THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

RACIAL HATRED BILL 1994.

Report by the
Senate Legal and Constitutional Legislation Committee

MARCH 1995

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Racial Hatred Bill 1994

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Racial Hatred Bill 1994

Introduction

1.1 On 2 February 1995 the Senate referred the *Racial Hatred Bill 1994* to the Committee for inquiry and report[1]. The Committee was required to report by 27 February 1995. Leave from the Senate was sought and the date to report was deferred to 7 March 1995.

Background

1.2 On 16 December 1992, the *Racial Discrimination Amendment Bill 1992* was introduced in the House of Representatives. It was introduced as a response to a number of reports which had addressed the issue of racial vilification,[2] and in furtherance of international treaty obligations concerning incitement to racial hostility or violence.[3]

1.3 The Bill contained two criminal offences which dealt with acts intended and likely to stir up hatred against a person or group on the ground of race, and acts done with the intention of causing persons of a particular race to fear that violence may be used against them. The Bill also included a civil provision which made it unlawful for a person to do a public act that is likely to 'stir up hatred, serious contempt or severe ridicule against a person or a group' on racial grounds. People affected by that unlawful act could bring a complaint against the perpetrators seeking civil remedies.

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1 *Journals of the Senate* No 136, 2 February 1995.

2 Australian Law Reform Commission, *Multiculturalism and the Law*, Report No. 57; Johnston, E., *National Report of the Royal Commission into Aboriginal Deaths in Custody*, Canberra, AGPS, 1991: Vol. 4; and Human Rights and Equal Opportunity Commission, *Racist Violence*, Canberra, AGPS, 1991.

3 *International Covenant on Civil and Political Rights*: art. 20(2); and *Convention on the Elimination of All Forms of Racial Discrimination*: art. 4(a).

1.4 The Bill was left to lie in the Parliament over the summer of 1992-93, in order to allow public discussion and scrutiny. The calling of a general federal election in early 1993 resulted in the lapse of the Bill. When the new Parliament convened, the Bill was not immediately reintroduced.

1.5 On 10 November 1994, a revised version of the Bill, titled the *Racial Hatred Bill 1994*, was introduced in the House of Representatives.

The Committee's Inquiry

1.6 The Committee received 24 submissions. Appendix 1 lists the names of those who made submissions.

1.7 The Committee held public hearings to discuss the provisions of the Bill in Canberra on 17 February 1995 and in Melbourne on 24 February 1995. An additional public hearing was held on 28 February 1995 in Canberra to discuss the ramifications for the Bill of the High Court's judgment in *Brandy v Human Rights and Equal Opportunity Commission*. Appendix 2 lists the persons who gave evidence to the Committee at the three public hearings.

Objective of the Bill

1.8 In the second reading speech on the *Racial Hatred Bill 1994*, the Attorney-General, Mr Lavarch, stated:

> "The *Racial Hatred Bill* is about the protection of groups and individuals from threats of violence and the incitement of racial hatred, which leads inevitably to violence. It enables the Human Rights and Equal Opportunity Commission to conciliate complaints of racial abuse....
>
> The bill is intended to close a gap in the legal protection available to the victims of extreme racist behaviour. No Australian should live in fear because of his or her race, colour or national or ethnic origin. The legislation will provide a safety net for racial harmony in Australia, as both a warning to those who might attack the principle of tolerance and an assurance to their potential victims."

1.9 The Committee heard evidence from witnesses who considered the objective of the Bill to be:

> 1. to set a social standard for the community which will have an educational effect; and
>
> 2. to punish acts which are reasonably likely to incite racial hatred, thereby deterring others from committing such acts.

Mr Lawrence Lau, President of the Australian Chinese Community Association of New South Wales Inc., stated:

> "I believe the law when enacted will have two prime objectives. One is to act as a deterrent so that the racists keep their views private. The second one is to have a very good educational effect on the community, giving the community a very powerful message that racial hatred and violence... will not be tolerated by this country.
>
> The other benefit of restraining racist views is that it would give education a head start. Everyone agrees that education is the prime weapon to combat racism. With the racist view maintained privately, the effect of long term education would [be amplified]".[4]

Scope of the Bill

1.10 The Bill deals with acts done by reason of the 'race, colour or national or ethnic origin of a person'. It does not specifically address acts done by reason of a person's religion. Mr Colin Neave, Deputy Secretary of the Attorney-General's Department, explained the relationship between the Bill and acts based on religious hatred, as follows:

> "Racial hatred and violence have been identified as significant concerns in a number of major inquiries. There has been no such compelling evidence of religious hatred in Australia. However, the

4 Evidence, 17 February 1995, L&C 298.

bill does allow religion to be recognised as a characteristic of an ethnic group".[5]

1.11 The Explanatory Memorandum to the Bill explains the Government's view of the term 'ethnic origin' as follows:

> "The term 'ethnic origin' has been broadly interpreted in comparable overseas common law jurisdictions (cf *King-Ansell v Police* [1979] 2 NZLR per Richardson J at p. 531 and *Mandla v Dowell Lee* [1983] 2 AC 548 (HL) per Lord Fraser at p. 562). It is intended that Australian courts would follow the prevailing definition of "ethnic origin" as set out in *King-Ansell.* The definition of an ethnic group formulated by the Court in *King-Ansell* involves consideration of one or more of characteristics such as a shared history, separate cultural tradition, common geographical origin or descent from common ancestors, a common language (not necessarily peculiar to the group), a common literature peculiar to the group, or a religion different from that of neighbouring groups or the general community surrounding the group. This would provide the broadest basis for protection of peoples such as Sikhs, Jews and Muslims."

1.12 The Committee notes, however, that in the United Kingdom, employment and industrial tribunals which have applied the principles set out in *Mandla v Dowell Lee*, have concluded that Muslims do not fall within the category of an 'ethnic group'. In *Nyazi v Rymans Ltd*, the Employment Appeals Tribunal stated:

> "[W]e are unable to conclude that Muslims satisfy the definition of the Act and come within the meaning of 'ethnic group'. All we can say is that Muslims profess a common religion in a belief in the oneness of God and the prophethood of Muhammed. No doubt there is a profound cultural and historical background and there are traditions of dress, family life and social behaviour. There is a common literature in the sense that the Holy Quaran is a sacred book. Even so, many of the other relevant characteristics would seem to be missing.

5 Evidence, 17 February 1995, L&C 253.

> The Muslim faith is widespread, covering many nations, indeed many colours and languages, and it seems to us that the common denominator is religion and a religious culture. In other words we believe Muslims are a group defined mainly by reference to religion and that being so we must find that we have no jurisdiction under the Act."[6]

1.13 The same finding was reached in 1991 in *Commission for Racial Equality v Precision Manufacturing Services.*[7]

1.14 The Board for Social Responsibility of the NSW Synod of the Uniting Church submitted to the Committee that the Bill should extend to acts of vilification based on the other person's religious beliefs, where the religious belief is commonly associated with people of certain races or ethnic origins. The Board submitted that such a provision needs to be explicit, in order to protect people such as Muslim women who suffered during the Gulf War.[8]

1.15 The Committee notes that although there is uncertainty about the meaning of 'ethnic origin', a court which is interpreting the meaning of these words may refer to the Explanatory Memorandum[9] which makes it clear that the term is intended to be applied broadly, and to include Muslims.

1.16 The Committee accepts the evidence of Mr Neave, the Deputy Secretary of the Attorney-General's Department, that in this case it may be difficult to define the term 'ethnic origin' in the Bill in a manner that does not inadvertently exclude other groups.[10]

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6 Employment Appeals Tribunal, unreported, EAT/6/88, 10 May 1988.

7 Sheffield Industrial Tribunal, unreported, 26 July 1991. Referred to in Poulter, S., 'Towards Legislative Reform of the Blasphemy and Racial Hatred Laws' (1991) *Public Law* 371, at 373.

8 Submission No. 12, 20 February 1995. See also submission No. 2, Mr John McNicol, Network for Christian Values, 15 February 1995, concerning the application of the Bill to religious groups.

9 *Acts Interpretation Act 1901:* s. 15AB.

10 Evidence, 17 February 1995, L&C 256.

Constitutional Validity of the Bill

1.17 The Committee received evidence from witnesses that the Bill may breach the implied constitutional guarantee of freedom of political discussion.[11] Mr Peter Bailey, a Visiting Fellow at the Faculty of Law of the Australian National University, and former Deputy Chairman of the Human Rights Commission, referred to the following statement by Professor Eric Barendt which was quoted by three of the Justices who formed part of the majority in the High Court case of *Theophanous v Herald & Weekly Times Ltd*:

> "'Political speech' refers to all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about."[12]

Mr Bailey then commented:

> "It seems to me that, if that is the broadly accepted definition by the High Court of political speech, it is difficult to think of much in the way of speech in a public space - which is what this legislation is about - that is not going to be deemed political.....
>
> That being the case, the legislation has to get through the gateway put by the High Court, which broadly is that the means adopted are reasonably and appropriately adapted to achieve the desired end.... I think that is correct and I think that, given the multiplicity of reports that have come out on racial vilification, the High Court would be unlikely to say that you cannot have some kind of restrictions. The question is whether this legislation goes too far down the line of restriction..."[13]

1.18 Mr Bailey suggested that the removal of the proposed criminal offence of inciting racial hatred from the *Crimes Act 1914* (Cth), and its

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11 Submission No. 14, Mr John King, Australians For Free Speech, 21 February 1995; Submission No. 16, Mr Peter Bartlett, Minter Ellison, 24 February 1995; Submission No. 24, Mr T. Bostock, 6 March 1995.

12 Evidence, 17 February 1995, L&C 294.

13 Evidence, 17 February 1995, L&C 294.

reformulation as a civil provision concerning racial harassment, under the *Racial Discrimination Act 1975*, would more appropriately meet the evil that it is sought to remedy, and therefore be more likely to withstand constitutional challenge.[14]

1.19 The Committee also heard from witnesses who considered that the *Racial Hatred Bill* is a proportionate response to a real problem, and that it will therefore by upheld as constitutionally valid.[15] Mr Alan Goldberg QC, Deputy President of the Executive Council of Australian Jewry, pointed out that every freedom has a correlative duty. He said we must recognise the right to be free from aggression.[16] Mr Goldberg noted that the implication of freedom of political discussion recognised by the High Court is not absolute, and that its 'underlying purpose is to ensure the efficacious working of representative democracy'. He concluded:

> 'This legislation does not impinge upon the preservation of those aspects of representative democracy. It does impinge upon a person's right to be racist in a way that harms and hurts, and there, we submit, is your proportionality."[17]

1.20 Mr Mark Leibler of the Ethnic Coalition also put freedom of speech in the context of the limitations upon it which are already accepted:

> "Freedom of speech... is not, and it has never been, an absolute right or an unequivocal right. Australian law contains many exceptions to the rule. It already prohibits criminal defamation, sedition and malicious communication, and, to date, I am unaware of any outcry, let alone any national campaign, which calls for the repeal of these laws. In various degrees, similar limitations apply to restrict access to pornography or to the use of offensive language in public. One's right to say or do what one likes is appropriately

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14 Evidence, 17 February 1995, L&C 294.

15 Submission No. 3, Mr Alan Rose, President, Australian Law Reform Commission, 15 February 1995; Submission No. 9, Mr Ron Castan AM QC, 20 February 1995.

16 Evidence, 24 February 1995, L&C 340.

17 Evidence, 24 February 1995, L&C 340.

constrained by one's obligation not to cause harm to another human being; someone who has an equal right not to be harassed."[18]

1.21 The Committee considers that some limitations on freedom of speech are necessary to avoid public disorder and social disharmony, and that this is the case with this Bill.

1.22 The Committee is of the view that a large proportion of speech which is intended to incite racial hatred would not have sufficient political content to constitute 'political discussion', as interpreted by the High Court. The Committee is satisfied that in those circumstances where political speech is involved (such as advocacy of changes to immigration policies) the Court will take account of the high public interest in protecting people from the consequences of racial hatred, in balancing that interest against freedom of political discussion. The Committee points out that the Bill would not prevent criticism of Government policies in relation to immigration or any other matter - it would merely prevent such criticisms from being couched in a manner which incited racial hatred and therefore pose a real risk of personal danger for people and disruption of social harmony. The Committee does not consider that this is an unreasonable derogation from the right to freedom of political discussion.

1.23 The Committee also received submissions which argued that the Bill, if enacted, would have a chilling effect on freedom of speech, with publishers and the media suppressing certain points of view for fear of attracting complaints under the legislation, even if these complaints are unfounded and eventually dismissed. It was argued that the fact that a person cannot claim costs in relation to proceedings before the Commission means that the risk of a complaint is sufficient inducement to avoid all discussion of racial issues, even when hatred or offence are not intended.[19]

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18 Evidence, 24 February 1995, L&C 369.

19 Submission No. 13, Mr Nigel Jackson, 19 February 1995; Submission No. 20, Mr Jack Herman, Australian Press Council, 24 February 1995; Evidence, 17 February 1995, L&C 271, per Senator Abetz; and Evidence, 24 February 1995, L&C 347-8 per Mr Peter Bartlett.

1.24 The Committee notes that the Human Rights and Equal Opportunity Commission has the power to dismiss complaints which are frivolous, vexatious, misconceived or lacking in substance, or which do not relate to an act which is unlawful under the Act. This can be done at the conciliation stage[20] or before or during an inquiry.[21] The vast majority of other complaints are resolved in the conciliation process. Accordingly, very few complaints reach the stage where an inquiry is conducted by the Commission and significant legal costs are involved. The Committee accepts the evidence given by officers of the Attorney-General's Department that the rule against the ordering of payment of costs is based on principles of 'access to justice'.[22] If a complainant faced the risk of a costs award against him or her, the complainant may be too fearful to make or pursue the complaint before the Commission.

1.25 The Committee also notes that media groups have already voluntary adopted codes of conduct which include provisions concerning racial vilification.[23] Such action was taken to ensure that broadcasters use their freedom of speech in a responsible manner which does not offend or injure people of different racial groups.

Criminal Offences

1.26 The Bill proposes to amend the *Crimes Act 1914* (Cth) by inserting in it 'Part IVA - Offences Based on Racial Hatred'. This Part contains three criminal offences, two of which concern threats of violence, and the third of which relates to inciting hatred.

1.27 Proposed s. 58 provides that it is an offence to threaten to cause physical harm to a person or group because of their race, colour, or

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20 *Racial Discrimination Act 1975:* s. 24(2).

21 *Racial Discrimination Act 1975:* s. 25X.

22 Evidence, 17 February 1995, L&C 271.

23 Federation of Australian Commercial Television Stations Code of Practice: para 1.6.6; and Federation of Australian Radio Broadcasters Code of Practice: para 1.3. See also Australian Press Council Statement of Principles: para. 9.

national or ethnic origin (hereafter described as 'race'). The maximum penalty is imprisonment for two years.

1.28 Proposed s. 59 provides that it is an offence to threaten to destroy or damage property because of the race of any other person or group. The maximum penalty is imprisonment for one year.

1.29 Proposed s. 60 provides that it is a criminal offence to do an act, otherwise than in private, which is intended to incite racial hatred against another person or group, and is reasonably likely to incite racial hatred. The act must be done because of the race of the other person or members of the group. The maximum penalty is imprisonment for one year.

Threats to harm people or property

1.30 The Committee heard evidence that it is already an offence in the States and Territories to threaten to injure people or damage or destroy property, regardless of the motivation behind the Act. It was also raised in evidence that the difficulty in proving the additional element that the substantial reason for the doing of the impugned act is the race of a person, might lead to the acquittal of a person who would otherwise be convicted under the ordinary State or Territory legislation. This problem was addressed by officers of the Attorney-General's Department in the following exchange:

> "**Senator ABETZ**--Do you accept that all the types of behaviour, irrespective of motivation, are already covered by criminal law in every single state and territory of the Commonwealth?
>
> **Mrs Jackson**--Yes, that's true.
>
> **Senator ELLISON**--And in those cases you do not have to prove any aspect of race; you just have to prove that they did it. In fact that is how they got the ANM in Western Australia. It would be easier to prosecute a racist group without bringing in the racist element. When they gaoled Van Tongeren and his band they did not allege any racial aspect because it did not form any element of the offence; it was arson.
>
> **Ms Sheedy**--It was murder, too.

Senator ELLISON--And murder. The fact was that it was much easier to prove without bringing this in.

Mrs Jackson--We would never suggest running a case of murder or grievous bodily harm or something that these offences be--

Senator ELLISON--But aspects of damage were also raised. What Senator Abetz is saying is that all of this is covered by the law at the moment and it is much easier to prove. If a person does it, they attract a criminal sanction, but if you go down this path you have to prove they did it but they did it with this intention and that makes it all the more difficult. So why not just forget the race bit and hit them with the threat to cause harm, damage or whatever? Is that not a much easier path for prosecution?

Mrs Jackson--That is certainly true. A number of the examples that you have given do postulate actual damage or actual violence and it is not envisaged that these provisions would encompass that.

Senator ELLISON--Let us deal with threats only.

Mrs Jackson--In the case of threats, it is certainly true that in the general run of cases it is much more difficult to prove. We concede that the bulk of prosecutors would shy away from that difficulty. That does not mean that there could not be circumstances which arise where the racial element is so strong--no-one would suggest that the Hitler Jugend would fall outside these provisions--that, with those kinds of high profile, high publicity cases, it would seem absurd not to proceed on these charges to make a very clear community statement that that kind of racist behaviour is not acceptable.

Senator ELLISON--But you run the risk of possibly losing the case because of the complexity of the prosecution.

Mrs Jackson--In those kinds of high profile ones, we would not see that there would be a difficulty with proof."[24]

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24 Evidence, 17 February 1995, L&C 261-2.

1.31 The Committee accepts that although there are greater evidentiary problems in proving offences under proposed sections 58 and 59 than under general criminal legislation, the risks involved are matters for the prosecuting authorities to determine. The Committee notes that proposed s. 61 provides that proposed sections 58 and 59 are not intended to exclude or limit the concurrent operation of any law of a State or Territory. Accordingly, a prosecutor will not be precluded from prosecuting offences under existing State or Territory laws if it is considered that such offences are more easily proved.[25]

1.32 Mr Jack King of Australians for Free Speech, submitted to the Committee that inciting violence or property damage should be an offence irrespective of whether the incitement occurs because of racial hatred, political views, personal greed or any other motivation. He concluded that it is not the motive which should be the crime, but rather the action.[26]

1.33 The Committee considers that the motive itself may exacerbate the crime, and accordingly add a further criminal dimension to it.

1.34 The Committee also notes the fact that the law already covers the acts involved in threatening violence to people or property, and this is no reason to fail to enact laws dealing specifically with racist threats of violence. Mr Lawrence Lau, President of the Australian Chinese Community Association of New South Wales Inc., stated:

> "Some people have said that the criminal sanction dealing with threats and harm to individuals is already covered by the criminal act. The criminal act does not cover the threat of harm to a group of people based on their race, ethnic backgrounds. If it is right for the criminal law to make such acts illegal, which is also accepted by the community, what is wrong with making the same act extend to a group of people whether it be based on their race, religious beliefs or ethnicity?"[27]

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25 Submission No. 9, Mr Ron Castan AM QC, 20 February 1995.

26 Submission No. 14, 21 February 1995.

27 Evidence, 17 February 1995, L&C 298.

1.35 A further issue was raised in relation to the educational value of the penalties imposed for breaches of proposed sections 58 and 59. The penalties for offences of threatening violence against people or property in the States vary, but some are significantly higher than the penalties in proposed sections 58 and 59.

1.36 For example, s. 199 of the *Crimes Act 1900* (NSW) provides that a person who makes a threat to destroy or damage property belonging to another person, with the intention of causing the person to fear that the threat would be carried out, is liable to imprisonment for 5 years. In contrast, under proposed s. 59, the same action would attract a maximum penalty of only one year's imprisonment if it is done because of the race of the person whose property is threatened. Senator Abetz addressed this problem as follows:

> "If, say, I undertook some of this behaviour, chances are at first instance I would be interviewed by a police officer of the state as opposed to the Commonwealth, one would assume. If I was doing this in New South Wales, if I had my wits about me I would be arguing that I did it out of racial hatred because that way I would get only two years imprisonment instead of five years under New South Wales law. I would have thought that that sends out the absolute wrong message to the people of Australia about the unacceptable nature within society of that sort of activity motivated out of racial hatred."

1.37 It was drawn to the Committee's attention that one method of alleviating this problem would be for racist motivation to be considered in the sentencing process, to increase the penalty which would otherwise apply. In the United States, where racial hatred laws have been held unconstitutional if they are directed at proscribing the message contained in the speech,[28] the Supreme Court has upheld the constitutional validity of 'penalty enhancement provisions', which provide for the increase of penalties for criminal acts which have been motivated by reason of the race, colour, religion or national origin of a person or group.[29]

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28 *R.A.V. v City of Saint Paul* 112 S. Ct. 2538 (1992).

29 *Wisconsin v Mitchell* 113 S. Ct. 2194 (1993).

1.38 Although the Committee considers that a penalty enhancement scheme would have a most valuable educational effect, it recognises the Constitutional problems involved in the Commonwealth imposing additional penalties in relation to State or Territory offences. The Committee recognises the need for a national standard in relation to racial hatred, and therefore accepts the consequential disparities in penalties of the different jurisdictions for racially and non-racially motivated violence.

1.39 It was also submitted to the Committee by representatives of the Victorian Council of Civil Liberties that legislation which includes racist motivation as an element of a crime is likely to give racists access to wide publicity and make martyrs of them.[30] It was suggested that it is important to treat racists who make threats of violence as 'ordinary criminals' rather than giving them a special status which might be exploited for publicity.[31] The Victorian Council of Civil Liberties recommended that racist motivation be considered at the stage of sentencing, rather than as an element of the offence, to avoid making heroes out of racists.[32]

1.40 The Committee considers, however, that the publicity attendant upon a trial for offences motivated by racism, may also have a valuable educational effect by clearly setting a community standard of what is unacceptable in Australian society and condemned by the law. While it is possible that some people might regard persons convicted under proposed sections 58 and 59 as martyrs, the Committee believes that most people would consider them to be criminals whose offence is compounded in seriousness by the fact that it was motivated by racism. People will only be considered martyrs if their acts are considered acceptable by the community. If acts which are likely to incite racial

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30 Evidence, 24 February 1995, L&C 342-3, per Mr Michael Pearce. See also: Submission No. 1, Mr John Bennett, Australian Civil Liberties Union, 15 February 1995; Submission No. 12, Rev. Harry Herbert, General Secretary, Board for Social Responsibility, NSW Synod of the Uniting Church in Australia, 20 February 1995.

31 Evidence, 24 February 1995, L&C 357, per Ms Jude Wallace of the Victorian Council of Civil Liberties.

32 Evidence, 24 February 1995, L&C 364.

hatred are generally considered to be despicable acts of cowardice, then it is unlikely that their perpetrators will be considered martyrs.

Incitement of racial hatred

1.41 Proposed section 60 will make it a criminal offence to commit an act, otherwise than in private, which is intended and reasonably likely to incite racial hatred, and is done because of the race of the person or group.

1.42 Questions were raised in evidence before the Committee as to why this provision is to be made a criminal offence rather than being subject to civil proceedings:

> "**Senator HARRADINE**--Why will inciting racial hatred be treated as a criminal offence when acts of racial discrimination in employment are treated only as a civil offence? Those acts of racial discrimination in employment could have far greater ramifications than the former.
>
> **Mr Campbell**--In part I think the reason is that article 4 of the Convention on the Elimination of All Forms of Racial Discrimination requires some offence related to the incitement of racial hatred, and that would require an offence throughout Australia. If we are going to give effect to that, we must have an offence related to the incitement of racial hatred.
>
> **Mr Neave**--In addition, I think the government is sending a pretty strong message that this sort of behaviour is not to be tolerated. I think that is also a very important aspect.
>
> **Senator HARRADINE**--I understand that. If an employer discriminates severely against an employee on the grounds of race, to that person that discrimination will have far more ramifications than that of an exhibition of racial hatred from time to time. Having been a member of the discrimination employment board and various others over the years, I know what hurts most: it is the dudding of persons, not giving them a fair go, a promotion, overtime and all the rest of it; rather than being called an Itie or whatever.

> **Mrs Jackson**--Perhaps the civil process available for discrimination provides the aggrieved employee with far greater personal remedies than the criminal process can. It also provides an educative process and conciliation where the HREOC consults with the employers. So perhaps a situation like that will not occur in that workplace again. For those reasons, the HREOC process is for more satisfactory. From the community's point of view it prevents further discrimination in that workplace and there are remedies available to the individual employee. In the criminal process, the individual employee stands to gain nothing as a person."[33]

1.43 Mr Peter Bailey, Visiting Fellow at the Faculty of Law of the Australian National University and former Deputy Chairman of the Human Rights Commission, recommended that proposed s. 60 be transformed into a civil provision relating to racist harassment in the *Racial Discrimination Act 1975*[34]. He stated:

> "It seems to me that to say that inciting racial hatred is more serious than all the other racial discrimination unlawful acts that are provided for in the Racial Discrimination Act is probably not quite fair in terms of weighting. I think freedom of speech is so important that it ought to be allowed to run, but that it ought to be quite clear that inciting people to hatred is not on. That is exactly what the Racial Discrimination Act does in the area of employment, in the area of education, in the area of accommodation, in the area of access to public places and so on. I think that to place this in that context rather than in the Crimes Act context would be preferable."[35]

1.44 Mr Bailey also raised the point that it is often difficult to get a racial hatred matter prosecuted, but if it were a civil matter, an aggrieved person could commence a complaint proceeding before the Human Rights and Equal Opportunity Commission on his or her own initiative. He considered that this empowered people, stating:

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33 Evidence, 17 February 1995, L&C 271-2.

34 Evidence, 17 February 1995, L&C 293.

35 Evidence, 17 February 1995, L&C 305.

> "We are empowering them to this point in time, not disempowering them which says that the government has to do it. Why does government have to do this? Why can't we give it to people? Why aren't we going to allow them remedies that are provided for in the rest of the Racial Discrimination Act, to do something?"[36]

1.45 Mr Ian Lacey of the Ethnic Communities Council (NSW), made the point that criminal provisions involve a level of condemnation which is important for victims of racial hatred. In response to the suggestion that civil procedures are preferable to deal with racial hatred, he asked:

> "But is the victim saying, 'Give my community damages'? The victim really wants to say, 'Let society condemn a person who does this sort of thing to communities in Australia'."[37]

1.46 The Committee agrees that criminal provisions are an important sign of society's condemnation of acts which incite racial hatred. Acts inciting racial hatred are more serious in their nature and consequences than other acts which attract the payment of compensation, such as negligence or breach of contract. They involve a malicious intent which is more suited to criminal sanctions rather than civil sanctions, and therefore should be met with criminal penalties rather than awards of damages.

1.47 Mr Alan Goldberg QC, Deputy President of the Executive Council of Australian Jewry, expressed the view to the Committee that criminal legislation specifically dealing with racist violence and racial hatred is necessary because it deals with the essential gravamen of the offence. He gave the example of racist graffiti on light poles or synagogues, and observed that the gravamen of the offence is not the defacing of property by sticking a piece of paper on it, but rather the racist content of the message on the paper.[38]

1.48 The Committee agrees that even when the acts involved are already covered by the ordinary criminal laws of the States and Territories, it is

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36 Evidence, 17 February 1995, L&C 305.

37 Evidence, 17 February 1995, L&C 310.

38 Evidence, 24 February 1995, L&C 346.

still necessary to have a specific law on the statute books which deals with the gravamen of the offence and addresses the racist nature of the offence.

Civil Sanctions

1.49 Part 3 of the Bill proposes to insert Part IIA in the *Racial Discrimination Act 1975*, entitled 'Prohibition of Offensive Behaviour Based on Racial Hatred'. Proposed s. 18C provides that it is unlawful for a person to do an act, otherwise than in private, which is reasonably likely to 'offend, insult, humiliate or intimidate' another person or group, if that act is done because of the race, colour or national or ethnic origin of the other person or members of the group.

1.50 Although proposed s. 18C describes the act as 'unlawful', section 26 of the Act provides that an 'unlawful' act is not a criminal offence unless it is expressly stated otherwise. The Schedule to the Bill places the provisions of Part IIA within the complaint and enforcement scheme of the *Racial Discrimination Act 1975.*

Brandy v Human Rights and Equal Opportunity Commission

1.51 The *Racial Discrimination Act 1975* provides that a complaint of a breach of the Act may be made to the Race Discrimination Commissioner. The complaint then goes through a process of conciliation. If conciliation fails, the matter is then referred to the Human Rights and Equal Opportunity Commission for determination. The Commission may make a determination that an unlawful act of discrimination has occurred, and that the respondent must pay compensation or employ the complainant or perform some other act to redress the discrimination.[39] Subsection 25Z(2) provides that the Commission's determinations are not binding or enforceable. Prior to amendments made in 1992, a complainant had to initiate proceedings in the Federal Court if he or she wished to have a determination enforced, and the Federal Court heard the entire matter over again.

1.52 The *Sex Discrimination and Other Legislation Amendment Act 1992* amended the *Racial Discrimination Act 1975* to provide a

39 *Racial Discrimination Act 1975:* s. 25Z.

mechanism for the enforcement of the Commission's determinations. Section 25ZAA provided that as soon as practicable after a determination was made, it had to be lodged with a Registry of the Federal Court, and the Registrar had to register it. Upon registration, section 25ZAB provided that a determination had effect as if it were an order made by the Federal Court, subject to review. During the review period of 28 days, a respondent could apply to the Federal Court for a review of the determination. The determination could not be enforced during the review period, or during the course of any review undertaken by the Federal Court. If no application for review was made, the Commission's determination could be enforced as a court order after the expiration of the 28 day period. If an application for review was made, section 25ZC provided that the Federal Court could review all issues of fact and law, but a party could not introduce 'new evidence' unless the Court granted leave to do so. After reviewing the determination, the Court could make such orders as it considered fit.

1.53 In *Brandy v Human Rights and Equal Opportunity Commission*,[40] the High Court held that sections 25ZAA, 25ZAB and 25ZAC were invalid because they breached the constitutional separation of powers by purporting to confer judicial power on an administrative body. Accordingly, there is no longer any mechanism in the *Racial Discrimination Act 1975* to provide for the enforcement of determinations made by the Human Rights and Equal Opportunity Commission under the civil provisions of the *Racial Hatred Bill 1994.*

1.54 In evidence before the Committee, Mr Colin Neave, Deputy Secretary of the Attorney-General's Department, stated:

> "The Government is considering all the implications of the Brandy decision. In the meantime, as an interim measure, the Government proposes to reinstate the previous enforcement regime for the enforcement of the determinations of the Human Rights and Equal Opportunity Commission. A committee will examine the most appropriate long-term response to the decision over the next three months."[41]

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40 Unreported, Full Court 95/006, 23 February 1995.

41 Evidence, 28 February 1995, L&C 399.

1.55 Mr Neave confirmed to the Committee that amendments would be introduced to the *Human Rights Legislation Amendment Bill 1994* to restore the enforcement regime that existed prior to the 1992 amendments.[42] Under this regime, a party could seek enforcement of a Commission determination by the Federal Court, but the Court will have to exercise its own judicial power by hearing all the evidence, rather than rely on the proceedings before the Commission.

1.56 Mr Neave also stated that it was not necessary to amend the *Racial Hatred Bill* because the necessary amendments have to be made to the *Racial Discrimination Act 1975* as a whole:

> "We see no reason to deal with the Racial Hatred Bill in any way different from the way in which we are presently dealing with it, because the issue as far as the Racial Hatred Bill goes at the moment is that determinations by the Race Discrimination Commissioner are not enforceable, as a result of the Brandy decision. Accordingly, we will deal with the problem posed by the Brandy decision in amendments to the other human rights legislation."[43]

1.57 The Committee does not consider it necessary to make any amendments to the *Racial Hatred Bill* to accommodate the High Court's judgment in *Brandy v Human Rights and Equal Opportunity Commission,* in reliance on the assurance from the Attorney-General's Department that appropriate amendments will be made to the *Racial Discrimination Act 1975.*

'Offend, insult, humiliate or intimidate'

1.58 The *Racial Discrimination Amendment Bill 1992,* which was the prior draft of the *Racial Hatred Bill 1994,* directed its civil sanctions at acts which were likely to 'stir up hatred, serious contempt or severe ridicule against a person or a group' on the ground of race. Proposed section 18C of the *Racial Hatred Bill 1994* is directed at acts which are reasonably likely to 'offend, insult, humiliate or intimidate'. The

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42 Evidence, 28 February 1995, L&C 412.

43 Evidence, 28 February 1995, L&C 413.

Committee received evidence of concern that the term "offend" is too broad.[44]

1.59 Mr Colin Neave, Deputy Secretary of the Attorney-General's Department, explained why the phrase was adopted in the Bill, as follows:

> "It picks up section 28A of the Sex Discrimination Act, where the expression used in subclause (b) of subsection (1) is 'offended, humiliated or intimidated'. It is there to deal with the harassment issue."[45]

1.60 Ms Joan Sheedy, Senior Government Counsel in the Human Rights Branch of the Attorney-General's Department addressed the meaning of 'offend' as follows:

> "There has already been a determination from the Human Rights and Equal Opportunity Commission in a case called *Shaw v Perpetual Trustees Tasmania,* which found that it requires a lot more than just incidental offence."[46]

1.61 The case of *Shaw v Perpetual Trustees Tasmania Ltd* included an allegation by a female employee that she was excluded from professional activities by a male-dominated office culture. She complained of a comment made that 'we are here to make profits not run women's lunches'. The Digest of the Commission's determination states:

> "Without more than incidental offence, the remarks did not establish the existence of such a male-dominated office culture as to constitute unfavourable conditions of employment or a detriment and therefore unlawful discrimination within the meaning of section 14(2)(a) or (d) of the Act (or sexual harassment within the terms of section 28 of the Act)."[47]

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44 Submission No. 11, Mr Joseph O'Reilley, Executive Director, Victorian Council for Civil Liberties, 21 February 1995; Submission No. 20, Mr Jack Herman, Executive Secretary, Australian Press Council, 24 February 1995.

45 Evidence, 17 February 1995, L&C 267.

46 Evidence, 17 February 1995, L&C 267.

47 (1993) EOC 92-550, 10 September 1993.

1.62 The Committee is satisfied that the word 'offend' will be interpreted by the Commission in a manner that attributes to it a sufficient level of gravity so that frivolous or trivial complaints will be dismissed.

Exemptions

1.63 Proposed section 18D sets out a number of exemptions from the application of proposed section 18C where an act is done 'reasonably and in good faith' in the course of an artistic performance; a statement, publication, discussion or debate held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or a publication of a fair and accurate report or fair comment on an event or matter of public interest.

1.64 Criticisms of these provisions were made to the Committee by those who considered that they amount to a "bonanza for lawyers"[48] because the words "fair" and "reasonable" are not clear terms.[49] Mr Michael Pearce, from the Victorian Council of Civil Liberties made the following criticisms of proposed section 18D:

> "It is studded with wide, general phrases such as 'good faith', 'scientific', 'artistic', reasonable', 'public interest', to which - some day - some courts are going to have to give some content. The further point about this provision is that it could well encourage the expression of racial hatred and abuse, because it is so widely cast that it offers a positive inducement or incentive to racists to dress up their message as pseudo-science. The effect of that provision could well be simply to discriminate between the sophisticated and the unsophisticated racist: to give the likes of David Irving a free run, and yet to make unlawful a relatively harmless schoolyard taunt."[50]

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48 Evidence, 24 February 1995, L&C 341, per Mr Michael Pearce from the Victorian Council for Civil Liberties.

49 Evidence, 17 February 1995, L&C 296 per Mr Geoffrey Atkinson of the National Aboriginal and Islander Legal Services Secretariat.

50 Evidence, 24 February 1995, L&C 341.

1.65 The Committee notes that the courts frequently deal with terms such as 'reasonable' and 'good faith', and that there is already considerable jurisprudence on their interpretation. The Committee also considers that the requirement that any exempted act be done 'reasonably and in good faith' will exclude sophisticated racists from exploiting the exemptions in proposed section 18D.

1.66 The criticism has also been made that the Human Rights and Equal Opportunity Commission does not have the expertise to be an arbiter of what is genuine art or science, and that it should not exercise such a role.[51]

1.67 The Committee considers that the Commission has the expertise and the function of identifying racism, and that it therefore has a legitimate role in identifying racism which is clothed in academic, artistic or scientific guise.

1.68 Mr Joe Wakim of the Australian Arabic Council submitted to the Committee:

> "Exemptions under section 18D present many problems, as the effects of the actions exempted are no less serious than the racist actions, and the grounds for exemptions do not mitigate the effect that the bill is ostensibly trying to address."[52]

1.69 The Committee agrees that acts covered by the exemptions may, in some cases, lead to offence, insult, intimidation or humiliation, but acknowledges that such exemptions are necessary to support the constitutional validity of the Bill. However, as Senator Spindler noted at the Melbourne hearing of the Committee, even where exemptions apply, the general prohibition will have an educational effect in changing the culture of society, and this will flow on to those areas which are the subject of exemptions.[53] The Committee also notes that the exemptions

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51 Submission No. 23, Ms Julia Bovard, Secretary of the Free Speech Committee, 1 March 1995. See also: Evidence, 17 February 1995, L&C 273.

52 Evidence, 24 February 1995, L&C 367. See also L&C 351-2.

53 Evidence, 24 February 1995, L&C 393-4.

do not apply to the criminal offences under the Bill, so acts which are reasonably likely to incite racial hatred will still be subject to proposed s. 60 of the *Crimes Act 1914* without any exemption.

Vicarious Liability

1.70 Proposed section 18E provides that an employer is vicariously liable for acts of his or her employee or agent, which are performed in connection with the employee's or agent's duties and which breach proposed section 18C, unless the employer can establish that he or she took all reasonable steps to prevent the employee or agent from doing the act.

1.71 Criticism was made of this provision at the public hearings, on the basis that it puts an undue onus on an employer to take active steps to prevent an employee doing an act which might reasonably 'offend, insult, humiliate or intimidate' a person by reason of their race.[54] Comparison was made with the equivalent provision in the New South Wales *Anti-Discrimination Act 1977*, which states that an employer is only vicariously liable for the acts of his or her employee or agent if the employer expressly or impliedly authorised the employee to do the act.[55]

1.72 The Committee accepts the view proffered by representatives of the Attorney-General's Department that this provision should remain in its current terms in order to maintain consistency with other vicarious liability provisions in Commonwealth discrimination legislation.[56]

Strategy against racial hatred

1.73 The Committee received evidence from a number of witnesses who supported an active education campaign to supplement the *Racial Hatred Bill 1995*.[57]

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54 Evidence, 17 February 1995, L&C 267-70.

55 Evidence, 17 February 1995, L&C 276.

56 Evidence, 17 February 1995, L&C 268.

57 Evidence, 24 February 1995, L&C 344 per Mr Michael Pearce; L&C 357 (continued...)

1.74 Mr Joe Wakim of the Australian Arabic Council, in a compelling submission, asked for much more to be done to counter racial hatred than just bringing forth this Bill.[58] Mr Wakim said that there were those in the ethnic community who held limited trust in certain instruments of the law. In fact, they had a marked unease with where recourse to the legal process might bring them.

1.75 Mr Wakim advocated that more resources be devoted to changing the community's perception of various groups. He suggested amongst other things that the relevant issues be addressed through education, advertising campaigns and proper treatment of such issues by the media.

1.76 The Committee agrees that the Bill it is considering should be seen as part only of an overall strategy to remedy racial hatred in Australia.

57(...continued)
per Ms Jude Wallace; L&C 394 per Dr Jureidini. See also: Submission No. 11, Mr Joseph O'Reilley, Executive Director, Victorian Council for Civil Liberties, 21 February 1995.

58 Evidence, 24 February 1995, L&C 388; and Submission No. 18, 15 February 1995.

Conclusion of the Majority

1.77 Intent of the Constitution

The Constitution gives the Parliament power to make laws "for the peace, order and good government of the Commonwealth" in respect of certain matters.

1.78 Purpose of the Bill

In the majority's view, the Parliament would be acting "for the peace, order and good government of the Commonwealth" were it to pass the *Racial Hatred Bill 1994*. This Bill seeks to bolster the right of people and groups to live in Australia free from the harm they would otherwise suffer due to their race.

1.79 Measures in the Bill

The Bill provides for criminal sanctions against those who deliberately strive to injure people or groups because of their racial origin. It enables them to take civil action when they suffer as subjects of racial acts.

1.80 Function of Criminal Law

Criminal law is concerned with preserving the integrity of the community. This Bill seeks to do that by curbing any force in Australia which would unduly strain its peace, order and good government.

1.81 Integrity of Society

A multicultural society must manifest its fundamental character, namely that it treats all its citizens as equals no matter what their ethnic origin. A vital means of doing that is to make criminal acts that are deliberately committed to fracture the society founded on that tenet.

1.82 Individuals and Groups

Individuals and groups are entitled to safeguards against harm which might otherwise befall them because of their race. The Bill provides considerable means of doing this.

1.83 Free Speech

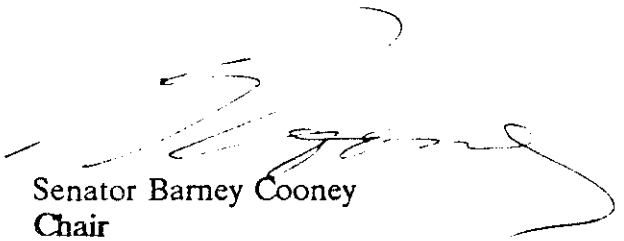
This Bill curtails free speech. The right to speak freely is fundamental to a decent and democratic society. But it is not absolute. It must be balanced against other rights, in this case the right to go about the community without being harmed because of the race into which one is born.

1.84 Part of a Strategy

Clearly this Bill should become but one of a number of actions the community ought take to ensure a sound, just and empathetic multi-racial society. As Mr Wakim points out, education, public campaigns and fair reporting in the media are other essential means of reaching this end.

Recommendation

Recommendation: The Committee recommends, by majority, that the bill as introduced be enacted.



Senator Barney Cooney
Chair

MINORITY REPORT - RACIAL HATRED BILL 1994

INTRODUCTION

Australia as a modern nation has literally drawn her population from the four corners of the world.

This diversity of race and culture has helped develop Australia into what she is today. Part of the Australian tradition has been tolerance and a "fair-go" for all.

Unfortunately, there is a small element within Australian society that seeks to instil fear in people based on ignorance concerning certain racial groupings within our society.

This activity is clearly and socially unacceptable to those who believe that people are equal irrespective of their race. It is especially so in Australia which has such a large proportion of its population drawn from all parts of the world. Whilst there is genuine consensus in the Committee about the evils of racial hatred and discrimination, there are different approaches and countervailing arguments that this dissenting report canvasses together with technical difficulties inherent in the proposed Bill.

CRIMINAL SANCTIONS

The creation of separate criminal offences for racially motivated crime has two major drawbacks.

The incalcitrant racist would wish for nothing more than to be sentenced because of beliefs held. Recently we have seen extremists of various persuasions prefer jail rather than comply with bail conditions to give publicity to their cause and to take a "moral stand." To provide racists with such a forum would be counter-productive.

As A A Borovoy says in *When Freedoms Collide: The Case for Our Civil Liberties* [1988] (at page 50):

> "Remarkably, pre-Hitler Germany had laws very much like the Canadian anti-hate law. Moreover, those laws were enforced with some vigour. During the 15 years before Hitler came to power there were more than 200 prosecutions based on anti-Semitic speech. And in the opinion of the leading Jewish organisation of that era, no more than ten percent of the cases were mishandled by the authorities. As subsequent history so painfully testifies, this type of legislation proved ineffectual on the one occasion when there was a real argument for it. Indeed, there is some indication that the Nazis of pre-Hitler Germany shrewdly exploited the criminal trials in order to increase the size of their constituency. They used the trials as platforms to propagate their message."

Now sixty years later, with the aid of mass communication, the platforms provided by such trials to propagate racist messages would be all the greater.

Secondly, there is the difficulty of proof. Recent world experience shows that very few successful prosecutions have been launched. When they fail on technical grounds, the racist walks free and claims to have been "vindicated" by the legal system.

In the view of the Coalition Senators it is far better that racists be treated as common criminals if they offend against the criminal laws.

Ms Wallace from the Victorian Council of Civil Liberties provided a cogent and enlightening example from Australia's recent social history when she said (*Hansard*, Legal and Constitutional, page 355):

Ms Wallace: "I would like to put the debate in a social context of what the community does about violence at large, because I think that reveals a great deal about our problem. Some 30 years ago we had chronic domestic violence. We still do, but we have decided in the interim that defining domestic violence as violence and prosecute the people who perpetrate the violence on members of their family. That has made the difference - not treating them as having a particular kind of violence, but treating them as ordinary perpetrators."

Ms Wallace of the VCCL later said (*Hansard*, Legal and Constitutional, p 387):

Ms Wallace: "And if there are levels of racial ignorance, you have a fertile ground for the growth of racism. We must address community ignorance about race and about victims, and we must do it with a budget and with a knowledge that the budget has to be commensurate with the difficulty of the task in front of us."

Legislation designed to increase the penalty when common criminal conduct is motivated by racial hatred would be the more appropriate legislative path. The Wisconsin example is worthy of consideration. Unfortunately, the lack of time has not enabled the Coalition Senators to consider this approach in detail. The following exchange discusses this proposal (*Hansard*, Legal and Constitutional, p 364):

Sen O'Chee: ".... I put to you the proposition that we could come up with an alternative solution which says that where somebody commits an offence, and one of the motivations of that offence is racism, and if the person is convicted of the simple criminal offence, the racist's motivation for that offence should be considered an aggravating factor and taken into consideration at sentencing. How would you feel about that approach?"

Mr Pearce: "I was about to put that very proposal. In relation to the existing law - the discretion open to a judge or a magistrate on sentencing, or he caters for that, and there is nothing to

stop prosecutors making that submission - those are the sorts of submissions that our Council would wholeheartedly support."

This approach would leave the universality of the offence and would not allow the perpetrator to make a hero out of him/herself. It is also not beyond the realms of possibility that criminal conduct based on racial hatred could also be engaged in forms other than that referred to in the proposed sections 58-60.

Proposed sections 58 and 59 seek to create new crimes. However, these are already covered by the existing laws of every State and Territory. The following dialogue is recorded (*Hansard*, Legal and Constitutional, p 261),:

Senator Abetz: "Do you accept that all the types of behaviour irrespective of motivation are already covered by criminal law in every single State and Territory of the Commonwealth?"

Mrs Jackson: "Yes, that's true."

And (*Hansard*, Legal and Constitutional, p 262):

Senator Ellison: "... What Senator Abetz is saying is that all of this is covered by the law at the moment and it is much easier to prove... so why not just forget the race bit and hit them with a threat to cause harm, damage or whatever? Is that not a much easier path for prosecution?"

Mrs Jackson: "That is certainly true. A number of examples that you have given do postulate actual damage or actual violence, and it is not envisaged that these provisions would encompass that."

Senator Ellison: "Let us deal with threats only."

Mrs Jackson: "In the case of threats, it is certainly true that in the general run of cases it is more difficult to prove. We can see that the bulk of prosecutors would shy away from that difficulty...."

The practical situation is that the behaviour(s) that will create an offence under proposed Sections 58 and 59 will virtually always come within the province of State and Territorial police. Mrs Jackson from the Attorney-General's Department, (*Hansard*, Legal and Constitutional, p 261) said:

Mrs Jackson: "As a matter of practical reality, I think the situation you postulate is probably right."

Further Mr Neave (*Hansard*, Legal and Constitutional, p 265) indicated the way the legislation might be used in the future:

Mr Neave: "....It is envisaged that this legislation will deal with some of the more obvious high-profile cases which - judging by the reports from various royal commissions, law reform commissions and others - in the past have not been dealt with...."

So there are practical enforcement difficulties and the real potential to provide martyrdom status to common criminals.

Throughout the hearing, the Committee was urged to consider the educational value of the legislation. Clearly, that cannot be discounted. However there is an anomaly which will mean that the proposed federal legislation will have a lower penalty for criminal activity if motivated by racism than State legislation which simply outlaws the same criminal activity irrespective of motivation. [See for example Section 199 of the New South Wales Crimes Act]. Also, Mr Pearce (*Hansard*, Legal and Constitutional, p 342) said:

Mr Pearce: "But let me make this point about it, Senator. Under Section 198 of the Crimes Act in Victoria for example, for the threat to damage property the penalty is 10 years. Under this legislation I think it is two years. Under this legislation you get time off for being a racist."

The educational value of such an anomaly is in direct contrast to what this Bill seeks to effect.

Proposed Section 60 is cause for great alarm. The principle of freedom of speech demands protection if we are to have a tolerant society. And in the context of this Bill, this principle needs to be examined closely. Coalition Senators believe freedom of speech ought to prevail in this situation.

Many columnists and Sir Maurice Byers QC, former Solicitor-General, (*The Australian*, 21.11.1994, p.11) have expressed their reservations about this aspect of the legislation on freedom of speech grounds.

Further, the proposed Section 60 will only make incitement to racial hatred a criminal offence if done "otherwise than in private." This would allow the insidious activity of inciting racial hatred in private, but not publicly. One wonders where the rationale for that distinction lies? Clearly the legislation must be aimed at the outworking of racial hatred once instilled as opposed to the thought process pure and simple. Racial hatred will not manifest itself in a different form if the incitement was in private as opposed to public.

Mr Bailey (*Hansard*, Legal and Constitutional, p 293) suggests that Section 60 ought become part of the civil aspect of this legislation:

Mr Bailey: ".....But for my own experience of working with the Racial Discrimination Act in the 1980s, quite a lot are amenable to

some kind of discussion and talk if you can approach them, not saying, 'You are going to be put before the police and the Crimes Act,' but saying, 'This kind of thing is not appropriate.' You can explain it to them, you can have a conciliation, and you can often bring about what we are really trying to achieve, which is the community that is comfortable with itself more than often results from criminal proceedings."

Further, Mr Bailey (*Hansard*, Legal and Constitutional, p 304) dealt with the practical difficulties in discussing Section 60 and said:

Mr Bailey: "....My first problem is the criminal proof beyond the balance of probabilities in this kind of case is extraordinarily difficult. It has been found difficult in New Zealand, in France, in the United Kingdom, in the United States and in Canada."

That world experience cannot simply be ignored. As Mr Pearce from the Victorian Council of Civil Liberties (VCCL) said (*Hansard*, Legal and Constitutional, p 341):

Mr Pearce: "...things which can today be said with impunity will, if this Bill is passed, become unlawful: ergo it imposes a restriction on free speech. The question about this Bill and the question for the Government is whether that restriction is justifiable. We in the VCCL say that no one has made out yet the case that it is justifiable."

In the light of the High Court decision in Theophanous v Herald and Weekly Times Limited it may well be possible that Section 60 will be considered to be unconstitutional.

CIVIL SANCTIONS

This bill also provides for civil sanctions which were to be enforced through the Human Rights and Equal Opportunity Commission along the same lines as the complaints of sexual harassment/discrimination and disability discrimination. Given the recent decision of the High Court in the case of Harry Brandy v HREOC (Unreported High Court Decision 02.03.1995), it will be necessary to await the Government's response to ascertain the mechanisms whereby enforceability for a complainant can be achieved.

There does not appear to be any similar legislation which is as broad as this current proposed legislation which deals with such terms as "offend" and "insult".

As Mr Pearce said (*Hansard*, Legal and Constitutional, p 341):

Mr Pearce: "....Dealing first of all with the civil side, essentially the effect of that legislation will be to protect people from hurt feelings. The legislation is designed specifically and in terms

to protect people from offence and insults. No other legislation or principle of law that we are aware of in this country has that effect.

"No other legislation or principle of the law that we are aware of seeks to protect people from hurt feelings. We say the Government has no role as the guardian of hurt feelings. We say that no case has been made out to give the Government that role, and we say further that no case has been made out as to why hurt feelings from racial abuse - as opposed to any of the many other forms of abuse to which people are subjected on a daily basis - ought to be singled out for special protection."

There appears no basis on which the majority report of the committee could be properly "satisfied" (see Majority Report, Racial Hatred Bill 1994, 1.61, p 21) as to the interpretation of "offend".

The case quoted in defence of the view provides no real precedent (HREOC & Shaw v Perpetual Trustee Tasmania).

It is not appropriate for the wording of the legislation to be based on the possibility that it maybe interpreted in the way the legislators would wish. The legislation itself should be clear.

The legislation then sets out certain criteria which is "safe ground." This safe ground area employs such phrases as "good faith", "scientific", "artistic", "reasonable" and "public interest". Any tribunal determining the civil liability of a respondent to proceedings would need to make determinations, such as whether the words complained about were said as part of a scientific pursuit or as part of an artistic performance. It would then need to determine whether they were done in good faith and whether it was reasonable to undertake that activity in the circumstances.

Further, the exclusion of artistic performances from the scope of the civil provision of the Bill makes it laughable. A comedian can, in the guise of an artistic performance, tell blatantly racist jokes on national television, and sell videotapes of the program for personal profit, but those some jokes told by an ordinary citizen in a public place such as a hotel or club, could render him/her subject to civil proceedings under the Bill.

If the Government is truly concerned to stamp out racism, then which is the greater evil: a racist joke told on national television, or, the same joke told in the relative confines of a hotel or club?

The legal minefield that this will create is inappropriate. It will clearly be a bonanza for lawyers and will keep the High Court employed for many years in determining the interpretations to be applied to such undefined phrases and words. As Mr Pearce so succinctly summarised the situation:

Mr Pearce: "This demonstrates graphically the difficulties which are encountered when you set about trying to make unlawful those things which are merely socially unacceptable." (*Hansard*, Legal and Constitutional, p 341)

There is another aspect of the civil sanction which provides for the vicarious liability of an employer. The legislation will make an employer vicariously liable for any offence or insult occasioned by an employee, even if the employer did not suspect that such a situation would, or might arise through an employee. This approach to vicarious liability seems somewhat harsh, although it seems to copy the vicarious liability in other discrimination legislation.

GENERAL COMMENTS

There are further difficulties with the legislation such as the definition of "ethnic." Although Ms Sheedy told the hearing at page 255 that there would be "no problem in interpretation" if the Courts were to follow the New Zealand interpretation, there is no guarantee that the Courts would necessarily adopt such an interpretation.

Although the Explanatory Memorandum and the Minister's speech may provide further clarification, legislation ought be clear on its face, and recourse to explanatory memoranda and Ministerial statement should only be required as a matter of last resort.

Even then, the High Court has recently shown itself perfectly willing to ignore such things when it can form a clear view of the legislation on its own.

Accordingly, when the Government is made aware of the difficulties of interpretation, then the legislation ought to adopt a definitions section outlining those definitions that the Government would wish the Courts to employ, rather than leaving the definitions open to legal challenge.

Whilst racist activities and beliefs are to be condemned, it is the view of the Coalition Senators that this is best addressed through educative processes.

Mr Pearce (*Hansard*, Legal and Constitutional, p 344) considered the legislation as "political window-dressing" and has suggested support be given to "educative and other community projects."

Mr Bartlett, a partner of the legal firm Minter Ellison, stated (*Hansard*, Legal and Constitutional, p 345):

Mr Bartlett: "I would say that in my view the Bill will do nothing to reduce or stop racial hatred. It seeks to take the easy approach of hitting any offender with a big stick, rather than the more difficult task of further encouraging multiculturalism through education and assimilation. The process of multiculturalism and assimilation is continuing in this country, and it would not be encouraged by harsh

criminal and civil remedies."

Mr Wakim, who is at the coalface of working with the Arab communities within Australia made the following point (*Hansard*, Legal and Constitutional, p 388):

Mr Wakim: "I must say, as a bi-lingual person, that I have had enormous difficulty explaining the concept of racial vilification in Arabic. A lot of this discourse goes way over the heads of the people that I think we are supposed to be addressing."

And later in (*Hansard*, Legal and Constitutional, p 391) Mr Wakim says:

Mr Wakim: "The thrust of what we really want to inject into this discourse is not so much about the legislation, but to try and have a look at the roots of the problem rather than the symptoms, and have a look at how we can redress the ignorance that is a fertile ground for the racism in the first place and we can redress the gap between the victim and the law, rather than the gap within the law."

SUMMARY

Given the difficulties of prosecuting the proposed Section 60 and the impact on freedom of speech, thus bringing into question the constitutionality of that criminal sanction, it is the Coalition view that this criminal aspect of the legislation should not be pursued.

In relation to the civil aspects of the legislation, the Harry Brandy v HREOC decision leaves in limbo the enforceability of any civil sanction. Given that there are very real difficulties with the legislation, it is the Coalition view that the legislation ought be withdrawn and reconsidered.

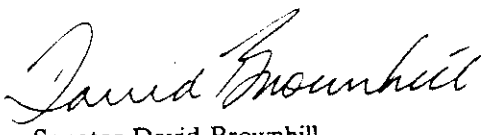
However, in the interim, there is nothing stopping the Government from embarking on an educational program to ensure that Australia's reputation as a tolerant and multicultural society is enhanced, and ensure the freedom for elements of its citizenry who feel threatened by, and are the victims of, unacceptable racially motivated behaviour.

Senator Chris Ellison

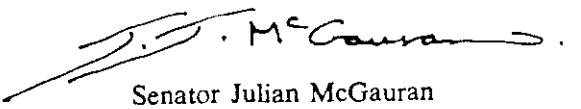
Senator Bill O'Chee

Senator Eric Abetz

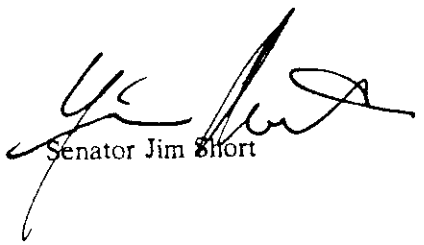
Senator Michael Baume



Senator David Brownhill



Senator Julian McGauran



Senator Jim Short

Appendix 1

Submissions Received

APPENDIX 1

Racial Hatred Bill 1994

List of Submissions

Sub No.	Individual/Organisation	Date of Submission
1.	Mr John Bennett, Australian Civil Liberties Union	15.02.95
2.	Mr John McNicol, NCV Lobby Service Inc.	15.02.95
3.	Mr Alan Rose, Australian Law Reform Commission	15.02.95
4.	Mr Isi Leibler, Executive Council of Australian Jewry	13.02.95
5.	Mr Chris Puplick, Anti-Discrimination Board of NSW	15.02.95
6.	Mr Peter Bailey, Faculty of Law, Australian National University	17.02.95
7.	Mr Scott Carter, Queensland Law Society Inc.	14.02.95
8.	Mr Maurie Stack, Law Society of New South Wales	15.02.95
9.	Mr Ron Castan QC, Barrister	20.02.95
10.	Fr W.J. Wright, Australian Catholic Bishops Conference	21.02.95
11.	Mr Joseph O'Reilley, Victorian Council for Civil Liberties	21.02.95
12.	Rev Harry Herbert, Uniting Church in Australia - NSW Synod	20.02.95
13.	Mr Nigel Jackson, Private Citizen	19.02.95
14.	Mr John King, Australians for Free Speech	21.02.95
15.	Mr Alan Goldberg QC, Executive Council of Australian Jewry	25.02.95
16.	Mr Peter Bartlett, Partner, Minter Ellison	24.02.95
17.	Mr Mark Leibler, Ethnic Coalition of Australia	24.02.95
18.	Mr Joe Wakim, Australian Arabic Council	15.02.95
19.	Mr Victor Borg, Ethnic Communities' Council of Victoria	24.02.95
20.	Mr Jack Herman, Executive Secretary, Australian Press Council	24.02.95
21.	Mr Geoffrey Atkinson, National Aboriginal & Islander Legal Services Secretariat	23.02.95
22.	Miss Lois O'Donoghue, Aboriginal and Torres Strait Islander Commission	23.02.95
23.	Ms Julia Bovard, The Free Speech Committee	01.03.95
24.	Mr Tom Bostock, Partner, Mallesons Stephen Jaques	06.03.95

Appendix 2

Details of Meetings

APPENDIX 2

Details of Meetings

Public Hearing: 17 February 1995
Commenced: 9.15am
Adjourned: 4.40 p.m.
Committee Room 1S3
Parliament House
CANBERRA

Attendance: **Committee Members**

Senator B Cooney (Chair)
Senator S Spindler
Senator C Ellison

Participating Members:

Senator Abetz
Senator Harradine

Witnesses: **Attorney-General's Department**

Ms Lynne Ashpole
Senior Government Lawyer,
Criminal Justice Branch

Mr Bill Campbell
Senior Government Counsel,
Office of International Law

Mr Paul Griffiths
Principal Government Lawyer,
Criminal Justice Branch

Ms Maggie Jackson,
Deputy Government Counsel,
Civil Law Branch

Mr Colin Neave,
Deputy Secretary

Dr Merrilyn Sernack,
Principal Counsel,
Human Rights Branch

Ms Joan Sheedy,
Senior Government Counsel,
Human Rights Branch

Individuals

Mr Gary Corr,
Barrister

Mr Ian Lacey,
Executive,
Ethnic Communities Council (NSW)

Mrs Josephine Lacey,
Vice-Chairperson,
Ethnic Communities Council (NSW)

Mr Victor Rebikoff,
Chairperson,
Federation of Ethnic Communities Council of Australia

Mr Geoffrey Atkinson,
National Aboriginal and Islander Legal Services Secretariat

Mr Peter Bailey,
Visiting Fellow, Faculty of Law,
Australian National University

Miss Catherine Chung
Vice-President,
Australian Chinese Community Association of NSW

Mr Lawrence Lau,
President,
Australian Chinese Community Association of NSW

Mr John McNicol,
National Coordinator,
Network for Christian Values Lobbying Services

Ms Mary McNish,
Hon. Secretary,
New South Wales Council for Civil Liberties Inc.

Public Hearing: 24 February 1995
Commenced: 9.05am
Adjourned: 4.40pm.
Commonwealth Parliamentary Offices
90 Collins Street
MELBOURNE

Attendance: **Committee Members**

Senator B Cooney (Chair)
Senator S Spindler
Senator C Ellison
Senator J McKiernan
Senator W O'Chee

Witnesses:

Ms Zita Antonios,
Race Discrimination Commissioner

Mr Peter Bartlett,
Partner, Minter Ellison

Mr Robert Chong,
Chinese Community Social Services Centre

Mr Alan Goldberg QC,
Executive Council of Australian Jewry

Mr Nigel Jackson,
Private Citizen

Dr Ray Jureidini,
Australian Arabic Council

Mr Mark Leibler,
Ethnic Coalition of Australia

Mr Geoffrey Muirden,
Secretary, Australian Civil Liberties Union

Mr Michael Pearce,
Victorian Council for Civil Liberties

Ms Bronwyn Pike,
Director, Justice and Social Responsibility Board,
Uniting Church in Victoria

Mr Joseph Wakim,
Australian Arabic Council

Ms Jude Wallace,
Victorian Council for Civil Liberties

Public Hearing: 28 February 1995
Commenced: 7.55pm
Adjourned: 9.00pm.
Committee Room 1S2
Parliament House
CANBERRA

Attendance: **Committee Members**

Senator B Cooney (Chair)
Senator C Ellison
Senator J McKiernan

Participating Members:

Senator Abetz
Senator Boswell
Senator Short

Witnesses: **Attorney-General's Department**

Ms Maggie Jackson,
Deputy Government Counsel,
Civil Law Branch

Mr Colin Neave,
Deputy Secretary

Mr Robert Orr
Deputy General Counsel

Dr Merrilyn Sernack,
Principal Counsel,
Human Rights Branch

Ms Joan Sheedy,
Senior Government Counsel,
Human Rights Branch

Individuals

Mr Gary Corr,
Barrister

Private Meeting: 6 March 1995
Committee Room 1S3
Commenced: 11.40am
Adjourned 12.40pm

Attendance: Committee Members

Senator B Cooney (Chair)
Senator C Ellison
Senator C Evans
Senator W O'Chee

Participating Members:

Senator E Abetz
Senator M Baume

Private Meeting: 7 March 1995
Committee Room 1S6
Commenced: 9.00am
Adjourned: 9.50am

Attendance: **Committee Members**

Senator B Cooney (Chair)
Senator C Ellison
Senator J McKiernan

Participating Members:

Senator Abetz
Senator Short