Human Rights Monitor Seminar: How to Make Prospective Racial Discrimination Legislation More Effective

Sunday 5 September 2004

Special Measures, Racial Vilification and Race Discrimination: Working for Substantive Equality

Paper by Peter Bailey

Part 1: Introduction

I propose to address two issues relating to Hong Kong's proposal to introduce racial discrimination legislation. They relate to the inclusion of provisions relating to special measures and to racial vilification or race hate speech. A 'special measures' provision was included in just two of the main international conventions proscribing discrimination. They are the *International Convention on the Elimination of All Forms of Racial Discrimination* 1965 (CERD) and the *Convention on the Elimination of All Forms of Discrimination against Women* 1979 (CEDAW). T

Article 1 of CERD states that positive or benign measures for achieving equality for members of groups identified by their race are not to be regarded as discriminatory. Article 2 requires ratifying states to take 'special measures' directed at achieving equality: section 2(a) below. Three issues are then discussed. First, the stipulation that special measures must be directed at achieving equality raises questions about their nature. Should they be termed substantive equality, positive discrimination or affirmative action (section 2(b))? Second, and more substantively, should the special measures, however described, be regarded as discriminatory (section 2(c))? Finally, how do special measures relate to what is often termed indirect discrimination (section 2(d)). Section 2(e) summarises the conclusions and recommendations arising.

Article 4 of CERD relates to hate speech and also raises difficult issues. It requires states to prohibit in law actions that incite, through propaganda or the activities of organisations, racial hatred and discrimination. The prohibition applies generally and in relation to the actions of public authorities. The problem is the clash between the prohibition of certain forms of speech and the guarantees of freedom of speech contained in the *International Covenant on Civil and Political Rights* 1966 (ICCPR) and in many other constitutions, including that of Hong Kong. The issues will be considered in Section 3.

Part 2: Special Measures

2(a): Special Measures in International Discrimination Law

As noted, only CERD and CEDAW contain special measures provisions. The two later discrimination instruments do not.[1]
The CERD provisions are contained in Articles 1.4 and 2.2. It appears that the principal provision was seen as contained in the positive obligation in Art 2.2, and that the approval of Art 1.4 was accordingly delayed until Art 2.2 had been approved.[2] The limitations on special measures contained in Art 1.4, the definition Article, are tighter than those in the policy and action oriented Art 2.2:

> *Article 1.4*
> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.
>
> *Article 2.2*
> States parties shall, when the circumstances so warrant take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate right for different racial groups after the objectives for which they were taken have been achieved.

Both Articles require termination of the measures once equality has been achieved, but only Art 1.4 requires special measures to be for the 'sole purpose' of achieving equal enjoyment of rights. The preferable interpretation would seem to be that Art 2.2 prevails, being the authoritative statement of obligation. That view is supported by the

---

[1] Neither ILO *Convention (No 111) Concerning Discrimination in Respect of Employment and Occupation* nor The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief 1981 contain such a clause, the first because it is requiring policy action, the second because it is declaratory in form. Nor do the *Convention on the Rights of the Child* 1981 or the draft Convention on Disability, because they are cast in rights rather than discrimination (equality-related) form.

[2] Sadurski W, ''Gerhardy v. Brown v. The Concept of Discrimination: Reflection on the Landmark Case That Wasn't' (1986) 11 *Sydney Law Review* 5 at 23.

absence in the shorter CEDAW definition of discrimination of any reference to special measures.[3]

In relation to CERD, McKean[4] puts a positive perspective on the inclusion of the special measures provision in the definition by commenting:

> A definition of discrimination [in Art 1.4] which incorporates the notion of special temporary measures, not as an exception to the principle but as a necessary corollary to it, demonstrates the fruition of the work of the Sub-Commission[5] and the method by which the twin concepts of discrimination and minority protection can be fixed into the principle of equality.[6]

I should add that CERD has recently issues a General Recommendation (No 30) emphasising the need for States to be active in taking special measures, particularly to deal with discrimination against non-citizens.

2(b) Special measures in domestic law

The special measures principle has been incorporated in one way or another in all Australian and most other countries' discrimination legislation. The primary reason is to give the widest possible support at legislative level for implementation of the principle of equality. Special measures provisions achieve this by ensuring that 'benign' discrimination is not subjected to attack on grounds that it is 'discriminatory' when its purpose or effect is to assist those suffering disadvantage to enjoy rights or a situation of equality with more advantaged members of the community. An interesting case supporting that view in relation to the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR) is made by van Dijk and van Hoof,[7] two respected experts on the ECHR, who show how the absence of an equality clause such as ICCPR Art 27 (or the special measures clause) has narrowed the substantive equality protection afforded by the ECHR.[8]

---

[3] CEDAW Art 4.1 reads:

Adoption by States Parties of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

[4] McKean W, *Equality and Discrimination Under International Law*, Clarendon, Oxford, 1983.

[5] The Sub-Commission of the Commission on Human Rights, on the Prevention of Discrimination and the Protection of Minorities.

[6] McKean, n 159.

[7] Van Dijk P and van Hoof GJG, *Theory and Practice of the European Convention on Human Rights*, Kluwer, Deventer-Boston, 1990 (2nd ed).

[8] Ibid, ch 7 generally, esp pp541-557.

In Australia s 8 of the *Racial Discrimination Act* 1975 (Cth) (RDA) in effect incorporates Art 1.4 of the CERD. This is unfortunate because, if a choice had to be made, it would have been preferable to use Art 2.2, as discussed in the next section. Section 8 of the RDA provides, somewhat perfunctorily:

> (1) This Part [defining unlawful discrimination] does not apply to, or in relation to the application of, special measures to which paragraph 4 of Article 1 of the Convention applies …

Section 7D of the *Sex Discrimination Act* 1984 (Cth) (SDA) contains a rather more comprehensive version:

> (1) A person may take special measures for the purpose of achieving substantive equality between:
> (a) men and women; or
> (b) people of different marital status; or
> (c) women who are pregnant and people who are not pregnant;
> (d) women who are potentially pregnant and people who are not potentially pregnant.
> (2) A person does not discriminate against another person under sections 5, 6 or 7 [defining sex, marital status and pregnancy/potential pregnancy] by taking special measures authorised by sub-section (1).
> (3) A measure is to be treated as being for a purpose referred to in subsection (1) if it is taken:
> (a) solely for that purpose; or
> (b) for that purpose as well as other purposes, whether or not its purpose is the dominant or substantial one.
> (4) This section does not authorise the taking, or further taking, of special measures for a purpose referred to in subsection (1) that is achieved.

The SDA formulation would I believe be a good model for the Hong Kong Ordinance.

2(c) Does 'discrimination' include 'benign discrimination'?

The reason for including the 'special measures' provision is to avoid opponents claiming that action in support of a racial (or women's) group is discriminatory (usually against the majority) and therefore unlawful. Cases have been brought in Australian law on this ground. For example, in *Proudfoot* a man, being excluded from special health service premises provided exclusively for women, claimed that the

exclusion was discriminatory against men under the (SDA).[9] The measure, while found to be discriminatory, was permitted by law because of the special measures provision in s 33 of the Act.[10]

Two opposing views have been taken about the inclusion of special measures provisions. One is that 'discrimination' in the context of discrimination law means only 'adverse' or 'negative' discrimination. Supportive or 'benign' measures are simply not discriminatory, meaning that no special measures provision is required.[11] That view is taken by some international lawyers, although to do this they have to disregard the implication in both CERD and CEDAW that benign discrimination would, apart from the special measure provisions, be discriminatory. The main reason for this view is that a taint would be put on action falling within the benign category if it was regarded as needing to be saved by the special measures provision. The other view, one supported by some international lawyers and most of those whose base is domestic law, accepts that benign action targeted at the disadvantaged group has, in many cases, a discriminatory effect. This view is supported both by logic and also by the need for 'benign' discrimination to be subject to limitations as to time and purpose if it is not itself to become discriminatory.[12] Special measures are equality measures, affirmative of the needs of the discriminated group or individual. Once their purpose in achieving equality has been accomplished, they should cease, to avoid inappropriate entrenchment and the consequent risk of discrimination against the non-target group.

In my view, the second approach is preferable. Let me help to explain this by giving a hypothetical example based on Hong Kong. Suppose the government decides to build a new school (School A) that will provide specially for a racial minority to have teaching in their own language. But the cost of the school will be met by postponing the building of another school (School B) in an area where the potential school numbers are growing fast. The School A proposal will be seen by the School B supporters as discriminatory, no matter how hard the government tries to indicate otherwise, and they will likely make a claim of unlawful discrimination under the Ordinance. The first reason for having a special measures provision is that the defenders of the measure will be able to say that such actions are envisaged by the legislation. Second, the very reason for selecting certain attributes

---

[9] *Proudfoot v* His claim was not upheld by the Human Rights and Equal Opportunity Commission, which found it to be a measure of affirmative action under the SDA.

[10] Section 33 was replaced in 1995 by s 7D quoted above.

[11] The purpose of such a provision is to provide an exemption from *unlawful* discrimination.

[12] Note that the limitations on the nature of special measures are less onerous in the CEDAW and *SDA* formulations because the measure does not have to be for the 'sole' purpose of achieving equality, as it seemingly does for CERD and the *RDA*.

(race, sex, disability etc) for protection is that attitudes and practice are heavily culturally determined. Unless there is protection for the target group, the tendency will be for decisions and action, both by the administration and in the courts, to go against them and in favour of the majority, particularly where the case is on the borderline and raises sensitive issues.[13] Special measures provisions at least make the situation a little more equal, because they clearly demonstrate that the law both *allows* and *expects* favourable action rather than assuming it is discriminatory. It is so easy to dress up in a populist way measures that appear benign (and thus 'not discrimination') but that, when put into practice, emerge as contrary to the promotion of substantive equality. This is aptly illustrated by the *Belgian Linguistic Case* 1968 1 *EHRR* 252.[14] There, complex arrangements relating to the provision of special schools for French-speaking Belgians in Dutch-speaking areas were held in part to be discriminatory, but there was no guidance from the ECHR itself because of the absence of a special measures provision. An Australian example can be found in *Koowarta v Bjelke-Peterson* (1982) 153 CLR 169. The High Court struck down a decision of a Queensland Minister who, when he refused to allow a transfer of land to an Aboriginal group, was following policy and was supported by a specific Cabinet decision. The system of reserves for Aboriginal people was seen by the Government as the preferred means of caring for them, and as being preferable to letting them leave the reserve where, in the governemnt's view, they were well educated and cared for and retained as a community. The decision of the Court was that the refusal was discriminatory. It was not saved by the allegedly benign treatment given on the reserves.

Third, and related, determining the borderline between what is and what is not discrimination in an undesirable sense is always fraught. In our example, if the School A case can readily be referred to the courts for decision, the courts can then become the arbiter of its fairness, and challenges may even tend to be abandoned because of the existence of the special measures provision. The issue is taken into an area of careful reasoning rather than left to a long political battle. An Australian example is found in the *Gerhardy* case discussed below. Fourth, there is the reasoning of McKean quoted above that sees advantage in the merger in the special measures doctrine of the twin concepts of discrimination and minority protection. Racial minorities often need both. In the School A case, minorities are involved, and the special measures doctrine helps by recognising the element of community disadvantage as part of the reason for the decision.

Finally, the same issues have to be faced regardless of whether the first or second view of benign discrimination is adopted. The issue is

---

[13] van Dijk and van Hoof, n , p544.
[14] Ibid at pp541-543

whether the benign measure really is that, or is unlawfully discriminatory. The difficulty with the first view is that because the legislation does not classify benign type actions as discriminatory, the critics (School B supporters) will loudly (and logically) assert that it is – and against them, the majority. The second view labels the benign action discriminatory, but allows the claim that the legislation expressly allows it as a special measure if it has an equality-advancing effect. The second view is more likely to be more favourable to the disadvantaged group. They can invoke the supportive legal principle of special measures at the start. The critics will then have to show that the legislation does not allow the benign action, a more difficult case to support than the appeal to the majoritarian interest. The special measures approach in effect reverses the cultural assumptions about equality.

Taking the argument one step further, an inclusive definition of discrimination, with exceptions, follows the accepted practice in that much of the law in everyday use, such as tax law, criminal law and family law. Further, exceptions are already an important feature of discrimination law. Such bodies of law 'discriminate' in determining to whom they apply by, for example, taxing different levels of income at different rates, distinguishing different levels of criminality, a married from a de facto relationship for certain purposes, and including exemptions in the discrimination provisions.. Exceptions are made in the interests of fairness, equality or justice. It is admittedly possible, and there is international warrant for it, [15] to use the concept of 'differentiation' to describe 'benign' discrimination. But this is an unfamiliar concept and if, over the past four decades it has not been possible to obtain consensus on what 'discrimination' means within the legal community, the wisest course seems to be to conform to normal usage. Where there is dispute, it is more readily handled when resort is not had to the sophisticated legal concept of differentiation as a vehicle for distinguishing between benign and adverse discrimination. A more direct and comprehensible means is to use discrimination and then an include exception through the special measures doctrine.

12(d) The limits of 'benign discrimination'

The situation as described in the preceding section leaves unresolved an issue of some importance. The issue is whether it is better to characterise some benign action as being discriminatory in nature. That is, to include some significant benign actions as within the scope of discrimination legislation. Examples are the grant of native title land to indigenous people and our School A case. In the following paragraphs it is suggested, after reviewing the literature and the *Gerhardy* case, that the dilemma is not as significant as is often

[15] See for example Human Rights Committee General Comment No

suggested. It can be reduced through recognising that some measures of a 'benign' kind simply do not fall within the discrimination category. The issues involved are really issues of substance or policy to which discrimination law does not apply, or only applies in part. At the heart of the issue is whether the claimed discriminatory action is really an aspect of the recognition of customary indigenous title to land, or in the School A example an aspect of the planned comprehensive education program. The School A proposal can accurately be characterised as a careful act of education policy, with the discrimination aspect arising as one element, but not the central one. The concept of discrimination applies within the ambit of the *pursuit of equality*, less if at all to much broader measures of community policy and practice.

First, then, *Gerhardy v Brown* (1985) 159 CLR 70. In that case Mr Brown sought, but was refused, access to land vested in the Pitjantjatjara people because he was not a member of that people, although of Aboriginal descent. He was convicted in the Magistrates' Court of being on the land without the permission required by s 19 of the *Pitjantjatjara Land Rights Act* 1981 (SA) (the Act). The case came to the High Court on removal from the Supreme Court, which found s 19 invalid for inconsistency with s 9 of the *Racial Discrimination Act* 1975 (Cth) (RDA). The High Court held by majority that s 19 was inconsistent with s 10. However, although the exclusion was discriminatory on ground of race, s 19 was saved by being a special measure under s 8 of the RDA.[16]

Although the High Court considered the Act as a whole, the focus was on s 19. Nevertheless, the usual reading of the case is that the Act as a whole was held to be a special measure pursuant to s 8 and Art 1.4. In the article by Sadurski already referred to,[17] he suggests that the Court failed to address a key issue, which is whether the 'benign' discrimination the Act undoubtedly contains should be classified as discrimination. He considers an opportunity to define the limits of 'benign' discrimination, and the circumstances in which it would be found, had been missed. I would agree with him, although with a refinement. What I suggest is that the action of giving such a large portion of land (102,630 square kilometres or about one tenth of the area of the State) is a major act of policy. As such, it does not fall wholly within the ambit of the discrimination law but represents implementation of a policy of conferring *land rights* on indigenous people. Its essence is to confer land rights. It is not an act of benign discrimination in the discrimination field. Similarly, the conferring of title to a body to build a school, or the building of a road or a wharf, is about education, or transport, not discrimination. What is more appropriately regraded as potentially discriminatory is the subsequent

---

[16] S 8 of the RDA invokes Art 1.4 of the CERD.
[17] Sadurski, n .

use of the land, not the original conferral as an act of policy. What I am trying to suggest is that in *Gerhardy* the real target was not the land grant itself, but s 19 which gave the local council the Act had established a power to exclude others on racial grounds. Likewise, in our School A case, the critics may well have a discrimination law concern. It mayrelate to one of the policies adopted by the new school, for example in relation to which students it would admit, rather than necessarily the issue of policy which led to the basic establishment of the school. If the complaint can be limited to this kind of implementation issue, as it was in the *Gerhardy* case, it is much less disruptive than if it is a full-on challenge to the whole project.

Thinking along these lines seems to have been involved in the review of *Gerhardy* by Brownlie.[18] He said that whether an act is discriminatory depends on its relevance to a ground of unlawful discrimination. Two principles are involved:

> … T]he first principle to apply is to ask whether the differentiation in the legal sense has a reasonable cause and relates to a legally relevant basis for different treatment. The second principle is that the modalities of the different treatment must not be disproportionate in effect or involve unfairness to other racial groups. What is 'disproportionate' is very much a matter of assessment in relation to the particular facts, and there may be some delicate nuances as to what is in local terms reasonable. In the case of the recognition of land rights, the restriction on freedom of movement, linked with such recognition, raises the issue of proportionality. In other words, even when the different treatment is not discriminatory in a legal sense, the modalities, the mode of implementation may be unreasonable and hence discriminatory at the second level.

Taking the issue further, he said that:

> The High Court appeared to treat the 'special measures' clause as legitimating what would otherwise be discriminatory in law, since they viewed the legislation without that clause as being discriminatory. This approach is a further development of the original faulty premiss, which is the assumption by the High Court that the protection of traditional land rights is discriminatory in the first place.

Comments to the same effect were also made by Nettheim when he reviewed *Gerhardy.* Observing that the search by indigenous people

---

[18] Brownlie I, 'The Rights of Peoples in International Law' in Crawford J, *The Rights of Peoples,* Clarendon, Oxford, 1988 (1992 reprint) Ch 1, at 10.

for land is not likely to cease simply because that search is not successful he said:[19]

> This leads to a major philosophical issue, namely, can the claims of indigenous peoples to long term differential status through land rights, self-government and so on, be reconciled with the powerful norm of non-discrimination? … [L]and rights legislation is *not* solely for the purpose of achieving equality within Australian society, whereupon it is to be phased out. It is designed to meet the claim of indigenous people for recognition of their distinct peoplehood on a long-term basis. (emphasis in original text)

Drawing on both these comments, it might be suggested that the benign act of conferring the land was not itself within the purview of discrimination law (although withdrawing would likely be). It was an act meeting a claim of separate peoplehood within the Australian nation. Its purpose was an act of policy and recognition at a higher level than equality, a recognition primarily of *rights* not of equality. It is a question of characterising the nature of the act, and it is less concerned with discrimination and equality than it is with dignity, justice and peoplehood (minority in the School A case) rights.

The difference between an act that occurs *within* the framework of discrimination law and an act that is properly located outside that framework is illustrated in international law itself. The *Convention on the Rights of the Child* 1981, for example, although clearly concerned with discrimination, has no 'special measures' clause. Its focus is on rights, not discrimination. It does invoke the principle of equality by proscribing discrimination in the enjoyment of rights, but the use of equality is related to equality in the enjoyment of rights, not on equality as the prime goal. Similarly, the two Covenants are concerned primarily with rights. Once again, they contain equality and discrimination provisions as an integral part of the package, but the discrimination is measured in terms of the rights and their enjoyment rather than by reference to equality. They are rights-conferring, not discrimination-defining, instruments.

McKean seems to take the 'international law' view of discrimination when commenting on ILO Convention 111 on discrimination in employment and occupation. It was the first of the 'discrimination' instruments that departed from the special measures concept. [20] He observed that the omission of the draft clause relating to special measures:[21]

---

[19] Nettheim G, 'Indigenous Rights, Human Rights and Australia', (1987) 61 *Australian Law Journal* 291 at 299.

[20] McKean, n 125-128

[21] Ibid, p128.

> … made an important contribution to the understanding of the juridical meaning of discrimination and influenced the drafting of later texts. It acknowledged unequivocally that special measures of protection are not discriminatory distinctions of they are designed to promote equality of opportunity and treatment. (p 128)

Although this puts well international law view that regards only 'negative' acts as discrimination, the fact that the Convention mandates *a policy,* rather than specific measures, of discrimination as do CERD and CEDAW, allows it to be fitted into the 'broad policy' characterisation suggested above. [22]

The discussion so far leaves one unresolved issue. How, using the School A example, would it be decided whether the proposal was a discriminatory measure or was better regarded as an education or a minority matter? The first point to be made is that the inclusion of a special measures provision makes the issue readily justiciable. On that basis, it can become the task of the court to identify how far the issue is 'education' or 'minority' and therefore not a matter of discrimination law, and to what extent it should be characterised as an issue of discrimination law. This is not a new issue for the courts. For example, the Australian High Court has taken the view that native title is not 'common law' title. Although a form of title was recognised pursuant to *Mabo*, it was superseded by *Native Title Act* 1993 (Cth), particularly s 223.[23] Because native title is a system that is not part of the common law, although recognised by it, the issue in conferring title is not discrimination but a matter involving Australian constitutionalism and the legal system as a whole. To use the words of Brownlie quoted above, such and issue is not within the 'legally relevant basis for different treatment.' Similar issues arose in the *Sinnapan* series of cases concerning the Northlands School in Melbourne.[24] In some 12 cases heard over a period of two years the

---

[22] Article 1.1 of the ILO Convention reads:

(1) For the purposes of this convention the term 'discrimination' includes:

(a) Any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of occupation or treatment in employment or occupation;

(b) Any other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organizations, where such exist, and with other appropriate bodies.

In Australia, the policy aspect would likely be excluded by the court, but the discrimination aspect would be reviewed and appropriate orders made, as in the *Sinnapan* cases noted below.

[23] *Ward v Western Australia*

[24] The key cases are *Sinnapan v Victoria* **(1994**) EOC 92-567 (Tribunal, for the facts); 92-568 (Supreme Court at first instance); 92-611 (SC, Appeal Division for legal issues); 92-658 and 659 (Tribunal, applying the Court decisions); 92-

tribunal, the courts, the government, the school and the indigenous people hammered out a solution. The originating action was a decision by the Government of Victoria to close the school, located in Broadmeadows, an outer Melbourne suburb. It was claimed that the consequent termination of the very special unit developed within it, that had been achieving significant success by increasing the retention rate of indigenous students, would be racially discriminatory. After many ups and downs, the final decision was that the Government should not be permitted to deprive the indigenous minority of the special unit. However, said the Court, it would not determine whether the school as a whole should be retained. This was a matter of policy. However, the Tribunal would be within its power to order that, to avoid the discrimination involved by simply closing the unit, the special needs of the indigenous young people should be met in an appropriate way by the system as a whole. This the education authority did. So the ambit claim of full retention of the school was refused as not appropriately determined by discrimination law, but the special measure relating to the unit was.

Thus there are precedents, which include also *Gerhardy*, for suggesting that the courts can separate out the discrimination and other issues involved. What then remains is for the courts to ensure that, insofar as discrimination law is concerned, the validity of the benign action, or relevant aspects of it as in s 19 of the Pitjantjatjara Lands Act and the indigenous unit of Northlands School, is protected as a special measure, even if aspects may be discriminatory. In our School A example, if a group of children not of the minority group were found to have great difficulty in getting to another school, it could be appropriate to declare unlawful a decision excluding them.[25] Such detailed issues are better not determined in the heated atmosphere of politics. They require the kind of fine tuning for which courts and tribunals are appropriate. I hope you may feel the Hong Court Tribunal and Courts would be able to handle our School A example in similar fashion.

2(e) Special measures and indirect discrimination

I have been asked to address the question whether indirect discrimination can be claimed to be a form of 'special measure'. Special measures, as already described, seek to achieve substantive equality by excluding some discriminatory acts of a benign nature from the legislation. Indirect discrimination, by contrast, extends the ambit of the legislation by introducing a provision allowing for the application of substantive equality principles. Indirect discrimination is often termed 'rule-' or 'outcome-based', or 'systemic' discrimination. It is described as 'rule-based' because the discrimination arises as a

---

663 (SC, CA, reviewing Tribunal orders); and then (**1995**) EOC 92-698 (Tribunal making final orders).

[25] The outcome in the *Belgian Linguistics Case* was similar.

result of following a rule or practice that results in disadvantage to members of the target group. Those members would probably not be caught by a formal application of direct discrimination provisions. It is termed 'systemic', or 'outcome-based' because often the rule or practice, although apparently not discriminatory,[26] will be associated with a large enterprise or industry, and its discriminatory operation only becomes apparent by analysing the situation of those to whom the rule applies.

The similarity between special measures and indirect discrimination lies in the fact that both seek to enable the courts to apply substantive equality principles. However, the way this objective is achieved is significantly different. Special measures provide a *general exemption* for benign action from the ambit of discrimination law (as for School A). On the other hand, indirect discrimination constitutes a *particularised extension* of the ambit of discrimination law (as in *Banovic*). Thus indirect discrimination is, in my view, better characterised as a measure of substantive equality that operates within and through discrimination law to achieve an outcome that may not be achieved when the usual processes of *formal* discrimination are applied. The outcome of proper application of both indirect discrimination and the special measures principles is substantive equality, but in very different circumstances. In the case of indirect discrimination, the claim is made by a *disadvantaged* person or group and, as in *Banovic*, they receive protection by cancellation of the offending rule. Special measures provisions, however, are most often invoked in controversial situations where persons *without disadvantage* (in a situation of privilege) claim that discrimination law is causing an erosion of what they see as their 'rights'. The special measure is then used by those with disadvantage to protect the benign discrimination that is under attack.

Indirect discrimination is, understandably, a principle that not infrequently generates opposition, just as do special measures. Those are aptly illustrated by the leading United States case of *Griggs v Duke Power Co* (1971) 401 US 424 and the Australian case of *Australian Iron and Steel Pty Ltd v Banovic* (1989) 168 CLR 165 (*Banovic*). In *Griggs* the powerhouse hiring practices, which had led to a heavy preponderance of white employees, were challenged. The claim was that the relative paucity of black employees was the result of the requirement that all employees had to have the equivalent of a higher school certificate. The Supreme Court, using the standard definition of discrimination in Title VII of the Civil Rights Code, found there had been what it described as 'rule-based' discrimination. This was not the usual 'in your face' form, but it was discriminatory. To ensure that the possibly more literal-minded Australian and British courts would accept this indirect form of discrimination, a special provision was

---

[26] A term to describe such a rule or practice is that it is 'facially neutral'.

included when the early discrimination legislation was being drawn up. The provision became standard in the UK and Australia but has since been redefined for the Commonwealth's sex and race discrimination legislation because of the somewhat mechanical way in which the *Griggs* decision was incorporated. The new definition remains 'rule-based' (that is the discrimination must result from a condition or requirement, which can include 'a practice'). It requires that the rule or practice must be 'reasonable in the circumstances'.[27]

In *Banovic* the difference between a 'substantive' and a 'formal' equality approach is epitomised in the joint judgment of Deane and Gaudron JJ in the majority, which adopted a substantive approach, and the separate minority judgments of Brennan and McHugh JJ, who adopted a more formal approach. In an earlier action a group of mainly Eastern European ironworkers had brought a case alleging direct discrimination in AIS hiring practices. As a result they had found it almost impossible to obtain employment at the steelworks. AIS was found to have discriminated directly and was ordered to revise its hiring and related practices. Then a downturn in business occurred and AIS used the standard LOFO (Last On, First Off) principle to retrench workers. As a result, a number of the women engaged following the earlier case were laid off and others were at risk. The Tribunal found the LOFO rule constituted indirect discrimination. The question of law, brought to the High Court on appeal from the New South Wales Court of Appeal, was whether the Tribunal's finding was correct. Deane and Gaudron JJ supported the Tribunal's use of the 'pool' of workers determined by reference to its composition at the time the last woman was taken on before the retrenchment commenced. They considered the 'pools' of male and female employees so constituted fairly reflected the composition of the workforce after the earlier case. Accordingly, the Tribunal's assessment, that a greater than fair number of women was laid off, was reasonable. It allowed a measure of justice for the women so recently taken on as a result of the earlier action. In dissent, Brennan J indicated that in his view the indirect discrimination provision did not justify the 'pools' as determined by the Tribunal and Deane and Gaudron JJ. Nor was the legislation itself designed to achieve the 'affirmative action' required to protect them. The proportions of men and women retrenched under the LOFO rule were, using as a 'pool' the male/female workforce as a whole (ie not taking into account the earlier decision), roughly the same (indeed, by a fraction of one per cent, the proportion of men laid off was greater than that of women). The rule was facially neutral. To lay off men who would not have been dismissed by its application to

---

[27] SDA s 7B. The original form, based on *Griggs* and referring to proportions in the two parts of the workforce, is retained in the *Disability Discrimination Act* 1991 (Cth). A modified 'reasonableness' form has been included in RDA s 9(1A).

preserve the women who had been taken on would be discriminatory:[28]

> The opposite to 'discrimination on the ground of sex' is not discrimination against the opposite sex; it is non-discrimination. … It offends justice to dismiss an employee in order to rectify the consequences of an illegality on the part of the employer. The Act does not require dismissals in a priority which will rectify those consequences; to the contrary, it prohibits them.

The two views are clearly put. In terms of formal logic it may be that the judgments of the minority have the edge. However, looking purposively (substantively) at the legislation, there would also have been injustice in laying off the very women who had at last managed to obtain employment.[29]

2(f) Conclusions

1. *Special Measures.* It is of great importance to effective racial discrimination legislation that the special measures principle be included. Doing this will:
   - (a) Conform with the provisions of CERD;
   - (b) enable the courts to handle significant areas of dispute by giving them a clear mandate to distinguish between benign and adverse discrimination;
   - (c) not prevent or impede the implementation of major issues of policy that are benign in their impact;
   - (d) make more difficult claims that in law that a disliked measure of benign discrimination is discriminatory; and
   - (e) in relation to challenged proposals, facilitate separation of 'policy' or non-discrimination from discrimination issues, as discussed in relation to *Gerhardy, Sinnapan* and the School A cases.
2. *Benign Discrimination.* Inclusion of the special measures principle in the form of a legally based exemption will
   - a) ensure that all acts and practices will be capable of being reviewed by the courts;
   - b) facilitate the declaration where appropriate of 'façade' (so-called benign) measures as unlawful discrimination;
   - c) assist, as noted in 1(e), in the separation of issues more properly regarded as concerned with rights, minorities, education and so on from those more appropriately the subject of discrimination law.

---

[28] *Banovic* at 172, 173.
[29] For a fascinating commentary on US decisions related to 'affirmative action' and discrimination see Sullivan K, '

3. *Special Measure Principles.* The special measures provision should define the limits of those measures, as in SDA s 7D. Specifically:
   a) special measures should not be permitted to continue after the equality purpose has been achieved; and
   b) actions beyond the scope of discrimination law, as in the conferring of native title to land, should be maintainable as features outside the purview of discrimination, while giving rise to discrimination remedies if the benefits they confer are reduced.
4. *Indirect discrimination.* Indirect discrimination is an essential feature of discrimination legislation:
   a) it will assist in providing for better application of principles of substantive equality;
   b) it will assure the courts that discriminatory rules and practices are included within the scope of unlawful discrimination where their outcomes are discriminatory.
   c) it is complementary to, but not a substitute for, special measures because it enables individuals and groups to challenge as unlawful superficially fair (facially neutral) rules, while special measures allow, and indeed mandate, positive action that might otherwise be successfully challenged as unlawful discrimination.

Part 3: Racist or Hate Speech

3(a): The international obligation

Article 4 of CERD has presented a real problem for many states ratifying the convention, including Australia. Australia lodged a reservation saying we would not regard a criminal offence as appropriate because of freedom of speech aspects, as we also did in relation to Article 20 of the ICCPR. [30] The free speech aspect is presumably also an issue for Hong Kong, where there would be a possibility of conflict with Article 16 of the Bill of Rights (corresponding to ICCPR Art 19) and ICCPR Art 20 is not reproduced in the Bill of Rights. Nonetheless, the requirement in Art 4 of CERD is clear, and the problem needs to be considered, because the propagation of racist denigration is a highly discriminatory, offensive and often effective means of subordination and oppression.

CERD Article 4 provides:

> States parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race

[30] Art 20 reads:
1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

> 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:
> (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;
> (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
> (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

3(b): The free speech dilemma

In Australia, the Commonwealth and most State jurisdictions have now introduced legislation in some form.[31] Our response has been varied, ranging from direct criminality in Western Australia to a mix of criminality and unlawful discrimination in several jurisdictions and a harassment style approach at Commonwealth level. The New South Wales and Commonwealth provisions illustrate the differences.

In New South Wales, both unlawful and criminal law approaches were adopted, although both measures were incorporated in the discrimination legislation. Both provisions apply to 'public acts', which are defined broadly in s 20B of the *Anti-Discrimination Act* 1977 to cover virtually any form of communication to the public. 'Public acts' include speaking, writing, printing, displaying notices, broadcasting, telecasting, screening and playing of tapes and other recorded material, as well as actions and gestures and the wearing or displaying of clothing, signs, flags, emblems and insignia. Distribution of any matter in the knowledge that it promotes or expresses racial hatred is also included. The unlawful act of racial vilification is contained in s 20C:

[31] For a comprehensive survey and analysis of the situation in Australia see the valuable book by Luke McNamara, *Regulating Racism: Racial Vilification Laws in Australia*, (Sydney) Institute of Criminology, Monograph Series No 16, Sydney, 2002.

> (1) It is 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.
> (2) Nothing in this section renders unlawful -
> (a) a fair report of a public act referred to in subsection (1); or
> (b) a communication or the distribution or dissemination of any matter comprising a publication referred to in Division 3 of Part 3 of the *Defamation Act* 1974 or which is otherwise subject to a defence of absolute privilege in proceedings for defamation; or
> (c) a public act, done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter.

In all the legislation there is careful protection of defamation remedies and of reasoned discourse in the public interest. The offence in NSW of serious vilification (s 20D) mainly differs from s 20C in that the same acts as in s 20C become criminal when they involve threatening or inciting violence towards persons or groups or their property.

The Commonwealth adopted an approach based on the sexual harassment provisions in the SDA,[32] approach, largely because of the implied right to freedom of political communication[33] that had just been established by the High Court.[34] The Commonwealth legislation did not create an offence. It added a new Part IIA to the RDA, in which s 18C reads in part:

> (1) It is unlawful for a person to do an act, otherwise than in private, if:
> d) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
> e) 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.

Section 18C provides that to be unlawful an act must be done 'not in private'. Although that phrase is not defined, the act is only unlawful if done in a public place, which includes any place to which the public

---

[32] Section 28A of the SDA.
[33] *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 (the political advertising case) and *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1
[34] The implied freedom was confirmed by a unanimous judgment of the Court in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 and in an associated case, *Levy v Victoria* (1997) 189 CLR 579, as applying to the States.

have access as of right or by invitation express or implied, and whether or not a charge is made for admission. As with the NSW legislation, a specific exemption is included (in s 18D) to cover fair report and comment, any reasonable and good faith performance, and public discussion or debate.

The provisions have been of value to a number of groups and their members, particularly in NSW and the Commonwealth. They have been interpreted carefully by the courts to avoid undue restriction of the freedom of speech. Under the NSW legislation an Aboriginal group in a country town (Wagga Wagga) was successful in obtaining an order from the Equal Opportunity Tribunal for an apology from an alderman of the city council and the payment of $3000 by way of compensation for damages.[35] The alderman had warned the Mayor that he planned to disrupt proceedings at the launch of the 1993 International Year for the World's Indigenous People. At the launch he pointed to one of the speakers, while waving his arms around, and referred to 'radical half-castes'. At a subsequent city council meeting when a letter from one of the complainants was being discussed he referred to 'half-breeds', to a 'reign of terror', and to their land claim as a 'declaration of war'. He also cast aspersions on Aboriginal people during a television interview. The Tribunal referred to the limitation in Art 19 of the ICCPR on the ground that freedom of speech carries with it special responsibilities; to Art 20; and also to the need to balance the freedom with the right to a dignified and peaceful existence:

> The dividing line arises when by a public act a person incites others to have hatred towards, serious contempt for … a particular person or group. … There is clearly danger in such behaviour and it is for this reason that the Act declares the conduct unlawful. (p 78266-7) … [P]roper procedures were available to Mr Eldridge, and there was no need to act as he did … what might be determined as 'the defence' provided in s 20C [of the NSW Act] is not made out. (p 78,268)

The Federal Court has decided numerous cases relating to the RDA. Not all the applications have been successful, the tendency in the unsuccessful applications being, in my assessment, towards taking too little into account the sensitivities of the disadvantaged minorities for whom the legislation is primarily devised.

An example of an action that failed because of the freedom os speech aspect is *Hagan v Trustees of the Toowoomba Sports Ground Trust* FCA [2001] 123 (23 February 2001). The Federal Court Appeal Division affirmed the decisions of HREOC and the first instance judge in finding no unlawfulness in continuing to use the name 'Nigger Brown Stadium' for a main public stand at the Toowoomba Oval. The

---

[35] *Wagga Wagga Aboriginal Action Group and Others v Eldridge* (1995) EOC 92-701

complaint was that the title contained in it a racist description and that this was offensive to Aboriginal people in the area. The complainant had felt unable to take his children to watch games played there and some others felt the same. On the other hand, it seems that at a public meeting attended by some 60 people across the community generally - although the racial composition of the meeting was not disclosed - there was unanimous support for retaining the name. The inquiries made by the courts suggested that the prominent footballer in whose honour the stadium was named, although of fully European origin, had always for unascertainable reasons been termed 'Nigger' Brown. The Appeal Court endorsed the finding of Drummond J at first instance that the RDA (especially s 9) was 'directed not to protecting the personal sensitivities of individuals, but as rendering acts against individuals unlawful only where those acts involve treating the individual differently and less advantageously than other persons' (para 15). This interpretation of the Act seems a little questionable. It seems possible that at the meeting, even though chaired by a prominent aboriginal person (para 11), the Aboriginals present may not have felt able to do more than go along with the general sentiment.[36]

The second case of interest – this one successful - relates to information circulated about Jewish people and the Holocaust. In *Jones v Scully* [2002] FCA 1080 2 September 2002) the Federal Court (Hely J), in a lengthy and careful judgment, found s 18C had been breached. He applied in significant respects the UK decision in *Irving v Penguin Books Ltd* (1992) EWHC QB 115 and also the principles in *Hagan.* His examination of each of the many leaflets and other documents complained of yielded a finding that all of them in whole or in part offended against s 18C. Accordingly, orders to cease distribution and sale were made, and costs were awarded against the respondent. The judgment is notable for its detailed application of the criteria 'reasonably likely', 'offend', and 'because of' in s 18C(1) and its careful analysis of the various documents. Hely J also followed the finding in the New Zealand case *King-Ansell v Police* [1979] 2 NZLR 531 that the Jewish people were a 'race' for purposes of the legislation. On the freedom of speech issue he endorsed the finding of the HREOC Commissioner. Commissioner Cavanough, after applying the test about freedom of political communication in *Lange,* found an unlawful act had been committed under s 18C (para 238):

> It is conceivable that the restrictions imposed by s 18C(1) of the *RDA* might in certain circumstances effectively burden freedom of communication about government and political matters.

---

[36] A critical appraisal of the whole process through the courts and the HRC is contained in Willheim E, 'Australia's Racial Vilification Laws Found Wanting? The 'Nigger Brown' Saga: HREOC, the Federal Court, the High Court and CERD,' *Asia-Pacific Journal on Human Rights and the Law,* (2004) Vol 4(1), 86-129. The author was counsel *pro bono* for Mr Hagan.

> However, it seems to me that, bearing in mind the exceptions or exemptions available under s 18D, Part IIA as a whole is 'reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the system of government prescribed by the Constitution.

In the most recent case, *Bropho v Human Rights and Equal Opportunity Commission* [2004] FCAFC 16 (6 February 2004), the court was divided. By majority the full Federal Court found against the complainant, who claimed that a cartoon in the West Australian Newspaper containing a group of eight panels with pictures and associated comment was offensive to Aboriginal people because it repeated familiar stereotypes and demeaned a deceased but revered Aboriginal Western Australian named Yagan. It also cast aspersions on the members of the Aboriginal delegation who in 1997 had gone to London to recover Yagan's head, which had been held in the Royal Institute in Liverpool until about 1964 and was afterwards buried in Everton. Yagan, while a man with considerable intelligence, had had a varied career. He was arrested in 1832 connection with the murder of a white man. Later in the year he escaped and in July1833 was shot by two young white men in what was described as an act of treachery. French J notes that the reaction of indigenous witnesses to the cartoon 'ranged from shock and distress to concern' (para 30) and that criticism of the visit to obtain the head had been damaging because the action 'was a very spiritual experience for those Aboriginal people who were involved' (para 32, quoting the Commissioner).

A key question was whether the cartoon was drawn and published 'reasonably and in good faith' so as to fall within the exemption provided in s 18D. There was general agreement that the onus of establishing the applicability of the exemption lies with the respondent.[37] On the matter of reasonableness and good faith, a distinction was drawn between the differing criteria needing to be applied respectively to an 'artistic' work, to a report of a meeting and to a discussion at a scientific gathering. The context of the publication would to some extent determine its reasonableness and its good faith content (para 80):

> The good faith exercise [by the paper] of that freedom will, so far as practicable, seek to be faithful to the norms implicit in its protection and to the negative obligations implied by s 18C. It will honestly and conscientiously endeavour to have regard to and minimise the harm it will, by definition, inflict. It will not use those freedoms as a 'cover' to offend, insult, humiliate or intimidate people by reason of their race or colour or ethnic or national origin. (para 95) … On the other hand, a person who exercises the freedom carelessly, disregarding or wilfully blind to

[37] See for example French J at para 111.

> its effect upon people who will be hurt or in such a way as to enhance that hurt, may be found not to have been acting in good faith. (para 102)

Notwithstanding these comments, French and Carr JJ dismissed the appeal, meaning that the cartoon, although hurtful, was covered by the s 18D exemption. Lee J dissented. Referring to the fact that the legislation recognises the mischief caused by racial discrimination and that it sees the control of free expression where it is offensive as 'in the greater public interest,' he said:

> In the instant case the Commission found that the cartoon was reasonably likely to offend, insult, humiliate or intimidate. … The act of distribution was at the most serious end of the spectrum with a corresponding onus on W A Newspapers to show that in those circumstances the act had been done reasonably and in good faith. The reasonableness of the act could only be judged against the possible degree of harm it may cause. Such harm, in the context of the Act, would be the extent to which that part of the community which consisted of persons who held racially-based views destructive of social cohesion, or persons susceptible to the formation of such opinions, may be reinforced, encouraged or emboldened in such attitudes by the publication, on the ground of race, of a cartoon which, irrespective of the intent of the artist and of the purpose of the publisher, was capable of being seen by such persons as providing support or justification from an authoritative source for views grounded on racial antipathy. … The act of publication was not an act of offensive behaviour in a minor degree in respect of a limited group of people. (paras 137-138)

Applying these views to the determination by the HREOC Commissioner that the cartoon was saved by the exemption he said:

> The Commission failed to consider the extent to which the publication infringed the terms of s 18C in assessing whether, for the purposes of the Act, publication of the cartoon could be said to have been done reasonably and in good faith. … [I]t seems to have been of the opinion that the 'surrounding circumstances' consisted of the opinion of the editor and of anterior material published by W A Newspapers. … Contemporaneous, or prior, publication of anodyne material would not, in itself, make an act of publication done because of race and involving racially offensive material, an act done reasonably and in good faith. (para 142)

My view is that Lee J's conclusion is correct. Section 18C establishes the standard as 'reasonably likely …to offend'. Modelled as it is on the definition of sexual harassment, it is designed to protect the target individual or group. As in harassment, on which this legislation is for reasons noted above modelled, the criterion should adopt no less a standard than is included in the revised (1995) version of harassment in the SDA[38] or the more empathic standard applying in SA and the ACT.[39] The SDA standard is that of a 'reasonable person' *in the target group*. The SA/ACT standard is that of *a person who 'reasonably feels harassed*. The standard being applied by the majority appears to be the old 'detriment' standard, operative in the SDA until 1995 and still operative in Western Australia. It is of the 'reasonable person' who, if not the person on the Bondi tram (or the Clapham Omnibus), is a 'typical' member of the majority and it requires that reasonable person reasonably to expect that harm might follow the action. The second standard recognises aptly the special hurt a harassed person experiences. The judgment of Lee J in *Bropho* would appear to be the logical consequence of applying either the current Commonwealth standard or the (preferable) SA/ACT standard.

The approach taken by many Australian judges to reasonableness in relation to the control of speech seems to have been drawn from comments about reasonableness in other areas of law and from the pre-1995 SDA formulation. Examples are the judgments of all the judges in *Hagan* and the majority in *Bropho*. This more formal approach was considered and adopted by Hely J in *Jones* (at para 107), where he quoted with approval the view of Kerr J in *Ball v McIntyre* (1966) 9 FLR 237. The focus is on the reasonable person rather than on the harassed person or group. It is that the:

> … behaviour to be offensive behaviour must be *calculated* to produce a stronger emotional reaction in the *reasonable man* than is involved in indicating difference from or non acceptance of his views or values. The behaviour to be offensive would normally be calculated to wound the feelings, or arouse anger, resentment, disgust or outrage in the mind of a *reasonable man*. (p 243) (emphases added)

The words have been emphasised because they are not, in my view, appropriately applied in the RDA context. Motive is not relevant. Nor should the reaction be that of the 'reasonable man': it should be that of the (almost necessarily raw or sensitive) member of the racially targeted group.

It seems to me important to include a remedy to cover the very prevalent harm caused by racial denigration in any racial

---

[38] SDA s 28A.
[39] *Equal Opportunity Act* 1984 (SA) s 87(11), *Discrimination Act* 1991 (ACT) s 58.

discrimination legislation Hong Kong should adopt. In the experience of Australia and many other countries, racial denigration – ranging from snide slurs to outright vilification and incitement - has been one of the most noxious and effective of the means used to keep racial and ethnic minorities unseen and afraid to assert their rights.[40] The provision could be rationally related both to the harm caused by denigration and be capable of ensuring that, bearing in mind its attendant responsibilities, freedom of speech can continue to be exercised freely. One effective means of achieving this balance would be to adopt for the legislation the 'harassment' rather than the 'restricting speech' mode. Our experience, and that of other countries, has been that the courts can handle the issues effectively, even if they do not yet always take sufficient note of the serious effects public racial denigration can have.

3(c): Conclusions and recommendations

Providing a remedy for racial minorities and their members who suffer racial denigration and hate speech is a significant element in any effective racial discrimination legislation. It:

1. would constitute compliance with CERD;
2. could be implemented consistently with Article 16 of the Bill of Rights, and more readily so if it adopted a harassment rather than a speech limitation paradigm
3. should incorporate the more advanced standard of reasonableness contained in the South Australian and ACT legislation, rather than the standard in the Commonwealth's SDA (not the standard in s 18C of the RDA).

---

[40] Examples of Australian inquiries are Human Rights Commission, *Report No 7: Proposals for Amendments to the Racial Discrimination Act to cover Incitement to Racial Hatred and racial Defamation,* AGPS, Canberra 1984 and *Racist Violence: Report of National Inquiry Into Racist Violence in Australia,* Human Rights and Equal Opportunity Commission, AGPS, Canberra, 1991, pp290-296, 299-300.