Problems in Drafting Legislation Against Racist Activities

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Not all countries which are signatories to the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD) prohibit the full range of racist activities identified in Article 4 of the Convention, even though by signing the Convention they have agreed to do so.[1] Much legislation against racial vilification[2] fails to proscribe more than a handful of narrowly defined acts.

The widespread reluctance of governments to legislate and to act against all kinds of harmful racist behaviour[3] indicates that some degree of 'racism' is present and accepted in most cultures. In those countries such as Australia, Canada and America which share a background of predominantly English culture and English law, redressing the harms of racism is often perceived as being of less importance than civil libertarian arguments in favour of the highest degree of preservation of the right to free speech even where the speech is harmful to individuals, groups, or society in general. There is also a tendency to fit rights and freedoms into accepted, pre-existing categories and therefore a general reluctance to introduce legislation aimed at combating harm to groups resulting from prohibited forms of expression, because English law traditionally provides remedies only for individuals and not for groups.

Professor Mahoney calls for a new view of law that focuses upon the harms to be prevented, saying that:

> when the debate involves the clash of interests presented by hate propaganda and freedom of speech, eighteenth and nineteenth century theories that served a need that

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1 Australia ratified CERD on 30 September 1975, but with a reservation on Article 4(a). The present Australian legislation against racial vilification includes: New South Wales: *Anti-Discrimination Act 1977* ss 20B–22; Queensland: *Anti-Discrimination Act 1992* s 126; Western Australia: *Criminal Code* ss 76–80 (the most comprehensive Australian legislation against hate propaganda); Australian Capital Territory: *Discrimination Act 1991* ss 65–67.

2 The term 'racial vilification' is used here to describe racist abuse, particularly in its extreme forms which include incitement to racist hatred, and instilling fear of racist violence. In *The Oxford English Dictionary*, 'vilification' is defined as: "1. The action of rendering vile in worth or estate; degradation; 2. The action of vilifying by means of abusive language; reviling . . . 3. The action of bringing into disrepute". To 'vilify' is defined as "1. To lower or lessen in worth or value; to reduce to a lower standing or level; to make of little (or less) account or estimation . . . to make morally vile; to degrade . . . to defile or dirty . . . To bring disgrace or dishonour upon . . . To depreciate or disparage in discourse, to talk slightingly or contemptuously of . . . To depreciate with abusive or slanderous language, to defame or traduce; to speak evil of . . . To regard as worthless or of little value; to condemn or despise . . . "

3 The United Nations has identified over 44 countries as having some type of legislation against racial discrimination: Centre for Human Rights, Geneva *Second Decade to Combat Racism & Racial Discrimination* (1991) United Nations New York, 5.

> modern democracies have outgrown do not seem to be the best way to solve the problem. . . . [T]he real value of hate speech must be assessed against the real harms it inflicts.[4]

In Australia such matters are presently being debated in the context of the Federal Government's proposal to introduce legislation against racial vilification.[5] It is acknowledged that racist speech and activities occur, but the slowness and possible ineffectiveness of proposed legislation in changing social values is emphasised, the harms of racist violence are played down, and the view that government restrictions upon free speech will have a 'domino effect' is promoted.[6] Commentators who conclude that racial vilification should not be the subject of legislation usually ignore the fact that lack of legislation against racial vilification does not ensure freedom of speech for everyone. They ignore that the Human Rights and Equal Opportunity Commission in its 1991 report on racist violence in Australia,[7] the Royal Commission into Aboriginal Deaths in Custody,[8] and the Australian Law Reform Commission in its 1992 report on *Multiculturalism and the Law*[9] all called for legislation specifically targeting racist activities, because of the levels of racist abuse and violence that they perceived. Commentators also ignore the fact that those harmed by racist abuse widely support legislation which will protect them.[10]

Legislation against racial vilification, and particularly against the most extreme forms of racial vilification such as hate propaganda, needs to deal with more than a few specific and very limited offences, because to fail to deal with significant elements of racist behaviour could render the legislation ineffective and even counterproductive, giving the message that the government is not serious about combating harmful racist behaviour.

Racial vilification injures the harmony between different groups that is essential for the successful operation of a multicultural society. Australia needs

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4 K Mahoney *Hate Vilification Legislation with Freedom of Expression: Where is the Balance?* (see XR).

5 The Racial Discrimination Amendment Bill 1992 (Cth) (the '1992 Bill') proposed amendments to the *Racial Discrimination Act 1975* (Cth) ('RDA') and *Crimes Act 1914* (Cth) (together referred to as the 'Acts') introducing various additional offences under the RDA, including the offence of racial vilification, and creating two new crimes with custodial penalties under the *Crimes Act*: (1) incitement of racist hatred; and (2) causing people to fear that racist violence will be used against them. The revised version of the Bill is, as at the end of October 1994, under consideration by Cabinet and has not yet been made public. It seems likely that the amendments finally approved by Cabinet will be based on the wording of the 1992 Bill.

6 P Adams 'Bigots better in the open' *The Australian–Weekend Review* 1–2 October 1994, 2. See Mahoney n 3 (below) for the opposite viewpoint.

7 Human Rights and Equal Opportunity Commission (HREOC) *Racist Violence: Report of the National Inquiry into Racist Violence in Australia* (1991) AGPS Canberra, ch 11, 273 ff.

8 E Johnston QC, Royal Commission into Aboriginal Deaths in Custody *National Report: Overview and Recommendations* (1991) AGPS Canberra, 78 (recommendation 213).

9 The Law Reform Commission *Multiculturalism and the Law* (1992) ALRC 57 Alken Press Pty Ltd, Smithfield, Appendix A (proposed cll 85 ZKD, 85 ZKE).

10 Submission of The Ethnic Coalition of Australia (4 November 1993) to the Commonwealth Attorney-General; B Freedman 'Vilification Law Postponed to '94' *The Australian Jewish News* (17 December 1993).

effective legislation as well as education in order to combat racial vilification successfully.

Legislation which is most effective in proscribing 'racist' behaviour which causes real harm can best be drafted on the basis of an analysis of:

(1) the nature of that behaviour;
(2) the forms that the behaviour takes; and
(3) the harms it causes.

The first part of this article will deal with a short analysis of those matters. The second part of the article will touch on the constitutional problems which Commonwealth racial vilification legislation could face in Australia, and the third part of the article will discuss specific problems with existing drafting of offences involving racial vilification in the light of the analysis contained in the first two parts.

Part 1: Racist Behaviour is Not Just About Race

The Nature of Racial Vilification

Racial vilification as the expression of 'racist' prejudice has four significant features:

1. Like most human activities, it flourishes and develops where it has some degree of social acceptance. This is confirmed not just by common sense, but by substantive historical evidence,[11] by situational analysis,[12] and by current anecdotal evidence. In February 1993 *The Guardian Weekly* commented that 'the links between the literature now circulating [in Britain] and the increase in attacks on ethnic minorities cannot be ignored'.[13] In the same issue it was reported that:

> racial attacks, including murder, have reached unprecedented levels in Britain. . . . Home Office figures show that racial attacks have grown from 4,383 in 1988 to 7,780 in 1991, the latest year for which figures are available. The Anti-Racist Alliance says that its research indicates only one in 10 such attacks are reported and a more accurate estimate would be 70,000. . . . British neo-fascist publications are printing the home addresses of prominent anti-racist campaigners with open encouragement to their supporters to 'carry out an assignment', wishing them 'good head-hunting'.[14]

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11 See eg I Muller *Hitler's Justice* (1991) Harvard University Press Cambridge Massachusetts and U Reifner 'The Bar in the Third Reich: Anti-Semitism and the Decline of Liberal Advocacy' (1986) 32 *McGill Law Journal* 97 on the effects of antisemitic Nazi legislation.

12 W Peters *A Class Divided: Then and Now* (1987) Yale University Press New Haven and PG Zimbardo *Psychology and Life* (1979) 10th ed Scott Foresman and Company Glenview Illinois, 638.

13 'The Scourge of Racism' *The Guardian Weekly* (28 February 1993), 7.

14 *The Guardian Weekly* (28 February 1993), 3.

Social acceptance can of course still exist even when existing laws prohibit the particular behaviour, especially when those laws are ineffective or are not strictly enforced.

2. Racial vilification is a common political tool, being used to blame 'scapegoat' groups for economic or social problems for which the politician or party has no realistic solution. A high ranking member of a white supremacist group in the United States commented:

> The number one thing is that nobody [in the group] gets blamed for anything. My marriage didn't work? It's not my fault, it's because I was a racial activist and my wife couldn't stand it. I didn't graduate from high school? It's because my Jewish English teacher didn't like me. If you couldn't find a job — hey it's not your fault, it's the Jews.[15]

Racist propaganda can be used to blame all economic/social problems upon a 'scapegoat' group, unite the population by identifying a common (imaginary) foe, or ensure conformity by the majority by punishing 'deviance' in a specific group.

3. Racial vilification is based on prejudice and the perpetrator's perception of difference between himself and the victim. It is not just about 'race'.

What is generally understood as 'racist' behaviour involves denigrating or attacking a person not because of what they say or what they do, but because of prejudice against them, which is rationalised as antipathy to personal characteristics (such as skin colour or cultural background) which the person cannot change and for which he is not responsible. Racists do not speak or act against their targets as a result of accurate identification of the person or group's 'race', which is in any case not a scientifically exact concept[16], but as a result of their perception of their targets as 'the other', as capable of being differentiated from the racist and his group. Victims are ascribed often quite imaginary characteristics by the perpetrator, and are then terrorised for belonging to a group which is said to have those characteristics, the whole process being often virtually impossible to analyse in logical terms. Professor Colin Tatz defined the term 'racism' as:

> convenient shorthand to cover *any* system or process by which people equate one set of characteristics — such as colour, religion, ethnicity, language — with another set of socially relevant characteristics, invariably negative; who then use those equated beliefs as *legitimate* reason for taking institutionalised action against them. [17]

Where a woman wearing a veil is verbally abused, it may be that she is being abused because she is female, because she is wearing a veil, because the

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15 *New Internationalist* (October 1994), 15 quoting *Mother Jones* (1994) Foundation for National Progress United States.

16 PL van den Berghe *Race and Racism* (1967) John Wiley & Sons Inc New York, 21.

17 C Tatz 'Racism and Antisemitism: their Place in University Curricula' (1992) 6(1) *Australian Journal of Jewish Studies*.

perpetrator thinks he knows what country she comes from, because he thinks he knows that she is Muslim, or because of the colour of her skin. It might be a combination of all of these things. It is likely that the perpetrator himself does not rationalise the basis for his abuse. He abuses the woman because he perceives her as different.

It is the fact that a distinction is made, in order to rationalise maltreatment or refusal to give privileges, rather than the way in which the differentiation is justified, which is generally regarded as demonstrating 'racism'.

4. Racial vilification involves a particular world view that sees human beings as naturally unequal and sees it as right for the 'inferior' humans to be treated badly and even to be physically harmed.[18]

These features of racial vilification are interrelated and their intricacies explain many of the problems of drafting appropriate legislation.

Forms of 'Racist' Behaviour

The *International Convention on the Elimination of All Forms of Racial Discrimination* identifies the dissemination of racist hate propaganda 'based on ideas or theories of superiority' or upon theories which 'justify or promote racial hatred and discrimination' as harmful racist behaviour which should be prohibited. It also identifies acts of violence or incitement to violence against groups of another colour or ethnic origin, and assistance in or financing of racist activities. Hate propaganda aimed at persuading the public to adopt a racist point of view, including the pernicious form of hate propaganda involving Holocaust denial, is disseminated through public and private speech, and through the publication of books, pamphlets, magazines and videos. Hate propaganda aimed at terrorising members of the targeted group or their supporters is disseminated through direct mailings or phone calls to individuals, racist graffiti (often including Nazi symbols) and damage to property associated with the targeted group, such as the group's meeting place, place of worship[19], schools or cemeteries.

The Harms Caused by Racist Activities

Racist behaviour hurts individuals, groups and society. Not only does it cause immediate pain to the victims[20], but it intimidates members of targeted groups from full participation in their own community. Racist abuse against an

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18 Anti-Defamation League *Hitler's Apologists: the Anti-Semitic Propaganda of Holocaust 'Revisionism* (1993) Anti-Defamation League New York.

19 Specifically prohibited in Colombia, Article 296 of the Constitution: Centre for Human Rights n 3, 57.

20 For descriptions of the immediacy and intensity of the harm wrought by the encouragement of prejudice, see the descriptions of Jane Elliott's experiments with young American children in Peters n 12, and with American college students in Zimbardo n 12, and also R Delgado 'Words that Wound' (1982) 17 *Harvard Civil Rights—Civil Liberties Law Review* 133,136–149.

identifiable group can result in the members of that group being fearful of joining in the political process, and can thus result in disempowerment of the group as a whole. This was recognised by members of the Canadian Supreme Court in the *Zundel*[21] and *Keegstra*[22] *Cases*, in the context of antisemitic hate propaganda and teachings, and by some countries which have legislated to protect the rights of minorities to participation in public debate. [23]

Racist behaviour spreads acceptance of racism and of white supremacy. Its effects are subtle and it relies upon indoctrination over time to establish that racism is acceptable.[24] It effectively denigrates the validity of 'non-Anglo' contributions and participation in all areas of society, and lays the foundation for the mistreatment of members of the victimised group.[25]

The harms of racist speech are cumulative and must be considered in the context of past acts against the particular group. Abuses that are minor in themselves become dangerous when they are part of a pattern of continuous racist abuse. In many cases, it is *because* of the history of violence against a particular group that hate propaganda has the power to intimidate and to harm that group's members. It can remind the victim of unspeakable brutalities carried out in the past.[26] The harm of hate propaganda is not the same as the upset and irritation caused by an attack upon the opinions or even the personal credibility of a political opponent who has deliberately put himself in a situation where his credibility can be questioned. Vilification which occurs as part of the 'rough and tumble' of politics is not the same as vilification which promotes 'hatred.'[27]

Racist speech usually attacks the victim in terms of a characteristic which is shared by the group of which his own family and his own social circle are part. Racist abuse thus attacks the victim's own identity, his family and his social group.[28]

Hate propaganda which takes the form of Holocaust denial is of course enormously painful to the survivors and to the families of those killed in the Holocaust — a blanket denial of the worth and the humanity of those who died.[29]

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21 (1992) 95 DLR.(4th) 202.

22 (1990) 61 CCC (3d) 1.

23 See eg legislation of the Byelorussian Soviet Socialist Republic 'concerning public discussion of important national issues', Article 4 of which states that 'Citizens of the Byelorussian SSR shall be guaranteed the right to participate freely in the discussion of important State and social issues': Centre for Human Rights n 3 36-37.

24 Mahoney n 4, 14.

25 Mahoney n 4, 9.

26 R Moon 'Drawing lines in a culture of Prejudice: *R v Keegstra* and the Restriction of Hate Propaganda' (1992) *University of British Columbia Law Review* 99, 115 — noting that none of the Canadian Supreme Court judges in *Keegstra* seemed to realise this.

27 *Keegstra's Case* n 22, 99.

28 P Rosenthal 'The Criminality of Racial Harassment' (1989-1990) 6 *Canadian Human Rights Year Book* 113, 118.

29 Holocaust denial is specifically prohibited by France, Austria, Germany, Israel : SJ Roth 'Denial of the Holocaust: An Issue of Law' (July 1994) Australian Institute of Jewish Affairs Inc, Briefing Paper

Arguments which play down the harm caused by racist speech and activities are usually based upon racist assumptions about how members of minority groups aren't so easily hurt as other people, or about how they should learn to cope with psychic harm. A related argument is that to allow racist speech is to 'promote right attitudes of tolerance' — that is, the intimidated have to learn to be tolerant of their intimidation, the abused have to be tolerant of their abuse.[30]

Part II: Constitutional Limitations on Australian Racial Vilification Legislation

The International Affairs Power

The Federal Government's power to legislate on the matters covered by CERD is derived from its constitutional powers in relation to international affairs, and therefore rests squarely upon its adoption of CERD. This means that Federal Government legislation against racial vilification cannot go beyond the meaning of CERD without the likelihood of being held to be unconstitutional. The difficulty is that CERD condemns racist behaviour in very general terms, leaving it to the signatory States to legislate in more detail.

Early in October 1994, fears were expressed that the Federal Government's proposed racial vilification legislation exceeded CERD, and was thus unconstitutional, because it 'included a ban on "imputing" a race to a person.'[31] It is submitted that this is too narrow an interpretation of the wording of CERD. At first sight Article 4 might seem to be worded more narrowly in relation to racial hatred offences than in relation to racial discrimination. Paragraph 1 of Article 1 of CERD defines the term 'racial discrimination' as meaning restrictive or exclusive behaviour 'based on race, colour, descent, or national or ethnic origin' which nullifies or impairs the victim's human rights. Most legislation enacted by signatory States to CERD uses the same or similar list of characteristics of the victim group not only to define 'racial discrimination', but also as part of the definition of acts of racial vilification. However, Article 4 does not use the same list of characteristics as Article 1 in condemning racial hatred and theories of racial superiority, but refers simply to 'any race or group of persons of another colour or ethnic origin'.

It is submitted that the wording of Article 4 is deliberately general, for example condemning supremacist theories 'which attempt to justify or promote racial hatred and discrimination *in any form*', and that it should not be read down

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No 23, and now also by Switzerland: Mahoney n 4 16. See generally: DE Lipstadt *Denying the Holocaust: the Growing Assault on Truth and Memory* (1993) The Free Press New York; G Seidel *The Holocaust Denial: Antisemitism, Racism and the New Right* (1986) Beyond the Pale Collective Leeds; T Solomon 'Denying the Holocaust' (1994) 8(2) *The Australian Journal of Jewish Studies* (forthcoming).

30 See W Sadurski 'Offending with Impunity: Racial Vilification and Freedom of Speech' (1992) 14 *Syd LR* 163, 175–6, 194–5.

31 M Kingston & S Voumard 'Government forced into redraft of race law' *The Sydney Morning Herald* (6 October 1994), 3.

by comparison with Article 1. Article 4 itself calls for a broad interpretation in that it specifically states that in adopting measures to eradicate racist discrimination and racist incitement to hatred 'due regard' must be had, by the States which are parties to the *Convention*, to the principles embodied in the *Universal Declaration of Human Rights* and to the rights set forth in Article 5 of CERD. Article 5 includes 'the right to security of person and protection by the State against violence or bodily harm' (paragraph (b)). The focus of Article 4 is therefore upon proscribing activities, in whatever form, which threaten the security of any person (such as hate propaganda aimed at terrorising members of the targeted group or their supporters) or which disseminate theories of racist supremacy (such as hate propaganda aimed at persuading the public to adopt a racist point of view). It is submitted that both Articles 1 and 4 should be interpreted broadly, and that where there is no definition of 'racial hatred' in CERD itself it is inappropriate to read into Article 4 the requirement that particular (limited) characteristics of the victim must be present for 'racial hatred' to exist, merely by analogy with the definition of 'racial discrimination' in Article 1.

Potential Conflict With an Implied Right to Freedom of (Political) Speech

The Australian Constitution does not grant any specific right to freedom of expression. The High Court decisions of *Australian Capital Television Pty Ltd v Commonwealth of Australia*[32] and *Nationwide News Pty Ltd v Wills*[33] have gone some way towards giving Australians a right to freedom of expression in a political context,[34] which has been confirmed by the High Court's handing down on 12 October 1994 of its decision in *Theophanous v Herald & Weekly Times.*

According to reports of that case[35] the four judges in the majority held that the 'chilling effect' of the present defamation laws upon free speech 'unacceptably affected the health of representative democracy, on which the constitution was based, and must be struck down'.[36] The three minority judges dissented strongly. Fears had already been expressed that the High Court could strike down Commonwealth legislation against racial vilification as being in breach of the implied constitutional right to free political speech[37] and the *Theophanous* decision will no doubt strengthen those concerns, even though there is no reason in principle why appropriate legislation against racial vilification should be seen as chilling free speech in the political or any other arena.

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32 (1992) 108 ALR 577.
33 (1992) 108 ALR 681.
34 See NF Douglas 'Freedom of Expression under the Australian Constitution' (1993) 16(2) *University of New South Wales Law Journal* 315; DZ Cass 'Through the Looking Glass: the High Court and the Right to Speech' (1993) 4 *Public Law Review* 229.
35 The judgments were unavailable to the author at the time of writing. Now reported at (1994) 124 ALR 1.
36 M Kingston 'Free Speech Rules, Says Court' *Sydney Morning Herald* (13 October 1994), 1.
37 Kingston and Voumard n 31.

McLachlin J of the Canadian Supreme Court expressed concerns in *Keegstra's Case*[38] that the prohibition of hate propaganda might have a chilling effect upon scientific discussion by intimidating scientists from researching topics which suggested differences between ethnic or racial groups. It is hard to imagine how any non-racist research could be discouraged by a ban on the expression of hate propaganda: expression is only likely to be 'chilled' where it is infected with racist assumptions.[39] It is in fact quite possible — although it may be difficult for some — to discuss political issues such as immigration without promoting racist views or denigrating groups on the basis that they are different from 'Anglo' Australians. Non-racist political speech need not be 'chilled' by reasonable legislation, and racial vilification legislation need not necessarily curtail political discussion.

In the case of *Cunliffe v Commonwealth*, also handed down on 12 October 1994, the High Court held by a majority of four to three that limitations on freedom of expression inherent in Part 2A of the *Migration Act 1958* (Cth) did not render that part of the legislation invalid. In his dissenting judgment, Chief Justice Mason made it clear that in his view "a law which targets information or ideas or which prohibits or regulates the content of communications ... would require compelling justification to sustain its validity"[40] and noted that "the court must determine whether the burden or restriction on the freedom is reasonably appropriate and adapted to the relevant purpose."[41] The same test was also mentioned by Gaudron J, who indicated that limits on free speech in areas "in which discussion has traditionally been curtailed in the public interests as, for example, with the law of sedition" would be most likely to be acceptable, saying that beyond that point, "some pressing public interest would have to be shown for the law to be valid."[42]

Clearly the law is in a state of flux in relation to the ambit of the implied right of free speech under the Australian Constitution, and Commonwealth racial vilification legislation must be drafted carefully. It is submitted, however, that it is not correct for any test of 'reasonable or appropriate' restrictions to be limited to traditional restrictions. As Professor Mahoney has noted, social and political functions of speech have changed, and the principle of free speech may require new content and meaning from that which it was given by nineteenth century thinkers.[43].

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38 *Keegstra's case* n 22, 120–121.
39 T Solomon 'Antisemitism as Free Speech: Judicial Responses to Hate Propaganda in Zundel & Keegstra' (1995) 13(1) *Journal of Australian-Canadian Studies* (forthcoming).
40 Unreported judgment, 12 October 1994, 13.
41 Unreported judgment, 12 October 1994, 14; see also Gaudron J at 101–102.
42 Unreported judgment, 12 October 1994, 102.
43 Mahoney n 4, 20.

Part III: Specific Problems in Drafting Offences

A common problem with legislation against the most extreme forms of racial vilification is that so many elements are included in each offence — as cumulative requirements, and not as alternatives — that the offence is almost impossible to prove. It is therefore unlikely that serious attempts will be made by the police or Department of Public Prosecutions to bring such offences to court. To make prosecution of the offence even less likely, the final requirement is sometimes that the Attorney-General must also consent to the prosecution.[44]

Two new crimes contained in the draft legislation against racial vilification circulated by the Federal Government in 1992 (the '1992 Bill') suffered from imposing cumulative requirements. The crime of inciting racist hatred required each of the following elements to be proved in court:

(a) the perpetrator in committing the act intended to stir up 'hatred' against a person or group 'on the grounds of' at least one of the following: race, colour, national or ethnic origin ;
(b) the act constituting the offence was a public act;
(c) the act was likely in all the circumstances to stir up 'hatred' against a person or group;
(d) the perpetrator knew that the act was a public act;
(e) the perpetrator knew that the act was likely to stir up 'hatred' against a person or group;
(f) the hatred that was likely to be stirred up was 'on the grounds of' at least one of the following: race, colour, national or ethnic origin of the victim.

Unfortunately, these requirements do not appear to identify the actual elements of racist behaviour as described in Part I of this article, and their cumulative nature makes it very difficult to make out the offence.

Public Act

Presumably it is intended that 'public act' includes an act communicated not only to all the public at large but also to any 'section of the public' or to any 'member of the public' selected as such. Australian courts have frequently considered these phrases where it has been necessary to decide whether invitations to buy securities have been circulated to the public[45].

It is arguable that there is no need for an additional requirement that the relevant act be a public one, let alone that the perpetrator knows his act to be public, where the offence requires some other fundamental element, such as

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44 *Public Order Act 1936* (UK) s 5A(5); *Criminal Code 1970* (Can) Article 281.1(3); *Race Relations Act 1971* (NZ) s 26; *Anti-Discrimination Act 1977* (NSW) s 20D(2).

45 The *Race Relations Act 1971* (NZ) picks up similar wording in s 25(2), referring to 'the public at large or . . . any member or members of the public'.

intent, to exist. Some countries impose a less stringent requirement, defining publication as an act in the presence of only a small number of individuals. Mexican legislation requires only one other person to be present,[46] and Cyprus, five.[47] Some countries do not require any public element in offences of serious vilification.[48]

Intent, Knowledge and Likelihood

The Bill referred to above requires the perpetrator to have knowledge about the nature and likely consequences of his act, as well as the intention to achieve those (likely) consequences. Proof of such a level of both knowledge and intent will be difficult[49] and would seem to go well beyond the principle that a person must understand the nature of his acts in order to have the requisite degree of *mens rea*. Likelihood can be useful as an alternative test, as in the Pakistani legislation which refers to acts carried out 'with intent to incite or which is likely to incite' and to acts which disturb 'or are likely to disturb' public tranquillity.[50] In Canada it is an offence (subject to certain limitations) either to communicate statements in any public place inciting hatred, where such incitement is likely to lead to a breach of the peace, or to communicate public statements wilfully promoting hatred against any identifiable group.[51]

It is submitted that it is preferable for the requirements of knowledge and intent to be alternatives. For such requirements to be cumulative could give the anomalous result that a person intending to stir up hatred, but knowing that because his acts are carried out in a non-racist, well-integrated community they are not *likely* to achieve that aim, could not be prosecuted. The more successful that the legislation is in achieving its aim of reducing racial conflict within communities, the harder it will be to secure convictions where one of the elements required is the likelihood of harm resulting.

A further anomalous effect is that the more outrageous and irrational the public act, the less likely it is to lead to ill will or hatred against the victims, and thus the less probable it is that it will be caught by any legislation that focuses upon likelihood of harm. Likelihood will generally depend upon the extent to which the racist acts or speech are taken seriously, although apparently unimportant racist acts or speech can still have effect over time, depending upon the volume and virulence of the propaganda. As Goebbels said, a lie told once is a lie, a lie told a thousand times is the truth. The offensive public question "How

46 Centre for Human Rights n 3, 115
47 Centre for Human Rights n 3, 68.
48 Centre for Human Rights n 3, 63, 64 (Cuba), 32 (Bulgaria), 72 (Denmark), 160 (Ukraine SSR), 166 (USSR)
49 See discussion by J Seemann 'Racial Vilification Legislation and Anti-Semitism in NSW: The Likely Impact of the Amendment' (1990) 12 *Sydney Law Review* 596, 609 of the provisions of the Israeli *Penal Code*, as well as s 5A of the *Race Relations Act 1976* (UK) (incitement to racial hatred).
50 Centre for Human Rights n 3, 130,129. See also legislation of Denmark (72) and New Zealand (121).
51 Sub-ss (1) and (2) respectively of Article 281.2 of the *Criminal Code 1970*.

many unbaptised babies did you bleed or eat last Pesach?",[52] not being particularly *likely* to stir up hatred amongst non-Jews in the wider Australian community because of its very outrageousness, would not be caught by legislation focusing upon the likelihood of the community being stirred up against Jews — despite being a question which is intended to, and does, instil fear of racist violence because of the degree of irrationality and hatred it displays.

Where knowledge of 'likely' consequences is to be an essential element of such crimes *in addition to* proof of intent, then ignorance or recklessness as to those consequences will effectively be a defence to conviction, as could also be a belief in the harmlessness or truth of the hate propaganda — because someone who believes in the truth of their racist statements could well argue that he did not think that such statements could incite hatred.

Defences of Sincerity or Truth

Some people believe that the sincerity of a perpetrator of racial vilification as to the truth of his racist statements somehow enhances his right to make those statements and diminishes his blameworthiness, no matter how abusive, harmful or offensive the statements might be. The New Brunswick Court of Appeal recently confirmed the right of a high school teacher to express extreme antisemitic opinions on television and in the newspapers while 'off duty' by reference to the teacher's "constitutional rights to freedom of conscience, religion and expression". The majority decision placed emphasis upon the idea that the teacher had been penalised by a board of inquiry for "publicly expressing his sincerely held views" — while placing less importance upon the content and harm of those views. [53]

The main reason that prosecution of racists leads to publicity for their racist views — a major concern of many media commentators[54] — is that most legislation against racist speech allows a defence of belief in the truth of the racist speech, particularly in the case of civil offences.[55] This effectively provides a defence for the most extreme racists, who are truly convinced of the truth of 'white supremacy'. It can also lead to results such as the re-trying of historical events such as the Holocaust, where the perpetrator claims a sincere belief in racist statements which include Holocaust denial.[56] For sincerity or belief in truth to be a defence always places more importance upon protecting the perpetrator's

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52 This statement was reportedly addressed to Jews who spoke in favour of anti-racist laws at public meetings held by the Federal Government in Adelaide in February 1993: *The Australian Jewish News* (19 February 1993), 1.

53 *Ross v Moncton Board of School Trustees District* 15 (1994) 110 D.L.R. (4th) 241, 248.

54 Adams n 6.

55 See eg Article 281.2(3)(c) of the Canadian *Criminal Code*: 'if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true'.

56 This happened in *Zundel's Case*. See Solomon n 38 and the articles referred to therein, as well as BP Elman 'Combating Racist Speech: the Canadian Experience' (1994) 32 *Alberta Law Review* 623.

statements or acts, no matter how evil-intentioned or reckless, than upon the harm caused to the targeted persons or group and to society generally.

Where the racist speech in question involves denigration of persons for their very existence, a decision has to be made between the benefits and the harms involved in allowing a complete defence of subjective belief in the truth of racist statements. The problem of reckless indifference to the effects of, or of belief in the truth of, racist hate propaganda could be remedied by a requirement that the perpetrator knew or *should have known* that his act was likely to cause offence or harm, stir up hatred, or whatever the criteria may be.

In any case, publicity for the occasional racist 'martyr' who defends himself in court is in my view outweighed by the benefits that Australian society as a whole, and members of minority groups in particular, will receive from proposed Commonwealth legislation against racial vilification. The publicity arising from the trial of a racist is also likely to be beneficial in leading to greater community discussion and understanding of the harms of racism. Although the Australian war crimes trials did not lead to convictions, they brought the reality of the Holocaust before people who otherwise might have given credence to the deniers.

Linking the Offence to the Characteristics of the Victim

The requirement that the offence be carried out 'on the grounds of' a specific characteristic of the targeted person or group has several difficulties. It is quite possible that the recklessness or stupidity of the perpetrator might result in his exculpation if his acts result from a belief that his victims are (for example) Jewish, when in fact they are not, or from his presumption that his victims have a particular characteristic which is not included in the list.

The more fundamental problem with legislation which lists specific characteristics is that it fails to take account of the fact that the essential elements of racist acts are intentional or reckless encouragement of violence against, or abuse of, individuals or groups perceived by the perpetrator as inherently different — for whatever reason.

Behaviour 'on the grounds of'

Racial vilification legislation which refers to the attributes of 'race, colour or national or ethnic origin' will not catch every manifestation of racial vilification even though every person has at least one of those attributes,[57] so long as the legislation requires that the act of vilification be made 'on the grounds of' one or more of those attributes. That wording requires a connection between the act and a particular listed attribute of the victim.

57 This was the argument put forward by the Federal Attorney General in the Second Reading Speech introducing the 1992 draft Commonwealth legislation.

Phrases such as 'on the ground of' and 'on the basis of' have been held by Australian courts to refer to 'the real actuating reason' for the prohibited act[58] and to require the characteristics in question to have a 'causally operative effect' on the committing of the prohibited act[59]. In *O'Callaghan v Loder*[60] the Victorian Equal Opportunity Tribunal indicated that it is sufficient if a proscribed ground 'constitutes a significant factor in the decision-making process', in order for the relevant act to have the necessary connection with the specific ground which will render that act unlawful. It does not even have to be the dominant ground for the unlawful act according to *Campbell v FH Productions & Ors*,[61] although in relation to the Commonwealth *Conciliation and Arbitration Act* it was held that the prohibited reason must be a 'substantial and operative' factor.[62] Under the *Sex Discrimination Act 1984* (Cth) s 8 and the *Racial Discrimination Act 1975* (Cth) s 18 the proscribed reason must be the 'dominant' reason for doing the act.

Real or Supposed Characteristics

It is arguable whether an imaginary or supposed characteristic can be said to have a causally operative effect upon the act in question, particularly where the prohibited act is allegedly on the ground of a characteristic which is generally imputed to persons of the victim's race or sex, that is, to a *presumed* characteristic. Thus in *Perera v Civil Service Commission & Anor (No 2)*[63] it was held that it was not enough to show in establishing discrimination 'on racial grounds' that the decision which was alleged to be discriminatory was taken on the basis of personal characteristics, even if those characteristics might be associated with the same racial group as the complainant.[64]

While some Australian State legislation specifically refers to imputed or presumed racial characteristics,[65] and French legislation refers to both 'true and supposed' characteristics[66], it is not always clear whether supposed or imaginary characteristics can be counted as an element of the relevant offence. If attributes of the victim on which the offence is based are required to be real, the perpetrator could be exonerated because of his own error. Such a result would hardly be acceptable in any other context. If one man attacks another because he thinks that his victim is homosexual, it would hardly be a complete defence to the attack that

58 *Hart v Jacobs* (1981) 39 ALR 209, 214. See generally GJ McCarry 'Discrimination "On the Ground of": a Note on an Overlooked Requirement' (1985) 13 *Australian Business Law Review* 250.
59 *Director-General of Education & Anor v Breen & Ors* (1982) 2 IR 93 (New South Wales Court of Appeal)
60 (1983) 5 IR 320 at 323.
61 (1984) EOC par 92-104 (Victorian Equal Opportunity Board)
62 *General Motors-Holdens Pty Ltd v Bowling* (1977) 51 ALJR 235. McCarry points out that this interpretation was derived from the previous interpretations of the phrase 'for the reason that' in trade practices legislation.
63 [1983] ICR 428 (English Court of Appeal)
64 433 and 439.
65 New South Wales, Victoria, Queensland, South Australia and Western Australia refer to actual or 'imputed' racial characteristics and the ACT to actual, imputed or presumed characteristics.
66 Centre for Human Rights n 3, 91

the victim was not homosexual, and that therefore the attack could not have been on the basis of an actual characteristic of the victim.

List of Characteristics is Inappropriate and Too Limited

Where legislation requires the offence of racial vilification to be on the grounds of one of a limited list of characteristics, sometimes with local variations, it is likely that many acts of racial vilification will not be caught. There are a variety of possible solutions, which are sometimes combined, including: extending the list of characteristics, focusing upon the intent to harm the victim or victim group, or emphasising the disharmony created within society through setting groups against each other.

If the list of characteristics is to be extended, it is important that 'religion' be included because it can be difficult to distinguish whether incitement against particular people is based on race or religion. The perpetrator may not make a clear distinction in his own mind between a Muslim woman and an Arab woman. A racist may abuse 'Muslims' rather than 'Arabs' to avoid prosecution.

Antisemitic hate propaganda may not always be covered by legislation where the list of relevant characteristics is too narrow.[67] To categorise Jewish people as all being of the same race invokes memories of the horrific results that followed from Hitler making such a false categorisation.[68] Neither 'race' nor 'ethnic origin' is on the face of it a realistic scientific description of Jewish people from many different countries.[69] Even if 'religion' were included as a category this would not cover everybody as many Australian Jews do not practise Judaism. The New South Wales *Anti-Discrimination Act* now defines race as including "colour, nationality, descent and ethnic, ethno-religious or national origin" which comes closer but still seems not entirely accurate. 'Descent' and 'ancestry' are used variously in the Queensland, Western Australian and South Australian legislation.[70] The characteristic which is actually shared by Australian Jews is a common historic and cultural legacy and therefore some degree of both subjective and objective common identity and common culture and it would seem preferable to have these characteristics specified in legislation rather than relying upon the necessity of generous judicial interpretation.[71]

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67 Seemann n 48, 604 to 606.

68 The Equal Opportunity Tribunal of New South Wales in an unreported judgment of 20 April 1993 (*Phillips v Aboriginal Legal Service*) confirmed in relation to the New South Wales Anti-Discrimination Act 1977 that being Jewish was 'being of a certain race'.

69 Although the New Zealand Court of Appeal held in *King-Ansell v Police* (1979) 2 N.Z.L.R. 531 that Jews in New Zealand formed a group with common ethnic origins, because of their shared customs, beliefs, and traditions: Richardson J 543. See also Lord Fraser's views of the meaning of 'ethnic' in *Mandla v Dowell Lee* (1983) 1 All ER 1069.

70 Queensland: *Anti-Discrimination Act 1992* s 4; Western Australia: *Equal Opportunity Act 1984* s 4(1); South Australia: *Equal Opportunity Act 1984* s 5(1).

71 Richardson J in *King-Ansell v Police* (1979) 2 NZLR. 531, 542 and 543 held that 'race' meant "whether the individuals or the group regard themselves and are regarded by others in the community as having a particular historical identity".

Some countries include political views[72], social or property status[73], profession or employment[74], caste, place of birth[75], customs or family situation[76] as characteristics on which an offence of serious vilification can be based. French legislation which refers to 'adherence or non-adherence' to a 'determined ethnic group, nation, race or religion'[77] recognises that non-membership can be just as important as membership in differentiating the victim from the perpetrator. The relevant offence does not focus in all cases so much upon the characteristics of the victim as upon the threat of violence against him, thus making the offence not so much one of 'racial vilification', but of serious vilification on any basis.

The Czechoslovakian Penal Code displays a different world view in prohibiting violence and threats against individuals or groups "because they adhere to the Socialist social and governmental system, because of their nationality, race, religion or because they are without confession".[78]

Pakistan and the Netherlands include an exhaustive list: Pakistan in its *Penal Code* prohibits incitement of "disharmony or feelings of enmity, hatred or ill will between different religious, racial, language or regional groups or castes or communities" on the grounds of "religion, race, place of birth, residence, language, caste or community *or any other ground whatsoever*" (emphasis added).[79]

It is arguable that any list of characteristics should indeed be exhaustive, or be done away with entirely. The act which should be punished is the act which is carried out with intent to incite hatred or violence, or arouse fear, and intent or recklessness should be the principal element of the prohibited act.

Provision is naturally made against such acts under non-specific criminal law which is not 'dedicated' to combating racist violence and vilification, but dedicated legislation is often regarded as necessary in addition to the general criminal law provisions.[80] This is particularly so where authorities are reluctant to use general law provisions to prosecute for racist activities.

The Manitoba *Human Rights Act 1974* requires only that a publication or action exposes or intends to expose a person or group to hatred.[81] The Federal Republic of Germany's legislation against incitement to hatred and vilification does not list any characteristics of the targeted group but simply prohibits the incitement of hatred or urging violence against 'certain groups in the population', and

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72 Bulgaria, Mauritius, the Netherlands, Tuvalu: Centre for Human Rights n 3, 32, 112, 116, 157.
73 Ukrainian SSR: Centre for Human Rights n 3, 160.
74 Trinidad & Tobago: Centre for Human Rights (1991) 152.
75 India: Centre for Human Rights n 3, 101.
76 France: Centre for Human Rights n 3, 91.
77 Centre for Human Rights n 3, 89. See also legislation of Tuvalu: Centre for Human Rights (1991) 157.
78 Centre for Human Rights n 3, 69 (original English text)
79 Centre for Human Rights n 3, 129,116.
80 M Jones 'Using the Law to Combat Hate Speech' (1994) 7 *Without Prejudice* 14.
81 Seemann n 48, 608.

prohibits: insulting, maliciously ridiculing or defaming such groups, where those acts 'attack the human dignity of others in a manner liable to disturb the public peace' (Section 130 of the *Penal Code*).[82] Germany also differs in its approach in legislating in great detail against the glorification of violence in any form.[83]

Other countries focus upon the use of force or violence against a person or group, including property damage, on the basis of specific 'racial' characteristics.[84] The Danish *Penal Code* underpins the Danish legislation against harmful racist behaviour by provision against communications which threaten or insult groups 'on the grounds of race, colour, national extraction, ethnic origin, or religion' (s 266b) as well as by prohibiting in more general terms, and without requiring any specific characteristics to be proved, the making of public statements aimed at provoking acts of violence or destruction or threats to commit punishable acts 'in a manner likely to inspire some other person with serious fears concerning the life, health or welfare of himself or of others' (Sections 266a and 266).[85] Denmark has also legislated for damages to be paid upon the violation of another person's 'peace' or 'honour'[86] and prohibits a person being 'insulted or exposed to indignity'.[87] The Federal Republic of Germany emphasises the protection of human dignity (Article 1 of its *Basic Law*, and Section 130 of the *Penal Code*) and the right to inviolability of personal honour (Article 5).[88] 'Honour' or 'dignity' are the basis for proscribing racial vilification in other countries too.[89]

Pakistan penalises acts 'prejudicial to the maintenance of harmony' between groups having different religions, races, or languages 'or any group of persons identifiable as such on any ground whatsoever and which disturbs or is likely to disturb public tranquillity'. [90] New Zealand prohibits inciting racial disharmony,[91] Cyprus prohibits the encouragement of 'mutual discord' and a 'spirit of intolerance' between groups[92] and Poland prohibits activities which advocate or extol discord.[93]

Stirring up "Hatred"

The requirements that the perpetrator intends to stir up hatred and that the perpetrator's act 'is likely, in all the circumstances, to stir up hatred'[94] are not

82 Centre for Human Rights n 3, 94
83 Centre for Human Rights n 3, 95
84 Bulgaria, Czechoslovakia, Cuba, Portugal, France, the Netherlands: Centre for Human Rights n 3, 32–33, 69, 63, 89, 117, 145.
85 Centre for Human Rights n 3, 72.
86 Centre for Human Rights n 3, 73
87 Centre for Human Rights n 3, 72.
88 Centre for Human Rights n 3, 92, 93, 94 and 95
89 Centre for Human Rights n 3, 86 (El Salvador), 94 (Germany), 99 (Hungary), 126 (Nigeria).
90 Centre for Human Rights n 3, 129
91 Centre for Human Rights n 3, 124.
92 Centre for Human Rights n 3, 69.
93 Centre for Human Rights n 3, 134.
94 Racial Discrimination Act Amendment Bill 1992 (Cth) s 58.

uncommon and sometimes cumulative requirements in legislation against extreme forms of racial vilification. It is not clear who is to be stirred up — whether it is sufficient that a small distinct group is likely to be 'stirred' to hatred, or whether the likelihood relates to the much more stringent test of arousing the community as a whole to hatred[95].

'Stirring up' is not an adequate description of the possible effect of public hate propaganda. It could imply that the hatred needs to exist already, or that the act must have immediate perceptible consequences. Initiating and encouraging racial hatred are equally offensive and such acts should still be penalised even if they have no immediately perceptible consequences. The Zionist Federation of Australia has suggested that 'promote or increase' be included in Commonwealth legislation against racial vilification in addition to the phrase 'stir up'.[96] 'Promote' is used in section 281.2 (2) of the Canadian *Criminal Code* of 1970. Use of the words 'expose,' as in the Manitoba *Human Rights Act* 1974[97], and 'excite' as in the New Zealand *Race Relations Act*, would seem to be desirable additions.

The simple word 'hatred' also creates problems of interpretation. The word 'hate' is used in racial vilification legislation in Australia[98], Canada, Bulgaria, Dominica, Germany, Mexico and the Netherlands.[99] Members of the Canadian Supreme Court have held different interpretations of the concept of wilful promotion of hatred.[100] In *R. v Keegstra,*[101] McLachlin J referred to political name-calling as being easily described as 'promoting hatred'.[102] She held that to ban the wilful promotion of hatred would also proscribe such activities as the promotion of 'active dislike'.[103] In the same case the majority determined that the term 'hatred' should be interpreted in the relevant context only to cover 'the most intense form of dislike'[104] as connoting 'emotion of an intense and extreme nature that is clearly associated with vilification and detestation,'[105] 'a most extreme emotion that belies reason; an emotion that, if exercised against members of an identifiable group, implies that those individuals are to be despised, scorned, denied respect and made subject to ill-treatment on the basis of group affiliation.'[106]

Other legislation contains possible alternatives to what may be a stringent test of proving 'hatred'. The wording of s 9A of the New Zealand *Race Relations Act*

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95 See on a similar point Seemann n 48, 607.
96 Submission of the Zionist Federation of Australia *The Australian Jewish News* (12 February 1993), 5.
97 Seemann n 48, 608.
98 New South Wales: *Anti-Discrimination Act 1977* ss 20B, 20C, 20D; Queensland: *Anti-Discrimination Act 1992* s 126; Western Australia: *Criminal Code* ss 77, 78, Australian Capital Territory: *Discrimination Act 1991* ss 66, 67.
99 Centre for Human Rights n 3, 32, 43, 81, 94, 115–116, 117.
100 The decision related to s 319(2) of the Canadian *Criminal Code*, RSC 1985, c C-46.
101 (1990) 61 CCC (3d) 1.
102 page 99
103 pages 116 to 118.
104 page 60.
105 page 59.
106 pages 59 and 60.

1970[107] refers to communications 'likely to excite hostility or ill-will against, or bring into contempt or ridicule, any group of persons' and it is arguable that such wording would be preferable to a requirement of inciting 'hatred'. Section 20C of the *Anti-Discrimination Act 1977* (NSW) similarly contains the concept of inciting serious contempt for, or severe ridicule of, a person or group. The German *Penal Code* includes not only 'inciting hatred' but also as alternatives: 'urging violence or arbitrary acts' and 'insulting, maliciously ridiculing or defaming' particular groups, in each case involving an attack on the 'human dignity of others'.[108] Austria, Byelorussia SSR, Cyprus, Trinidad and Tobago and the Ukrainian SSR and USSR all legislate against acts arousing or exciting some or all of: hostility, enmity or ill-will.[109]

Less stringent criteria are imposed by legislation which concentrates upon threats, slander, abuse or insult to a victim or group.[110] "Contempt" and "ridicule" are often used in this context, for example in New Zealand and Mexican legislation.[111] France and Germany recognise in their legislation the concept of group defamation.[112]

Penalties

The issue of the desirability of imposing criminal sanctions for the most severe offences is outside the scope of this article[113]. It is assumed that custodial penalties should be an available option in cases of racist hate propaganda likely to instil fear of violence, by parity with penalties for battery. It should be noted that custodial penalties are already available under the *Sex Discrimination Act*,[114] *Racial Discrimination Act*[115] and *Disability Discrimination Act* [116] for acts such as victimisation, providing false or misleading information, or disclosure of private information by a tribunal member.

Conclusion

Legislation against racial vilification should follow Article 4 of CERD in prohibiting a range of hate propaganda including direct mailing, the promotion of racial superiority, and participation in, and financing of, organisations that carry out such activities.[117]

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107 Centre for Human Rights n 3, 121.
108 Centre for Human Rights n 3, 94
109 Centre for Human Rights n 3, 27, 35, 68, 152, 161, 167.
110 Centre for Human Rights n 3, 88 (Finland), Germany (94), Netherlands (117), Poland (134).
111 Centre for Human Rights n 3, 121,115/6.
112 Centre for Human Rights n 3, 90,94.
113 For a brief discussion see Seemann n 48, 612-614.
114 s 93, 94, 112.
115 s 27E, 27(2), 27F.
116 s 112, 42, 127.
117 Bulgaria, Czechoslovakia, Ecuador, the Netherlands, Portugal and Spain legislate specifically against such associations or their support and financing: Centre for Human Rights n 3, 32, 70, 85, 117, 145–6, 150.

Legislation against extreme forms of racial vilification such as hate propaganda should not require the proof of many cumulative elements. The drafting of offences must take into account that racist activities are not necessarily connected with actual attributes of targeted individuals or groups. Drafting should proscribe racial vilification both where there is intent to cause harm and where there is recklessness as to whether harm results, because of the destructive message that unpunished racial vilification gives to society at large.

Legislation would provide justification for individuals not to put up with racist speech or action. It would provide moral and legal support to those people whose natural instincts are against racism. In an increasingly secular society, and particularly in a multicultural society, law has an enhanced role to play in setting moral standards. Failure of governments to legislate in the face of racial vilification and violence gives those who are harmed the even more painful message that the government will not protect them.[118] High Court decisions confirming an implicit Constitutional right of freedom of expression, at least in the context of political discussion, should not be used as an excuse by the Federal Government for abrogating its responsibilities to protect its citizens from vilification, and to promote values that are appropriate to Australian society. Legislation not only establishes sanctions against unacceptable behaviour, but creates a public conscience and a minimum standard for expected behaviour.[119] In this respect it has an essential role to play in combating racism.

118 Mahoney n 4 (below).
119 Quigley J (at first instance) in *Keegstra's Case*, quoted in Rosenthal n 28, 122.