Anti-Semitism, hate speech and Pt IIA of the Racial Discrimination Act

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In Australia, hate speech laws such as Pt IIA of the Racial Discrimination Act 1975 (Cth) have always generated controversy. Those laws and the international human rights regime that underpin them have been strongly influenced by the experience of the Holocaust and by the dangers of anti-Semitism. An understanding of the nature of anti-Semitism and of the Australian case law dealing with anti-Semitic speech sheds light on the debate as to whether the curiously drafted Pt IIA should be retained, amended or discarded. The article argues that there are powerful policy reasons for retaining Pt IIA and other hate speech laws, but that the legislation should be amended to substitute objective tests for subjective criteria. The amendments would achieve a more defensible balance between the legitimate protection of vulnerable groups from serious hate speech and the values of free speech.

INTRODUCTION

Vilification of Jews is perhaps the oldest continuous form of hate speech in recorded human history.[1] The catastrophe of the Holocaust has led to the widespread (but not universal) recognition in Western democracies of the dreadful consequences that can flow from rekindling or encouraging age-old prejudices.[2]

The grim resurgence of anti-Semitism in many parts of Europe is a reminder that condemnation of bigotry and prejudice in international instruments is no guarantee that behaviour flowing from those attitudes can be eradicated.[3] Anti-Semitism in English-speaking countries, although endemic until relatively recently, has never been as virulent as on the European continent, at least since Jews were readmitted to England in Cromwell's time.[4] Even so, English-speaking countries are by no means immune from an upsurge in manifestations of anti-Semitism, including hate speech. Australia, for example, in recent times has recorded an upsurge in both the number of anti-Semitic incidents and anti-Semitic publications including some in the mainstream media.[5] In April 2016, following repeated

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[1] "Racial vilification" and "hate speech" tend to be used more or less interchangeably, although understood literally "hate speech" is not confined to vilification on racial grounds. It has been suggested that in "its purest form, hate speech is simply expression which articulates hatred for another individual or group, usually based on characteristics (such as race) which are perceived to be shared by members of the target group": J Weinstein and I Hare, "General Introduction" in I Hare and J Weinstein (eds), *Extreme Speech and Democracy* (OUP, Oxford, 2009), 4. It is convenient to use "hate speech" as the generic term.

[2] Writing in 1963, just after the Eichmann trial, Hannah Arendt thought that: "Anti-Semitism has been discredited, thanks to Hitler, *perhaps not forever* but certainly for the time being ... because ... most people have realised that in our day the gas chamber and the soap factory are what anti-Semitism may lead to" (emphasis added): H Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin Books, New York, 2006), 10. Arendt was right to add the three qualifying words.

[3] For a survey that includes some of the more extreme recent manifestations of anti-Semitism and the often confused official responses, see KL Marcus, *The Definition of Anti-Semitism* (OUP, Oxford, 2015), especially, "Introduction" and Ch 1.

[4] Jews were expelled from England by the Edict of Expulsion 1290 issued by Edward I. Some Sephardic Jews came to England following their expulsion from Spain in 1492, but formal approval was not given for Jews to resettle in England until 1657.

[5] The Executive Council of Australian Jewry publishes a detailed annual report on anti-Semitism in Australia: see Executive Council of Australian Jewry, *ECAJ Report on Antisemitism in Australia: 1 October 2014-30 September 2015* (November 2015, ECAJ), http://www.ecaj.org.au/wp-content/uploads/2015/11/ECAJ-Antisemitism-Report-2015.pdf. The Report contains a helpful discussion of the concept of anti-Semitism and of various definitions (pp 9-17).

anti-Semitic comments by individual members of the United Kingdom Labour Party, the Leader, Jeremy Corbyn, announced an inquiry into "anti-Semitism and other forms of racism" in the Party.[6]

In Australia, proposals for national laws penalising or providing civil remedies for hate speech or the laws themselves have always generated controversy. The Commonwealth Parliament has repeatedly rejected legislation criminalising hate speech despite the *International Convention on the Elimination of All Forms of Racial Discrimination* (1966) (Racial Discrimination Convention)[7] requiring state parties to impose criminal penalties for the dissemination of ideas based on racial superiority or racial hatred.[8] Part IIA of the *Racial Discrimination Act 1975* (Cth), which provides civil remedies against persons engaging in hate speech,[9] has proved controversial ever since its introduction in 1995.[10] The controversy erupted into a full-scale political contest about the merits of retaining the legislation, following the Federal Court's 2011 decision in *Eatock v Bolt*.[11] Despite the withdrawal of Government proposals to repeal or substantially modify Pt IIA,[12] the debate remains live.[13]

Representative organisations of the relatively small Australian Jewish community[14] have strongly supported Pt IIA and other laws directed at hate speech as bulwarks against the harm caused by anti-Semitism. This support is demonstrated not only by communal organisations urging the retention or broadening of the protection accorded by existing laws,[15] but by the role played by representative organisations in initiating or standing behind proceedings seeking remedies against purveyors of egregious anti-Semitic material. For this reason, the interpretation of Pt IIA of the *Racial Discrimination Act* has been heavily influenced by cases involving anti-Semitic speech.

This is hardly surprising since there is a clear link between acknowledging the harm that can be caused by anti-Semitic conduct and the enactment of hate speech laws. The domestic legislation of many countries, including Australia, has directly resulted from the post-war international human rights

[6] Labour Press, "Jeremy Corbyn launches action plan on tackling anti-Semitism and other forms of racism" (Labour Party, Press Release), http://press.labour.org.uk/post/143593428989/jeremy-corbyn-launches-action-plan-on-tackling. The so-called "Shami Chakrabarti Inquiry" delivered an anodyne report in June 2016: http://www.labour.org.uk/page/-/party-documents/ChakrabartiInquiry.pdf.

[7] *International Convention on the Elimination of All Forms of Racial Discrimination* (Racial Discrimination Convention): Opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969, except for one article). Australia signed the Convention on 13 October 1966.

[8] Racial Discrimination Convention, Art 4(a), requires state parties to impose criminal penalties for the dissemination of ideas based on racial superiority or racial hatred. Bills were introduced into the Commonwealth Parliament in 1974, 1992 and 1994 to impose penalties for hate speech, but these provisions were rejected: see *Toben v Jones* (2003) 129 FCR 515, [114]-[127] (Allsop J). In 1975 Australia deposited a reservation relating to Racial Discrimination Convention, Art 4(a).

[9] See text below accompanying nn 41-46.

[10] By the *Racial Hatred Act 1995* (Cth).

[11] *Eatock v Bolt* (2011) 197 FCR 261. Bromberg J upheld complaints against a prominent journalist and a newspaper for articles conveying offensive messages about certain "fair skinned Aboriginal people". For discussion of the case and its role in the campaign to repeal s 18C, see A Stone, "The Ironic Aftermath of Eatock v Bolt" (2015) 38(3) MULR 926.

[12] For an account of the Government's 2014 proposals to repeal or amend Pt IIA of the *Racial Discrimination Act*, see K Magarey, "The Attorney-General's Suggested Changes to the Racial Discrimination Act 1975" (Parliamentary Library, Parliament of Australia, 2014).

[13] The Australian Law Reform Commission suggested in 2015 that Pt IIA of the *Racial Discrimination Act* "would benefit from more thorough review" to determine whether it unjustifiably limits freedom of speech, but recommended that this should be done in conjunction with consideration of anti-vilification laws more generally: Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (ALRC Report 129, December 2015), [4.207] (ALRC Report).

[14] According to the 2011 Census, 97,335 Australians identified themselves as Jewish: Australian Bureau of Statistics, *Australia, Basic Community Profile*, http://www.censusdata.abs.gov.au/census_services/getproduct/census/2011/communityprofile/0. This figure is widely thought to be an underestimate by about 20%.

[15] See, eg, NSW Legislative Council, *Racial Vilification Law in New South Wales: Standing Committee on Law and Justice*, Parl Paper No 50 (2013), [3.9]-[3.10], [3.25]-[3.26], [4.7], [4.33], [4.64], [4.95], [4.158]-[4.159], [5.1]-[5.9] (referring to submissions by the NSW Jewish Board of Deputies and the Executive Council of Australian Jewry); ALRC Report, n 13, [4.185], [4.211] (referring to submissions by the Australia/Israel and Jewish Affairs Council).

regime which was itself influenced by the experience of the Holocaust and its aftermath. For example, work on the Racial Discrimination Convention commenced in consequence of an epidemic of swastika daubing and other forms of anti-Semitism in the late 1950s and early 1960s.[16] It is Australia's adherence to the Racial Discrimination Convention which underpins the constitutionality of Pt IIA as the Commonwealth law specifically addressing hate speech.[17]

ANTI-SEMITISM

Hate speech laws are generally not directed solely or even principally at anti-Semitic conduct.[18] But the issues raised by Pt IIA of the *Racial Discrimination Act* are thrown into relief by the way in which the provisions have been applied in cases involving publication of anti-Semitic material. It is therefore useful to start with some observations on anti-Semitism, albeit at the risk of oversimplifying the vast literature on a complex subject.

The "Merchant of Venice" and anti-Semitic stereotypes

That anti-Semitic stereotypes have long been deeply entrenched in Western culture is undeniable. Countless illustrations can be selected, not all of them from ancient sources. The best known is the character of Shylock in *The Merchant of Venice*. Shakespeare's "world masterpiece"[19] is hardly recent, but is of profound importance to an understanding of anti-Semitism. The play is an integral component of the Western canon and its messages form part of the cultural background of generations of literate people. The continuing debate about whether the play should be regarded as anti-Semitic or as perpetuating anti-Semitic stereotypes reveals much about the nature of prejudice.

Some commentators, perhaps influenced by Shakespeare's genius for ambiguity and his uncanny ability to evoke sympathy for a character otherwise presented as the quintessential villain, argue that the play is not anti-Semitic. They point to Shylock's poignant plea: "If you prick us do we not bleed?",[20] usually overlooking that Shylock poses the rhetorical question as justification for his apparently irrational thirst for revenge against Antonio.

Others have no doubt that the play, despite its ambiguities, subtleties and profundities, is anti-Semitic.[21] They see Shylock as representing the stereotype of the greedy, usurious and devious Jew, firmly established by the long tradition (certainly by the 16th century) of poisonous anti-Semitism. He is presented as the epitome of the eternal Jew.[22] A little more subtly, Shylock's actions echo the ancient blood libel directed against the Jews, since his thirst for Christian blood, albeit the blood of an adult rather than an innocent child, transcends even his yearning for ducats. Shylock, like all Jews, segregates himself from the mainstream,[23] implying the self-bestowed

[16] E Schwelb, "The International Convention on the Elimination of all Forms of Racial Discrimination" (1966) 15 Int & Comp LQ 996, 997, cited in *Toben v Jones* (2003) 129 FCR 515, [92] (Allsop J).

[17] As a law with respect to "external affairs" pursuant to *Constitution*, s 51(xxix): see *Toben v Jones* (2003) 129 FCR 515, [13]-[21] (Carr J; Kiefel J agreeing), [140]-[148] (Allsop J).

[18] In some jurisdictions, legislation specifically prohibits anti-Semitic conduct, such as Holocaust denial: see M Whine, "Expanding Holocaust Denial and Legislation Against It" in Hare and Weinstein, n 1, 543-547.

[19] The phrase is that of A Julius, *Trials of the Diaspora: A History of Anti-Semitism in England* (OUP, Oxford, 2010), 666. Julius uses the same expression for Dickens'\ *Oliver Twist*, also a candidate for promoting an anti-Semitic stereotype.

[20] Act III, Sc 1.

[21] The critic, Harold Bloom, says that "[o]ne would have to be blind, deaf, and dumb not to recognize that Shakespeare's grand, equivocal comedy *The Merchant of Venice* is nevertheless a profoundly anti-Semitic work": H Bloom, *Shakespeare: The Invention of the Human* (Riverhead Books, New York, 1998), 171.

[22] *The Eternal Jew* was the name of a Nazi propaganda film made in 1940. It was based on a book published in 1937.

[23] Act 1, Sc III: "I will buy with you, sell with you, talk with you, walk with you and so following; but I will not eat with you nor drink with you, nor pray with you."

superiority of "our sacred nation".[24] Shylock is the embodiment of cruel Jewish literalism, set alongside Christian love and charity, even if the latter manifests itself by requiring the Jew's loss of identity, daughter and possessions.[25]

One of the remarkable features of the *Merchant of Venice* is that it was written at a time (1597), when there were virtually no Jews in England.[26] The fact that anti-Semitic stereotypes can exist in the absence of Jews indicates that prejudices about Jews and Judaism were deeply embedded in ways of thinking in some societies. Indeed, David Nirenberg argues that obnoxious ideas and characteristics attributed to Judaism have shaped much Western and Islamic thinking and has even done so in societies virtually devoid of Jews.[27]

Two approaches to defining anti-Semitism

Again at the risk of oversimplification, it is possible to identify two broad approaches to defining anti-Semitism. Although Pt IIA, like other hate speech laws, is not confined to anti-Semitic speech or conduct, echoes of each approach can be discerned in the text of the legislation and the construction accorded to it by the courts.

The first focuses on the perceptions and conduct of the person engaging in allegedly anti-Semitic behaviour, rather than on the effects of the behaviour on the target group. In 2005, the European Monitoring Centre on Racism and Xenophobia (EUMC) formulated a "Working Definition" of anti-Semitism. The Working Definition defines anti-Semitism as

> a certain perception of Jews, which may be expressed as hatred towards Jews. Rhetorical and physical manifestations of anti-Semitism are directed towards Jewish or non-Jewish individuals and/or their property, towards Jewish community institutions and religious facilities.[28]

While this definition has never been officially endorsed by the European Union, it has proved influential and has been adopted in slightly modified form by the United States State Department.[29]

Because the Working Definition concentrates on the perceptions and behaviour of perpetrators, it lends itself to the use of examples of conduct that can be characterised as anti-Semitic. The illustrations given by the EUMC include the following:

- Calling for, aiding, or justifying the killing or harming of Jews in the name of a radical ideology or an extremist view of religion.
- Making mendacious, dehumanizing, demonizing, or stereotypical allegations about Jews as such or the power of Jews as collective – such as, especially but not exclusively, the myth about a world Jewish conspiracy or of Jews controlling the media, economy, government or other societal institutions.
- Accusing Jews as a people of being responsible for real or imagined wrongdoing committed by a single Jewish person or group ...
- Denying the fact, scope, mechanisms (eg gas chambers) or intentionality of the genocide of the Jewish people at the hands of National Socialist Germany and its supporters and accomplices during World War II (the Holocaust).

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[24] Act 1, Sc III.

[25] In the court scene Shylock is referred to only once by name. Otherwise he is "the Jew". As Stephen Greenblatt points out, there are numerous examples of what he describes as "unself-conscious Jew-baiting" in Shakespeare's plays: S Greenblatt, *Will in the World: How Shakespeare Became Shakespeare* (Jonathan Cape, London, 2004), 258-260, 264.

[26] As was Marlowe's vicious *The Jew of Malta* (1589). One school of thought regards the *converso* Rodrigo Lopez, executed for treason in 1594, as a model for Shylock. See Greenblatt, n 25, 273-282. Hence Stephen Dedalus' assessment in J Joyce, *Ulysses* (1922), 9.749-751 that: "Shylock chimes with the jewbaiting that followed the hanging and quartering of the Queen's leech Lopez, his jew's heart being plucked forth while the sheeny was still alive."

[27] D Nirenberg, *Anti-Judaism: The History of a Way of Thinking* (Head of Zeus, London, 2013).

[28] European Monitoring Centre on Racism and Xenophobia, *EUMC Working Definition of Antisemitism* (EUMC), http://www.antisem.eu/projects/eumc-working-definition-of-antisemitism/.

[29] Special Envoy to Combat Anti-Semitism, *Fact Sheet: Defining Anti-Semitism* (US Department of State, Fact-Sheet), http://www.state.gov/j/drl/rls/fs/2010/122352.htm. See Marcus, n 3, 161-164, 166-169.

These illustrations provide more or less objective standards against which allegedly anti-Semitic conduct can be assessed. They do not characterise conduct as anti-Semitic on the basis of the likely reactions of Jewish groups or individuals.

The second broad approach is to define anti-Semitism primarily by reference to the perceptions of the target group at whom the conduct or speech appears to be directed. In 2006, for example, the United Kingdom All-Party Parliamentary Inquiry into Anti-Semitism expressed the view that the Jewish community itself is best equipped to determine what constitutes anti-Semitism.[30] The Inquiry's view was that:

> any remark, insult or act the purpose *or effect of which* is to violate a Jewish person's dignity or create an intimidatory, hostile, degrading, humiliating or offensive environment for him [or her] is antisemitic [emphasis added].[31]

This approach necessarily gives primacy to the subjective reactions of those that experience (or consider that they experience) anti-Semitic conduct or speech.[32]

The "objective" and "subjective" definitions of anti-Semitism highlight a tension that is inherent in the language of Pt IIA of the *Racial Discrimination Act*. If it is accepted that hate speech should be subject to legislatively imposed limits, one of the key policy questions is whether it is appropriate to define hate speech by reference to its impact on the target group or individuals, or whether the legislation should apply only to speech contravening objective criteria. As will be seen, Pt IIA incorporates elements of each approach and, for that reason, contains language incorporating different concepts that are not always easy to reconcile.

LEGISLATIVE RESPONSES TO HATE SPEECH

In Australia, as in many other liberal democracies, the law attempts to curtail hate speech in two main ways. One approach is to criminalise the more serious forms of hate speech, thereby exposing offenders to penalties ranging from bonds or fines to imprisonment. The second approach is to allow victims of hate speech, or their representatives, to seek civil remedies against the perpetrators of hate speech. The borderline between the two approaches is not always precisely delineated. Civil proceedings, for example, can ultimately result in the imposition of sanctions if a recalcitrant defendant refuses to obey orders requiring hate speech to be removed from a web site.[33] But the distinction is usually clear enough.

Criminal penalties

Unlike the Commonwealth,[34] five Australian States make it a criminal offence to publish certain forms of hate speech.[35] In practice, criminal sanctions are rarely invoked, even against purveyors of virulent

[30] All-Party Parliamentary Group against Antisemitism, *Report of the All-Party Parliamentary Inquiry into Antisemitism* (Stationery Office Ltd, 2006), [3] http://www.antisemitism.org.uk/wp-content/uploads/All-Party-Parliamentary-Inquiry-into-Antisemitism-REPORT.pdf. This Report, as well as the 2013 Report and 2015 Report from the same group, were not official Parliamentary Reports, but were prepared at the request of the Chair of the All-Party Parliamentary Group Against Antisemitism.

[31] *Report of the All-Party Parliamentary Inquiry into Antisemitism*, n 30, [4].

[32] *Report of the All-Party Parliamentary Inquiry into Antisemitism*, n 30, [4].

[33] In *Jones v Toben* (2009) 255 ALR 238, contempt proceedings were successfully brought against a notorious Holocaust denier who had refused to comply with orders made in civil proceedings requiring him to remove anti-Semitic material from a website.

[34] There are laws of general application that can be used against persons who engage in particular forms of hate speech, eg, *Criminal Code* (Cth), s 471.12, creates an offence of using a postal service in a way that reasonable people would regard as being, in all the circumstances menacing, harassing or offensive (this provision barely survived a constitutional challenge in *Monis v The Queen* (2013) 249 CLR 92, a six-member High Court being evenly divided). But s 471.12 is not specifically concerned with hate speech.

[35] *Anti-Discrimination Act 1977* (NSW), s 20D; *Racial and Religious Tolerance Act 2001* (Vic), s 24; *Anti-Discrimination Act 1991* (Qld), s 131A; *Racial Vilification Act 1996* (SA), s 4; *Criminal Code* (WA), ss 77 – 80D; *Discrimination Act 1991* (ACT), ss 66, 67. The Tasmanian Law Reform Institute recommended against introducing a racial vilification criminal provision, largely on the ground that similar legislation elsewhere has not proved to be an effective means of addressing racist behaviour: Tasmanian Law Reform Institute, *Racial Vilification and Racially Motivated Offences*, Final Report No 14 (2011), [5.3.17].

hate speech. Indeed, with the exception of Western Australia, it appears that there have been no successful prosecutions in Australia for contraventions of hate speech laws.

The fundamental difficulty facing prosecutors is the evidentiary burden imposed by the legislation creating the offences. In New South Wales, for example, in order to prove the offence of "serious racial vilification",[36] the prosecution must prove that the defendant:

- has committed a public act;
- which incites hatred towards, serious contempt for, or severe ridicule of a person or group of persons;
- on the ground of the race (as defined)[37] of the person or members of the group; and
- has done so by means which include threatening physical harm or inciting others to threaten physical harm.

Experience has shown that it is particularly difficult for prosecutors to establish that a public act has incited hatred, contempt or ridicule.[38]

It is no coincidence that Western Australia is the only jurisdiction in which prosecutions for hate speech, specifically speech targeting Jews, have succeeded. Legislation criminalising hate speech was introduced in Western Australia in 1990, largely as a result of outrages perpetrated by a neo-Nazi organisation including defacing synagogues and distributing anti-Semitic posters. The legislation was repealed and replaced in 2004 with even broader provisions that do not require proof that the defendant has incited hatred towards or contempt for a particular group or that the defendant has threatened or incited physical harm.[39] In consequence convictions for publication of provocative anti-Semitic statements have succeeded and resulted in imprisonment of the offender.[40]

Civil remedies

State laws providing civil remedies for victims of hate speech usually incorporate the concept of "incitement" found in the criminal statutes.[41] Accordingly, these laws are subject to many of the limitations found in the legislation criminalising hate speech. By contrast, Pt IIA of the *Racial Discrimination Act* is subject to no such limitation. Because Pt IIA is a national law and has such a broad reach, its approach to hate speech is of particular significance.

Part IIA of the Racial Discrimination Act

The legislation

The central provision in Pt IIA of the *Racial Discrimination Act* is s 18C(1), which provides:

> It is unlawful for a person to do an act, otherwise than in private, if:
>
> (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
>
> (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

[36] *Anti-Discrimination Act 1977* (NSW), s 20D.

[37] *Anti-Discrimination Act 1977* (NSW), 4(1), defines "race" broadly to include: "colour, nationality, descent and ethnic, ethno-religious or national origin".

[38] *Sunol v Collier [No 2]* (2012) 260 FLR 414, [28], [33]-[34] (Bathurst CJ); *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* (2006) 15 VR 207 (construing *Racial and Religious Tolerance Act 2001* (Vic), s 8(1), which prohibits conduct inciting hatred on the ground of religious belief). On the NSW legislation, see NSW Legislative Council, n 15. This inquiry was set up because of the then Premier's concern that no prosecutions had been instituted under the existing laws.

[39] See D Meagher, "So Far No Good: The Regulatory Failure of Criminal Racial Vilification Laws in Australia" (2006) 17 PLR 209, 218-219, 228-230; *Criminal Code* (WA), s 77.

[40] See *O'Connell v Western Australia* [2012] WASCA 96.

[41] The following provisions providing civil remedies for hate speech incorporate the concept of "incitement": *Anti-Discrimination Act 1977* (NSW), s 20C(1); *Racial and Religious Tolerance Act 2001* (Vic), s 7(1); *Anti-Discrimination Act 1991* (Qld), s 124A(1); *Racial Vilification Act 1966* (SA), ss 4, 6; *Anti-Discrimination Act 1998* (Tas), s 19; *Discrimination Act 1991* (ACT), s 66(1).

Conduct that is rendered unlawful by s 18C is, however, not a criminal offence.[42]

Except for the absence of criminal sanctions, Pt IIA of the *Racial Discrimination Act* goes considerably further than earlier attempts to enact national laws to combat hate speech. The *Racial Discrimination Bill 1992* (Cth), for example, if passed, would have made it unlawful for a person knowingly or recklessly to do a public act "likely to stir up hatred, serious contempt or severe ridicule" against a person or group on the ground of race or ethnic origin. By contrast, s 18C(1)(a) of the *Racial Discrimination Act* does not require proof of intention or recklessness by the person accused of a contravention. Furthermore, a contravention only requires conduct that is reasonably likely in all the circumstances to "offend, insult, humiliate or intimidate another person or group". It is therefore not necessary for the complainant to prove that the conduct is likely to stir up racial hatred, serious contempt or severe ridicule. The complainant must prove that the conduct was done because of the race or ethnic origin of the relevant persons or group, but this burden can be discharged by showing that race or ethnic origin was one reason for the conduct. The reason need not be the dominant or even a substantial reason for performing the relevant act.[43]

Part IIA is clearly designed to protect vulnerable groups and individuals from hurt, fear and humiliation that public expressions of hatred and bigotry can inflict. The legislation also aims to provide tolerance and understanding among different social and ethnic groups that make up a diverse community.[44] These objectives are compatible with Australia's constitutional structure, which recognises an implied freedom of political communication, but does not accord protection to the "*laissez-faire* of an unregulated marketplace of ideas".[45] Giving effect to the objectives, however, necessarily intrudes into the values underpinning freedom of speech.

Part IIA of the *Racial Discrimination Act* attempts to achieve a balance between the competing values through s 18D. This provision qualifies the scope of the prohibition in s 18C by creating what the heading describes as "Exemptions". Most significantly for present purposes, s 18D provides that s 18C does not render unlawful anything said or done reasonably and in good faith in making or publishing a fair comment on any matter of public interest, provided that the comment is an expression of a genuine belief held by the person making the comment.[46]

In *Bropho v Human Rights & Equal Opportunity Commission*,[47] French J queried the characterisation of s 18D as a provision creating "exemptions" from the prohibition in s 18C. His Honour saw the proscription in s 18C as itself an exception to the fundamental principle that people should enjoy freedom of speech and expression.[48] He therefore preferred to understand s 18D as defining the limits of the proscription and not merely as a free speech exception. In whatever way it is characterised, s 18D is an important limitation on the operation of Pt IIA.

Critics of Pt IIA of the *Racial Discrimination Act* usually focus on both the breadth and lack of precision in the statutory language, particularly s 18C.[49] While these are matters of legitimate concern, generality of statutory language is not necessarily to be deplored. In the area of free speech, where it

[42] *Racial Discrimination Act 1975* (Cth), s 26.

[43] *Racial Discrimination Act 1975* (Cth), s 18B.

[44] *Toben v Jones* (2013) 129 FCR 515, [136] (Allsop P), referring to the Racial Discrimination Convention and the Explanatory Memorandum in the *Racial Hatred Bill 1994* (Cth). For a concise statement of why Parliaments enact laws to regulate racial vilification, see Meagher, n 39, 221, 225.

[45] *McCloy v New South Wales* (2015) 89 ALJR 857, [122] (Gageler J). Part IIA might be read down if it is applied to a political communication, but it is unlikely that the legislation would be declared wholly invalid: *contra* ALRC Report, n 13, [4.202]-[4.204]; cf *Coleman v Power* (2004) 220 CLR 1; *Tajjour v New South Wales* (2014) 254 CLR 508.

[46] *Racial Discrimination Act 1975* (Cth), s 18D(c)(ii). The other exemptions include anything said or done reasonably and in good faith in the course of a discussion for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest: s 18D(b).

[47] *Bropho v HREOC* (2004) 135 FCR 105.

[48] *Bropho v HREOC* (2004) 135 FCR 105, [72].

[49] See Meagher, n 39, 227-231; ALRC Report, n 13, [4.179].

is inevitable that a constant weighing of values will be required,[50] a high degree of precision in the statutory language may be an unrealistic aspiration. And although broad language may confer a degree of latitude to judges, that does not mean that decision-making must descend to intuitive value judgments or "unprincipled fluidity" in the law.[51] Courts are regularly required to interpret open-ended and potentially value-laden statutory language or to apply vague standards, including in constitutional adjudication.[52] Part of the judicial function is to construe legislation in a manner that articulates the value judgments required and to justify the choice in a transparent and principled manner. This process curtails the range of the constructional choices available for the future.

The principal difficulty posed by the drafting of Pt IIA is not so much the vagueness of the language, as the mixture of objective and subjective standards incorporated in the legislation. Just as anti-Semitism can be understood by reference either to objective or subjective criteria, hate speech can be defined by either objective or subjective standards. Where legislation designed to curb hate speech incorporates both kinds of standards, the linguistic tensions are not easily resolved.

The authorities construing s 18C(1)(a) have from time to time cited an observation by the Attorney-General made during the Second Reading Speech for the *Racial Hatred Bill 1994* (Cth), that the Bill:[53]

> requires an objective test to be applied by the [Human Rights and Equal Opportunity] Commission so that community standards to behaviour *rather than the subjective views of the complainant* are taken into account [emphasis added].

It is not entirely clear which part of the legislation the Attorney-General was referring to when he made this remark, but it is difficult to reconcile the language of s 18C(1)(a) with his observation. The provision does not say that it is unlawful to do an act only if it is objectively reasonable for the relevant person or group to be offended (or insulted, humiliated or intimidated) by the conduct. The word "reasonably" qualifies the word "likely' '.The question posed by s 18C(1)(a) is whether in all the circumstances it is reasonably likely that the person or group will be offended, not whether it is reasonable by community standards that the targets of the conduct are or claim to be offended.

The statutory language creates a problem. If the test is simply whether it is reasonably likely, in the sense that there is a reasonably good chance, that a targeted individual or group[54] will be offended by hate speech, the subjective responses of the individual or members of the group to the hate speech may well be decisive in determining whether conduct contravenes s 18C(1)(a). Courts have been quick to perceive that if subjective responses determine the outcome of complaints about hate speech, the legislation will intrude too deeply into the freedom to express opinions. Accordingly, they have sought to limit the intrusion by introducing objective standards for which the statutory language provides little warrant.[55]

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[50] J Stone, *Social Dimensions of Law and Justice* (Maitland Publications, Sydney, 1964), 230.

[51] *Contra* Meagher, n 39, 227, 231.

[52] See especially AM Gleeson, "Individualised Justice – The Holy Grail" (1995) 69 ALJ 421, 427-428 (referring to *Trade Practices Act 1974* (Cth), s 52 and Pt IVA and the *Contracts Review Act 1980* (NSW); S Kiefel, "Proportionality: A Rule of Reason" (2012) 23 PLR 85; *McCloy v New South Wales* (2015) 89 ALJR 857 (applying "proportionality" analysis to hold that legislation banning political donations by property developers did not infringe the implied freedom of political communication).

[53] Commonwealth, House of Representatives, *Parliamentary Debates*, 15 November 2014, 3341 (Michael Lavarach, Attorney-General). This passage was cited, eg, by French J in *Bropho v HREOC* (2004) 135 FCR 105, [66].

[54] Hate speech, it is fair to say, always has a target.

[55] See text below accompanying nn 69-71.

ANTI-SEMITIC SPEECH AND THE CONSTRUCTION OF PT IIA

A threshold question

In order to establish a contravention of s 18C(1) of the *Racial Discrimination Act*, it is necessary to show not only that the relevant act was reasonably likely to "offend, insult, humiliate or intimidate",[56] but that the act was done "because of the race, colour, or national or ethnic origin" of a person or a group of people.[57] The latter requirement predicates a causal relationship between the act and the characteristics of the person or group. In the case of a group, the implicit precondition for the application of s 18C(1) is that the members possess a common characteristic of race, colour or national or ethnic origin.

Once again, there is a disparity between the expectations incorporated in the Explanatory Memorandum and the language of s 18C. The Explanatory Memorandum specifically referred to decisions in other jurisdictions[58] and stated that it was intended that, consistently with those authorities, the legislation was designed to "provide the broadest basis for protection of people such as Sikhs, Jews and Muslims". The Explanatory Memorandum appears to have assumed that the term "race" would cover people of Jewish origin. Why it also assumed, in the absence of religion being mentioned in s 18C, that Muslims would be protected is unclear.

Despite the racial theories of Nazi Germany, it is doubtful (to say the least) whether Australian Jews can be said to be distinguishable from the rest of the community on the basis of their common race. Certainly Jewish people are not distinguishable on the basis of their colour or national origin. The threshold question in a case involving anti-Semitic speech is, therefore, whether Jews, or members of the Jewish group said to be reasonably likely offended by the conduct, have a common ethnic origin.

The only reasoned analysis of this question is the judgment of Hely J in *Jones v Scully*,[59] a case involving a complaint that the respondent, a retired Tasmanian schoolteacher, had distributed anti-Semitic literature.[60] The respondent, who was not legally represented, argued that Jews are not a group united by either race or ethnic origin.

Hely J rejected the argument, referring both to the Explanatory Memorandum and the cases cited in that document. However, he appeared to consider that whether Jews constitute a group with common ethnic origins is a question of fact, although he did not refer in detail to the evidence on the point.[61] This conclusion is consistent with the approach taken by the New Zealand Court of Appeal in a case cited in the Explanatory Memorandum. The Court in that case found that Jews in that country had a common ethnic origin on the basis of evidence given by an expert with qualifications in

[56] I generally use the term "offended" in discussing s 18C(1)(a) to include "insulted, humiliated or intimidated", unless the context indicates otherwise.

[57] *Jones v Scully* (2002) 120 FCR 243, [95] (Hely J).

[58] *King-Ansell v Police* [1979] 2 NZLR 531 (where the NZ Court of Appeal held that Jews in New Zealand could be regarded as having a common "ethnic origin" for the purposes of *Race Relations Act 1971* (NZ), s 25(1)); *Mandla v Dowell-Lee* [1983] 2 AC 548, 562 (Lord Fraser) (holding that Sikhs were a group of persons defined by reference to "ethnic ... origins" within the meaning of *Race Relations Act 1976* (Vic), s 3(1)). See Explanatory Memorandum, *Racial Hatred Bill 1994* (Cth), 3.

[59] *Jones v Scully* (2002) 120 FCR 243. The issue had briefly been adverted to previously in *Miller v Wertheim* [2002] FCAFC 156, a curious case involving a dispute within the Jewish community.

[60] Hely J made declarations and restraining orders. The orders are set out in the judgment: *Jones v Scully* (2002) 120 FCR 243, [247].

[61] *Jones v Scully* (2002) 120 FCR 243, [113].

anthropology and sociology.[62] By contrast, in *Jones v Toben*[63] Branson J held, on the authority of *Jones v Scully* and without reference to evidence, that Jews in Australia have a "common ethnic origin".[64]

In principle, the better view is that the question of whether a particular group said to be offended by hate speech has a common ethnic origin (or a common race, colour or national origin) must be determined by evidence, unless the issue is not in dispute.[65] In practice, Jewish complainants have not found it difficult to discharge the evidentiary burden by relying on expert evidence that Jews can be regarded as having a common ethnic origin.[66] The expectation stated in the Explanatory Memorandum to the *Racial Hatred Bill 1994* (Cth) that Jewish people would have the protection of Pt IIA has therefore been met. But in the absence of a prohibition in Pt IIA on hate speech directed at religious groups, the expectation that Muslims would enjoy the same protection is very unlikely to be met.[67] It is not easy to justify the disparity in treatment.

Prohibited conduct

Section 18C(1)(a) of the *Racial Discrimination Act* directs attention to the "reasonably likely" responses, in all the circumstances, of the relevant group or individuals to hate speech. Consistently with the legislation's apparent emphasis on likely subjective reactions, evidence of the personal responses of individuals to the conduct complained of is admissible on the question posed by s 18C(1)(a).[68] In the case of complaints about anti-Semitic speech, therefore, evidence can be given by Jewish people as to the impact of the material published on them and, in particular, whether the material caused them to feel offended, insulted, humiliated or intimidated.

It might be thought that the language of s 18C(1)(a) justifies the courts in giving very great weight to evidence of this kind. After all, if members of the targeted group are genuinely offended or insulted by the hate speech, it would seem "reasonably likely" that the speech will have the prohibited effect. However, courts have been conscious that to allow subjective evidence to be determinative (or nearly so) would give the statutory prohibition a very wide reach.

This concern has led the authorities to construe "reasonably likely" as importing an objective test into s 18C(1)(a). In *Hagan v Trustees of Toowoomba Sports Ground Trust*,[69] for reasons that are not entirely clear, Drummond J thought it was "apparent" that the impugned act is not to be assessed by its subjective impact upon a complainant. Hely J took the same view in *Jones v Scully*,[70] holding that evidence that Jewish people were actually offended by the anti-Semitic publications, although admissible, was not determinative of the question posed by s 18C(1)(a).

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[62] *King-Ansell v Police* [1979] 2 NZLR 531, 535 (Richmond J); 543 (Richardson J); 538-539 (Woodhouse J).

[63] *Jones v Toben* [2002] FCA 1150.

[64] *Jones v Toben* [2002] FCA 1150, [69]. There was an appeal but senior counsel representing the appellant did not challenge Branson J's holding on this issue: *Toben v Jones* (2003) 129 FCR 515.

[65] In *Eatock v Bolt* (2011) 197 FCR 261, Bromberg J relied on extensive documentary evidence to find that Australian Aboriginal people are a race and have a common ethnic origin. His Honour said at [312] that it was important that Aboriginal people regard themselves and are regarded by others as having the two characteristics identified by Lord Fraser in *Mandla v Dowell-Lee* [1983] 2 AC 548, 562, as essential to a group with common ethnic origins, namely a long shared history and a culture of their own.

[66] In a criminal prosecution in Western Australia, extensive expert evidence was given as to whether Jews were a group of persons defined by reference to race or ethnic origins. Professor Andrew Markus, Professor of Jewish Civilisations at Monash University, gave evidence based, among other things, on a 2008 national survey of 5100 people who regarded themselves as Jewish: see *O'Connell v Western Australia* [2012] WASCA 96, [33]-[35].

[67] See *Khan v Commission, Department of Corrective Services* [2002] NSWADT 131 (holding that a Muslim prisoner could not establish a complaint of discrimination on the ground of "ethno-religious origin" contrary to *Anti-Discrimination Act 1977* (NSW), s 20C). If, however, there is evidence that hate speech has been directed at a religious sub-group with common racial or ethnic characteristics, such as Muslims of Arab background, Pt IIA of the *Racial Discrimination Act* may well apply.

[68] *Jones v Scully* (2002) 120 FCR 243, [99] (Hely J).

[69] *Hagan v Trustees of Toowoomba Sports Ground Trust* [2000] FCA 1615, [15].

[70] *Jones v Scully* (2002) 120 FCR 243, [98]-[101].

The insistence on an objective test has produced an important consequence. The inquiry as to whether members of a group are reasonably likely to be offended by hate speech is to be undertaken by reference to a "reasonable" or "ordinary" member of the group. The invocation of such a hypothetical person is designed to exclude from consideration reactions which are extreme or atypical.[71] Courts therefore somehow have to assess presumably genuine evidence of subjective responses against the responses the court attributes to a reasonable member of the group. This is not an easy task.

The courts have introduced objective standards into the rather unpromising language of s 18C(1)(a) in another way. In *Creek v Cairns Post Ltd*,[72] Kiefel J said that to "offend, insult, humiliate or intimidate" is to inflict "profound and serious effects, not to be likened to mere slights". This language suggests that s 18C(1) has to be understood as implicitly incorporating an objectively ascertainable threshold that complainants must satisfy in order to establish a contravention of s 18C(1). Yet, as French J observed in *Bropho*,[73] the words "offend, insult, humiliate or intimidate" are "open textured" and therefore quite capable of being given a broad construction. He pointed out that the "lower register" of the dictionary definition of these terms "seem a long way from the mischief to which Art 4 of the [Racial Discrimination Convention] is directed".[74] His Honour had in mind, in particular, that speech is not always "polite and inoffensive".[75]

The difficulty in applying a test combining subjective and objective elements is compounded when hate speech targets or reaches a group or sub-group said to be particularly vulnerable to the responses identified in s 18C(1)(a). In *Jones v Toben*, a case involving Holocaust denial, Branson J determined the impact of anti-Semitic material on a readily accessible website on "young and impressionable"[76] members of the Jewish community. Her Honour did not analyse the difficulty of identifying a "reasonable" or "ordinary" member of a "young and impressionable" sub-group.[77] In deciding what characteristics should be imputed to such a hypothetical construct, it is difficult to avoid the conclusion that the subjective reactions of the sub-group will carry great weight.

Jones v Toben illustrates another difficulty in applying the statutory language. In that case, Branson J was satisfied that material published on the internet by the respondent conveyed a series of imputations, including the following:[78]

(a) there is serious doubt that the Holocaust occurred;

(b) it is unlikely that there were homicidal gas chambers in Auschwitz.

Branson J said that it was not for the Court to determine whether the Holocaust occurred,[79] but found that the imputations were reasonably likely to offend and insult a group of people, namely Australian Jewry. Her Honour reasoned as follows:[80]

> The applicant gave evidence that the Australian Jewish community has the highest percentage of survivors of the Holocaust of any Jewish community in the world outside of Israel. Each of the first two of the imputations ... thus challenges and denigrates a central aspect of the shared perception of

[71] *Eatock v Bolt* (2011) 197 FCR 261, [251] (Bromberg J).

[72] *Creek v Cairns Post Ltd* (2001) 112 FCR 352, [16].

[73] *Bropho v HREOC* (2004) 135 FCR 105, [67].

[74] *Bropho v HREOC* (2004) 135 FCR 105, [68].

[75] See also *Coleman v Power* (2004) 220 CLR 1, [239] (Kirby J).

[76] *Jones v Toben* [2002] FCA 1150, [96].

[77] Compare, in a different context, the remarks of Neave JA in *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* (2006) 15 VR 207, [158] (considering the absurdity of postulating a "reasonable" neo-Nazi). In *Sunol v Collier [No 2]* (2012) 260 FLR 414, [34], Bathurst CJ (with Allsop P and Basten JA agreeing), construed *Anti-Discrimination Act 1977* (NSW), s 49ZT, which prohibits incitement of hatred of a person on the ground of homosexuality, as requiring consideration of the effect of the conduct on an "ordinary" (rather than "reasonable") member of the audience hearing the alleged incitement.

[78] *Jones v Toben* [2002] FCA 1150, [88].

[79] *Jones v Toben* [2002] FCA 1150, [89].

[80] *Jones v Toben* [2002] FCA 1150, [93].

> Australian Jewry of its own modern history and the circumstances in which many of its members came to make their lives in Australia rather than in Europe. To the extent that the material conveys these imputations it is, in my view, more probable than not that it would engender feelings of hurt and pain in the living by reason of its challenge to deep seated belief as to the circumstances surrounding the deaths, or the displacement, of their parents or grandparents. For the same reason, I am satisfied that it is more probable than not that the material would engender in Jewish Australians a sense of being treated contemptuously, disrespectfully and offensively.

This reasoning concentrates on the likely responses of members of the Jewish community to the material, having regard to its particular sensitivities. The analysis is consistent with the statutory language, if not necessarily with the authorities discerning objective elements in the statutory test.[81]

On one view, the decision in *Jones v Toben* holds Holocaust denial is "reasonably likely" to cause offence to members of the Jewish community because they are very sensitive to manifestly false refusals to acknowledge a catastrophic event of profound importance to the community. Another interpretation is that a reasonable person, not necessarily Jewish, would not only expect the Jewish community to be deeply offended by the material, but would consider that response to be perfectly justified.

Whichever interpretation is correct, the decision suggests that anyone who denies the occurrence of an historic act of genocide or mass slaughter is at risk of the denial being regarded as reasonably likely to offend or insult people of the same ethnic or racial group as the victims of the atrocities. Moreover, Branson J held that the complainant did not have to prove the historical truth of the Holocaust. Responding to this holding, a commentator sympathetic to hate speech laws has characterised the "judicial reluctance ... to deal with the central issue of the historical fact of the Holocaust [as leading] to a bizarre and unsatisfactory conclusion on the substantive merits of the claim".[82]

The virtues of a court ruling on the historical authenticity of the Holocaust may be debatable.[83] But if the approach taken in *Jones v Toben* is correct, a person denying the truth of a bitterly disputed historical event may infringe Pt IIA of the *Racial Discrimination Act* because the denial causes great offence to members of the group asserting that the event did take place (unless the denier can invoke the exemption in s 18D). That this is not a fanciful prospect is shown by Turkey's vehement rejection of the generally accepted fact that the deaths of hundreds of thousands of Armenians between 1915 and 1923 was the result of a deliberate policy of genocide[84] by the Ottomans and their successors. Indeed Australia's own "history wars" have seen denials of the mass slaughter perpetrated on Indigenous people.

The requirement of causation

The requirement in s 18C(1)(b) of the *Racial Discrimination Act* that the act complained of be done "because of the ... ethnic origin" of the relevant person or group introduces the notoriously difficult concept of causation into the legislation. When the persons reasonably likely to be offended, insulted, humiliated or intimidated by an act are Jewish, how does one assess whether the act has been done *because* those persons are Jewish?

[81] On appeal, the publisher was legally represented but no challenge was made to the findings that the material was reasonably likely to offend or insult Jewish people: *Toben v Jones* (2003) 129 FCR 515, [22]. The full text of the material is set out in the judgment of Carr J.

[82] D Fraser, "'On the Internet, Nobody Knows You're a Nazi': Some Comparative Legal Aspects of Holocaust Denial on the WWW" in Hare and Weinstock, n 1, 535.

[83] This effectively occurred in the defamation proceedings brought by the Holocaust denier, David Irving: *Irving v Penguin Books Ltd* [2001] EWCA Civ 1197; see RJ Evans, *Lying About Hitler: History, Holocaust and the David Irving Trial* (Basic Books, NY, 2001); D Lipstadt, *History on Trial: My Day in Court with a Holocaust Denier* (Harper Perennial, NY, 2006).

[84] The word "genocide" was coined by a Polish Jew, Raphael Lemkin, in his book, *Axis Rule in Occupied Europe* (Carnegie Endowment for International Peace, Division of International Law, Washington DC, 1944). He used the term to describe the deliberate mass killing of Armenians in what is now Turkey. Lemkin, who lost many members of his family in the Holocaust, helped draft the *Convention on the Prevention and Punishment of the Crime of Genocide* (1948).

The authorities have generally construed the causation requirements in s 18C(1)(b) as incorporating both objective and subjective elements. In a sense this is consistent with the approach taken to s 18C(1)(a), but the consequences are different. The introduction of objective considerations into s 18C(1)(a) limits (or at least potentially limits) the scope of the prohibition. The introduction of objective considerations into s 18C(1)(b) usually makes it more difficult for the publisher of hate speech to defend his or her conduct on the ground that the material was not published "because of the race, colour or national or ethnic origins" of the complainants.

In *Creek v Cairns Post Pty Ltd*,[85] Kiefel J referred to cases decided on other sections of the *Racial Discrimination Act* which indicated that the inquiry under s 18C(1)(b) is as to the "true ground" of the decision. Her Honour took the authorities to mean that s 18C(1)(b) is not to be applied subjectively, in the sense of considering only what the person whose conduct is in question provides as the basis for the action. The inquiry "considers what was in truth likely to have given rise to [the conduct], when regard is had to all the circumstances, and this would include the nature of the conduct and the words and expressions used".[86]

Later, Kiefel J said that the relevant question having regard to s 18B is "whether anything suggests race as a factor in the [newspaper's] decision to publish the photograph".[87] That was said to involve an inquiry as to whether the publication was "motivated by considerations of race".[88]

This approach was followed by Carr J (with whom Kiefel J agreed) in *Toben v Jones*.[89] The publisher in that case (the appellant) did not give evidence as to his intention or motivation in publishing material denying the truth of the Holocaust which, as his counsel conceded, was reasonably likely to offend Australian Jews. Carr J considered that the appellant had attempted a "sick inversion and an exercise in sophistry" in arguing that the deaths of only 800,000 people instead of six million (as he contended was the truth) was "good news and a cause for celebration".[90] Carr J concluded that a fair reading of the material "shows that its whole tenor is to offend and insult those who maintain that the Holocaust occurred and, in particular, Jewish people".[91] In effect, Carr J let the publications speak for themselves in determining whether one reason the respondent published the material was the "ethnic origin" of Jewish people.

Allsop J's approach was a little different. He was sceptical about departing too far from the purpose or intention of the person engaging in the conduct,[92] but accepted that objective evidence can assist in determining why the material was published. Thus he agreed with Carr J that the "obviously offensive" nature of the material warranted finding that the appellant acted as he had because of the ethnic origin of Jewish Australians.[93] Allsop J added a warning that if the test of causation is less stringent than he identified, an issue might arise as to whether s 18C(1)(b) could reasonably be regarded as appropriate or adopted to implementation of the Racial Discrimination Convention, thereby casting doubt on whether it is constitutionally valid as an exercise of the Commonwealth Parliament's power to legislate with respect to external affairs.[94]

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[85] *Creek v Cairns Post Ltd* ((2001) 112 FCR 352, [22].

[86] *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, [22].

[87] *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, [28].

[88] *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352 concerned the publication by a newspaper of a photograph of an indigenous girl in a bush setting which was said to convey a false impression of the environment in which relatives could raise her. Kiefel J found (at [29]) that since the photograph had been chosen from a library as the only one available, race was not a factor in its publication.

[89] *Toben v Jones* (2003) 129 FCR 515, [31]. The Full Federal Court dismissed an appeal from the decision of Branson J in *Jones v Toben* [2002] FCA 1150: see text above accompanying nn 76-81.

[90] *Toben v Jones* (2003) 129 FCR 515, [33].

[91] *Toben v Jones* (2003) 129 FCR 515, [37].

[92] *Toben v Jones* (2003) 129 FCR 515, [151].

[93] *Toben v Jones* (2003) 129 FCR 515, [154].

[94] *Toben v Jones* (2003) 129 FCR 515, [155].

The outcome of *Toben v Jones* is that although an examination of the reason or reasons for an act must involve consideration of why the particular actor engaged in the conduct, the objective character of the hate speech may be virtually conclusive as to whether (relevantly) ethnic origin was a reason for the conduct. If the material published is blatantly anti-Semitic, a court is likely to infer that one reason it was published was because of the ethnic origin of the Jewish people likely to be offended. In effect, the objective evidence may render implausible denials by the publisher that he or she was motivated by the fact that the group likely to be offended was Jewish.

The free speech exemption

Section 18D, like other provisions in Pt IIA of the *Racial Discrimination Act*, incorporates both subjective and objective tests. A person publishing material that otherwise contravenes s 18C must establish that he or she has acted both reasonably and in good faith in order to claim the benefit of the exemption.[95] If the publication is said to constitute fair comment on a matter of public interest, the publisher must also show that the comment expresses his or her genuine belief.

It has not proved easy for a publisher of offensive material to satisfy the requirements of s 18D. Whether a person has acted reasonably imparts an objective judgment. Importantly, the assessment is informed by the normative elements incorporated in s 18C. Thus a person who publishes a comment which includes gratuitously offensive or insulting material irrelevant to the matter of public interest under discussion is likely to be found not to have acted reasonably.[96]

Even the requirement of good faith, which might be thought to be satisfied if the publisher has acted honestly, has been interpreted to set a higher standard. The publisher is expected:

> under the aegis of fidelity or loyalty to the relevant principles in the Act, [to adopt] a conscientious approach to the task of honouring the values asserted by the Act. This may be assessed objectively.[97]

Thus a person who exercises freedom of speech in a way that makes little or no attempt to minimise the offence experienced by people affected by the comments may be found not to have acted in good faith.[98] Publications judged to be provocative, as demonstrated by derision or gratuitous asides, are unlikely to come within the protection afforded by s 18D.[99]

In view of the construction accorded to s 18D, it is not surprising that attempts to rely on s 18D of the *Racial Discrimination Act* as a defence in cases involving anti-Semitic speech have failed. In *Toben v Jones*, for example, the respondent invoked the protection of s 18D(b), arguing that the offensive material was published for a genuine purpose in the public interest. Carr J held that since the respondent knew that Jewish people would be offended by the challenge to the historical reality of the Holocaust:

> [A] reasonable person acting in good faith would have made every effort to express the challenge and his views with as much restraint as was consistent with the communication of those views.
>
> ...
>
> [T]he Document shows that [the respondent] made no such effort. On the contrary, the terms of the Document are ... deliberately provocative and inflammatory.[100]

Allsop J considered that the tenor of the material was to insult and offend Jews and that this appeared to have been deliberate.[101] In the absence of an explanation from the respondent, Allsop J

[95] The publisher bears the onus of proof: *Eatock v Bolt* (2011) 197 FCR 261, [339] (Bromberg J).

[96] *Bropho v HREOC* (2004) 135 FCR 105, [81].

[97] *Bropho v HREOC* (2004) 135 FCR 105, [96]; see also *Eatock v Bolt* (2011) 197 FCR 261, [353].

[98] *Bropho v HREOC* (2004) 135 FCR 105, [102].

[99] *Eatock v Bolt* (2011) 197 FCR 261, [413], [414], [425].

[100] *Toben v Jones* (2003) 129 FCR 515, [44]-[45] (Kiefel J agreeing).

[101] *Toben v Jones* (2003) 129 FCR 515, [161].

found that the material was designed to smear, hurt, offend, insult and humiliate Jews. In his view, on "no conception of the phrase 'good faith' could the material be so characterised".[102]

AN IDEAL BALANCE?

If the worth of Pt IIA of the *Racial Discrimination Act* is to be measured by the level of protection it accords to members of the Jewish community against hate speech, it must be judged a success. The authorities have interpreted Pt IIA in a manner that is favourable to complainants seeking remedies against publishers of blatantly anti-Semitic material, as indicated by the following:

- Australian Jews have been readily recognised as a group with a common ethnic origin and therefore within s 18C(1)(b);
- whether an act is assessed reasonably likely to offend, insult, humiliate or intimidate members of the Jewish community is to be determined by the reactions of an ordinary member of the community or, in some cases, of a particularly vulnerable sub-group within the community;
- as a consequence, Holocaust denial, at least if published repeatedly and in combination with anti-Semitic slurs, is very likely to constitute conduct within s 18C(1)(a);
- courts have been ready to conclude that by reason of the very nature of the anti-Semitic publications complained of, one reason for the publication was the "ethnic origin" of the Jewish people reasonably likely to be offended by the material thereby satisfying the "causation" requirement; and
- courts have also been prepared to draw inferences from the anti-Semitic character of publications making it unlikely that the publisher will be able to establish that he or she has acted "reasonably and in good faith" or that the publication is for a "genuine purpose in the public interest".

The broader question posed by Pt IIA, however, is whether the legislation achieves an appropriate balance between the competing values it seeks to accommodate. In addressing this question, it is important to acknowledge that, despite its worthy objectives, a law which gives substantial levels of protection to Jewish people and other minority groups vulnerable to hate speech does not necessarily achieve the optimum outcome for a society that, for good reasons, places high value on freedom of speech.

As I have noted, one common criticism of Pt IIA is that the language is insufficiently precise to avoid the need for judicial value judgments.[103] A more cogent criticism is that the prohibition in s 18C is framed too widely and intrudes too far into freedom of speech. Proponents of this view generally contend that a prohibition on speech that is likely to offend or insult particular groups or individuals goes too far in protecting the feelings of people who might be sensitive to slurs or abuse. These critics support amending s 18C, for example by limiting the prohibition to speech that is reasonably likely to vilify or intimidate another person or group.[104]

Those who contend that Pt IIA is too broad but should be retained in a modified form accept, at least in principle, that some legislative restraints on hate speech are justified, even in a society that values freedom of expression. Many arguments have been advanced in favour of laws curtailing hate speech, but two are particularly powerful.

The first argument is based on what the legal philosopher Jeremy Waldron calls "the public good of inclusiveness".[105] He argues that hate speech undermines inclusiveness by compromising the dignity of those who are targeted, both in their own eyes and in the eyes of their fellow citizens. Hate speech attributes characteristics to persons of common ethnicity, race or religion, thereby suggesting

[102] *Toben v Jones* (2003) 129 FCR 515, [164]. In *Jones v Scully* (2002) 120 FCR 243, Hely J rejected a defence based on s 18D(b), partly because of the contents of the leaflets and partly because Ms Scully never identified what her genuine purpose was in distributing the leaflets: see [137], [147], [159], [170], [186], [198], [227].

[103] See text above accompanying nn 49-52.

[104] Amendments to this effect were proposed by the Attorney-General in March 2014. The proposal defined "vilify" to mean "incite hatred against a person or a group of persons". The proposal, which was withdrawn in August 2014, included an exemption drafted far more broadly than s 18D: see Magarey, n 12.

[105] J Waldron, *The Harm in Hate Speech* (Harvard University Press, Cambridge Massachusetts, 2002), 5.

that they should be disqualified from being treated as members of society in good standing. Hate speech laws confirm that all people are members of society in good standing and are worthy of equal respect and standing in the broader community. In determining conduct that should be subject to legal constraints, Waldron distinguishes, for example, between attacks on a body of beliefs adhered to by particular groups and attacks on the basic social standing and reputation of people who adhere to the beliefs.[106] It is one thing to mock the tenets of Judaism, Islam or Christianity; it is quite another to impute to all Jews, Muslims or Christians characteristics such as dishonesty, cruelty or greed.

The second major justification for laws prohibiting hate speech is that such speech causes harm not only to the target group but to society at large. The Supreme Court of Canada has argued that speech calculated to diminish the dignity and self-respect of vulnerable groups can inflict not merely hurt feelings or emotional distress, but serious psychological harm on the members of those groups.[107] Hate speech may also influence some people susceptible to the message to harm people who are denigrated and denied the respect due in a society which "venerates the equality of all persons".[108] The history of anti-Semitism provides little comfort for those who would argue that there is little or no relationship between hate speech directed at identifiable groups and more serious conduct intended to inflict physical, psychological or other harm on members of those groups.

These two arguments provide a solid foundation for retaining hate speech laws in some form. But they also lend force to the criticism that the current reach of Pt IIA is too wide. The arguments advanced by Waldron and the Supreme Court of Canada distinguish between speech that is merely offensive or insulting and speech that detracts from the equal standing in society of members of the group targeted by hate speech. Laws curtailing hate speech are justifiable not because they protect people from being offended or insulted by prejudiced and ill-informed views, but because they help to protect vulnerable groups from more serious harm such as intimidation, discrimination, social exclusion and, ultimately violence. These principles suggest that Pt IIA should be amended by eliminating references to conduct that is merely likely to offend or insult members of a particular group. This could be achieved, for example, if the legislation was confined to hate speech or conduct that is likely to intimidate, degrade or incite hatred or contempt for members of the group. Amendments of this kind, however, will not of themselves overcome the difficulties associated with the mix of objective and subjective standards incorporated in the legislation.

The difficulties created by the drafting of the current legislation would be reduced by two significant amendments. One would substitute for the current "to offend, insult, humiliate or intimidate" a more demanding standard such as to "degrade, intimidate or incite hatred or contempt". The other would be to replace the references to the subjective responses of groups targeted by hate speech with an objective test for determining whether the hate speech is likely to have the prohibited effect. An objective test would involve reference to the standards of a reasonable member of the community at large. In practice, as in so many areas of the law, this would involve courts exercising judgment in the light of their assessment of prevailing community standards, taking account of the evidence adduced in the individual case.

As applied to anti-Semitic speech, the current legislation reflects the definition of anti-Semitism that focuses upon the perceptions of Jewish people themselves. A law which incorporates objective standards would reflect a definition that rests on the attribution of false characteristics to Jews or the expression of hatred towards Jewish people. As has been seen,[109] the latter lends itself to identifying behaviour that can readily be characterised as anti-Semitic without reference to the subjective

[106] Waldron, n 105, 120-121.

[107] *R v Keegstra* [1990] 3 SCR 697, 746 (Dickson CJ). A majority of the Court held that a provision creating the offence of wilfully promoting hatred against an identifiable group distinguished by colour, race, religion or ethnic origin imposed reasonable limits on freedom of speech and thus did not violate the Canadian Charter of Rights and Freedoms. Accordingly, the Court upheld the conviction of a teacher who informed his students that Jews, among other attributes, were "treacherous", "sadistic", "money-loving", "power hungry" and "child killers".

[108] *R v Keegstra* [1990] 3 SCR 697, 756 (Dickson CJ).

[109] See text above accompanying n 29.

responses of members of the Jewish community. The approach also allows for a judgment to be made by reference to broader community standards (as interpreted by the judiciary) as to whether anti-Semitic conduct or speech is likely to intimidate, degrade or incite hatred or contempt for Jewish people.

While a legislative standard that incorporates references to community standards requires the application of value judgments, an objective approach to determining the likely effects of hate speech is more likely over time to produce consistency in adjudication. The outcome of a complaint would not depend on the intensity of feelings about an issue within a particular group. Rather, the result would be determined by the application of standards capable of application to all groups and individuals seeking the protection of the legislation. The adjudicative process could be informed by evidence explaining the impact of the hate speech on those groups and individuals, but that would not necessarily be the predominant consideration. In particular, the application of community standards would allow for the values of free speech to play a direct role in an early stage of the adjudicative process, rather than be introduced into the equation only after the hate speech has been found to infringe the statutory prohibition.

One way of testing whether this approach provides adequate protection against anti-Semitic speech is to apply the approach to the vexed question of whether Holocaust denial should be unlawful. For reasons of history, expiation and a fear of resurgent Nazism many European countries criminalise Holocaust denial.[110] In *Garaudy v France*,[111] the European Court of Justice decided that such laws are compatible with Art 10.1 of the *European Convention on Human Rights and Fundamental Freedoms*[112] which guarantees freedom of expression. The Court therefore upheld a French law which penalised anyone denying the existence of one or more crimes against humanity, as defined in the Statute of the International Military Tribunal of 8 August 1945 creating the Nuremberg Tribunals.[113]

The Court considered that the French law fell within the exception in Art 10.2 for laws restricting freedom of speech that "are necessary in a democratic society ... for the protection of disorder or crime [or] for the protection of the reputation or rights of others".[114] In its view:

> There can be no doubt that denying the reality of clearly established historical facts, such as the Holocaust, as the applicant does in his book, does not constitute historical research akin to a quest for the truth. The aim and the result of that approach are completely different, the real purpose being to rehabilitate the National-Socialist regime and, as a consequence, accuse the victims themselves of falsifying history. Denying crimes against humanity is ... one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others.[115]

This reasoning does not rely simply on the extreme offence Holocaust denial causes to members of the Jewish community (and to others). It invokes the likelihood that Holocaust denial, at least in parts of Europe, is likely to incite hatred towards Jews and may provoke civil disorder, including violence. The analysis therefore reflects the distinction maintained by Waldron and other commentators between hate speech that is justifiably subject to legislative controls and hate speech that should not be prohibited.

It is perhaps doubtful whether particular cases of Holocaust denial invariably can be addressed in this way. Some forms of Holocaust denial, for example, may be coupled with expressions of other

[110] See n 18 above.

[111] *Garaudy v France* (European Court of Human Rights, Application No 65831/01, 24 June 2003).

[112] *European Convention on Human Rights and Fundamental Freedoms*: Opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

[113] *Loi sur la liberté de la presse du 29 juillet 1881, no 90-615* [Freedom of the Press Act 29 of 29 July 1881, No 90-615], (France) JO, July 1890, s 24.

[114] *European Convention on Human Rights and Fundamental Freedoms*, Art 10.2.

[115] *Garaudy v France* (European Court of Human Rights, Application No 65831/01, 24 June 2003), 23.

obviously deluded beliefs that no reasonable person could take them seriously or think that they could incite hatred of Jews or any other group. Other forms of Holocaust denial may be disseminated to such a limited audience as to be incapable of causing the harm identified by the European Court of Justice.[116]

In practice, however, Holocaust denial is nearly always accompanied by hate speech imputing false and demeaning characteristics to Jews as a group. This is shown by the Australian cases, all of which involved hate speech going beyond Holocaust denial. Similarly, in *Garaudy v France*, the publications for which the author was convicted were described by a French court as asserting that "Israel Zionist lobbies" deliberately distorted history for political ends in order to legalise acts of violence and endanger world unity and peace. Anti-Semitic speech of this kind, at least if widely distributed, is very likely to be covered by a prohibition which directs attention to whether the speech is likely to degrade, intimidate or incite hatred or contempt for Jewish people and incorporates community standards rather than relying on the subjective impact of hate speech on target groups. It follows that if the prohibition is drafted in this manner, members of the Jewish community and of other minority groups would continue to enjoy substantial protection against hate speech.

A redrafting of s 18C of the *Racial Discrimination Act* is not the only amendment that is worthy of consideration. It is, for example, difficult to justify an interpretation of the "exemption" in s 18D which places a premium on a publisher conscientiously adhering to the values embodied in the legislation. But the key provision is the legislative prohibition on free speech. That prohibition should be drafted in terms that achieve a more defensible balance between the laudable aims of the current legislation and the values of free speech.

CONCLUSION

Once an issue is politicised, as occurred in Australia with the debate about retaining Pt IIA of the *Racial Discrimination Act*, careful analysis tends to give way to vehement advocacy of starkly contrasting views. The proper role of hate speech laws in a democracy that values not only diversity and tolerance but freedom of speech and expression, is a topic that deserves close consideration.

Complaints about anti-Semitic speech have played an important part in shaping the interpretation of the rather curious language of Pt IIA. The decided cases, when assessed against an understanding of anti-Semitic conduct, strongly suggest that there are sound reasons for retaining legislative protections against hate speech. But they also suggest that amendments to the current legislation can achieve a more appropriate balance between the interests the legislation seeks to accommodate. Properly drafted constraints on anti-Semitic speech, as well as on other forms of hate speech, are compatible with the fundamental values underpinning Australian democracy.

[116] Section 18C(1) is concerned only with conduct that takes place "otherwise than in private": see s 18C(2), (3); *Silberberg v Builders Collective of Australia Inc* (2007) 164 FCR 475, [19]; *Jones v Toben* [2002] FCA 1150, [74].