

## Cyber Racism

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**Soon after the internet** began to expand as a global communication network, in the early days of Web 1.0, the founder of a US-based, now worldwide White Power group was reported in 1998 to say:

It's been a tremendous boon for us ...That's why I dedicate most of my time to this. I feel like I've accomplished more on the Web than in my 25 years of political activism. Whereas before, we could reach only people with pamphlets or holding rallies with no more than a few hundred people, now we can reach potentially millions.<sup>1</sup>

The internet has played a key role in the spread of racism, offering opportunities that amplify the reach and potential impact of White power, Islamophobia, anti-Semitism, Islamist and ultra-nationalist ideologies and actions. At the same time that racist organisations were discovering, exploring and exploiting the potential of the internet, the international community was recognising the dangers that the technology represented to community wellbeing and harmony. In 1998 the United Nations Commission on Human Rights first discussed the role of the internet in the light of the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). Since then the issue has been a constant on the UN human rights agenda, while also being the focus of special attention by the Council of Europe (CoE) and the Organisation for Security and

Cooperation in Europe (OSCE). The Council of Europe Convention on Cybercrime was promulgated in 2001, with the additional protocol on race hate as a cybercrime coming into effect in 2006. The essential problem in responding to cyber-racism lies in the significantly different approaches to how an appropriate balance can be struck between protecting those who are harmed by racism, while ensuring freedom of speech and communication are protected and advanced.

This tension — between freedom and constraint — underpins the situation in Australia, and found its first expression in 1966, long before the internet. During that period when White Australia and assimilation were still the policy settings for immigration on the one hand and indigenous affairs on the other, the government of Prime Minister Harold Holt, who had recently replaced the long-serving, very conservative Robert Menzies, resolved to sign on to the new ICERD. However, Australia lodged a reservation against the Convention's article 4, excluding itself from having to legislate to criminalise the expression of race hatred. Even so, it would take another decade for the ratification of the remainder of the Convention to be translated into national law, through the *Racial Discrimination Act*. Drafted under the ALP government of Gough Whitlam in 1975, the Act was passed under the Coalition led by Malcolm Fraser in 1976. Amended once more in 1996 to include a civil protection against racial vilification (so that an offended party has to take action to seek redress), the Act effectively excludes from national jurisdiction any criminal liability for race hate speech, and its communication. In each case, conservatives and libertarians joined in common cause to prevent criminal law restricting freedom of speech and communication. Thus nearly half a century after the advent of UN Convention, the expression of racism in cyberspace (and hate speech more widely) have only been prosecuted by the police in Western Australia; elsewhere in the states and in the

Commonwealth a raft of differing constraints in the civil sphere remain operative, with limited criminal sanction, or as untested propositions that have not been prosecuted.

### **What is racism?**

The ICERD was drawn up in the mid-1960s, 20 years after the end of the World War II, still very much in the shadow of the Holocaust (the Nazi's attempted annihilation of the world's Jewish population), but also increasingly inflected by struggles for liberation by non-European powers seeking freedom from European empires. In addition, the internal struggle for freedom by the African peoples against apartheid in South Africa had moved to a new level of violence and suppression.

The enactment of the Convention at that time demonstrated an agreement among a large majority of the UN membership to engage with racism; it reflects the multiple directions in which racism was being resisted, and the need for a common statement. The key idea is captured in that article 4 (on which Australia continues to reserve its agreement) where states were asked to make a commitment to:

... condemn all propaganda and all organisations 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.<sup>2</sup>

Racism contains a number of different dynamics — it can be concerned mainly with affirming an ethnic, 'racial' religious or national identity, in part by expressing superiority over others. Racism also can be rather more focused on active hostility and vilification of other groups identifiable through their ethnic or cultural characteristics. Some of these dimensions are further captured in a Council of Europe Protocol (2006) that defines racist and xenophobic material as anything that 'advocates, promotes or incites hatred, discrimination or violence, against

any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors'. While 'race' remains a controversial word (it refers to social beliefs about difference rather than scientifically valid categories that differentiate human groups), belief about race is central to the attitudes expressed through racism. Racism as an ideology or belief system then becomes active through racial discrimination — processes which reduce life opportunities and threaten the wellbeing of targeted groups and individuals.

Racism becomes a particularly pernicious problem in multicultural societies, especially those emerging from a colonial past. Australia was established on lands belonging to Indigenous peoples, with racism a central part of the rationale that legitimised the settlement by Europeans. That colonial racism had many aspects — ranging from religious claims to be enlightening heathens, through Social Darwinian claims about the existence of a natural hierarchy of societies where the right and responsibility of higher orders was to rescue, or replace and transform (racially-defined) less developed groups. In order for this justification to work, detailed racist explanations for the lower levels of Indigenous development were necessary, often framed by unquestioned assumptions about the superiority and virtue of European civilisation, and fed by ignorance and fear of the 'primitive' cultures that had been conquered. Racism in regard to Indigenous and colonised peoples remained a widespread component of European imperialism well into the 20th century. It really only began to fade as the European empires pulled back into their metropolitan centres. However, as the former colonised peoples gravitated towards the metropolises the racism of the past found new forms in the conflicts over immigration and discrimination, as the migrants entered declining and poorly paid sectors of the host economies.

By the third quarter of the 20th century many European countries had started to adjust to their new populations, and adopted various social policies designed to facilitate their management. In some countries this took the form of multiculturalism, drawing on a Canadian concept that had evolved in that country's attempt to resolve the long-standing tension between Francophone and Anglophone populations (the 'bi-cultural' resolution ); other immigrant communities argued for their own recognition of difference, thus the term 'multiculturalism'. In Europe multiculturalism became part of British, Dutch and Scandinavian policy rhetoric. Germany followed a more segmented model, insisting for many years that its guest-workers were temporary residents. Meanwhile France stressed an assimilationist ideology of a singular French culture and identity encompassing all its immigrants (mainly from former colonies). None of these approaches dealt very well with issues of racism, often expressed as overt hostility to immigrants 'of colour' by predominantly White host populations. Indeed, in the first decade of this century, racism has re-emerged as an increasingly acceptable ideology of national or religious identity. In particular, White power has targeted Muslims of colour throughout Europe, while Islamists have attacked Christians, Jews and other more moderate Muslims. Anti-Semitism continues to re-emerge as a major problem, fuelled by an unlikely alliance between European Jew-haters, and Islamist-driven opposition to Israel.

The net effect of these currents has been to erode political support for multiculturalism in Europe, while intensifying the more blinkered perspectives against community cooperation and cohesion enabled by an increasingly racialised political discourse. Racism re-emerges in social practices that privilege one cultural perspective over all others, that produce much poorer economic outcomes for groups differentiated only by their skin colour ethnicity or religion, and that introduce

surveillance procedures that stereotype and stigmatise young men from minority communities.

Racism in Australia shares some aspects of the European situation, though it is also framed by the local history of colonialism and continuing internal colonialism. When the Commonwealth was established in 1901, its charter claimed a common racist ideology expressed in the Constitution and the first Acts of the new Parliament. Four problems of 'race' confronted the Parliament: the place of the Indigenous peoples and what recognition they would be given; the religious beliefs of the three major British peoples and how they might be accommodated; the emerging challenge of the demographic invasion of Australia by the main competing Asian empires of China and Japan; and the residual dangers of pre-modern work practices reflected in the South Sea islander indentured workers of Queensland. While not perhaps phrased as described here, these issues were to shape and then sustain Australia's internal and external relations for the next century. Indigenous people were effectively excluded from consideration as part of the national community; they were to be managed through practices reflecting the colonial legacy of the nation, and were able to secure few if any rights as citizens until the Constitutional Referendum of the late 1960s. Thereafter they would be subject to irregular but recurring attempts to ensure their subordination and accommodation to the consequences of European settlement; nevertheless they continued to struggle for recognition as an exceptional element of Australian society, gaining some limited rights in relation to their traditional lands.

The founding nation, the United Kingdom of Great Britain and Ireland, settled among its diversity three main religious groups — Anglicans, coming from England and representing the dominant political tradition; Presbyterians from Scotland, some still smarting following their defeat by the English in the wars that had created the 'United' Kingdom; and

Catholics, some also from Scotland, but mainly from Ireland, the latter a reluctant colony of the English and one in constant revolt against London. From the outset, religion thus had a quasi-ethnonational quality to it, pervading the national body and psyche in many twisting points of conflict and intolerance; the Catholic population were often tagged with Irish-linked terms of vilification and abuse. The most the Constitution would do was to recognise that the government should make no law for the establishment of any religion, protecting minority Protestant and Dissenting voices, and by flow-on Catholics, Jews, Muslims and Hindus, from the constraints of the established church of the United Kingdom. The first national Parliament assumed the country would remain Christian, and instituted a daily non-denominational Christian prayer at the opening of its two Houses.

One of the drivers for Federation has been said to be the shared colonial anxiety about Australia's proximity to Asia, and the inflow of Asiatics, mainly from China and Japan. Thus the *Immigration Restriction Act* of 1901 was designed to close off Asians' access to the country, despite their significant role in its history and development. Ironically, the Chinese community had been strong advocates of Federation, believing it would free them from the barriers they experienced to travel between the states that had existed when each had been an independent colony. Many were strongly moved by the rhetoric of equality and freedom that characterised the emerging nationalism of the new country, some carrying those values back to the struggle for liberal democracy going on in China at the time. Yet inside Australia nationalism was fired up by hatred of the Chinese, amplified by the hysteria over the Boxer rebellion of 1900 and the entrapment of foreign embassy staff. The relief of Peking saw its palaces put to the torch and looted by the relieving European Australian (and Japanese) powers. The Chinese were seen as both a political threat should the Chinese empire (and

later Republic) ever resuscitate its fortunes and capacities, and a demographic economic and cultural threat should the existing settlers be permitted to stay and expand their communities. For three generations the Chinese came to hold pride of place in the demonology of Australia's national pantheon, a position magnified in the struggle of the government after 1945 to expel wartime Chinese refugees, and then by the rise of Communist China as a major international power after 1949. This history underpins the occasionally uncomfortable national conversation about China and the Chinese that resurfaced in the 1980s after the end of White Australia, and continues today.

The fourth racist element, that of indentured workers with no residential rights, was initially focused on the so-called Kanakas who mainly worked the Queensland sugar fields in the late 19th century. They were recruited, sometimes by as crude a method as kidnap, and brought to Australia by 'blackbirders' ships, specially fitted out to restrain them on the voyage. Over a number of generations this trade became more routinised as the conditions improved and the contracts became less exploitative. Indeed when the *South Sea Islander Labourers' Act* of 1902 came into force, a law that would end the trade and force many Islanders to leave their homes in Australia, the British administrator of the source islands complained to the Australian Prime Minister about the economic disaster the decision would mean for the survival of Island communities, now long dependent on the wages of their distant sons. A hundred years after the expulsion of the Islanders, and at around the time the Queensland government finally recognised their descendants as an Australian ethnic community, the Australian government resurrected short-term worker residency permits (guest workers) under the 457 visa category, allowing employer fixed-term sponsorship on terms of fair pay and conditions, with a special Pacific Seasonal Worker Scheme visas (416) allowing employment but not permanent settlement.

Contemporary racism in Australia reflects the full range of global possibilities, reflective of Australia's multicultural status. While most Australians do not see themselves as racist, they seem to believe most other Australians are racist, and many express support for racist values, as demonstrated in the 1998 Survey of racial attitudes carried out for the Government, and finally released under Freedom of Information in 2011. Here acceptance of racist views probably means they believe that most Australians have a racialised world-view, and 'naturally' prefer 'their own kind' over people who are culturally distant from themselves. Most Australians are less comfortable with and are unlikely to advocate racially based discrimination or violence, nor propose that other cultures should be prevented from arriving in Australia, or should be expelled. However, there are some people and organisations that do hold these more racist views and advocate more severe sanctions against people whom they dislike. Also, racist views can be intensified under the appropriate conditions; people who normally do not hold racist views or see the world through a racist mind-set can be triggered to that point of view through aggressive communication and political animation. Simplification of differences and exhortations to racist action can produce an exacerbation of hostility — examples abound even in Australia, where the 2005 December 'riot' in Cronulla against Muslims provides a clear example of the process at work (and the role of the internet and social media in accelerating the growth in mob anger on both 'sides'). Contemporary targets of racism may include Aboriginal Australians, Asians, Muslims, Jews, Africans, 'Indian students' and other identifiable and vulnerable groups. Reverse racism may also characterise conflictual relations, where the victims act in aggressively or defensively racist ways (even with little power and few resources) towards their tormentors or people perceived to be from the 'tormenting' group.

### **Why is cyber racism an issue?**

Given that racism is an issue of concern for a multicultural society, as it undermines social cohesion and intensifies conflict and competition over scarce resources, the communication of racist ideas and the advocacy of racist action play major roles in contributing to its social impact. In the pre-internet world, and even during the early development of the world wide web, extremist groups had a limited capacity to communicate their ideas. This doesn't mean that the audio and video tapes, press and radio, and to some extent television and cinema, did not convey racist content. However, whereas in the traditional broadcast model of media a small number of producers direct their content to a large range of consumers, the new digital world multiplies the possibilities of production and producers, while it moves the communication of ideas outside the realm of traditional 'order keepers' such as the Press Council and the Australian Communication and Media Authority. The communication of racist content can now occur through a wide range of media, through many competing and often contradictory jurisdictions, to audiences that range from the innocent and unaware to the actively engaged and potentially dangerous.

Writing in a paper for a UN workshop to commemorate the end of the third world decade to combat racism and racial discrimination, Bent Sorensen notes that there were over 3,000 websites worldwide inciting racial hatred in 2002; by 2009, the Simon Wiesenthal Institute has the figure at over 10,000 (from its Digital Terrorism and Hate report series 2010). Moreover, the vast majority of sites are hosted in the United States, where freedom-of-speech laws protect web publishers from disclosure or prosecution. American anti-racism researchers have demonstrated that the internet has allowed for the linking up of extremist groups in Europe and the United States (and Australia), speeding up the transfer of

information, expediting the sharing of tactics and recruitment, and facilitating mobilisation for racist events (now extended through Facebook, Twitter and SMS communication; Wiesenthal, 2009). European critics of the US legal framework from countries such as Germany, Austria and France complain that the American position can only be held by a country that has not itself experienced the horrors of totalitarian racism.

American organisations are only too aware of the apparent contradictions in their nation's position, and some of the horrendous consequences. For example, Wiesenthal notes:

... how viral hate online incubates, empowers and emboldens violent bigots. With over one and a half billion users (almost one quarter of the world's population), the Internet is the prime means of communication and marketing in the world. The Internet's unprecedented global reach and scope combined with the difficulty in monitoring and tracing communications make it the prime tool for extremists and terrorists.<sup>3</sup>

The 2009 Report identifies a range of internet uses that support racism — including Facebook, YouTube, websites, email lists, online music and book stores such as Amazon and iTunes, online games, social networking and chat rooms.

Cyber racism has become an issue in Europe and the Americas, and continues to generate rising concern as the web multiplies and new social media expand rapidly. In Australia it has appeared twice on the agenda of the Australian Human Rights Commission (AHRC) and its predecessor the Human Rights and Equal Opportunity Commission (HREOC). The first appearance occurred in the wake of a wider public debate on racism in Australia, apparently triggered by the European concerns, and the case of the Adelaide Institute (of which more below).

In 2002 the HREOC convened a symposium on cyber-racism, which foregrounded Council of Europe moves to

address cyber-racism ([http://www.humanrights.gov.au/racial\\_discrimination/cyber racism/index.html](http://www.humanrights.gov.au/racial_discrimination/cyber racism/index.html)). In opening the Symposium, Race Discrimination Commissioner Bill Jonas commented in relation to a broad view in the international community at the 2001 Durban Conference on Racism, pointing to the need for government sanctions to address cyber racism:

This raises doubts for me about whether the individual complaints-based process offered by the Human Rights Commission is sufficient to the task of protecting Australians from this kind of material. The complaints-based process has its limitations. It relies on victims to make complaints. Identifying the author or the publisher of the material is often a stumbling block.<sup>4</sup>

The Commission further stated in relation to the Censorship laws and their use to try to regulate the internet that:

... the prohibition of racial vilification on the Internet is an objective consistent with the aims and principles of the classificatory system in Australia. Moreover, the inconsistency between the classificatory standards and the Racial Discrimination Act and criminal anti-vilification laws create obvious uncertainty and inefficiencies in Internet content regulation.<sup>5</sup>

In exploring the range of strategies available in Australia, the inevitable conclusion from a reading of the Commission's overview must be that very little can be or is being done officially.

The final report of the 2002 symposium ([http://www.humanrights.gov.au/racial\\_discrimination/cyber racism/report.html](http://www.humanrights.gov.au/racial_discrimination/cyber racism/report.html)) offered an overview at the time of possible ways forward. It noted the lack of criminal sanctions, and compared Australia in this regard (unfavourably) with the Council of Europe and its Protocol providing criminal sanctions against cyber racism and xenophobia. Yet as Akdeniz (2006) clearly demonstrated a few years later, a global cyber world renders

regional controls less than effective, while even in Europe many countries have not implemented the Council protocol. The report systematically summarised the options open to Australia, through government, the internet industry and the community. It concluded that overlapping and competing regimes of control with limited powers essentially allowed internet racism to slip through the net of regulation. Unlike pornography, violence or terrorism, racism was not a high priority for the government (especially in the heightened nationalistic and racially tinged fervour of the post-9/11 fears of Muslims). The Commission had no pro-active powers; it could merely respond to complaints and attempt to conciliate them, or channel them to the Australian Broadcasting Authority (precursor to the Australian Communications and Media Authority). However, as the Commission itself pointed out, with no national criminal sanctions against hate speech, and no powers to identify and pursue racism on its own volition, the Commission could do little more than offer a low-key educative function to the industry and the community. The industry was engaged in many other struggles to prevent government regulation, and had no desire to open up a new front over internet freedom of speech.

The key direction proposed by the 2002 report that might promise improvement lay in strong support for community-based capacity-building to identify, resist and condemn racist content. One example of this approach, the Magenta Foundation, operates with government support in the Netherlands. Unfortunately, there is no evidence that such an outcome was implemented by the Commission, the government or the industry in Australia.

For nearly a decade there was no further action by the government. Instead the Toben/Adelaide Institute case slowly worked its way through laborious civil court processes, which were still the sole remedy for offended communities and

individuals for whom conciliation has failed. Indeed, as the Commission itself noted, the conciliation process depended on the assumption that racism was the result of misunderstanding: if only the offending party were to understand the 'truth' and the hurt inflicted, it would apologise, make suitable restitution, and not reoffend. On almost every point these assumptions were false: cyber-racism was for the most part planned, sustained and targeted by people who knew exactly what they were doing and who were seeking to cause harm and offence. They would resist conciliation, refuse to apologise, and only marginally modify their behaviour when their legal defences had been exhausted, and then only enough to allow them to recommence their racism in a slightly different guise.

The second AHRC Cyber Racism seminar in April 2010 followed over a year of agitation by a small group of anti-racist activists in the wake of an outbreak of racist and anti-Semitic posts on social media sites by young people associated with two of Sydney's leading private schools. Commencing in December 2008, the media foregrounded a number of Facebook pages attacking Jews and Muslims. In response to these events then AHRC Race Discrimination commissioner Tom Calma was reported calling for tougher cyber-racism laws, while evidence emerged of a neo-Nazi group recruiting young people through the internet (*The Age*, 15 December 2008). The failure of the government to legislate a national human rights act in 2009, which would have had to address criminalising hate speech, was thrown into sharp relief by the announcement in February 2010 that complaints about cyber racism had doubled over the previous two years (from 9% to 18% of all race discrimination cases). In response to approaches from the Jewish community, the federal Attorney General requested the AHRC to conduct a 'sweeping review' of racist material on the internet, advising if changes might be needed in the *Racial Discrimination Act* (*The Age*, 21 February 2010). In

April 2010, he announced the Human Rights framework; however, it made no mention of any proposed action on cyber racism.

In the lead-up to the April 2010 seminar, acting RD Commissioner Graeme Innes was quoted as indicating he did not think a strengthening of the law was the appropriate response (*The Age*, 25 April 2010). Indeed, Innes was to be proved correct in his prediction, as the seminar undertaken in conjunction with the Internet Industry Association, and involving major industry figures from the United States, did not resolve to pursue any legislative directions. Rather the focus shifted to cyber-bullying initiatives, where the primary focus would be on ensuring young-people would be helped to become more 'cyber-smart'. The AHRC 'fact sheet' on cyber racism gives a list of industry policies, including complaints and take-down, or banning user responses.

### **The Toben Adelaide Institute case**

Australia is renowned in the global debate on cyber racism because of the so-called Toben case. Toben is an Adelaide-based Australian of German origin, who for many years has been an ardent denier of the Holocaust. For his activities he has been gaoled in Germany (where Holocaust denial is an offence); in Australia he has been pursued by the Executive Council of Australian Jewry ([http://www.ecaj.org.au/race\\_hatred.htm](http://www.ecaj.org.au/race_hatred.htm)) through their advocate Jeremy Jones. Jones has been persistent in his actions, as well he might given the circuitous processes available in civil law to avoid or bypass the intent of the legislature to minimise racist propaganda. Holocaust denial seeks to denigrate and humiliate people of Jewish faith and background, by claiming that there never was a systematic Nazi extermination plan, and that Jews are using the unfortunate events of the war to build their own post-war financial and political interests. It is widely accepted that Holocaust-denial is a form of racism and anti-Semitism.

The case became possible in 1996 following the passing of the *Racial Vilification Act*, and was triggered by Toben's advertisement in *The Australian* newspaper announcing his site as a source for 'truth' about the Holocaust. The case began when the ECAJ made a complaint to the Race Discrimination Commissioner that Toben's Adelaide Institute had published 'malicious anti-Jewish propaganda' on its website (H97/120). The Commissioner found that the complaint was not amenable to conciliation, and it went to a public inquiry in 1998. The Commissioner ruled in 2000 that the complaint was well founded and that Toben should withdraw the material and apologise, commenting though that 'determinations of this Commission are not of course enforceable'. The request by Jones that Toben be ordered to undertake counselling by the Commission was rejected, as no such capacity existed in the Commission. Toben did nothing; Jones sought a Federal Court order, where he had to prove from the beginning the case that had been proven to the Commission. Branston J found that the Adelaide Institute had behaved unlawfully under the RDA and ordered that the offending material be removed and Toben promise not to re-offend, although no order was made for an apology (FCA 1150, 2002). Toben then appealed, and lost. Toben then did nothing. In 2006 Jones began proceedings for contempt of court against Toben. At the end of 2007 the contempt was proven and Toben apologised for the contempt and agreed he would take down the offensive material. Soon after he indicated to the court he would not do so. In February 2008, Jones again took Toben to court for contempt. In April 2009 a further order was given stating that Toben had been in 'wilful and contumacious contempt of court' on seven occasions, and that Branston's 2002 orders stood. In June 2009, Toben successfully sought an extension of time to appeal the contempt findings. In August 2009 Toben's appeal was heard and dismissed, and he was jailed for three months; he took

down the offensive material as leaving it up would be a continuation of the contempt (and could have left him in gaol). However, he did not pay the order's costs and was taken to bankruptcy court in 2010 by Jones; five appearances later he finally committed to paying the \$56,000 in legal fees incurred by Jones and the ECAJ in mid 2011, and did so, leaving only the remaining costs for the last cases. However, by then the Adelaide Institute site had a new owner, with new offensive material.

The details here are important as they point to the extraordinary difficulty and expense (Jones' time was unpaid and ran into hundreds of hours) that the average citizen would have in seeking redress for racism on the internet, even where there is an identifiable perpetrator, an Australian site, and an acknowledgement of the offensive material. One-off slanders by individuals against racial or religious groups (e.g. foul language used against Muslims or the online rants of White Power bands) might lead to a complaint where the AHRC and the service provider agree to take down the post, ban the poster, or simply leave them in cyberspace unmolested and enjoying the infamy. However, systematic racism that uses foreign servers and anonymous posters remains a much more difficult problem.

### **What has Australia achieved in combating cyber racism?**

The Commission and the government appear to have achieved very little during more than a decade of attention to cyber-racism, other than noting the rising proportion of racial discrimination complaints to the AHRC that are now about online hate. Other interventions seem to be minimal, despite briefings to government on the role of cyber-racism and hate speech on the internet demonstrating how they inflame inter-communal relations. Most of the few interventions that have eventuated have been the result of civil society organisation

(such as the ECAJ) contacts with the internet service provider, the site owner or the page owner. Groups of individuals, such as the Indigenous people who succeeded in having *Herald-Sun* newspaper journalist Andrew Bolt identified as a racist for his descriptions of them in the paper and on-line, have also used the system, but always against strong antipathy.

The Australian delegation that met with the UN Human Rights Council for its Universal Periodic Review in February 2011 faced interrogation on every area of UN Human Rights concerns. Many of the Council members pursued the question of Australia's recalcitrance on the ICERD Article 4 reservation, recommending that the reservation be withdrawn. China asked Australia about 'the specific measures adopted to protect indigenous peoples, foreign immigrants and ethnic minorities from discrimination and against systematic racism in the media and internet'. The Russian Federation recommended that Australia:

... implement additional measures to combat discrimination, defamation and violence (including cyber racism) against the Arab population and Australian Muslims, against recently arrived migrants (primarily from Africa) and also foreign students (essentially coming from India).<sup>6</sup>

The government's response accepted the recommendation in the following terms: 'Australia's new multicultural policy includes a National Anti-Racism Partnership and Strategy, establishment of the Australian Multicultural Council, a "multicultural ambassadors" program and a Multicultural Youth Sports Partnership Program.' The Anti-Racism Strategic Partnerships announced in February 2011 (in preparation for Parliamentary Secretary Lundy's appearance before the UN Committee in Geneva later that month), were due to be launched during 2012. The Diversity and Social Cohesion program revised and relaunched in August 2011 focuses on community development approaches to minimising intercultural hostility, and has

been heralded as ‘a major component of the government’s approach to cultural diversity’. The key objectives are:

- the importance of all Australians respecting one another regardless of cultural, racial or religious differences
- the fair treatment of all Australians, encouraging people to recognise that our interactions should be accepting of, and responsive to, each other’s backgrounds, circumstances, needs and preferences
- opportunities for people to participate equitably in Australian society and to understand the rights and responsibilities that we share as part of that society
- a sense of belonging for everyone by helping communities work towards a spirit of inclusiveness and a shared identity as Australians
- the benefits of living in a culturally diverse society
- to build the capacity of specific communities who are under significant pressure because of their culture or religion.

During 2011 the government acceded to the European Convention on Cybercrime. Discussing the Convention, the Attorney General noted:

The international nature of cyber crime is such that no nation alone can effectively combat the problem and international cooperation is essential. It is also essential that Australia has in place appropriate arrangements both domestically and internationally to be in the best possible position to combat cyber crime. The Council of Europe Convention on Cybercrime is the first international treaty on crimes committed either against or via computer networks.... aimed at the protection of society against cyber crime, especially by adopting appropriate legislation and fostering international co-operation. It also contains a series of powers and procedures relating to accessing important evidence of cyber crimes, including by way of mutual assistance.<sup>7</sup>

The Convention contains an additional optional protocol, originally included in an early Australian draft proposal, which identifies hate-speech as a cyber crime. However, as the anti-censorship Electronic Frontiers Australia applauded, the protocol was dropped by the Australian government as a matter of policy after strong pressure from opponents of its perceived restrictions on free speech.

Such a protocol would inevitably threaten recognized free expression rights in many nations. This illustrates the problem with attempts to criminalize content when there is no universal agreement about criminality.<sup>8</sup>

Yet such an argument can only stand if there are some other forms of effective protection for those harassed and intimidated by on-line hate speech.

## **Conclusion**

Control of cyber hate speech sits on the most challenging interface between the values associated with freedom of expression, and the value associated with freedom from hate and vilification. Different societies have addressed this tension from their own cultural and historical perspectives. In the main, Europe has sought to criminalise hate speech, while the United States has for the most part given priority to freedom of speech, leaving other less powerful avenues to protect people from on-line vilification.

In Australia, cyber hate speech associated with race is unlawful but not illegal at the national level, even though it may be illegal if difficult to prosecute in some state jurisdictions. Effectively this means it is up to the offended party to seek action to protect themselves under the law. As Australia has no fundamental human rights protection, that broader avenue for seeking redress (open in both the United States and Europe) does not exist for Australians. Neither though does the European concern to protect individuals and groups by empowering government agencies to act against promoters of hate.

This chapter has argued that freedom of speech deservedly stands as a significant societal value, the defence of which characterises the most ardent liberal societies. However, while liberal tolerance of hate speech may be a crucial dimension of the social order, for those who are already marginalised or powerless it has to be balanced through interventions by the community, through government, that bolster their rights to live free from persecution and vilification. Australia has chosen a rhetoric that suggests strong defence of rights, while in reality it offers some of the weakest protections in the Western world. The expansion of cyber-racism has opened new arenas where this contradiction has been exposed; as yet there is little sense that more effective responses such as those evident in Europe and North America in government, the internet industry or in civil society are being implemented. When cyber racism can lead to the real-world horrors of Oslo and the mass murders of July 2011, both the immediacy of the need for and the salience of concerted and systemic action are revealed. Minimalist non-intervention cannot remain the preferred strategy.

## Endnotes

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