1994

THE PARLIAMENT OF THE COMMONWEALTH
OF AUSTRALIA

HOUSE OF REPRESENTATIVES

# RACIAL HATRED BILL 1994

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General, the Honourable Michael Lavarch MP)

70856 Cat. No. 94 5283 5

9 780644 366977

Printed by Authority by the Commonwealth Government Printer

# RACIAL HATRED BILL 1994

## OUTLINE

This Bill makes provision in relation to racial hatred by amending the *Crimes Act 1914* to provide for three criminal offences and the *Racial Discrimination Act 1975* to provide for a civil prohibition. The Bill addresses concerns highlighted by the findings of the National Inquiry into Racist Violence and the Royal Commission into Aboriginal Deaths in Custody. In doing so, the Bill closes a gap in the legal protection available to the victims of extreme racist behaviour.

The Bill is intended to strengthen and support the significant degree of social cohesion demonstrated by the Australian community at large. The Bill is based on the principle that no person in Australia need live in fear because of his or her race, colour, or national or ethnic origin.

The High Court has recently established an implied guarantee of free speech inherent in the democratic process enshrined in our Constitution. But the High Court has also made it clear that there are limits to this guarantee. There is no unrestricted right to say or publish anything regardless of the harm that can be caused. A whole range of laws protect people's rights by prohibiting some forms of publication or comment, such as child pornography and censorship laws, criminal laws about counselling others to commit a crime, and Trade Practices prohibitions on misleading and false advertising or representations.

While it is highly valued, the right to free speech must therefore be balanced against other rights and interests.

The Bill is not intended to limit public debate about issues that are in the public interest. It is not intended to prohibit people from having and expressing ideas. The Bill does not apply to statements made during a private conversation or within the confines of a private home.

The Bill maintains a balance between the right to free speech and the protection of individuals and groups from harassment and fear because of their race, colour or national or ethnic origin. The Bill is intended to prevent people from seriously undermining tolerance within society by inciting racial hatred or threatening violence against individuals or groups because of their race, colour or national or ethnic origin.

The criminal offences are set out in clause 4 of the Bill. The first 2 offences address respectively threats, done because of race, colour or national or ethnic

origin, against people and property, while the third prohibits acts done because of race, colour or national or ethnic origin, otherwise than in private, with the intention of inciting racial hatred if a substantial reason for doing the act is, and the act is reasonably likely to, to incite such hatred. Threatening to harm a person carries a higher penalty of 2 years' imprisonment than threatening to damage property and incitement to racial hatred, which carry a penalty of 1 year.

By contrast, the civil prohibition in clause 6 of the Bill addresses acts done because of race, colour or national or ethnic origin, otherwise than in private, which are reasonably likely to offend, insult, humiliate or intimidate people. Under the *Racial Discrimination Act 1975* ("RDA"), there are already a number of other prohibitions the contravention of which may be investigated and conciliated by the Human Rights and Equal Opportunity Commission ("HREOC") under the *Human Rights and Equal Opportunity Commission Act 1986* ("HREOC Act"). The proposed prohibition on offensive behaviour based on racial hatred would be placed within the existing jurisdiction of the Commission to conciliate and/or determine complaints alleging breaches of the RDA. This victim-initiated process is quite different from the criminal offence regime where the initiative for action generally involves police and prosecution authorities.

Both the criminal offences and the civil prohibition are supported by 2 interpretative provisions. One provides for circumstances in which an act is taken not to be done in private and the other addresses the reasons for the doing of an act.

The terms "ethnic origin" and "race" are complementary and are intended to be given a broad meaning.

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

the general community surrounding the group. This would provide the broadest basis for protection of peoples such as Sikhs, Jews and Muslims.

The term "race" would include ideas of ethnicity so ensuring that many people of, for example, Jewish origin would be covered. While that term connotes the idea of a common descent, it is not necessarily limited to one nationality and would therefore extend also to other groups of people such as Muslims.

Financial Impact Statement

There are unlikely to be significant costs to the Australian Federal Police or the Director of Public Prosecutions in relation to any criminal investigations or prosecutions.

HREOC will administer the provisions of the legislation in relation to civil complaints. Costs are estimated by HREOC to be $0.603m for the first financial year of operation of the legislation and $1.177m and $0.740m for the following two financial years respectively. In the first year of operation, the costings include an amount for HREOC to promote the legislation and to disseminate information about it for the purposes of educating the community in its objectives and operation. Costings also include funds to enable HREOC to fulfil the function of promoting the legislation and disseminating information about it in the following two years.

## NOTES ON CLAUSES

## PART 1 - PRELIMINARY

Clause 1: Short title

This clause is formal and provides that the legislation is to be called the Racial Hatred Act 1994.

## PART 2 - AMENDMENT OF THE CRIMES ACT 1914

This Part amends the Commonwealth *Crimes Act 1914* to create new criminal offences in respect of racial hatred. These offences give effect to, and are wholly based upon, Australia's obligations under Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination and Article 20.2 of the International Covenant on Civil and Political Rights.

Clause 2: Principal Act

This clause provides that the Act amended by Part 2 of this legislation is the *Crimes Act 1914*.

Clause 3: Title

This clause amends the long title of the Crimes Act. This change is necessary in order to describe more accurately the current provisions of the Crimes Act, which are no longer concerned solely with offences against the Commonwealth itself.

Clause 4

This clause inserts a new part – Part IVA – into the Crimes Act.

**Proposed section 57**

Proposed section 57 is an interpretative provision dealing with the reasons for doing an act. It has been included in the Bill in order to address circumstances in which an unlawful act is done for more than one reason.

Proposed section 57 is intended to ensure that a person is responsible for the consequences of his or her actions where the action was based on two or more reasons, one of which was the race, colour or national or ethnic origin of the other person or group, and that reason is at least a substantial one.

Race, colour or national or ethnic origin **must** be of real importance as a reason for the doing of a prohibited act. It must be more than a peripheral or incidental reason for the doing of that act.

The operation of proposed section 57 will enable law enforcement authorities to weigh up a situation in which an act is done for 2 or more reasons. In making that calculation, one of the reasons **must** be because of race, colour or national or ethnic origin and that reason **must** be a substantial reason, though not necessarily the dominant reason for the offence to be proven before the courts.

Generally, if there are two or more reasons for doing a particular act, one of those reasons can be determined to be the dominant reason. If, however, there are two or more reasons and race, colour or national or ethnic origin is not the **dominant** reason, section 57 enables the court to consider any other reasons to determine whether race, colour or national or ethnic origin is at least a **substantial** reason. What constitutes a "substantial reason" would be a matter of degree to be determined in the circumstances of the case and the court's determination would therefore be based on the evidence before it: see *Williams v. Spautz* (1992) 174 CLR 509 at p.537 where Justice Brennan sets out a judicial interpretation of the meaning of "substantial".

The requirement in proposed section 57 is stricter than that applying to the civil prohibition (cf section 18B). The latter provision requires only that race, colour or national or ethnic origin be one of the reasons for doing the proscribed act.

**Proposed section 58**

Proposed section 58 creates a criminal offence in relation to threats made to people because of their race, colour or national or ethnic origin.

Proposed section 58 provides that a person must not threaten to cause physical harm to another person or a group of people 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.

The penalty has been set at 2 years' imprisonment and is comparable to those set by State law.

Under the Western Australian *Criminal Code* the intentional incitement of racial hatred by possession of threatening or abusive material carries a penalty of 2 years' imprisonment or, on summary conviction, imprisonment for 6 months or a fine of $2,000. Under the Code, the intentional promotion of racial hatred by

publishing threatening or abusive material carries the same penalties. Relevant offences under the New South Wales *Anti-Discrimination Act 1977* carry a fine of $1,000 or imprisonment for 6 months or both.

In respect of the proposed Commonwealth offence, an alternative penalty to imprisonment is available. Under section 4B of the Crimes Act the court may, if it thinks it is appropriate in all the circumstances of the case, instead of, or in addition to, the penalty of imprisonment for 2 years, impose a pecuniary penalty of $12,000 for an individual or $60,000 for a body corporate. Alternatively, under section 4J of the Crimes Act, an offence against proposed section 58 may be dealt with in a court of summary jurisdiction with the consent of the prosecutor and the defendant and in this case the maximum penalty that may be imposed is imprisonment for 12 months and/or a fine not exceeding $6,000.

**Proposed section 59**

Proposed section 59 creates a criminal offence in relation to threats made by a person to damage property because of the race, colour or national or ethnic origin of any other person.

Proposed section 59 provides that a person must not threaten to destroy or damage property (other than property belonging to the person) because of the race, colour or national or ethnic origin of any other person or any group of persons. The penalty has been set at 1 year's imprisonment which, again, compares with those set by State law for offences involving property.

Under section 4H of the Crimes Act, this offence is a summary offence. Section 4B of the Crimes Act applies allowing for a maximum penalty of 1 year imprisonment and/or a fine not exceeding $6,000.

**Proposed section 60**

Proposed section 60 creates a criminal offence in relation to the intentional incitement of racial hatred.

The elements of the offence are:

> the commission of an act otherwise than in private (note that a definition of what acts are taken not to be done in private is provided);
>
> done with an intention to incite racial hatred (ie a subjective test);
>
> done because of race, colour or national or ethnic origin; and

which is reasonably likely in all the circumstances to incite racial hatred (ie an objective test).

The Bill is intended to strengthen and support the significant degree of social cohesion demonstrated by the Australian community at large.

Proposed subsection 60 (1) provides that a person must not with the intention of inciting racial hatred against a person or group of people do an act otherwise than in private if the act is reasonably likely in all the circumstances to incite such hatred and 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.

Proposed subsection 60(2) provides that for the purposes of subsection (1) an act is taken not to be done in private if it causes words, sounds, images or writing to be communicated to the public; or is done in a public place; or is done in the sight or hearing of people who are in a public place. Only a broadcast or transmission with the requisite intention would be caught by this provision. Proposed subsection 60(2) is intended to emphasise that conduct constituting an offence under the section must take place otherwise than in private. The following conduct is specified: a communication to the public, an act done in a public place or done within the sight or hearing of people in a public place. It should be noted that the term "writing" is defined in section 25 of the *Acts Interpretation Act 1901* to include "any mode of representing or reproducing words, figures, drawings or symbols in a visible form".

Proposed subsection 60(3) provides that under the section "public place" includes any place to which the public has access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.

**Proposed section 61**

Proposed section 61 preserves the concurrent operation of State and Territory laws. Some relevant sanctions are found under the New South Wales *Anti-Discrimination Act 1977*: section 20A proscribes discrimination in a registered club on the ground of race while section 20C provides a civil sanction by making it unlawful for a person by a public act to incited hatred towards, serious contempt for or severe ridicule of a person because of the race of that person. Section 20D provides a criminal sanction in relation to any public act inciting hatred towards, serious contempt for or severe ridicule of a person because of the race of that person.

Other criminal sanctions are found in section 126 of the Queensland *Anti-Discrimination Act 1991* and in the Western Australian *Criminal Code* (sections 76 to 80 inclusive). The latter provisions apply to the intentional possession and publication of material inciting racial hatred and to the intentional possession and display of material to harass a racial group.

Section 66 of the Australian Capital Territory *Discrimination Act 1991* provides a civil sanction in relation to racial hatred. Section 67 of that Act also provides a criminal offence in relation to the public incitement of racial hatred involving serious contempt for, or severe ridicule of, a person on the grounds of race.

Proposed section 61 expressly states that the Bill does not seek to cover the field and allows for existing State and Territory criminal laws, whether these relate to general assault or damage to property or address specific racist conduct, to continue to operate. Subsection 4C(2) of the Crimes Act provides that a conviction under State or Territory law precludes proceedings for the same offence under the law of the Commonwealth. It would not therefore be possible for a person to be prosecuted twice for the same offence – a choice would have to be made by the prosecuting authorities as to the jurisdiction in which to lay the charges.

The provisions of Part IVA are intended therefore to supplement State and Territory criminal laws, particularly in those jurisdictions which have not enacted specific provisions.

## PART 3 - AMENDMENT OF THE RACIAL DISCRIMINATION ACT 1975

Part 3 will be an integral element of the Commonwealth's overall scheme of human rights legislation based on the conciliation of complaints, together with an Australia-wide community education program designed to reinforce tolerance and harmony while at the same time ensuring people know their rights and remedies. The Commonwealth scheme of human rights administration addresses discrimination in the area of sex, race and disability. Part 3 will add offensive behaviour because of race, colour and national and ethnic origin as additional grounds for investigation and conciliation under that scheme. The emphasis is therefore to promote racial tolerance by bringing the parties together to discuss the act the subject of complaint and arrive at a conciliated and agreed outcome.

Under the Racial Discrimination Act there are already a number of other prohibitions the contravention of which may be investigated and conciliated by HREOC under the HREOC Act. The proposed prohibition on offensive behaviour based on racial hatred would be placed within the existing jurisdiction of HREOC to conciliate and/or determine complaints alleging breaches of the Racial Discrimination Act. This victim-initiated process is quite different from the criminal offence regime where the initiative for action generally involves police and prosecution authorities.

Part 3 amends the *Racial Discrimination Act 1975* to allow complaints to HREOC about actions done otherwise than in private because of race, colour or national or ethnic origin where the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate. HREOC is able to screen out vexatious complaints and complaints lacking in merit or substance so that only well-founded complaints would be dealt with.

A complaint, once received by HREOC, is referred to the Race Discrimination Commissioner who could investigate the complaint. If the complaint is found to come within the provisions of the Racial Discrimination Act, an attempt is made to conciliate and to reach an amicable settlement between the parties. If conciliation is not possible then the matter can be referred back to HREOC for a determination. That determination, whilst not binding on the parties, is enforceable in the Federal Court.

Part 3 makes certain acts unlawful. Section 22 of the Racial Discrimination Act allows people to make complaints to HREOC about unlawful acts. Section 26 of the Racial Discrimination Act provides that unlawful acts are not criminal offences unless specifically stated in Part IV of the Racial Discrimination Act. Thus the proscribed acts relating to racial hatred under the Racial Discrimination Act are unlawful, but are not criminal offences.

Clause 5

This clause indicates that the Principal Act that is amended in Part 3 is the Racial Discrimination Act.

Clause 6

This clause inserts a new part – Part IIA – in the Racial Discrimination Act.

**Proposed section 18B**

Proposed section 18B is an interpretative provision dealing with the reasons for doing an act.

Proposed section 18B provides that if an act is done for 2 or more reasons and one of the reasons is the race, colour or national or ethnic origin of a person (whether or not it is the dominant reason or a substantial reason for doing the act) then, for the purposes of the Part, the act is taken to be done because of the person's race, colour or national or ethnic origin. Here the complainant needs only to prove that race, colour or national or ethnic origin was a reason for doing the prohibited act.

**Proposed section 18C**

Proposed section 18C provides a civil remedy in relation to acts done otherwise than in private which may be offensive to people and which are done because of the race, colour or national or ethnic origin of those people.

Proposed section 18C provides that it is unlawful for a person to do an act, otherwise than in private, if the act is reasonably likely, in all the circumstances, to offend, insult, 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 of some or all of the people in the group. This civil prohibition is analogous to that applying to sexual harassment under the *Sex Discrimination Act 1984* in which unwelcome acts are done in circumstances in which a reasonable person would be offended, intimidated or humiliated.

The same definitions of "an act done otherwise than in private" and "public place" apply to this prohibition as apply to the criminal offence provisions.

**Proposed section 18D**

Proposed section 18D provides a number of very important exemptions to the civil prohibition created by proposed section 18C. The exemptions are needed to ensure that debate can occur freely and without restriction in respect of matters of legitimate public interest.

However, the operation of proposed section 18D is governed by the requirement that to be exempt, anything said or done must be said or done reasonably and in good faith. It is not the intention of that provision to prohibit a person from

stating in public what may be considered generally to be an extreme view, so long as the person making the statement does so reasonably and in good faith and genuinely believes in what he or she is saying.

First, there is the exemption which deals with an act that is done reasonably and in good faith in relation to artistic works. This exemption would cover both serious drama and comedy acts. Whilst some of these performances may cause offence to some people, they are presented as entertainment and are not within the scope of the prohibition.

There are also exemptions which will cover statements, publications and the like made for academic, artistic or scientific purposes or for any other worthwhile purpose in the public interest.

There is an exemption relating to the making or publishing of a fair report of an event or matter of public interest. The media is entitled to report events as they happen. The publication must be fair. The provision would not affect the accurate reporting of public debate on matters of acknowledged sensitivity, for example, policy on native title or migration.

Finally there is an exemption for the making or publishing of a fair comment on a matter of public interest. This is qualified by the requirement that the comment be an expression of a genuine belief held by the person making the comment. This is also subject to the overall qualification in section 18D that to be exempt, anything said or done must be said or done reasonably and in good faith.

It is for the complainant, in relation to the civil prohibitions, to establish that the respondent's act was reasonably likely in all the circumstances to offend, insult, humiliate or intimidate another person or group, and that the act was done because of the race, colour, or national or ethnic origin of the complainant or group of people of which the complainant is a member. However, if so established, the onus then rests on the respondent to show, on the balance of probabilities, that his or her action falls within one of the exemptions in section 18D.

**Proposed section 18E**

Proposed section 18E provides for situations in which an employer may be accountable for the actions of his or her employees where the employer failed to take reasonable steps to prevent the employee's unlawful acts ie acts which may

be reasonably likely to offend etc another person and which are done because of the other person's race, colour or national or ethnic origin.

Under proposed section 18E an employer may thus be vicariously liable for the unlawful acts of an employee. However the employer has a complete defence if it is established he or she took all reasonable steps to prevent the employee from doing the unlawful act. This provision is in terms similar to section 106 of the *Sex Discrimination Act 1984* and section 18A of the *Racial Discrimination Act 1975*. The terms of section 123 of the *Disability Discrimination Act 1992* achieve the same result.

An employer will not therefore be held responsible if the employer demonstrates that he or she took all reasonable steps to prevent the employee or agent from doing the act the subject of complaint. Such recognition of accountability by the employer for an employee's actions may be seen as a normal feature of the employer/employee relationship.

**Proposed section 18F**

Proposed section 18F preserves the concurrent operation of State and Territory laws.

Clause 7

Clause 7 deals with consequential amendments to the Racial Discrimination Act and is purely formal in character.