Racist Speech and Freedom of Speech

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The illiberal effects of racial vilification laws

In 1992, the High Court decided that the Australian Constitution contains an implied right to freedom of communication in relation to political and public matters.[1] In October 1994, the same Court held that this implied freedom demanded the creation of a limited defence to defamation actions brought by politicians or electoral candidates for statements concerning the performance of their official duties and their suitability for office.[2]

This emerging judicial protection of freedom of speech is in stark contrast to the pending legislative attempt to stifle the expression of unpopular opinions embodied in the Racial Hatred Bill 1994 (Cth). Its possible prohibition of statements made in public debate represents an undesirable limitation upon freedom of speech.

Of course, to argue against restriction of the freedom of speech of those whose views one abhors is not to express support for those views. The philosophy expressed in the famous remark attributed to Voltaire still holds true: 'I disapprove of what you say, but I will defend to the death your right to say it'. Being 'eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death'[3] is not to display affinity with extremists and zealots.

The Racial Hatred Bill 1994

Enacted solely under the external affairs power, the proposed legislation involves implementation of the articles of the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination that demand prohibition of incitement of racial hatred.

The legislation proposes two sets of sanctions for racist speech. The first are criminal penalties created by amendments to the Crimes Act 1914 (Cth). The second are civil sanctions created by amendments to the Racial Discrimination Act 1975 (Cth), to be administered by determinations under the complaints mechanism of the Human Rights and Equal Opportunity Commission and enforced by the Federal Court.

The criminal sanctions include the prohibition of threats to cause physical harm because of race, colour or national or ethnic origin and threats to property because of those reasons. While it is appropriate to criminalise threats to persons or property, the provisions of the Bill dealing with threats may amount to duplication of existing law in many states. Threats of violence against a person may already be punishable so that the proposed prohibition of racist threats is superfluous. As an editorial in *The New Republic* pointed out, 'Hate crimes need not go unpunished in the absence of hate crimes legislation, since most are also real crimes (TNR 1991: 8).' In that case, the most that will be accomplished by the proposed legislation is to add penalties for ideological unsoundness to the protections of the general law.

A new criminal offence of incitement of racial hatred will also be created. Any person who, with the intention of inciting racial hatred, does an act (otherwise than in private) which is reasonably likely to incite racial hatred against a person or group of persons is guilty of an offence punishable by one year's imprisonment. An act is not done in private if it is done in a public place or in the sight or hearing of people

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1 *Australian Capital Television Pty Ltd* v *Commonwealth* (1992) 175 CLR 106; *Nationwide News* v *Wills* (1992) 177 CLR 1.
2 *Theophanous* v *Herald and Weekly Times* (1994) 124 ALR 1; *Stephens* v *West Australian Newspapers* (1994) 124 ALR 80.
3 *Abrams* v *United States* 250 US. 616 at 630 (1919).

in a public place, or causes words, sounds, images or writing to be communicated to the public.

The civil sanction provided by the proposed legislation is against public acts done because of race, colour or national or ethnic origin which are 'reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people'. The same definition of when an act is not done in private is used here.

There are exemptions from this civil sanction. The exemptions are for 'anything said or done reasonably and in good faith' in:

1. an artistic work, or
2. 'fair and accurate' reports of matters of 'public interest', or
3. 'fair comments' on matters of 'public interest' provided it is 'an expression of a genuine belief' of the person, or
4. discussion or debate made for any 'genuine' academic, artistic or scientific purpose or 'any other genuine purpose in the public interest'.

The onus is on the defendant to show that they come within one of these exemptions. For example, in the case of news reporting, a media defendant found to have offended racial sensitivities would have to prove five elements in order to avoid liability:

1. that the statement was made reasonably,
2. that the statement was made in good faith,
3. that the report was 'fair',
4. that the report was accurate, and
5. that the matter reported is of 'public interest'.

If all five are not satisfied liability will remain. This imposes an onerous burden on publishers. The language of the exemption makes it clear that inaccurate reporting is not protected from sanction. Even inaccurate reporting merits protection because of the inhibiting effect that its prohibition has upon freedom of speech. American case law recognises that 'erroneous statement is inevitable in free debate, and ... must be protected if the freedoms of expression are to have the "breathing space" that they "need ... to survive"'.[4] If the error is deliberate the case for protection is lesser of course, but the exemption does not protect unintentionally inaccurate reports.

Existing state or territory law capable of operating concurrently with the proposed federal law when it is enacted is to be preserved. Such law exists in Western Australia, New South Wales, Queensland, and the ACT. The Explanatory Memorandum to the Bill asserts: 'Subsection 4C(2) of the Crimes Act provides that a conviction under State or Territory law precludes proceedings for the same offence under the law of the Commonwealth. It would not therefore be possible for a person to be prosecuted twice for the same offence (HoR 1994: 8)'. This is probably incorrect. While it would not be possible for a person to be convicted twice for the same offence, they could be prosecuted twice, which would place them in double jeopardy of conviction through a second trial after acquittal under state law.

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The 'Chilling' Effect of the Racial Hatred Bill 1994

Even if the prohibitions in the legislation could not be used to impede public debate and were never enforced that way, those who wish to express controversial views about matters concerning race will inevitably be frightened into silence. In the United States this is referred to as the 'chilling effect' of prohibition upon non-prohibited speech. People wishing to make genuine contributions to public debate will refrain from doing so if they fear that they may be punished by the law. It is reasonable to expect that people will tend to make only statements which 'steer far wider of the unlawful zone.'[5] Overzealous enforcement of the legislation would further exacerbate its effects on people's willingness to contribute to public debate.

Although the legislation would almost certainly have a 'chilling' effect on most people, it is unlikely to deter

[4] *New York Times* v *Sullivan* 376 US 254 at 271-2 (1964), quoting *N.A.A.C.P.* v *Button* 371 US 415 at 433 (1963).
[5] *Speiser* v *Randall* 357 US. 513 at 526 (1958).

extremists. Indeed, prosecutions under racial vilification laws may actually be welcomed by those who vilify. They offer the extremist the desirable prizes of publicity and martyrdom. This is an issue which surely has not been sufficiently considered by the proponents of this type of legislation. For example, Canada's Chief Justice, Brian Dickson, stated that 'hate propaganda legislation and trials are a means by which the values beneficial to a free and democratic society can be publicised.'[6] Indeed, it is remarkable that those supporting such legislation evidently discount the publicity that speech trials give to the holders of extreme views. There is considerable danger that the state will afford extremists public exposure they would never otherwise achieve.

Left to their own devices cranks will be largely ignored. But attempts to stop them from speaking grant them public notoriety which would otherwise be denied to them and to their messages. A good example is provided by revisionist historian David Irving whose odious views about the Holocaust were widely reported following the federal government's decision to refuse him entry into Australia. If he had been prosecuted while in Australia his notoriety would have been all the greater.

The enthusiasm that extremists have always had for prosecution is also because prosecution offers them the prospect of martyrdom for the cause. Among their peers, prosecution and a prison term are badges of honour distinguishing them for service to the 'cause'. Left wing martyrs must surely realise that feelings of pride about deliberately infringing what one feels to be an unjust law, and the prestige of peer admiration for doing so, are not unique to one side of extremist politics. The folly of state persecution of dissenting opinion is that it gives heart to the dissenter.

It should also be remembered that suppression of extremist speech gives it far more credibility to those disposed to believe it, who will only see in its suppression affirmation of its truth, not of its falsity. That is completely contrary to what the proposed legislation is supposed to achieve.

Ideological Censorship

Anti-vilification legislation facilitates ideologically based censorship of ideas and reinforces the legitimacy of censorship by the state of views of which it disapproves. In *Doe v University of Michigan*, in invalidating the University of Michigan's 'speech code' as constituting a violation of freedom of speech, an American District Court emphasised the impermissibility of state censorship of ideas. The Court held: 'What the University could not do ... was [to] establish an anti-discrimination policy which had the effect of prohibiting certain speech because it disagreed with ideas or messages sought to be conveyed.'[7]

It is only if racist speech is not restricted that it can be repudiated effectively. As Justice Louis Brandeis said in 1927, 'the remedy to be applied is more speech, not enforced silence.'[8] For example, in *Doe's* case a student had been subjected to a formal hearing under the speech code because he had expressed the belief, during a social work class, that homosexuality was a disease susceptible to psychological treatment.[9] Those who disagree with that view are handicapped by prohibition in refuting it: 'it may well be that a class on social work is not an inappropriate forum for a rational discussion of why the "disease" model of sexual difference has lost credibility among social scientists ... The trouble is you cannot begin to conduct this conversation when you outlaw the expression of the view that you would criticise (Gates 1993: 44-5).' Suppression also raises the prospect that racist extremism will merely be driven underground, where it will fester and spread immune from the public debate that will ultimately be its demise.

Support for the prohibition of racist speech gives credibility to viewpoint-based suppression of speech. There appears to be an eccentric view held by proponents of censorship that one can support freedom of speech by calling for freedom where one agrees with the content of the speech and supporting restriction where one disagrees with the content. Aside from being cynical and self-serving, such a view of freedom of expression hardly provides a reasoned approach to freedom of expression for the law to take. The old notion that it is free speech for all or effectively none has kept its currency because it is true. Selective support for freedom of speech erodes the principle of viewpoint neutrality. The more that principle is eroded by censorship of the views one disagrees with, the greater is the likelihood that when the ideological climate changes, one's own views will be those whose expression is prohibited.

Protection of One's Own Right to Speak

Restrictions on the right of others to speak can be all too easily used to justify restrictions on one's own right to speak. As Laurence Maher has argued, the legitimisation of legal use of highly subjective concepts such as 'vilification' or 'offensiveness' could justify punishment of left-wing or feminist speech, such as that of those protesting on Anzac Day against rape and murder committed by soldiers

[6] *R* v *Keegstra* [1990] 3 SCR. 697 at 769 (per Dickson CJ).
[7] 721 F. Supp. 852 (E.D. Mich. 1989) at 863.
[8] *Whitney* v *California* 274 US 357 at 377 (1927) (per Brandeis J).
[9] 721 F. Supp. 852 (E.D. Mich. 1989) at 861.

against non-combatants by 'denounc[ing] all soldiers as rapists or war criminals (Maher 1994: 391).'

The principle of caution towards the creation of ideologically acceptable and unacceptable speech by the state protects the right of dissenters of whatever political persuasion to express their views. The United States Supreme Court struck down a federal law that permitted the use of military uniforms in drama only if the portrayal did not discredit the armed forces. The Court said that such a provision which left Americans free to praise the war in Vietnam while sending to prison those who opposed it 'cannot survive in a country which has the First Amendment.'[10]

This applies as much to minorities as to anyone else. In the United States it was the First Amendment's extraordinarily broad protection of freedom of speech that permitted the protests of the civil rights movement. We would express agreement with Justice Black's dissent to the decision upholding Illinois' 'group libel' law, a prototype of racial vilification legislation: 'If there be minority groups who hail this holding as their victory, they might consider the possible relevancy of this ancient remark: "Another such victory and I am undone."'[11]

Censorship of Minorities

It is ironic that racial vilification legislation is very likely to be enforced against members of minority groups who express their frustration in an inflammatory manner. In 1993, vitriolic public abuse was exchanged on each side of the debate over native title to land. The possibility that minority groups arguing in favour of their rights will be further silenced by the law is intolerable. Such legislation is hardly a present to marginalised groups. Over the year in which the University of Michigan's speech code was enforced, over twenty black students were accused of racist speech by white students (Gates 1993: 44).

As Frank Brennan has argued, even if persons from minority groups who make inflammatory statements about other races are not prosecuted, the result will be one-sided enforcement: 'Presumably the advocates of this law would espouse a selective prosecution procedure under which one would leave warring minorities to themselves while making a show trial of the mainstream community member who had singled out one racial group (Brennan 1994: 15).' Such lopsided enforcement will arouse, not reduce, resentment towards minority groups.

Conclusion

From our foregoing comments and for the reasons we give against proscribing racist speech, it should be clear that we do not support the adoption of the Racial Hatred Bill. Its probable legal inhibition of freedom of public debate about an extraordinary range of issues such as affirmative action, immigration and native land title suggests that it will be an illiberal blot on the statute book should it be enacted.

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References

Brennan, Frank 1994, 'Does Australia need a racial vilification law ?', *Quadrant*, November: 14-15.

Gates, Henry Louis Jr 1993, 'Why civil liberties pose no threat to civil rights: Let them talk', *The New Republic*, 20 & 27 September: 37-49.

HoR (House of Representatives) 1994, *Racial Hatred Bill 1994: Explanatory Memorandum, Parliament of the Commonwealth of Australia*, Canberra.

Maher, Laurence W. 1994, 'Migration Act visitor entry controls and free speech: the case of David Irving', *Sydney Law Review* 16: 358-393.

TNR 1991, Editorial: 'Breaking the Codes', *The New Republic* 8 July: 7-8.

[10] *Schacht* v *United States* 398 US 58 at 63 (1970).
[11] *Beauharnais* v *Illinois* 343 US 250 at 275 (1952).