom, House of Commons, Home Affairs Committee, Third Report *Racial Attacks and Harassment* (1994) HMSO London, para 96.

2 *Stephen's Digest of the Criminal Law* (1883), art 98.

As far back as 1732, a court held that a newspaper which made scurrilous allegations against Portuguese Jewish immigrants, resulting in violence against Jews, was seditious because it tended "to raise tumults and disorders among the people, and inflame them with a spirit of universal barbarity against a whole body of men, as if guilty of crimes scarce practicable, and totally incredible".[3]

In 1947 the publisher of a local British newspaper was prosecuted for sedition for the publication of an anti-semitic editorial. The owner of the paper, James Caunt, was acquitted because it was not established that he intended to promote violence.[4] This was the impetus for Jewish groups to lobby for stronger legislation.

Statute

There were, however, other existing legislative provisions which dealt with acts which promoted violence. Section 5 of the *Public Order Act 1936* provided that it was an offence to use "threatening, abusive or insulting words or behaviour, with intent to provoke a breach of the peace, or whereby a breach of the peace is likely to be occasioned". This offence covered both the situation where the person subjectively intended to provoke a breach of the peace, and where, from an objective point of view, the words were likely to provoke a breach of the peace.

A good example of the use of s 5 of the *Public Order Act 1936* is the case of *Jordan v Burgoyne*.[5] In that case the defendant had made an anti-semitic speech at a right-wing rally held in Trafalgar Square. The rally was attended by a group of people who strongly objected to his views, and who reacted with violence. The defendant was charged and convicted with a breach of s 5 for using insulting words which were likely to result in a breach of the peace. On appeal, the court of Quarter Sessions held that although the speech was insulting, it was not likely to lead ordinary reasonable persons to commit breaches of the peace, and allowed the appeal. The court's concern was that freedom of speech would be unreasonably restricted if people who objected to the ideas of a speaker could cause his or her conviction of an offence merely by reacting violently to the speech.

On appeal to the Queen's Bench Division, Lord Parker CJ rejected any test based on the audience being 'reasonable' people. He argued that a speaker "must take his audience as he finds them, and if those words to that audience or that part of the audience are likely to provoke a breach of the peace, then the speaker is guilty of an offence".[6]

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3 *R v Osborne* (1732) 2 Swanst 503. See description in A Lester and G Bindman *Race and Law* (1972) Penguin Books, 345-6.

4 *R v Caunt, The Times* 18 November 1947. See description of the case in: 'Seditious Libel and the Press' (1948) 64 *Law Quarterly Review* 203; A Lester and G Bindman n 3, 347-8; and P Leopold 'Incitement to Hatred: The History of a Controversial Criminal Offence' (1977) *Public Law* 389, 391.

5 [1963] 2 QB 744.

6 [1963] 2 QB 744 at 749.

In the later case of *Cozens v Brutus*[7] the House of Lords considered this balance between freedom of speech and the likelihood of violence. The case concerned a person who walked onto the tennis court during a match at Wimbledon in which a South African was playing, and protested against apartheid until he was physically removed by police. He was prosecuted under s 5 of the *Public Order Act 1936* on the ground that he used insulting behaviour to the spectators with intent to provoke a breach of the peace. Lord Reid observed:

> Parliament had to solve the difficult question of how far freedom of speech or behaviour must be limited in the general public interest. It would have been going much too far to prohibit all speech or conduct likely to occasion a breach of the peace because determined opponents may not shrink from organising or at least threatening a breach of the peace in order to silence a speaker whose views they detest. Therefore vigorous and it may be distasteful or unmannerly speech or behaviour is permitted so long as it does not go beyond any one of three limits. It must not be threatening. It must not be abusive. It must not be insulting.[8]

After a great deal of discussion of the meaning of 'insulting', the House of Lords concluded that it must be interpreted in its ordinary sense, and that in this case the appellant's actions were not 'insulting', even though they may have been 'deplorable' and would justly cause the spectators to be angry.

In reviewing the law prior to the introduction of the *Race Relations Act 1965,* Lester and Bindman have stated:

> What emerges from a survey of the legal background is that, without the necessity of creating a new offence of racial incitement, English law could deal effectively with racialist speeches or publications which either threatened the peace or injured the reputation of identifiable individuals [under the law of defamation]. Two overlapping areas were untouched by the law as it stood before 1965: incitement to racial hatred (rather than to violence), and the defamation of racial groups (rather than of identifiable individuals).[9]

The Race Relations Act 1965

In 1965 the *Race Relations Act* was passed to deal with racial discrimination, and incitement to racial hatred. It did not make it unlawful to express ideas or views that were racially discriminatory in nature, as this would be too great a restriction of freedom of speech. Instead the legislation was directed at words or behaviour which were likely to incite hatred, on the grounds that this is a threat to public order.

Section 6 of the *Race Relations Act* provided that it was an offence for a person, with the intent of stirring up hatred against a section of the public distinguished by colour, race or ethnic or national origins, to publish or distribute written matter, or use words in any public place or at a public meeting, which are threatening,

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7 [1973] AC 854.
8 [1973] AC 854 at 862.
9 A Lester and G Bindman n 3, 356-7.

abusive or insulting, and which are likely to stir up such hatred. Prosecutions could not be brought without the consent of the Attorney-General.

As noted above, the *Public Order Act* provided that it was an offence if *either* subjective intent, *or* objective likelihood, of provoking violence, could be proved. In contrast, the *Race Relations Act* required *both* subjective intent and an objective likelihood, that the words would stir up racial hatred.

The Public Order Act 1936

In 1976, the section was amended and inserted as s 5A in the *Public Order Act 1936*. The amendment removed the requirement of showing that the accused intended to cause racial hatred. At the time, Lord Hailsham asserted that a law which allows a person to be convicted of an indictable offence, without the requirement of proving intent, is a "constitutional outrage and an undermining of our principles of the criminal law".[10]

The Government justified this change by noting that since the introduction of section 6 of the *Race Relations Act 1965*, racist propaganda had become more sophisticated, disclaiming any intention of stirring up racial hatred and purporting to make a contribution to public education and debate. The more moderate the tone of the message, the more powerful its effect. The Government considered that the best way to tackle this problem was to remove the necessity for proving subjective intent.[11]

A further review of the legislation was conducted by the British Government, and a White Paper was presented on its conclusions in 1985.[12] The Government rejected recommendations to broaden the scope of the s 5A to make criminal the expression of racist views:

> A variety of amendments to the section were suggested, many of which would alter the basis of the offence, so that the criminal law would be used against the production of material or the expression of views which are offensive in a multi-racial society. The Government believes that the reasonable exercise of freedom of expression should be protected however unpleasant the views expressed, and has concluded that section 5A should continue to be based on considerations of public order.[13]

The Government did, however, agree to other amendments and in 1986 a new *Public Order Act* was introduced. Section 18 of the *Public Order Act* now deals with incitement to racial hatred. The difficulty of deciding whether to use an objective

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10 United Kingdom, House of Lords *Parliamentary Debates* 15 November 1976, vol 377 col 1092; cited in Human Rights Commission *Incitement to Racial Hatred: The International Experience* (1982) Occasional Paper No 2, 10.

11 Secretary of State for the Home Department *Racial Discrimination* Cmnd 6234, para 126; cited in SH Bailey, DJ Harris and BL Jones *Civil Liberties: Cases and Materials* (1991) 3rd ed Butterworths London, 612.

12 Home Office *Review of Public Order Law* (1985) Cmnd 9510.

13 Home Office *Review of Public Order Law* (1985) Cmnd 9510, para 6.5.

or a subjective criterion as the basis of conviction, was resolved by providing the option to prove either. Section 18(1) provides:

> A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if—
> (a) he intends thereby to stir up racial hatred, or
> (b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.

The objective alternative may, however, still be eliminated if the person was not aware of the nature of his or her words or actions. Sub-section 18(5) provides that if a person did not intend to stir up racial hatred, the person is not guilty if he or she was not aware that his or her words or actions might be threatening, abusive or insulting.

Sub-section 18(2) provides that an offence under this section can now be committed in private as well as in public (although not in a dwelling, if the offence is not visible or audible outside).

It is also an offence under s 23 for a person to have in his or her possession material which is threatening, abusive or insulting, if it is intended to be published or distributed, and it is intended, or is likely, to stir up racial hatred.

The reason given by the Government for the restoration of the subjective test was that it had proved difficult to establish that when racist material was sent to 'reasonable' people such as Members of Parliament or clergymen, it would be likely to stir up racial hatred. In these cases it may be easier to prove that it was intended by the person who sent the material that it would stir up racial hatred, even if it was not likely to have that effect.[14]

Football Offences

In the United Kingdom, specific legislation has been enacted to prohibit racist or indecent chanting. Section 3 of the *Football (Offences) Act 1991* makes it an offence to take part in "chanting of an indecent or racialist nature" at designated football matches. There is no need to establish that the chanting is likely to stir up racial hatred or amounts to harassment. Nevertheless, it has still been difficult to achieve convictions. A prosecution against a football supporter who had been singing racist songs was dismissed on the basis that the prosecution failed to

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14 Home Office *Review of Public Order Law* (1985) Cmnd 9510, para 6.6. Note, however, that in *R v Britton* [1967] 2 QB 51, the Court of Appeal considered that racist material sent to a Member of Parliament was not intended to stir up racial hatred, but was rather directed at persuading him to change his mind and vote against immigration.

prove that he had been "chanting" (that is, repeating words and sentences in concert with at least one other person).[15]

Although there have been considerable numbers of arrests under this section, there have been few prosecutions. In the 1991-92 football season, there were 76 arrests, but only 6 prosecutions.[16]

Part 2: Problems with the Legislation

There are several elements of the legislation which have caused problems in its practical application. These include the difficulty in defining words such as "hatred", "insulting" and "abusive", the difficulty in proving that words or actions were 'likely to stir up racial hatred', the relationship between race and religion, and the politicisation of the offence by only allowing the Attorney-General to commence a prosecution. There is also the further problem that acquittals of some groups, while others are convicted, can lead to even greater racial disharmony than was caused by the impugned acts. Finally, there is the concern that such legislation only leads to more sophisticated forms of racial vilification. These problems are discussed below.

The Breadth of the Terms

As legislation which prohibits incitement to racial hatred is a significant limitation on freedom of speech, it is important that the extent of this burden is clearly defined, so free speech is not limited any more than is absolutely necessary. Unfortunately the term "hatred" is subjective in nature, leaving a broad discretion to the judge or jury which has to determine whether there has been incitement to racial hatred.

In the United States legislation prohibiting incitement to racial hatred has been struck down on the grounds that the term "hatred" is overbroad and uncertain. In *State v Klapprott*[17] the Supreme Court of New Jersey held that a statute that made it an offence to utter any statement inciting hatred, abuse, violence or hostility against a group by reason of race, color, religion or manner of worship, was void for uncertainty, because the terms "hatred", "abuse" and "hostility" are abstract and indefinite. Chief Justice Brogan asked:

> Is it possible to say when ill will becomes hatred or when unworthy, scurrilous or false statements become abuse? As well try to point to a spot within a triangle which is equidistant from every point in the area enclosed as say when hatred takes the place of some lesser emotion. Then these passions . . . as well as being abstract, are relative to the individual. There is no norm to judge whether or when such emotion or passion

15 *The Times* 2 December 1991. Discussed in J Oyediran 'The United Kingdom's Compliance with Article 4 of the International Convention on the Elimination of all Forms of Racial Discrimination' in S Coliver (ed) *Striking a Balance* (1992) University of Essex, 250.

16 United Kingdom, House of Commons, Home Affairs Committee, Third Report *Racial Attacks and Harassment* (1994) HMSO London, para 109.

17 127 NJL 395 (1941); 22 A 2d 877.

> comes into being. It may be entirely subjective in a given case. We do not think such phases of human reaction or emotion can be made a legitimate standard for a penal statute.[18]

This point was later supported by the Supreme Court of the United States in *Winters v New York*.[19]

The Canadian Supreme Court, in *R v Keegstra*[20] also discussed the meaning of "hatred", in the context of incitement to racial hatred. Chief Justice Dickson considered that the term "hatred" was a restriction on the application of the relevant legislation, because it "connoted emotion of an intense and extreme nature that is clearly associated with vilification and detestation".[21] Madam Justice McLachlin, however, on behalf of the minority,[22] considered that the term "hatred" was overbroad. She observed:

> The *Shorter Oxford English Dictionary* defines "hatred" as: "The condition or state of relations in which one person hates another; the emotion of hate; active dislike, detestation; enmity, ill-will, malevolence". The wide range of diverse emotions which the word "hatred" is capable of denoting is evident from this definition. Those who defend its use in [the relevant section] emphasize one end of this range — hatred, they say, indicates the most powerful of virulent emotions lying beyond the bounds of human decency and limiting [the section] to extreme materials. Those who object to its use point to the other end of the range, insisting that "active dislike" is not an emotion for the promotion of which a person should be convicted as a criminal. To state the arguments is to make the case; "hatred" is a broad term capable of catching a wide variety of emotion.[23]

Her Honour also observed that the subjectivity of the term presents further dangers, particularly when the speech was unpopular.

One of the justifications for legislation prohibiting incitement to racial hatred, is compliance with the United Kingdom's obligations under Article 4 of the *Convention on the Elimination of All Forms of Racial Discrimination* (CERD). Article 4, however, only obliges state parties to prohibit "incitement to racial *discrimination*", rather than hatred.[24] Early drafts of article 4 that were submitted to the United Nations Human Rights Commission prohibited "incitement to racial hatred" as well as "incitement to racial discrimination", but the Commission rejected the reference to "incitement to racial hatred" on the grounds that the courts could not measure hatred.[25] Michael Korengold has observed that this distinction made by

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18 22 A 2d 877 at 882.
19 333 US 507 at 517 (1948).
20 [1990] 3 SCR 697.
21 [1990] 3 SCR 697 at 777.
22 McLachlin, Sopinka and La Forest JJ.
23 [1990] 3 SCR 697 at 855-6.
24 Article 4 also provides that the dissemination of ideas based on racial superiority or *hatred* shall be an offence punishable by law. It does not, however, apply to incitement. The United Kingdom has not prohibited the dissemination of ideas on the grounds that this is too great a burden on freedom of speech.
25 M Korengold 'Lessons in Confronting Racist Speech: Good Intentions, Bad Results and Article 4(a) of the Convention on the Elimination of All Forms of Racial Discrimination' (1993) 77 *Minnesota Law Review* 719, 726, n 23.

the Human Rights Commission was vital in maintaining the appropriate balance with freedom of speech:

> Prohibiting incitement to racial hatred would punish a person for causing another to hate, a result which is dangerously close to prohibiting the thought or feeling of hatred itself. Criminalization of a specific thought or feeling is precisely the type of viewpoint regulation that compromises the right to free expression. The Commission made a crucial distinction between a state's power to punish acts and its power to punish thoughts or feelings.[26]

Contrary to the distinction drawn by the UN Human Rights Commission, the United Kingdom's legislation does prohibit incitement to racial *hatred*. It is therefore left to the jury to determine whether 'hatred' means intense detestation or merely ill-will or dislike.

As noted above, the English courts have already had difficulty with interpreting the meaning of "insulting". In *Brutus v Cozens* the Divisional Court of the Queen's Bench Division considered an insult to be 'behaviour which affronts other people and evidences a disrespect for their rights, behaviour which reasonable persons would foresee is likely to cause resentment or protest such as was aroused in this case'.[27] On appeal to the House of Lords, Lord Reid disagreed, observing that the word 'affront' is too vague, and that there can be disrespect without insult. He concluded that there can be no useful definition of 'insulting' but that 'an ordinary sensible man knows an insult when he sees or hears it'. In this case he disagreed with the Divisional Court (which obviously was not comprised of ordinary sensible men), and held that there was no insult.[28]

When is an Act Likely to Stir Up Racial Hatred?

The difficulty in proving that a person intended to stir up racial hatred, led to the removal of this subjective test in 1976. From that time it only had to be proved that the words or actions were likely to stir up racial hatred.

Even this objective test is difficult to meet. It may be the case that the words were likely to cause reasonable people to feel sympathy for the victims of the insults or abuse.[29] In the case of *R v Read* the defendants were prosecuted for a speech in which they referred to people as "wogs", "coons", "niggers" and "black bastards". In their defence they argued that the speeches were so intemperate that they were likely to stir up sympathy for the abused groups, rather than hatred. They were acquitted by the jury.[30]

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26 M Korengold n 25.
27 [1972] 1 WLR 484, 487.
28 For further cases discussing the meaning of 'insulting' see: *Bryan v Robinson* [1960] 2 All ER 173; *R v Ambrose* (1973) 57 Cr App Rep 538.
29 See eg the case of *R v Jones and Cole*, where this view appears to have been accepted by the jury: Human Rights Commission *Incitement to Racial Hatred: The International Experience* (1982) Occasional Paper No 2, 35, n 26.
30 J Oyediran in S Coliver (ed) n 15, 247.

In many cases it depends upon the audience to whom the words or actions are directed. For example, in *R v Britton*,[31] which was the very first prosecution for incitement to racial hatred, the defendant was a seventeen year old boy who had left a pamphlet objecting to black immigration on the door of the home of a Member of Parliament. He was convicted, but on appeal his conviction was quashed. The case turned on the meaning of distribution, but Lord Parker CJ also noted that it could not be said that the act was intended to stir up hatred, when it was in fact intended to persuade the Member of Parliament to change his policy and fight against further immigration. Although it was the subjective test which was under consideration in this case, it would also have been difficult to establish that sending such pamphlets to Members of Parliament was likely to stir up racial hatred.

In other cases, where the words in question are part of a speech delivered to a racist audience, it is difficult to establish that it would be likely to stir up racial hatred, when the racial hatred already existed.[32]

Race and Religion

The *Race Relations Act 1965* and the subsequent versions of the incitement to hatred provisions in the *Public Order Act 1986* refer to stirring up hatred against a section of the public distinguished by "colour, race, or ethnic or national origins". No specific reference is made to religion. At the time the legislation was first introduced, this was the subject of debate,[33] because one of the primary groups lobbying for the legislation was the Jewish community. Some Members of Parliament argued that Jewish identity is based on religion and that the provision should be extended to cover religion.[34] The Home Secretary, Sir Frank Soskice, observed:

> I would have thought a person of Jewish faith, if not regarded as caught by the word "racial" would undoubtedly be caught by the word "ethnic", but if not caught by the word "ethnic" would certainly be caught by the scope of the word "national", as certainly having a national origin.[35]

As Lester and Bindman have noted, membership of a religion involves personal choice, whereas membership of a racial group is inherited.[36] A person of any race may convert to religions such as Judaism and Islam, and there are many communities of these faiths which are of vastly different racial origins. It is therefore difficult to categorise religious groups, such as Jews, Muslims or

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31 [1967] 2 QB 51.
32 G Bindman 'Incitement to Racial Hatred in the United Kingdom: Have We Got the Law we Need?' in S Coliver (ed) *Striking a Balance* (1992) University of Essex, 261.
33 DGT Williams 'Racial Incitement and Public Order' [1966] *Criminal Law Review* 320, 323-4.
34 United Kingdom, House of Commons, 711 *Parliamentary Debates* 3 May 1965 per Mr St John-Stevas at 959 and Sir B Janner at 690-1.
35 United Kingdom, House of Commons *Parliamentary Debates* 3 May 1965 cols 932-3. Cf *Ealing London Borough Council v Race Relations Board* [1972] AC 342, where the House of Lords considered that "national origin" related to place of birth.
36 A Lester and G Bindman n 3, 363.

Christians as members of a "race" or ethnic origin. This has led to unfortunate legal distinctions being drawn between those religious groups that are covered by the legislation, and those not covered. It appears that Jews and Sikhs have succeeded in achieving recognition as belonging to a certain "ethnic origin",[37] whereas Christians, Muslims[38] and Rastafarians[39] do not receive the same protection of the law. This discrimination between different religions is an unfortunate consequence of the English legislation.[40]

In Northern Ireland, the law has specifically dealt with incitement to religious hatred since the enactment of the *Prevention of Incitement to Hatred Act 1970*. The first prosecution under the Act concerned the publication of a book called *Orange Loyalist Songs 1971*. The songs contained lines suggesting that members of other faiths looked best with bullets in their backs. The defendants claimed that they had no intent to incite hatred, and were acquitted by the jury.[41] The political and social damage caused by the acquittal was such that no prosecution has been brought since,[42] despite the fact that there has been no absence of public words and actions which are likely to incite hatred against persons on the basis of religious belief.

Role of the Attorney-General in Initiating Prosecutions

The advantage in the Attorney-General having control over prosecutions is that frivolous and vexatious actions can be eliminated at a very early stage.

The disadvantage is that it politicises the use of the section, and allows it to be seen as an instrument of executive oppression or protection for certain groups, depending on one's point of view. For example, a complaint by a British resident of German origin that the BBC was publishing material which vilified Germans, was not acted upon by the Attorney-General. An attempt to bring a private action against the BBC was dismissed by the Court of Appeal on the grounds that there was no cause of action.[43] Regardless of whether the complaint had any merit, the situation could be seen as a Government protecting some racial groups, while allowing others to be vilified with impunity.[44]

In practice, very few of the matters referred to the Attorney-General have been prosecuted, which itself leads to accusations of political selectivity. One reason

37 *Mandla v Dowell Lee* [1983] 1 All ER 1062. See also *King-Ansell v Police* [1979] 2 NZLR 531 for recognition by the New Zealand Court of Appeal that Jewish people fall within the category of "ethnic origin" in the New Zealand legislation.

38 *Nyazi v Rymans Ltd* (unreported, 10 May 1988). See reference in *Halsbury's Laws of England* 4th ed, Vol. 4(2), para 153, n 5.

39 *Crown Suppliers (PSA) v Dawkins* [1993] ICR 517.

40 See further: T Murphy 'Incitement to Hatred: Lessons from Northern Ireland' in S Coliver (ed) s 15, 264.

41 *Belfast Telegraph* 28 June 1971 and 14 December 1971. See description in P Leopold n 4, 401.

42 J Oyediran in S Coliver (ed) n 15, 249.

43 *Thorne v British Broadcasting Corporation* [1967] 1 WLR 1104.

44 A Lester and G Bindman n 3, 364.

provided by the Attorney-General for the low number of prosecutions is that an unsuccessful prosecution does more harm than good to the cause of racial equality.[45]

The Racial Unrest Caused by Prosecutions

British experience has shown that racial vilification laws are not confined to protecting minorities. They can be used to prosecute members of minorities who verbally attack the majority. The fourth prosecution under s 6 of the *Race Relations Act* was of a leader of the Black Power movement, Michael Abdul Malik, who was charged with stirring up racial hatred against white people. He was convicted and sentenced to imprisonment for 12 months.[46]

In November 1967, four members of the Universal Coloured People's Association, were convicted of stirring up racist hatred against white people.[47]

By contrast, in March 1968, when charges were brought against four members of the Racial Preservation Society, they were acquitted. They claimed that they were not intending to stir up racial hatred, but were educating the people about the problems of coloured immigration and attacking politicians for their inaction. In the course of the trial, they introduced evidence about the purity of races, genetic inequality of the races, and the impact of immigration upon the crime rate. When they were acquitted, they claimed that the court had given respectability and legitimacy to their views.[48] They even reprinted a "Souvenir edition" of the offending article.

The fact that black leaders were being imprisoned, and white people such as Enoch Powell[49] and the leaders of the National Front were either not charged or were acquitted for racist speeches, led to even more racial unrest.

Increased Sophistication of Racist Propaganda

Lester and Bindman have noted that one of the effects of s 6 of the *Race Relations Act* is that racist propaganda is now couched in more moderate tones. They note that an unfortunate consequence is that this has led to a wider audience and had a deeper effect upon public opinion, than insulting or abusive racist words.[50]

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45 G Bindman 'Incitement to Racial Hatred' (1982) *New Law Journal* 299, 301.
46 *The Times* 9 November 1967. See also *R v Malik* (1968) 1 WLR 353.
47 *R v Sawh, The Times* 29-30 November 1967.
48 A Lester and G Bindman n 3, 369-70; and Human Rights Commission *Incitement to Racial Hatred: the International Experience* (1982) Occasional Paper No 2, 8.
49 There is some evidence that Enoch Powell's speeches were referred to the Attorney-General for possible prosecution: *The Times* 4 May 1968 and 23 November 1968. No prosecution was ever initiated. See generally: SH Bailey, DJ Harris and BL Jones n 11, 614.
50 A Lester and G Bindman n 3, 374. See also: Secretary of State for the Home Department *Racial Discrimination* Cmnd 6234, para 126.

An example of this trend is the case of *R v Hancock* where people who published articles asserting the racial superiority of white people and seeking the repatriation of black people, were acquitted because they were not written in a "threatening, abusive or insulting" manner.[51] The acquittal of the defendants, however, gave the appearance that the law accepted and approved of these views.

Lester and Bindman have also noted that another effect of s 6 is to make issues assume a purely legal dimension, rather than a moral one:

> Public attention is diverted from considering whether racialist propaganda is morally wrong or factually inaccurate to whether it is illegal. In such a climate, the demagogue's cowardly attack upon a defenceless minority can all-too-readily be interpreted as courageous conduct, carrying a real risk of prosecution and imprisonment, while members of the minority are regarded not as victims but as a privileged group, immune to criticism.[52]

The Future of Laws Prohibiting Incitement to Racial Hatred in the United Kingdom

Another review of the *Public Order Act 1936* was undertaken in 1990. Joanna Oyediran noted that proposals to broaden the scope of the provisions concerning racial hatred, were rejected:

> Despite the reforms of 1986, the offence of incitement to racial hatred remains a weak and ineffective provision. Proposals for a new, broader offence of exposing members of racial minorities to hatred, ridicule or contempt . . . or for extending the offence so as to make the advocacy of discrimination and repatriation illegal . . . were rejected in the Green Paper on the *Public Order Act 1936* on the grounds that such legislation would criminalize the expression of opinions regardless of the manner or circumstances in which they were expressed, an unacceptable proposal in a democratic society.[53]

Recently, however, a private member's bill, the *Racial Hatred and Violence Bill 1994* was introduced by Mr Hartley Booth in the Westminster Parliament.[54] The Bill seeks to widen the term "hatred" to include "hatred, hostility, violence or discrimination". It also seeks to remove the requirement that the words or actions be "threatening, abusive or insulting". The Second Reading debate indicates that although the Bill is supported by the Labour Party, the Government is not supporting it, on the grounds that it is awaiting reports from a Select Committee and a special investigation into the workings of the *Public Order Act* before it will consider further amendments.[55]

The Home Affairs Committee published its report on *Racial Attacks and Harassment* in May 1994. The Report contained several recommendations to

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51 *R v Hancock, The Times* 29 March 1969, referred to in J Oyediran in S Coliver (ed) n 15, 247.

52 A Lester and G Bindman n 3, 372; and Human Rights Commission *Incitement to Racial Hatred: The International Experience* (1982) Occasional Paper No 2, 9.

53 J Oyediran in S Coliver (ed) n 15, 249.

54 United Kingdom, House of Commons *Parliamentary Debates* 16 December 1993, 1300. See discussion in Editorial 'Hate crimes' (1994) *Criminal Law Review* 313.

55 United Kingdom, House of Commons *Parliamentary Debates* 11 March 1994 per the Minister of State, Home Office, Mr Peter Lloyd, 585.

amend the law relating to incitement to racial hatred. The first major recommendation was that the Attorney-General's consent be no longer required to initiate a prosecution. Several witnesses before the Committee had argued that this was an unnecessary impediment to prosecutions. It was also noted that one of the grounds used by the Attorney-General for declining to consent to a prosecution was the very broad criteria of "public interest". The Committee concluded:

> Whilst we have no reason for concluding that successive Attorney-Generals have behaved other than perfectly correctly in refusing to authorise prosecutions, we can see no obvious reason why Part III should not be treated like an ordinary criminal offence, and why the DPP should not decide whether or not a prosecution under the Part should proceed.[56]

The Committee also reconsidered the subjective and objective tests concerning the stirring up of racial hatred. These tests were still considered to be too stringent. The Committee recommended the amendment of the objective test, that the words or actions are "likely to stir up racial hatred", to a new test that "having regard to all the circumstances it is reasonably foreseeable that racial hatred may be stirred up thereby". This provision is already included in the *Racial Hatred and Violence Bill*, and the Committee recommended that such an amendment be made.[57]

Other proposed amendments concerned the powers of the police to make arrests under the *Public Order Act* and the enforcement of the *Football (Offences) Act*.

It remains to be seen what further action the Westminster Parliament will take in relation to incitement to racial hatred.

Conclusion

In framing Australian legislation on racial vilification, regard should be had to the problems that have been encountered in the United Kingdom. The definitions of the words used in the legislation should be clear, so that juries are not left with a large range of discretion in interpreting the legislation. Consideration should be given to whether the legislation should extend to religious belief as well as race. The consequences of requiring all prosecutions to be initiated by the Attorney-General, as is the current position in New South Wales,[58] should also be considered. The most difficult matter to determine will be the level of intent required to secure a conviction, and whether an objective test should apply, even in a criminal matter where guilty intent is normally required.

Perhaps the greatest lesson to be learnt from the United Kingdom experience is that we should be clear about what we expect such legislation to achieve. In the

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56 United Kingdom, House of Commons, Home Affairs Committee, Third Report *Racial Attacks and Harassment* (1994) HMSO London, para 97.

57 United Kingdom, House of Commons, Home Affairs Committee, Third Report *Racial Attacks and Harassment* (1994) HMSO London, para 101.

58 *Anti-Discrimination Act 1977* (NSW) s 20D(2).

United Kingdom, during every review of the racial hatred legislation, the allegation is made that the legislation has failed and must be amended because racist material and racist violence is increasing, rather than decreasing. The experience of places where racial hatred or vilification legislation has been enacted, such as the United Kingdom, Northern Ireland, former Yugoslavia and Germany, shows that it will not have the effect of eliminating racial hatred, and if we expect it to do so, we too will be disappointed and consider our legislation to have failed. While racial vilification legislation may have the effect of removing from circulation some of the more virulent and offensive racist literature, it may also result in the production of more sophisticated racist propaganda, couched in moderate and persuasive tones, as has occurred in the United Kingdom.

If the aim of racial vilification legislation is to punish racists and racist organisations, we may also be disappointed. Experience in the United Kingdom has again shown that many of the most notorious racists are capable of avoiding conviction under such legislation, and that it is often members of minority groups, who do not have the same access to legal advice, who are caught by the legislation.

If the aim of racial vilification legislation is to set out community standards of behaviour, then it may well achieve this objective. However, one might wonder whether there are other less coercive means of achieving the same result.