Double Standards and Two Edged Swords

Racial vilification legislation was initially promoted in Australia, as law against 'inciting racial hatred', justified by the 'reasonable person' test.

Typical of such new law was that of South Australia, enacted in 1996, making illegal "... any public act that encourages or incites others to hate people because of race, nationality, colour or ethnic origin".

It is puzzling that nationally unified Defamation Law was not deemed a suitable stock on which to graft racial hatred objectives, rather than have the States and Territories enact Vilification Laws. What emerged are anomalies similar to those which caused confusion and discrimination prior Defamation law reform.

Some State versions in conjunction with the (Commonwealth) Racial Discrimination Act have morphed into prohibitions against 'giving offence' or 'causing harm' to others on racial grounds. These vague, subjective and improper barriers to free speech are a dangerous regression. It is certainly not clear that the latter imposts would pass the 'reasonable person test'.

Blatant lack of impartiality and consistency have been evident in a number of recent cases. This obvious bias has caused many to regard such law with suspicion and contempt.

The then Western Australian Solicitor General, Jim McGinty intervened to block a case brought against an indigenous person accused of racial vilification of a white person, on the grounds that "the intention of the legislation was to restrain hatred (expressed) only in the most vile and serious of manners".

The dangerously subjective nature of this law and its interpretation was later demonstrated, again in Western Australia, when a young man was jailed for three years for publicly expressing the opinion that Israel and some of its citizens were guilty of war crimes in Palestine.

Another more recent case against Journalist Andrew Bolt in the Federal Court demonstrates similar contentious interpretation of the Commonwealth Racial Discrimination Act (1975). The plaintiffs, a group of 'fair skinned

Aboriginal people', argued that an article by Bolt breeched the Act by conveying offensive messages about fair skinned Aboriginal people, saying they were not genuine and were motivated by gaining benefits enjoyed by Aboriginal people. (The articles had actually referred to 'some' not all fair skinned aboriginals).

The judge rejected the Defence argument that the Blogs were exempt under (Sect. 18D) the Act in that they were for a genuine purpose and in the public interest. He also dismissed the argument that incitement to hatred was not attributable to the remarks. This Act merely required the plaintiffs ("or some of them") to establish by joint claim that they were offended by what was written for the action to succeed. And so it did.

It was embarrassing for this outcome that within a few weeks of the Bolt judgement, another group of Aboriginal people in Victoria began a campaign to establish a "Certificate of Aboriginality" - claiming this would help "stamp out fraudulent claims of Aboriginality". They point out that the number of fair skinned individuals making the claim have increased markedly in recent years. Many are refused status (and hence, benefits) because of insufficient evidence. A part Aboriginal man quoted in the Weekend Australian (March 24/25) stated that he agreed with much of what Andrew Bolt had written : "what Bolt was saying is what everybody knows, that there's a benefit to some people in calling themselves Aboriginal".

Irrespective of personal opinion - whether it be about Palestine or Aboriginality - it is outrageous and dangerous in a free society that public expression of such views, is muzzled. Legislation has effectively placed many important issues beyond public criticism and debate. Issues relating to social justice, national sovereignty, illegal migration, treatment of women and religious belief cannot be discussed publicly without fear of legal entrapment. A consequence not of incitement to racial hatred, but simply because a person or persons may claim to have been offended or hurt by the published or spoken material. ('Fawlty Towers' and Borat would never make it on that basis).

Public criticism ought be well researched, truthful and even funny. No one should be above it. It certainly should not be prohibited on the grounds it

might offend someone. Hateful attacks against individuals solely on the basis of race should be made actionable under Discrimination Law. In the words of Mr McGinty, the legislation should "restrain hatred expressed only in the most vile and serious of manners".

In the rough and tumble of public debate, free speech will occasionally offend, sometimes intentionally. The public will make judgements accordingly - 'ad hominem' attacks (playing the man) are generally recognised by reasonable persons, as poor substitute for facts. It is usually beneficial that contrary and even extreme views are aired publicly to be challenged by open debate, rather than forced underground, to fester surreptitiously.