Office of Multicultural Interests - Western Australia

Racism and the fourth estate. free speech at what cost?

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I would like to begin by acknowledging the traditional owners of the country on which we meet - the Noongar people.

It was with great pleasure that I accepted the invitation of the Office of Multicultural Interests to present this seminar and share with you some of my experiences and observations about racism and the media in Australia.

The media play a major role in establishing, reaffirming and undermining 'popular' attitudes about race and racism in Australia. This point is not new. It has been made time and again. In 1991, evidence presented to HREOC's National Inquiry into Racist Violence found clear links between media coverage of Indigenous and immigration issues and the levels of victimisation of individuals and organisations from Aboriginal and ethnic communities. Evidence to the Inquiry also raised issues about the role of the media in promoting and perpetuating racist stereotypes - especially in relation to Aborigines.

More recently, concerns about the media's capacity to foster racism were expressed at the United Nations World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban, South Africa last year. In its final declaration, the Conference noted 'with regret' that

"certain media, by promoting false images and negative stereotypes of vulnerable individuals or groups of individuals, particularly of migrants and refugees, have contributed to the spread of xenophobic and racist sentiments among the public and in some cases have encouraged violence by racist individuals and groups".[1]

At the same time, the Conference also welcomed the positive contribution which could be made by the media and by new information and communications technologies such as the internet, drawing attention to its potential to create educational and awareness-raising networks against racism.[2]

We heard the same messages about the media in national consultations on racism, which I undertook last year in my capacity as Race Discrimination Commission in preparation for the World Conference Against Racism. The consultations began with a national summit and a youth summit on racism in May 2001, followed by regional consultations in capital cities, rural and regional towns and remote communities across the States and Territories of Australia. As part of the consultation process, we also conducted specific focus groups with Indigenous, refugee and migrant women in New South Wales.

One issue frequently raised in these consultations was the role of the media in influencing public opinion. Many participants identified the power of the media to incite or combat racism and many also expressed concerns about the lack of appropriate measures to ensure that the media combats rather than fosters racism. There was consensus on the need for a more rigorous media code of conduct to ensure the media positively promotes cultural diversity. The code of conduct should include more effective and transparent complaint and enforcement provisions be implemented by a body that includes community representatives.

In response to the little booklet summarizing the national consultations, The Daily Telegraph editorialised - under the title 'Democratic freedoms threatened'- that the Commission was trying to impose a "sweeping media code of conduct to prevent racial discrimination". Columnist Piers Ackerman wrote that I had "apparently relied on material solicited from people who believe they are owed positions of power and responsibility in society because of the colour of their skin, their gender, or their particular language or choice of clothing".[3] This attack illustrates the sensitivity of the environment in which we work. It is a contentious job trying to balance what some see as competing rights - the right to free speech with the right to freedom from discrimination, racial hatred and intimidation.

Today, I would like to speak about these competing rights. I want to examine the Australian debate particularly and then discuss Australian legislation and other regulations which constrain speech in the interests of freedom from racial vilification.

Freedom of speech vs. freedom from racial vilification

Balancing the right to free speech with that of freedom from racial vilification is undoubtedly a difficult and complex task.

Freedom of the press and freedom of expression are basic tenets of liberal philosophy and of parliamentary democracy. Unlike Americans, Australians do not have an express constitutional guarantee of free speech, and the implied protection only covers 'political communication.' However, the federal Human Rights and Equal Opportunity Commission Act 1986 does provide limited recognition that our 'human rights' include the right to freedom of opinion and expression as set out in Article 19 of the International Covenant on Civil and Political Rights.

Freedom of expression is of critical importance to those of us who work in the field of human rights because it enables us to reveal and critique corruption, injustice, inequality and oppression.

Yet freedom of expression is not always an instrument of liberty. Racial abuse, vilification and the dissemination of racist propaganda are forms of expression that violate the rights and freedoms of others. Racial vilification can take spoken or written form, and may also include images, which offend, insult, humiliate or intimidate others because of their race. Where these expressions are extreme, they can generate such fear as to prevent others from living or working in certain places, from taking up employment, travelling to work, and other activities that many take for granted.

Racist actions are cultivated by the acceptability of racist speech - as a consequence racial abuse and vilification can lead to more overt racism such as physical attacks and even homicide.[4] So, limiting racial abuse and vilification not only protects the victims from such behaviour, it can also prevent the escalation of racially motivated crime and safeguard the longer-term stability of society.

The aftermath of 11 September 2001 illustrates how, in the after-shock of a crisis, particular racial groups can become the targets of aggressive retaliation, even from their fellow citizens. In Australia, in the weeks following September 11, Arabic communities reported an escalation of attacks - especially against women and girls.

For these reasons, the right to freedom of expression must be limited by the right to freedom from racial vilification and abuse. The *Universal Declaration of Human Rights* states that the rights and freedoms of the individual are limited by "the rights and freedoms of others" and the need to meet the just requirements of morality, public order and welfare.[5] In addition, the *International Covenant on Civil and Political Rights*, like the Declaration, states that freedom of expression can be limited by law where this is necessary to respect the rights or reputations of others, or for the protection of public order.[6] So international human rights instruments do not assert freedom of expression as an absolute right. Rather, this right must be limited by accepted legal exceptions, and particularly the rights of other individuals.

Of course, in reality, the right to freedom of expression is never absolute. In Australia, we limit free speech by having laws:

• on defamation to deter and redress assaults on reputation,
• on pornography, to restrict material deemed utterly offensive, degrading, exploitative or corrupting,
• on copyright to protect the value of intellectual property,
• on sedition to protect national security,
• on tobacco or firearms advertising to limit the impact of legal yet harmful products,
• on false advertising to protect people from being deceived or misled.

Yet certain segments of the media argue consistently that democracy is undermined by limitations on expression imposed by legislation or regulation. Whenever the issue of regulating racial vilification has been raised in Australia over the last 3 decades, the media has invariably asserted its right to report on issues of concern to the community without fear of censorship or excessive restriction. The commonly expressed fear is that legislation blurs the line between criticism and abuse and stifles public debate on issues of legitimate public interest.

These claims are based on two flawed arguments.

- One is that racial vilification is no worse than any other form of vilification and it only results in 'hurt feelings'. There is a great deal of research which shows that racial vilification imposes cumulative harm serving to silence and subordinate minority groups, minimising their participation in society and affecting the educational patterns and life outcomes of vilified groups and individuals.[7]

- The second is that in tolerant societies like Australia, there is no real need for such laws. This claim has also been challenged - in our own recent national consultations and most prominently in HREOC's 1991 National Inquiry into Racist Violence.

The media were among the most vocal critics of HREOC's 1991 National Inquiry into Racist Violence. The final report of the Inquiry was described in The Australian as 'hysterical and melodramatic'. [8]

Similarly, the introduction of the Racial Hatred Bill to Parliament in 1994 caused many newspapers to issue strong statements defending freedom of speech from a perceived attack:

- Melbourne's Age newspaper ran an editorial on 11 November 1994 asking: "Why muddy the waters with a bill for which there is no demonstrated, let alone urgent need, and which, however carefully it is phrased may transgress their right of free speech?"[9]

- The Herald Sun editorialised on 2 November 1994 described the Racial Hatred Bill as a 'dangerous piece of legislation' and argued that it "may turn out to be the biggest destroyer of that most necessary thing in a democracy - freedom of speech."[10]

- The Australian published a swag of letters decrying the proposed bill fearful that it would 'gag discussion' and arguing that racial vilification laws..."have the potential to turn obscure racists into martyrs for the cause of free speech."[11]

The reactions elicited by the proposed new racial vilification legislation in 1994 were very similar to those expressed in Parliament by members of the opposition Liberal/National parties two decades earlier over the introduction of the Racial Discrimination Act 1975. To ensure the bill's successful passage through Parliament in the face of vehement opposition, two clauses had to be dropped: one dealing with incitement to racial disharmony and the other dealing with the dissemination of ideas based on racial superiority. John Howard, then a junior Liberal Party backbencher, argued the opposition line in the following terms:

"To get into the field of prohibiting the dissemination of ideas is something which is so dangerous, in the Opposition's view, that in no circumstances could we agree to the inclusion of the clause....it is one of those situations where one has to balance competing demands. On the one hand, there is the demand to eliminate acts of racial discrimination. On the other hand, there is the demand for preservation of a completely free society in which it is proper and reasonable for people to have freedom to disseminate ideas." [12]

Frameworks for regulating and legislating against racial vilification

There are two main kinds of protection against racial vilification in the media in Australia:

• Media industry codes - these are non-legal standards produced and monitored by the media themselves and largely enforced through media self-regulation.

• Legislation - this includes both civil provisions such as Commonwealth and state anti-discrimination legislation and criminal law which provide specific penalties for assault, battery, abusive or threatening phone calls and the incitement of criminal acts of racist violence.

Media Industry Codes

The media insists that their own rules and codes governing reporting are sufficient safeguards to protect against individuals and organisations being hurt by racially offensive material. However, aside from the Racial Discrimination Act, there are no uniform standards operating to regulate all media in Australia. Instead, there is a rather confusing array of professional codes and standards that guide what various media should or should not publish.

The Australian Journalists' Association has a Code of Ethics which sets out that "journalists shall not place unnecessary emphasis on gender, race, sexual preference, religious belief, marital status or physical or mental disability." The Code is binding on all journalists who are members of the Association and journalists who breach the code can be fined by the Association's Adjudication Committee. However, not all journalists are members of the Association and non-members are not liable for fines under the code. Furthermore, interpreting what constitutes 'unnecessary emphasis' is a contentious and highly subjective exercise. The Royal Commission into Aboriginal Deaths in Custody found many examples where newspaper reports stressed the Aboriginality of alleged criminal offenders for no reason other than that the journalist or editor considered this to be relevant. [13]

The Australian Broadcasting Tribunal is responsible for monitoring the standards of commercial radio and television programs under the Broadcasting Act 1942. Under the Act, licensees must not transmit a program which "is likely to incite or perpetuate hatred against; or gratuitously vilifies; any person or group on the basis of ethnicity, nationality, race, gender, sexual preference, religion or physical or mental disability." An individual or group who believe that a broadcaster has breached this standard can complain to the Tribunal which then investigates the complaint and has the power to impose fines or cancel commercial media licences. However, the Tribunal has never exercised its powers to withdraw or refuse to renew a licence for breach of the standards on racial vilification.

The print media is much less regulated than the broadcast media. It's bound only by guidelines laid out by the Australian Press Council, which is a voluntary body made up of press and public representatives who adjudicate on complaints. The relevant Press Council principles advise that,

" publications should not place gratuitous emphasis on race, religion, nationality, colour, country of origin, gender, sexual orientation, marital status, disability, illness, or age of an individual or group. Nevertheless where it is relevant and in the public interest, publications may report or express opinions in these areas"

and that

"the press needs to show more sensitivity in reporting issues when minority groups are perceived in the community to be different or when they are the subject of a particular debate... "[14]
These are admirable principles - but what effect do they have in practice? Under the Press Council Principles, the headline, 'ABORIGINAL GANGS TERRORISE SUBURBS' which appeared in The West Australian newspaper in the early 1990s[15] was found not to breach the standards of the Press Council. Yet this same headline was found to be a 'fundamental untruth' by the Royal Commission into Aboriginal Deaths in Custody in its report of May 1991.[16]
Clearly, media self-regulation operates unevenly depending on the form of media and is often inconsistent with the racial vilification provisions of the *Racial Discrimination Act*.

Legislation

How has Australian law negotiated the balance between freedom of expression and freedom from racial vilification?

The major international standard on the regulation of racist speech is found in the *International Convention on the Elimination of all Forms of Racial Discrimination* (ICERD) which Australia ratified in 1975. Article 4 requires parties to adopt immediate and positive measures to combat the spread of racist ideologies. Article 4(a) requires dissemination of ideas based on racial superiority or hatred, incitement of racist violence and all acts of racial violence to be offences punishable by law.

When Australia ratified the Convention in 1975, it submitted a declaration with respect to article 4 stating "it was not at present able to treat as offences all matters covered by Article 4(a)". The Whitlam Labor Government expressed its intention, 'at the first suitable moment to seek from Parliament legislation specifically implementing the terms of Article 4a.' [17] That 'suitable moment' did not arrive until 1995 with passage of the Racial Hatred Act.

The impetus to introduce Commonwealth legislation which met Australia's obligations under ICERD and outlawed racial vilification came after a series of reports in the early 1990s which recommended the introduction of federal laws to address racial vilification. In 1991, HREOC's National Inquiry into Racist Violence and the Report of the Royal Commission into Aboriginal Deaths in Custody both found that racist violence occurred at unacceptably high levels in Australia. The following year, the Australian Law Reform Commission released its report *Multiculturalism and the Law* which also documented the existence of racist abuse. These reports dealt a blow to the notion that Australia was a tolerant society with no real need for laws prohibiting racial vilification.

When the *Racial Hatred Bill* was first introduced to Parliament in 1992, it proposed to make racial vilification unlawful by amending both the Racial Discrimination Act 1975 and the Crimes Act 1914 to create the offence of racial incitement. However, after more than two years of consultation and negotiation in Parliament, the criminal sanctions and provisions regarding racial incitement were removed entirely to secure its passage into legislation. When the Act was passed in October 1995, the Keating Labor government made a commitment to introduce further legislation imposing criminal sanctions for extreme racist behaviour if it were re-elected - neither of which happened.

Currently, the civil remedies offered by the *Racial Hatred Act* are the only national provisions specifically directed against racist speech. Given its importance, it is worth taking a moment to explore how the Act works.

Under the *Racial Hatred Act* it is unlawful to insult, humiliate, offend or intimidate another person or group in public on the basis of their race. A public act can include racist abuse yelled from one person's house to their neighbour's house. On the other hand, a private conversation between two individuals is not unlawful in Australia - even if the discussion is racist (subject to the possibility that it may amount to racial harassment at work or school, for example).

In order to protect freedom of expression, the legislation sets out certain circumstances in which the racial prohibition will not apply, providing the person has acted reasonably and in good faith. First, if the action is part of an artistic work it is not unlawful. Also exempt are academic and scientific works and debates or comments on matters of public interest. This permits a range of public policy issues to be debated such as multiculturalism, affirmative action for migrants and so on. The media are given considerable scope within a third exception which permits fair and accurate reporting on any matter of public interest. This last exception enables the media to report on public issues, such as racial incitement or racially offensive conduct. It also allows editorial opinions and the like, providing they are published without malice.

This national legislation has some distinct limitations as these examples demonstrate.

The scrawled statement on Carol Martin's media release - "Just goes to show you can't trust a blackfella" - would probably escape because the offender is anonymous and unlikely to be identified .[18] The conciliation process needs two identifiable parties - a complainant and a respondent.

The identification of gang rapists in Sydney as Lebanese, while it may effectively stereotype the entire Lebanese community, would also probably escape on the basis that it is factually accurate: a "fair and accurate report on a matter of public interest".[19] Public 'debate' about the cultural mores which could have lead these young men to consider Anglo women as "fair game", may also be lawful on the basis that it reflects writers' genuinely held beliefs on a matter of public interest.

Publication of One Nation Party member David Oldfield's call for a ban on Muslim immigration [20] would also probably escape as the *Racial Hatred Act* does not extend to (or is not currently interpreted to cover) vilification on the ground of religion as distinct from race and ethnicity.

State law

In 1989, New South Wales became the first state to make it unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of a person or groups of persons or members of a group on the grounds of race. The 1989 amendment to the *Anti-Discrimination Act 1977* also created a criminal offence for inciting hatred, contempt or severe ridicule towards a person or group on the grounds of race by threatening physical harm (towards people or their property) or inciting others to threaten such harm. Prosecution of the offence of serious vilification requires consent from the Attorney-General and carries a maximum penalty of a $10 000 fine or 6 months imprisonment for an individual - $100 000 for a corporation. This provision has not yet been used.

South Australia and the ACT have anti-vilification laws that essentially mirror the New South Wales legislation while Queensland and Victoria outlaw both racial *and* religious vilification.

Unlike the other states and territories, Western Australian law imposes criminal but no civil sanctions against racial vilification. In Western Australia, the *Criminal Code* was amended in 1989 to criminalise the possession, publication and display of racially threatening or abusive material. A penalty of up to two years imprisonment for an indictable offence and six months imprisonment or a fine of up to $2 000 for a summary offence can be imposed for possessing threatening or abusive material with the *intent* to publish, distribute or display that material to create or promote racial hatred. It is noteworthy that the Western Australian legislation only addresses written or pictorial information - not verbal comments. The emphasis on written material arose in direct response to the racist poster campaigns launched in the late 1980s and early 1990s by the extremist anti-Black, anti-Semitic, anti-Asian Australian Nationalist Movement.

The question now facing Western Australians is - are criminal sanctions against racial vilification effective enough? Is there a need to provide victims of racial vilification with civil remedies through state-based, not just federal legislation? Should speech also be covered? Can legislation of any kind - civil or criminal - succeed in combating racial vilification?

How effective are anti-vilification laws in Australia?

Given the differences in the content and application of the various state and federal antivilification laws, it is difficult to evaluate the effectiveness of criminal versus civil sanctions against racial vilification in the different states and territories.

In practical terms, judging by the number of complaints lodged, civil remedies appear to have been more useful to more victims of racial vilification. Civil remedies are relatively inexpensive, flexible and confidential making a complaints-based approach potentially more attractive to people who have been vilified.

Since the federal Act came into operation, HREOC has received almost 500 complaints of racial vilification. In 2000-2001, HREOC received a total of 373 enquiries about racial vilification and 118 complaints under the *Racial Hatred Act*. Around one quarter of these complaints (24%) involved the media, with a substantial proportion relating to disputes between neighbours.

While the numbers of complaints made on the grounds of racial vilification are not huge, it is important to note that in comparison, to date, there have been no criminal prosecutions in the states or territories with criminal sanctions. This may be due to the requirement for the Attorney-General to consent and the higher standard of proof set for criminal cases which requires proof beyond reasonable doubt. Obtaining proof of the requisite intent will almost always be a challenge.

I believe that legislation *can* and *does* play an important role in combating racial vilification. The principal achievement of the legislation has been to give the victims of racial vilification an avenue of redress for their injustice. Not only do the laws provide a measure of justice and comfort to victims, but they help to deter the most violent and extreme forms of racism and serve as a declaration that racist behaviour will not be tolerated.

However, while laws do help to regulate conduct, legislation is most effective when it operates in conjunction with other forms of social intervention in tackling racism and racial vilification. This point was made by the late Justice Murphy who, when introducing the *Racial Discrimination Bill* into Parliament in 1974 argued, 'laws proscribing discrimination are vital though they are not in themselves sufficient.' He added:

"The legislation recognises that there must also be effective and systematic enforcement of rights and promotion of education and research if the elimination of racial discrimination in this country is to be advocated in fact as well as in theory."[21]

Conclusion

I would like to conclude by mentioning some of the broader strategies we at the Commission are developing and implementing to tackle racism in Australia.

If we are serious about combating racism, education must be a priority. One of the most successful public education projects that HREOC has undertaken over the last few years is the booklet *Face the Facts*. This publication, currently in its second edition, takes a number of common misconceptions relating to Indigenous people, migrants and refugees and provides the public with clear, factual information on issues such as native title and multiculturalism. This booklet has been widely distributed among community groups, public libraries and schools and is about to be updated on the internet. We are also in the process of developing an education module based on the latest edition of *Face the Facts* aimed at upper primary and secondary school students and their teachers.

Encouraging understanding of and compliance with our legislation is another important educative function of the Commission. Currently, my staff are looking at the issue of racial vilification on the internet. Later this year, 1 will be consulting with a select panel of experts in the field of 'cyber-racism'. These experts will evaluate the effectiveness of current regulation of racial vilification on the Internet in Australia and assess whether and how regulation can be made more effective. An important function of these consultations is essentially educative - we aim to raise awareness of and foster compliance with our legislation amongst relevant stakeholders and decision-makers in the field of internet regulation.

Monitoring the media for evidence of racially biased reporting or sensationalist headlines is another routine part of our everyday work. Yet rather than just focusing on the negative, HREOC also looks for and celebrates positive examples of media reporting that have helped to tackle prejudice that leads to racism. Each year, HREOC presents Human Rights Awards in a number of categories, including media. These awards recognise the contribution to Australian society of a wide variety of individuals and organisations committed to issues of human rights, social justice and equality. Last year, the ABC's 4 Corners program won the media award for two stories screened in August 2001: one about the physical and mental health of asylum seekers in detention and the second an 'inside story' of asylum seekers in Villawood Detention Centre. In allowing detained asylum seekers to speak for themselves, both stories helped to break down stereotypes that foster racial prejudice against asylum seekers.

Clearly, legislation alone is not a panacea for racism. Education about the standard set by the legislation must be widespread and clearly understood in order for laws to have a preventative effect and influence social norms. Compliance with legal standards has to be valued by opinion leaders - including politicians. Flouting racial vilification laws should not be proof of strength in politics. There must also be continuous attention to eradicating racist messages from policies, from the educational curriculum, from institutions (such as the police), from the labour market and indeed from the media.

Notes

1. World Conference Against Racism, Durban Declaration, para 89.
2. World Conference Against Racism, Programme of Action, paras 140-141.
3. The Daily Telegraph, Thursday 6 December 2001.
4. Gordon Allport, The Nature of Prejudice, 1958.
5. Article 29(2) Universal Declaration of Human Rights.
6. ICCPR Article 19(3).
7. E Stefanou-Haag, 'Antiracism - From Legislation to Education' (1994) 1 (1) Australian Journal of Human Rights.
8. The Australian, 22 April 1991, p 10.
9. The Age, 11 November 1994.
10. Herald Sun, 2 November 1994, p 12.
11. The Australian, 11 November 1994.
12. House of Representatives, Hansard, 6 March 1975, ppl408-9.

13. Royal Commission into Aboriginal Deaths in Custody, Regional Report of Inquiry into Underlying Issues in Western Australia, Volume 2, Canberra, 1991, pp 724-727.
14. Australian Press Council, Reporting Guidelines - General Release Number 240, September 2001, http://www.presscouncil.org.aulpcsitetguides/qpr248.htmi
15. The West Australian, 28 February 1990.
16. Royal Commission into Aboriginal Deaths in Custody, Regional Report of Inquiry into Underlying Issues in Western Australia, Volume 2, Canberra, 1991, p 713.
17. ICERD, Declaration made by Australia, 30 September 1975.
18. 'Racist taunt over Derby health', The West Australian, 30 July 2002.
19. 'Reign of terror by mobile phone and the promise of a smoke', The West Australian, 13 July 2002.
20. 'One Nation Call for Ban', The Bankstown Torch, 24 July 2002.
21. Laksiri Jayasuriya, Legislating Against Racial Incitement: Strategies and Rationales, Department of Social Work and Social Administration, University of Western Australia, 1989, p19.