

# RACIAL VILIFICATION LEGISLATION AND ANTI-SEMITISM IN NSW: THE LIKELY IMPACT OF THE AMENDMENT

## INTRODUCTION

In May 1989 NSW became the first Australian jurisdiction to pass legislation prohibiting incitement to racial hatred. The *Anti-Discrimination (Racial Vilification) Amendment Act 1989* (hereafter "the Amendment") was the subject of much public debate, but ultimately received remarkable support from all political parties in Parliament.<sup>2</sup> It was intended by the legislature to be "a clear statement that racial vilification has no place in our community";<sup>3</sup> "a start in eliminating the racial intolerance that affects so many people's lives".<sup>4</sup> This paper analyses the ability of the Amendment<sup>5</sup> to fulfil these objectives by examining its likely application to the situation of the Jewish community of NSW. Section 1 explores the historical background of anti-Semitism in Australia. Section 2 describes some examples of anti-Semitic racial vilification in the contemporary community which might be targets of the legislation. Section 3 applies the provisions of the Amendment to these examples, compares it with legislation overseas, and considers some of the problems which may arise.

Certain issues which are beyond the scope of this paper need to be identified. The first is the controversy over the restriction of free speech

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<sup>1</sup> I am grateful to Dr Hilary Astor for her help and encouragement in the preparation of this paper.

<sup>2</sup> See *Hansard*, 10 May 1989 NSW Legislative Assembly pp. 7919-7932; NSW Legislative Council pp. 7810-7839; The only person to speak against the Amendment in the entire debate was the Independent MLC Mrs Marie Bignold.

<sup>3</sup> The Hon. E. P. Pickering, Minister for Police, Second Reading Speech, *Hansard*, NSW Legislative Council, 10 May 1989, p. 7812.

<sup>4</sup> The Hon. J. Dowd, Attorney General for NSW, Reply speech, *Hansard*, NSW Legislative Assembly, 10 May 1989, p. 7932.

<sup>5</sup> Which came into operation on 1 October 1989.

by legislation. It is accepted here that there must be a balance between the right to free speech and "the right to a dignified and peaceful existence free from racist harassment and vilification".<sup>6</sup> This paper is about whether that balance as it has been defined by the legislation will in fact protect Jews in NSW from racial vilification. The second issue is whether any problems might arise from the interaction between the NSW *Anti-Discrimination Act 1977* (hereafter "the Act") and the Federal *Racial Discrimination Act 1975*; this is a Constitutional law question which requires judicial resolution. Finally, the potential for jurisdictional problems in attempts to prosecute publishers or broadcasters living in other Australian States is ignored here; this is a practical matter which will vary from case to case.

## 1. HISTORY OF RACIAL VILIFICATION OF JEWS IN AUSTRALIA

There have been Jews in Australia since the beginning of European colonisation. Anti-Semitism has also been present since that time, playing its part in moulding Australian racist attitudes. Encel argues that for many years it was possible to imagine that prejudicial treatment of Aborigines, non-British migrants and Asians were separate issues; but that now these are more easily seen as "aspects of one central question of racialism".<sup>7</sup> Thus, while recognising that the racism experienced by each of these groups has been unique, it is important to note that those experiences have also been connected. It is in this context that anti-Semitism is examined here; the experiences of Jews will also be relevant in assessing the likely impact of the Amendment on other manifestations of racism in NSW. The focus is on racial vilification of Jews rather than other forms of anti-Semitic activity which would potentially come under the pre-Amendment provisions of the Act.<sup>8</sup>

While institutional anti-Semitism was not a feature of Australian society, and, for the most part, Rubinstein argues that "the Australian Jewish community managed . . . to keep anti-Semitism in perspective",<sup>9</sup> the economic depression of the 1890s and the influx of Russian Jewish immigrants revealed a high level of anti-Jewish prejudice in Australia. Even serious newspapers such as the *Age* resuscitated the stereotypes of Jews as usurers, and the *Bulletin* attacked Jews "as part of international finance and usury". The sensationalist *Truth* justified the Russian pogroms

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<sup>6</sup> NSW Government, *Discussion Paper on Racial Vilification and Proposed Amendments to the Anti-Discrimination Act 1977*, December 1988, p. 1.

<sup>7</sup> S. Encel, "The Nature of Race Prejudice in Australia", in F. S. Stevens (ed) *Racism: the Australian Experience. Vol. 1: Prejudice and Xenophobia* (Sydney, Australia and New Zealand Book Co., 1971), pp. 30-40 at p. 39.

<sup>8</sup> An example of this would be the continuing policies of the Melbourne Club and the Royal Sydney Golf Club to discriminate, inter alia, against Jews, denying them membership; this and other instances are documented by S. Rutland in *Edge of the Diaspora: Two Centuries of Jewish Settlement in Australia* (Sydney, Collins, 1988); see particularly p. 144.

<sup>9</sup> H. Rubinstein, *Chosen: the Jews in Australia* (Sydney, Allen and Unwin, 1987), p. 159.

on the basis that Jews had killed Christ and were responsible for all wars. Left-wing anti-Semitism also began to develop, becoming a "stock-in-trade" of sections of the labour movement. Anti-Semitism was apparent in literature, particularly that of nationalist writers such as Henry Lawson and Norman Lindsay.<sup>10</sup>

The fringe Right-wing groups<sup>11</sup> such as the New Guard which emerged in the 1930s continued the portrayal of Jews as menacing financiers; additionally, the bogey of Communism was added to the list of Jewish "crimes". Local Nazi groups were established which received publications from Germany. The Guild of Watchmen of Australia marked Hitler's rise to power by issuing the *Protocols of the Elders of Zion*. This "classic" anti-Semitic work, which appeared in Czarist Russia at the turn of the century, purports to be the record of the deliberations of Jewish "elders" plotting world domination. It is used as a source by most radical, particularly Right-wing, anti-Semites, despite having been proved in the 1920s to be a complete forgery. It was plagiarised for the most part from a satire in the form of imaginary dialogues on Napoleon III by a writer called Maurice Joly.<sup>12</sup> The *New Times*, Melbourne periodical of the Douglas Social Credit Movement, serialised the *Protocols* during World War II.<sup>13</sup> Its Sydney counterpart, the *New Era*, made a hero of American Henry Ford and publicized the activities of Australian journalist Eric Butler, both noted anti-Semites.<sup>14</sup> The influx of Jewish refugees from Europe during this period sparked resentment which Rubinstein argues would have greeted them even if they were not Jewish, but which in this climate "was expressed in the traditional language of stereotyping and easily developed into anti-Semitism".<sup>15</sup>

A relative lack of anti-Semitism in the immediate post-War period might be explained by the great economic growth and opportunity of that period; since the decline in economic conditions in recent decades began, anti-Semitism has certainly increased.<sup>16</sup> The fringe Right-wing

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<sup>10</sup> Rutland, *op. cit.*, pp. 93-97, and H. Rubinstein, *op. cit.*, pp. 159-163.

<sup>11</sup> See the discussion of the following and other groups in Rutland, *op. cit.*, pp. 197-201; H. Rubinstein *op. cit.*, pp. 178-179.

<sup>12</sup> *Dialogues aux enfers entre Machiavel et Montesquieu* (1864). The plagiarism was first reported by Phillip Graves in *The Times*, August 1921. Subsequent investigations confirmed the *Protocols*' complete lack of authenticity; c.f. *Encyclopaedia Britannica* (William Benton, 1973) Vol. 2, p. 84.

<sup>13</sup> A notorious international example of uses of the *Protocols* in anti-Semitic literature is Henry Ford's book *The International Jew* (subtitled "The World's Foremost Problem") (1948—no publishing details given). This uses quotes from the *Protocols* as chapter headings. For example, Ch. 5, "The Jewish Political Programme" which quotes the "Fifth Protocol": "We will so wear out and exhaust the Gentiles . . . that they will be compelled to offer us an international authority"; and Ch. 9, "Bolshevism and Zionism", quoting the "Sixth Protocol": "We shall soon begin to establish huge monopolies, colossal reservoirs of wealth, upon which even the big Gentile properties will be dependent to such an extent that they will all fall together with the government credit . . ." (p. 124).

<sup>14</sup> C.f. reference to Ford *supra* n. 13.

<sup>15</sup> H. Rubinstein *op. cit.*, p. 178.

<sup>16</sup> Creighton Burns, in Australian Human Rights Commission, *Words That Wound—Proceedings of the Conference on Freedom of Expression and Racist Propaganda* (Occasional Paper No. 3, Canberra, AGPS, 1983), pp. 66-68.

anti-Semitism of groups such as National Action and the League of Rights<sup>17</sup> has continued, and gained grassroots support. There has also been the growth of extreme Left and radical Arab anti-Zionism, using a rhetoric "whose images and language echo precisely the images and language of traditional anti-Semitism . . . labelling all Jewish and Israeli activities as 'Zionist', and then hiding under the UN resolution that 'Zionism is a form of racism' ".<sup>18</sup> This has been particularly felt on campuses since the 1960s. There have been regular incidents of vandalism and offensive graffiti.<sup>19</sup> Traditional anti-Semitic imagery is also occasionally found in the mainstream press; an example was a cartoon in the *National Times* in 1984 which accompanied an article critical of Israel's treatment of Palestinian Arabs. The cartoon depicted a cloven-hoofed, stereotypically "Jewish" figure, apparently a rabbi, with a Nazi SS symbol on its clothing, slicing a child to pieces under a background of what appeared to be a crescent moon dripping with blood. This cartoon was the subject of a successful complaint to the Australian Press Council.<sup>20</sup>

While anti-Semitism in Australia is less significant when compared with the general tolerance of ethnic groups within the general community, its impact is still, and increasingly, felt. Of 1700 formal complaints made to the Human Rights Commission of racial discrimination between October 1975 and April 1982, 1193 were primarily of incitement to racial hatred or racial or ethnic defamation. The great majority of these were brought against organisations or individuals whose express aim was to promote racial hatred, usually against Jews. More than half of the "really racist propaganda" was against Jews.<sup>21</sup>

The next section deals in a more detailed way with some of the contemporary manifestations of anti-Semitic racial vilification in Australia.

## 2. CONTEMPORARY EXAMPLES

### (i) *The League of Rights*

In 1946, the League of Rights, successor to the Social Credit Movement, was established in Victoria; by 1960 it could proclaim itself a national

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<sup>17</sup> H. Rubinstein *op. cit.*, p. 226. The League is discussed below.

<sup>18</sup> H. Rubinstein *op. cit.*, pp. 227-228. The Australian Parliament has called for the quashing of this resolution.

<sup>19</sup> Rutland *op. cit.*, p. 337.

<sup>20</sup> The Press Council found that this figure was a symbol of racial hatred of the Jewish people. While the cartoonist "was entitled . . . to express his strong disapproval of the treatment of Palestinians in Israel, and to convey that he saw an ironic parallel with Nazi Germany's drive for Lebensraum", he "went beyond that and used images which tapped deep well-springs of racial and religious prejudice, thereby giving offence to at least some Jewish people through the revival of memories of past persecution". The newspaper should have been aware that the cartoon was capable of being seen as anti-Jewish as well as a political comment. Australian Press Council, *Annual Report No. 9* (1984), pp. 29-30.

<sup>21</sup> *Proposal for Amendments to the Racial Discrimination Act to Cover Incitement to Racial Hatred and Racial Defamation*. Australian Human Rights Commission (Report No. 7, Canberra, AGPS, 1984), pp. 3-6.

organisation. It grew rapidly, "winning support from sections of the rural community and small businessmen who felt threatened by large corporations, trade unions and the expansion of government control".<sup>22</sup>

In 1946 Eric Butler, who founded and is still the leader of the League, published *The International Jew*, a commentary on the *Protocols*. In its opening pages, he wrote: "Hitler's policy was a Jewish policy; it helped further the declared aim of International Jewry, in spite of what Hitler SAID about International Jewry".<sup>23</sup> The League continues to reprint this and other explicitly anti-Semitic material. It is the main Australian distributor of Holocaust denial material,<sup>24</sup> and continually agitates against what it terms "political Zionism". This includes claiming that the Jews of today are not Semites at all (thus, the League cannot be "anti-Semitic") and alleging that both Wall Street and the Kremlin are controlled by Zionists. The League's platform also includes anti-Asian and anti-Aboriginal campaigning.<sup>25</sup>

The League might simply exist on the ineffectual political fringe if not for its involvement in "mainstream" conservative issues. It advocates states' rights, retention of the monarchy and the traditional Australian flag, a strong defence policy and lower taxes. As a result, mainstream politicians have occasionally associated themselves with the League—for example Sir James Killen in the 1960s and Senator Flo Bjelke-Petersen in the 1980s—giving it a certain amount of credibility.<sup>26</sup> Other politicians are extremely concerned about this. In April 1988, National Party Senator Ron Boswell exposed the League in the Senate. He noted "an alarming escalation of the League's activities" in recent months; including the use of churches as "innocent vehicles" to spread the League's philosophy, and the League's involvement in the controversy over World Heritage listing for Queensland forests—timberworkers were told by the League that their jobs were being sacrificed as part of an international plot by Jewish bankers.<sup>27</sup>

### *(ii) Holocaust imagery and Holocaust revisionism*

The destruction of European Jewry during World War II, known as the Holocaust, was one of the most devastating events in Jewish history. Not surprisingly, Holocaust revisionism—the term used to describe those who argue either that the Holocaust did not happen, or that it has been grossly exaggerated—outrages the Jewish community of Australia.

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<sup>22</sup> Rutland *op. cit.*, p. 336.

<sup>23</sup> *Ibid.*; C.f. H. Rubinstein *op. cit.*, p. 226, citing K. D. Gott, *Voices of Hate* (Melbourne, Dissent Publishing Association, 1965), p. 19.

<sup>24</sup> See below.

<sup>25</sup> H. Rubinstein *op. cit.*, pp. 226-227.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Hansard*, Australian Senate, 27 April 1988, p. 1945.

The League of Rights is one of the major Australian proponents of the revisionist view. Butler's *The International Jew* denies that six million were exterminated, accepting only that conditions in concentration camps deteriorated through the war, and that there were probably "isolated acts of barbarism". Books in the League bookshops include *The Diary of Anne Frank—a Hoax; Debunking the Genocide Myth;* and *None Dare Call it a Conspiracy*.<sup>28</sup> In 1987, the League was involved in British historian David Irving's Australian tour, which promoted his book *Churchill's War*. This book, after being rejected by a number of British companies,<sup>29</sup> was published by the West Australian Veritas Press, which publishes material "strikingly identical" to that in the League's bookshops.<sup>30</sup> It blames Churchill for much that befell Britain during the war, outlining how Churchill was "bought" by a group of wealthy Jews after being snubbed by Hitler in 1932, thus becoming the "hired help" of these "Elders of Zion", and plotting war with Germany.<sup>31</sup> An earlier Irving book claims that Hitler was innocent of responsibility for what happened to the Jews.

John Bennett of the Australian Council for Civil Liberties is another prominent revisionist. Bennett's book, *Your Rights*, has been published since 1974, with regular revisions. While it originally focussed on civil liberties in Australia, the 1989 version is "an attempt to rewrite the history of Europe in the twentieth century".<sup>32</sup> It denies that the Holocaust occurred, asserting that the claim of six million deaths was fabricated by "Zionist propagandists" to win sympathy for the State of Israel. "Zionist power" is also "both a cause and a result" of Prime Minister Bob Hawke's opinions.<sup>33</sup>

### (iii) Arab anti-Semitism

The tensions between Israel and its Arab neighbours have unfortunately been imported to Australia. Some elements of the Arab-language press make regular attacks on Judaism in conjunction with their attacks on Zionism. An example, which is by no means isolated: in April 1981 an article in *An-Nahar* was the subject of a successful complaint by the NSW Jewish Board of Deputies to the Australian Press Council. The article, beginning as an attack on Israel, then set out material alleged to be taken from the Torah (the Pentateuch—the basis of Jewish law) and the *Protocols*. "The whole tenor of these alleged teachings was to bring the Jewish religion, wherever found and of whatever political

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<sup>28</sup> Senator Boswell, *Hansard*, Australian Senate, 27 April 1988, p. 1946.

<sup>29</sup> Anthony Dennis, "Rejected Churchill Book Published Here", *Sydney Morning Herald*, 15 September 1987.

<sup>30</sup> Boswell, *op. cit.*

<sup>31</sup> Robert Manne, "Revising History, Minus the Facts", *The Age*, 30 September 1987.

<sup>32</sup> Gerard Henderson, *The Australian*, 3 April 1989.

<sup>33</sup> *Ibid.*

persuasion, under a wholesale condemnation and could not fail to excite anti-Jewish feeling when published in Australia". The paper apologised for "any inconvenience", and "professed to adopt a stand against racism".<sup>34</sup> Similar attacks in certain Arab-language publications, however, continue.

Most recently, the Jewish community of Sydney has been concerned about the activities of Sheikh Taj Eldine El-Hilaly, Imam of the Lakemba mosque. Hilaly has linked Jews with "all the wars and problems which threaten peace and stability of all the world", and also accused Jews of trying "to control the world . . . by . . . treason" and by "sexual perversion".<sup>35</sup> These statements were made in October 1988, addressing a group of Muslim students, the Senior Usrah, at Sydney University, and have been described as "among the most shockingly anti-Semitic ever to be uttered publicly by a religious leader in Australia".<sup>36</sup> The speech aroused a public controversy which resulted in an investigation by the Ethnic Affairs Commission of NSW. The Commission found that the speech contained material unacceptable to the community at large and hurtful to Jews; which justified, although it did not incite, violence towards the Jews.<sup>37</sup>

Representatives of various Islamic organisations were quick to dissociate themselves from the Imam's statements.<sup>38</sup> However, the Senior Usrah published a response<sup>39</sup> which accused the Jewish community of distortion and media manipulation; claimed that the Imam's comments referred only to "Biblical Jews" as portrayed in the Qur'an, and not to contemporary Jews, and justified what he had said by reference to the UN resolution that "Zionism is racism" and to the *Protocols*.

In August 1989 a group called SUMSA (Sydney University Muslim Students Association), which may be associated with the Senior Usrah, held a meeting on campus entitled "Zionism—the Other Face of Nazism". During the meeting, the guest speaker when asked, refused to comment on the statements made by Sheikh Hilaly to the Senior Usrah. In the discussion following the meeting, the same speaker justified his comments about Jewish and Zionist "plans for world domination" by producing a copy of the *Protocols*, which he cited as "history".

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<sup>34</sup> Australian Press Council, *Annual Report* No. 6 (1982), pp. 53-54.

<sup>35</sup> Paolo Totaro, Ethnic Affairs Commission of NSW, *S. 16(a) Investigation into Certain Utterances of Imam Taj Eldine El-Hilaly, Chairman's Report to the Minister*, 11 November 1988, pp. 4-5.

<sup>36</sup> Susan Bures, "Muslim Religious Leader Slanders Jews", *Australian Jewish Times*, 21 October 1988, p. 3.

<sup>37</sup> Totaro, *op. cit.*, p. 9.

<sup>38</sup> Telegram, President of the Australian Federation of Islamic Councils, to the Prime Minister, 2 November 1988 (NSW Jewish Board of Deputies Archives). C.f. *Hansard*, House of Representatives, 10 November 1988, p. 2825, and Dr Ahmad Shboul, Senior Lecturer, Semitic Studies, University of Sydney and Member, Advisory Council on Multicultural Affairs, letter to the *Australian Jewish Times*, published 4 November 1988, p. 10.

<sup>39</sup> Senior Usrah Group, "The Case of Imam Tajuddin al-Hilaly" (monograph).

(iv) *Videogames*

In September 1987, the *Sydney Morning Herald* publicised the arrival in Melbourne of violent and anti-Semitic computer and video games thought to originate among West German neo-Nazis. With names like "Hitler", "Diktator", "Auschwitz" and "Stalag", they "Let players act out parts—like concentration camp guards who prevent Jewish prisoners from escaping death in gas ovens".<sup>40</sup>

Radio 2GB reported the Jewish community's "outrage", and the Victorian Jewish Board of Deputies' request for the government to ban them.<sup>41</sup> The Victorian Minister for Consumer Affairs referred the matter to the censorship review panel in the Law Department, asking the working party reviewing X-rated video laws "to consider this game a threat to public morals". However, they could not be removed from sale under existing laws because they were not "physically dangerous".<sup>42</sup>

(v) *Hate mail*

Another type of vilification is the "hate mail" regularly received by members of both the non-Jewish and Jewish communities. The form this mail takes varies. Examples include long strings of quotes extracted from classic anti-Semitic sources, interspersed with more "updated" statements such as the claim that the Jewish "strategy" of exploiting black/white tension had been written into the US Congressional record and now reached Australia; "So the Aboriginal is under the spell of the same policy nothing to do with the dreamtime just a jew's nightmare" [sic]. Some examples include anti-Asian material.<sup>43</sup>

This "mail" reaches members of the public in a number of ways. Some is addressed to Jewish individuals and organisations by name, or to people who have written letters to newspapers on topics of public interest, whether or not these are related to topics relevant to Jews or the Jewish community. Often, mail will be addressed to "The School Captain", at a school; the Publications Committee of the Sydney University Union also receives such material regularly. Random letterboxing is also common, and sometimes material is left on the seats of trains or in other public places. Often the "mail" is anonymous; however, in many cases it is signed by groups such as National Action; or by individuals. It is estimated that at least one person or organisation in NSW receives this mail every day.<sup>44</sup>

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<sup>40</sup> G. Leech, "Steps to Beat the Spread of Nazi 'games' ", *Sydney Morning Herald*, 8 September 1987.

<sup>41</sup> "Phil Simon Live", Radio 2GB, 10 September 1987.

<sup>42</sup> Leech, *loc. cit.*

<sup>43</sup> NSW Jewish Board of Deputies archives.

<sup>44</sup> Information from Jeremy Jones, gathered over seven years involvement with the Public Relations Committee of the NSW Jewish Board of Deputies, personal interview.



### 3. THE RACIAL VILIFICATION AMENDMENT

The examples discussed here all arguably express "hatred towards, serious contempt for, or severe ridicule of" Jews. Before the passage of the 1989 Amendment, there was no redress against any of them beyond (where applicable) Australian Press Council or Australian Broadcasting Tribunal reprimands.<sup>45</sup> A number of issues bear on the question of whether the new law in fact changes the situation and provides avenues for the protection of the Jewish community of NSW.

#### (i) Definition of "race"—does it protect Jews?

Jewish identity is a complex mixture of religious, ethnic, national and socio-cultural factors.<sup>46</sup> The Anti-Discrimination Board, the body which has the responsibility for administering the Act and this Amendment, recognises that for Jews, "discrimination is as much racial as it is religious".<sup>47</sup> However, "hate propaganda may focus primarily on the religious aspects of other cultures as expressing what is uniquely 'alien' in that culture". Both the Board and the Human Rights Commission have thus argued that legislation which does not specifically cover religion as well as race may be inadequate to protect against some forms of prejudice.<sup>48</sup> The Commission points to the British experience of racist journals which once attacked "Indians" and "Brownskins" but since anti-racism legislation "now use Hindu as an extreme term of abuse".<sup>49</sup>

The NSW Jewish Board of Deputies and Ethnic Affairs Commission both made submissions to the Attorney-General recommending inclusion of a separate provision to cover ethno-religious groups for the purposes of the racial vilification Amendment.<sup>50</sup> However, the legislature has not followed this advice in amending the Act. The new ss. 20C(1) and 20D(1) give "race" as the unlawful ground for inciting hatred, contempt or ridicule. S. 4(1) of the Act defines "race" as including "colour, nationality and ethnic or national origin", and s. 4(3) allows a "race" to be comprised of two or more distinct races.

At first glance, then, Jews might not be protected. However, the New Zealand case *King-Ansell v. Police*<sup>51</sup> and the House of Lords' decision

<sup>45</sup> The Press Council considers it a serious breach of ethical standards for a newspaper to publish matter disparaging or belittling groups by reference to their race, nationality or religion. However, it cannot enforce any sort of remedy against breaches of this code. The Australian Broadcasting Tribunal can impose penalties of various kinds, but a breach of its Standards does not constitute a breach of the law.

<sup>46</sup> See e.g. W. D. Rubinstein, *The Jews in Australia* (Australian Ethnic Heritage Series, Melbourne, AE Press, 1986) pp. 3-6, for a discussion of this complexity.

<sup>47</sup> NSW Anti-Discrimination Board, *Discrimination and Religious Conviction* (Sydney, 1984), p. 194.

<sup>48</sup> *Id.* p. 277; Human Rights Commission Report No. 7, *supra* n. 21, p. 17.

<sup>49</sup> *Id.* p. 18.

<sup>50</sup> Uri Themal, Deputy Chair, Ethnic Affairs Commission of NSW, personal interview.

<sup>51</sup> [1979] 2 N.Z.L.R. 531.

in *Mandla v. Dowell Lee*<sup>52</sup> suggest that they may be included in the definition of "race". In *King-Ansell*, Richardson J. described the "real test" as "whether the individuals or the group regard themselves and are regarded by others in the community as having a particular historical identity in terms of their colour or their racial, national or ethnic origins".<sup>53</sup> Woodhouse J. described the word "race" as used in the legislation as "deliberately flexible": "the kind of discrimination which amounts to religious intolerance alone is not the target of this particular legislation: but to give effect to its important purpose of making every form of racial discrimination unlawful . . . the language must not be interpreted in any confined or restricted way but broadly and in terms of commonsense".<sup>54</sup> Jews in New Zealand were consequently a group with common ethnic origins. In *Mandla*, shared history and cultural tradition, often involving religious observance, were held to be essential; and geographical origin, language, literature, a distinct religion and minority status were relevant but not essential characteristics which define an ethnic group.<sup>55</sup> Thus, Sikhs were an ethnic group even though not biologically distinguishable from other groups living in the Punjab.

In December 1988, the Attorney-General assured the NSW Jewish Board of Deputies that these decisions are "clear authority" in NSW, and that thus Jews would be covered by the proposed legislation.<sup>56</sup> The concerned response was that since "there can be no guarantee that any judge in NSW will feel bound to follow either a New Zealand or English decision", the Jewish community would prefer that Parliament's intention to protect it were spelt out explicitly in the legislation.<sup>57</sup> Nearly every speaker in the Parliamentary debate on the Amendment mentioned Jews and anti-Semitism;<sup>58</sup> the Minister for Police,<sup>59</sup> and the Attorney-General<sup>60</sup> both referred to the overseas decisions in stating that Jews, as an ethno-religious group, are covered by the Amendment. Given that the laws of statutory interpretation allow recourse to be made to *Hansard* to help determine Parliamentary intention, this would be useful in attempting to establish that Jews are included in the definition. The Acting President of the Anti-Discrimination Board has said that he will be taking *King-*

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<sup>52</sup> [1983] I.C.R. 385.

<sup>53</sup> [1979] 2 N.Z.L.R. 531 at 542.

<sup>54</sup> At 537, referring approvingly to *Ealing LBC v. Race Relations Board*, [1972] 1 All E.R. 105.

<sup>55</sup> [1983] I.C.R. 385 per Lord Fraser of Tullybelton at 392.

<sup>56</sup> Letter, John Dowd, NSW Attorney-General, to Graham de Vahl Davis, President, NSW Jewish Board of Deputies, 29 December 1988 (NSW Jewish Board of Deputies archives).

<sup>57</sup> Letter, Graham de Vahl Davis to John Dowd, 14 March 1989 (NSW Jewish Board of Deputies archives).

<sup>58</sup> *Hansard*, 10 May 1989, NSW Legislative Assembly pp. 7919-7932; NSW Legislative Council, pp. 7810-7839.

<sup>59</sup> *Id.* p. 7811.

<sup>60</sup> *Id.* pp. 7931-7932.

*Ansell* and *Mandla* as guides pointing to this inclusion;<sup>61</sup> it is yet to be seen whether the Equal Opportunity Tribunal<sup>62</sup> and the courts will agree with this policy decision.

If these cases are in fact held to be authoritative in NSW, then it would appear that anti-Semitic racial vilification will be covered. There is, however, the (admittedly slight) possibility that *Mandla*, which did not directly concern Jews, may be held not to apply to them. There is also the qualification in Woodhouse J.'s judgment in *King-Ansell* which appears to distinguish statements "amounting to religious intolerance alone". The claim of Sheikh Hilaly's supporters that his comments refer only to "Biblical" and not to Australian Jews, and his attacks on the Jewish religion as such,<sup>63</sup> raise this issue as a matter for concern.

Unlike the 1987 Bill, the Amendment applies to all "races", not merely "minorities". This alteration was the subject of considerable political controversy, the whole of which need not be dealt with here. However, one pertinent argument was that the "minorities" provision would possibly have authorised racial vilification by minority groups of the majority, undermining the communal harmony which the Act aims to foster. There are examples in Britain of cases in which the corresponding legislation (not limited to the protection of "minorities") has been used by whites to proceed against black groups.<sup>64</sup> Some such actions may well be justified; however, the present form of the Amendment may also pave the way for the bringing of vexatious claims. For example, anti-Zionist groups might argue that since "Zionism is racism",<sup>65</sup> a Jewish communal organisation with a vocal commitment to Zionism is in fact inciting racial hatred. Representatives of both the Anti-Discrimination Board and the Ethnic Affairs Commission feel confident that the Board's role as "first address" for complaints, and the need for the Attorney-General's consent for criminal prosecutions, provide an adequate filtering mechanism to deal with these problems.<sup>66</sup> There is still the concern, however, that this need to screen will use up scarce resources and block more serious complaints; and that if such a claim were to be given publicity as a result, the consequence would be the likelihood of the further spreading of anti-Semitism.

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<sup>61</sup> Steven Mark, Acting President, Anti-Discrimination Board, personal interview.

<sup>62</sup> The Tribunal before which unconciliated complaints under the Act are heard.

<sup>63</sup> The *Australian Jewish Times* report of his speech included the following quotes: Jews have levelled "insults and defamations against God" and "lowly and despicable allegations against the Prophets"; the text of the Torah he called a forgery "infected by ill-conceived ideas written by persecuted captives"—Susan Bures, *loc. cit.*

<sup>64</sup> Documented by G. Bindman in "Incitement to Racial Hatred", [1982] *New Law Journal* 299.

<sup>65</sup> Relying in this opinion on the United Nations resolution of 1975.

<sup>66</sup> Steven Mark and Uri Themal, personal interviews.

**(ii) To whom must vilification be addressed, and how must they be affected?**

It is unlawful by the new ss. 20C and 20D to "incite" hatred, serious contempt or severe ridicule by a "public act". S. 20B defines "public act" as including "any form of communication to the public", "any form of conduct observable to the public", and "the distribution or dissemination of any matter to the public with the knowledge that the matter promotes or expresses hatred towards, serious contempt for, or severe ridicule of a person or group" on the ground of race.

The presence of a "public" is clearly crucial; purely private conversations and acts are not intended to be caught. Anti-Semitic videogames, which are offered for sale to the general public, would clearly offend; however, distinguishing between "private" and "public" may not always be so easy. A prosecution in Britain<sup>67</sup> of a person who had attached a racist leaflet to an individual's door failed on the "dubious ground" that the recipient and his family were not "a section of the public".<sup>68</sup> The definition of the relevant public in the *Race Relations Act 1965* (UK—was slightly different (and arguably much clearer): "the public at large or . . . any section of the public not consisting exclusively of an association of which the person publishing or distributing is a member".<sup>69</sup> There may nevertheless be comparable problems with the NSW Amendment, particularly in the case of "hate mail". Material distributed through random letterboxing or on train seats would probably fall within the section—but what of mail sent directly and by name to individuals in a private capacity?<sup>70</sup> If members of the organisation sponsoring the "act" are held not to be members of the public, could Sheikh Hilaly's speech be excused if only members of the Senior Usrah were admitted?

The question of how the "public" must be affected by the communication, conduct or distribution is more difficult still. Dictionary definitions of "incite" include to urge, or stir up a person;<sup>71</sup> to stimulate or prompt to action.<sup>72</sup> The meaning of "incitement" is a difficulty adverted to but not resolved in the Parliamentary debate on the Amendment.<sup>73</sup>

The New Zealand legislation uses the words "likely to excite hostility or ill-will against, or bring into contempt or ridicule".<sup>74</sup> In *King-Ansell* the court found this test satisfied because two Jewish witnesses found

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<sup>67</sup> *R. v. Britton* [1967] 2 Q.B. 51.

<sup>68</sup> Bindman, *loc. cit.*, p. 299.

<sup>69</sup> S. 6(2).

<sup>70</sup> Of course, the law can only apply to mail which includes a sender's name and address.

<sup>71</sup> *The Oxford Illustrated Dictionary* (2nd ed, Oxford, Clarendon Press, 1975), p. 425.

<sup>72</sup> *The Macquarie Dictionary* (1st ed, Sydney, Macquarie Library, 1981), p. 895.

<sup>73</sup> The Hon. Mr Aquilina, MLC, *Hansard*, NSW Legislative Assembly, 10 May 1989, p. 7931.

<sup>74</sup> S. 25(1) *Race Relations Act 1971* (NZ).

the material offensive and derogatory. Hodge argues that this avoided the issue; the Crown should be made to show some factual likelihood that the recipient is at least capable of being moved in the political direction urged by the material.<sup>75</sup> In a later case,<sup>76</sup> such evidence was required by the New Zealand Equal Opportunity Tribunal, and the attitude of the recipient—in this case the readership of a newspaper—was taken into account. The British test is “likely to stir up hatred”,<sup>77</sup> and requires the prosecution to prove that there are people in the audience or readership open to persuasion or likely to feel racial hatred.

Such a requirement seems both unreasonable and counterproductive. The British wording has arguably caused some prosecutions which seemed straightforward to fail. The Committee which framed the Canadian legislation saw that “the holding up of identifiable groups to hatred or contempt is inherently likely to dispose the rest of the public to violence against members of those groups and inherently likely to expose them to loss of respect among their fellow men”.<sup>78</sup> Thus the effect on the immediate audience is not necessarily relevant. The *Manitoba Human Rights Act* 1974 reflects this, requiring only that the publication or action exposes or intends to expose a person or group to hatred.<sup>79</sup> The *British Malicious Communications Act* 1988 makes an offence the sending of a letter or article which conveys an indecent or grossly offensive message or a threat, which has as its purpose the causing of distress or anxiety to the recipient.<sup>80</sup> Likewise, in addition to the prohibitions in the ultimate wording of the Amendment, the Unsworth Government’s 1987 Bill’s proposed s. 20B(1) would have made it unlawful to cause or threaten physical harm towards or to engage in any act of intimidation towards members of a group. This would have had a much farther-reaching effect, recognising that the damage to the target group may be just as dangerous if the racial vilification offends or hurts them while not actually increasing the number of people in the wider community holding racist views.

Instead, as the Amendment stands, it would seem that communications or conduct might not “incite” if there is no observable or likely effect on the audience. Thus, “hate mail” sent to a Jew—who is unlikely to be inspired to anti-Semitism thereby—may not be covered. Nor may a communication to an audience already “converted”—such as Hilaly’s. The Ethnic Affairs Commission’s decision that the speech

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<sup>75</sup> W. C. Hodge, “Incitement to Racial Disharmony” [1980] N.Z.L.J. 187 at p. 189.

<sup>76</sup> *Neal v. Sunday News Auckland Newspaper Publications* [1985] E.O.C. 92-130.

<sup>77</sup> Both the *Race Relations Act* 1976 and the new *Public Order Act* 1986 use the same language.

<sup>78</sup> Cited in R. Pettman, *Incitement to Racial Hatred: the International Experience* (H.R.C. Occ. Paper 2, Canberra, A.G.P.S., 1982), p. 18.

<sup>79</sup> S. 2(1). C.f. *Saskatchewan Human Rights Code* 1979 s. 14(1); *British Columbia Civil Rights Protection Act* 1981 s. 1—both have similarly broad provisions, and do not require proof of persuasion of the audience.

<sup>80</sup> S. 1.

"justified but did not incite" violence against Jews is significant; it is conceivable that advocating harm might be held to be acceptable, if it cannot be proven to actually cause harm. Similarly, there might be a technical, if distorted, argument that anti-Semitic videogames only allow participants to vent their frustrations and aggression in a non-violent way, and that thus they do not foster racist attitudes. These must be seen as undesirable results. The Anti-Discrimination Board's policy will be that the offending act must "at least have reached an audience which could possibly be affected";<sup>81</sup> a policy which effectively admits the problems outlined above.

*(iii) Is there a requirement of intent?*

Linked with "incitement" is the question of intent. Neither s. 20C or s. 20D of the Amendment incorporates an express requirement of intent. However, the definition of "public act" in s. 20B includes "(a) any form of communication to the public . . . (b) any conduct . . . observable by the public . . . and (c) the distribution or dissemination of any matter to the public with knowledge that the matter promotes hatred towards, serious contempt for, or severe ridicule of, a person or group . . . on the ground of race . . .". There is a certain ambiguity here. The requirement of knowledge appears only to apply to subsection (c); it may be intended to protect "unwitting messengers", such as people hired to distribute material through letterboxes who do not themselves read it. However, it is possible that it would be held to apply to (a) and (b) as well.<sup>82</sup> If so, then "knowledge" could be taken to imply some level of intent to cause the "inciting" effect.

Such an intent requirement would have significant implications. The strict requirement in the British *Race Relations Act 1965* was described by Lord Scarman as one of the restrictions which rendered s. 6 "useless to the policeman in the street".<sup>83</sup> The *Public Order Act 1986* (UK) partly remedies this, imposing as alternative requirements either intent or the likelihood of racial hatred being stirred up. Thus, if the prosecution can prove intent to stir up racial hatred, it seems that it is not necessary to prove intent to threaten, abuse or insult; but if the conduct was merely likely to stir up hatred, lack of such intent will be a defence.<sup>84</sup> This seems more practical than the Israeli Penal Code, which provides a criminal sanction for the publication or possession of any material "with the purpose of stirring up racism", whether or not the publication actually leads to racism.<sup>85</sup> Despite the specific language used, a recent Supreme Court

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<sup>81</sup> Steven Mark, personal interview.

<sup>82</sup> Steven Mark, personal interview.

<sup>83</sup> Report on Red Lion Square disturbances, 1974, cited by Bindman, *loc. cit.*, p. 299.

<sup>84</sup> Edward Rees, "Public Order Act 1986: 1 Offences" [1987] 17 *Legal Action*, pp. 9-11.

<sup>85</sup> Ss. 144B, 144D.

decision<sup>86</sup> reveals disagreement over the required mens rea; possibly opening the way for the use of the "knowledge rule". According to this rule, awareness of high probability that conduct will lead to a given result is equivalent to intent to cause the result. This lack of clarity in interpretation may also raise problems at the evidentiary level.<sup>87</sup>

These examples highlight potential difficulties with the NSW Amendment. If an intent requirement is held to exist, then the League of Rights or Irving's publishers might argue that the only intention behind their publications is "to tell the truth". Sellers of videogames might claim that they intend merely to amuse their customers. Steven Mark suggests that "ignorant recklessness" or "wilful blindness" to the results of actions may be sufficient "intent" to catch wrongdoers claiming this defence.<sup>88</sup> This would be a welcome interpretation; however, it also is an issue for the court to decide.

*(iv) The exceptions—protecting free speech?*

S. 20C(2)(c) exempts from the ambit of the Amendment "a public act done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter". These exceptions are the legislature's attempt to "achieve a balance between the right to free speech and the right to an existence free from racial vilification".<sup>89</sup> Without denigrating the importance of the former, the question to be asked is whether the exceptions are not so widely defined as to endanger the latter.

The "reasonably and in good faith" requirement may have the effect of importing the troublesome intent requirement, and thus make lawful many actions which have the effect of promoting racial hatred. If a person could prove that she or he meant in good faith only to promote discussion of an issue, then the act concerned might be exempted regardless of its impact on public opinion. In other words, this provision may effectually make the necessary intent "lack of reasonable good faith".

In Canada, the combination of the intent requirement and the various defences—including truth, and the discussion of matters relevant to the public interest and believed on reasonable grounds to be true<sup>90</sup>—has made it extremely difficult to get convictions.<sup>91</sup> The Israeli Penal Code

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<sup>86</sup> *Kahane v. Executive Board of the Broadcasting Authority*, H.C. 399/85, 1987, cited by E. Lederman and M. Tabory, "Criminalisation of Racial Incitement in Israel", [1987] 24 *Stanford Journal of International Law* 55 at pp. 73-74; 71.

<sup>87</sup> *Id.* at pp. 74-75.

<sup>88</sup> Personal interview.

<sup>89</sup> Mr Pickering, Minister for Police, *Hansard*, NSW Legislative Council, 10 May 1989, p. 7811.

<sup>90</sup> S. 281.2(3).

<sup>91</sup> Pettman, *op. cit.*, pp. 19-21.

incorporates the exceptions of a correct and fair report of an action or a quotation from religious writings; so long as such publication "is not done with the purpose of bringing about racism".<sup>92</sup> This proviso makes the exceptions superfluous; they retain only a declaratory value.<sup>93</sup>

A related problem is the need to define "academic, artistic, scientific, research" and other "public purposes". As Moss points out, legislation must draw the difficult distinctions between statements which clearly and directly incite racial hatred; vulgar and insulting comments; unscientific generalisations intended to contribute to debate; and factual comments regarding differences between races.<sup>94</sup> Yet individuals will inevitably differ over how to classify particular statements or publications; and the wording of the Amendment unfortunately—perhaps inevitably—leaves much room for individual interpretation. The League of Rights might convince a judge that it is discussing issues of public interest, or presenting literary works, when it distributes the *Protocols*. Revisionists might be judged merely "unscientific" in their claims. Irving, who presents himself as a respectable scholar, might successfully assert that he is engaged in genuine and reasonable academic exploration. Yet all these examples unquestionably have the potential to stir up hatred of Jews. On the other hand, in France in 1981, Robert Faurisson, a university professor, was convicted under legislation prohibiting incitement to racial hatred, after claiming on radio that the Holocaust was a hoax.<sup>95</sup> He was not protected by the shield of "academia".

The removal of "religious" as one of the exempt public interest purposes (it was included in previous drafts of the Amendment) is a positive development as far as the Jewish community is concerned. Anti-Semitism, as discussed above, has often been disguised as religious dogma; Sheikh Hilaly is one notable recent example.

The Israeli provision points to a clear concept of "balance" which might be useful in the NSW Act; declaring the importance of free speech in specified areas, but also ensuring that people actually guilty of racial vilification are not able to hide behind the defence of "good faith". Steven Mark argues that this concept of balance is implied in the Amendment; the definition is loose, and therefore flexible. The "purposes" need to be balanced against the effect of the acts; neither is an absolute standard.<sup>96</sup> The uncertainty of the balancing act, however, makes it highly likely that some of the types of racial vilification intended to be prohibited will slip through the exceptions. Again, if the case law develops in such a way as to emphasise the actual effects of certain acts and statements

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<sup>92</sup> S. 144C; Lederman *loc cit.*, p. 63.

<sup>93</sup> Lederman *loc cit.*, pp. 80-81.

<sup>94</sup> I. Moss, "Inciting Racial Hatred: the Facts", *Ethnos* (December 1987), p. 9.

<sup>95</sup> Pettman, *op. cit.*, p. 31.

<sup>96</sup> Personal interview.



on racial and ethnic groups in assessing "reasonable good faith" and the importance of those "public purposes", this danger will at least be minimised.

(v) *The criminal offence—will it help?*

The provisions of new s. 20D make it a criminal offence to incite racial hatred by means including threatening, or inciting others to threaten, violence to persons or their property on the ground of their race. This gives a complainant, or complaining group,<sup>97</sup> two possible causes of action: either a conciliation attempt which may lead to a hearing before the Equal Opportunity Tribunal, or, if the Anti-Discrimination Board President and the Attorney-General decide that the event complained of attracts s. 20D, a criminal action.

An important question is whether criminalisation helps to protect potential victims; whether it strengthens the existing civil provisions. Tatz argues that criminalisation is necessary if we are serious about eliminating racism: "With conciliation, we are treating racism as some kind of social disease which needs counselling and guidance and psychology, not the sanction of the law". It is a matter of giving the authorities "the tools to do the job".<sup>98</sup> This possibly reflects a misconception of the aims of conciliation; it is not meant to be a form of "counselling" for offenders at all. However, it is also possible that this is a commonly held misconception—in which case Tatz's statement cannot be ignored. Fraser argues that mediation and conciliation, because it is based on a false assumption of equality between the parties, will always fail in the case of real racism.<sup>99</sup> The power relationship is unbalanced from the beginning; and there is nothing to talk about in any case. Conciliation only serves to legitimate the discussion, rather than judging one side to be wrong.<sup>100</sup> Certainly it is clear that conciliation is never going to be an effective way to treat a Butler or a Hilaly who in all probability firmly believes that Jews are central pins in an evil international conspiracy. Thus, the submissions of the Jewish community supported the inclusion of the criminal provision in addition to the civil one.

There are arguments, however, that criminal provisions do not work; and Jewish opinion is not unhesitatingly supportive of it.<sup>101</sup> Publicity of

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<sup>97</sup> The new s. 88 allows for the making of "representative complaints" by a representative body on behalf of and with the consent of a person or persons belonging to a named group. This will help overcome the impediments to making an individual complaint: lack of confidence, language problems, unfamiliarity with the workings of a body such as the Anti-Discrimination Board, and the intimidating nature of the complaint in these cases.

<sup>98</sup> C. Tatz, "The Danger of Racism is Exclusion", *Ethnos* (December 1987), p. 8.

<sup>99</sup> D. Fraser, "It's Alright Ma, I'm Only Bleeding", (1989) 14 *Legal Service Bulletin* 69 at 70.

<sup>100</sup> E.g. Alan Goldberg Q.C., speaking to the Executive Council of Australian Jewry in response to Human Rights Commission Report No. 7, 1984 (NSW Jewish Board of Deputies archives).

<sup>101</sup> Jeremy Jones, personal interview.

an organisation such as the League, if not handled sensitively and sensibly, could have the undesirable effect of allowing the League to reach a wider audience.<sup>102</sup> Prosecution in a case where there is no demonstrable injury might do more harm than good, hardening racial attitudes and creating martyrs; Hodge points to a case in the United States<sup>103</sup> in which a battle was fought over the right of a Nazi group to march. When after the case was concluded the march was approved, 20 Nazis turned up, an hour late, to be met by several thousand counter-demonstrators. In New Zealand, *King-Ansell's* main impact was to inform the public that a Nazi party still existed.<sup>104</sup>

Fraser agrees, citing two Canadian cases in which Holocaust revisionists were convicted,<sup>105</sup> that the publicity of the racist cause is counterproductive. He argues further that, at a trial, just like a mediation, the underlying premise is that both sides have a case, and thus the racist argument is legitimated by the legal process. In *Zundel* this was taken to the extent that the appellate court confirmed the trial judge's refusal to take judicial notice of the Holocaust, since this would have gone to the main issue. "Not only were his views given massive free publicity by coverage of the trial, but the very existence of the trial took the problem of such manifestations of racism out of the public political forum and very easily lifted them into the sterile world of law". Fraser has "little doubt that public exposure of racism for what it is will lead to its defeat" nor "that the victims of racist attacks do gain some psychological benefit from the prosecution of racists"; but doubts that the benefits of the trial process outweigh the disadvantages. Thus he argues for "direct action" at the social group level.<sup>106</sup>

Bindman feels that a criminal approach does work, but only if it is supported by adequate resources. He argues that the small number of convictions in the UK is a result of insufficient priority being given to the issue by police, and of excessive caution on the part of the Attorney-General, whose permission (as in NSW) is needed to prosecute, and who appears to have been exercising this power "with excessive caution". He argues that the opinion on which the power has been exercised—that an unsuccessful prosecution does more harm than good—"is not generally accepted and should not impede the enforcement of the law".<sup>107</sup> However, Steven Mark sees the likely operation of the NSW provision as very different. In NSW, unlike in the UK, it will be from the Anti-Discrimination Board and not the individual complainant or the police that matters will

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<sup>102</sup> *National Socialist Party of America v. Village of Skokie* (1977) 432 U.S. 43.

<sup>103</sup> Pettman, *op. cit.*, p. 15.

<sup>104</sup> *R v. Zundel* 35 D.L.R. (4th) 338, and *R v. Keegstra* 19C CC (3D) 254.

<sup>105</sup> Fraser, *loc. cit.*, pp. 70-71.

<sup>106</sup> Bindman, *loc. cit.*, p. 301.

<sup>107</sup> Personal interview.

be referred to the Attorney-General. In addition, the Anti-Discrimination Board and the Equal Opportunity Tribunal are bodies with a higher profile and greater capacity to procure more complete remedies than the British Race Relations Commissioner.<sup>108</sup> The implication is that the likelihood of successful prosecution, and of prosecution in harmony with the intended purpose of the legislation, is greater than it was in Britain. Mark also feels that since there is not, in comparative terms, a great tendency to incitement to racial violence (as opposed to non-violent racial vilification) in Australia, the section will not be used a great deal.<sup>109</sup>

All these arguments have merit, and serve to indicate the difficulty of the whole area. Much depends on what the purpose of the criminal law is seen to be. If prosecutions are obtained, the retributive effect of the law will be significant. It could be argued, however, that as a deterrent, the criminal provisions are useful even if they are never used. In New Zealand, the legislation has been used far more successfully as a shield than as a sword, with conciliation preferred to prosecution.<sup>110</sup> Fraser's argument underestimates the powerful educative and normative effect of legislation as a means of stating communal standards; it is significant to define activity as "criminal". Consistent with this argument, Lederman and Tabory claim that the Israeli law has "reinforced anti-racist ideology and influenced modes of behaviour through its normative prescription against racism".<sup>111</sup> It is still too early to evaluate its educational impact, but "a tangible change has occurred in Israel's public atmosphere": there is less tolerance for racist statements.<sup>112</sup> In Canada, while convictions are hard to get, there is a deterrent effect; "but this has not pre-empted hate campaigns by the Ku Klux Klan . . . which is not to say that without such legislation these organisations would not have been much more active. They would certainly have been more overt . . .".<sup>113</sup>

## CONCLUSION

There are undoubted problems with the Amendment. Some arise from ambiguities in the drafting of the provisions. The English experience is that similar latitude in drafting allows the attitudes of judges, some very hostile to the purpose of the legislation, to intrude and to negate the effectiveness of the law.<sup>114</sup> Some result from the understandable caution of a legislature enacting such innovative law. Some are inherent and unavoidable because they involve the balancing of delicate issues and

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<sup>108</sup> Personal interview.

<sup>109</sup> Pettman, *op. cit.*, p. 15.

<sup>110</sup> Lederman, *loc. cit.*, pp. 81-84.

<sup>111</sup> *Ibid.*

<sup>112</sup> Pettman, *op. cit.*, p. 21.

<sup>113</sup> Bindman, *loc. cit.*, p. 301.

<sup>114</sup> Steven Mark, personal interview.

important rights, a dimension which will always come down to a decision on the facts of a particular case, and which will depend on the direction which the developing case law takes.

This legislation by its very nature involves issues which are of crucial importance and sensitivity to significant groups within the community. In the first three weeks of its operation, the Anti-Discrimination Board received over seventy inquiries relating to it, many of which will probably lead to the lodging of formal complaints.<sup>115</sup> The "representative complaint" provision also means that complainants will often have more substantial resources available than individual complainants relying on other provisions of the Act to date. These factors are likely to lead to appeals from the Equal Opportunity Tribunal to the courts. In Mark's view, this is a welcome development; it will prompt valuable judicial discussion of anti-discrimination law; an area which at present suffers from a dearth of case law.<sup>116</sup> This may very well be true; it only serves to highlight the fundamental problems that exist.

As far as the Jewish community of NSW is concerned, the Amendment is a qualified success. It is a success in that it publicly defines racial vilification as unacceptable, recognises some of the problems that the community faces, and provides some opportunities for redress. The qualification is that the numerous drafting ambiguities may allow people and organisations who are undoubtedly breaking the spirit of the law to remain within the letter of the law. The Amendment is a valuable first step; it remains to be seen whether it will overcome the enormous practical problems which it is likely to face, and whether it will prove to be an effective measure in fighting racism.

JACQUI SEEMANN  
Final Year Student.

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<sup>115</sup> Personal interview.