

Human Rights Commission

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## Incitement to Racial Hatred: Issues and Analysis

"Good gracious. Anybody hurt?"

"No'm. Killed a nigger."

"Well, it's lucky because sometimes people do get hurt."

Mark Twain. The Adventures  
of Huckelberry Finn

### Racial Hatred

Human beings have a passion for categorisation. Depicting the graded variety of the world in discrete symbolic forms is one of our most deep rooted propensities.

Biologically, "race" refers to specific patterns of genetic difference within a species as a whole. As a species we can interbreed if we want to, our progeny will be viable, and the differences between us will be very small indeed compared with the differences between a human being and anything else. If and when we do breed, our children inherit a shuffled sequence of the parental genes. The shuffling is so effective that the outcome, except in the case of identical twins, is always genetically unique, which means that in this sense practically every individual is too. This is why there is such variety in human potential and such a diversity of personal endowments.

Mating opportunities are not everywhere the same, however, since comparatively few realise the biological possibility of breeding with someone far removed from where they live, either geographically, or by socio-economic, linguistic, or religious distance. Other environmental influences vary too, causing natural selection and adaptation. Hence, within the common gene pool that all humans share, there are eddies. The

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eddies are not very large - Lewontin argues that only 6% or so of human genetic diversity is "racially" derived, 8.3% being due to differences between the more local populations within any one "race", which leaves by far the largest fraction due to the difference between individuals as such.

The findings (i) that human genetic diversity is evolutionarily advantageous, and we should celebrate it as such since we simply do not know what qualities will prove most adaptive for any future stage of our species, in part or in whole; (ii) that human genetic diversity is most evident within the major groups that might be made of mankind, rather than between them, the concept of the latter proving problematic anyway because of the way in which human races form a genetic continuum; and (iii) that our genetic diversity as a species is so extraordinarily rich that under "most systems of equal opportunity and equivalent selection, any numerically significant segment of the human species could ... probably replace any other with respect to behavioral capacities";<sup>2</sup> all seem to be particularly important. Any det7;te about human values ought to be informed by such empirical propositions which, while ultimately inconclusive in themselves, are far from irrelevant.

So much for science. Racial hatred ignores such niceties. The surge of self-determination in the 20th century, both individual and collective, has placed the issue of race high on the global socio-economic and political agenda. As assumptions of superiority have been challenged, the emotional response that would once have considered those categorised as inferior - as beneath contempt, if not actually inhuman - has all too often turned into hatred. Such feelings were intensified where groups, identifiably different, came into competition for the same set of resources, particularly where these were scarce ones.

The idea of "pollution", common to many forms of social control (note the pollution taboos of countless traditional and contemporary societies - linked by Douglas<sup>3</sup> to concepts not of dirt but of "displaced-matter" and a general desire to order the cosmos, thus helping allay deep fears about its arbitrary construction) - has been allied with "race" to sanction all sorts of nonsense about ethnic purity and uncontaminated breeding stock and the perils of miscegenation (perils belied in scientific fact by the importance of "hybrid vigour").

Fake plans for world domination, such as the Protocols of the Elders of Zion, surface with monotonous regularity, and are meant to justify antisemitic sentiments on a mass scale. Policies of repatriation ("send them back where they came from") are typical planks in many racist platforms. Institutional humiliation and harrassment abound - the discrimination in areas of housing, employment, education, access to welfare services and other public amenities - formally organised by the state in a country like South Africa; less formally so elsewhere. Racist organisations proliferate and equal opportunities, even in democratic societies, are hard won and desperately difficult to enforce.

Australia is not immune in this regard, as members of community relations and anti-discrimination bodies amply testify. The symptoms of overt and covert racism, both inter-personal and institutional, are manifest here.

#### Incitement to Racial Hatred

The concept of incitement to racial hatred is self-explanatory. Some of the means used have been cited above; others include written and printed propaganda, spoken words used in public meetings and other public places (which raises the question of defining what "public" means), radio and T.V. broadcasts (or bits thereof), filmed or staged material,

gestures (such as forms of salute), Pre-recorded telephone messages, the wearing or display of special clothing, signs (such as graffiti), flags, insignia, and any other such representations (and, where appropriate, the distribution or dissemination or same), random violence up to and including riots, and membership of, or the provision of assistance to, racist organisations in particular and racist activities in general.

Incitement can be inflammatory and the hatred and violence obvious to all, or it can take much more subtle forms, to the point where race is not even mentioned. This raises much broader questions: whether anything that excites or hostility or intolerance, or anything that exposes a people to sentiments that ridicule an identifiable sector of it, is serious enough to warrant concern? Ill.-will, hostility and intolerance are more diffuse than hatred, but they can be as much, even more significant than it, when it comes to considering the causes of communal racism. Need a breach of the peace be impending to warrant our concern, or should we be looking deeper and wider - for the seedbeds of dissent?

There are other issues, too. Is it important whether those doing the incitement seem to mean what they say, or should one allow for inadvertence, for reckless rhetoric (the question of intent)? Should one link the concept of incitement to that of rights, giving as grounds deserving of intervention those "human"? acts where rights (civil political social? economic? have been (or look likely to be) abridged (which raises the question of the specific character of the behaviour itself)? What amount of overlap is there between the concept of incitement to racial hatred and that of group defamation; can the latter be used, in other words, as a way of incorporating the former?



### Freedom of Expression vs Censorship

The "classic" Objection to governmental attempts to control incitement to racial hatred is the defence of freedom of expression.

At One end of this spectrum are those who see any legislation that would inhibit Speech or publication, however pernicious that speech or publication happens to be, as the thin edge of the wedge. Rather than drive racist sentiments deeper, they would argue, to fester and infect, we should allow them to flourish unrestricted. In this way the sources of social disease might better be identified, and met by counter-propositions as appropriate. Freedom of expression is central to the liberal traditions of the West; it Was hard won and should be closely guarded against any sort of censorship.

At the other end are those who would count in the multifarious costs of such uninhibited behaviour, and who would advocate as a consequence (carefully delimited) controls upon the diverse forms of it in **the** interests of preserving public order. The debate that traditionally counterpositions the good (of freedom of expression) and the bad (of censorship) shades, that is, into one in which one civic good (freedom of expression) Confronts another (public order), and what might have seemed initially a simple matter of being either for or against free speech becomes a somewhat more complex matter of balancing off the competing values of this and "the peace", where automatic deference to neither obtains.

### Freedom of Expression vs Freedom of Opportunity

The debate does not end here however. As we probe the roots of public order we find that we are faced with the question of what makes for social cohesion? Rather than protecting a preferred value (free speech) from erosion - a

rather negative approach in this context - we find that countering incitement to racial hatred (should we choose to do so) means fostering freedom of opportunity (the right, that is, of each individual to build his or her life and to live in an atmosphere of mutual tolerance, understanding and respect) - something that proves in practice to be much more radical in the real sense of that term. What emerges is a third argument, more comprehensive again, that counter-positions the good (of freedom of expression) and the good (of freedom of opportunity), and places upon the well-meaning legislator the task of striking the kind of balance that has bedevilled democratic communities for millenia.

#### How Have Other Countries Responded?<sup>4</sup>

Of the politico-judicial systems most comparable to the Australian (Britain, New Zealand, Canada and the United States), only America has not made specific provision for racial incitement. One should note (see the famous 'case of *Beauharnais v. Illinois* for example)<sup>5</sup> occasional attempts there to pre-empt group libel or to punish forms of incitement in the interests of maintaining public order. America's revolutionary tradition however, enshrined in the First Amendment of its national Constitution, continues to stand in the way of attempts by particular States of the Union to introduce anti-hate legislation.

How one assesses the success or failure of such an approach is hard to say. The U.S. has suffered an appalling amount of racial hatred and there have been the high costs of all the concomitant violence and discrimination. It would take a particularly brave person, or a particularly dogmatic one, to say with any degree of certainty whether or not this has been worth the country's commitment to such an untrammelled conception of free speech. It is an elementary question, but one always worth asking: freedom is for whom, to do what, for how long?

Canada, though close to the U.S. and much influenced by its jurisprudential example, chose in 1970 to introduce federal legislation meant to punish those who might incite hatred against sections of the public identifiable in terms of their colour, race, religion or ethnic origin, and likely to lead to a breach of the peace; or who might wilfully promote such hatred Per se. This was followed up by a specific clause of the Canadian Human Rights Act of 1977, and by provincial human rights codes, the most recent of which was British Columbia's Civil Rights Protection Act of 1981.

The Canadians were especially concerned, when the original Acts were introduced, to control the effects of hate propaganda. The powers they conferred have not been much used, and it is hard to say what would constitute empirical evidence of the success or failure of the enterprise. Much of the significance of legislation of this sort is symbolic. It gives overt recognition to official concern with the issue of racial hatred, and formally sanctions the attempt to prevent the in-  
treatment of it. The fact that few offenders have been brought to court does not detract from these functions. There is also a certain inhibitory effect, though this too would be difficult to measure with any precision. How many racially inflammatory acts have not been performed because of the deterrent presence of legislation prohibiting them?

The U.K., under Labour Party leadership, first moved to ban incitement to racial hatred in 1965. The original initiative was taken very much in the interests of public order and there was seen to be a close link between the two.

Non-white immigration on a relatively large scale, and the upsurge in bigotry and unrest that went with it, made the link relatively easy to see; and the need for some kind of legislative intervention seemingly urgent. There were problems with the result, however, particularly in establishing a

protagonist's "intent", in defining key words like "hatred" and "insult", or in getting the Attorney-General's approval to prosecute. As a consequence the incitement provisions were amended in 1976, though not all the suggested reforms were made. As in Canada, prosecutions have been few.

Whether things would have been worse without such legislation is once again more difficult to say. What is clear in the British case is how much the efficacy of such provisions depends on the commitment of those whose job it is to administer and enforce them. Much more could have been done than was done, and much violence avoided, if the constabulary had been prepared to do it - particularly after 1976. It is not enough apparently to place on record governmental good intent, and expect legislation to apply itself.

New Zealand followed the pattern of the U.K. legislation (with some revisions) passing an anti-incitement Act in 1971. Its social history has been quite different from Britain's, and the permanent presence of a large Maori population has made for different attitudes, and different strategies of inter-racial accommodation. The official position at the time seemed, to be that though legislation of this sort was not strictly necessary, it did provide a good opportunity for the Government to be seen to be doing good works. This opinion could not belie a good deal of racial resentment in the society at large, though not much of this was of the extreme sort the anti-incitement provisions were designed to prevent. As elsewhere there has been a notable paucity of prosecutions. Indeed, in 1977 the Act was amended to include conciliation procedures, and these have proved more popular.

The Commission's Occasional Paper No. 2, "Incitement to Racial Hatred: the International Experience", contains details of the legislation and experience of several countries with respect to racist propaganda. Copies are available on application to the Commission.

What Is To Be Done (If Anything)?

Taken together these cases (and others as well, particularly European ones) suggest a number of points at which it is worth expanding on the two basic alternatives: whether or not, that is, to legislate to control incitement to racial hatred. We can decide -

A. not to legislate, either

(i) because it inhibits freedom of expression, or

(ii) because a good law is not possible having looked in detail at the difficulties involved in framing one, e.g. questions as to who such provisions might cover, how anti-incitement activities might be described, what media to include, whether it would be necessary to establish intent, what defences - if any - might be allowed and what sanctions to apply; or

B. to legislate, regardless of these objections,

(i) in very general terms that prohibit incitement to hatred without mentioning race or ethnicity or nationality as such; or

(ii) by providing for more informal, less court-centred alternatives - machinery that might investigate, conciliate and/or mediate such problems, or might implement socio-educational policies of some kind; or

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(iii) in terms of group defamation (making, this unlawful, even criminal, whether or not we permit class actions too);

and/or

(iv) in the particular terms typical of most of the countries discussed, which means providing adequate answers to the questions asked under A(ii) above.

None of the country cases is without its problems and deserves uncritical acclaim. We can learn from them all, however, as much as possible about the pitfalls involved, and what the main areas of analytic concern ought to be. Let us look at the latter in a little more detail.

- Freedom of Expression

No-one asserts an absolute right to freedom of expression. Some come close to it, and they are the ones least likely to see legislation as a desirable part of the process of social reform. The opposite of free speech and press they tend to construe as a state of enforced silence. Those more removed from such an assertion, however, tend to have a rather more interventionist idea of how the law relates to the rest of society. For them the opposite of unimpeded expression need not be enforced silence, since they prefer to countenance the concept of civilised restraint.

The ideas above are loaded ones, full of the the freight of further beliefs. No-one disagrees with the proposition that in a democratic society free speech is central, and that any restrictions upon it need to be supported by the best of reasons. Furthermore, what seem to be good reasons today can become bad reasons tomorrow. This too is obvious. But then, equally obvious are the dangers inherent in making a

fetish of any human principle, and this is where the trouble begins, since rights and freedoms are made by human beings, for human beings, and they must be made and administered with humanity or they are brought into contempt.

A long list of contemporary states have been prepared to compromise freedom of expression at least to the extent necessary to protect the intricate fabric of society at large, and the equal opportunities of all their members. Have they gone too far however? Have they done the right thing? Truly tolerable and stable communities are those informed by human conscience.<sup>6</sup> They also require the leaven of debate if that informing process is not to become a dictatorial one. As a consequence legislation in this area has not been easy to draft. While outright defamation is readily defined and punished, what of the sort of incitement that takes legitimate social resentments and puts the blame for them upon scapegoat groups in ostensibly legitimate ways? These may be no less, and may perhaps be much more, effective in terms of raising racial hatred. Protecting freedom of expression while preserving fair play can, as a consequence, present very real problems indeed.

Libertarians tend to rely on the good judgement of the majority, decrying those who would use the power of the state (whether or not expressed in the "public interest") to push their preferences (however enlightened) "down others throats without allowing them the opportunity to be persuaded •.".7 Advocates of incitement legislation on the other hand would point up the dangers democracies face and the insidious ways in which they have been subverted in the name of that very tame majority. Canada's Special Committee said:

"While holding that over the long run the human mind is repelled by blatant falsehood and seeks the good, it is too often true, in the short run, that emotion displaces reason and individuals perversely reject the demonstrations of truth put before them and foresake the good they know ... Those who urged a century ago

that men should be allowed to express themselves with utter freedom even though the heavens fall did so with great confidence that they would not fall. That degree of confidence is not open to us today ... however small the actors may be in number, the individuals and groups promoting hate ... constitute a 'clear and present danger' to the functioning of a democratic society. For in times of social stress, such 'hate' could mushroom into a real monstrous threat to our way of life. "8

This does beg the question of how we define "hate", though this in turn need not mean that we should attempt no such definition at all. The impossibility of obtaining completely aseptic procedures would not permit a concerned surgeon to perform operations in a sewer, or serious attempts by conscientious legislators to draw a line.

#### Generalising the Issue

It has been argued that one should not legislate against racial hatred per se, and indeed that it is counter-productive to do so since this draws undue attention to divisions in society that are better dealt with in a more oblique way. Hence, if legislation is deemed desirable, then we should pass provisions prohibiting incitement to hatred in general and not nominate ethnic, national, religious or other such groupings in particular, thereby covering all contingencies without making an issue out of any one of them. To some extent public order statutes do this already.

One drawback to this approach would seem to be the very comprehensive character of the result. Legislative provisions so wide-ranging become extremely slippery to use, precisely because of their unfocussed character. The courts, singularly averse to such vagueness and universality, shy away from them. Indeed, all those who enforce the law are invariably much happier with the practical, the concrete and the precise. This is not the only problem though. Racial hatred is a fact.

Incitement to it exists and in many communities is a most immediate phenomenon, having particularly pernicious and pervasive consequences. One's "racial" or "ethnic" characteristics; one's "nationality" or "religion"; these are things one either can do nothing about it, or can change only with great difficulty having been born that way or having been conditioned, probably from birth, to the culture or the beliefs involved. To be singled out on grounds like these is to be given very little choice.

#### Conciliation

It is not uncommon to advocate an administrative rather than a judicial response to incitement to racial hatred, at least as a line of first resort.

Criminal proceedings mainly serve to try and punish. They hardly allow the most sensitive and informal of proceedings, and they tend to deter the wrong-doer by threat of prosecution rather than by working to alleviate the source of the problem. They present other shortcomings too'. If the law is not to be brought into disrepute, it needs to be precise enough to be applicable, and describe crimes of a kind that can be detected. It runs ever the risk of helping to consolidate that body of opinion it is designed to oppose, thereby exacerbating the social divisions it ought supposedly to alleviate; it needs the support of the police and the courts to be effective; and the standard of proof required for conviction is very high.

Civil proceedings on the other hand call for a large financial outlay (unless instituted under the auspices of a legal aid program of some kind), the outcome is often not very satisfactory, and the prospects for reconciliation are remote.

Hence the significance of conciliation procedures (or mediation ones - they are not the same), administered by a commission or tribunal for example, with its own enforcement powers. The courts and the police need not be involved, which makes them considerably less difficult to initiate, and therefore considerably more attractive to those who have suffered at the hands of officialdom and have come to expect little of it. They smack less of coercion and in this respect can seem more appropriate to the nature of the misdemeanour. And they can be much more confidential.

The problem remains, however, what to do with the dedicated racist who incites hatred because he or she wants another kind of society altogether, and who is hardly likely, as a consequence, to accept the authority of the courts let alone that of some lesser body. To catch these people one either has to rely on the reformist capacities of freedom of speech (the libertarian approach) or cast wide the safety net of the law, mitigating their influence through the use of the sort of unequivocal statement that only a democratic statute about what society considers permissible - even one rarely cited - can make (which is what the interventionist would recommend).

The arguments about free speech have been rehearsed above. The interventionist ones are less familiar however. Drafting legislation to this effect is one way, in this view, of saying what is and what is not acceptable in civilised discourse. It gives legal voice to victims who would articulate their entitlements, and it is a clear expression of society's concern. While conciliation or mediation may well be a good approach to put "out front", it does not, in interventionist parlance, obviate the necessity for legislation. Indeed, the particular inadequacies of conciliation and mediation would only seem to make that necessity more apparent.

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### Education

It is often argued that the law is an unwieldy weapon and when used too far beyond what the mores of the majority will permit, it becomes impotent and is largely ignored. When legislation to prohibit incitement to racial hatred of contempt is described in these terms, as just such an unwarranted extension, then that, the protagonist typically concludes, seems sufficient cause to do no more about it. And there is a deal of good sense in this point of view. There is nonetheless a counter-position to be considered that stipulates (i) that the law can play a significantly less awkward and more constructive role than the above would suggest, and (ii) that legislating to prohibit racial hatred does not ignore majority mores - quite to the contrary, it can allow them specific expression.

The assumption that laws do not change people's prejudicial attitudes is, of course, incorrect. Law has long proven an effective way of combating racist propaganda of all kinds. Though one bold legislative initiative is hardly likely to eliminate all the misgivings and the emotional confusions involved, much can and has been done to protect the targets of racial incitement by setting through law an appropriate moral example, and by modifying the behaviour of many a would-be racist. Modifying such behaviour is important since in its train, if we are to believe contemporary studies of the effects of this kind of legislation, come changes in attitude and reductions in racial prejudice. This applies particularly to those members of society one might call "conventional", plus those who submit most readily to authority, who would remain otherwise untouched by the appeal to reason or to a sense of their altruism or empathy.<sup>9</sup>

The debate between active and passive conceptions of the law implicit here is an extensive one. Each side has venerable antecedents. No-one, however, denies that education

is called for if one is to build a racially harmonious society, and the point to be made is that law has an important part to play in the process of education itself. This is particularly apparent with group defamation, since group defamation can become part of a culture at large, and as such can only be brought to an end where a populace effectively condones it. To prohibit such libel is to intervene in that acculturation process, to prevent miseducation, and to permit more tolerant alternatives to take its place.

The conspicuous failure to legislate social mores, such as the era of Prohibition in the United States, demonstrates the need for majority support if a democratic law is to work. Most civilised individuals in contemporary democracies, however, do actually subscribe - more or less enthusiastically - to the ideals of racial harmony, and if not, they will find it simpler to conform to what the government does than actively to fight for other laws. So what the government does can be crucial in this regard.

The law still has its limits. Legislation, it is argued, can lead to complacency, and to compliance in form but not substance. And laws do not always have the consequences intended by those who enact them. Even the most enlightened legislation furthermore, prohibiting incitement to racial

or whatever, will not rid a community of hate. What it can do though is help control its overt manifestations. Legislation sets out rights and establishes the means (perhaps not at once or very often, but the means nonetheless) for redress. And where nothing in particular is being done, making a law, it is argued, can make a considerable difference to the constellation of influences at any one time.<sup>10</sup>

#### Group Defamation

The differences between "defamation" and "incitement" are most clear in the Canadian case. Section 281 of Canada's

Criminal Code created three substantive criminal offences unknown at the time to its common law. The first prohibited genocide. The second was designed to deal with the public incitement of hatred where such incitement seemed likely to lead to a breach of the peace. The third made it an offence wilfully to promote hatred against any group identifiable in terms of its colour, race, ethnic origins or religion. This last was specifically included as a group defamation clause.

The issue of group defamation was canvassed in the American case of *Beauharnais v. Illinois*, where Frankfurter J. seemed to draw a direct line between the libel of an individual and that of a "defined group". Defenders of freedom of expression reject the analogy as an unconvincing one. However an individual's status and opportunities in society may well depend as much on the status of and options open to the group to which he or she unavoidably belongs, as any more personal qualities he or she may have.

Some who concede the need for group defamation laws would prefer them to be civil not criminal ones. However, a civil action for damages would likely be unworkable, because of the lack of availability of class actions.

And if the issue of incitement is as important as it is made out to be, then an unequivocal statement is probably called for of the sort only criminal law allows.

Deciding these issues will not exhaust that of incitement to racial hatred however. While group defamation and incitement to racial hatred may overlap, the former is a more general misdemeanour. Incitement may occur in a straightforward fashion with the stirring up of sentiments of passionate dislike for people in some target group (whether this provokes public disorder, or only seems likely to, or where the state of public

disorder is not taken into consideration at all). It may also be done very subtly, involving group defamation of several sorts.

Though one cannot make too much of the distinction, since the issues do merge, it is still worthwhile making it if only to remind those who might think that group defamation laws would cover all contingencies. For they may not. It is quite possible to incite racial hatred without defaming a group's good name. One could give public speeches about the causes of unemployment and the content of a country's immigration laws, catalysing in the process widespread resentment, even hatred and violence, against a national minority, without once being threatening, abusive or insulting. There May well be the need as a consequence to make provision for these and other such acts, especially where the public peace is at stake.

#### Class Actions

Whether as part of a civil action for group defamation or as a criminal one, the case is often argued for class actions that would allow the claims of a number of people to be brought against the one defendant at the one time. The one plaintiff could then sue on behalf of a much larger number, and the subsequent court rulings would apply to all. This is a secondary issue however' and while it would help in controlling incitement to racial hatred for ethnic groups, for example, to be able to bring class actions that allow for damages, this is a question that shall not be discussed in detail here.<sup>11</sup>

## The Seven Key Aspects of Contemporary Legislation:

the constituency

Whom do anti-incitement laws seek to protect? Presumably, every potential victim of "race" hatred (or contempt, or whatever). The concept can be broadly construed to embrace that of ethno-religious social entities like the Jews, or national groups somehow rendered a minority in another culture or state, but these raise definitional problems of their own.

It has been argued that "race" is so thoroughly misleading a concept that it should be abandoned. And indeed, the term is a highly complex one, fraught with emotive connotations and much abused. Very few serious attempts to categorise human groups are patently false, but every one will be radically misleading in fact.

Whatever we make of the scientific status of "race" as a term, it nonetheless plays an important part still in sustaining the unequal conditions under which particular groups within many societies must live. As a consequence: "It seems that the only safe way to define race is to say that race is whatever the people in positions of power say it is for, racism is about power. Nothing shows this more clearly than the widely different definitions of race itself"<sup>12</sup>

When we discuss incitement to racial hatred, we are not talking about all social groupings however. We are not talking about the differences between the sexes, Or marital status, or the handicapped, or geriatrics or Children. We are talking - however crude the labelling process - about people in a general population who happen to be identifiably different because of particular inherited characteristics or acquired cultural qualities, that have been turned against them to socially and

economically disadvantageous effect. Anti-incitement legislation does therefore typically attempt to list those to whom it is meant to apply (though there are cases, like the Canadian Criminal Code, which merely cite "an identifiable group" and leave it at that). The problem the Jews present (is their defining characteristic their own ethnic awareness, or their religion?) is usually solved in practice by opting for "ethnicity" (this was an important issue in England where it was decided not to include "religions" as groupings, so that one now risks indictment there for insulting or abusing or threatening somebody because they are brown or Indian, but not because they are Hindu).

The question of what groupings to nominate specifically is one that has to be answered in the particular social context in which it is asked. Whether or not to include "religion" (or, more loosely, "creed") likewise depends on the society concerned. A list of constituents of some sort does seem called for however if one is seriously to consider such legislation, since catch-all categories are unsatisfactory if only because of their highly generalised and unspecific character.

#### the act

- What sort of behaviour might anti-incitement provisions proscribe? If such legislation is to be comprehensive enough to cover all the ways in which "racist" sentiments can be conveyed, then-it will need to make mention of spoken, printed, published, pictorial, broadcast (including radio and television - whether transmitted or cable), taped and recorded (including video-Cassette), filmed or staged material, plus notices, mime, gestures (such as forms of salute), telephone messages, the wearing or display. of special clothing, signs, flags, emblems, insignia, and any other representation, and where appropriate the distribution or dissemination of same. On the other hand a brief formula like British Columbia's "any conduct

or communication" might suffice - though it would be open to the same objections as other overly abstract legal expressions usually are. What, too, of racist candidates who stand at elections; of racist meetings; or racist marches? Presumably if all the above were banned there is very little that people at such events could publicly say or display, so anti-incitement objectives would have been met anyway.

Defining "public" and "private" is also more difficult than might at first appear. Liberal democracies, with their individualist predilections, are likely to place a priority on protecting what people do in small numbers among themselves, though this has not always been the case. Indeed, the Canadian Special Committee made a point of recommending provisions that could reach over this line, since a good deal of hate propaganda was first fostered, it argued, under such circumstances, and nipping incitement in the bud meant having the power to enter what are normally seen to be sacrosanct domains. As a consequence the federal Canadian legislation only excludes from its purview "private conversations", which would, on paper, severely restrict the range of individual actions possible in this regard. Other countries have been more concerned to wait until incitement enters the public sphere, and though this may be rather late in the day, it would be unrealistic in terms of prevailing political ideologies to expect much else to find wide-spread legislative favour. Nor - arguably, should it.

Defining "public" still needs attention.. Loudspeaking - in a city square is obvious enough, but what about an invited audience in a local hall? What about abuse across a back-fence - that is, racist incitement audible in public but issuing from private property? Is there anything conceivably that does not have public consequences? Though it would be an important part of any incitement law, the definition of what is "public" has broad implications and one would want to explore these to confirm how the word should be used in this case.'

22.

the nature of the act

Wording has been very varied on this issue, the continuum of excluded activities ranging from what seems to be no more than bad-mouthing, through scurrilous invective, to threats of outright violence. British and New Zealand legislation is phrased in terms of speeches or publications that are "threatening, abusive or insulting". Canada's criminal code mentions the incitement or promotion (of hatred), but nothing more specific than this. Its provincial legislators have gone into greater detail - , however, Saskatchewan for example circumscribing a list of activities tending or likely to tend to delimit the enjoyment of one's legal rights, or anything which "exposes or tends to expose" people to a number of undesired influences. (The concept of "exposure" was also used in the Illinois statute of 1949, and could be a particularly useful one, despite its vagueness, since it would allow the law to cover the case where the racist would rather create the conditions for disharmony than incite or otherwise promote it outright.)

Which raises the question again of how such "conditions" might be defined, without unduly restricting free speech. What to one person is an insult, to another is a funny joke. What seems abusive may, it is claimed, be satiric affection. What threatens here, merely stirs and stimulates there, and so on. It would probably be impossible to find a form of words satisfactory from all points of view. The whole area is very sensitive, and it would seem advisable, therefore, to eschew it altogether.

the effect

A wide range of consequences has been listed as offences under legislation of this sort. The strictest construction cites actual violence, that is, a discernible

breach of the peace (at which point the problem is covered, under most jurisdictions, by public order ordinances). Less strict and more problematic is the "clear and present" likelihood of same. These tests are objectively applicable in a way the following are not. They are the least ambiguous and therefore the least controversial of effects.

In practice the problem typically proves more complex than this, and more complex laws are then - called for if racial hatred is to be contained. It became an active issue in England, for example, whether in establishing the likelihood or not of a breach of the peace one had to -take one's audiences as one found them. It was concluded there, and it would seem reasonable enough to have done so, that indeed one should; in other words, that one cannot assume that a public meeting will consist of reasonable, right-thinking men and women, without undue attachment to particular points of view, slow to anger and restrained in dissent.<sup>13</sup>

Since racial hatred is widely taken to be one source of public disorder, anything that promises more of the same is arguably worth prohibiting too. "Hatred" has proved difficult to define, however, which is one cause of libertarian dissent. In British courts it is not untypical, for example, for those who claim that certain acts are conducive to racial hatred to find their plea turned around, and the same acts described as more likely to create sympathy for the victims. The danger may not be a "clear and present" one in such cases, but communal harmony is jeopardised, and just as decisively an interventionist would argue, by the inculcation of emotions short of hatred, such as hostility, ridicule, contempt, intolerance, derision, obloquy - anything in fact (to quote the Saskatchewan Code) that belittles, or affronts the dignity of individuals or of identifiable groups of them. 'Even issues ostensibly free of emotion altogether - such as arguments and ideas based on assumptions about the superiority or

inferiority of one social group in comparison with another - can have divisive effects when gratuitously used to enrich the soil in which the seeds of civil strife are known to flourish.

The further one moves away from the immediacy of public disorder, the more likely it is that legislation will endanger our freedom of speech, the more tenuous becomes the case for intervention, and the more appropriate that for education and debate.<sup>14</sup> Nonetheless considerable pains have been taken, in notably democratic societies, to prevent the promotion of the more covert forms of "racism". British Columbia's Civil Rights Protection Act, for example, includes hatred, contempt, and a superiority/inferiority clause as prohibited acts. It also adds, as does the Saskatchewan Code, interference with another's civil rights as actionable. The latter defines interference in some detail, citing the deprivation, abridgement, or restriction of any rights that one is entitled to under the law, as justifying prosecution. Group defamation provisions like the federal Canadian one, where the promotion of hatred against any specific minority (regardless of whether or not this leads to a breach of the peace) is an indictable offence, make prosecution obligatory for slander and insult, as well as for any more direct threats. There is even provision for official action where no complaint as such has been laid.<sup>15</sup>

#### the intent

It is a moot point whether the act of incitement (however defined), and likewise any effects it might have, should or should not have been "intended" for it to constitute a crime. The Canadian Criminal Code includes both contingencies. The breach of the peace clause in that Code makes no mention of whether or not incitement is meant, but the following subsection describes group defamation in terms of it having been "wilfully" promoted. This was the subject of much discussion in the case of Buzzanga and Durocher,<sup>16</sup> where it

was found that proof of intention to promote hatred was essential at law for any act to constitute an offence, and furthermore, that this was a very difficult thing to establish. How does one distinguish, for example, between the deliberate and the merely reckless. British Columbia's Civil Rights Protection Act prohibits any act that has, "as its purpose", interference with one's civil rights, which presumably does require the need to prove intent for a prosecution to succeed. The incitement clause of the first U.K. Race Relations Act of 1965 also required evidence of a desire to create hatred, though this came under some criticism at the time and Lord Scarman, in his report on the Red Lion Square disturbances, saw it as too tight: a restriction. It was subsequently dropped, and the - British only ask at present for proof of the likelihood of racial hatred as a consequence of the act of incitement, and nothing more.

Following Britain's experience, it does seem to be an undue complication to have to establish "intent". While it would hardly be fair to be held to account for the results of one's acts one may not have meant, the need remains to consider in advance the consequences of what one does. Eliminating "intent" makes such consideration all-important. It has proved too difficult in practice to work in a decent safeguard in this respect without rendering the whole of an anti-incitement law inoperative.

Without a mens rea many would consider such legislation preposterous, though there has been no instance since the British dropped "intent" of their government exploiting it in undemocratic ways. Whether the chronic character of the underlying problem and the pressing need to do something about it is well served by provisions that seek out someone to "blame" in this way, is another moot point.

26.

defences

It is generally held that there is little excuse in a democracy for behaviour that threatens the public peace. If one considers inciting racial "hatred" to constitute such a threat, then there would appear little excuse for that either. Racial "disharmony" is more problematic since the link between it and public disorder is said to be harder to establish, and legislating against language and behaviour of this sort is more fraught with risks to free speech. While one might perhaps want to exclude scientific discourse (as the Dutch do), or matters of history or contemporary affairs (like the Germans - though this is getting very general and likely in practice to allow almost anything), or judicial or parliamentary reports (like the British), the serious nature of the problem would suggest little room for excuses except where (as the U.K. law allows) those involved happen to be demonstrably ignorant of the contents of the matter in question, with no reason to believe it to be suspect.

The issue becomes very tricky indeed where racial incitement shades into group defamation. It would restrict free expression too much, it is felt, to have the same provisions as apply in the case of individuals. Hence the Canadians specifically exempt statements that a defendant can either establish as true, or can say were made either on a religious subject, or are relevant to any subject of public interest the discussion of which appears to be of public benefit (and which the discussant believes, on reasonable grounds, to be true), or involves something which he or she has pointed out, in good faith, as fit to be "removed".

Now, while these are all quite proper defences of freedom of expression, they also make the sub-section a waste of time since such a comprehensive range of reasons precludes in practice the possibility of successful prosecution. To resolve

this dilemma we would have to resist casting it in terms of a trade-off between freedom of speech and public order. We would have to view it instead as an issue where freedom of speech confronts freedom of opportunity. Construed in this way it still makes sense to safeguard democratic expression, but not by citing such a comprehensive catalogue of excuses. Group. defamation laws, particularly those that allow of class actions, may well provide a much needed avenue of recourse against the more insidious and invidious forms of "racial" incitement, but there would be no point, regardless of the position one takes on the issue of freedom of expression, in passing ham-strung legislation that is bound to fail.

### **Sanctions**

Incitement to racial hatred is serious, and where defined as a crime it is treated as such. Since jurisdictions differ in what they consider "serious" to mean, and how much money or time in gaol an offence might merit, it has come to depend on the local milieu what gets decided in this respect. Belgium doubles the punishment for civil servants for example, while the French require the guilty party to publish the court opinion, thus disseminating such decisions as widely, if not more so, than the original material. The Canadian law also makes it possible, once there has been a conviction, to impound "anything by means of or in relation to which the offence was committed". Despite fears of this being used to censor undesired political opinions, nothing of the sort has happened since it was first brought in nor is it likely to in the normal course of events. Legitimate debate continues in Canada unimpeded, and any fears of this sort have so far proved groundless.

28.

## Conclusion

The empirical evidence to hand does not allow of any – uncompromising conclusions. On overseas experience, legislation looks to have been both a legitimate and beneficial response to have made to incitement to racial hatred. Those countries who have passed it have managed thereby to make an unequivocal statement of what they find acceptable in this regard, and they have equipped themselves with backstop powers with which to confront and control inflammatory defamation and other fanatical activities should these ever get out of hand. Freedom of expression does not appear to have suffered undue interference. On the other hand, it is not altogether clear that the countries which do not have such legislation experience significantly more, or more serious, expressions of racial hatred. Each country needs to reach its own conclusions based on its own experience.

Racial hatred is manifest in petty prejudice, biased institutions, and the work of diverse organisations both large and small.

Petty prejudice, from foreign examples, is best met by providing adequate conciliation and/or mediation procedures, publicising their presence, and educating potential and actual victims in their use. Otherwise, inculcating tolerance is simply part of the larger process of reproducing a civilised community.

Institutional racism can be counteracted by measures designed to ensure equality of opportunity, by positive discrimination where appropriate, and public awareness campaigns to bring to the attention of all concerned both the existence of this form of incitement, and its pervasive consequences.

The control of racist organisations - whether of the small extremist variety, or whether large and mainstream - may call for all the above, and depending on one's premises, for support for legislation of a more pointed sort. Passing laws against racist statements and behaviour may prevent larger organisations from acting, or from perpetuating their opinions in this way; more extremist groups can be relegated to the socio-political fringe by provisions that prohibit their meeting or their capacity to publish and speak. This, however, returns one to the issues broached above under freedom of expression and to one's general understanding of democratic theory and practice. Which means in the end taking some kind of decision about the desirability or otherwise of the sort of freedom that ensures a fair go 17

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11. See, however, the comprehensive and basically sympathetic statement of the arguments of both proponents and opponents in the Law Reform Commission's Discussion Paper No. 11 "Access to the Courts - II, Class Actions" (June 1979).
12. A. Dummett, A Portrait of English Racism (Penguin, 1973), pp. 73, 70.

13. Lord Parker's judgement in the well-known case of *Jordan v. Burgoyne*, 2 All E.R. (1963) p. 227. This does however allow at least the possibility of a "heckler's veto".
14. See, for example, Cmnd. 6234 "Racial Discrimination" (1975) p. 31.
15. R. Rivett, "Legislation on Racial Threats and Insults: submission to the Legal Committee of the Informal.

1. *Regina v. Buzzanqa and Durocher*, 49 C.C.C. pp.369-390.

**17. See Appendix I.**



## Appendix I

The original draft of the Racial Discrimination Bill 1975 contained anti-incitement provisions. These would have made it unlawful to publish and distribute written matter or to broadcast by means of radio or television or to utter in any public place or meeting written or spoken matter intended to promote ideas based on the alleged superiority of persons of a particular race, colour, nationality or ethnic group, or to promote hatred or hostility or toward them, or to bring them into ridicule or contempt.

The failure of this Commonwealth initiative has not deterred State administrations from considering the issue. The latest example is the proposal by the Anti-Discrimination Board in Sydney to amend the N.S.W. Anti-Discrimination Act to make it unlawful to incite racial disharmony or violence.

Victims of racial disharmony have formed a "significant proportion of the complaints on the grounds of race taken to the Counsellor for Equal Opportunity" in New South Wales, as discussed in her report for the year 1980-81. Given this and other such evidence, the law committee of a Race Relations Consultative Group, originally convened by the Anti-Discrimination Board, drafted a detailed submission to service what seemed to be emerging as a clear communal need. This has met with considerable approval from ethnic and Aboriginal groups.

Particular care was taken to safeguard freedom of speech, and not to eschew the significance of community education (to which intractable racists would be immune anyway).

2.

The detailed proposals would make it unlawful publicly to incite violence, hatred or contempt of a person (groups are not covered) or to publish material to any of these ends on the grounds of race, including colour, nationality, ethnic or national origin. They do not cover insults. Those aggrieved would be able to make a complaint to the Counsellor for Equal Opportunity, and if not satisfied after an investigation and attempt at conciliation (or the Counsellor considered it appropriate for other reasons), would be referred to the Equal Opportunity Tribunal for an Inquiry. The Tribunal could, as needs be, grant an injunction, call for a published apology or other such retraction, and otherwise act to remedy the situation, with power to fine or imprison those who did not comply.

The evidentiary requirement would be to establish the facts at issue on the balance of probabilities - the criminal standard of proof is not envisaged.

A respondent would have available a number of defences, such as the private nature of the putative offence, its non-racial or non-incitement character', the fact that the event or the matter complained of constituted fair comment on a matter of public interest, or that the individual accused knew nothing of the contents of the offending material, e.g. a postman, or was engaged in a program of legitimate education or research.



