

# HUMAN RIGHTS LAW AND RACIAL HATE SPEECH REGULATION IN AUSTRALIA: REFORM AND REPLACE?

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## I. INTRODUCTION

In Australia, the number of instances inciting racial hatred and discrimination as well as threatening physical harm—towards people or their property—on the basis of race has surged in recent years.<sup>1</sup> This trend is clearly reflected in the dramatic increase in civil complaints lodged with the Australian Human Rights Commission alleging racial hatred during the 2012–2013 financial year.<sup>2</sup> Some incidents of racial hostility have escalated to actual, racially-based attacks. For example, the Executive Council of Australian Jewry (ECAJ) recorded 231 incidents of “racist violence” against Australian Jews from October 2012 to September 2013; representing the second highest total on record, and a 69% increase above the average of the previous twenty-three year reporting period.<sup>3</sup> Australia’s peak intelligence

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<sup>1</sup> There has been a noticeable increase in attacks on members of racial minority groups, including Jews, immigrants, and international students from China and India. See Kate Warner, *Sentencing Review 2009–2010*, 34 CRIM L.J. 385 (2010); Gail Mason & Andrew Dwyer, ‘A Negation of Australia’s Fundamental Values’: *Sentencing Prejudice-Motivated Crime*, 36 MELBOURNE U. L. REV. 871, 873 (2013); Dan Meagher, *So Far So Good?: A Critical Evaluation of Racial Vilification Laws in Australia*, 32 FED. L. REV. 225, 227 (2004); Gail Mason, ‘I am Tomorrow’: *Violence Against Indian Students in Australia and Political Denial*, 45(1) AUSTRALIAN & NEW ZEALAND J. CRIMINOLOGY 4, 5 (2012).

<sup>2</sup> In the 2012–2013 financial year, 192 civil complaints were filed with the Australian Human Rights Commission alleging racial hatred under section 18C of the Racial Discrimination Act 1975 (Cth) (RDA). AUSTRALIAN HUMAN RIGHTS COMMISSION (AHRC), PROPOSED AMENDMENTS TO RACIAL DISCRIMINATION ACT: APRIL 2014 ¶ 67 (2014), available at [https://www.humanrights.gov.au/sites/default/files/20140428\\_RDA\\_submission.pdf](https://www.humanrights.gov.au/sites/default/files/20140428_RDA_submission.pdf). This represents an almost 60% increase over the preceding year. Much of the rise can be accounted for by material published in social media on the internet. See Dr. Tim Soutphommasane, *Racism is a Moral Issue*, AHRC (2014), <http://www.humanrights.gov.au/news/speeches/racism-moral-issue>.

<sup>3</sup> These instances of violence encompassed “physical assault, vandalism—including through arson attacks—threatening phone calls, hate mail, graffiti, leaflets, posters, and abusive and intimidat[ing] electronic mail.” JEREMY JONES, EXEC. COUNCIL OF AUSTRALIAN JEWRY, 2012 REPORT ON ANTISEMITISM IN AUSTRALIA 9 (2012), available at [http://antisemitism.org.il/webfm\\_send/59](http://antisemitism.org.il/webfm_send/59). Racially based attacks against Jews in Australia invariably increase during periods of conflict in the Middle East. JULIE NATHAN, EXEC. COUNCIL OF AUSTRALIAN JEWRY, 2014 REPORT ON ANTISEMITISM IN AUSTRALIA 15–16 (2014), available at [http://www.ecaj.org.au/wp-content/uploads/2012/08/2014\\_antisemitism\\_report.pdf](http://www.ecaj.org.au/wp-content/uploads/2012/08/2014_antisemitism_report.pdf). Several incidents attracted significant media attention, such as a severe attack, perpetrated by a gang of youths, on a Jewish family walking home from a Sabbath dinner. Sally Willoughby, *Five People Hospitalised After Brawl in Bondi*, SYDNEY MORNING HERALD (Oct. 26, 2013), <http://www.smh.com.au/nsw/five-people-hospitalised-after-brawl-in-bondi-20131026-2w80v.html>. New South Wales Anti-Discrimination Board President Stepan Kerkyasharian acknowledged the incident would be investigated as a case involving “severe racial vilification.” *Jewish*

body, the Australian Security Intelligence Organization (ASIO), considers the Jewish community to be the top target of terrorism in Australia.<sup>4</sup> The Muslim community has also been increasingly subjected to attacks in light of recent terror raids by federal police and events in Syria and Iraq.<sup>5</sup>

A recent incident in the state of Queensland highlights the ongoing problem of racial intolerance. A railway guard in Queensland was subjected to a torrent of racial abuse in the course of performing his duties. The guard requested a passenger take his feet off a train seat, prompting the passenger

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*Community Reps Condemn Sydney Brawl*, NEWS.COM.AU (Oct. 27, 2013, 1:46 PM), <http://www.news.com.au/national/breaking-news/jewish-community-reps-condemn-sydney-brawl/story-e6frku9-1226747723206>. Although this is a criminal offense under existing state law in New South Wales, it never been prosecuted. There are no commonwealth law offenses for severe racial vilification in Australia. See *infra* notes 200–21 and accompanying text. A more recent incident gaining media attention occurred on a bus in Sydney where a group of teenagers hurled anti-Semitic taunts, such as “Kill the Jews” and “Heil Hitler,” at approximately thirty Jewish children aged between five and twelve years old. They also allegedly threatened to “slit the children’s throats.” Jewish schools and places of worship were placed under heightened security after this incident. Megan Levy, *Teens Arrested Over Racist Attack on Bus Full of Jewish School Students*, SYDNEY MORNING HERALD (Aug. 7, 2014), <http://www.smh.com.au/nsw/teens-arrested-over-racist-attack-on-bus-full-of-jewish-school-students-20140807-101995.html>; Ben McClellan et al., *Jewish Schools in Lockdown After Bondi Race Hate Bus Attack*, DAILY TELEGRAPH (Aug. 8, 2014), <http://www.dailytelegraph.com.au/news/nsw/jewish-schools-in-lockdown-after-bondi-race-hate-bus-attack/story-fni0cx12-1227017340546>. In March 2015, the federal government provided \$18 million AUD to schools deemed to be at risk of racist incidents or terrorist attacks. Jewish or Islamic schools make up over half of the fifty-four identified at risk schools nationwide. The funds provided to the schools are to be used to employ security guards. Shalailah Medhora, *Schools at Risk of Racist or Terrorist Attack Given Funds to Employ Security Guards*, THE GUARDIAN (Mar. 2, 2015), <http://www.theguardian.com/australia-news/2015/mar/02/schools-at-risk-of-terrorist-or-racist-attack-given-funds-to-employ-security-guards>.

<sup>4</sup> JONES, *supra* note 3, at 75. Very recently, in Europe, there has also been a significant rise in racist hate speech directed at Jews and in anti-Semitic violence forcing many Jews to migrate to Israel or consider leaving Europe. These incidents have alarmed political leaders in the U.K., France, Denmark, Belgium, and Holland. Julie Nathan, *Antisemitism in the 21st Century*, J-WIRE (Feb. 17, 2015), <http://www.jwire.com.au/antisemitism-21st-century-writes-julie-nathan/>.

<sup>5</sup> In a three week period, there were thirty attacks on Muslims. Most of these attacks involved damage to mosques, physical assaults and threats of violence against religious leaders and women wearing the hijab. Heath Aston, *Dozens of Anti-Muslim Attacks as Islamic Leaders Warn of Community Fear*, SYDNEY MORNING HERALD (Oct. 9, 2014), available at <http://www.smh.com.au/national/dozens-of-antimuslim-attacks-as-islamic-leader-s-warn-of-community-fear-20141009-113tmk.html>; Phil Mercer, *Muslims Feel Violent Backlash After Australian Anti-Terror Raids*, VOICE OF AMERICA (Oct. 16, 2014), <http://www.voanews.com/content/muslims-feel-violent-backlash-after-australian-anti-terror-raids/2485585.html>.

to call the guard a “nigger and a black dog.” After the guard indicated the train would not leave the station until the offender exited the train, the offender asked the guard: “Do you want to come to Australia and learn some proper English? Learn some fucking English cause this is Australia . . . I can’t understand you . . . Do you even have citizenship, you fucking nigger?” The racial abuse was recorded by a friend and subsequently posted on the alleged offender’s Facebook, which went viral and enabled him to be tracked down by police.<sup>6</sup>

The growth in incidences of incitement to racial hatred and violence has taken place against a backdrop of widespread national debate on the utility of existing commonwealth racial vilification laws.<sup>7</sup> In 2014, the newly elected Australian government proposed changes to section 18C of the commonwealth Racial Discrimination Act 1975 (RDA), which drew

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<sup>6</sup> Natalie Bochenski, *Shocking Racist Attack on Queensland Rail Guard Goes Viral*, BRISBANE TIMES (Oct. 12, 2014), <http://www.brisbanetimes.com.au/queensland/shocking-racist-attack-on-queensland-rail-guard-goes-viral-20141012-114v70.html>; Natalie Bochenski, *Alleged Train Abusers: Timeline of Social Media Sting*, BRISBANE TIMES (Oct. 13, 2014), available at <http://www.brisbanetimes.com.au/queensland/alleged-train-abusers-timeline-of-a-social-media-sting-20141012-1152r0.html>; Brittany Vonow et al., *Teenagers Charged Over Racist Attack on Security Guard on Brisbane Train*, COURIER MAIL (Oct. 13, 2014), <http://www.couriermail.com.au/news/queensland/teenagers-charged-over-racist-attack-on-security-guard-on-brisbane-train/story-fnihsrf2-1227088232685>. The Queensland Police Service indicated they would consult with the Department of Justice to consider, for the first time ever, bringing separate charges for severe racial vilification under Queensland legislation. *Id.* This is significant because no individual has ever been prosecuted for severe vilification in Queensland.

<sup>7</sup> An extensive study undertaken over a twelve year period by the Challenging Racism Project at the University of Western Sydney found that 84% of survey respondents acknowledged the existence of racism in Australia, one fifth indicated they have been subjected to verbal abuse, racial slurs, and name calling based on their race, and one in twenty Australians indicated they have been physically attacked because of their race. Forty-one percent agreed that “Australia is weakened by people of different ethnic origins sticking to their old ways.” THE CHALLENGING RACISM PROJECT, NAT’L LEVEL FINDINGS 2, [http://www.uws.edu.au/\\_data/assets/pdf\\_file/0007/173635/NationalLevelFindingsV1.pdf](http://www.uws.edu.au/_data/assets/pdf_file/0007/173635/NationalLevelFindingsV1.pdf). In 2012, the AHRC conducted a survey as part of its National Anti-Racism Strategy. One thousand five hundred eighty-four anonymous online surveys were completed. The survey found 66% of those responding had experienced racism. Ninety percent said racism is a very important or extremely important issue facing individuals and Australia as a whole. AHRC, RACISM: IT STOPS WITH ME 4 (2013), available at [http://www.humanrights.gov.au/sites/default/files/document/publication/WEB\\_RISWM\\_one\\_year\\_report%20final.pdf](http://www.humanrights.gov.au/sites/default/files/document/publication/WEB_RISWM_one_year_report%20final.pdf); see also AHRC, NAT’L ANTI-RACISM STRATEGY: CONSULTATION REPORT (2012), [https://itstopswithme.humanrights.gov.au/sites/default/files/consultation\\_report.pdf](https://itstopswithme.humanrights.gov.au/sites/default/files/consultation_report.pdf). This trend in Australia has been accompanied by a concomitant increase in the propagation of racist hate speech globally. Kathleen Mahoney, *Hate Speech, Equality, and the State of Canadian Law*, 44 WAKE FOREST L. REV. 321, 321 (2009).

extensive criticism from various groups and sectors of the community as evidenced by the large number of submissions made to a public inquiry conducted by the Attorney General.<sup>8</sup> The widespread community uproar forced the government to defer making any changes to the current legislation. Prime Minister Tony Abbott explained the decision to shelve the proposed changes: “When it comes to counter-terrorism, everyone needs to be part of team Australia . . . The government’s proposals . . . have become a complication in that respect. I don’t want to do anything that puts our national unity at risk at this time, so those proposals are now off the table.”<sup>9</sup> Physical threats to persons or property involving racial animus are referred to in existing Australian state and territory legislation as serious or severe racial vilification. No comparable commonwealth law attracts criminal penalties.<sup>10</sup>

The disturbing trend towards racial intolerance and animosity, as well as the national debate on proposed changes to the existing commonwealth laws dealing with racial vilification, brings into sharp focus a number of interrelated issues: How are these matters currently dealt with in the Australian legal system at the federal and state levels? Should cases of inciting racial discrimination, racial hatred, and severe vilification be dealt with in the criminal justice system, through civil mechanisms, or both? Should these incidents be prosecuted as specific hate crimes or should such cases be handled under existing criminal laws? What policy objectives are furthered by prosecuting these occurrences as hate crimes? Is Australia complying with its international legal obligations?

This Article will argue that several factors justify prosecuting these activities as specific hate crimes under federal criminal laws. First, international treaties to which Australia is a party require the creation of specific criminal offenses to address circumstances involving the dissemination of ideas based on racial superiority or hatred, incitement to racial hatred, contempt or discrimination, threats or incitement to violence, as well as the provision of assistance to racist activities (including financing). Second, the main justifications in support of free speech do not justify

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<sup>8</sup> Latika Bourke, *Government Sifts Through Racial Discrimination Act Submissions as Institute of Public Affairs Says Immediate Action Needed*, ABC NEWS (July 4, 2014), <http://www.abc.net.au/news/2014-07-04/changes-to-racial-discrimination-act-put-on-hold/5571478>.

<sup>9</sup> Stephanie Anderson, *Proposed Changes to Racial Discrimination Act ‘Off the Table,’* SBS NEWS (Aug. 5, 2014), <http://www.sbs.com.au/news/article/2014/08/05/proposed-changes-racial-discrimination-act-table>.

<sup>10</sup> See Gail Mason, *Hate Crime Laws in Australia: Are They Achieving Their Goals?*, 33 CRIM. L.J. 326 (2009); see *infra* notes 158, 194.

protecting speech inciting racial discrimination, hatred, and violence. Third, there are fundamental human rights principles, such as the right to dignity and equality, which translate into the need for racial minorities to live in the community free from fear of hostility and violence. Regulating this conduct as a hate crime fosters social cohesion by promoting tolerance of diversity in a multicultural society. Fourth, the purposes of racial vilification laws may not currently be achieved through existing state and commonwealth legislative schemes. Finally, a lacuna exists in Australian criminal law in relation to offenses proscribing racial violence and hate speech. Coupled with this is the issue of adequacy of general offense aggravation provisions. The cumulative effect of these arguments is a proposal for specific criminal law reforms to bring Australia into compliance with international law, to further the objectives of hate crime legislation, and to establish an effective system for enforcement of such legislation.

## II. INTERNATIONAL LEGAL OBLIGATIONS

### *A. The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights*

In 1948, the U.N. General Assembly unanimously adopted the Universal Declaration of Human Rights (UDHR) to set a standard for the global promotion of human rights.<sup>11</sup> Article 19 of the UDHR protects freedom of expression: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek,

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<sup>11</sup> Universal Declaration of Human Rights (UDHR), G.A. Res. 217 (III)A, U.N. Doc. A/810 (Dec. 10, 1948), available at [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/217%28III%29](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/217%28III%29). Eight states abstained from voting on this Resolution. *UDHR Voting Record*, UNBISNET, <http://unbisnet.un.org:8080/ipac20/ipac.jsp?&profile=voting&uri=full=3100023~!909326~!0&ri=1&aspect=power&menu=search&source=~!horizon>. The UDHR received such widespread support because General Assembly resolutions are not binding under international law and there was no process set up in the UDHR to implement its provisions. Nonetheless, the UDHR set a standard by which to measure a government’s treatment of its own citizens. Alan Berman, *International Human Rights Law and New Zealand’s Foreign Relations: A Comparative Study of New Zealand’s Relations with South Africa and Iran*, 12 U. HAW. L. REV. 283 n.6 (1990). Former Australian Foreign Minister H.V. Evatt was President of the UN General Assembly at the time the UDHR was adopted. See Gillian Triggs, President, Austl. Hum. Rts. Comm., Address at the Australian Public Service and Human Rights Network (Oct. 29, 2012), available at <https://www.humanrights.gov.au/news/speeches/aps-human-rights-network-speech-prof-gillian-triggs-2012>.

receive and impart information and ideas through any media and regardless of frontiers.”<sup>12</sup>

This right is qualified by a general limitation clause in Article 29(2):

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.<sup>13</sup>

International treaties to which Australia is a party, such as the International Covenant on Civil and Political Rights (ICCPR),<sup>14</sup> recognize

<sup>12</sup> UDHR, *supra* note 11, pmb1. The UDHR was adopted after the establishment of the U.N. Member states were concerned with avoiding a repeat of the atrocities of World War II. This concern is reflected in the preamble of the resolution:

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people.

*Id.* The UDHR is now considered to have the force of customary international law. See Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT’L & COMP. L. 287, 319 (1996); Kristen E. Boon, *The United Nations As Good Samaritan: Immunity and Responsibility*, 16 CHI. J. INT’L L. 341, 385 n.182 (2016).

<sup>13</sup> UDHR, *supra* note 11, art. 29(2). Earlier wording of the UDHR suggests the drafters thought the right to freedom of expression does not entail the right to incite racial hatred. Stephanie Fariior, *Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech*, 14 BERKELEY J. INT’L L. 1, 12 (1996). Most of the drafters believed that Article 29(2), along with Article 7 recognizing the right of all to equal protection against incitement to discrimination in violation of the UDHR, permitted limitations on the advocacy of racial hatred. *Id.* at 12–14; see also Robin Edger, *Are Hate Speech Provisions Anti-Democratic?: An International Perspective*, 26 AM. U. INT’L L. REV. 119, 126–27 (2010).

<sup>14</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (Mar. 23, 1976) [hereinafter ICCPR], available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>. This treaty, absent Article 41, entered into force in Australia on Aug. 13, 1980. See U.N. Treaty Collection, *International Covenant on Civil and Political Rights*, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-4&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&lang=en). Article 41 came into force on Jan. 28, 1993. *Id.* Australia is a signatory to both the ICCPR as well as the First Optional Protocol to the ICCPR. Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), U.N. Doc. A/RES/21/2200 (1966), 999 U.N.T.S. 302 (Mar. 23, 1976), available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCCPR1>.

that the right to freedom of expression is not unbridled.<sup>15</sup> The exercise of such a right carries with it special responsibilities including, but not limited to, respecting the rights of others and safeguarding public order.<sup>16</sup> The ICCPR recognizes that the right to freedom of expression is abused if exercised in a manner designed to destroy the rights of others, and in such circumstances, the right can be legally restricted.<sup>17</sup> Article 19 stipulates that:

(1) Everyone shall have the right to hold opinions without interference.

(2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either

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aspx. The Optional Protocol took effect in Australia on Sept. 25, 1991. See U.N. Treaty Collection, *Optional Protocol to the International Covenant on Civil and Political Rights*, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-5&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-5&chapter=4&lang=en). The Optional Protocol allows the United Nations Human Rights Committee (UNHRC) to consider communications from persons alleging their rights under the ICCPR have been violated. See Katherine Gelber, *Free Speech Hate Speech and an Australian Bill of Rights*, 2 DRAWING BD: AUSTL. REV. PUB. AFF. 107, 111 n.16 (2002). State signatories accept the ability of the UNHRC to entertain such communications. *Id.*; see also Alan Berman, *The Experiences of Denying Constitutional Protection to Sodomy Laws in the United States, Australia and Malaysia: You've Come A Long Way Baby And You Still Have a Long Way to Go*, OXFORD U. COMP. L. FORUM (2008), <http://ouclfiuscomp.org/articles/berman2.shtml#fn302sym>.

<sup>15</sup> For example, some scholars point to Articles 19 and 20 of the ICCPR, which were drafted within the wider historical context of the atrocities committed during World War II, as evidence of the content and parameters of permissible limitations to the right to freedom of expression. See Expert Seminar on the Links between articles 19 and 20 of the International Covenant on Civil and Political Rights: Freedom of Expression and Advocacy of Religious Hatred that Constitutes Incitement to Discrimination, Geneva, Oct. 2–3, 2008, *Articles 19 and 20 of the ICCPR*, Conf. Room Paper No. 3 [hereinafter Ghanea], available at <http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Seminar2008/CompilationConferenceRoomPapers.pdf> (by Nazila Ghanea); Christian Tomuschat, *International Covenant on Civil and Political Rights*, UNITED NATIONS AUDIOVISUAL LIBRARY OF INT'L LAW (2008), [http://legal.un.org/avl/pdf/ha/iccpr/iccpr\\_e.pdf](http://legal.un.org/avl/pdf/ha/iccpr/iccpr_e.pdf).

<sup>16</sup> Hate crime laws are designed to maintain public order not simply by averting violence but also by “upholding against attack a shared, public sense of the basic elements of each person’s status, dignity, and reputation as a citizen or member of society in good standing—particularly against attacks predicated upon the characteristics of some particular social group.” Jeremy Waldron, *Dignity and Defamation: The Visibility of Hate*, 123 HARV. L. REV. 1596, 1605 (2010).

<sup>17</sup> See Farrior, *supra* note 13, at 3–5 (providing a detailed account of the drafting history of the UDHR, ICCPR, and the International Convention on the Elimination of All Forms of Racial Discrimination).

orally, in writing or in print, in the form of art, or through any other media of his choice.

(3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.<sup>18</sup>

The drafters of the ICCPR recognized that hate speech would weaken individual rights and progressively erode fundamental democratic values.<sup>19</sup> The best way to protect the principle of freedom of expression is to recognize that certain forms of expression are dangerous to the freedom itself. Banning racist hate speech is an acceptable restriction on freedom of expression because such speech is intended to defeat the rights of its targets—by silencing their free speech—and undercuts the most basic principles underlying international human rights law: equality and non-discrimination.

Some jurisdictions, such as Canada, have expressly recognized that equality rights co-exist with the right to freedom of expression. The Supreme Court of Canada has upheld federal criminal laws prohibiting hate propaganda—e.g., public incitement of racial hatred likely to result in a breach of the peace and willful promotion of hatred—by recognizing that the right of freedom of expression does not enjoy primacy over equality rights.<sup>20</sup> Both

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<sup>18</sup> ICCPR, *supra* note 14, art. 19. The author recognizes repressive regimes have in the past used the public order exception in Article 19 as a loophole to suppress dissent by restricting the free expression of ideas. One of the problems with the language of Article 19 is that states can decide when particular restrictions are warranted. See Farrow, *supra* note 13, at 7 n.30 (noting South Africa's use of the limitations clause as an example of such abuse).

<sup>19</sup> Farrow, *supra* note 13, at 9.

<sup>20</sup> *R v. Keegstra*, [1990] 3 S.C.R. 697 (Can.) (concluding advocacy of racial hatred that constitutes incitement to discrimination, hostility or violence represents an attack on equality rights). This also seems to be the position embraced by the U.N. Committee on the Elimination of Racial Discrimination (ICERD Committee). UN Office of the High Commissioner for Human Rights, ICERD Comm., General Recommendation No. 35: Combating Racist Hate Speech, ¶ 26, U.N. Doc. CERD/C/GC/35 (Sept. 26, 2013) [hereinafter General Recommendation No. 35], available at <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhssyNNtg151ma08CMa6o7Bglz8iG4SuOjovEP%2bcqr8joDoVEbW%2bQ1MoWdOTNEV99v6FZp9aSSA1nZya6gtpTo2JUBMI0%2boO mjAwk%2b2xJW%2bC8e> (“Freedom of expression should not aim at the destruction of the rights and freedoms of others, including the right to equality and non-discrimination.”); *cf.*

fundamental rights enshrined in the Canadian Charter of Rights and Freedoms are indivisible.<sup>21</sup> For this reason, restrictions on racist hate speech actually foster, rather than impede, free expression by disallowing speech that is likely to silence the free speech rights of the targeted racial group.<sup>22</sup> Thus, rather than inhibiting free speech, such regulations simply reflect a more subtle and sophisticated understanding of the right to freedom of expression.<sup>23</sup>

The ICCPR requires states to prohibit certain types of hate speech. Article 20(2) provides: “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”<sup>24</sup> This provision has proven to be contentious in the international community. Some view the prohibition in Article 20(2) as excessively restrictive of free speech since incitement to discrimination sets a relatively low threshold for the prohibition of speech.<sup>25</sup> Others have pointed to the limited classifications of hate speech actually covered by this provision.<sup>26</sup> Nevertheless, Article 20(2) only requires states to prohibit statements promoting racial hatred that constitute incitement<sup>27</sup> to racial “discrimination, hostility or violence.”<sup>28</sup>

Farrior, *supra* note 13, at 5–6 (suggesting the principle of equality and non-discrimination enjoys precedence over the right to freedom of expression).

<sup>21</sup> R v. Keegstra, 3 S.C.R. 697.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*; See Mahoney, *supra* note 7, at 346.

<sup>24</sup> ICCPR, *supra* note 14. While some countries with hate speech regulations have relied upon them to suppress political dissent, many countries have not done so. Farrior, *supra* note 13, at 32 n.195; see also FRANCES D’SARZA & KEVIN BOYLE, STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION AND NON-DISCRIMINATION 44 (Sandra Colver ed., 1992).

<sup>25</sup> During the drafting of Article 20(2), some thought prohibiting hate speech would violate the right to freedom of expression. Farrior, *supra* note 13, at 8–17. Debate on this Article was contentious. *Id.*

<sup>26</sup> See Ghanea, *supra* note 15; *Hate Speech: What do We do*, ARTICLE 19, <http://www.article19.org/pages/en/hate-speech-more.html>.

<sup>27</sup> Some commentators have suggested that incitement focuses on the intent or actual impact of the speech in prompting one spectator to harm another individual or group. Professor Susan Benesch persuasively reasons that incitement to discrimination, hostility, or violence exists if speech seeks to “provoke reactions (perlocutionary acts) on the part of the audience . . . . When inflammatory speech inspires one audience to harm another person or group . . . successful incitement [has been established].” Expert Workshops on the Prohibition on Incitement to National, Racial or Religious Hatred, Feb. 9–10, 2011, *Contribution to OHCHR Initiative on Incitement to National, Racial or Religious Hatred*, at 4 [hereinafter Benesch], available at <http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Others2011/SBenesch.doc> (by Susan Benesch).

<sup>28</sup> ICCPR, *supra* note 4, art. 20(2). It is highly debatable whether statements promoting racial hatred are, at the very least, likely to concurrently incite racial discrimination. See

The U.N. Human Rights Committee (UNHRC) has expressly indicated the right of free speech in Article 19 of the ICCPR does not offer protection for spreading “racial or religious hatred.”<sup>29</sup> In *J.R.T. and the W.G. Party v. Canada*, the founder of a political party in Canada made a complaint to the UNHRC alleging violation of his right to free expression contained in Article 19 of the ICCPR.<sup>30</sup> The complainant disseminated the policies of his party in pre-recorded messages which could be accessed by members of the public by telephoning the party office.<sup>31</sup> The messages cautioned listeners of the “dangers of international finance and international Jewry leading the world into wars, unemployment and inflation and the collapse of world values and principles.”<sup>32</sup> The UNHRC found the anti-Semitic opinions disseminated through the telephone system constituted the advocacy of racial hatred.<sup>33</sup> For

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MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 475 (2d ed. 2005).

<sup>29</sup> *Faurisson v. France*, U.N. Hum. Rts. Comm., Commc’n No. 550/1993, ¶¶ 9.5–9.7, U.N. Doc. CCPR/C/58/D/550/1993 (Dec. 16, 1996). In *Faurisson*, the UNHRC upheld the Gaysot Act, a 1990 French law making it an offense to trivialize crimes against humanity committed by the Nazis during World War II. The law was passed in response to revisionist accounts of Nazi war crimes by historians. The government viewed these revisionist accounts as “a subtle form of contemporary anti-Semitism.” *Id.* ¶ 7.2. Faurisson, a former literature professor at the prestigious Sorbonne in Paris, was convicted under the Gassyot Act for expressing skepticism towards the use of gas chambers in Nazi concentration camps to exterminate Jews. He also criticized the judgment at Nuremberg as a judicial sham. *Id.* ¶ 7.3. The UNHRC found this to be an unlawful attack on the reputation and the memory of the victims of Nazism. Accordingly, the UNHRC held the French law was justified under Article 19(3)(a) to protect the rights and reputation of others. The restriction on Faurisson’s free speech rights was necessary to protect the Jewish community to live “free from fear of an atmosphere of anti-Semitism.” *Id.* ¶ 9.6. The UNHRC also indicated the state requirement imposed by Article 20 is not incompatible with the right to freedom of expression in Article 19. *Id.* ¶ 9.7; see also Gelber, *supra* note 14, at 107.

<sup>30</sup> *J.R.T. v. Canada*, U.N. Hum. Rts. Comm., Commc’n No. 104/1981, U.N. Doc. CCPR/C/OP/2 (July 18, 1981). The relevant Canadian law prohibited discriminatory telephonic messages of any matter that is likely to expose a person or persons to hatred or contempt on the grounds, inter alia, of race and religion. *Id.* ¶ 2.2. The Canadian Human Rights Commission allowed a complaint by Jewish groups alleging a breach of the relevant legislation. *Id.* ¶ 2.4. This decision was later enforced by the Canadian Federal Court against the founding member of the political party, who then submitted a complaint to the UNHRC alleging a violation of his free speech rights under Article 19(1) and (2) of the ICCPR. *Id.* ¶ 2.5. The UNHRC found Canada was not in breach of these provisions. Instead, the Committee found the author’s communication of racist ideas to be inconsistent with the provisions of Article 20(2) of the ICCPR. *Id.* ¶ 8.

<sup>31</sup> *Id.* ¶ 2.1.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* ¶ 8(b).

this reason, the racist ideas communicated were not protected by Article 19.<sup>34</sup> Indeed, the UNHRC found Canada has a duty under Article 20(2) of the ICCPR to prohibit the spreading of such racist ideas.<sup>35</sup> This case illustrates: (a) the right to free speech is not absolute; and (b) domestic laws implementing the obligations of Article 20(2) are entirely consistent with the right to freedom of expression contained in Article 19, the exercise of which carries with it special duties and responsibilities.<sup>36</sup> Some commentators have suggested the UNHRC's comments imply that states ratifying the ICCPR should enact laws criminalizing the promotion of racial hatred.<sup>37</sup> Others have pointed to the terms in Article 20(2) as allowing state compliance through the provision of civil remedies or criminal penalties.<sup>38</sup>

*B. The International Convention on the Elimination of All Forms of Racial Discrimination*

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) covers a wider range of hate speech than Article 20 of the ICCPR, and is more explicit in mandating that State parties declare as an offense certain types of racial hate speech. The ICERD penalizes certain hate speech to deter actions that foster or incite racial discrimination.<sup>39</sup> Article 4(a) compels state parties to establish an offense for the following:

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Farrior, *supra* note 13, at 50, 91; Edger, *supra* note 13, at 134–36.

<sup>37</sup> Expert Workshops on the Prohibition on Incitement to National, Racial or Religious Hatred, Nairobi, Apr. 6–7, 2011, *Background paper on Australia's Response to Articles 19 and 20 of the ICCPR*, at 2–4 [hereinafter Gelber Background Paper], available at [http://www2.ohchr.org/english/issues/opinion/articles1920\\_iccpr/docs/expert\\_papers\\_Bangkok/KATH\\_GELBER.pdf](http://www2.ohchr.org/english/issues/opinion/articles1920_iccpr/docs/expert_papers_Bangkok/KATH_GELBER.pdf) (by Gelber). The Concluding Observations of the UNHRC to Australia's Fifth Report under the ICCPR note Australia's existing federal laws regulating hate speech that contain only civil remedies are insufficient to meet the obligations of Article 20. *Id.* at 3 n.10. This also implies Australia must adopt criminal sanctions for advocacy of racial hatred that constitutes incitement to hostility or violence. *Id.* at 3–4; see also Benesch, *supra* note 27.

<sup>38</sup> Ghana, *supra* note 15. Some have suggested that sanctioning someone with imprisonment for advocacy of racial hatred that incites racial discrimination or hostility rather than violence might violate the sentencing principle of proportionality, particularly since incarceration potentially jeopardizes many other human rights. Farrior, *supra* note 13, at 11, 92–93. The ICERD Committee, however, seems to have rejected this interpretation. See *infra* note 48.

<sup>39</sup> International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106(XX), U.N. Doc. A/6014, 660 U.N.T.S. 195 (Dec. 21, 1965), available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx> [hereinafter ICERD]. This treaty, which entered into force in Australia on Sept. 30, 1975, has 177 parties and 87 signatures. See

State Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention,<sup>40</sup> *inter alia*:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof.<sup>41</sup>

Article 4(a) thus prohibits the following acts:

(1) all dissemination of ideas based on racial superiority;<sup>42</sup>

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U.N. Treaty Collection, *International Convention on the Elimination of All Forms of Racial Discrimination*, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-2&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-2&chapter=4&lang=en).

<sup>40</sup> The due regard clause incorporates all of the rights in the UDHR. Some states, such as the U.S., have construed this clause as not requiring governmental actions which inhibit the right to freedom of speech and association. The ICERD Committee has rejected this interpretation of the due regard clause, holding that states cannot rely on the clause to justify deviating from the compulsory obligations in Article 4. General Recommendation No. 35, *supra* note 20, ¶ 19 (“The due regard clause has been interpreted by the Committee to apply to human rights and freedoms as a whole, and not simply to freedom of opinion and expression.”). The Committee has also noted that the due regard clause relates to all of the principles in the UDHR. *See infra* note 48. For this reason, placing less emphasis on the right to freedom of speech in circumstances involving racist hate speech does not render the due regard clause inconsequential, particularly since all treaties recognizing the right to freedom of expression provide that this right can be abridged in certain instances.

<sup>41</sup> ICERD, *supra* note 39, art. 4(a).

<sup>42</sup> The U.N. Commission on Human Rights drafted the ICCPR and ICERD, and subsequently appointed two Special Rapporteurs to engage in a wide-ranging study of the right to freedom of expression. Farrior, *supra* note 13, at 87–89. The right to be meaningfully informed has been cited as one justification by these Special Rapporteurs for banning the dissemination of ideas based on racial superiority. *Id.* at 91 n.559. Criminal sanctions for

- (2) all dissemination of ideas based on racial hatred;
- (3) incitement to racial discrimination;
- (4) acts of violence against any race or group or persons of another colour or ethnic group;
- (5) incitement to such acts; and
- (6) the provision of any assistance to racist activities, including the financing thereof.

Domestic legislation is required to implement the requirements of the ICERD; even in instances where other laws penalize some of the same acts, such as assault, affray and intimidation.<sup>43</sup> The Committee on the Elimination of Racial Discrimination (ICERD Committee) is the body responsible for overseeing the domestic implementation of the ICERD. The ICERD Committee has explicitly recognized that banning certain types of racist hate speech is entirely consistent with promoting a robust right to freedom of expression.<sup>44</sup>

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dissemination of ideas based on racial superiority or hatred have been passed by some states, and a majority of the ICERD Committee has indicated this category of speech should be criminalized. Nevertheless, some states have not passed domestic implementing legislation in relation to this category of speech. *Id.* at 57. Other state parties to the ICERD, such as the U.K., Canada, New Zealand, France, Denmark and Germany have enacted criminal offenses for acts of racial hatred or the dissemination of racist ideas inciting racial discrimination or hatred. Alexander Tsesis, *Dignity and Speech: The Regulation of Hate Speech in a Democracy*, 44 WAKE FOREST L. REV. 497, 521–23 (2009). These prohibitions were traditionally intended to prevent the incitement of violence. *Id.* More recently, these laws have been enacted in reliance on the obligations flowing from international treaties, such as the ICCPR and the ICERD. *Id.*; see also Louise Johns, *Racial Vilification and ICERD in Australia*, 2 MURDOCH U. ELECTRONIC J.L. 2–3 (1995); Edger, *supra* note 13, at 145–49; *infra* note 164.

<sup>43</sup> Johns, *supra* note 42, at 2.

<sup>44</sup> Banning racist hate speech is entirely consistent with freedom of expression in that the two are

complementary and not the expression of a zero sum game where the priority given to one necessitates the diminution of the other. The rights to equality and freedom from discrimination, and the right to freedom of expression, should be fully reflected in law, policy and practice as mutually supportive human rights.

General Recommendation No. 35, *supra* note 20, ¶45. The ICERD Committee is empowered to consider complaints from individuals or groups of individuals within its jurisdiction alleging to be a victim of a violation of their rights under this treaty provided a state declaration has been issued recognizing the competence of the ICERD Committee to consider such communications. ICERD, *supra* note 39, art. 14(1).

Most of the experts comprising the ICERD Committee are of the view that Article 4(a) refers to criminal offenses. This view is partially due to an understanding that the protracted nature of civil litigation would prove of limited utility in serving the goals of deterrence and punishment required to successfully guard the community from racial discrimination.<sup>45</sup> Moreover, the ICERD Committee has indicated that available civil penalties do not fulfill the obligations under the treaty.<sup>46</sup>

This view is consistent with the language of the ICERD. While Article 20(2) requires states to “prohibit” the advocacy of racial hatred that incites discrimination, hostility or violence, Article 4(a) contains the words “punishable by law.” This language arguably compels states to establish criminal punishment for disseminating ideas based on racial superiority or hatred, acts of racial violence, and incitement to racial discrimination and violence.<sup>47</sup> For example, the ICERD Committee held in *Jewish Community of Oslo v. Norway*<sup>48</sup> that failure to convict the leader of a Neo-Nazi group

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<sup>45</sup> Farrior, *supra* note 13; Edger, *supra* note 13, at 135.

<sup>46</sup> Although the ICERD Committee is also of the view that intent is not an essential element in establishing an offense under Article 4, approximately thirty states require intent to disseminate ideas of racial superiority or hatred to establish criminal liability. Farrior, *supra* note 13, at 57.

<sup>47</sup> Johns, *supra* note 42, at 2–3.

<sup>48</sup> *Jewish Community of Oslo v. Norway*, U.N. Hum. Rts. Comm., Commc’n No., 30/2003, UN Doc. CERD/C/67/D/30/2003 (Aug. 15, 2005). In 2002, the Supreme Court of Norway acquitted Terje Sjolie, the leader of Bootboys, a Neo-Nazi group, for racist statements made at an unauthorized march to commemorate the Nazi leader Rudolph Hess. Sjolie declared “our people and country are being plundered and destroyed by the Jews, who suck our country empty of wealth and replace it with immoral and un-Norwegian thoughts.” *Id.* ¶ 2.1. The Supreme Court overruled a Court of Appeal conviction of Sjolie under section 135a of the Norwegian Penal Code prohibiting a person from “threatening, insulting, or subjecting to hatred, persecution or contempt, any person or group of persons because of their . . . race.” *Id.* ¶ 2.5. The Court of Appeal concluded the speech could be understood as accepting the mass extermination of Jews, however, the Supreme Court found the statements were merely Nazi rhetoric—expressing at most support for the National Socialist ideology rather than advocating organized violence against Jews. Thus, while the Supreme Court found the statements derogatory and offensive, the court held that punishing such statements was incompatible with the right to free speech since no actual threats were made nor were orders given to carry out threats. *Id.* ¶ 2.7. Contrary to the finding of the Supreme Court, the ICERD Committee found Article 4 of the ICERD requires states to prohibit the dissemination of ideas based on racial superiority or hatred. Moreover, the Committee noted other international bodies give less protection to freedom of speech in cases of racist hate speech. As such, the Committee found Sjolie’s acquittal constituted a violation of Articles 4 and 6 of the ICERD, since his statements contained ideas based on racial superiority or hatred, as well as incitement to racial discrimination or violence. *Id.* ¶¶ 10.1–6

under Norway's domestic criminal laws for statements involving ideas based on racial superiority or hatred as well as incitement to racial discrimination, if not violence, constitutes a violation of Articles 4 and 6 of the ICERD.<sup>49</sup>

General Recommendation No. 35, adopted by the ICERD Committee in 2013, deals with combating racist hate speech.<sup>50</sup> It notes that the high incidence of racist hate speech globally poses a substantial risk to the promotion of human rights. Implementing the obligations of the ICERD holds the greatest promise of both "translating the vision of a society free from intolerance and hatred into a living reality and promoting a culture of respect for universal human rights."<sup>51</sup>

The Recommendation notes the obligatory and essential nature of Article 4 in addressing racial discrimination through punitive measures in instances

In 2004, two years after the Supreme Court reversed the lower court, section 100 of the Norwegian Constitution was amended to empower the Parliament to pass laws prohibiting racist speech in compliance with its international treaty obligations. The Norwegian government subsequently amended section 135a of the General Civil Penal Code to extend criminal liability to negligent statements, and increased the penalty from two years to three years imprisonment. *See id.* ¶ 8.5. The code now reads:

Section 135a:

Any person who wilfully or through gross negligence publicly utters a discriminatory or hateful expression shall be liable to fines or imprisonment for a term not exceeding three years. An expression that is uttered in such a way that it is likely to reach a large number of persons shall be deemed equivalent to a publicity uttered expression. The use of symbols shall also be deemed to be an expression. Any person who aids and abets such an offence shall be liable to the same penalty.

A discriminatory or hateful expression here means threatening or insulting anyone, or inciting hatred or persecution of or contempt for anyone because of his or her (a) skin colour or national or ethnic origin, (b) religion or life stance, or (c) homosexuality, lifestyle or orientation.

Act of 22 May 1902 No. 10, The General Civil Penal Code *as amended* by Act of 21 December 2005 No. 131, Norwegian Ministry of Justice Legislation Department at 57 (2006) (unofficial translation) (internal citation omitted), *available at* <http://www.ub.uio.no/ujur/ulovdata/lov-19020522-010-eng.pdf>.

<sup>49</sup> *See Jewish Community of Oslo v. Norway*, *supra* note 48, ¶¶ 10.1–6.

<sup>50</sup> The ICERD Committee noted that "[r]acist hate speech can take many forms and is not confined to explicitly racial remarks" but can include:

indirect language [employed] . . . to disguise its targets and objectives . . . emanating from individuals or groups . . . orally or in print, or disseminated through electronic media, including the Internet and social networking sites, as well as non-verbal forms of expression such as the display of racist symbols, images and behaviour at public gatherings, including sporting events.

General Recommendation No. 35, *supra* note 20, at 19.

<sup>51</sup> *Id.* at 10.

when prevention and deterrence fail. The provision serves an important symbolic function in highlighting the global community's revulsion to racist hate speech—which repudiates the central doctrines of human dignity and equality, and demeans the social status of persons and groups in the wider community.<sup>52</sup> The ICERD Committee makes specific recommendations regarding the circumstances in which racist hate speech should be subject to criminal sanctions:

The Committee recommends that the criminalization of forms of racist expression should be reserved for serious cases, to be proven beyond reasonable doubt, while less serious cases should be addressed by means other than criminal law, taking into account, inter alia, the nature and extent of the impact on targeted persons and groups. The application of criminal sanctions should be governed by principles of legality, proportionality and necessity . . . the Committee recommends that the States parties declare and effectively sanction as offences punishable by law:

- (a) All dissemination of ideas based on racial or ethnic superiority or hatred, by whatever means;
- (b) Incitement to hatred, contempt or discrimination against members of a group on grounds of their race, colour, descent, or national or ethnic origin;
- (c) Threats or incitement to violence against persons or groups on the grounds in (b) above;
- (d) Expression of insults, ridicule or slander of persons or groups or justification of hatred, contempt or discrimination on the grounds in (b) above, when it clearly amounts to incitement to hatred or discrimination;
- (e) Participation in organizations and activities which promote and incite racial discrimination.<sup>53</sup>

The Committee also indicated that five elements<sup>54</sup> should be considered in determining whether certain conduct should be criminally proscribed as a

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<sup>52</sup> *Id.* at 46.

<sup>53</sup> *Id.* at 13.

dissemination of ideas based on racial superiority or hatred and as incitement to hatred, contempt, or discrimination: the content and form of speech;<sup>55</sup> the prevailing economic, social, and political climate;<sup>56</sup> the position or social status of the speaker in influencing public opinion;<sup>57</sup> the reach of the speech;<sup>58</sup> and the objectives of the speech.<sup>59</sup>

Australia ratified the ICERD in 1974 and the ICCPR in 1980, both subject to reservations.<sup>60</sup> Australia's reservation to the ICERD evinced their intent to pass domestic implementation legislation as soon as practicable:

The Government of Australia . . . declares that Australia is not at present in a position specifically to treat as offences all the matters covered by Article 4 (a) of the Convention. Acts of the kind there mentioned are punishable only to the extent

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<sup>54</sup> *Id.* at 15.

<sup>55</sup> This factor considers whether the speech is confrontational and direct, the means by which the speech is disseminated, and the mode in which it is delivered. *Id.*

<sup>56</sup> Existing local configurations of discrimination against ethnic and other groups are to be considered. Communications which in some situations may be harmless can have grave meaning in other contexts. *Id.*

<sup>57</sup> For example, politicians and other persons enjoying high social status can have an influence in generating an adverse environment for particular racial groups. Though the right to freedom of expression in relation to political matters is recognized, the Committee stresses that the exercise of this right carries with it special responsibilities. *Id.*

<sup>58</sup> This includes the makeup of the audience, the mode of communication (e.g., via the internet or mainstream media), and the regularity of the communication that might suggest a calculated tactic to provoke racial or ethnic hostility. *Id.*

<sup>59</sup> Speech safeguarding the human rights of individuals and groups should not be subject to criminal or civil sanctions. *Id.*

<sup>60</sup> Some scholars have been extremely skeptical of Australia's ratification of treaties with reservations. For example, Neil Löfgren has suggested that Australia ratifies many international treaties to showcase its staunch support for the promotion of human rights, while simultaneously evading its obligations under such treaties indirectly through the use of reservations. See Neil Löfgren, *Keeping the Colonisers Honest: The Implications of Recommendation 333*, in MAJAH INDIGENOUS PEOPLE AND THE LAW 88 (G. Bird et al. eds., 1996). The U.S. has deployed a similar strategy and has made reservations disclaiming any obligation to implement the provisions of Article 20 of the ICCPR and Articles 4 and 7 of the ICERD—to the extent such laws would restrict the right of free speech protected by the U.S. Constitution. U.S. Reservations, Understandings, and Declarations: International Covenant on Civil and Political Rights, 138 CONG. REC. S4781-01 (1992); U.S. Reservations, Understandings, and Declarations: International Covenant on the Elimination of All Forms of Racial Discrimination, 140 CONG. REC. S7634-02 (1994); see also Stanley Halpin, *Racial Hate Speech: A Comparative Analysis of the Impact of International Human Rights Law Upon The Law of the United Kingdom and the United States*, 94 MARQUETTE L. REV. 463, 488–90 (2010).

provided by the existing criminal law dealing with such matters as the maintenance of public order, public mischief, assault, riot, criminal libel, conspiracy and attempts. It is the intention of the Australian Government, at the first suitable moment, to seek from Parliament legislation specifically implementing the terms of Article 4 (a).<sup>61</sup>

Australia's more recent reservation to the ICCPR indicates Australia may not introduce any further domestic laws to implement its obligations under Article 20:

Australia interprets the rights provided for by articles 19, 21 and 22 as consistent with article 20; accordingly, the Commonwealth and the constituent states, having legislated with respect to the subject matter of the article in matters of practical concern in the interest of public order (*ordre public*), the right is reserved not to introduce any further legislative provision on these matters.<sup>62</sup>

### C. Legislative Attempts to Implement International Treaty Obligations

Past proposals to implement Australia's ICERD obligations through domestic legislation have proven fruitless.<sup>63</sup> In 1992, the Australian government introduced a bill containing criminal offenses designed to give effect to some of Australia's obligations under Article 4(a) of the ICERD.<sup>64</sup> The move to enact federal vilification laws was influenced by three national

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<sup>61</sup> International Convention on the Elimination of All Forms of Racial Discrimination, Australian Reservations, 660 U.N.T.S. 195 (Oct. 7, 1966), available at [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-2&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-2&chapter=4&lang=en).

<sup>62</sup> International Covenant on Civil and Political Rights, Australian Reservations, 1197 U.N.T.S. 411 (Aug. 13, 1980), available at [https://treaties.un.org/Pages/ViewDetilas.aspx?src=IND&mtdsg\\_no=IV-4&chapter=4&lang=en#EndDec](https://treaties.un.org/Pages/ViewDetilas.aspx?src=IND&mtdsg_no=IV-4&chapter=4&lang=en#EndDec).

<sup>63</sup> Gelber Background Paper, *supra* note 37, at 2; LUKE MCNAMARA, REGULATING RACISM: RACIAL VILIFICATION LAWS IN AUSTRALIA 304–05 (2002). Efforts to include provisions proscribing racial hatred were rejected at the time the Commonwealth Racial Discrimination Act (RDA) was passed in 1975. Similarly, attempts in the 1980s to supplement the RDA with provisions proscribing racial hatred and racial defamation were unsuccessful. See Luke McNamara & Tamsin Solomon, *The Commonwealth Racial Hatred Act 1996: Achievement or Disappointment*, 18 ADEL L. REV. 259, 262–65 (1996).

<sup>64</sup> Gelber Background Paper, *supra* note 37, at 3; McNamara & Solomon, *supra* note 63, at 263–64.

reports written in 1991–1992: the National Inquiry into Racist Violence;<sup>65</sup> the Royal Commission into Aboriginal Deaths in Custody;<sup>66</sup> and the Australian Law Reform Commission report on Multiculturalism and the Law.<sup>67</sup> Each of these reports recognized the widespread problem of racial vilification and violence in Australia, though only the National Inquiry into Racist Violence recommended enactment of a criminal offense to address racist violence and intimidation as well as incitement to racist violence and racial hatred likely to lead to violence.<sup>68</sup>

The original Racial Discrimination Amendment Bill 1992 proposed two criminal offenses based on inciting racial hatred and violence.<sup>69</sup> The language in this bill was substantially similar to the wording in the state anti-discrimination law in New South Wales' Anti-Discrimination Act 1977.<sup>70</sup>

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<sup>65</sup> AUSTRAL. HUM. RTS. & EQUAL OPPORTUNITY COMM., RACIST VIOLENCE: REPORT OF THE NATIONAL INQUIRY INTO RACIST VIOLENCE IN AUSTRALIA (1991) [hereinafter HREOC REPORT], available at <https://www.humanrights.gov.au/sites/default/files/document/publication/NIRV.pdf> (recommending federal civil offenses be established against racial harassment, incitement to racial hostility, and racial violence and racial hatred likely to lead to violence). The HREOC report viewed incitement of racial hostility as less serious than racist violence and intimidation. *Id.* at 300.

<sup>66</sup> ELLIOT JOHNSTON, VOL. 4, AUSTRALIAN ROYAL COMMISSION INTO ABORIGINAL DEATHS IN CUSTODY: NATIONAL REPORT (1991), available at <http://www.healthinfonet.ecu.edu.au/key-resources/bibliography?lid=10265> (click "View Report" to download) [hereinafter ABORIGINAL REPORT]. The Aboriginal Report recommended federal civil legislation modeled on Article 20 of the ICCPR, and advocated for the enactment of a federal civil offense making racial vilification unlawful. Racial vilification would involve speech that amounted to "racial violence, discrimination or hostility." *Id.* at 28.3.31.

<sup>67</sup> AUSTRAL. LAW REFORM COMM., REPORT NO. 57, MULTICULTURALISM AND THE LAW (1992), available at <http://www.alrc.gov.au/sites/default/files/pdfs/publications/alrc57.pdf> (recommending the enactment of a federal law carrying civil penalties for incitement to racial hatred and hostility).

<sup>68</sup> HREOC REPORT, *supra* note 65, at 390–92. McNamara & Solomon, *supra* note 63, at 261–63; Tim Wilson, *Opponents Speak with Mixed Voices*, AUSTRALIAN (Aug. 9, 2014), available at <http://www.timwilson.com.au/articles/opponents-speak-with-mixed-voices-the-australian>.

<sup>69</sup> Racial Discrimination Amendment Bill 1992 (Cth) [hereinafter RDA 1992], available at <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillsdgs%2F9I410%22>. The bill proposed amending the Crimes Act 1914 by inserting a new Part IVA, titled "Racial Incitement." *Id.* at 4. The bill proposed criminalizing "racial incitement," which is defined as "knowingly perform[ing] a public act that is racially offensive with the intention of stirring up hatred against a person or group of people on the grounds of race, colour or racial or ethnic origin." *Id.* It also proposed making it an offense to perform an act with the intention of causing "persons of a particular race, colour or national or ethnic origin to fear that violence may be used against them or other persons of such a group." *Id.*

<sup>70</sup> McNamara & Solomon, *supra* note 63, at 263–64.

The 1992 bill also recommended adding a civil provision for acts likely to “stir up hatred, serious contempt, or severe ridicule against a person or a group” on the grounds of race, colour, or national or ethnic origin.<sup>71</sup> The bill was introduced just before the summer recess in Parliament, during which the then Labor government sought public submissions.<sup>72</sup> Concerns were raised that: (a) the creation of a federal offense of racial incitement would excessively restrict freedom of speech; (b) pre-existing offenses, such as assault, deal with the conduct covered in the proposed amendments; and (c) more effective enforcement of existing laws would accomplish the same purpose.<sup>73</sup> At the date this bill was introduced, there had been no prosecutions under parallel state legislation in New South Wales (NSW).<sup>74</sup> The government called an early federal election at the beginning of 1993 and the bill subsequently lapsed.<sup>75</sup> Reservations expressed in the public submissions were allegedly taken into account by the government in an amended bill introduced in 1994.<sup>76</sup>

The Racial Hatred Bill 1994 did not follow the recommendations of any of the national reports. It proposed three criminal offenses, two of which deal with threatening to cause physical harm to persons or property because of race, colour or national or ethnic origin.<sup>77</sup> Conduct reasonably likely to incite racial hatred was made a third criminal offense.<sup>78</sup> Arguably, these proposed criminal offenses partially implemented Australia’s obligations under the ICCPR and the ICERD.

The 1994 bill also proposed amending the Racial Discrimination Act 1975 to provide that it is unlawful to do an act which is “reasonably likely to offend, insult, humiliate or intimidate” another person or group, if one of the reasons for doing the act is their race, color or national or ethnic origin.”<sup>79</sup> These civil provisions arguably have no explicit foundation in the ICCPR or

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<sup>71</sup> RDA 1992, *supra* note 69, at 4.

<sup>72</sup> McNamara & Solomon, *supra* note 63, at 263–64.

<sup>73</sup> RDA 1992, *supra* note 69, at 3.

<sup>74</sup> *Id.* at 2. Indeed, as outlined later in this Article, there have been no prosecutions to date under the NSW Act. *See infra* Part II.D.

<sup>75</sup> McNamara & Solomon, *supra* note 63, at 263–64.

<sup>76</sup> Racial Hatred Bill 1994 (Cth) [hereinafter RHB 1994], *available at* <http://parlinfo.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillsdgs%2FM7Z10%22>. Five hundred and sixty-three submissions were opposed to the proposed law, and eighty-three were in favor of it. *Id.* at 5.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 9.

the ICERD since there is nothing in either treaty imposing an obligation to proscribe racially offensive, insulting, or humiliating speech.<sup>80</sup>

Debate in the House of Representatives on the Racial Hatred Bill 1994 was highly charged. Proponents of the law noted the roots and pervasiveness of racism in Australia, the level of racial violence, and the devastating socio-economic and psychological consequences of racist hate speech on its targets.<sup>81</sup> They also discussed the adverse impact societal racism has on its targets' inclination to engage in meaningful dialogue and participate in democratic institutions.<sup>82</sup> In contrast, representatives opposed to the bill repeated popular claims made by journalists regarding the need to safeguard free speech principles from being eroded by " 'thought police' and the forces of 'political correctness.' " <sup>83</sup> Such opponents preferred the U.S. approach to hate speech; namely, that the best way to counter hate speech is through more speech rather than the suppression of such speech.<sup>84</sup>

The Senate Legal and Constitutional Legislation Committee Inquiry into the Racial Hatred Bill received twenty-four submissions.<sup>85</sup> The proposed bill was intended to: (a) serve an educational function concerning appropriate standards for public discourse; and (b) punish acts threatening violence and inciting racial hatred so as to deter others from doing the same.<sup>86</sup> Concerns were raised that pre-existing offenses already dealt with threats to people or property irrespective of motivation.<sup>87</sup> The proposed offenses would be more difficult to prove because of the need to establish racial motive.<sup>88</sup> This, in turn, could result in the acquittal of an individual who would in other circumstances be convicted under existing state or territory laws.<sup>89</sup> These concerns were dismissed by the senate committee because prosecutors would

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<sup>80</sup> See *Toben v. Jones* (2003) 129 FCR 515, for an example of an unsuccessful attempt to challenge these civil provisions—which were ultimately incorporated into section 18C of the RDA—on the basis of an invalid exercise of commonwealth power with respect to "external affairs" due to the nonconformance of such provision with the ICERD. See also *infra* note 115 and accompanying text.

<sup>81</sup> McNamara & Solomon, *supra* note 63, at 272.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 272–73.

<sup>84</sup> *Id.* at 273.

<sup>85</sup> SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE, RACIAL HATRED BILL 1994, at 2 (1995), available at [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Completed\\_inquiries/pre1996/racial\\_hatred/index](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/pre1996/racial_hatred/index).

<sup>86</sup> *Id.* at 2–3.

<sup>87</sup> *Id.* at 10.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

not be prevented from charging offenders under existing state or territory laws.<sup>90</sup>

An additional problem identified with the proposed criminal offenses is that punishment under existing laws for threats to people or property carries much heavier prison sentences.<sup>91</sup> This is a significant issue that has also been identified in similar state laws criminalizing serious racial vilification, and has been a considerable factor accounting for lack of prosecutions in all states and territories that have made serious racial vilification a criminal offense.<sup>92</sup>

The civil provisions were the only provisions with enough support in the Senate to be enacted into legislation.<sup>93</sup> Responding to the Australian government's failure to enact any criminal offenses, in 1994 the ICERD Committee recommended that Australia enact suitable laws so as to enable it to withdraw its reservation to Article 4(a) of the ICERD.<sup>94</sup> In 2013, the

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<sup>90</sup> *Id.* at 12. Proposed section 61 of the bill provided that the criminal offenses in sections 58 and 59 were not intended to exclude or limit the concurrent operation of any law of a state or territory. This would ensure state and territory laws are not deemed invalid under section 109 of the Australian Constitution due to inconsistency with commonwealth law.

<sup>91</sup> *Id.* at 13.

<sup>92</sup> Alan Berman & John Anderson, *Anti-Semitic Attack Proves Need for Racial Vilification Laws*, ON LINE OPINION (Aug. 14, 2014), <http://www.onlineopinion.com.au/view.asp?article=16591>. Concern over the lack of prosecutions for serious racial vilification prompted the Premier of NSW to request that the Upper House Parliamentary Committee conduct an inquiry into the effectiveness of the state racial vilification laws. STANDING COMM. ON LAW & JUSTICE, RACIAL VILIFICATION LAW IN NEW SOUTH WALES (2013) [hereinafter Committee Report], available at [http://www.parliament.nsw.gov.au/Prod/Parliament/committee.nsf/0/e08d4387100a3c56ca257c35007fcc4d/\\$FILE/Racial%20vilification%20law%20in%20New%20South%20Wales%20-%20Final%20report.pdf](http://www.parliament.nsw.gov.au/Prod/Parliament/committee.nsf/0/e08d4387100a3c56ca257c35007fcc4d/$FILE/Racial%20vilification%20law%20in%20New%20South%20Wales%20-%20Final%20report.pdf). Some of the participants in the inquiry asserted that existing laws governing serious racial vilification require a much higher level of evidentiary proof and provide lower sentences than the parallel crimes of assault and affray in the *Crimes Act 1900* (NSW) (Crimes Act). *Id.* at 30–31. For this reason, the general offences under the Crimes Act are invariably pursued by prosecutors. *Id.* The Committee noted the majority of stakeholders construed the lack of prosecutions under the existing racial vilification laws as indicative of their ineffectiveness, especially in light of the fact that such laws were intended to set a symbolic standard demonstrating that the community considers serious racial vilification inexcusable. *Id.* at 35. As a result, the Committee concluded the educative and symbolic functions of the law are impeded by the absence of prosecutions as there has been no media coverage that would inform the wider community of their existence and purpose. *Id.*

<sup>93</sup> McNamara & Solomon, *supra* note 63, at 265.

<sup>94</sup> *Id.* at 261.

ICERD Committee reiterated its recommendation that states parties withdraw existing reservations to the treaty.<sup>95</sup>

*D. The Current “Racial Hatred” Legislative Landscape*

There are currently no separate federal criminal offenses in existence that implement the obligations of Article 20(2) of the ICCPR or Article 4 of the ICERD.<sup>96</sup> In 2007, Australia indicated in its Fifth Report to the UNHRC under the ICCPR that it considered its reservation to Article 20 of the ICCPR necessary.<sup>97</sup> In its concluding observations, the UNHRC called upon Australia to enact a comprehensive legislative framework giving effect to the provisions of the ICCPR at the federal level, and expressed regret with Australia’s continuing failure to withdraw its ongoing reservation.<sup>98</sup> These observations may suggest that it is partly the lack of criminal offenses in existing domestic legislation that keeps Australia from complying with its Article 20 obligations.<sup>99</sup>

Australia’s ongoing reservations to both treaties are primarily based on an exaggerated concern with maintaining notions of free speech.<sup>100</sup> Undue emphasis on protecting free speech rights has eclipsed consideration of other human rights protections—such as the right to dignity and equality—which translate into the need for racial minorities to live in the community free of fear from hostility and violence.<sup>101</sup> Indeed, the recent national debate surrounding proposed amendments to the civil liability provisions of section

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<sup>95</sup> The Committee encouraged state parties retaining a reservation to explain why such a reservation is deemed essential, the specific impact of the reservation on existing domestic law and policy, as well as any strategies to reduce the scope of and withdraw the reservation within a set period of time. General Recommendation No. 35, *supra* note 20, at 7.

<sup>96</sup> Gelber Background Paper, *supra* note 37, at 2.

<sup>97</sup> *Id.* at 3. Australia also indicated its continuing reservation to Article 4(a) of ICERD is necessary.

<sup>98</sup> Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Comm.: Australia, 95th Sess., Mar. 16–Apr. 3, 2009, ¶ 9, U.N. Doc. CCPR/C/AUS/CO/5 (May 7, 2009), available at <http://www2.ohchr.org/english/bodies/hrc/docs/co/CCPR-C-AUS-CO5-CRP1.doc>.

<sup>99</sup> Gelber Background Paper, *supra* note 37, at 3.

<sup>100</sup> McNamara & Solomon, *supra* note 63, at 272–73. See also Waldron, *supra* note 16, at 1599–1600 (persuasively reasoning that laws prohibiting hate speech, at a minimum, strive to reassure all members of society that they will be protected from “abuse, defamation, humiliation, discrimination and violence”).

<sup>101</sup> Waldron, *supra* note 16, at 1599–60. See also MCNAMARA, *supra* note 63, at 304–05; NEIL REES, SIMON RICE & DOMINIQUE ALLEN, AUSTRALIAN ANTI-DISCRIMINATION LAW 620 (2014).

18C of the RDA brought to light the relatively greater concern of Australians with respect to freedom from racial abuse in public spaces, as opposed to freedom of speech.<sup>102</sup> In sharp contrast to an almost 60% increase in complaints of racial discrimination received in 2012, the Australian Human Rights Commission (AHRC) receives just a small number of complaints each year alleging a violation of the right to freedom of speech.<sup>103</sup> While some states and territories have established criminal offenses for serious racial vilification, these laws do not implement all obligations flowing from the ICERD.<sup>104</sup> For example, most restrict serious vilification offenses to public acts rather than extending the scope of the offense to all circumstances, irrespective of whether the vilification occurred in public as provided in Article 4(a) of the ICERD.<sup>105</sup>

Moreover, the laws proscribing serious vilification have almost never been enforced at the state or territory level because of complicated procedural hurdles in the relevant legislation, a lack of knowledge on the part of law enforcement about the existence of such offenses, and resistance by prosecutors to bring claims under offenses which impose much higher evidentiary burdens and lighter sentences than exist for parallel common crimes, such as assault, affray and intimidation.<sup>106</sup> Indeed, the only jurisdiction in which there has been a successful prosecution under state or territory legislation is Western Australia.<sup>107</sup> The ineffectiveness of these

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<sup>102</sup> See Professor Gillian Triggs, President, Sydney Institute, Address: Freedom of Speech and Racial Vilification: One Man's Freedom Ends Where Another's Start (Nov. 23, 2013) (transcript available at <https://www.humanrights.gov.au/news/speeches/freedom-speech-and-racial-vilification-one-man-s-freedom-ends-where-another-s-starts>).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* The public act requirement in the NSW legislation prompted the NSW Aboriginal Land Council and the NSW Young Lawyers to recommend to a parliamentary inquiry that NSW dispense with the requirement that the vilification be in public, noting that Article 4(a) of the ICERD requires the criminalization of all vilification. Some inquiry participants recommended as a compromise that the public act requirement be replaced with public communication. Alternatively, some suggested the internet be included in the definition of public act so as to capture communication on social media. See Committee Report, *supra* note 92, at 38–40; Mason, *supra* note 10, at 328–29.

<sup>106</sup> See Mason, *supra* note 10, at 328–29; *infra* notes 201–12 and accompanying text.

<sup>107</sup> Western Australia has established criminal offenses for racist conduct, including conduct intended to incite racial animosity or racial harassment. See Criminal Code §§ 77–78, 80A (W. Austrl.). There have been three prosecutions for these racial hatred offenses, of which, two have been successful. See REES, RICE & ALLEN, *supra* note 101, at 683, 686. Most recently, in 2011, a man in Western Australia was sentenced to three years imprisonment on six racial hatred charges for posting an online video referring to a Jewish man he encountered

state and territory laws in discharging Australia's obligations under the ICERD and achieving the goals of hate speech regulation are canvassed in greater detail later in this Article.

Australia's overstated concern with freedom of speech contradicts the view of the ICERD Committee that proscribing racist hate speech complements rather than diminishes the right to freedom of expression.<sup>108</sup> Moreover, Australia's continuing reservation to the relevant provisions in the ICCPR and the ICERD represents a marked difference from most other countries ratifying these international conventions. Only a minority of states have articulated reservations to the hate speech provisions of the ICCPR and the ICERD.<sup>109</sup> This signifies the principles enunciated in both treaties have gained relatively widespread acceptance globally.<sup>110</sup>

### *E. The Constitutional Position*

Unlike many other Western democracies, the Australian Constitution provides no express guarantee of freedom of expression that would impose a limitation on enacting federal criminal provisions in conformity with the relevant provisions of the ICCPR and the ICERD. The High Court of Australia, however, has recognized the plenary power of the federal

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in a supermarket as a "racist, homicidal maniac." In the video, the defendant said: "You have a religion of racism, hate, homicide and ethnic cleansing." Angie Raphael, *Man Jailed for Posting Anti-Semitic Video Online*, SYDNEY MORNING HERALD (Jan. 31, 2011), <http://www.smh.com.au/technology/technology-news/man-jailed-for-posting-antisemitic-video-online-20110131-1abm3.html>.

<sup>108</sup> See General Recommendation No. 35, *supra* note 20, ¶ 45.

<sup>109</sup> The U.K., Belgium, Denmark, Finland, Iceland, Ireland, the Netherlands, Sweden, New Zealand, and the U.S. have also attached reservations to Article 20 of the ICCPR. See U.N. Treaty Collection, *International Covenant on Civil and Political Rights*, [https://treaties.un.org/Pages/ViewDetails.aspx?sr=IND&mtdsg\\_no=IV-4&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?sr=IND&mtdsg_no=IV-4&chapter=4&lang=en). Austria, Belgium, France, Ireland, Italy, Japan, Switzerland, Thailand, and the U.S. have attached reservations or announced they would interpret Article 4 of the ICERD either in conformance with their constitution or consistent with the right of free expression. See U.N. Treaty Collection, *International Convention on the Elimination of All Forms of Racial Discrimination*, [http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=I V-2&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=I V-2&chapter=4&lang=en).

<sup>110</sup> Erik Bleich, *The Rise of Hate Speech and Hate Crime Laws in Liberal Democracies*, 37 J. ETHNIC & MIGRATION STUD. 917, 921 (2011). The ICERD Committee has repeatedly called on states attaching reservations such as Australia, the U.K., and the U.S. to adopt legislation that would bring them in compliance with their Article 4 international legal obligations. Ivan Hare, *Extreme Speech under International and Regional Human Rights Standards*, in EXTREME SPEECH AND DEMOCRACY 70 n.41, 72 n.46 (Ivan Hare & James Weinstein eds., 2009); SAMUEL WALKER, HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY 89–90 (1994).

government to enact domestic legislation implementing Australia's international treaty obligations.<sup>111</sup> This broad power has three qualifications. First, the treaty must be *bona fide*.<sup>112</sup> Second, the domestic law must conform to the provisions of the treaty.<sup>113</sup> Finally, the implementing legislation must not violate a constitutional prohibition or limitation on power.<sup>114</sup> As discussed below, the implied limit on legislative power to interfere with communication on governmental and political matters is unlikely to be a constitutional impediment to the enactment of federal laws criminalizing racist hate speech.<sup>115</sup> Consequently, it is unlikely the High

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<sup>111</sup> *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 (holding the external affairs power granted under section 51 of the Australian Constitution provides the federal government with the power to implement treaty provisions in domestic legislation).

<sup>112</sup> *Id.* at 216.

<sup>113</sup> *Id.*

<sup>114</sup> *Commonwealth v. Tasmania* (1983) 158 CLR 1 (Tasmanian Dams Case). In the Tasmanian Dams Case, the High Court held the conformance requirement means the law must carry

into effect or to comply with the particular provisions of a treaty . . . [In other words], the law [must be] capable of being reasonably considered to be appropriate and adapted to achieving what is said to impress it with the character of a law with respect to external affairs. [There should] be a reasonable proportionality between the designated purpose or object and the means which the law embodies for achieving or procuring it.

*Id.* at 259–60. As with constitutional jurisprudence in the U.S., the High Court is especially concerned with laws that are overinclusive. Underinclusiveness is less of a concern unless the deficiency in implementation of a treaty “is so substantial as to deny the law the character of a measure implementing the convention or, when coupled with other provisions of the law . . . ma[ke] it substantially inconsistent with the convention.” *Victoria v Commonwealth* (1996) 187 CLR 416.

<sup>115</sup> The civil provisions of the RDA are arguably more susceptible to constitutional challenge as exceeding the external affairs power in the Australian Constitution because they do not contain criminal provisions as provided in Article 4 of the ICERD and render unlawful actions that are merely likely to “offend, insult, humiliate or intimidate” a person or group because of their race or ethnic origin. *Toben v Jones* (2003) 129 FCR 515. This possibly sets a lower bar for legal intervention than the ICERD or ICCPR allow. Nonetheless, in *Toben*, an Australian federal court rejected just such a challenge. *Id.* The court held the civil provisions need to be considered in relation to both the ICERD as well as the ICCPR, and that the relevant provisions prohibiting public acts are likely to incite other persons to racial hatred and discrimination or amount to acts of such hatred or discrimination. Consequently, the ICCPR was found to be directed not just at acts of racial discrimination and hatred, but also to dissuading “public expressions of offensive racial prejudice that might lead to acts of racial hatred and discrimination.” *Id.* The court also held the legislature can choose the means by which it gives effect to a treaty. Given the result in *Toben*, criminal provisions with language paralleling that contained in Article 20 of the ICCPR and Article 4 of the ICERD would likely be upheld against challenge as exceeding the “external affairs” power of the Commonwealth.

Court would strike down criminal laws implementing Australia's obligations under the ICCPR and the ICERD as an invalid exercise of commonwealth power with respect to "external affairs."

Australia has neither an entrenched nor an ordinary bill of rights at the commonwealth level,<sup>116</sup> however, the High Court of Australia has found that the doctrine of representative and responsible government reflected in the text and structure of the Australian Constitution implicitly guarantees the freedom of expression in relation to public and political matters.<sup>117</sup> Though there would arguably be a limited class of racist hate speech associated with the freedom of political discussion, the High Court has tended to embrace an expansive view of public and political matters that are encompassed within the freedom.<sup>118</sup>

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See also REES, RICE & ALLEN, *supra* note 101, at 618; Katharine Gelber, *Implementing Racial Anti-Vilification Laws in New South Wales 1989–1998: A Study*, 59 AUSTRALIAN J. PUBLIC ADMIN. 13, 21 (2000).

<sup>116</sup> See GEORGE WILLIAMS & DAVID HUME, HUMAN RIGHTS UNDER THE AUSTRALIAN CONSTITUTION 67–70 (2d ed. 2013). In deciding not to incorporate an entrenched bill of rights within the Australian Constitution, the framers were heavily swayed by the writings of two nineteenth-century English constitutional commentators, James Bryce and A.V. Dicey, both of whom were cynical about the need to protect civil liberties through an entrenched bill of rights. *Id.* at 67. Early attempts to include provisions, such as a due process clause, were rejected by the framers, who were apprehensive that such a clause would inhibit the ability of the states to continue their racially discriminatory policies. The debate over this clause—which was defeated by a vote of 23 to 19—reflected the lack of concern the majority of the framers possessed with respect to the protection of minority rights. *Id.* at 69–70.

<sup>117</sup> The implied freedom of political communication is not an individual right. See *Lange v Australian Broad. Corp.* (1997) 189 CLR 520 (stating sections 7 and 24 of the Australian Constitution give rise to an implied freedom of political communication that does not bestow individual rights). Rather, the implied freedom acts as a restraint on legislative action, and is balanced against other legitimate interests. See WILLIAMS, BRENNAN & LYNCH, *supra* note 116, at 1136; Michael Coper, *The High Court and Free Speech: Visions of Democracy or Delusions of Grandeur?*, 16 SYDNEY L. REV. 185 (1994) (sketching the policy arguments in favor of, and opposing, the implied guarantee of freedom of communication in relation to political matters).

<sup>118</sup> See Dan Meagher, *What is 'Political Communication?' The Rationale and Scope of the Implied Freedom of Political Communication*, 28 MELB. U. L. REV. 438, 463 (2004) (noting the court's terminology in *Lange* "necessarily entails a broader conception of political communication" (internal quotation marks omitted)). Racist hate speech relating to Australia's immigration and asylum seeker policy would likely be associated with public and political discussion as it could affect federal voting intentions. See *Lange*, 189 CLR at 560 (considering a particular communication to be based on "political matters" if there is a link with the choice of voters in federal elections or on referenda to amend the constitution under section 128); *Levy v State of Victoria* (1997) 189 CLR 579, 623 (finding insulting, offensive, passionate, or angry speech that draws on fear or prejudice can still be classified as political if it can be associated with the choice of voters in federal elections). However, outright

Nonetheless, the right of political communication is not absolute. Laws infringing on political communication are constitutional if: (a) their purpose is compatible with maintaining the constitutionally prescribed system of representative government; and (b) they are reasonably appropriate and adapted to achieving a legitimate end.<sup>119</sup> Moreover, the High Court has recognized governmental regulation of expression might be needed in certain circumstances—e.g., to prevent intimidation and undue influence in elections.<sup>120</sup> Thus, even if a law burdens political communication, it might still survive constitutional scrutiny if the government is trying to achieve another legitimate goal, such as the protection of individuals from racial vilification, the promotion of equal opportunity for all citizens, or the enhancement of participation in the political process through a citizenry

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denigration of a particular race or ethnic group arguably would not fall within the zone of public or political discussion. See, e.g., *Owens v Menzies* (2012) QCA 170 (upholding a state vilification law against a challenge that it violated the implied freedom of political communication after concluding the relevant provision was reasonably adapted to achieve the legitimate aims of promoting equality of opportunity and improving the quality of democratic life through an educated citizenry respectful of the dignity and worth of all members).

<sup>119</sup> See *Coleman v Power* (2004) 209 ALR 182 (holding a law must have a sufficiently important purpose to justify interfering with the political communication needed to maintain a constitutionally prescribed system of representative government). The interest in political communication will in many cases trump the countervailing justification for the law. See, e.g., *Australian Capital Television Pty. Ltd. v Commonwealth* (1992) 177 CLR 143 (indicating content-based restrictions will be held to a much higher level of scrutiny and must be justified by a reasonably tailored and compelling public interest, as opposed to content-neutral restrictions, which are much more likely to survive constitutional muster). Racial vilification laws have been criticized as content-based restrictions designed to suppress racist ideas. In actuality, anti-vilification laws are concerned with conduct that incites racial hatred, and at most, only incidentally prevent political communication. See Asaf Fisher, *Regulating Hate Speech*, U. TECH. SYDNEY L. REV. 21, 42–43 (2006) (reasoning the current RDA is directed at the effects of racial vilification rather than the content of the underlying racist messages communicated). Even assuming the High Court considers anti-vilification laws content-based, the interest of the government in preventing the potential physical violence often associated with hate speech might be sufficiently compelling to overcome the overriding weight usually accorded to political communication. See Adrienne Stone & Simon Evans, *Australia: Freedom of Speech and Insult in the High Court of Australia*, 4 INT'L J. CONST. L. 677, 683 (2006). Moreover, racial vilification laws arguably facilitate representative democracy because the targets of racist hate speech will be more likely to participate in the political process. See Katharine Gelber & Luke McNamara, *Freedom of Speech and Racial Vilification in Australia: 'The Bolt Case' in Public Discourse*, 48 AUSTRALIAN J. POL. SCI. 470, 479 (2013). Thus, these restrictions seem compatible with maintaining the constitutionally prescribed system of representative government.

<sup>120</sup> *Australian Capital Television*, 177 CLR, at 142–43.

considerate of the worthy contribution of all its members to public discourse.<sup>121</sup>

The High Court has not yet had occasion to determine if racial vilification laws are invalid because they burden the implied freedom of political communication. State vilification laws in New South Wales, Queensland and Victoria have been challenged on the basis they violate the implied freedom of political communication, and there has been some disagreement about whether these laws effectively burden freedom of political communication.<sup>122</sup> However, even if such laws do effectively burden political communication, they are nonetheless reasonably appropriate and adapted to achieving other legitimate ends—e.g. preventing vilification, promoting the human rights goals of equality and dignity as well as enhancing democratic life—in a manner compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.<sup>123</sup> Thus, criminal offense provisions in commonwealth legislation implementing Australia's obligations under Article 20 of the ICCPR and Article 4 of the ICERD are unlikely to run afoul of constitutional limitations.

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<sup>121</sup> See, e.g., *Owens v Menzies* (2012) QCA 170. In *Owens*, President of the Queensland Court of Appeal Margaret McMurdo found the challenged anti-vilification law reasonably appropriate and adapted to serve the legitimate ends of “promoting equality of opportunity for all members of the community . . . and improv[ing] the quality of democratic life through an educated citizenry respectful of the dignity and worth of all members.” *Id.* at 415.

<sup>122</sup> Compare *Sunol v Collier (No. 2)* (2012) NSWCA 44 (upholding the challenged homosexual vilification provisions of the *Anti-Discrimination Act 1977* (NSW) as reasonably tailored to achieve an appropriate balance between preventing homosexual vilification and the freedom to discuss and debate political matters required by the constitution), with *Owens v. Menzies* (2012) QCA 170 (concluding the state vilification law was reasonably adapted to achieve the legitimate aim of promoting equality of opportunity and improving the quality of democratic life through an educated citizenry respectful of the dignity and worth of all members), and *Catch the Fire Ministries Inc. v Islamic Council of Victoria Inc.* 15 VR 207 (2006) (concluding the prevention of religious vilification sufficient to deny a challenge to a state religious vilification law on grounds that it violated the implied freedom to free political communication). See also Joshua Close, Case Note, *Applying an Unequal Balance: Freedom of Expression and Religious Vilification in Catch the Fire Ministries Inc. & Ors. v Islamic Council of Victoria Inc.*, 3 QUEENSLAND L. STUDENT REV. 1 (2010).

<sup>123</sup> See *supra* notes 118–22 and accompanying text.

*F. Implementation of International Treaty Obligations by Other Western Democracies*

The failure of the Australian federal government to pass criminal laws implementing its obligations under both the ICCPR and the ICERD is out of sync with most other Western democracies, which have made promotion of racial hatred or incitement to racial discrimination, hatred, or violence a criminal offense. These countries recognize that the propagation of racist ideas erodes notions of equality and can ultimately lead to racial violence, thereby undermining social stability and public order.

For example, the atrocities committed by the Nazis against the Jews in World War II affected the means deployed by European countries to deal with racist hate speech.<sup>124</sup> As a result, France, Italy, Austria, and Germany outlawed denial of the Holocaust and particular groups holding extremist views.<sup>125</sup> Similarly, Ireland, Sweden, the U.K., and the Netherlands criminalized incitement to racial discrimination or hatred.<sup>126</sup> Some countries also sought to ban the dissemination of racist ideas inciting racial discrimination or hatred; recognizing such ideas are a breeding ground for racial intolerance and may ultimately lead to violence involving racial animus.<sup>127</sup>

Other Western democracies, such as Canada (which has a constitutionally entrenched right of free speech), have enacted specific criminal offenses for public incitement of racial hatred likely to cause a breach of the peace and willful promotion of racial hatred.<sup>128</sup> Indeed, there has been a growing

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<sup>124</sup> Mary Coussey, *Tackling Racial Equality: International Comparisons*, HOME OFFICE RESEARCH STUDIES 10, 17–22 (2002); Robert Kahn, *Why Do Europeans Ban Hate Speech? A Debate Between Karl Loewenstein and Robert Post*, 41 HOFSTRA L. REV. 545, 563 (2013); David Kretzmer, *Freedom of Speech and Racism*, 8 CARDOZO L. REV. 445, 448–49 (1987); Cristiana Carletti, *Contemporary Social Fuelling the Genocide Intent: Hate Speech and Hate Crimes: Legal Remarks For a Common Definition and Related Operational Preventing Mechanisms*, 3 EUR. CRIM. L.R. 355 (2013), available at [http://www.academia.edu/6874485/Contemporary\\_social\\_fuelling\\_the\\_genocide\\_intent\\_hate\\_speech\\_and\\_hate\\_crimes\\_Legal\\_remarks\\_for\\_a\\_common\\_definition\\_and\\_related\\_operational\\_preventing\\_mechanisms](http://www.academia.edu/6874485/Contemporary_social_fuelling_the_genocide_intent_hate_speech_and_hate_crimes_Legal_remarks_for_a_common_definition_and_related_operational_preventing_mechanisms).

<sup>125</sup> See Coussey, *supra* note 124, at 17–22.

<sup>126</sup> *Id.*

<sup>127</sup> See *id.*; Carletti, *supra* note 124, at 356.

<sup>128</sup> Criminal Code, R.S.C., c. C-46, § 319 (1985) (Can.), available at <http://laws-lois.justice.gc.ca/eng/acts/C-46/page-71.html#h-92>; Gelber, *supra* note 14, at 113; Waldron, *supra* note 16, at 1596–97. See also *supra* notes 30, 42; *infra* note 162.

acceptance of hate speech regulation globally.<sup>129</sup> Even the U.S., which has historically extended constitutional protection to hate speech, has fashioned hate crime laws enhancing penalties for certain categories of crimes motivated by racial prejudice that have survived constitutional review.<sup>130</sup> In *R.A.V. v. City of St. Paul*,<sup>131</sup> the U.S. Supreme Court struck down as

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<sup>129</sup> The growing acceptance of hate speech regulation globally is reflected in the 1996 South African Constitution that includes a hate speech provision in its constitutionally entrenched right to freedom of expression. Article 16(2) of the South African Constitution provides that freedom of expression does not extend to incitement of imminent violence or advocacy of hatred based on race which constitutes incitement to cause harm. There is also a general limitation clause in Article 36 allowing for the abridgement of rights to

the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors, including the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.

S. AFR. CONST., 1996, Art. 16 § 2; Art. 36, available at <http://www.gov.za/documents/constitution/chapter-2-bill-rights>; see also Gelber, *supra* note 14, at 113–15.

<sup>130</sup> See Eric Barendt, *Free Speech in Australia: A Comparative Perspective Symposium, Constitutional Rights for Australia*, 16 SYDNEY L. REV. 149 (1994). The traditional protection afforded to hate speech in the United States reflects an underlying mistrust of the government to remain neutral in regulating speech. Content-based governmental restrictions of hate speech might ultimately lead to restrictions on other types of harmless protected speech, such as political speech. The difference in approach to hate speech regulation in the United States and Europe can be explained in part by the unique features of U.S. history, including the fight for independence against a distant imperial monarch which fostered suspicion of government. Unlike Europe, the United States was not affected by authoritarian regimes at the time free speech jurisprudence was developing in the early twentieth century in the United States. *Id.* at 155–57. In addition, constitutional provisions in some European countries, such as Germany, were written in the aftermath of the atrocities committed during World War II. Consequently, their constitutional free speech provisions are more firmly rooted in the emerging norms of international human rights law reflected in the UDHR. Manifesting their experiences during World War II, some European countries, including the U.K., France, and Germany all criminally proscribe incitement to racial hatred. *Id.* at 157–60.

<sup>131</sup> 505 U.S. 377 (1992). Writing for the majority, Justice Scalia acknowledged certain categories of speech are unprotected under the First Amendment, such as fighting words, obscenity, defamation, and threats of physical harm. But even these categories of unprotected speech can only be regulated to the extent there is no content discrimination. For example, the government may proscribe libel, but it may not proscribe only libel critical of the government. Thus, the First Amendment prevents the government from proscribing speech because of its disapproval of the ideas expressed. *Id.* at 384. The Court did note, however, that if the entire “basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists.” *Id.* at 388. So, for example, the government could criminalize threats directed against the President since the reason threats of violence are unprotected (e.g., protecting individuals

unconstitutional a city hate crime ordinance prohibiting the display of a symbol that “arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.” The Court held the ordinance was content and viewpoint based, as it only proscribed a class of fighting words considered particularly offensive by the city; namely, fighting words that communicate messages of racial, gender or religious intolerance rather than fighting words on other topics (such as union membership) or all fighting words.<sup>132</sup> Despite its decision in *R.A.V.*, just one year later, the U.S. Supreme Court upheld a penalty enhancement scheme in a state hate crime statute.<sup>133</sup> Most states in the United States now have hate crime laws.<sup>134</sup> In addition, the federal government has also passed hate crime legislation providing for enhanced penalties for certain categories of bias inspired crimes.<sup>135</sup>

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from the fear of violence and the disruption that fear engenders) have special significance when applied to the President. *Id.*

<sup>132</sup> *Id.* at 383–84.

<sup>133</sup> *Wisconsin v. Mitchell*, 508 U.S. 476 (1993). In *Mitchell*, the respondent’s sentence for aggravated battery was enhanced pursuant to Wisconsin law on the basis he intentionally selected his victim on account of the victim’s race. Writing for a unanimous Court, Chief Justice Rehnquist upheld the state law, finding it directed at conduct unprotected by the First Amendment. Chief Justice Rehnquist reasoned that bias inspired crimes are singled out for penalty enhancement because they are considered to cause greater individual and societal harm—such crimes cause distinct emotional distress on their victims, provoke community turmoil and are more likely to trigger retaliatory crimes. *Id.* at 487–88. In addition, judges have historically taken into account many factors in sentencing, including the motive for commission of the crime. *Id.* at 485–87. One commentator has suggested the Court’s reasoning that the statute punished the conduct rather than offender’s expression is a “distinction without a difference,” since the contested issue was not the conduct amounting to battery but instead the racial animus that provoked the offender. Bleich, *supra* note 110, at 924.

<sup>134</sup> Forty-five states and the District of Columbia have laws creating criminal offenses for a number of bias inspired actions involving violence or intimidation. See Bleich, *supra* note 110, at 924.

<sup>135</sup> *Id.* Pursuant to the Violent Crime Control and Law Enforcement Act, the U.S. Sentencing Commission implemented sentencing guidelines for federal hate crimes committed on the basis of the actual or perceived race, color, religion, national origin, ethnicity, or gender of any victim of such crimes. 28 U.S.C. § 994 (1994). In 2009, federal hate crime laws were extended to crimes motivated by animus to the victim’s actual or perceived gender, sexual orientation, gender identity, or disability. Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, § 4701, 123 Stat. 2835 (2009) (codified at 18 U.S.C. § 249 (2012)) (this bill also eliminated the requirement that a victim of intimidation or violence be engaged in one of the areas of protected activity previously designated in the Civil Rights Act such as attending schools, applying for employment, and voting). This measure was added to a Defense Spending Bill to ensure it was not blocked by Republicans. See Jeff

More recently, the U.S. Supreme Court has displayed a greater willingness to allow regulations proscribing symbolic hate speech under the “true threats” exception to First Amendment protection. In *Virginia v. Black*, the Court considered the constitutionality of a state law making it a felony to burn a cross on another’s property with the intent to intimidate any person or group.<sup>136</sup> Under the law, cross burning was considered “*prima facie* evidence of an intent to intimidate.”<sup>137</sup> The Court held the provision unconstitutional because it discriminated on the basis of content and viewpoint by selectively singling out cross burning due to its distinctive message.<sup>138</sup> At the same time, the Court held that cross burning could be criminally proscribed as a “true threat” if it was used to intimidate another person.<sup>139</sup> Justice O’Connor, writing for the majority, concluded “the First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation,” and therefore the regulation of the unprotected category of speech (true threats) in this manner was content neutral.<sup>140</sup>

In conclusion, it is apparent that the global trend concerning hate speech regulation may reflect a growing interaction between domestic hate speech law and the developing body of international human rights law concerning the permissible parameters and requisite standards for hate speech regulation contained in the ICCPR and the ICERD. This interaction may also be observed with regard to the national laws of many other countries that provide greater domestic regulation of hate speech in fulfilment of their obligations under the two treaties.<sup>141</sup>

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Zeleny, *Obama Signs Hate Crimes Bill*, N.Y. TIMES (Oct. 28, 2009), available at [http://thecaucus.blogs.nytimes.com/2009/10/28/obama-signs-hate-crimes-bill/?\\_r=0](http://thecaucus.blogs.nytimes.com/2009/10/28/obama-signs-hate-crimes-bill/?_r=0).

<sup>136</sup> *Virginia v. Black*, 538 U.S. 343 (2003).

<sup>137</sup> *Id.* at 343 (emphasis added).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 360.

<sup>140</sup> *Id.* at 362.

<sup>141</sup> Some international scholars, such as former Australian High Court Justice Michael Kirby, have convincingly reasoned that the forces of globalization have led to greater mutual dependence of states. See Justice Michael Kirby, Address at University of Adelaide and Flinders University Conference on International Law: Hope Amidst the Gloom (Feb. 27, 2004) (transcript available at [http://www.hsourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj\\_27feb04.html](http://www.hsourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_27feb04.html)). Such dependence has played an influential role in fostering greater harmony in human rights protections globally. Justice Kirby pointed to the emergence of a “transnational jurisprudence” in most ultimate courts throughout the globe as one aspect of globalization. *Id.* This has been exhibited in the greater recourse to international human rights law in the process of constitutional interpretation. See Berman,

## III. FREE SPEECH JUSTIFICATIONS AND RACIST HATE SPEECH

Free speech adherents generally proclaim three main justifications for protecting speech. First, proponents contend testing ideas in an unregulated marketplace will ultimately lead to the discovery of truth.<sup>142</sup> Second, free expression fosters democratic values.<sup>143</sup> Third, individuals must be free to express themselves to promote self-actualization.<sup>144</sup>

According to the first justification, truth will percolate to the surface through a free flow of dialogue in the competitive marketplace of ideas. Based on the writings of John Stuart Mill, this justification for free speech was initially judicially recognized by U.S. Supreme Court Justice Oliver Wendell Holmes in his dissent in *Abrams v. United States*:

When men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against

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*supra* note 14, at n.9; Halpin, *supra* note 60, at 492–96 (asserting the forces of globalization, international human rights norms, foreign policy considerations, academic commentary, and the internet have had some influence in sustaining prohibitions of particular hate speech in the U.S., particularly in the post 9-11 period as the Court has seemingly excepted from First Amendment protection speech intended to induce fear of some harm in the future). The proliferation of racist hate speech globally has been associated with an increase in terrorism, which reinforces the importance of tackling the problem both domestically and internationally. Mahoney, *supra* note 7, at 321 n.1. See also *infra* note 158.

<sup>142</sup> The notion that unfettered choice in the marketplace of ideas is the best way to ensure truth underpins U.S. Supreme Court free speech jurisprudence and reflects a mistrust of government. See Barendt, *supra* note 130, at 156; Andrew Kenyon, *What Conversation? Free Speech and Defamation Law*, 73 MOD. L. REV. 697, 698, 706 (2010) (suggesting suspicion of governmental action as a possible fourth justification for resisting legal restrictions on speech).

<sup>143</sup> Gelber, *supra* note 14, at 109–10.

<sup>144</sup> *Id.*

attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.<sup>145</sup>

The argument suggests that the best way to counter racist hate speech is to allow more speech. This, in turn, acts as a safety valve. In other words, legal restrictions on hate speech will merely drive speech underground. This could ultimately lead to physical violence against the targets of such speech, thereby proving more menacing to racial harmony. However, there is no empirical evidence supporting this safety valve theory. During the recent national debate on proposed changes to the civil provisions of the RDA, Prime Minister Abbott relied on this justification as a basis for amending the legislation to raise the legal threshold for bringing a civil complaint for racial vilification: “No one wants to see bigotry or intolerance in our society. The best counter to a bad argument is a good one. And the best antidote to bigotry is decency, proclaimed by people engaging in a free and fair debate.”<sup>146</sup>

Some scholars question the validity of the marketplace of ideas conception of free speech. These scholars argue that truth is unlikely to emerge in an entirely unregulated market,<sup>147</sup> particularly when participants in the market do not have the resources to ensure equal access to have their views aired.<sup>148</sup> As such, the ability of an idea to gain acceptance in the marketplace may reflect the allure rather than the truth of such idea.<sup>149</sup>

This criticism is equally applicable to racist hate speech. Racist hate speech has no value in discovering truth in the competition of the

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<sup>145</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919). See also Kenyon, *supra* note 142, at 702; Gelber, *supra* note 14, at 109.

<sup>146</sup> Judith Ireland, *Politics Live*, SYDNEY MORNING HERALD (Mar. 25, 2014), <http://www.smh.com.au/federal-politics/the-pulse-live/politics-live-march-25-2014-20140324-355ew5.html>.

<sup>147</sup> See James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 502 (2011); Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 487 (2011). But cf. Eugene Volokh, *In Defense of the Marketplace of Ideas/Search for Truth As a Theory of Free Speech Protection*, 97 VA. L. REV. 595 (2011) (rejecting the idea that truth is unlikely to emerge in an unregulated market and defending the marketplace of ideas conception of free speech).

<sup>148</sup> See Marie Iskander, *Balancing Freedoms and Creating a Fair Marketplace of Ideas: The Value of 18C of the Racial Discrimination Act*, 8 INDIGENOUS L. BULL. 19, 19 (2014) (citing Eric Barendt, *Why Protect Free Speech?*, in FREEDOM OF SPEECH 34 (2d ed. 2005)).

<sup>149</sup> Barendt, *supra* note 130, at 156.

marketplace of ideas because the speech is based on false stereotypes.<sup>150</sup> Furthermore, individuals or groups subjected to hate speech are unlikely to engage in a robust dialogue that would demonstrate the fallacies inherent in the speech because hate speech has the effect of silencing its targets. Finally, the marketplace of ideas rationale assumes individuals act rationally in embracing or rejecting particular ideas. However, a multiplicity of factors, aside from reason, often determines if an individual will subscribe to racist ideas, and it is not entirely rational.<sup>151</sup> Therefore, the marketplace of ideas rationale does not present an adequate justification for protecting hate speech.

According to the second rationale, free speech fosters democratic values. Such values depend upon unrestricted expression on political matters so that citizens can participate meaningfully by making informed decisions at the polling booth. As discussed above, the High Court of Australia relied on this rationale in finding an implied constitutional freedom of political communication arising from the system of representative government.<sup>152</sup> Yet, the implied freedom is not absolute.<sup>153</sup> Laws regulating racist hate speech arguably prevent potential violence that can result from such speech. Severe racial vilification has a chilling effect on the willingness of racial minorities to participate in public discourse, thereby eroding their ability to meaningfully participate in the political process and broader community activities. Thus, such laws arguably foster democratic and community values rather than impede them.<sup>154</sup>

The self-actualization rationale views expression, including the freedom to seek, receive, and communicate information and ideas, as vital to human self-development.<sup>155</sup> This rationale assumes that self-development is an absolute right that should not be affected by other interests, such as respect

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<sup>150</sup> See Kretzmer, *supra* note 128, at 476; Kenyon, *supra* note 142, at 697–98 (asserting hate speech and vilification cannot be regarded as conversational speech that facilitates truth in the marketplace of ideas). Canadian Supreme Court cases considering the constitutionality of criminal laws banning racist hate propaganda also recognize that such speech can hinder the search for truth as bigotry obscures reasoning in an entirely unregulated marketplace of ideas, thereby obliterating the marketplace. See, e.g., *Keegstra*, 3 S.C.R. 697.

<sup>151</sup> Kretzmer, *supra* note 128, at 470.

<sup>152</sup> *Nationwide News Pty. Ltd. v Wills* (1992) 177 CLR 1, 71–72, 74. Some commentators have suggested the discovery of truth rationale has also influenced High Court reasoning in the implied freedom cases. See, e.g., Gelber, *supra* note 14, at 110.

<sup>153</sup> See *Australian Capital Television*, 177 CLR at 142.

<sup>154</sup> Kenyon, *supra* note 142, at 704.

<sup>155</sup> *Id.* at 705–06. This rationale is reflected in Article 19(2) of the ICCPR.

for the dignity of all members of society.<sup>156</sup> Hate speech, however, has been demonstrated to have damaging physical and psychological effects on its targets and the wider racial group of which they are or perceived to be a member.<sup>157</sup> For this reason, regulations restricting racist hate speech actually promote self-development, and the chief reasons advanced in support of free speech do not justify protecting speech inciting racial discrimination, hatred, and violence.

#### IV. EXISTING LAWS DO NOT FURTHER THE POLICIES OF RACIAL HATE SPEECH REGULATION

Laws regulating the dissemination of ideas based on racial superiority or hatred, advocacy of racial hatred that constitutes incitement to racial discrimination, hostility and violence as well as severe vilification (threats to persons or property based on racial animus) are intended to serve manifold functions. Such laws are meant to: (a) promote the values of representative democracy by seeking to ensure racial minorities participate meaningfully in public and political discourse; (b) redress historical marginalization and discrimination of racial minorities; (c) encourage civil dialogue and respect between all groups in society; (d) foster fundamental principles of human rights, such as the right to dignity and equality, which allow racial minorities to live in the community free from fear of hostility and violence; (e) serve an educative and symbolic function in highlighting societal abhorrence of hate speech involving racial animus; (f) further the goals of retribution, community protection, deterrence, denunciation, and rehabilitation; and (g) advance social cohesion by endorsing tolerance of diversity in a multicultural society.<sup>158</sup> Existing state and commonwealth legislative schemes fail to achieve these goals in a number of ways.<sup>159</sup>

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<sup>156</sup> Kritzmer, *supra* note 128, at 482–83.

<sup>157</sup> Victims and their associated racial groups have their sense of security eroded because they feel susceptible to future physical and emotional injury. See Mason, *supra* note 1, at 883, 890; Warner, *supra* note 1, at 389. This detrimental impact also applies to members of other marginalized minority groups experiencing severe vilification, such as members of the lesbian, gay, bisexual, transgender and intersex community. See generally ALAN BERMAN & SHIRLEEN ROBINSON, *SPEAKING OUT: STOPPING HOMOPHOBIC AND TRANSPHOBIC ABUSE IN QUEENSLAND* 202 (2010).

<sup>158</sup> Hate crime laws recognize the targets of such crimes, the wider group of which people are perceived to be a member of, and society in general, suffer greater injury than victims of crimes not motivated by animus or prejudice toward protected groups. These injuries may include pecuniary loss as well as a variety of negative feelings, such as loss of dignity, depression, and other physical maladies induced by racial vilification. There is a growing body of national and

*A. Commonwealth Laws*

At present, the Commonwealth cannot prosecute as separate substantive hate crimes individuals engaging in the most egregious forms of racist hate speech, such as instances involving severe vilification. Incidents of severe racial vilification undermine societal attempts to promote social justice and the human rights principles of dignity, equality and tolerance. Such incidents also increase the moral blameworthiness of the offender and should justify greater punishment. Expressly labelling and penalizing such conduct as hate crimes reinforces the law's symbolic and educational message about society's unwillingness to countenance the commission of such acts.<sup>160</sup>

This significant gap in the criminal law can be remedied by the creation of a separate offense labelled as "severe racial vilification" and is justified on the basis of "draw[ing] public attention to the wrongness of a particular

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international literature documenting the links between personal experiences of racism and poor health. See generally Yin Paradies, *A Systematic Review of Empirical Research on Self-reported Racism and Health*, 35 INT'L J. EPIDEMIOLOGY 888 (2006); YIN PARADIES, RICCI HARRIS & IAN ANDERSON, *THE IMPACT OF RACISM ON INDIGENOUS HEALTH IN AUSTRALIA AND AOTEAROA: TOWARDS A RESEARCH AGENDA* (2008) (cooperative Research Centre for Aboriginal Health, Discussion Paper Series No. 4), available at <https://www.lowitja.org.au/sites/default/files/docs/Racism-Report.pdf>; MICHAEL CHESTERMAN, *FREEDOM OF SPEECH IN AUSTRALIAN LAW: A DELICATE PLANT* 193–95 (2002); JEREMY WALDRON, *THE HARM IN HATE SPEECH* 5 (2012); Mason, *supra* note 1, at 874; Gail Mason, *The Hate Threshold: Emotion, Causation and Difference in the Construction of Prejudice-Motivated Crime*, 23 SOCIAL & LEGAL STUDIES 293, 294–98 (2014); Mason, *supra* note 10, at 328–29; Meagher, *supra* note 1, at 225; Cagle Juhan, *Free Speech, Hate Speech, and the Hostile Speech Environment*, 98 VA. L. REV. 1577 (2012).

<sup>159</sup> See Mason, *supra* note 1, at n.10 (noting it is debatable if a commonwealth offense exists for urging the use of force or violence against a racial group). In 2010, the Commonwealth Criminal Code was amended making it an offense to intentionally urge the use of violence against a group of people, or a member of a group, when the target group is distinguished by race. See *Criminal Code Act 1995* (Cth) sch 80.2A–80.2B. The offender must intend that violence or force will occur, and the use of violence or force must "threaten the peace, order and good government of the Commonwealth." *Id.* This provision is actually contained in Division 80 of the Criminal Code entitled "Treason, urging violence and advocating terrorism." *Id.* It is most unlikely this provision of the Criminal Code would cover the range of speech for which international law requires the creation of criminal offenses, as such conduct can be clearly distinguished from treason and terrorism offenses which are largely motivated by hostility towards the government.

<sup>160</sup> See *supra* note 157. As previously canvassed, excessive concern with maintaining notions of free speech has largely overshadowed historical debate on suggested commonwealth criminal offenses for inciting racial hatred and violence as well as severe vilification. See generally *supra* notes 60–80, 94–95 and accompanying text; MCNAMARA, *supra* note 63.

course of action.”<sup>161</sup> The wrongness of particular conduct is what underpins the case for criminalization, and in the case of “severe racial vilification,” the “wrongness stems from the fact that it treats those affected as less than full members of the community. It is wrong because it degrades the dignity of the minority . . . [and] fail[s] to treat minorities with equal respect as human beings.”<sup>162</sup> The underlying norms of equality and entitlement to be treated as full members of society provide the reason for regulating this specific kind of offense in light of the “bad consequences that flow from the discriminator’s culpable choice, that is, the objective consequence of treating certain members of the community as less than full members of society.”<sup>163</sup>

The creation of a specific “severe racial vilification” offense aims to serve the goals of retribution, community protection, denunciation, and deterrence by proportionately punishing such conduct, denouncing the perpetrators of such conduct, and discouraging others from committing such offenses in the future.<sup>164</sup> Even though it is possible these aims are advanced by establishing separate substantive hate crime offenses, the experience of other jurisdictions with federal systems of government, such as Canada, demonstrate that the use of criminal sanctions at the commonwealth level for racist hate speech offenses<sup>165</sup> has limited utility in cultivating equality and tolerance of diversity in a multicultural society, as the instances of prosecution are low.<sup>166</sup>

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<sup>161</sup> See ANDREW ASHWORTH & JEREMY HORDER, *PRINCIPLES OF CRIMINAL LAW* 79 (7th ed. 2013) (providing as examples of the principle of fair labeling “the creation of racially or religiously aggravated versions of certain offences, where the aggravating feature becomes part of the offence label rather than merely a matter that affects sentencing”).

<sup>162</sup> DENNIS J. BAKER, *THE RIGHT NOT TO BE CRIMINALIZED: DEMARCATING CRIMINAL LAW’S AUTHORITY* 201–02 (Tom Campbell ed., 2011).

<sup>163</sup> *Id.* at 202.

<sup>164</sup> See generally *supra* notes 60–80, 94–95 and accompanying text; McNAMARA, *supra* note 63.

<sup>165</sup> Canada has established criminal offenses for inciting racial hatred in a public place and the willful promotion of racial hatred. See Criminal Code, R.S.C., c. C-46, § 319 (1985) (Can.). These criminal provisions have been upheld against constitutional challenge by the Supreme Court of Canada. See, e.g., *Keegstra*, 3 S.C.R. 697 (holding infringements on the right of free speech are constitutional when narrowly tailored to achieve a substantial governmental interest thus satisfying the requirement of proportionality). Aside from these criminal offenses, the Canadian Human Rights Act of 1977 made it unlawful to communicate hate messages or propaganda; however, this civil provision was repealed in 2013. See Luke McNamara, *Criminalising Racial Hatred: Learning from the Canadian Experience*, 1 AUSTRAL. J. HUM. RTS. 198, 201–03 (1994); Mahoney, *supra* note 63, at 231 nn.119–31; Edgar, *supra* note 13, at 139–45.

<sup>166</sup> See *Keegstra*, 3 S.C.R. at 784 (conceding the imperfections of criminal laws in promoting equality and tolerance of diversity in a multicultural society). The low number of actual prosecutions in Canada evidences the reluctance of the state to prosecute hate

Moreover, even in jurisdictions with unitary systems of government, such as Norway, the failure to prosecute persons committing racist hate speech offenses has been criticized for undermining efforts to encourage respectful dialogue between different groups in society, promote equality, tolerance of diversity in a multicultural society, and the meaningful participation of racial minorities in public and political discourse.<sup>167</sup> Nonetheless, at the very least, the criminal law can be deployed in cases requiring tough punitive measures against more severe racial vilification—i.e. incitement to racial hatred and overt violence and physical threats to persons and property based on race—as an important symbolic gesture to emphasize societal disapproval of such conduct and hopefully deter prospective violators. As Kathleen Mahoney has convincingly reasoned:

The need for a state to apply hate speech laws with firmness, consistency, and wisdom is essential if the norms of behaviour we wish to promote in society are to be encouraged. We cannot erase hatred from the world, but we can condemn it and criminalize it. Of all the actions that can be taken to prevent atrocities before they happen . . . there is none more important than prohibiting the worst forms of hate speech.<sup>168</sup>

The only remedies currently available at the commonwealth level in Australia to deal with racial vilification are civil ones contained in the RDA. Access to these remedies, however, entails a lengthy procedure that must be followed by the victim as a pre-condition to commencing civil

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propaganda except in the most serious cases. MCNAMARA, *supra* note 63, at nn.33–35 and accompanying text.

<sup>167</sup> The failure to prosecute persons for racist hate speech offenses (including under the 2005 amendments) has been sharply criticized in Norway. For example, a blogger advocating violence against Muslims in Norway has not been prosecuted under the revised laws. *See supra* note 48; Singre Bangstad, Comment, *Whatever Happened To Norway's Incitement Laws*, INSTIT. OF RACE REL. (Oct. 20, 2011), available at <http://www.irr.org.uk/news/whatever-happened-to-norways-incitement-laws>. In 2011, a right-wing fanatic murdered seventy-seven people in Norway (many of whom were attending a young Labour Party conference) to decimate future Labour leaders and prevent the continued breakdown of Nordic culture brought about by the influx of Muslims. Press Release, Institute of Race Religion, *The Conspiracy Theory and the Oslo Massacre* (Sept. 1, 2011), available at <http://www.irr.org.uk/news/breivik-the-conspiracy-theory-and-the-oslo-massacre/>.

<sup>168</sup> Mahoney, *supra* note 7, at 351.

proceedings.<sup>169</sup> The victim must initially file a complaint with the AHRC.<sup>170</sup> After a complaint is lodged, the matter may be dismissed if the substance of the complaint is not covered by the RDA.<sup>171</sup> The matter may also be dismissed after an investigation is conducted if it is determined the matter is one over which the AHRC has no jurisdiction under the legislation.<sup>172</sup> If appropriate, an attempt will be made to conciliate or resolve the matter through a face-to-face meeting or telephone conference.<sup>173</sup> The AHRC is not empowered to determine if unlawful discrimination as defined under the RDA has occurred.<sup>174</sup> If the matter is not resolved by the Commission, the complaint is terminated and the complainant has sixty days to commence civil proceedings in the Federal Magistrates Court or the Federal Court of Australia for breaches of section 18C of the RDA.<sup>175</sup> This process depends solely on complaints instigated by individuals or groups affected by the challenged breach. The AHRC has neither the resources nor the mandate to initiate investigations of breaches of the legislation in the absence of a complaint.

It is unclear if conciliation is a viable way of dealing with the volume of complaints filed with the AHRC annually. Conciliation might promote civil dialogue and respect between different racial groups in some instances, but it is unlikely to rectify historical marginalization and discrimination of racial minorities. In addition, the conciliation process is confidential. For this reason, any resolution does not further the educative and symbolic goals of the law in underscoring community norms repudiating racist hate speech. Furthermore, most complainants lack the resources and inclination to pursue civil remedies if the matter is not resolved. And finally, civil litigation may

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<sup>169</sup> MCNAMARA, *supra* note 63, at 304–05. The procedure for instituting an action in states providing civil remedies for incitement of racial hatred is equally cumbersome. See, e.g., *Ekerawali v Jones (No. 3)* (2014) NSWCATAD 58. The procedural history of this NSW case was protracted, demonstrating the need to attempt conciliation before instituting a civil claim of racial vilification with the NSW Civil and Administrative Tribunal.

<sup>170</sup> *The Complaints Process for Complaints About Sex, Race, Disability, and Age Discrimination*, AHRC, <http://www.humanrights.gov.au/complaint-process-complaints-about-sex-race-disability-and-age-discrimination>.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

have no impact in dissuading a persistent violator of the law seeking to gain notoriety to desist.<sup>176</sup>

During the recent national debate on possible changes to the RDA, the Prime Minister accurately noted the threshold for bringing a civil action for racial vilification is relatively low under existing legislation as liability can attach to conduct that is “reasonably likely . . . to offend, insult, humiliate or intimidate” another person or group in public because of their race.<sup>177</sup> There

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<sup>176</sup> MCNAMARA, *supra* note 63, at 304–05; KATHARINE GELBER, *SPEECH MATTERS: GETTING FREE SPEECH RIGHT* 85 (2011).

<sup>177</sup> Under existing legislation, it is unlawful to offend, insult, humiliate or intimidate another person or group in public because of their race. Section 18C of the RDA, entitled “Offensive behaviour because of race, colour or national or ethnic origin” states specifically:

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

*Racial Discrimination Act 1975* (Cth) s 18C, available at [http://austlii.edu.au/au/legis/cth/consol\\_act/rda1975202/s18c.html](http://austlii.edu.au/au/legis/cth/consol_act/rda1975202/s18c.html). There are three key elements required to establish civil liability:

- (1) the act must be done otherwise than in private;
- (2) which is reasonably likely, in all the circumstances to offend, insult, humiliate or intimidate another person or group of people. This element focuses on the impact of the act on the people against whom it is directed;
- (3) other person or group of people.

A number of cases have considered the requisite showing a complainant must satisfy to establish each of these elements. See *Racial Vilification Law in Australia*, AUSTRALIAN HUMAN RIGHTS COMMISSION (2002), available at <https://www.humanrights.gov.au/publications/racial-vilification-law-australia> (providing an overview of the cases considering each of these elements); see also REES, RICE & ALLEN, *supra* note 101, at 628–56 (considering in detail all of the case law interpreting section 18C). The key element in establishing civil liability under section 18C is the emotional impact of the speech on the victim of the offensive or insulting speech. This section does not deal with speech that is likely to incite others to hate the victim due to comments based on their race as required under Article 20(2) of the ICCPR. Rather, section 18C is designed to protect individuals against racial prejudice and intolerance.

There are exemptions (or defenses) to civil liability under section 18C. These three exemptions are set out in section 18D which states:

- (1) Section 18C does not render unlawful anything said or done reasonably and in good faith:
  - (a) in the performance, exhibition or distribution of an artistic work; or
  - (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or, scientific purpose or any other genuine purpose in the public interest; or
  - (c) in making or publishing:

is no international human right to be free from racially offensive comments.<sup>178</sup> The government's recent unsuccessful attempt to change

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- (i) a fair and accurate report of any event or matter of public interest; or
  - (ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

*Racial Discrimination Act 1975* (Cth) s 180. These exemptions have also received extensive consideration by the federal courts. See REES, RICE & ALLEN, *supra* note 101, at 656–69.

Some academic commentators have noted that section 18C sets a comparatively low bar for establishing liability. See MCNAMARA, *supra* note 63, at 50. A major impetus for the move to replace section 18C was a ruling in the landmark case *Eatock v Bolt* (2011) 197 CFR 261. In *Bolt*, comments were made in two newspaper articles by a conservative commentator, Andrew Bolt, suggesting certain high profile “fair-skinned Aboriginals” (such as legal academic Professor Larissa Behrendt) were not genuinely Aboriginal (referred to as “political Aborigine”), but were pretending to be so they could access benefits available to Aboriginals, such as university scholarships. These comments were held by the federal court to be in violation of section 18C. None of the exemptions in section 18D were held to apply. *Id.* Section 18D permits fair comments made in good faith, if such comments are “an expression of a genuine belief held by the person making the comment.” This fair comment defense covers a large amount of journalistic writing, provided it is based on accurate statements of fact. The court found Bolt did not make the comments in good faith as both articles contained factual errors, distortions of the truth and inflammatory language. Bibhu Aggarwal, *The Bolt Case: Silencing Speech or Promoting Tolerance?*, MORE OR LESS DEMOCRACY AND NEW MEDIA (2012), [http://www.futureleaders.com.au/book\\_chapters/pdf/More-or-Less/Bibhu\\_Aggarwal.pdf](http://www.futureleaders.com.au/book_chapters/pdf/More-or-Less/Bibhu_Aggarwal.pdf); Andrew Bolt, *What is the New Black*, HERALD SUN (Apr. 15, 2009), [http://blogs.news.com.au/heraldsun/Andrewbolt/index.php/heraldsun/comments/column\\_white\\_is\\_the\\_new\\_black#52712](http://blogs.news.com.au/heraldsun/Andrewbolt/index.php/heraldsun/comments/column_white_is_the_new_black#52712).

Some academics, including former Chief Justice of the NSW Supreme Court James Spigelman, have suggested *Bolt* marshalled in a new era in which the right not to be offended trumped the right of free speech. The current Attorney General defended the right of journalists, such as Bolt, against political censorship saying, “[p]eople like Mr. Bolt should be free to express any opinion on a social or cultural or a political question that they wish to express.” Emma Griffiths, *George Brandis Defends ‘Right to be a Bigot’ Amid Government Plan to Amend Racial Discrimination Act*, ABC NEWS (Mar. 24, 2014), <http://www.abc.net.au/news/2014-03-24/brandis-defends-right-to-be-a-bigot/5341552>. This reasoning has been rejected with vehemence by other commentators who assert the case simply recognizes the need to balance the right of free speech alongside correspondingly valuable rights, including the right to be free from racial bias and intolerance. See Aggarwal, *supra* note 177; Sarah Maddison, *Indigenous Identity, ‘Authenticity’ and the Structural Violence of Settler Colonialism*, 20 IDENTITIES: GLOBAL STUDIES IN CULTURE AND POWER 288–303 (examining the “structural violence” experienced by Aboriginals living in urban areas, and concluding that *Bolt* represents an attempt on the part of this group of indigenous people to preserve their indigenous identity in the face of the symbolic violence that the challenged publications represent).

<sup>178</sup> Sarah Joseph, *Andrew Bolt, Free Speech, and Racial Intolerance*, CASTAN CENTRE FOR HUMAN RIGHTS LAW (Sept. 29, 2011), <http://castancentre.com/2011/09/29/andrew-bolt-free->

existing legislation<sup>179</sup> to make it unlawful to vilify or intimidate another person or group based on race<sup>180</sup> might have been more appropriate as a

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speech-and-racial-intolerance/; Sarah Joseph, *Submission on the Repeal of Section 18C of the Racial Discrimination Act*, CASTAN CENTRE FOR HUMAN RIGHTS LAW 5–6 (Apr. 30, 2014), <http://www.law.monash.edu.au/castancentre/policywork/section-18c-submission.pdf>. See also Maddison, *supra* note 177, at 298.

<sup>179</sup> AHRC President Gillian Triggs, prominent members of the legal community, academics, racial and ethnic minority groups, and members of Parliament (including some members of the governing party which suggested the changes), expressed opposition to the proposed changes. On behalf of 190 ethnic communities, the Community Relations Commission of NSW made a submission to the federal government opposing the proposed changes to the legislation:

Our laws against racial vilification are one of the few inhibitors we possess against the introduction into Australia of the racism which underpins many overseas conflicts and violence to which it can give rise . . . the changes proposed . . . will send a dangerous signal that hate speech is sanctioned by the law as a form of freedom of speech, that bigotry has a place in our society . . . The practical effect will be that far fewer cases of racist behaviour will be deemed unlawful, and many such cases will not only be excused, but even celebrated as a demonstration of freedom of speech. Even in situations of unambiguous abuse, the victim will be required by law to prove that the abuse may incite a third party to racial hatred or has caused fear of physical harm—extremely narrow and difficult tests to satisfy.

Media Statement, *Community Relations Commission of NSW Urges Government to Back Down on 18C* (Apr. 17, 2014), [http://www.crc.nsw.gov.au/\\_data/assets/pdf\\_file/0004/22819/20140331\\_CRC\\_urges\\_government\\_to\\_back\\_down\\_on\\_18C.pdf](http://www.crc.nsw.gov.au/_data/assets/pdf_file/0004/22819/20140331_CRC_urges_government_to_back_down_on_18C.pdf); Patricia Karvelas, *Dump Race Hate Reforms: Migrants*, THE AUSTRALIAN (Apr. 17, 2014), <http://www.theaustralian.com.au/national-affairs/dump-race-hate-reforms-migrants/story-fn59niix-1226887050671?nk=55bc3a1bfc0441f91d4c1480387f912f>. A group representing “Indigenous, Greek, Jewish, Chinese, Arab, Armenian and Korean communities” also vigorously objected to the proposed changes, recognizing the RDA was enacted in 1995 after three nationwide studies found a link between racial vilification and violence motivated by racial animus. Joint Statement, National Congress of Australia’s First Peoples, *Leaders Reject Proposed RDA Changes* (Mar. 18, 2014), available at <http://nationalcongress.com.au/joint-statement-race-hate-laws/>. See also Stephanie Anderson, *Liberal MP to Cross Floor on Racial Discrimination Changes*, SBS NEWS (Aug. 5, 2014), available at <http://www.sbs.com.au/news/article/2014/08/05/liberal-mp-cross-floor-racial-discrimination-act-changes>. Overwhelming community resistance forced the current government to forego any immediate plans to amend existing federal racial vilification laws. Mark Kenny, *Race Hate: Voters Tell Brandis to Back Off*, SYDNEY MORNING HERALD (Apr. 13, 2014), <http://www.smh.com.au/federal-politics/political-news/race-hate-voters-tell-brandis-to-back-off-20140413-zqubv.html> (a nationwide poll found almost 90% of respondents supported the existing law making it “unlawful to offend, insult or humiliate someone because of their race or ethnicity.”). Emma Griffiths, *Government Backtracks on Racial Discrimination Act 18C Changes; Pushes Ahead with Tough Security Laws*, ABC NEWS (Aug. 6, 2014), <http://www.abc.net.au/news/2014-08-05/government-backtracks-on-racial-discrimination-act-changes/5650030>.

criminal offense in partial implementation of Australia's obligations under the ICERD, provided the defenses suggested by the Attorney General are eliminated.<sup>181</sup> Under the draft legislation, "vilify" means inciting hatred

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<sup>180</sup> The proposed changes to this legislation were contained in an exposure draft released by the current Attorney General, George Brandis. The Freedom of Speech (Repeal of 18C) Bill 2014 exposure draft would have repealed sections 18C, 18D, and 18E and inserted the following:

1. It is unlawful for a person to do an act, otherwise than in private, if
  - (a) the act is reasonably likely:
    - (i) to vilify another person or group of persons; or
    - (ii) to intimidate another person or a group of persons, and
  - (b) the act is done because of the race, colour or national or ethnic origin of that person or that group of persons.
2. For purposes of this section:
  - (a) vilify means to incite hatred against a person or a group of persons;
  - (b) intimidate means to cause fear of physical harm:
    - (1) to a person; or
    - (2) to the property of a person; or
    - (3) to the members of a group of persons.
3. Whether an act is reasonably likely to have the effect specified in subsection (1)(a) is to be determined by the standards of an ordinary reasonable member of the Australian community, not by the standards of any particular group within the Australian community.
4. This section does not apply to words, sounds, images or writing spoken, broadcast, published or otherwise communicated in the course of participating in the public discussion of any political, social, cultural, religious, artistic, academic or scientific matter.

Media Release, Attorney-General for Australia Minister For the Arts, Racial Discrimination Act (Mar. 25, 2014), <http://www.attorneygeneral.gov.au/Mediareleases/Pages/2014/First%20Quarter/25March2014-RacialDiscriminationAct.aspx>.

Triggs noted the greatest flaw in the exposure draft is that it has been motivated principally by a desire to ensure a "Bolt-like case [did] not emerge again. . . [trying] to change the law to deal with that one case is probably, as a matter of legislative drafting and law reform, not a wise approach to the law." Tony Jones, *Proposed Changes to Racial Discrimination Act Need to be Redrafted*, ABC NEWS (Mar. 26, 2014), <http://www.abc.net.au/lateline/content/2014/s3972316.htm>. See Law Institute of Victoria, Exposure Draft of the Freedom of Speech (Repeal of s18C) Bill 2014: Submission to the Commonwealth Attorney-General (Apr. 30, 2014), [http://www.liv.asn.au/getattachment/e34b9ad3-cd16-4187-a49e-beb4bee35121/Exposure-Draft--Freedom-of-Speech-\(Repeal-of-s18C\).aspx](http://www.liv.asn.au/getattachment/e34b9ad3-cd16-4187-a49e-beb4bee35121/Exposure-Draft--Freedom-of-Speech-(Repeal-of-s18C).aspx); see also Maurice Blackburn Lawyers, Exposure Draft of the Freedom of Speech (Repeal of s18C) Bill 2014 (Cth): Submission to the Attorney-General Hon. George Brandis (Apr. 2014), <http://hrlc.org.au/wp-content/uploads/2014/05/Submission-Racial-Discrimination-Act-reforms-300414.pdf>; Sarah Joseph, *Rights to Bigotry and Green Lights to Hate*, THE CONVERSATION (Mar. 27, 2014), <http://theconversation.com/rights-to-bigotry-and-green-lights-to-hate-24946>.

<sup>181</sup> See Meagher, *supra* note 1, at n.102 (accurately pointing out that criminal laws reflect more serious conduct that is punitive in nature). For this reason, criminal laws are unlikely to

against a person or group. The exposure draft limits “intimidation” to fear of physical harm.<sup>182</sup> Both are forms of conduct requiring criminalization under the ICERD.

To fully discharge its obligations under the ICERD, the government should extend criminal liability to include the dissemination of ideas based on racial superiority or hatred, inciting racial hatred, contempt or discrimination (through the expression of insults, ridicule, slander or otherwise), and physical threats to persons or property based on race (serious/severe vilification) or incitement to such acts.<sup>183</sup>

The following are possible formulations of four offenses in a graded hierarchy that would comply with the obligations under the ICERD:

- (1) Any person who knowingly or recklessly does an act that is reasonably likely in all the circumstances to<sup>184</sup>

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provide defenses on free speech or public interest grounds. *Id.* In addition, proposed changes under section 3 of the exposure draft would have provided a defense to virtually any journalistic comment, academic commentary, artistic expression, or indeed any expression in a social or public context that incites racial hatred or intimidates an individual or racial group, even if such comments are not made in good faith. Contrasted with existing legislation, section 4 of the exposure draft does not require a showing that the acts or comments were made reasonably and in good faith. This was intended to excuse the comments made by Bolt in both newspaper articles. See Gillian Triggs, Address to the National Press Club: The Freedom Wars and the Future of Human Rights in Australia (Apr. 9, 2014) (transcript available at <https://www.humanrights.gov.au/news/speeches/freedom-wars-and-future-human-rights-australia>).

<sup>182</sup> The proposed changes to the civil provisions of the RDA in the exposure draft defining “vilify” and “intimidate” very narrowly is more appropriately addressed by the criminal law for more serious instances of racist hate speech. The determination of whether an act is likely to vilify is judged by an ordinary reasonable member of the Australian community without reference to the impact of the speech on the person or group to whom it is directed. This is consistent with the interpretation of incitement embraced by commentators in relation to Article 20(2) of the ICCPR. See, e.g., Benesch, *supra* note 27 (contending incitement should focus on the intent or actual impact of the speech in arousing one’s audience to harm another individual or group through the acts of discrimination, hostility, or violence).

<sup>183</sup> See *supra* notes 39–43 and accompanying text; see also *infra* notes 221–22 (proposing eliminating the state and territory criminal offenses for serious vilification as there have been no prosecutions under such laws, except for Western Australia, and this would promote uniformity and consistency in application).

<sup>184</sup> Note this formulation does not include a public act requirement because Article 4(a) of the ICERD requires criminalization of all vilification irrespective of whether the vilification took place in public. The language “reasonably likely in all the circumstances” is intended to signify that all of the circumstances surrounding the communication should be taken into account in determining if particular conduct incites, promotes or expresses hatred. It more readily accords with a probability, rather than a possibility, of the act inciting hatred against

incite (through the expression of insults, slander, acts of violence or otherwise) hatred towards,<sup>185</sup> serious contempt for, severe ridicule, or discrimination of, a person or group of persons on the ground of the race of the person or members of the group is guilty of an offense.

- (2) Any person who threatens physical harm towards, or towards any property of, the person or group of persons on the ground of the race of the person or members of the group, or incites others to threaten physical harm towards, or towards any property of, the person or group of persons is guilty of an offense.
- (3) Any person who knowingly disseminates ideas based on racial superiority or hatred by whatever means is guilty of an offense.
- (4) Any person who knowingly participates in organizations and activities that promote or incite racial hatred or discrimination is guilty of an offense.

These proposed offenses should be included in the Criminal Code rather than as provisions in the RDA. All four offenses should be created as indictable offenses with only the third offense (disseminating ideas) and fourth offense (participating in organizations and activities) to be dealt with

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racial groups. The court should consider factors mentioned by the ICERD Committee, including the content and form of the speech, the prevailing economic, social, and political climate, the position or social status of the speaker in influencing public opinion, the reach of the speech, and the objectives of the speech. *See supra* notes 52–60. The NSW Bar Association also proposed that the characteristics of the audience to which the words or conduct is directed, along with the historical and social context, should be used to determine if particular conduct incites hatred under the NSW provision criminalizing serious racial vilification under section 20D of the ADA. *See RACIAL VILIFICATION LAW IN NEW SOUTH WALES, supra* note 92, at 45; *cf. Meagher, supra* note 1; *see also Benesch, supra* note 27; REES, RICE & ALLEN, *supra* note 101, at 671.

<sup>185</sup> Because the incitement requirement has been found to be the major evidentiary impediment accounting for the total absence of prosecutions under state laws criminalizing serious racial vilification, it might be advisable to substitute the word “incite” with “promote” or “express.” Several participants in a recent NSW parliamentary inquiry proposed this language to clarify, and make more accessible, the element of incitement. Again, the labeling is important to ensure a clear communicative exercise in relation to the type and extent of the wrongdoing and in giving “fair opportunity” to avoid the wrongdoing in the clear knowledge of the proscribed conduct. *See Findlay Stark, It's Only Words: On Meaning and Mens Rea*, 72 CAMBRIDGE L.J. 155, 166 (2013).

summarily, unless the prosecution elects otherwise. The first offense involving proscription of the most serious forms of racial vilification through hate speech and other violent acts should be strictly indictable. The second offense involving threats of physical harm or harm to property through racial speech should be classified as indictable, but to be dealt with summarily unless the accused or the prosecution elects for trial on indictment. The only exemptions from liability should be for communications that are true or made in good faith. These exemptions should be specified in precise terms rather than the more general defenses of lawful excuse or justification.<sup>186</sup> A specific defense raised by an accused person would have to be established by that person on the balance of probabilities. The maximum penalty should be twelve years imprisonment for the most serious indictable offense, which is greater than the penalties for common crimes, such as assault, affray and intimidation.<sup>187</sup> For lesser offenses in a graded hierarchy, the maximum penalties should be proportionately reduced to seven years, four years, and three years imprisonment.

The government should also reform the racial vilification provisions of the RDA to complement the criminal law so that less serious instances of harmful hate speech can be dealt with through civil mechanisms. The current wording of section 18C of the RDA suffers from both vagueness and overbreadth in that it prohibits conduct that is “reasonably likely to offend, insult . . . another person or group in public because of their race.” The words “offend” and “insult” should be excised from this provision, as it is difficult for courts to determine what constitutes offensive speech.<sup>188</sup>

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<sup>186</sup> These two proposed specific exemptions parallel two of the defenses contained in the Canadian Criminal Code for willful promotion of hatred. See Criminal Code, *supra* note 161, at s 319(3). See Meagher, *supra* note 1, at 131, for reasons why the defenses on public interest grounds in the Canadian Criminal Code should not be included as exemptions from liability.

<sup>187</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW). The maximum penalties under the Crimes Act 1900 (NSW) are two-year imprisonment for “common assault,” and ten year imprisonment for “affray.” *Id.* §§ 61, 93C. The maximum penalty for “intimidation” is five year imprisonment or a fine of fifty penalty units. *Id.* § 13.

<sup>188</sup> The term “offensive” is difficult to define, since its meaning changes with the public attitudes and the morality of particular cultures. See, e.g., *Ball v McIntyre*, (1966) 9 FLR 237, *R. v. Butler*, (2003) NSWLR 2; *Coleman v Power*, (2004) 220 CLR 1, *Ferguson v Walkley*, (2008) 17 VR 647; *Beck v New South Wales*, (2012) NSWSC 1483. Moreover, offensive conduct and language laws provide far too much discretion to law enforcement and judges, as well as potentially chilling protected expression because of uncertainty surrounding the type of conduct/language that will be considered offensive. See Luke McNamara & Julia Quilter, *Turning the Spotlight on ‘Offensiveness’ as a Basis for Criminal Liability*, 39 ALTERNATIVE

Equally important, as previously noted, none of the international instruments regulating racist hate speech require states to disallow offensive speech. In other words, there is no international human right to be free from offensive speech.<sup>189</sup> As such, the following language should be added, “the act is reasonably likely, in all the circumstances, to ridicule, humiliate or intimidate, another person or a group of people; and the act is done because of the race, colour, or national or ethnic origin of the other person or some or all of the people in the group.” Adding this language to section 18C would continue to focus on the impact of the speech on the victim as the main element in establishing liability under this section of the RDA rather than on objective conceptions of “offensiveness.” This provides redress for particular instances of racial bigotry and intolerance that has a harmful impact on the emotional and psychological well-being of individuals and groups targeted by the speech. This would continue to encapsulate the vast majority of racial abuse complaints made to the AHRC as most such complaints concern material published on the internet, which has highly

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L.J. 36, 37–38 (2014); DAVID BROWN ET AL., CRIMINAL LAWS: MATERIAL AND COMMENTARY ON THE CRIMINAL LAW AND PROCESS OF NSW 520–26, 541–44 (6th ed. 2015); *see also* Julia Quilter & Luke McNamara, *Time to Define ‘The Cornerstone of Public Order Legislation’: The Elements of Offensive Conduct and Language Under The Summary Offences Act 1988 (NSW)*, 36 U. NEW S. WALES L.J. 534–37, 540–47, 553–54 (2013) (asserting that the enforcement of such laws has a disparate impact on marginalized minority groups, particularly Indigenous Australians).

<sup>189</sup> This approach to offensive speech is consistent with the approach adopted by the U.S. Supreme Court. As U.S. Supreme Court Justice Harlan stated in the landmark case *Cohen v. California*, 403 U.S. 15 (1971), “one man’s vulgarity is another’s lyric.” This case dealt with the constitutionality of an offensive conduct law. Cohen had been convicted under this law in the lower courts for wearing a jacket into a courtroom bearing the words “Fuck the Draft,” which were plainly visible. *Id.* at 16. The Supreme Court struck down the offensive conduct statute in part because it prohibited a potentially boundless range of speech. *Id.* at 25. Justice Harlan was especially concerned that the government might forbid particular words as a “convenient guise for banning the expression of unpopular views.” *Id.* at 26. *See also* Joseph, *supra* note 178. Australian free speech advocates argue it is difficult for courts to determine precisely what constitutes offensive speech, and that vagueness and overbreadth risks chilling protected expression. *See* Committee Report, *supra* note 92, at 65–66; Meagher, *supra* note 1, at 236–37. The current Attorney General, George Brandis, contends offensive speech should be protected, stating that “[p]eople do have a right to be bigots you know. . . . In a free country people do have rights to say things that others find offensive, insulting or bigoted.” Richard Ackland, *George Brandis’ Knot-Twister Over Free Speech*, SYDNEY MORNING HERALD (Mar. 14, 2014), <http://www.smh.com.au/comment/George-brandis-knottwister-over-free-speech-20140313-34p6q.html>. The Shadow Attorney General, Mark Dreyfus, claimed this approach to offensive speech would give a “green light to racist hate speech in Australia.” Griffiths, *supra* note 177.

damaging psychological impacts, but is unlikely to result in physical violence.<sup>190</sup> The current defenses in section 18D should remain.

In sum, the myriad aims of laws regulating racial hate speech are more likely to be achieved through a multi-pronged approach involving the criminal law, civil remedies, conciliation, educational initiatives, and strategies to embolden “bystander anti-racism.”<sup>191</sup> Federal criminal laws are important to target the most severe and deliberate forms of racist hate speech, further the symbolic and educational aims of the law, and give a national focus to promote uniformity and consistency throughout the country.<sup>192</sup>

Civil remedies might be more appropriate in protecting individuals against racial bigotry and intolerance in less serious cases of harmful hate speech, which have a deleterious impact on the emotional and psychological well-being of individuals and groups targeted by the speech. Conciliation might be another tool in the arsenal of the state to address individual instances of racial prejudice and intolerance and encourage respectful dialogue between different racial groups. This panoply of measures provides latitude for the government to deploy civil or criminal mechanisms to suit the actual factual context in particular cases so that less harmful racist hate speech can be dealt with through civil remedies rather than the criminal law.<sup>193</sup> The legislative language must be clear in demarcating between these less harmful forms of hate speech to ensure there is a bright line test for what conduct should be dealt with by the criminal law as opposed to civil remedies. One should also not underestimate the importance of educational initiatives, such as the “Racism: It Stops With Me” National Anti-Racism campaign launched by the Australian Human Rights Commission in 2012 to raise public awareness of the ongoing problem of racism in Australia and the

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<sup>190</sup> See Triggs, *supra* note 181; Joseph, *supra* note 178.

<sup>191</sup> See Mahoney, *supra* note 7, at 351. Bystander anti-racism involves actions by individual members of society forcefully confronting racism. Kevin Dunn et al., *Submission to the National Anti-Racism Partnership & Strategy Discussion Paper 2–4* (2012), available at [http://www.uws.edu.au/\\_data/assets/pdf\\_file/0008/424169/Challenging\\_Racism\\_Project.Submission\\_Anti\\_Racism\\_Strategy.pdf](http://www.uws.edu.au/_data/assets/pdf_file/0008/424169/Challenging_Racism_Project.Submission_Anti_Racism_Strategy.pdf). Research has shown that confronting racism at the time it occurs benefits the target of the racism and is more likely to stop the racist behavior at the time and in the future. *Id.* at 4. Such action can ultimately change existing social norms and lessen “false consensus effects,” which occur when the offender overrates societal backing of their racist beliefs. *Id.* at 5. Such strategies to empower individuals to confront racism have been noticeably lacking in Australia.

<sup>192</sup> Meagher, *supra* note 1, at 230–47.

<sup>193</sup> *Id.*

need for individual members of society to confront racism at the time it occurs.<sup>194</sup>

### *B. State and Territory Laws*

Due to the lack of federal criminal offenses for serious racial vilification, the Commonwealth has deferred to the states to assist in satisfying its international obligations under the ICCPR and the ICERD.<sup>195</sup> There are civil and criminal laws prohibiting racial vilification in all jurisdictions in Australia except for Tasmania, Western Australia, and the Northern Territory.<sup>196</sup> Tasmania only has civil laws outlawing racial vilification,<sup>197</sup> and Western Australia relies exclusively on the criminal law to regulate racial vilification.<sup>198</sup> The Northern Territory has neither civil nor criminal racial vilification laws.<sup>199</sup>

Those states and territories with civil provisions prohibiting racial vilification use variants of the NSW legislation, the first state to adopt a comprehensive scheme for racial vilification.<sup>200</sup> NSW, along with Queensland, South Australia, Victoria, and the Australian Capital Territory have made serious vilification a criminal offense within current anti-discrimination legislation, however, the laws do not form part of the consolidated criminal law legislation or the criminal codes of those jurisdictions.<sup>201</sup> In Queensland, South Australia, and the Australian Capital Territory, the laws are substantially similar to the NSW legislation.<sup>202</sup>

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<sup>194</sup> The campaign recognizes certain priority areas in which racism should be addressed, including education, workplaces, sports, services provided by government, online communication and the media. RACISM: IT STOPS WITH ME, *supra* note 7, at 4; Dunn et al., *supra* note 191.

<sup>195</sup> Berman & Anderson, *supra* note 92.

<sup>196</sup> REES, RICE & ALLEN, *supra* note 101, at 670 (providing both the civil and criminal laws prohibiting racial vilification in all applicable jurisdictions).

<sup>197</sup> *Id.* at 690 (citing *Anti-Discrimination Act 1991* (Tas) s 19).

<sup>198</sup> Mason, *supra* note 1, at n.10 (citing *Criminal Code Act Compilation Act 1913* (WA) schs 77–80D).

<sup>199</sup> REES, RICE & ALLEN, *supra* note 101, at 670.

<sup>200</sup> *Id.* Section 20C(1) of the *Anti-Discrimination Act 1977* (NSW) makes it unlawful “for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group.”

<sup>201</sup> The NSW legislation includes the same conduct as the civil provision with an added element which includes threatening or inciting others to threaten physical harm towards people or property. See *Anti-Discrimination Act 1977* (NSW) s 20D; see also Mason, *supra* note 1, at 11; *Racial Vilification Act 1996* (SA) s 4; *Discrimination Act 1991* (ACT) s 67;

Section 20D of the NSW Anti-Discrimination Act 1977 provides that an act of vilification is criminal if a person by, a public act, “incites hatred towards, serious contempt for, or severe ridicule of, a person by threatening physical harm towards, or towards any property of, a person or group of persons on the basis of race (including ethnic origin).”<sup>203</sup> However, the laws prohibiting serious/severe vilification have never been enforced to the point where a criminal prosecution has commenced. With the exception of the Australian Capital Territory, a cumbersome process exists in all of these jurisdictions for bringing criminal proceedings under the legislation.<sup>204</sup>

Concern over the lack of prosecutions for serious vilification in NSW prompted the former Premier of NSW, Barry O’Farrell, to request in 2012 that the Upper House Standing Committee on Law and Justice conduct an inquiry and report on:

- (1) the effectiveness of section 20D of the *Anti-Discrimination Act 1977* which creates the offence of serious racial vilification;

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*Anti-Discrimination Act 1991* (Qld) s 131A; *Racial and Religious Tolerance Act 2001* (Vic) ss 24–25, cited in Mason *supra* note 1, at 9.

<sup>202</sup> In NSW, the Attorney General must consent to the prosecution, and the maximum penalty is fifty penalty units, six months imprisonment, or both. See *Anti-Discrimination Act 1977* (NSW) s 20D. The monetary penalties under the Queensland legislation are higher, and the state Attorney-General or the Director of Public Prosecution (DPP) must consent to the prosecution. See *Anti-Discrimination Act 1991*(Qld) s 131A(4). The monetary penalties under the South Australia legislation are lower, and the DPP must consent to the prosecution. See *Racial Vilification Act 1996* (SA) s 4. The only penalty under the legislation of the Australian Capital Territory is fifty penalty units. See *Discrimination Act 1991* (ACT) s 67.

<sup>203</sup> *Anti-Discrimination Act 1977* (NSW), s 20D.

<sup>204</sup> The Australian Capital Territory is the only jurisdiction which does not require the consent of a crown legal officer (i.e., Attorney General or DPP) to commence criminal proceedings. REES, RICE & ALLEN, *supra* note 101, at 683. Even in cases in which an offense of serious vilification is believed to have occurred, the statute of limitations and cumbersome referral process for consent has precluded prosecution under the relevant law. For example, in *Brosnahan v Ronoff* (2011) ACAT 439, an offender was found by the Queensland Civil and Administrative Tribunal to have engaged in serious gender identity vilification. The offender refused to participate in mediation or conciliation that forms part of the process involved in complaints filed with the Anti-Discrimination Commission Queensland. The tribunal member hearing the case would have recommended referral to the Attorney General to seek written consent to commence criminal proceedings under the Justice Act 1866, but was precluded from doing so because the one year statute of limitations under the Act had already expired. See Alan Berman, *Queensland Harbors Discrimination*, QNEWS (Oct. 14, 2011), <http://qnews.com.au/article/queensland-harbors-discrimination>.

- (2) whether section 20D establishes a realistic test for the offence of racial vilification in line with community expectations; and
- (3) any improvements which could be made to section 20D, having regard to the continued importance of freedom of speech.<sup>205</sup>

Notwithstanding twenty-seven public complaints about alleged serious racial vilification since 1998, there have been no prosecutions in NSW.<sup>206</sup>

Submissions made to the committee by relevant stakeholders expressed several concerns.<sup>207</sup> First, the lack of prosecutions evidences the law's failure to tackle even the most egregious manifestations of racial hatred and harassment, thereby eroding public confidence in the law as well as the symbolic and educative<sup>208</sup> functions of the law in expressing societal disapproval of the most serious forms of racist hate speech. Second, the absence of prosecutions is synonymous with conceding there have been no instances of racial vilification worth prosecuting.<sup>209</sup> Finally, the lack of prosecutions is inconsistent with community attitudes and experiences.<sup>210</sup> The Committee found the complete absence of prosecutions was due in part to complicated procedural hurdles in the legislation,<sup>211</sup> a lack of knowledge on the part of law enforcement about the existence of such offenses, and resistance by prosecutors to bring claims for an offense that imposes a higher

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<sup>205</sup> Committee Report, *supra* note 92, at iv.

<sup>206</sup> From 1992 to 2013, the DPP received eleven referrals from the President of the Anti-Discrimination Board, two of which were in turn referred to the police for further investigation. Neither of those two investigations produced sufficient evidence to justify prosecution under section 20D. *Id.* at 23, n.98.

<sup>207</sup> *Id.* at 24–29.

<sup>208</sup> *Id.* The committee concluded the lack of prosecutions hampers the educative purpose of the law as there are no prospects for the community to be made aware of the law. *Id.* at 28.

<sup>209</sup> *Id.* at 23–24.

<sup>210</sup> *Id.* at 23–26. These concerns were articulated in submissions from the Anti-Discrimination Board, Australian Lawyers Alliance, the Redfern Legal Centre, and the Executive Council of Australian Jewry. *Id.* at 25. Some of the inquiry participants viewed the absence of prosecutions as evidence of the success of the law as a deterrent. *Id.* The committee noted the majority of stakeholders believed section 20D was ineffective. *Id.* at 26.

<sup>211</sup> *Id.* at 11–12. The President of the NSW Anti-Discrimination Board must investigate a complaint of racial vilification and consider whether an offense may have been committed under section 20D. If the President considers there may have been an offense committed, the President is to refer the complaint to the NSW Attorney General who may then refer it to the DPP to institute criminal proceedings. Since 1990, the Attorney General has delegated this power to the DPP. *Id.* at 12.

evidentiary burden to prove the elements of the offense.<sup>212</sup> In addition, there are much lower maximum sentences available than exist for parallel common crimes, such as assault, affray, and intimidation.<sup>213</sup>

Nevertheless, more general criminal offenses fail to target the racial element of the vilification. For example, if a perpetrator is convicted of a general criminal offense, such as assault, and the offense is found to have been motivated by racial prejudice or hatred, this is to be taken into account as an aggravating factor under the Crimes (Sentencing Procedure) Act 1999 (NSW).<sup>214</sup> Thus, racial motive may be considered even when it is not a specific element of the offense. As an aggravating factor, the racial motive element increases the seriousness of the assault and may lead the court to impose a more severe punishment. Arguably, prosecutors are induced to rely upon these “aggravating factors” as a way of dealing with cases involving serious racial vilification in the expectation of sentence enhancement. However, this reliance weakens the symbolic and educative impact of criminalizing such conduct.<sup>215</sup> The factors accounting for the ineffectiveness

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<sup>212</sup> *Id.* at 40–43. The problem of proving the element of incitement was cited as a major reason for the failure to prosecute instances of serious racial vilification under section 20D of the legislation. Some suggested using words other than incite, such as promote or express. *Id.* at 41. Such words arguably widen the scope of section 20D and are more in line with Australia’s obligations under the ICERD. Others were concerned that changing the language would be inconsistent with the language of the ICCPR and the ICERD. *Id.* Reservations were also expressed that more permissive language would greatly lower the evidentiary burden and interfere too much with freedom of expression. *Id.*

<sup>213</sup> Given the high evidentiary burden for proving all of the elements of the offense, most prosecutors pursue general criminal offenses under the Crimes Act 1900 (NSW)—which has a lower evidentiary threshold and carries higher sentences. See Mason, *supra* note 10, at 328–29. Thus, the maximum punishment available for an offense under section 20D fails to proportionately reflect the gravity of the offense. Committee Report, *supra* note 92, at 33–35.

<sup>214</sup> See *Crimes (Sentencing Procedure) Act 1999* (NSW) § 21A(2)(h) (“[T]he offence was motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged such as people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability.”).

<sup>215</sup> Committee Report, *supra* note 92, at 28 (concluding the law’s educative and symbolic functions are impeded by the absence of prosecutions as there has been no media coverage that would inform the wider community of the existence and purpose of section 20D). In a recently conducted nationwide study on the interpretation and application of sentence aggravation provisions in Australia, Gail Mason concluded that the prosecution have too often tried to have these provisions applied to offenders from the very minority groups they were intended to protect. Mason, *supra* note 158, at 308. Sentence aggravation provisions have also been criticized in other jurisdictions due to procedural problems arising from the way in which aggravated offenses are pursued by prosecutors. See Abenaa Owusu-Bempah, *Prosecuting Hate Crime: Procedural Issues and the Future of Aggravated Offences*, 35 J. LEGAL STUD. 443 (2015) (suggesting racially and religiously aggravated offences in U.K.

of the criminal legislation prohibiting serious racial vilification in NSW apply with equal force to Queensland, South Australia and the Australian Capital Territory.

In NSW, the Committee has recommended changes to overcome the procedural hurdles to prosecution.<sup>216</sup> Recommendations included the referral of cases for prosecution directly from the President of the Anti-Discrimination Board to the NSW police force to investigate possible serious vilification and prepare a brief of evidence for the Director of Public Prosecution to consider.<sup>217</sup> It also recommended that police officers receive specific training about the law and that the government increase the time period for lodging complaints about alleged criminal offenses from six months to a year.<sup>218</sup> Instead of advocating an increase in the maximum penalties under section 20D to overcome the problem of likely prosecution of serious vilification as a common crime, the Committee simply recommended that the NSW government review the adequacy of the maximum penalty under section 20D, taking into account the maximum penalty for comparable general criminal offenses under the Crimes Act 1900.<sup>219</sup> The Committee felt the procedural recommendations should be implemented first to determine if these changes resulted in more prosecutions.<sup>220</sup>

Given the numerous procedural and substantive obstacles to prosecution of serious racial vilification in all states and territories aside from Western Australia,<sup>221</sup> the federal government should fulfill its obligations under the ICCPR and the ICERD by creating a hierarchy of commonwealth criminal offenses in the form previously recommended. In addition, all state and territory criminal laws proscribing serious racial vilification should be repealed. This repeal and replace approach would promote uniformity and consistency in application throughout Australia. In this spirit, Western

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legislation be repealed and replaced with sentencing legislation to deal with hostility-based offending).

<sup>216</sup> Committee Report, *supra* note 92, at 85, 88, 92–93.

<sup>217</sup> *Id.* at 92.

<sup>218</sup> *Id.* at 85, 180.

<sup>219</sup> *Id.* at 73.

<sup>220</sup> *Id.* at 61.

<sup>221</sup> Western Australia is the only jurisdiction to incorporate the offense of racial vilification into its Criminal Code. See *Criminal Code Act Compilation Act 1913* (WA) schs 77–80D. Western Australia has also imposed greater penalties for certain criminal offenses when committed in circumstances of racial aggravation, and remains the only jurisdiction in which there has been a successful prosecution under state or territory legislation. See REES, RICE & ALLEN, *supra* note 101, at 683, 686; Raphael, *supra* note 105.

Australia and the Northern Territory would need to adopt civil provisions rendering racial vilification unlawful consistent with the NSW legislation. Similarly, the civil provisions in the commonwealth RDA should remain operative concurrently with state and territory civil law remedies.<sup>222</sup>

## V. CONCLUSION

There are numerous reasons justifying the creation of specific hate crime offenses under federal criminal laws to address serious racial vilification. Racial hate speech undercuts the basic principles of equality and non-discrimination that underpin international human rights law. Human rights are intended to co-exist with and supplement the right to freedom of expression. Restrictions on racial hate speech facilitate rather than impede freedom of expression by disallowing speech that is likely to silence the free speech rights of the targeted group.

The UNHRC has consistently recognized that racial hate speech is not protected by Article 19 of the ICCPR. Indeed, domestic laws prohibiting the communication of racist ideas likely to expose a person to discrimination, hostility, or violence are required by Article 20(2) of the ICCPR. The ICERD further requires states to pass domestic legislation criminalizing the dissemination of ideas based on racial superiority or hatred, incitement to racial hatred, contempt or discrimination (through the expression of insults, ridicule, slander or otherwise), threats or incitement to violence as well as prohibiting assistance to racist activities (including financing).

Beyond establishing criminal offenses for these activities, Australia will have an on-going duty to effectively enforce any such criminal legislation. As the ICERD Committee held in *Jewish Community of Oslo v. Norway*, a failure to convict a person under domestic criminal laws for statements

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<sup>222</sup> See *supra* notes 182–86 and accompanying text. The commonwealth RDA establishes a lower evidentiary burden than state civil laws regulating racist hate speech by focusing on the emotional impact of the speech on the targeted individual or group. By contrast, the state and territory laws require the public act “incite” racial hatred towards the targeted individual or group. The incitement requirement is concerned with the impact of the speech on third parties. See REES, RICE & ALLEN, *supra* note 101, at 628–56. The state and territory civil provisions arguably take away more permissible rights granted by the commonwealth RDA to bring a civil claim for racial vilification. Section 6A(2) of the RDA was inserted to overcome this aspect of possible direct inconsistency arising from commonwealth and state and territory laws regulating race discrimination. See RDA 1992, *supra* note 69, § 6A(2). This provision prevents individuals from filing a complaint of unlawful discrimination under the RDA if they have already lodged a complaint under state or territory law.

involving ideas based on racial superiority or hatred as well as incitement to racial discrimination, if not violence, constitutes a violation of Articles 4 and 6 of the ICERD. Moreover, Australia should withdraw its ongoing reservations to Article 20(2) of the ICCPR and Article 4(a) of the ICERD and enact commonwealth criminal offenses along the lines previously recommended to fulfil its obligations under both treaties. Failure to pass such legislation weakens the Australian government's claim to be a law-abiding nation concerned with promoting international norms governing the regulation of racist hate speech.

As hate crime expert Gail Mason aptly points out, the federal government often responds to claims of racism and racist violence with denial; a tactic which in part maintains "Australia's image as a good global citizen."<sup>223</sup> This indifference to the experiences of racial minorities ultimately hampers the success of crime prevention and other strategies to address societal racism.<sup>224</sup> Australia must do more than merely pay lip service to important international treaty obligations governing the regulation of racial hate speech if it is to be taken seriously by the international community as a nation intent on addressing the most serious forms of racist hate speech.

It is apparent that under international treaty obligations and fundamental human rights principles, including the right to dignity and equality, there is a significant void in the Australian criminal law in relation to severe forms of racial hate speech. The main justifications put forward in support of freedom of speech do not actually justify protecting speech that incites racial discrimination, hatred, and violence. To empower racial minorities to live in the Australian community free from the fear of hostility and severe forms of violence, there must be specific criminal offenses in relation to racial hate speech alongside the existing civil complaint mechanisms through anti-discrimination legislation.

It is important that federal legislation grades criminal offenses in a hierarchy of seriousness, analogous to the way in which anti-terrorism offenses are graded in the Commonwealth Criminal Code. This would give national prominence to the issue of racially motivated hate speech and reflect the seriousness with which it is viewed by the Australian community. Significantly, there must be a strictly indictable offense of "severe racial vilification" punishable by a significant period of imprisonment to demonstrate the substantial wrong of this type of conduct. Then, as there is a

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<sup>223</sup> Mason, *supra* note 1, at 17–18.

<sup>224</sup> *Id.* at 51–52.

distinct graded hierarchy of conduct, circumstances, and consequences in which racial hatred speech is criminalized, there should be a logical and incremental categorization down to the offense of disseminating ideas based on racial superiority and racial hatred through any form of communication. These lower level types of offenses can usually be dealt with summarily in magistrate courts.

Australia prides itself as a multicultural democratic society tolerant and understanding of cultural diversity. Consequently, legal reform is both long overdue and urgently needed. The robust law reforms recommended in this Article will help provide greater assurances to racial minorities living in the Australian community that their fundamental human rights of dignity and equality are appropriately recognized and protected. As a result, they can live in a cohesive society free from the fear of hostility and violence arising from perplexing racial hatred and discrimination.

