Legislative approaches to the regulation of racial hatred: a study of racial vilification laws in Australia, 1989-1999

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PART I
CHAPTER 1

GENERAL INTRODUCTION

1. INTRODUCTION

During the past ten years legislation has been enacted in the majority of Australian jurisdictions\(^1\) which attempts to regulate various forms of conduct amounting to 'racial vilification'. The difficult task of defining racial vilification will be discussed in chapter 2 of this thesis, but for the purpose of this general overview, the following definition of racial vilification provides a useful starting point: racial vilification is any sort of conduct (commonly spoken or written words or images) which has the effect of generating racist ill-feeling against an individual who belongs to a particular racial or ethnic group or against members of the group generally.

That such conduct is undesirable should be axiomatic,\(^2\) particularly in a country like Australia where multiculturalism is both a statistical reality (in terms of

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\(^1\) *Anti-Discrimination Act* 1977 (NSW), Part 2 Division 3A (as amended in 1989); *Criminal Code* 1913 (WA), Chapter XI (as amended in 1990); *Discrimination Act* 1991 (ACT), ss 66-67; *Racial Discrimination Act* 1975 (Cth), Part IIA (as amended in 1995); *Racial Vilification Act* 1996 (SA) (proclaimed in 1998), *Wrongs Act* 1939, s37 (as amended in 1996). Section 126 of the *Anti-Discrimination Act* 1991 (Qld) creates an offence of inciting unlawful discrimination via the *means* of racial vilification; it does not regulate racial vilification as such: see chapter 7 of this thesis.

\(^2\) As Ch'ang has observed, "In Australia, where multiculturalism is a declared policy of, and publicly advocated by the Australian government, racial conflict of whatever cause is incompatible with such policies and contrary to the aim of maintaining law and order in society": S Ch'ang, "Legislating Against Racism: Racial Vilification Laws in New South Wales" in S Coliver (ed), *Striking A Balance: Hate Speech, Freedom of Expression and Non-Discrimination* (London and Colchester: Article 19, International Centre Against Censorship and Human Rights Centre, University of Essex, 1992) 87.
the nation’s population composition)³ and official government policy.⁴ Certainly, the growth of regulatory anti-vilification legislation during the past decade in Australia would seem to reflect increasing recognition of the need to address the harmful effects of the ridicule, stereotyping, discrimination, intimidation, aggression, and violence to which people are subjected because of their actual (or perceived or assumed) race, ethnicity, religion or national origin.⁵

While the assumption that racial vilification is socially undesirable is relatively straightforward and uncontroversial,⁶ resolution of the question whether

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³ See discussion of relevant statistics in chapter 3 of this thesis.
⁴ Commonwealth of Australia, Office of Multicultural Affairs, National Agenda for a Multicultural Australia (Canberra: AGPS, 1989). See further discussion of multiculturalism policy in chapter 3 of this thesis.
⁵ Most anti-vilification laws in Australia only extend protection to racial (including ethno-religious) groups and not to other identifiable groups who may be subjected to vilification. However, in New South Wales, vilification is also unlawful where it is based on (actual or perceived) homosexuality (Anti-Discrimination Act 1977 (NSW), ss49ZT-49ZTA (as amended in 1993 by the Anti-Discrimination (Homosexual Vilification) Amendment Act 1993 (NSW)), HIV/AIDS status (Anti-Discrimination Act 1977 (NSW), ss 49ZXA-49ZXC (as amended in 1994 by the Anti-Discrimination (Amendment) Act 1994 (NSW)), and transgender identity (Anti-Discrimination Act 1977 (NSW), ss 38R-38T (as amended in 1996 by the Transgender (Anti-Discrimination and Other Acts Amendment) Act 1996 (NSW)). This thesis is specifically concerned with the operation of racial vilification and does not address the extension of anti-vilification laws to protect other identifiable groups. For further discussion of these other forms of anti-vilification laws, see L McNamara, “Anti-Vilification Laws: Protecting Whom From What?” (1994) 13 Socio-Legal Bulletin 28; A Scailhill, “Can Hate Speech Be Free Speech” (1994) 4 Australasian Gay and Lesbian Law Journal 1; and R Takach, “Gay and Lesbian Inequality: The Anti-Vilification Measures” (1994) 4 Australasian Gay and Lesbian Law Journal 30. In 1999 the New South Wales Law Reform Commission recommended that there should be no extension of the grounds of unlawful vilification, specifically rejecting submissions that the legislation should be extended to cover gender vilification, religious vilification and disability vilification: see New South Wales Law Reform Commission, Review of the Anti-Discrimination Act 1977 (NSW). Report Number 92 (Sydney: New South Wales Law Reform Commission, 1999) at 526-535.
⁶ It should be noted that while the undesirability of racial vilification is widely recognised, one of the arguments advanced by opponents of the legal regulation of racial vilification is that the problem is insufficiently large or serious to warrant legislative intervention. The difficult task of accurately measuring the extent of racial vilification is discussed in chapter 2.
The creation of legislative regulatory mechanisms has a part to play in the response to this social problem has been a vexed process. The enactment of racial vilification laws in five Australian jurisdictions during the past ten years has been a very controversial process. Each stage in the growth of racial vilification legislation in Australia has been surrounded by heated debate (both inside and outside the legislature) regarding the desirability of legislation designed to render unlawful conduct amounting to racial vilification.

1.1 The Debate over Racial Vilification Laws: Points of Controversy

The main points of contention in the debate over racial vilification laws can be grouped into two general categories.

First, debate has focused on whether the legal regulation of racial vilification is reconcilable with the valued liberal democratic ‘right’ of all citizens to ‘free speech’ or ‘free expression’. A component of this debate is disagreement over whether racial vilification occurs with sufficient frequency and whether it is sufficiently harmful to warrant the intervention of legal regulation.

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7 See, eg, Ch’ang, supra note 2 at 87. Similar controversy has surrounded the introduction of racial vilification legislation in a number of countries around the world. See Coliver, supra note 2; and L Greenspan & C Levitt (eds). Under the Shadow of Weimar: Democracy, Law and Racial Incitement in Six Countries (Westport: Praeger, 1993).

8 Media coverage and scrutiny of proposed racial vilification has been intense. Strong expressions of firmly held views on the merits—or otherwise—of racial vilification laws have been recurring staples in editorials, opinion columns, and letters to the editor in newspapers around the country when racial vilification legislation has been before a state or federal parliament. For example, the Racial Hatred Bill, when it was before the Commonwealth Parliament in 1994, was the subject of extensive media coverage and debate. See chapter 5 of this thesis.

Second, debate has revolved around the question of what forms of regulation and legal sanctions (if any) are legitimate/appropriate/effective? As Reid and Smith have observed, "[t]he choice of an appropriate and effective regulatory regime is, however, problematic." Subsidiary questions in this category include: Should civil remedies be made available to aggrieved persons? Should the full weight of the criminal justice system be invoked in appropriate circumstances? Is conciliation an appropriate mechanism for the resolution of disputes of this nature?

These two categories of debate are related. Different forms of regulation have different implications for the right to freedom of expression and may be assessed differently from the point of view of whether they constitute an unjustifiable infringement of this right. However, a significant motivation for this thesis is the perception that debate over racial vilification laws has tended to focus disproportionately on the first category questions; specifically, on philosophical and ‘in principle’ analyses of the question of free speech compatibility. Indeed, it would not be an overstatement to say that the question of the implications of racial vilification laws for the right to freedom of expression has dominated and even overwhelmed the law reform debate, often to the exclusion of consideration of other relevant matters.

Laws dealing with the regulation of the expression and communication of racism undoubtedly represent a controversial extension of the regulatory role of the legal system. Examination of the implication of the legislative regulation of racial vilification for the enjoyment of free speech is integral to any assessment of the

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10 Ibid at 2.
justifiability of racial hatred laws. However, it is equally important that room be made in the academic, political and mass media discourses for consideration of other important matters. In particular, attention needs to be directed at examining the practical workings of the various existing forms of racial vilification legislation, with a view to facilitating an assessment of the significance and relative merits of different models of legal regulation.

1.2 Focus of This Thesis

The primary aim of this thesis is to contribute to filling this gap in the academic literature and the wider political debate on the merits of racial vilification laws. Therefore, this thesis does not engage directly in the familiar debate over whether racial vilification laws are justifiable and legitimate in light of democratic free speech principles and rights. The philosophical, political and legal arguments on the relationship between free speech and racial vilification have been well rehearsed and there is a substantial body of Australian scholarly literature on the topic. There is a

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similarly large body of literature in other common law countries where the relationship between free speech and the legislative regulation of racial vilification has been keenly debated.\textsuperscript{14}

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Rather than engage in the familiar debate over the compatibility of free speech and racial vilification legislation, this thesis adopts as its starting point the fact that a variety of racial vilification statutes have already been validly enacted in Australia on the basis that legal regulation of racial vilification is not fatally inconsistent with a continued commitment to the principles of free speech, expression and communication.

Upon this foundation this thesis will examine an important, but to date, largely neglected, set of concerns regarding the adoption and operation of different legislative models for the regulation of racial vilification. This thesis aims to answer a series of questions regarding the nature and operation of racial vilification laws which arise for consideration once the hurdle of free speech compatibility has been negotiated. Specifically, this thesis will analyse the ‘shape’ in which regulatory legislation has passed the threshold of free speech compatibility.

This approach represents a new scholarly perspective on the relationship between free speech and racial vilification legislation. It is an approach which is more attuned to the history of the debate over racial vilification legislation in Australia,


For a selected list of relevant works from the USA — where vigorous debate over the relationship between the extensive free speech protection contained in the
where the law reform debate over racial vilification legislation has not focused narrowly on whether, in light of its impact on free speech, racial vilification *should* be legally regulated (as it has to a large extent in the United States of America (USA)). In Australia, the debate has not been limited to consideration of this 'in principle' conflict. On the contrary, as this thesis will show, the central point of contention in the history of racial vilification in Australia has been: what is the most appropriate form of legislative regulation for racial vilification? Concern about the implications of the various regulatory models for free speech—an influence described in this thesis as 'free speech sensitivity'—has been a significant feature of this choice.

2. OBJECTIVES

The specific objectives of this thesis are to:

1. advance the terms of the scholarly debate beyond the conventional focus on whether racial vilification laws are reconcilable with a commitment to the democratic principle of free speech;

2. review, critically analyse and compare the diverse range of models of legal regulation (both with respect to scope and legislative regulatory form) which have been adopted by federal, state/provincial and territorial legislatures in Australia to deal with various forms of racial vilification;

3. identify the various factors which have influenced the choice of different legislative models for the regulation of racial vilification and to assess the

First Amendment and attempts to legislatively regulate hate speech has spawned a great deal of scholarly writings — see *infra* note 28.
implications of the choices that have been made from the point of view of the level of protection provided for victims of racial vilification;

4. assess the impact of free speech principles and free speech ‘sensitivity’ on the initial choice and modification of regulatory models by legislatures, and on the application and interpretation of relevant legislation by human rights agencies, prosecuting authorities, tribunals and courts; and

5. assess the capacity of various regulatory models to achieve the objectives of racial vilification laws in a democratic multicultural society, including an assessment of strengths and weaknesses of the various approaches to the regulation of racial vilification which have been utilised to date in Australia.

3. RESEARCH METHODOLOGY

This thesis will review the history and current status of racial vilification laws in all Australian jurisdictions where such laws have been enacted. In the ten years since the enactment of Australia’s first racial vilification statute by the New South Wales Parliament—the *Anti-Discrimination (Racial Vilification) Amendment Act 1989* (NSW)—the Commonwealth Parliament, and the legislatures of Western Australia, South Australia and the Australian Capital Territory have followed suit. One of the most immediately striking features of the body of racial vilification laws which is currently in operation in Australia is that, while two of the five regulatory regimes are very similar, the various statutes provide for a diverse range of approaches to the regulation of racial vilification.

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15 Sections 66-67 of the Australian Capital Territory’s *Discrimination Act 1991* are modelled on, and largely identical with, ss 20C-20D of the New South Wales *Anti-Discrimination Act 1977*. The regulatory regimes established by these statutes are discussed in detail in chapter 9 of this thesis.
The statutes vary in two primary respects. First, there is considerable variation in the breadth of coverage—that is, in the definition of what sort of conduct is prohibited or rendered unlawful. Second, the statutes vary in terms of the regulatory mechanism adopted for enforcement of the standard established by the legislation.

The regulatory models utilised in Australian racial vilification laws can be divided into three main types. One, a number of statutes invoke criminal prosecution and punishment for certain (aggravated) forms of racial vilification. Two, a number of statutes provide for the making of human rights complaints regarding breaches of the legislative standard to a human rights agency for conciliation or mediation, and where this proves ineffective, inappropriate or impossible, referral to a quasi-judicial tribunal for adjudication. Three, one statute creates civil liability in the form of a 'statutory tort' which can be enforced in the mainstream court system.

In order to undertake a comprehensive critical comparative review of Australian racial vilification laws, a range of research methods have been adopted:

(i) review of secondary literature on racial vilification laws;

(ii) review of selected media reports surrounding the enactment of racial vilification laws;

(iii) collection and analysis of relevant statutes (including amendment history), cases and available statistical data; and

(iv) examination of other relevant primary materials including records of parliamentary debates and reports of relevant commissions of inquiry.16

16 Unless otherwise specified, legislation and case law is reviewed as at 31 December 1999, and statistical data is reviewed as at 30 June 1999.
This thesis aims to analyse both the enactment and the operation of various models of racial vilification legislation. However, as will be revealed, analysis of the operation of a number of the statutes is rendered difficult because the usual observable manifestations of a regulatory regime (such as prosecutions, complaints, actions, and judicial decisions) are limited or non-existent. To compensate, and in order to be able to offer some insights into the operation of particular regulatory models that have been established in Australia but not yet invoked, this thesis will selectively examine aspects of the operation of relevant equivalent Canadian statutes.

Canada has been chosen as the source of this minor comparative component for a number of reasons, including the general similarity of the Australian and Canadian legal systems (in both substantive and procedural terms), and similarities in the major political values which have influenced the enactment of racial vilification in the two countries (including a democratic commitment to both free speech and multiculturalism).

A feature of the debate in Australia over the appropriateness of racial vilification legislation during the past decade has been reference to the experience of other countries\(^{17}\) as illustrative of either the success/effectiveness of laws concerned

with regulating expressions of hatred against racial or ethno-religious groups, or conversely, the ineffectiveness or negative impact of racial vilification laws. Clearly, there is much to be gained from such a comparative perspective. As Australian jurisdictions begin to come to terms with the role of and impact of racial vilification legislation, an assessment of the operation of similar statutory provisions in other jurisdictions is likely to produce valuable results.

The experiences of other multicultural societies such as Canada, where parallel legal institutions and principles operate and similar statutory provisions are in force, are considered to be of particular relevance. As in Australia, multiculturalism is official government policy in Canada, and associated protections have been enshrined in the Canadian *Charter of Rights and Freedoms*. On the specific issue of the legal regulation of racial vilification, Canada provides a very useful comparative reference, particularly in light of recent decisions of the Supreme Court of Canada which address the constitutional status of prohibitions on expressions of racial hatred. As Cotler has observed,

"Canada has become a world centre for hate propaganda litigation... Moreover, the Canadian experience is now perhaps the most compelling legal precedent respecting [racist incitement and free speech]."

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18 There is a significant body of comparative literature dealing with various aspects of multiculturalism in Australia and Canada. See, for example, S Gunew, "Multicultural Multiplicities: US, Canada, Australia" (1993) 52 *Meanjin* 447; and R Patterson, "Two Nations, Many Cultures: The Development of Multicultural Broadcasting in Australia and Canada" (1993) 11 *Australian-Canadian Studies* 17.

19 See *Multiculturalism Act 1988* (Canada).

20 The relationship between racial vilification legislation and government policy on multiculturalism is discussed in chapter 2 of this thesis.

21 The term 'hate propaganda' is commonly used in Canada to refer to racial vilification.

Analysis of selected aspects of the Canadian experience with racial vilification legislation will be included in this thesis to facilitate a fuller discussion of the range of models of legal regulation than would be possible if the focus was exclusively on Australian legislation. While there has been considerable legislative activity in Australia in the last 10 years in the field of racial vilification regulation, only in New South Wales,23 and more recently, at the federal level,24 has there been sufficient practical experience to sustain detailed analysis of the operation of the relevant regulatory regimes. This is particularly so in relation to the adoption of criminal law and tort-based civil law regulatory approaches.

Notwithstanding that in four Australian jurisdictions legislation creates a criminal offence with respect to particular forms of racial vilification,25 it remains very difficult to assess the impact of regulation of racial vilification via the criminal law because, to date, there have been no criminal prosecutions in this country. Yet, the role of criminal law in the regulation of racial vilification has been, and remains, an important component of debate over the regulation of racial vilification. There is a clear need for informed analysis on the operation and impact of the criminal law in relation to the regulation of racial vilification. In contrast to the Australian experience, criminal prosecution has been a prominent (if infrequently employed) component of the Canadian legal system’s response to racial vilification. Comparative analysis of the relevant provisions of Canada’s Criminal Code,26 is likely to produce valuable

23 Complaints under s 20C of the Anti-Discrimination Act 1977 (NSW), analysed in chapters 8-9 of this thesis.
24 Complaints under s 18C of the Racial Discrimination Act 1975 (Cth), analysed in chapters 5-6 of this thesis.
results. Therefore, these provisions will be examined in chapter 10 of this thesis, in the context of an analysis of the racial vilification legislation enacted by the Western Australian Parliament, which relies exclusively on criminal law regulation.

Similarly, analysis of the operation of British Columbia’s Civil Rights Protection Act 1981 and s 19 of Manitoba’s Defamation Act 1987 (first introduced in 1934) can be expected to offer some insights into the operation of tort-based approaches to the regulation of racial vilification. Therefore, the operation of these Canadian statutes will be examined in chapter 11 of this thesis, with the specific aim of a facilitating analysis of the statutory tort of racial victimisation which has been created by the Parliament of South Australia.

Despite Canada’s reputation as a ‘leader’ in the field of racial hatred laws, few would suggest that the Canadian legal system’s capacity for addressing the full range of activities which constitute racial vilification is perfect. Specific concerns have been raised about Canada’s heavy reliance on criminal prosecution. For example, Elman, supra note 14 at 643, has concluded that

... the criminal process is long, expensive, and, most importantly, unpredictable. It should not be casually invoked. Alternative legal means—perhaps human rights legislation—should be studied to determine if they might be effective in combating racism.

The examination in this thesis of Australia’s experience with non-criminal forms of legal regulation—in particular, the extensive use of confidential conciliation in the handling of racial vilification matters by the New South Wales Anti-Discrimination Board and the Commonwealth Human Rights and Equal Opportunity Commission—offers the potential for valuable insights into the significance of the full range of regulatory models currently adopted in the legislative regulation of racial vilification, so that the comparison may be of value in Canada as well as Australia.
4. PRIMARY ARGUMENTS

In this thesis two related primary arguments will be advanced.

4.1 The Impact of Free Speech Sensitivity on the Shape of Racial Vilification Laws

The first argument that will be advanced in this thesis is that even though no racial vilification statute in Australia has been formally invalidated for infringing on free speech, free speech sensitivity has had a profound impact on the form, substance and practical operation of racial vilification laws.

This influence is illustrated by the preference for ‘soft’ regulatory mechanisms based on victim initiation, conciliation and the avoidance of criminal prosecution. This thesis argues that such models have been adopted not simply because they are considered the most effective means of regulating racial vilification, but because they are the least objectionable forms of regulation from the point of view of their impact on free speech ‘sensitivity’. That is, contrary to the perception of many free speech advocates and opponents of regulation that free speech principles have had to ‘yield’ to racial vilification laws, the former have actually had a profound effect on the latter.

This thesis further argues that the influence of free speech sensitivity is not only felt in the legislature during the establishment of the regulatory regime—its impact is ongoing and cumulative. Free speech sensitivity has had a powerful impact on the operation of racial vilification legislation in a variety of ways including the terms in which legislatures have enacted racial vilification statutes, the willingness of victims of racial vilification and prosecuting authorities, and the judicial and quasi-
judicial interpretation of the scope of racial vilification statutory provisions. With few exceptions, the general pattern of the influence of free speech sensitivity has been to restrict the scope of racial vilification legislation and to contribute to a reluctance to initiate or invoke criminal law regimes for the regulation of racial vilification.

4.2 The Limitations of Existing Racial Vilification Legislation

The second primary argument advanced in this thesis is that existing regulatory models are inadequate to deal with the problem of racial vilification. More specifically, the major models currently employed in Australia, notably the civil human rights conciliation model and the criminalisation model, are flawed.

A survey of the major models of regulatory enforcement currently operating in Australia suggests that common assumptions about the operation and impact of racial vilification laws may be misconceived. In particular, legislation that provides for criminal prosecution, while commonly considered to be 'heavy-handed' and a case of overkill, may, in practice, be inadequate, by virtue of considerable barriers to commencement and completion of proceedings.

Legislation which allows for the making of complaints to a human rights agency represents a more promising approach to the regulation of racial vilification. However, this approach suffers from a number of flaws. First, it places onerous responsibility for the carriage of the process (and, therefore, the enforcement of the standards of behaviour imposed by the legislation) on the victim/complainant. Second, it uncritically assumes the value of conciliation/mediation in racial vilification cases to which this process of dispute resolution may be ill-suited. Third, it fails, due
to its private and confidential nature, to advance the symbolic and educational objectives of racial vilification regulation. Effective regulation of racial vilification requires a novel or customised approach to regulation which is appropriately adapted to the objective of minimising the harm suffered by victims of racial vilification. To this end, the conventional barriers between alternative regulatory structures, including the rigid criminal/civil distinction, will need to be reconsidered.

5. JUSTIFICATIONS FOR MOVING BEYOND THE HURDLE OF FREE SPEECH COMPATIBILITY

The foundation upon which this thesis is based, with respect to the question of free speech compatibility, requires some justification lest it appear that a core issue regarding the legal, moral and philosophical legitimacy of racial vilification laws has been summarily dismissed or ignored.

5.1 Recognition of the Importance of Free Speech Jurisprudence and Scholarship

The focus in this thesis on the origins, nature and operation of existing regulatory models for dealing with racial vilification does not amount to a rejection of the relevance or significance of free speech questions in the evaluation and analysis of racial vilification laws nor does it amount to a denigration of the conventional debate between proponents and opponents of the regulation of racist hate speech. It certainly does not represent an attack on the work of scholars who continue to engage actively and productively in this debate.
In the USA, there is a large, rich and ever-growing body of academic scholarship in which scholars continue to debate the legitimacy of restrictions on hate speech in light of the free speech protection of the First Amendment to the United States Constitution. This scholarship—which includes work from a variety of

perspectives including civil libertarians, liberal theorists and critical race theorists—is of considerable value, particularly in the USA where the primacy of free speech constitutional rights, principles and rhetoric remains a major obstacle to the enactment of hate speech regulations. In this context, continued scholarly engagement with the ‘first’ category of questions regarding the legitimacy of legislative regulation of hate speech is necessary and relevant to policy and law reform debates.

5.2 The Legal Circumstances of Australia

Unlike the USA, in Australia, it is conceptually and legally possible (as well as desirable and potentially beneficial from a law reform point of view) to move beyond this threshold issue and consider other issues about how racial vilification is regulated. While legislative restrictions on the expression of racial hatred remain controversial in Australia, the legality and constitutionality of various forms of legislative regulation of such conduct are not seriously in question. The High Court ruled, in a series of cases during the 1990s, that a narrow constitutional guarantee of freedom of communication in relation to political discourse is implicit in the Australian Constitution. However, the implied constitutional guarantee of freedom of
communication has been recognised by the High Court in limited terms. In *Lange v ABC*\(^{30}\) a unanimous High Court stated:

The freedom of communication which the Constitution protects is not absolute. It is limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution. ... The freedom will not invalidate a law enacted to satisfy some other legitimate end if the law satisfies two conditions. The first condition is that the object of the law is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government ... which the Constitutions prescribes. The second is that the law is reasonably and appropriately adapted to that end.\(^{31}\)

In light of the narrow scope of the freedom it is unlikely that this constitutional development jeopardises the validity of racial vilification legislation.\(^{32}\)

\(^{30}\) (1997) 189 CLR 520.

\(^{31}\) *Ibid* at 561.

\(^{32}\) Akmeemana and Jones, *supra* note 13 at 156-164, have concluded that

... racial vilification laws are clearly justifiable if they do, in fact, impact on political discussion. Limitations on political discourse may be justified where they do not go beyond what is reasonably necessary for the preservation of an ordered society, or for the protection or vindication of the legitimate claims of individuals to live peacefully and with dignity in society. It is arguable that there is sufficient evidence that the curtailment of racist speech is necessary for the above reasons and is conducive to “the overall availability of the effective means of political communication and discussion in a democratic society” [quoting Deane J in *Cunliffe v Commonwealth of Australia* (1995) 182 CLR 272 at 339].

To put it simply, racial vilification laws are a feature of the Australian legal systems. Therefore, scholarly analysis need not be limited to the conventional threshold question regarding the philosophical compatibility of racial vilification legislation with commitment to free speech. Indeed, the existence of such laws in Australia demands that additional lines of research inquiry be pursued. This thesis pursues one such line of inquiry—critical analysis of the nature and operation of the range of existing forms of legislative regulation of racial vilification in Australia.

5.3 Need for Analysis of Practical Operation of Racial Vilification Laws

The legitimacy of racial vilification laws remains a contentious issue in Australia. That legislative limits on the expression of racist views should generate controversy.

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Canada (Canadian Human Rights Commission) (1990) 75 DLR (4th) 577 (Supreme Court of Canada); R v Keegstra [1991] 2 WWR 1 (Supreme Court of Canada); and Ross v New Brunswick School District No 15 (1996) 133 DLR (4th) 1 (Supreme Court of Canada). See also Saskatchewan Human Rights Commission v Bell (1994) 114 DLR (4th) 370 (Saskatchewan Court of Appeal); Canadian Jewish Congress v North Shore Free Press Ltd (1998) 30 CHRR D/5 (British Columbia Human Rights Tribunal).

A significant reason why the academic literature in the USA remains preoccupied with the theoretical relationship between speech regulation and free speech principles is that anti-racism law reform has not crossed the judicially established threshold of free speech compatibility. A number of attempts have been made to enact racial vilification laws, but the courts have consistently invalidated these statutes as unjustifiable infringements on free speech which is protected by the First Amendment. The decision of the United States Supreme Court in RAV v St Paul, 505 US 377 (1992), where the Court struck down a city racial/gender vilification ordinance as unconstitutional, is illustrative of this pattern. See generally D Knoll, “Anti-Vilification Laws: Some Recent Developments in the United States and their Implications for Proposed Legislation in the Commonwealth of Australia” (1994) 1 Australian Journal of Human Rights 211.

For example, during the passage of the Racial Hatred Act 1995 (Cth) through the Commonwealth Parliament in 1994-1995, debate over whether racial vilification laws were justifiable in light of free speech principles dominated the parliamentary
and disagreement is neither surprising nor necessarily undesirable: it is entirely appropriate that the regulation of certain types of public speech or expression should be exposed to careful scrutiny and public debate. However, to date, the quality and productivity of this debate in Australia has been undermined by a tendency towards abstract, decontextualised and rhetorical analysis. In such an environment, arguments made 'in principle' — such as those frequently advanced in the name of 'free speech' — are too readily assumed to carry a persuasiveness which may not be borne out in practice. Insufficient attention has been paid to the practical workings of existing racial vilification laws in Australia, with the result that while a significant and valuable body of commentary and critique has emerged in this country the debate has lacked a solid empirical foundation.

Another related limitation of the conventional focus of racial vilification law research and scholarship is that while considerable attention has been devoted to the question of the 'in principle' compatibility of free speech with the legislative regulation of racial vilification, there has been little analysis of the impact which free speech sensitivity has had on the regulatory form of racial vilification legislation.

proceedings: see McNamara and Solomon, note 32 supra at 272-277; and chapter 5 of this thesis.
35 See references listed supra note 13.
36 In part, the limited attention devoted to analysis of the practical operation of racial vilification legislation can be explained by the fact that the relevant statutes have only been in operation for a short period of time, with relatively little published data (including judicial and quasi-judicial decisions), rendering analysis difficult. However, a similar failure to research the operation of racial vilification legislation has been observed in Canada, notwithstanding the longer history of racial vilification in that country. A planning meeting convened by the Department of Canadian Heritage in 1997 on hate crime and bias activity concluded that, to date, there had been inadequate examination of the operation and effectiveness of existing federal and provincial legislation, particularly those that relied on administrative and civil law remedies (as opposed to criminal law remedies). See "Workshop Report #1: Legislative and Policy Issues" in Department of Canadian Heritage, National
5.4 Consideration of the Impact of Free Speech Sensitivity on the Regulatory Form of Racial Vilification Legislation

As explained above, this thesis consciously and decisively seeks to move beyond the conventional philosophical and jurisprudential threshold question for research and scholarship on racial vilification legislation: free speech compatibility. However, it is important to emphasise that in negotiating the threshold hurdle of free speech compatibility, this thesis does not thereafter ignore the question of the relationship between free speech rights and principles on the one hand, and the legal regulation of racial vilification on the other. A study of the forms of regulation adopted under Australian racial vilification laws—that is, the subject of this thesis—could not adequately be undertaken without addressing the impact which ‘free speech sensitivity’ (a concept which is broader than recognised legal and constitutional rights, also encompassing free speech rhetoric, principles, and consciousness) has had on the shape of racial vilification laws, in terms of substantive and procedural form, both at the time of enactment, and as a result of practical operation and interpretation.

The phrase ‘free speech sensitivity’—adopted in this thesis to capture the full extent of the influence of free speech rights and principles on the legal regulation of racial vilification—is drawn from the scholarship of Laurence Tribe, a leading scholar of constitutional law and theory in the USA. Tribe has argued that the law “may create remedies for the damage done with words so long as these remedies

Planning Meeting on Hate Crime and Bias Activity, April 16-17 1997 (Ottawa: Department of Canadian Heritage, 1997).
display *sufficient sensitivity to freedom of expression* as well". The phrase is also used, quite deliberately, to reflect the ambivalence and uncertainty regarding the parameters of speech which should be regarded as 'free' – that is, immune from legal regulation. This connotation of the term is particularly appropriate to the Australian legal and political context, where, unlike numerous democratic countries such as Canada\(^3\) and the USA,\(^4\) the 'right' does not have a legislative or explicit constitutional source,\(^5\) but is derived from the common law.\(^6\) Accordingly the level of uncertainty about its precise dimensions and attributes, and its implications for attempts to regulate communicative behaviour are exacerbated. Finally, the limited Australian jurisprudence on the question of the level of scrutiny to which proposed speech/expression restrictions should be subjected in support of the 'right' to free speech (which flows, to a significant extent, from the absence of a 'lightning rod' for constitutional challenge\(^7\)) means that there is little guidance as to where the line


\(\text{\textsuperscript{38}}\) Section 2(b) of the *Canadian Charter of Rights and Freedoms* provides that "Everyone has the following fundamental freedoms: freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

\(\text{\textsuperscript{39}}\) The First Amendment to the USA Constitution provides that "Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

\(\text{\textsuperscript{40}}\) See cases cited *supra* note 29.


\(\text{\textsuperscript{42}}\) This 'lightning rod' is provided in the USA and Canada, respectively, by the First Amendment to the USA Constitution, and s 2(b) of the *Canadian Charter of Rights and Freedoms* 1982.
should be drawn, other than subjective moral, philosophical and political viewpoints, which vary in the degree of scrutiny exercised.

Of course, that does not mean that racial vilification legislation is not subject to scrutiny for 'free speech sensitivity': the stories of the enactment of racial vilification statutes presented in this thesis reveal that it most certainly is. As Sadurski has observed, the task of subjecting a legislative restriction on speech to scrutiny is not only completed by judges ruling on constitutional challenges to legislation. Sadurski notes that the scrutiniser may also be "a legislator, a citizen, or an academic." Scrutiny of racial vilification legislation for free speech sensitivity plays a crucial part in the initiation of racial vilification. However, the process of scrutinising for free speech sensitivity does not end with the enactment of the legislation—in a form considered by legislators to be compatible with free speech principles. It is also an enduring feature of the administration and interpretation of legislative regimes for the regulation of racial vilification—a process in which tribunal members, human rights agencies, and complainants and respondents (via conciliation) actively participate.

One of the key questions which this thesis will address is: what factors have influenced the choice of particular forms of legislative regulation? Answering this question involves coming to terms with the tension between the identification of the most effective modes of legislative regulation when it comes to anti-social conduct in the form of racial vilification, and sensitivity towards the consequences of this choice for free speech principles and rights. The point is that free speech concerns will be addressed, not as a commonly identified (surmountable or insurmountable) barrier to

43 Sadurski, supra note 13 (1999) at 40.
44 Ibid.
the enactment of racial vilification laws, but as one of the factors to have influenced
the adoption, application and interpretation of racial vilification legislation in
particular regulatory forms. In adopting this novel ‘post-threshold’ perspective on
the relationship between free speech and racial vilification laws, this thesis aims to
make a valuable contribution to the existing scholarly literature.

6. EXPLAINING THE FOCUS ON SPECIFIC RACIAL
VILIFICATION LEGISLATION IN LIGHT OF THE DIVERSITY
OF MODES OF REGULATION

The focus of this thesis is the way in which racial vilification is regulated by state-
sponsored formal legal rules—that is, statutes of general application. The rationale
for this focus is that legislation enacted by national, state/provincial and territorial
legislatures is a central legal tool for the regulation of various forms of anti-social
behaviour, including racial vilification. The nature, operation and impact of this form
of regulation warrant close attention and analysis. However, it is important to
recognise that, in addition to specific racial vilification legislation, conduct amounting
to racial vilification may be regulated in a variety of ways (both legal and non-legal),\textsuperscript{45}
including the following.

6.1 Informal Norms and Values

The expression of racist attitudes is informally regulated by informal social and moral
norms regarding the acceptability of such comments. The approval or disapproval of
such conduct by friends, family and peers (irrespective of the formal legality or

\textsuperscript{45} See generally, \textit{ibid} at 183-87.
illegality of such conduct) is an important aspect of the broader phenomenon of the regulation of racial vilification.

### 6.2 Other Legislation

In addition to the operation of the broad statutes of general application with which this thesis is concerned, racial vilification may be the subject of other forms of formal legal regulation depending on the context or setting in which it occurs. For example, employment discrimination legislation in most Australian jurisdictions renders unlawful racial slurs or harassment in the workplace context, on the basis that vilification in that context may be considered to amount to racial discrimination. In some jurisdictions racial discrimination legislation expressly identifies and regulates racial harassment as a unique form of racial discrimination (in the same way that sexual harassment is regulated as a particular and distinctive form of sex discrimination).

Public order statutes which create criminal offences such as “offensive language in a public place” and “offensive behaviour in a public place”, also have

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47 See, for example, *Equal Opportunity Act 1984* (WA), s 49A.

48 See, for example, ss 4-4A of the *Summary Offences Act 1988* (NSW) which provide that:
the potential to regulate certain forms of racial vilification, but prosecutions for conduct of this type have been very rare.\textsuperscript{49} Ironically, legislation of this type has

4 Offensive Behaviour

(1) A person must not conduct himself or herself in an offensive manner in or near, or within view or hearing from, a public place or a school.

Maximum penalty: 6 penalty units or imprisonment for 3 months.

(2) A person does not conduct himself or herself in an offensive manner as referred to in subsection (1) merely by using offensive language.

(3) It is a sufficient defence to a prosecution for an offence under this section if the defendant satisfies the court that the defendant had a reasonable excuse for conducting himself or herself in the manner alleged in the information for the offence.

4A Offensive language

(1) A person must not use offensive language in or near, or within hearing from, a public place or a school.

Maximum penalty: 6 penalty units.

(2) It is a sufficient defence to a prosecution for an offence under this section if the defendant satisfies the court that the defendant had a reasonable excuse for conducting himself or herself in the manner alleged in the information for the offence.

\textsuperscript{49} In one such case in 1997, Ronald Dodge was convicted in the New South Wales Local Court of using offensive language in a public place, contrary to s4A of the Summary Offences Act 1988 (NSW) and fined $400: \textit{Equal Time} (Number 31, February 1997). In a shopping centre car park Dodge had shouted at a rabbi and his family in a shopping centre car park that “All you Jews should have been slaughtered” and “You should have been turned into lampshades”.

In 1980 a man who called himself “Herr Hitler” was charged with offensive behaviour for “walking down Darlinghurst Road in Kings Cross [Sydney] on a summer night … at 7.45pm, wearing an ‘S & M’ T-shirt, metal-studded bracelets and a chain, and carrying a riding crop, which he used to hit rubbish bins and shop windows whilst shouting ‘Heil Hitler!’” (facts from D Brown, D Farrier and D Weisbrot, \textit{Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales} (Sydney: Federation Press, 2nd edition, 1996) at 958). At the time the relevant legislation was s 5 of the \textit{Offences in Public Places Act} 1979 (NSW) which provided that:
more commonly been characterised as an instrument of racism (particularly with respect to its impact on Indigenous Australians) than as a legal mechanism for regulating racism.  

6.3 Industry and Educational Codes

Racial vilification is the subject of a variety of codes and standards which have been voluntarily adopted in various settings. A number of professional sporting bodies have adopted codes of conduct dealing with racial vilification. For example, the Australian Football League (AFL)'s rule on racial and religious vilification provides, inter alia, that

No Player ... shall act towards or speak to any other person in a manner, or engage in any other conduct which threatens, disparages, vilifies or insults another person ... on the basis of that person's race, religion, colour, descent or national or ethnic origin.  

A person shall not, without reasonable excuse, in near or within view from a public place or school behave in such a manner as would be likely to cause reasonable persons justifiably in all the circumstances to be seriously alarmed or affronted.

The charge was dismissed in the Central Court of Petty Sessions, the magistrate ruling that the accused's conduct was not "sufficiently marked" to constitute an offence under s 5: ibid at 960.


AFL Rule No 30, cited in G Gardiner, Football and Racism: the AFL's Racial and Religious Vilification Rule (Clayton: Monash University Koorie Research Centre, 1997). Since the rule's introduction in 1995, there have been a number of highly
The media is another industry in which racial vilification is regulated by voluntary codes. Complaints of racial vilification in the print media can be made to the Australian Press Council, while the Australian Broadcasting Authority plays a similar role in relation to racial vilification on radio and television which violates the respective self-regulatory codes. These forms of industry self-regulation do not operate in isolation from statutes of general application; there is a considerable degree of overlap and scope for interaction between the different regulatory spheres.

Publicised incidents of racial vilification during the course of AFL matches in relation to which the rule has been invoked. See Gardiner, *ibid* at 19-27; also M Davis, “Saints in ruck with AFL over racism claim”, *The Australian*, 7 April 1999, 5; S Linnell, “Racial abusers may be ‘outed’”, *The Sydney Morning Herald*, 22 April 1999, 45; and A Stevenson, “I’m black and I’m proud”, *The Daily Telegraph Mirror*, 8 May 1993, 19.

See generally M Jones, “The Legal Response: Dealing With Hatred — A User’s Guide” in C Cunneen, D Fraser and S Tomsen (eds), *Faces of Hate: Hate Crime in Australia* (Sydney: Hawkins Press, 1997) 214 at 224-233. Jones concludes that “While self-regulation has not proved to be very effective with respect to the prevention of the spread of hatred, it may provide a useful remedy in an individual case”: *ibid* at 224-225.


For example, where considered appropriate, the NSW Anti-Discrimination Board may refer a complaint of racial vilification which it receives to the relevant industry regulatory body, such as the Australian Press Council. On other occasions complaints arising out of the one incident might be pursued simultaneously in both forums.
A number of educational institutions have also adopted their own codes and complaints procedures for dealing with racial vilification. For example, the New South Wales Department of School Education has adopted a system-wide policy and complaints procedure. Many Australian universities have also adopted similar codes, which provide for a complaints/grievance procedure based on conciliation and/or disciplinary proceedings.

Without ignoring or underestimating the significance of these various forms of regulation, as stated above, this thesis is specifically concerned with the emergence and operation of public statutes of general application. An analysis of this important form of regulation of racial vilification is a necessary pre-condition to any future consideration of the role of racial vilification legislation within the broader mix of informal and formal modes of regulation of behaviour in multicultural societies.

7. CHAPTER OVERVIEW

The remaining chapters in Part I of this thesis provides important background for the analysis of Australian racial vilification laws that follows. Chapter 2 provides an overview of the nature and extent of racial vilification in Australia. Chapter 3 introduces the primary motivations for the legislative regulation of racial vilification in Australia. Chapter 4 outlines the framework for the analysis of racial vilification regulatory regimes which is adopted in this thesis.

56 NSW Department of School Education, Anti-Racism Policy Statement and Grievance Procedures (Sydney: NSW Department of School Education, npd).
57 See, eg, Flinders University Anti-Racism Policy, University of New South Wales Anti-Racism Policy Statement, University of Queensland Policy Statement on Racism, and the Griffith University Sexual and Other Harassment Policy (according to which “other harassment may be based on gender, race, disability, sexual preferences or a range of other factors” (emphasis added).
Part II (chapters 5-6) will review and critically analyse the development and current status of national racial vilification laws—that is, legislation enacted by the Commonwealth Parliament. Part III (chapters 7-11) reviews and analyses all racial vilification legislation enacted by state and territorial legislatures. Part IV (chapter 12) will draw together the major findings from Parts II and III and will present conclusions on the two primary arguments which are advanced in this thesis.
CHAPTER 2

THE NATURE AND EXTENT OF RACIAL VILIFICATION IN AUSTRALIA

1. INTRODUCTION

This chapter provides important background information for the analysis of racial vilification laws that follows in the remainder of this thesis. Section 2 will discuss the definition of racial vilification, while section 3 will review available data on the occurrence of conduct amounting to racial vilification in Australia.

The purposes of this chapter are: to establish a clear understanding of the conduct at which the regulatory processes reviewed in this thesis have been directed; and to explain why racial vilification has become the subject of legislative regulation in Australia. At this introductory stage, the discussion of definitions and the analysis of motivating factors will be necessarily general in nature. The legal definitions of racial vilification and the motivation for specific racial vilification in particular jurisdictions at particular times will be discussed in parts II and III of this thesis.

2. WHAT IS RACIAL VILIFICATION?

2.1 Terminology

Racial vilification is the term most frequently used in Australia to describe the conduct with which this thesis is concerned. The terms ‘racial harassment’, ‘racial
incitement’, ‘incitement to racial hatred’ and ‘promotion of racial hatred’ are also used in Australia.

2.2 Definition

While the word ‘vilification’ can be defined with relative simplicity—"to defame or speak evil of”\(^2\)—there is no one universally accepted or applicable definition of what constitutes racial vilification. Indeed, disagreement over how narrowly or broadly the term should be defined has featured prominently in debates about the legal regulation of the conduct. This is not surprising — the nature of the conduct in question is such that it is practically impossible to identify with precision its ‘boundaries’. This creates problems for attempts to legally regulate the conduct, given the emphasis conventionally placed, in line with liberal accounts of the rule of law, on the need to identify with clarity and certainty the dividing line between what is lawful and what is unlawful. The pursuit of a universally applicable definition upon which to focus the debate about the desirability of legal regulation is unavoidably circular because the most readily available definitions are those contained in legislation—and as this thesis will reveal, a wide variety of legislative definition and regulatory approaches have been adopted.

In 1991 the Australian Human Rights and Equal Opportunity Commission (HREOC)’s National Inquiry into Racist Violence endorsed the following definition of racial vilification:

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1 This chapter does not aim to present an argument in support of the desirability of legislative regulation of racial vilification. As explained in chapter 1, this is neither an objective of this chapter specifically, nor this thesis generally.

the use of words, writing, images or behaviour to stir up hatred in others against a group or groups of people identified by race, colour, descent, or national or ethnic origin.\(^3\)

While this definition is a reasonably effective ‘blanket’ description of the range of modes of expression which can constitute racial vilification, it is, in two key respects, too narrow. First, the phrase “to stir up” suggests that racial vilification necessarily involves acting with the intention of causing the specified negative outcome. This is too limited as a generally applicable description because existing legislation in a number of jurisdictions does not require evidence of subjective intention, focusing rather on an objective assessment of whether the conduct may or does cause the specified negative outcome. Second, the reference to “hatred” implies that only animosity or ill-feeling at the ‘extreme’ end of the spectrum constitutes racial vilification when, in fact, existing legislation regulates a wider range of negative sentiments.

The definition adopted by the Australian Law Reform Commission (ALRC) in its report on *Multiculturalism and the Law*\(^4\) more accurately captures the breadth of the category of racial vilification. As explained by the ALRC

Incitement to racist hatred or hostility, or racial vilification, encompasses words, whether speech or writing, and actions and gestures that promote hatred, hostility, contempt or serious ridicule of a person or group of persons on the ground of colour, race, ethnic or national background.\(^5\)

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\(^5\) *Ibid* at 159. See also J Gibson, “The Issue of Racial Vilification” (1990) 64(8) *Law Institute Journal* 709 at 709, who defines racial vilification as “all acts, conduct, behaviour or activity involving the defamation of individuals and groups on the ground of their colour, race or ethnic or national origins, as well as those which constitute the incitement or stirring up of hatred or other emotions of hostility and
The most significant characteristic of conduct defined as racial vilification, in the context of a study of its legal regulation, is that it does not generally involve the infliction of 'harm' in the terms in which this is traditionally understood—that is, actual or threatened personal violence or property damage, or economic detriment. The infliction of harm in these terms is one of the primary justifications for legal regulation, particularly via criminal law, but also via civil law (e.g., the tort of negligence) and statutory anti-discrimination laws.

More specifically, racial vilification does not involve physical violence (although it may be accompanied by actual or threatened violence). In addition, one of the most common arguments advanced in support of the legal regulation of racial vilification is that it may be a precursor to, or may incite, racist violence or 'hate crimes'. Nevertheless, it is important to recognise this point of distinction between enmity against those individuals and groups.” In Canada “hate propaganda” (the Canadian equivalent of the term “racial vilification”) was defined by Dickson CJC in *R v Keegstra* in essentially similar terms: “... expression intended or likely to create or circulate extreme feelings of opprobrium and enmity against a racial or religious group...” *R v Keegstra* [1991] 2 WWR 1 at 23, per Dickson CJC. See also Law Reform Commission of Canada, *Hate Propaganda*. Working Paper 50 (Ottawa: Law Reform Commission of Canada, 1986). Like the definition of racial vilification adopted by the National Inquiry in Racist Violence in Australia, this definition focuses on the extreme end of the spectrum of ill-feeling—that is, hatred. While this was appropriate in the case of *Keegstra*—which involved a criminal offence of hate propaganda/racial vilification under the Canadian Criminal Code—a more generally applicable definition should not be limited in this way. Existing legislation in some Canadian jurisdiction regulates a broader category of racial vilification including 'lesser' negative consequences such as “contempt” (or “looking down” on a person or group [This definition of “contempt” was adopted by the Canadian Human Rights Tribunal in *Nealy v Johnston* (1989) 10 CHRR D/6450 at D/6469, in a case involving s 13 of the *Canadian Human Rights Act* 1977, and endorsed by the Supreme Court of Canada in another s 13 case, *Taylor v Canadian Human Rights Commission* (1990) 75 DLR (4th) 577 at 600-601. See also *Canadian Jewish Congress v North Shore Free Press Ltd and Collins* (1998) 30 CHRR D/5; and *Abrams v North Shore Free Press Pty Ltd and Collins* (unreported, British Columbia
racial vilification and racist violence. Conduct falling into the second category is unquestionably unlawful as a crime against the person or property. Conduct falling into the first category will generally be considered lawful unless regulated by specific racial vilification legislation.

Racial vilification may also be distinguished from racial discrimination. Vilification does not necessarily involve the sort of harm with which anti-discrimination statutes are generally concerned—the denial of some opportunity, entitlement or advantage available to, or enjoyed by, members of other racial groups, whether in the context of education, employment or service delivery.

The drawing of these contrasts is not designed to suggest that racial vilification does not involve the infliction of harm. Indeed, one of the core arguments advanced by proponents of the legal regulation of racial vilification faced with opposition based on free speech principles, is that racial vilification, even where the conduct does not involve physical harm to person or property, is inherently harmful in that it causes psychological harm to the victim or target group. (The justification for the legal regulation of racial vilification is discussed further in chapter 3 of this thesis.) Rather, the point of distinguishing racial vilification from other acts legally recognised as harmful is to underscore the fact that the harm caused by racial vilification is of a different type than that which has traditionally been regulated by the criminal law, and, more recently, anti-discrimination law.

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6 Whether such 'hate crimes' should be punished more severely than equivalent crimes not motivated by racist hatred has also been the subject of consideration in both Australia and Canada. In Australia, see NIRV Report, supra note 3 at 300; also C Cunneen, D Fraser and S Tomsen (eds), Faces of Hate: Hate Crime in Australia (Sydney: Hawkins Press, 1997).
3. THE NATURE AND EXTENT OF RACIAL VILIFICATION

There is no doubt that conduct amounting to racial vilification does occur in Australia. However, the prevalence of conduct which falls within the various definitions of racial vilification referred to above is difficult to determine. Very little of the available data reveal the prevalence of conduct amounting to hate propaganda or racial vilification which does not involve violence. Most of the available data records incidents of racial violence, which as discussed above, is not synonymous with racial vilification. On the assumption that acts of racially-motivated violence are the most extreme manifestation of racist attitudes, evidence of racist violence can be treated as an (admittedly imprecise) indication as to the (presumably higher) level of 'pre-violence conduct' at which racial vilification or hate propaganda laws are specifically directed. Certainly, one of the strongest arguments which has been advanced in favour of prohibiting public expressions of racial hatred is that such conduct either directly encourages, or otherwise increased the likelihood of, racially motivated violence.

In this section of this thesis, available data on racist violence and racial vilification in Australia will be discussed. This discussion is not designed to establish whether racial vilification occurs with sufficient frequency or intensity to warrant state intervention in the form of legal regulation. To attempt such an assessment would be futile in the absence of anything approaching consensus amongst participants in debates over racial vilification laws as to the necessary threshold.

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before regulation is warranted.\textsuperscript{8} In any event, as noted in chapter 1, the starting point for this thesis is that a majority of Australian legislatures has already made the decision that there is a sufficiently serious problem to warrant the introduction of racial vilification legislation. The objective in this chapter is to establish a working appreciation of the nature and extent of racial vilification in order to provide a foundation for the analysis of the various models of legislative regulation in Australia, to which this thesis is primarily devoted.

At the outset it is important to recognise that although the use of legislation to regulate racial vilification in Australia has only developed during the past decade, racial vilification is not a recent phenomenon in this country. Racism has been a significant feature of social relations in Australia since the commencement of European colonisation.\textsuperscript{9} Moreover, for much of Australia's post 1788 history governments have adopted a range of racist law and policies.\textsuperscript{10} The most vivid manifestations of state-sanctioned racism have occurred in the area of Aboriginal affairs, including the forced (and legally supported) removal of Aboriginal children from their families with a view to assimilating Aboriginal children into the dominant

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\textsuperscript{8} One of the arguments advanced by opponents of the legislative regulation of racial vilification is that there is not a sufficiently large problem to warrant legislative intervention. For example, during the debate in the lead-up to the enactment of the \textit{Racial Hatred Act} 1995 (Cth), former Labor Senator John Button, has stated recently, "I worry about the proposed racial vilification legislation. I worry about the need for it, and whether, in fact, it may be counter-productive": J Button, "When banter crosses the border of the vilification bill", \textit{The Sydney Morning Herald}, 5 September 1994, 13. Similarly, newspaper commentator Frank Devine, concluded that "No need for the legislation has been demonstrated": F Devine, "Divisive racial hatred Bill an insult to us all", \textit{The Australian}, 14 November 1994, 11.

\textsuperscript{9} See \textit{NIRV Report}, supra note 3 at chapter 3; see also A Markus, \textit{Australian Race Relations 1788-1993} (Sydney: Allen and Unwin, 1994).

‘white’ culture and ‘breeding out’ Aboriginality.\(^{11}\) The ‘white Australia’ policy on immigration was also fundamentally racist in character.\(^{12}\) Recognition of the role which racist attitudes and racial vilification\(^{13}\) have played in Australia’s past is an important component of understanding the nature and extent of the contemporary problem of racial vilification, and of attempt to regulate it via legislation.\(^{14}\)


\(^{12}\) See Markus, *supra* note 9 at 110-154.

\(^{13}\) Racial vilification has been an important component of the pursuit of government policies with respect to Indigenous peoples in Australia. For example, Markus records that in 1927, when asked by the Prime Minister, SM Bruce, whether South Australia would accept “quadroon” and “octoroon” Aboriginal children into institutions operated by the state government, the Premier of South Australia stated that to accept the children would “be greatly to the disadvantage of South Australia, as it would be increasing an undesirable element in the population.” The Premier stated that “persons with aboriginal blood almost invariably mate with the lowest class of whites, and in many cases, the girls become prostitutes”: quoted in A Markus, *Governing Savages* (Sydney; Allen and Unwin, 1990) at 28-29. Another example was the observation by WC Wentworth in 1844 during debate on proposed legislation dealing with the giving of evidence by Aboriginal people, that it would “be quite as defensible to receive as evidence in a Court of Justice the chatterings of the ourang-outang as of this savage race”: quoted in H Reynolds, “Racial Thought in Early Colonial Australia” (1974) 20(1) *Australian Journal of Politics and History*, cited in H McRae, G Nettheim and L Beacroft with L McNamara, *Indigenous Legal Issues* (Sydney: LBC Information Services, 2nd ed, 1997) at 35.

\(^{14}\) During the second reading debate on the Anti-Discrimination (Racial Vilification) Amendment Bill 1989 in the Legislative Council of the New South Wales Parliament, Australian Labor Party MLC, Mr McDonald, observed:

Unfortunately, racial vilification is as much a part of Australian society as Waltzing Matilda. From an early age we are brought up with a liberal helping of racist jokes, sayings and comments. Not one member of Parliament would have been brought up without racist cultural activity being part of their lives. We are instilled with it from an early age. Over the years the only change has been the targets of racial vilification. In the early 1900’s the Irish community faced the taunts and insults of the established community. In the post-war era the Italians and Greeks faced the taunts and attacks and the sense of cultural humour that was used against the community. In the 1970’s and 1980’s it was the Asian community, including the Vietnamese and Chinese community. In every era it has been the Aboriginal community, and for many generations it has been the Jewish community of this country.
The 1991 report of the Human Rights and Equal Opportunity Commission’s National Inquiry into Racist Violence (the ‘NIRV Report’) attempted to determine and document the level of racist intimidation, harassment and attacks. The National Inquiry into Racist Violence received 1447 reports of racially motivated acts of violence or harassment. The NIRV Report found that “Racist violence is an endemic problem for Aboriginal and Torres Strait Islander people in all Australian States and Territories.” It also found that “Racist violence on the basis of ethnic identity in Australia is nowhere near the level that it is in many other countries. Nonetheless it exists at a level that causes concern and it could increase in intensity and extent unless addressed now.”

A specific study undertaken for the NIRV in the Sydney suburbs of Campbelltown and Marrickville found “a level of racist violence, which while not as high or as violent as that found in other English speaking countries, is nevertheless more than can be explained by the activity of a few extremist groups or disturbed individuals.”

This conclusion contains two very important insights about the nature of racial vilification in Australia. First, it highlights the importance of localised analyses of the incidence of racial vilification. National or state figures may give an

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15 NIRV Report, supra note 2 at 170. Rubenstein has argued that, “It is clear that this is only a fraction of the incidents actually occurring”: C Rubenstein, “Legislatating an end to racism”, The Sydney Morning Herald, 23 May 1995, 13. Rubenstein refers to a Bureau of Immigration, Multicultural and Population Research study which “found that almost three-quarters of a surveyed group of overseas students had encountered prejudice and discrimination when in Australia undergoing university training”: ibid.

16 NIRV Report, supra note 3 at 387.

17 Ibid.

inaccurate indication as to the prevalence of racial vilification in a particular locality, such as suburbs where there is a relatively large number of people belonging to a particular ethnic group. Second, it draws attention to the fact that it is not only members of organised racist organisations in Australia that are responsible for acts of racial vilification. The conduct of organisations like the Australian Nationalist Movement, the League of Rights, National Action and the Adelaide Institute¹⁹ is an important part of the broader problem of racial vilification, and an important political motivation for the enactment of racial vilification legislation.²⁰ However, racial vilification is perpetrated by a wider cross-section of the Australian community than is represented by extremist right-wing organisations. Racial vilification, as defined in this chapter, is not simply a minor ‘aberration’ in an otherwise tolerant multicultural society, but is a manifestation of the attitudes about ethnicity, race and difference held by a not insignificant number of Australians.²¹ As noted above there is a strong tradition of racism in Australian law, politics and popular attitudes which undermines the common assumption that racial vilification is a fringe phenomenon.²²


²⁰ The relationship between the activities of such organisations and the decision of state governments to initiate racial vilification legislation will be discussed in more detail in Part III of this thesis.

²¹ See generally E Vasta and S Castles (eds), The Teeth Are Smiling: The Persistence of Racism in Multicultural Australia (Sydney: Allen and Unwin, 1996). Illustrative was the rise to political prominence of Pauline Hanson’s One Nation Party in 1996-97, on a platform which include hostility to so-called ‘special rights’ for Indigenous Australians and opposition to multiculturalism, which effectively ‘tapped’ racist sentiments and attitudes among voters and potential voters.

²² For example, this theme featured prominently in statements of opposition to the proposed Commonwealth Racial Hatred Bill during debates in the Commonwealth Parliament in 1994-95. See discussion in Chapter 5 of this thesis.
Another important factor to consider about the nature and extent of racial vilification is that the prevalence of racial vilification fluctuates over time. Local, national or international events may lead to a rise in the frequency and intensity of conduct amounting to racial vilification. For example, during the time of the Gulf War in 1990-1991, there was a reported increase in the level of racial vilification and racist violence directed at Arab Australians. More recently the election of Pauline Hanson to the Commonwealth House of Representatives in 1996 and the subsequent emergence of Pauline Hanson's One Nation Party (re-)ignited a familiar debate in Australian politics about multiculturalism, immigration and Aboriginal affairs policy, creating a climate in which incidents of racial vilification increased. For example, in 1996/97 the Human Rights and Equal Opportunity Commission's Race Discrimination Commissioner reported a "rise in telephone calls and personal approaches ... from Australians reporting their fears and anxieties as a result of their own or their children's direct experiences of overt racist behaviour." Similarly in 1997 the President of the New South Wales Anti-Discrimination Board observed that the so-called 'Hanson effect' has been felt by many people through Australia. There has been a rise in both numbers and the seriousness of complaints to the Anti-Discrimination Board. To put it bluntly, more Australians have been


subject to greater levels of personal abuse, threat, vilification and intimidation on the basis of their race or ethnic origin than was the case previously.\textsuperscript{25}

Complaints to human rights agencies also provide a valuable insight into the extent of the problem of racial vilification. Between 13 October 1995—when the \textit{Racial Hatred Act} 1995 (Cth) came into operation—and 30 June 1999 the Human Rights and Equal Opportunity Commission received 425 formal complaints of racial vilification under s 18C of the \textit{Racial Discrimination Act} 1975.\textsuperscript{26} In the decade since racial vilification was added as a ground of complaint to the NSW Anti-Discrimination Act (October 1989-June 1999), 702 s 20C complaints have been lodged with the NSW Anti-Discrimination Board.\textsuperscript{27}

\textsuperscript{25} C Puplick and A Norton, “Best gag on racial abuse”, \textit{The Sydney Morning Herald}, 13 January 1997, 13. The Chairman of the NSW Ethnic Affairs Commission reported that “information received by the commission suggest that [during 1997] there has been an increase ... in the number of people who feel they have been subjected to racism during the past 12 months”: S Kerkyasharian, “Racism on rise” (letter to the editor), \textit{The Sydney Morning Herald}, 14 January 1998, 10.


Care needs to be taken, however, in using these data as a measure of the ‘true’ level of racial vilification, given that rate of reporting is likely to be low. Just as it is widely recognised that there is a high degree of “hidden crime” it is reasonable to assume that there is also a high level of “hidden racial vilification”. In its final report the National Inquiry into Racist Violence observed that “In the course of the Inquiry it became apparent that many cases of racist violence go unreported to authorities and agents who might have helped victims.” Similarly, a 1989 British Home Office report that under 5% of incidents motivated by racism are reported to the police.

HREOC Race Discrimination Commissioner Zita Antonios has observed that “For various reasons, formal complaints statistics are notoriously unreliable indicators of the many forms of racism in our community.” Commissioner Antonios has warned against the incorrect use of complaints statistics to make direct links between the number of complaints, relative to the total population, and the extent of the seriousness of the problem. It is clearly invalid to measure the worth of legislation simply by how frequently it is used. There are numerous examples of statutes invoked in only the rarest situation and we do not hear calls for their abolition.

In addition to taking into account the phenomenon of ‘hidden’ (that is, unreported) racial vilification it is also important to recognise that the legal definition contained in relevant legislation may cover only a sub-set of incidents which come within the general definition of racial vilification discussed above. Legal definitions may,

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29 *NIRV Report, supra* note 3 at 18.


therefore, have a ‘culling’ effect on the proportion of racial vilification incidents which are identified as such.

In this context data on inquiries to human rights agencies (which may or may nor translate into formal complaints) are also instructive from the point of view of determining the size of the problem of racial vilification (although they also need to be interpreted with awareness of the high unreported rate). For example, between July 1996 and June 1998 the NSW Anti-Discrimination Board received 100 formal complaints of racial vilification. However, it received 566 enquiries during the same period. The ratio of enquiries to complaints reported by the NSW Anti-Discrimination Board in a two year period was, therefore, more than 5:1.

Further evidence of the occurrence of racial vilification in Australia is contained in data compiled by the Executive Council of Australian Jewry (ECAJ) on reported incidents of antisemitism. ECAJ has collected this information in a systematic way since 1989. Of course, antisemitic conduct is only one form of racism—that is, racial vilification directed at Jews – and it is impossible with any sort of accuracy to extrapolate from the level of racial vilification experienced by Jews to the level of racial vilification experienced by all racial, ethnic or ethno-religious groups. Nonetheless, the data are valuable as an insight into the prevalence of racial vilification.

32 Ibid.
In its *1998 Annual Report into Antisemitism in Australia* ECAJ recorded “324 reports of anti-Jewish violence, physical harassment, vandalism and intimidation.” According to ECAJ this figure represented an increase of 22 per cent over the previous twelve months and was 16 per cent higher than the previous worst year. It was also 43 per cent higher than the average since detailed record keeping commenced in 1989.

One of the important findings of the *1998 Annual Report into Antisemitism in Australia* was that the “main growth area” for the distribution of antisemitic material was the internet. The internet is being used not only as a vehicle for Jewish vilification, but racial vilification generally. The Taskforce Against Hate coordinated by the Simon Weisenthal Center in the USA has identified over 1000 “hate sites” on the world wide web.

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4. CONCLUSION

As stated at the outset of this chapter, it has not been the purpose of this chapter to establish whether racial vilification is a sufficiently large and serious problem in Australian to warrant legislative regulation. The Commonwealth Parliament and a number of state/territorial legislatures have already made this assessment. However, the data reviewed here does supports the conclusion that the problem at which racial vilification legislation is directed is a real one—racial vilification is a phenomenon that occurs in Australia, to an extent that is more than trivial.\(^{39}\)

Moreover, the data reveals three important things about the nature of racial vilification in both countries. First, while organised racist groups make a significant contribution to the incidence of racial vilification in Australia, racial vilification is not limited to such groups. Racial vilification is a form of anti-social conduct in which a number of ‘ordinary’ Australians—including newspaper commentators, radio broadcasters, sporting competitors, work colleagues and neighbours—engage on occasion. The diversity of forms of racial vilification (in terms of perpetrator identity, motivation, frequency and seriousness) presents a challenge for attempts to

\(^{39}\) In the second reading debate on the Anti-Discrimination (Racial Vilification) Amendment Bill 1989 in the Legislative Council of the NSW Parliament, Australian Democrat MLC Elisabeth Kirby made an interesting observation which offered an interesting perspective on the parallels between Australia and Canada (and the state of New South Wales and the province of British Columbia specifically) with respect to both the incidence and regulation of racial vilification: “I believe that similar measures are to be introduced in British Columbia [in 1993 the British Columbia Parliament passed the Human Rights Amendment Act 1993 (BC) which added racial vilification as a ground of complaint under provincial human rights legislation: see Human Rights Code 1996 (BC), s 7]. In a way that is ironic, because only a few years ago Chinese friends of mine who considered it necessary to leave Malaysia, came to Australia. These wealthy, professionals looked around Australia, but told me that they could not stay in Australia because there was here too much of a racist attitude. They said ‘Off we go to Canada, we will be all right’. They went to Canada and live in Vancouver. They are now facing there exactly the same sorts of problems
create a comprehensive legislative regulatory regime of general application. This difficulty will be discussed in subsequent chapters of this thesis will reference to the particular regulatory models which have been adopted in Australia.

Second, following on from the first observation, Australia has had a history of racist attitudes and conduct (including governmental action) directed at particular minority Indigenous, racial and ethnic groups. The point here is that the harm caused by a single act of racial vilification cannot be assessed in isolation from the broader context in which they take place. Rather, assessment of the significance and impact of acts of racial vilification must taken into account the historical background against which they occur, as well as the contemporary social and political context from which they emerge, and into which they are received.

Finally, racial vilification occurs in a number of forms (most recently, email communication and distribution of material on the internet) and with different ‘grades’ of seriousness. The ‘variability’ of racial vilification has important implications for the choice and operation of different legislative models for the regulation of racial vilification.

that members of our Chinese community are facing in Australia, particularly in Sydney”: New South Wales Hansard (Legislative Council), 10 May 1989, p 7824.
CHAPTER 3

MOTIVATIONS FOR THE LEGISLATIVE REGULATION OF RACIAL VILIFICATION

1. INTRODUCTION

In this chapter the primary rationales and motivations for the enactment of racial vilification legislation will be discussed. Of course, the factors examined here are not uniformly applicable to each of the Australian jurisdictions where racial vilification legislation is presently in operation. That is, the legislative regulation of racial vilification has not been motivated by precisely the same factors—which partly explains why the form of regulation varies from jurisdiction to jurisdiction. However, it is possible to identify some of the key motivations and influences. An understanding of the rationale for the regulation of racial vilification is an important foundation for the analysis of regulatory models which follows in parts II and III of this thesis.

The starting point for considerations of the necessity for specific racial vilification legislation in Australia is recognition that the particular nature of racial vilification is such that this sort of conduct is not adequately covered by other forms of common law or statutory regulation (such as defamation, assault or incitement).1 Having recognised the limitations of existing modes of legal regulation, the most

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significant motivations for the enactment of dedicated racial vilification legislation have been:

(i) application of government policies on multiculturalism including demonstrated support for racial, ethnic and cultural diversity, and tolerance;
(ii) fulfilment of obligations under international human rights law;
(iii) response to perceived increases in the prevalence of racial vilification at particular times on particular localities;
(iv) identification of a link between racial vilification and other forms of racist harm including violence and discrimination, and recognition of the value of proactive regulation and escalation prevention; and
(v) recognition that racial vilification is seriously harmful in its own right and, therefore, warranting regulation.

2. GOVERNMENT POLICY ON MULTICULTURALISM

As Mahoney has observed, "Modern democracies that respect equality and multiculturalism have accepted as a fundamental principle that legislative protection and government regulation are required to protect the vulnerable." As noted above, Australia is accurately defined as a multicultural nation, not simply in terms of the ethnic diversity of its population, but also with respect to government policies which value and support cultural diversity.

3 According to 1996 census data 23.3% of Australia’s population of 18.5 million (as at 30 June 1996) was born overseas: National Multicultural Advisory Council, Australian Multiculturalism For a New Century: Towards Inclusiveness (Canberra: AGPS, 1999) at 16. The 4.3 million overseas born residents have come from almost
In 1989 the Australian Government formally adopted a policy of multiculturalism with the release of the National Agenda for a Multicultural Australia. Amongst the main objectives of the policy as stated in the National Agenda document are the promotion of “an environment that is tolerant and accepting of cultural and social diversity and respects and protects the associated rights of individuals.” The National Agenda states that “[a]ll members of Australian society should be able to enjoy the basic right of freedom from discrimination on the basis of race, ethnicity, religion or culture.” According to the National Agenda, “Fundamentally, multiculturalism is about the rights of the individual—the right to equality of treatment; to be able to express one’s identity; to be accepted as an Australian without having to assimilate to some stereotyped model of behaviour.”

On 30 October 1996, at a time when the recently elected Liberal Party-National Party Coalition Federal Government’s commitment to multiculturalism and principles of anti-racism was under scrutiny because of its failure to unequivocally oppose the racist and divisive politics of Independent Member of the House of Representatives, Pauline Hanson, the Commonwealth House of Representatives...

200 different countries: ibid. 42% of people living in Australia was either born in another country or has at least one parent who was born overseas: ibid.

4 Commonwealth of Australia, Office of Multicultural Affairs, National Agenda for a Multicultural Australia (Canberra: AGPS, 1989) at 17.
5 Ibid.
6 Ibid at 15.
unanimously passed a Parliamentary Statement on Racial Tolerance, which read,
inter alia:

That this House: reaffirms its commitment to the right of all Australians to enjoy equal rights and be treated with equal respect regardless of race, colour, creed or origin ... [;] reaffirms its commitment to maintain Australia as a culturally diverse, tolerant and open society, united by an overriding commitment to our nation, and its democratic institutions and values [; and] denounces racial intolerance in any form as incompatible with the kind of society we are and want to be.8

In June 1997 the Federal Government established a National Multicultural Advisory Council which was asked to review the policy of multiculturalism as expressed in the National Agenda for a Multicultural Australia.9 In its final report released in May 1999 the National Multicultural Advisory Council recommended that the following definition of multiculturalism be adopted:

Australian multiculturalism is a term which recognises and celebrates Australia's cultural diversity. It accepts and respects the rights of all Australians to express and share their individual cultural heritage within an overriding commitment to Australia and the basic structures and values of Australian democracy. It also refers to the strategies, policies and programs that are designed to ... promote social harmony among the different cultural groups in our society.10

As the various policy statements and official expressions of support for multiculturalism discussed here reveal, opposition to racism generally, and racial vilification in particular, is widely regarded as an integral part of the commitment of governments to multiculturalism. For example, in its 1992 report on

8 Commonwealth Hansard (House of Representatives), 30 October 1996, p 6156.
10 National Multicultural Advisory Council, Australian Multiculturalism For a New Century: Towards Inclusiveness (Canberra: AGPS, 1999) at 78.
Multiculturalism and the Law the Australian Law Reform Commission stated that “racist conduct ... undermines the goals of multiculturalism”\textsuperscript{11}:

Multiculturalism is an articulated policy of the national government. The protection of all Australians from acts and expressions of racist violence and intimidation is an integral part of this policy. Racist violence has a very damaging impact on community relations in a multicultural society. The Commonwealth’s commitment to multiculturalism and its stated acceptance of its international obligations strongly support the view that it should take responsibility for ensuring that all Australians are protected from racist violence ... \textsuperscript{12}

Consequently, legislative measures to combat racial vilification have been motivated by a recognition that it would be inconsistent with a stated commitment to anti-racism and the value of cultural diversity to allow conduct like racial vilification which is antithetical to the principles of multiculturalism, to go unchecked. In this respect, racial vilification laws have been adopted for both symbolic and practical reasons: to establish acceptable norms of behaviour conducive to harmony in an ethnically diverse society, and to provide protection to actual and potential victims of racial vilification.

3. INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

State Parties to two major international human rights instruments—the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the International Covenant on Civil and Political Rights (ICCPR)—assume an obligation to enact racial vilification legislation.

\textsuperscript{11} Australian Law Reform Commission, \textit{supra} note 1 at 139.

\textsuperscript{12} \textit{Ibid} at 153.
The ICERD came into force on 4 January 1969. One hundred and fifty-five countries, including Australia, are Parties to the Convention. Article 4 of ICERD provides:

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

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as 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 organization 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.

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The ICCPR came into force on 23 March 1976. One hundred and forty-four countries,\(^{16}\) including Australia,\(^{17}\) are Parties to the Convention. Article 20(2) of the ICCPR provides that “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”\(^{18}\)

In purported\(^{19}\) fulfilment of the obligations assumed under these two conventions, many countries around the world, including Australia, have enacted racial vilification legislation.\(^{20}\)


\(^{17}\) Australia ratified the Convention on 13 August 1980. However, Australia entered a reservation “to the effect that it interpreted the rights provided for by Articles 19 (freedom of expression, 21 (right of peaceful assembly) and 22 (right to freedom of association) as being consistent with Article 20”: Akmeemana and Jones, supra note 13 at 131.


\(^{19}\) Even where states have been motivated to enact racial vilification by their international treaty obligations, the terms of the legislation enacted may not mirror precisely the scope or form of legal regulation by Article 4(a) of ICERD or Article 20(2) of ICCPR, and in some cases a state party’s obligations may have been only partially fulfilled. For example, doubts have been expressed by a number of commentators about whether the Racial Hatred Act 1995 (Cth) adequately satisfies Australia’s obligations under international human rights law, and article 4(a) of ICERD in particular. Akmeemana and Jones, supra note 13 at 139, assert that “It is clear that the Racial Hatred Act fails to meet the requirements of Article 4(a) of CERD and Article 20(2) of [ICCPR]”. See also Johns, supra note 13. Concern for the free speech implications of full compliance with the requirements of the ICERD and the ICCPR is an important influence on the degree of compliance. The terms in which the Racial Hatred Act 1995 (Cth) was ultimately enacted is illustrative of this point. See further discussion in chapter 5 of this thesis.

In addition to motivating the enactment of federal or national racial vilification legislation, the human rights standards established by international law have also been influential in motivating the legal regulation of racial vilification at the state/territorial level of government.\textsuperscript{21}

4. LOCAL TRIGGERS AND PRECIPITATING EVENTS

Frequently, the enactment of racial vilification legislation has taken place in response to a reported increase in the frequency and/or seriousness of incidents of racial vilification, commonly as a result of the activities of organised racist organisations. For example, the addition of a series of racial vilification offences to the Western \textit{Australian Criminal Code} 1913 in 1990\textsuperscript{22} was a direct response to the activities of the Australian National Movement, an organisation which actively promoted, racist attitudes and conduct against Asians, "Coloureds" and Jews, by various means including via a poster and graffiti campaign.\textsuperscript{23}

\textit{Countries} (Westport: Praeger, 1993); Coliver, \textit{supra} note 15, Part III of which review the experiences of 14 countries.

\textsuperscript{21} For example, during the second reading speech on the \textit{Anti-Discrimination (Racial Vilification) Amendment Act} 1989 (NSW) in the NSW Legislative Council, the Minister for Police and Emergency Services stated that the legislation was being introduced "in the spirit" of the ICCPR, particularly article 19 and 20: New South Wales Hansard (Legislative Council), 10 May 1989, p 7810.

\textsuperscript{22} \textit{Criminal Code} 1913 (WA), ss 77-80 (as amended by the \textit{Criminal Code Amendment (Racist Harassment and Incitement to Racial Hatred) Act} 1990 (WA). The regulatory regime established by this legislation is examined in chapter 10 of this thesis.

One of the interesting features of the influence of 'local factors' such as these is that the regulatory form adopted has often been significantly shaped by the nature of the racial vilification around which calls for regulation had been mobilised. This relationship has important implications for the longevity and utility of racial vilification legislation. These implications will be discussed during the course of this thesis.

5. RACIAL VILIFICATION AS PRECURSOR TO MORE SERIOUS HARMS

Racial vilification is considered to contribute, either directly or indirectly, to an increased risk of harm against the individual or group targeted by the racial vilification. One of the primary motivations for the legislative regulation of racial vilification is based on prevention or risk reduction with respect to unequivocal harms such as violence and unlawful discrimination. With reference to the Canadian context (where racial vilification is more commonly known as ‘hate propaganda’) Mahoney has made this point about racial vilification well:

Society as a whole suffers because such expressions undermine freedom and core democratic values by creating discord between groups and an atmosphere conducive to discrimination and violence. Therefore, hate propaganda is not a mere expression of intention to act in the future. It is an act, a consequence, and end in itself. At best it is a practice of discrimination. At worst it is raw violence. Both are connected. Non-violent hate speech exists on a continuum which eventually and inevitably leads to violence once the weapons of segregation, disparagement and propaganda have done their work.

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25 K Mahoney, Hate Vilification Legislation with Freedom of Expression: Where is the Balance? (Brisbane & Sydney: Bureau of Ethnic Affairs Queensland & Ethnic Affairs Commission of New South Wales, 1994) at 9. In R v Keegstra [1991] 2 WWR 1 at 43 Dickson CJC observed that one of the harms caused by racial vilification/hate propaganda was “the possibility that prejudiced messages will gain
Reflecting this understanding of the impact of racial vilification, in the second reading speech in the House of Representatives on the Commonwealth Racial Hatred Bill 1994, the Commonwealth Attorney General observed that “Racial hatred provides a climate in which people of a particular race or ethnic origin live in fear and in which discrimination can thrive. It provides the climate in which violence may take place”. Similarly the HREOC National Inquiry into Racist Violence (NIRV) noted that racial vilification contributed to the “threatening environment” which increased the risk of violence. The NIRV explained that the anticipation of violence by targets of racial vilification may create a defensive attitude which enhances the probability of violence. Those who assume that violence is a real and present danger are more likely to react to situations in a way which anticipates, and may therefore encourage, violence.

Identification of the connection between racial vilification and specific incidents of racial discrimination and racially motivated violence creates a strong motivation for early intervention and preventive regulation. One of the aims of racial vilification legislation is to reduce the risk of escalation of the vilification into discrimination or violence either by the original perpetrator of the vilification or both

some credence, with the attendant result of discrimination, and perhaps even violence, against minority groups in Canadian society.”

26 Commonwealth Hansard (House of Representatives), 15 November 1994, p 3340.
those who might subsequently be encouraged by his/her conduct to act in a discriminatory or violent way.\textsuperscript{29}

6. RACIAL VILIFICATION AS HARMFUL IN ITSELF

In addition to concerns about encouraging, inciting or facilitating acts of violence or discrimination, recognition that racial vilification is harmful in itself has emerged as an important rationale for the legal regulation of racial vilification. The NIRV observed in 1991 that:

The evidence presented to the Inquiry indicates that direct physical violence is only one aspect of the effect on the victim. There are also psychological effects to be considered. In addition the effects are cumulative in nature rather than simply derived from any single incident.\textsuperscript{30}

\textsuperscript{29} See T Solomon, "Antisemitism as Free Speech: Judicial Responses to Hate Propaganda in \textit{Zundel} and \textit{Keegstra}" (1995) 13(1) \textit{Australian-Canadian Studies} 1 at 9.

\textsuperscript{30} \textit{NIRV Report}, supra note 1 at 115. See also T Solomon, "Problems in Drafting Legislation" (1994) 1 \textit{Australian Journal of Human Rights} 265 at 270. In \textit{R v Keegstra} [1991] 2 WWR 1 Dickson CJC observed that hate propaganda/racial vilification was not merely offensive, but caused "very real harm". The Chief Justice of the Supreme Court of Canada (at 42, 42-43) identified...

... two sorts of injury caused by hate propaganda. First there is harm done to members of the target group. It is indisputable that the emotional damage caused by words may be of grave psychological and social consequence. ... [W]ords and writings that wilfully promote hatred can constitute a serious attack on persons belonging to a racial or religious group, and in this regards the Cohen Committee noted that these persons are humiliated and degraded. ... The derision, hostility and abuse encouraged by hate propaganda ... have a severely negative impact on the individual's sense of self-worth and acceptance. ... A second harmful effect of hate propaganda which is of pressing and substantial concern is its influence upon society at large ... It is ... not inconceivable that the active dissemination of hate propaganda can attract individuals to its cause, and in the process create serious discord between various cultural groups in society.
The psychological effect of racial vilification experienced by targeted individuals and groups, has been variously identified as "psychic harm", "psychological assault" or "spirit murder". Critical race scholar, Mari Matsuda, has observed that

The negative effects of hate messages are real and immediate for the victims. Victims of vicious hate propaganda have experienced physiological symptoms and emotional distress ranging from fear in the gut, rapid pulse rate and difficulty in breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis, and suicide.

Other harms that have been identified as possible results of racial vilification include loss of self-esteem (including "feelings of powerlessness" and "a sense of hopelessness"), "emotional abuse that undermines a victim’s right to subjective integrity and/or sense of self", insecurity and "inner turmoil" about one’s identity (including a tendency to "reject one’s own identity as a victim-group member"),

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35 NIRV Report, supra note 1 at 115.
36 Jones, supra note 33 at 308.
37 Matsuda, supra note 34 at 2336.
38 Ibid at 2337.
and marginalisation or “withdraw[al] from full participation in society.”

In a recent public inquiry decision, the Human Rights and Equal Opportunity Commission, recognised that the racial discrimination and racial vilification to which the complainant had been exposed in his workplace had caused him to suffer “a severe major depressive disorder”.

The cumulative impact of racial vilification has been explained by Solomon as follows:

The harms of racist speech are cumulative and must be considered in the context of past acts against the particular group. Abuses that are minor in themselves become dangerous when they are part of a pattern of continuous racist abuse. In many cases it is because of the history of violence against a particular group that hate propaganda has the power to intimidate and to harm that group’s members.

7. CONCLUSION

This chapter has provided an overview of the most significant motivating factors for the legislative regulation of racial vilification. This information provides an important background for the analysis of specific racial vilification statutes to which attention will now be turned.

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39 Mahoney, supra note 2 at 9.
41 Ibid.
42 Solomon, supra note 30 at 270.
CHAPTER 4

FRAMEWORK FOR THE ANALYSIS OF RACIAL VILIFICATION LAWS

Consideration of the legislative regulation of racial vilification in Australia can be traced back to the early 1970s in the context of the emergence of anti-discrimination statutes, such as the Racial Discrimination Act 1975 (Cth). However it was not until 1989 that a racial vilification statute was enacted by an Australian legislature: the Anti-Discrimination (Racial Vilification) Amendment Act 1989 (NSW). It was only in 1995 that national racial vilification legislation was introduced by the Federal Parliament with the enactment of the Racial Hatred Act 1995 (Cth). In addition to these two jurisdictions racial vilification legislation has also been enacted in Western Australia, the Australian Capital Territory, and South Australia.

Two introductory observations about the circumstances of the enactment of racial vilification legislation in Australia may be made, in light of the primary concerns of this dissertation. First, throughout the decade during which racial vilification legislation has been enacted by six Australian legislatures, free speech

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1 This Act added racial vilification provisions to the Anti-Discrimination Act 1977 (NSW), Part 2, Division 3A.
2 This Act added racial vilification provisions to the Racial Discrimination Act 1975 (Cth), Part IIA.
5 Racial Vilification Act 1996 (SA), Wrongs Act 1939, s 37 (as amended in 1996) (proclaimed and came into operation on 7 July 1998. Section 126 of the Anti-Discrimination Act 1991 (Qld) is sometimes described as a racial vilification legislative provision. However, it does not proscribe racial vilification as such, but rather the incitement of unlawful discrimination where the means adopted to achieve
sensitivity has been an important dimension of the environment in which racial vilification legislation has been shaped. However, the impact of free speech sensitivity has not been consistent or uniform. It has prompted quite diverse regulatory responses. It has most commonly been a factor influencing opposition to criminal law and public prosecution as regulatory tools, and a preference for civil human rights law regulation. However, paradoxically, it has also been manifested, in one jurisdiction, in a preference for (narrowly defined) criminal law regulation over civil modes of regulation.⁶

Within the category of civil law regulation, free speech sensitivity has been an influential factor in the reliance on the informal conciliation-based processes of the civil human rights complaint resolution system. However, mirroring the ‘exception’ to the pattern of reliance on civil law over criminal law, one jurisdiction has preferred to regulate racial vilification via the creation of a civil cause of action justiciable in the mainstream civil court system.⁷ Free speech sensitivity was a factor in this choice.

It will be argued that these significant variations in the influence of free speech sensitivity are at least partly explained by the absence of express legal protection of free expression rights. This absence contributes to a blurring (and often an extension) of the boundaries of the immunity afforded to speech/expression, as well as inconsistency as to its significance for the desirability and legitimacy of laws which regulate racial vilification.

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⁶ See the discussion of Western Australia’s racial vilification legislation in chapter 10 of this thesis.
⁷ See the discussion of South Australia’s racial vilification legislation in chapter 11 of this thesis.
A second introductory comment about the enactment of racial vilification laws in Australia is that there is considerable variation between the different statutes, in terms of scope, and type of regulation. A variety of regulatory models have been adopted in different jurisdictions. The two most significant areas of variation are the scope of the legislation (including the breadth of the category of racial vilification which is legislatively proscribed as unlawful\(^8\)) and the enforcement process (ranging from victim initiated conciliation-based processes to criminal prosecution).

The primary objective of this thesis is to identify, analyse and examine the significance of both of these features of the enactment, operation and interpretation of racial vilification legislation in Australia: the impact of free speech sensitivity and the adoption of diverse regulatory models.

The body of this thesis is divided into two parts. Part II (chapters 5-6) will review the history and current status of racial vilification laws enacted by the Commonwealth Parliament, focusing on the enactment of the *Racial Hatred Act 1995* (Cth) which added racial vilification to the *Racial Discrimination Act 1975* as a ground of complaint. Although it is one of the most recent additions to the list of Australian racial vilification statutes, the Commonwealth legislation is considered first because, given its national coverage, it provides an important backdrop to the examination of state/territorial legislation and an appropriate starting point for a comparative analysis of legislative approaches to the regulation of racial vilification in Australia. Appreciation of the nature of the regulatory regime in operation in those states/territories that have enacted racial vilification legislation requires an

\(^8\) Each statute regulates a (smaller or larger) subset of the conduct defined in chapter 2 as racial vilification. The *scope* of each statute will be examined in the respective chapters in Parts II and III of this thesis.
examination of the inter-relationship between the state/territorial regime and the federal regime which applies across the country.

Part III (chapters 7-11) will review the history and current status of racial vilification laws enacted by state and territorial legislatures from the Anti-Discrimination (Racial Vilification) Amendment Act 1989 (NSW) to the Racial Vilification Act 1996 (SA). A distinctive feature of the chapters on racial vilification legislation in Western Australia (chapter 10) and South Australian (chapter 11) will be the inclusion of a section which reviews the operation of equivalent Canadian legislation. As explained in chapter 1, the specific purpose of these selected comparative inclusions will be to facilitate analysis of the operational significance of those models of legal regulation (namely, criminal law and tort law) which have been adopted in Australia but, to date, not yet invoked in the shape of formal legal proceedings.

Each state jurisdiction will be considered in turn, in chronological order according to the date of the first enactment of racial vilification legislation. This chronological jurisdiction-by-jurisdiction structure has been adopted (in preference to a structure organised around the type of regulator regime established by the legislation) primarily to ensure clarity. In turn, this structure facilitates a cumulative comparative approach to the analysis of Australian racial vilification legislation. The chronological approach also facilitates consideration of whether, over the course of the last decade, any pattern has emerged in terms of the preferred approaches to the legislative regulation of racial vilification, including the influence of prevailing political climates (and the party political affiliation of the government of the day), and the issue of whether particular jurisdictions have borrowed or learned from the experiences of other jurisdictions that have previously enacted legislation.
PART II – NATIONAL LEGISLATION
CHAPTER 5

PART IIA OF THE RACIAL DISCRIMINATION ACT 1975 (CTH)—THE NATURE OF THE REGULATORY APPROACH

1. INTRODUCTION

This chapter will examine the history and current status of the legislative regulation of racial vilification by the Australian Commonwealth Parliament. By virtue of its national coverage, the Commonwealth legislative regime is an important starting point for the comprehensive review of racial vilification legislation which is the framework for this thesis. Also, Australia’s Commonwealth racial vilification legislation is, in its own right, a valuable vehicle for exploring this thesis’s primary concerns with the impact of free speech sensitivity on the shape of racial vilification legislation and the choice of particular legislative models for the regulation of racial vilification. The main points of controversy in the parliamentary debate leading up to the enactment of the Racial Hatred Act 1995 (Cth) centred around the issue of which forms of legislative regulation were compatible with a continued commitment to free speech, and consequently, whether criminal regulation or civil human rights regulation was more appropriate.

Section 2 of this chapter will review the background to the eventual enactment of national racial vilification legislation in 1995. Section 3 will examine the ‘shape’ of the Racial Hatred Act 1995 (Cth), including an analysis of the key features of the regulatory framework and an analysis of the way in which free speech sensitivity and other factors impacted on the regulatory form ultimately adopted. Section 4 of this
chapter will examine the operation of the racial vilification provisions of the *Racial Discrimination Act 1975* (Cth) from 1995 (when they came into force) until 30 June 1999. This examination will be based on a review of statistical data published by the Human Rights and Equal Opportunity Commission (HREOC) on complaints made under s 18C of the *Racial Discrimination Act*, and analysis of all racial vilification cases formally decided by a HREOC public inquiry. The significance of the statistical information and the case law for the theses advanced in this thesis will be examined.

2. **BACKGROUND**

The introduction of national racial hatred legislation in Australia has been a long and protracted process, stretching over more than two decades from the time of the enactment of national racial discrimination legislation in the early 1970s.

2.1 **Clause 28 of the Racial Discrimination Bill 1974**

Racial vilification provisions were contained in the Racial Discrimination Bill 1974, introduced by the then Labor Government. The 1974 Bill formed the basis for the *Racial Discrimination Act 1975* (Cth), but the racial vilification was deleted prior to the enactment of the legislation.

Clause 28 of the 1974 Bill provided that:

A person shall not, with intent to promote hostility or ill-will against, or to bring into contempt or ridicule, persons included in a group of persons in Australia by reason of the race, colour or national or ethnic origin of the persons included in the group—

(a) publish or distribute written matters;

(b) broadcast words by means of radio or television; or

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(c) utter words in any public place, or within the hearing of persons in any public place, or at any meeting to which the public are invited or have access,

being written matter that promotes, or words that promote, ideas based on—

(d) the alleged superiority of persons of a particular race, colour or national or ethnic origin over persons of a different race, colour or national or ethnic origin; or

(e) hatred of persons of a particular race, colour or national or ethnic origin.

Penalty: $5,000.²

The Liberal Party-Country Party Coalition, in Opposition, did not support the inclusion of this clause in Australia’s first national anti-discrimination statute. During debate in the House of Representatives, the Liberal Party Member for Bennelong, John Howard, expressed the Opposition’s concerns about the proposed criminalisation of racial vilification:

... [T]o attempt to proscribe dissemination of ideas, however base many people in this chamber might find those ideas, is to get into an area which in the view of the Opposition is so dangerous and could infringe on such a basis right that the Opposition very strongly opposes the inclusion in the Bill of this clause.³

Coalition MHR, Mr Hunt warned that “The Bill could destroy freedom of speech and attempt to stifle freedom of thought”.⁴

The Attorney-General, Mr Enderby, defended the inclusion of clause 28 on the basis that it reflected Australia’s obligation under International Convention on the Elimination of All Forms of Racial Discrimination,⁵ and because “the criminal law

² Commonwealth Hansard (House of Representatives), 9 April 1975, p 1408.
³ Ibid at 1408-1409.
⁴ Commonwealth Hansard (House of Representatives), 8 April 1975, p 1299.
⁵ See chapter 3 of this thesis, and further discussion below in this chapter.
does not only provide a penalty; it expresses a sense of community outrage at certain types of behaviour."^6

The 1974 Bill, with clause 28 intact, was passed in the House of Representatives on 9 April 1975.^7

However, the Coalition again opposed the inclusion of clause 28 in the Senate, where it held the balance of power. As in the House of Representatives, the Coalition’s opposition to clause 28 was motivated primarily by concern for the consequences for free speech of criminalising racial vilification. Liberal Party Senator Chaney stated that “Clause 28 … represents a dangerous restriction on freedom of speech in Australia.”^8 Liberal Party Senator Greenwood expanded on this theme:

... [T]he basic objection which the Opposition has is that this clause is an infringement of freedom of expression which ought not to be seen in a Bill of this character which is directed towards improving human relations.9

The Labor Party proposed a compromise amendment which would limit the prohibition of racial vilification to conduct which was done with “intent to provoke a breach of the peace”.10 However, the Coalition did not accept the amendments maintaining its complete opposition to the clause in its entirety. Clause 28 was deleted11 before the Racial Discrimination Bill 1974 was passed in the Senate.

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^6 Commonwealth Hansard (House of Representatives), 9 April 1975, p 1409.
^7 Ibid at 1416.
^8 Commonwealth Hansard (Senate), 22 May 1975, p 1803. See also Senator Missen, Commonwealth Hansard (Senate), 27 May 1975, p 1883.
^9 Commonwealth Hansard (Senate), 29 May 1975, p 2032.
^10 Ibid at 2036 per Senator McClelland.
^11 Ibid.
On 3 June 1975 the House of Representatives accepted the Senate’s amendments to the Racial Discrimination Bill, including the deletion of clause 28. The *Racial Discrimination Act 1975* (Cth), without a provision dealing with racial vilification received assent on 11 June 1975.

Australia’s unsuccessful first attempt to enact legislation for the regulation of racial vilification has been discussed at some length because the story of the demise of clause 28 in the Commonwealth Parliament resonates loudly in the evolution of

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12 Commonwealth Hansard (House of Representatives), 3 June 1975, p 3248; Commonwealth Hansard (Senate), 4 June 1975, p 2186.

... make it unlawful for a person to publicly utter or publish words which, having regard to all the circumstances, are likely to result in hatred, intolerance or violence against a person or persons, or a group of persons, distinguished by race, colour, descent or national or ethnic origin [and] ... make it unlawful to publicly insult or abuse an individual or group, or hold that individual or group up to contempt or slander, by reason of their race, colour, descent or national or ethnic origin.

— Human Rights Commission, *Proposed Amendments to the Racial Discrimination Act Concerning Racial Defamation*. Discussion Paper No 3 (Canberra: Human Rights Commission, 1983) at 2. The Commission recommended that publication be defined broadly “to cover the print and electronic media, sign boards, abusive telephone calls etc and that both the individual making the statements and the owners and controllers of the issuing medium would be covered ...”: ibid at 3. Significantly, the Human Rights Commission explained that “Setting the provisions within the ambit of the *Racial Discrimination Act* makes it possible to retain the very considerable advantages of adopting conciliation procedures in such cases” and argued that “Avoiding a criminal law approach maintains the parallel with the defamation of individuals and increases the educative role of the law”: ibid. The Commission’s proposals were not enacted into legislation. See also Human Rights Commission, *Proposal for Amendment to the Racial Discrimination Act to Cover Incitement to Racial Hatred and Racial Defamation*. Report No. 7 (Canberra: Australian Government Publishing Service: 1984); and R Pettman, *Incitement to Racial Hatred*:...
each of the successful attempts to enact racial vilification legislation which have followed in the majority of Australian jurisdictions. Specifically, free speech sensitivity and resistance to the employment of the criminal law to regulate racial vilification—key factors in the excision of clause 28 from the *Racial Discrimination Act* 1975 (Cth)—have been a recurring theme in the history of racial vilification legislation in Australia.

2.2 Obligations Under International Human Rights Law

As illustrated with reference to the *Racial Discrimination Bill* 1974, one of the motivations for the enactment of racial vilification legislation by the Commonwealth Parliament has been Australia’s obligations under international human rights law. As noted in chapter 3 of this thesis, Australia is a Party to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the International Covenant on Civil and Political Rights (ICCPR). Both of these conventions imposes an obligation on state Parties to render racial vilification unlawful. However, Australia’s ratification of both treaties includes a reservation with respect to the provisions relating to the prohibition of racial vilification—motivated primarily by a perceived conflict with the right to freedom of expression protected by article 20 of the ICCPR. In relation to ICERD Australia expressed a reservation indicating that it was “not at present in a position...”

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14 See chapter 3 of this thesis.
specifically to treat as offences all the matters covered by article 4(a) ...” but that it would do so at the “first suitable moment”. 15

Australia’s maintenance of this reservation has been a subject of international attention and criticism. For example, at its 1067th meeting on 18 August 1994, the United Nations Committee on the Elimination of Racial Discrimination (which monitors compliance with the obligations of state parties under the ICERD) recommended that Australia ‘adopt appropriate legislation with a view to withdrawing its reservation to article 4(a) of the Convention’.16

Notwithstanding Australia’s reservations to the relevant articles of ICERD and ICCPR, Australia’s obligations under international human rights law have frequently been cited as one of the motivations for the enactment of national racial vilification legislation.17 However, despite the enactment of the Racial Hatred Act 1995 (Cth) Australia’s reservation to the ICERD has not been removed. This is not surprising because it is highly unlikely that the Racial Hatred Act will be considered by the ICERD Committee to completely fulfil Australia’s treaty obligations, particularly in light of the absence of criminal sanctions, which article 4(a) of ICERD is generally considered to require.18 The same comment may be made about

15 Cited in Akmeemana and Jones, note 13 supra at 131.
Australia’s reservation to the ICCPR. For example, article 20(2) requires the prohibition of religious vilification which is not covered by the *Racial Hatred Act* 1995 (Cth).19

2.3 Commissions and Inquiries

In addition to persistent lobbying by ethnic community organisations, and the creation of racial vilification laws at the state/territory level (commencing with the passage of the *Anti-Discrimination (Racial Vilification) Amendment Act* 1989 (NSW)), pressure for the enactment of national racial vilification legislation was also generated by the release of the reports of HREOC’s National Inquiry into Racist Violence (1991),20 the Royal Commission into Aboriginal Deaths in Custody (1991),21 and the Australian Law Reform Commission’s reference on Multiculturalism and the Law (1992).22 Each of the reports identified racial vilification as a sufficiently serious problem in Australia to warrant the making of such conduct unlawful.

As discussed in chapter 2, HREOC’s National Inquiry into Racist Violence found that “Racist violence is an endemic problem for Aboriginal and Torres Strait Islander people in all Australian States and Territories.”23 It also found that ‘Racist violence on the basis of ethnic identity in Australia is nowhere near the level that it is in many other countries. Nonetheless it exists at a level that causes concern and it


19 See Akmeemana and Jones, *supra* note 13 at 175-176.

20 *NIRV Report*, *supra* note 17.


could increase in intensity and extent unless addressed now.\textsuperscript{24} In the \textit{National Report of the Royal Commission into Aboriginal Deaths in Custody} Commissioner Johnston noted that verbal abuse constituting racial vilification was a persistent feature of the systemic discrimination suffered by Aboriginal people in the criminal justice system, particularly at the point of contact with police.\textsuperscript{25}

While there was general agreement that the nature and extent of the problem of racial vilification in Australia warranted legislative intervention, views as to the most appropriate form of legal regulation differed. The primary point of divergence was over whether criminal law was an appropriate form of regulation, or whether conciliation-based human rights law was more appropriate.

The most extensive proposals came from the National Inquiry into Racist Violence. Its recommendations included:

3. That any qualification on Australia’s obligations under Article 4(a) of the Convention on the Elimination of All Forms of Racial Discrimination be removed.


5. That the Federal \textit{Crimes Act} be amended to create a clearly identified offence of incitement to racist violence and racial hatred which is likely to lead to violence.


7. That the Federal \textit{Racial Discrimination Act} be amended to prohibit incitement of racial hostility, with civil remedies similar to those already provided for racial discrimination.

8. That Federal and State Crimes Acts be amended to enable courts to impose higher penalties where there is a racist motivation or element in the commission of the offence.\textsuperscript{26}

\textsuperscript{23} NIRV, \textit{supra} note 17 at 387.
\textsuperscript{24} \textit{Ibid.}
\textsuperscript{25} RCIADIC, \textit{supra} note 21 at 71.
\textsuperscript{26} NIRV, \textit{supra} note 17 at 389-390.
The Royal Commission into Aboriginal Deaths in Custody recommended that governments which have not already done so legislate to proscribe racial vilification... However, the Royal Commission did not support the enactment of criminal laws for the regulation of racial vilification, concluding that conciliation-based laws along the lines of section 20C of the New South Wales Anti-Discrimination Act 1977 were preferable. Similarly, in its report on Multiculturalism and the Law, the Australian Law Reform Commission recommended that incitement of racist hatred and hostility be made unlawful, but (by majority) considered it inappropriate to create any criminal offences:

The Commission, by majority, supports making incitement to racist hatred and hostility unlawful. The majority considers that making it a crime, however, restricts freedom of speech unduly. It is of the view that conciliation, backed up by civil remedies when conciliation fails, is the more appropriate way to deal with it and opposes the creation of a criminal offence.

The primary argument advanced by the Australian Law Reform Commission for preferring conciliation-based civil regulation over criminal regulation—that is, the relative impact on free speech—is a recurring theme in debates surrounding the enactment of racial vilification legislation. What is significant in this regard is that the

27 RCIADIC, supra note 21 at 75.
28 Ibid at 74-75. Section 20C of the Anti-Discrimination Act 1977 (NSW) is discussed in detail in chapters 8-9.
29 ALRC, supra note 22 at para 7.47. The Law Reform Commission did support the creation of a separate offence of racist violence: ibid para 7.33.
30 Free speech sensitivity was not the only factor influencing the approach preferred by the Australian Law Reform Commission. Professor Michael Chesterman (a member of the majority group) has noted that "There were also familiar concerns about not creating martyrs, not providing opportunities for the authorities to obtain convictions against Aborigines and other minority groups etc": personal communication (email), Professor Michael Chesterman, Faculty of Law, University of New South Wales, 17 November 1999.
decision as to the most appropriate method of legislative regulation is based primarily on concern for minimising impact on free speech, rather than on the demands of effectively regulating the problem in question (that is, racial vilification). Reservation about the adequacy of the conciliation-based civil human rights law approach as a means of implementing the most appropriate regulatory strategy is implicit in the position adopted by the minority that a criminal offence for intentional racial vilification be adopted, on the basis that “[t]o offer no more than conciliation in such cases would add to the trauma of the victims”\(^{31}\). The point is, as is particularly well demonstrated in the emergence of the *Racial Hatred Act 1995* (Cth), that the paramount objectives behind the creation of the regulatory regime will have a major impact on the shape of the legislative framework. Primary concern for the impact of regulation on free speech will yield a particular regulatory framework. Concern for setting community standards on the unacceptability of racial vilification, and concern for providing victims of racial vilification with an effective means of legal redress and protection are likely to yield a rather different regulatory framework. The suggestion is not that free speech sensitivity has been the exclusive influence on the shape of racial vilification in Australia; nor is it that responsibility for all weaknesses in the regulatory regimes established by racial vilification can be attributed to free speech sensitivity. The argument that is proposed and advanced throughout this

\[^{31}\textit{Ibid} \text{para 7.48. The minority recommended that the following offence be added to the } \textit{Crimes Act 1914 (Cth):} \]

A person must not publish, by any means, anything that is based on ideas or theories of superiority of any race or group of persons of one colour or ethnic origin over another, or promotes hatred or hostility between such races or groups, if the person intends that the publication will incite hatred or hostility towards an identifiable group and is likely to have that effect.
thesis is that the tension between free speech sensitivity and effective regulation of racial vilification has been a consistently influential factor on the evolution of racial vilification legislation in Australia.

2.4 Government Responses to the Recommendations

2.4.1 The 1992 Bill

The then Australian Labor Party (ALP) Government’s initial legislative response to the reports and recommendations discussed above was the Racial Discrimination Amendment Bill 1992 which was introduced into the House of Representatives in December 1992. The bill proposed amendments to both the Racial Discrimination Act 1975 (Cth) and the Crimes Act 1914 (Cth), reflecting a preference for the combined criminal law/conciliation-based human rights law approach advocated by the National Inquiry into Racist Violence.

The 1992 bill proposed that the Racial Discrimination Act 1975 (Cth) be amended to make racial vilification unlawful and a basis for complaint to the HREOC. Racial vilification was defined as “knowingly or recklessly doing a public act which was likely to stir up hatred, serious contempt or severe ridicule against a person or a group of persons on the ground of race, colour or national or ethnic origin”. The bill also proposed the addition of two racial incitement offences to the Crimes Act 1914 (Cth): intentionally stirring up hatred on the ground of race, colour or national or ethnic origin; and, inspiring fear that violence may be used against persons because of their race, colour or national or ethnic origin.

The Bill was circulated for public discussion and comment. However, when a federal election was called for March 1993 the bill lapsed.
2.4.2 The 1994 Bill

When the 1992 bill was not reintroduced into the new Parliament following the election, concerns were raised about the Labor Government’s commitment to national racial hatred legislation. However, in November 1994 a revised bill—the Racial Hatred Bill 1994—was introduced into the House of Representatives.

Like its predecessor, the 1994 bill was based on a two-pronged approach to the proscription of racial vilification, proposing changes to both the Crimes Act 1914 (Cth) and the Racial Discrimination Act 1975 (Cth). The 1994 bill proposed that three new criminal offences be created. The first would have prohibited specific threats to person where motivated by the race, colour or national or ethnic origin of the person or persons threatened, while the second would have prohibited racially-motivated threats to property. The third amendment to the Crimes Act 1914 (Cth) proposed by the 1994 bill was the creation of an offence of intentionally inciting racial hatred, which was similar in terms to the offence of stirring up racial hatred proposed in the 1992 bill.

The amendment to the Racial Discrimination Act 1975 (Cth) proposed by the 1994 bill was substantially different from the change proposed by the 1992 bill. Where the 1992 bill had essentially adopted the wording of section 20C of the Anti-

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32 The Racial Hatred Bill 1994 proposed the addition of the following offence to the Crimes Act 1914 (Cth) punishable by imprisonment for one year:

A person must not, with the intention of inciting racial hatred against another person or a group of people, do an act, otherwise than in private, if the act:
(a) is reasonably likely, in all the circumstances, to incite racial hatred against the other person or group of people; and
(b) is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people on the group.
Discrimination Act 1977 (NSW)\(^3\) (albeit with an additional subjective mens rea component) the wording contained in the 1994 was unique among Australian racial hatred laws. Under the bill it would be unlawful to do a public act which was likely to 'offend, insult, humiliate or intimidate', a definition which appears to be considerably wider than the 1992 bill's reference to 'hatred, serious contempt or severe ridicule'. No evidence of intention, knowledge or recklessness would be required, but the proposed section contained a long list of exemptions or 'defences'.\(^4\)

The Racial Hatred Bill 1994 was passed in the House of Representatives on 16 November 1994, notwithstanding the opposition of the Liberal Party-National Party Coalition. The primary reason for the Coalition's opposition to the Racial Hatred Bill 1994 was essentially the same factor that had motivated the Coalition in 1975 to oppose the inclusion of clause 28 in the Racial Discrimination Act 1975

\(^3\) See chapter 8 of this thesis.
\(^4\) Section 18D of the Bill provided that:

Section 18C does not render unlawful anything said or done reasonably and in good faith:

(a) in the performance, exhibition or distribution of an artistic work; or
(a) in the course of any statement, publication, discussion or debate made or held for any genuine academic artistic or scientific purpose or any other genuine purpose in the public interest; or
(a) in making or publishing:

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

(Ctii): concern that the legislation would result in too great an infringement of free speech.\(^{35}\)

After second reading in the Senate on 28 November 1994, the bill was referred to the Senate Legal and Constitutional Legislation Committee on 2 February 1995. In March 1995 the committee recommended (by a party-lines majority) that the bill be enacted as introduced.\(^{36}\) In the Senate the bill was supported by both the ALP and the Australian Democrats. It was opposed in its entirety by the Coalition Opposition, again, primarily on free speech grounds. The Western Australian Greens (who held two Senate seats) supported the regulation of racial vilification via civil human rights law and processes as reflected in the proposed amendment to the Racial Discrimination Act 1975 (Ctii). However, the WA Greens refused to support the inclusion of criminal sanctions within the regulatory framework for racial vilification. As a result of amendments introduced in the Senate by the WA Greens, the provisions which would have added three new offences to the Crimes Act 1914 (Ctii) were deleted from the legislation before it was passed on 24 August 1995. Consequently, in its final form, the Racial Hatred Act 1995 (Ctii)\(^{37}\) was a substantially different piece of legislation than the Racial Hatred Bill that was first tabled in Parliament late in 1994. As will be discussed in the next section of this chapter, free speech sensitivity had a major influence on the final shape of the legislation, and in particular the decision to rely exclusively on a civil human rights regulatory framework and to reject the use of criminal regulation. Curiously, the two

\(^{35}\) The Opposition's reasons for refusing to support the Racial Hatred Bill are discussed further, below.

political parties for whom free speech sensitivity was a determinative factor in bringing about this outcome—the conservative Liberal Party-National Party Coalition and the WA Greens—are generally considered to occupy opposite end of the political spectrum. This observation reveals the difficulty of ‘pigeon-holing’ free speech sensitivity in political or ideological terms, such is its malleability in the context of the Australian legal system where free speech is nowhere defined or expressly protected.\textsuperscript{38}

3. THE IMPACT OF FREE SPEECH SENSITIVITY ON THE SHAPE OF THE \textit{RACIAL HATRED ACT}

Compared with the heated debate and extensive media coverage which surrounded the passage of the Racial Hatred Bill 1994 through the Commonwealth Parliament commencing with its introduction into the House of Representatives in November 1994, the passing of the \textit{Racial Hatred Act} 1995 Act (Cth) by the Senate on 24 August 1995\textsuperscript{39} attracted little media attention. In large part this can be explained by the fact that during the course of its passage through the legislature the regulatory framework provided for by the legislation was transformed from one which emphasised a dual strategy of regulation via the criminal law and civil human rights law to one which relied exclusively on civil human rights law. It would appear that the removal of criminal sanctions—and, therefore, also of consequential police

\textsuperscript{37} The \textit{Racial Hatred Act} 1995 (Cth) received assent on 15 September 1995 and the amendments to the \textit{Racial Discrimination Act} 1975 (Cth) came into force on 13 October 1995.

\textsuperscript{38} See chapter 1 of this thesis.

\textsuperscript{39} The \textit{Racial Hatred Act} 1995 (Cth) commenced operation on 13 October 1995.
powers to investigate the offences covered by the legislation—was sufficient to allay the fears of many who opposed the proposed legislation on free speech grounds.

This section of this chapter will review the role that free speech sensitivity played in the transformation of the legislative framework for the regulation of racial vilification from November 1994 when the Attorney General proposed that racial vilification should be regulated using a combination of criminal and civil human rights law\(^40\) to August 1995, when the Senate passed legislation which regulated racial vilification via civil human rights law only. It will be argued that various manifestations of free speech sensitivity had a decisive impact on the outcome of the legislative process, along with other related factors including application of the concept of ‘tolerance’. This argument will be advanced via an analysis of the parliamentary debates, in the House of Representatives and the Senate.

### 3.1 House of Representatives

From the outset of debate on the Racial Hatred Bill 1994, the relationship between the proposed legislation and free speech featured prominently. This relationship was flagged as an important issue by supporters and opponents alike.

The main free speech-related themes of contributions to the parliamentary debates from Government members in support of the legislation were that:

- free speech was not absolute;
- the proposed legislation’s infringement of free speech was necessary and justifiable; and

the degree of infringement was minor and posed no threat to Australian democracy.

In the second reading speech Attorney General Michael Lavarch observed that:

This bill has been mainly criticised on the grounds that it limits free expression and that to enact such legislation undermines one of the most fundamental principles of our democratic society. Yet few of these critics would argue that free expression should be absolute and unfettered. Throughout Australia, at all levels of government, free expression has had some limits placed on it when there is a countervailing public interest. ...

In this bill, free speech has been balanced against the rights of Australians to live free of fear and racial harassment. Surely the promotion of racial hatred and its inevitable link to violence is as damaging to our community as issuing a misleading prospectus, or breaching the Trade Practices Act. ...

It is worthy of note that New South Wales has had similar legislation for five years and yet no-one has seriously argued that free speech has been curtailed there. Nor has it been unduly limited in any other Australian jurisdictions where similar legislation exists. But perhaps most noteworthy are the experiences in other liberal democracies throughout the world that ban racial hatred and violence. Free speech is a constitutional right in Canada and many European countries, yet the highest courts in these countries have held provisions which ban racist hatred and violence in public to be reasonable and necessary. In fact, in 1989, the Canadian Supreme Court upheld Canada’s anti-hate legislation.41

The Attorney General’s reference to the Canadian legal position on the relationship between free speech and the regulation of racial vilification is interesting. It implies that if the legislative regulation of racial vilification has been deemed to be compatible with a constitutionally entrenched right to free speech (as in Canada) then it should be beyond question that racial vilification legislation is valid in Australia, where the ‘right’ to free speech does not enjoy the same level of legal protection.42

41 Ibid at 3337.
42 See also the contribution from ALP MHR Mr Ferguson who noted that “If we look at the international dimensions of this matter we see that this supposed assault on freedom of expression, free speech, et cetera, has not really convinced a large
However, the fate of the Racial Hatred Bill 1994 suggests that this may not be the case. Instead, it may be that the loosely and subjectively defined concept of free speech which permeated the Australian parliamentary debate over the Racial Hatred Bill was, in fact, a more powerful influence on the shape of legislative regulating racial vilification than the formally recognised, but perhaps more narrowly defined, concept of protected expression in the Canadian constitutional context.

Following the lead of the Attorney General’s second reading speech, one of the main themes of the contributions to the debate from Governments MHRs was that the right to free speech was not absolute and the proposed limitation on expression in the form of the Racial Hatred Bill was necessary and acceptable. Mr Latham stated that “A restriction against incitements to racial violence and vilification is totally valid to ensure not so much absolute freedom of speech but fair speech, consistent with values of tolerance and understanding.” Mr Tanner argued that the proposed legislation actually enhanced free speech:

number of other liberal democracies that they should not move to do something about [racial vilification]”: Commonwealth Hansard (House of Representatives), 16 November 1994, p 3427.

43 See the following contributions from ALP MHRs: Mr Gibson, Commonwealth Hansard (House of Representatives) 15 November 1994, p 3348; Ms Deahm, Commonwealth Hansard (House of Representatives), 15 November 1994, pp 3378-3379; Ms Henzell, Commonwealth Hansard (House of Representatives), 16 November 1994, p 3418; Mr O’Connor, Commonwealth Hansard (House of Representatives), 16 November 1994, p 3440; Mrs Easson, Commonwealth Hansard (House of Representatives), 16 November 1994, p 3445; Mr Snowdon, Commonwealth Hansard (House of Representatives), 16 November 1994, p 3453; Mr Snow, Commonwealth Hansard (House of Representatives), 16 November 1994, p 3457, Mr Hollis, Commonwealth Hansard (House of Representatives), 16 November 1994, p 3461; Mr Melham, Commonwealth Hansard (House of Representatives), 16 November 1994, p 3489.

44 ALP MHR Mr Latham, Commonwealth Hansard (House of Representatives), 16 November 1994, pp 3411-3412. Mr Latham further stated that that “It is a nonsense to say that opposition members support absolute freedom of speech when, consistently, they recognise the need for defamation and obscenity regulations and consumer protections laws in this country”: p 3412.
This legislation is enhancing freedom of speech. It is protecting freedom of speech. It is protecting the rights of individuals who happen to be of a different racial background from the dominant group to be able to live their lives and express their views and their culture without fear of intimidation, without fear of threats and without fear of having racial hatred and ultimately violence incited against them.\footnote{ALP MHR Mr Tanner, Commonwealth Hansard (House of Representatives), 15 November 1994, pp 3355-3356; see also ALP MHR Mr Theophanous, Commonwealth Hansard (House of Representatives), 16 November 1994, p 3435.}

Supporters of the proposed legislation also emphasised the value of the original bill’s adoption of a “two-tiered attack on racial hatred—criminal and civil procedures”\footnote{ALP MHR Mr Gibson, Commonwealth Hansard (House of Representatives), 15 November 1994, p 3350.} as one of the strength of the regulatory framework to be established by the legislation. For example, Labor MHR Mr Gibson observed that the option of lodging a complaint with HREOC would be of great value in empowering victims of racial vilification to initiate a regulatory mechanism “whether or not the matter is being considered for criminal prosecution …”\footnote{ALP MHR Mr Gibson, Commonwealth Hansard (House of Representatives), 15 November 1994, p 3350; see also ALP MHR Ms Henzell, Commonwealth Hansard (House of Representatives), 16 November 1994, p 3420.}

The major themes in Coalition members’ contributions to the debate in the House of Representatives were that legislation regulating racial vilification:

- is unnecessary because the incidence of serious racial vilification is not high and such conduct is already adequately covered by existing law (such as the criminal offence of incitement),\footnote{Liberal Party MHR Mrs Sullivan, Commonwealth Hansard (House of Representatives), 15 November 1994, p 3366, National Party MHR Mr Cobb, Commonwealth Hansard (House of Representatives), 15 November 1994, 3381; Liberal Party MHR Mr Abbott, Commonwealth Hansard (House of Representatives), 16 November 1994, p 3492; Liberal Party MHR Mr Slipper, Commonwealth Hansard (House of Representatives), 16 November 1994, p 3500.}
would cause greater harm by causing social disharmony and by encouraging racist activity;\textsuperscript{49}

would have a negative impact on the quality of public debate on such political topics as immigration policy and foreign policy;\textsuperscript{50}

is ineffective, with education\textsuperscript{51} and ‘more speech’\textsuperscript{52} representing more promising approaches to the problem of racial vilification; and

should be resisted because it involves the government establishment of ‘thought police’\textsuperscript{53} and is an exercise in ‘political correctness’\textsuperscript{54}.

\textsuperscript{49} For example, National Party Leader Mr Fisher stated that “there is a very real risk that the imposition of criminal sanctions could provide [the Far Right] ... with a target and encouragement to do exactly that which this bill seeks to prevent. Surely this would be disaster”; Commonwealth Hansard (House of Representatives), 15 November 1994, p 3353. Another line of argument was that the legislation would fuel dispute between different ethnic groups. For example National Party MHR Mr Katter stated that “there are Serbians and Croats in North Queensland, and to start emphasising racial differences and handing them this sort of bludgeoning machinery is very dangerous”; Commonwealth Hansard (House of Representatives), 16 November 1994, p 3495; also National Party MHR Mr Neville, Commonwealth Hansard (House of Representatives), 16 November 1994, p 3509.

\textsuperscript{50} National Party MHR John Forrest, Commonwealth Hansard (House of Representatives), 16 November 1994, 3429; also Liberal Party MHR Mr Williams, Commonwealth Hansard (House of Representatives), 15 November 1994, p 3363.


\textsuperscript{52} For example, Liberal Party MHR Mr Slipper argued that “While racists are free to express their ideas, they can be identified and challenged. They can be shown to others for the irrationality they represent. Surely ... we would acknowledge that laws are completely ineffective in changing the way people think”; Commonwealth Hansard (House of Representatives), 16 November 1994, p 3498.

\textsuperscript{53} National Party MHR Mr Forrest Commonwealth Hansard (House of Representatives), 16 November 1994, p 3431; Liberal Party MHR Mr Cameron described the Racial Hatred Bill as “the most recent manifestation of disturbing Orwellian tendencies in the ALP’s legislative agenda”; Commonwealth Hansard (House of Representatives), 16 November 1994, p 3462. Liberal Party MHR Mr Slipper described the legislation as “reminiscent of what we would normally expect in
A number of speeches in the House of Representatives opposing the Racial Hatred Bill—primarily from Opposition (Liberal-National Coalition) MHRs—echoed arguments which had been advanced by opponents of the legislation in media editorials and commentaries in the lead-up to the bill's introduction into the Commonwealth Parliament and during the bill's passage through the parliament.

54 Totalitarian regimes"; Commonwealth Hansard (House of Representatives), 16 November 1994, p 3500; see also National Party MHR Mr Neville, Commonwealth Hansard (House of Representatives), 16 November 1994, p 3507.

55 Eg, National Party MHR Mr Fisher, Commonwealth Hansard (House of Representatives), 15 November 1994, p 3354; Liberal Party MHR Mr Cameron Commonwealth Hansard (House of Representatives), 16 November 1994, pp 3463, 3488.

56 ALP MHR Mr Campbell opposed the legislation, describing the Racial Hatred Bill as "an insult to Australia and Australians" which would erode free speech, "the central element upon which our democratic system rests": Commonwealth Hansard (House of Representatives), 15 November 1994, p 3384.

57 Free speech-based opposition expressed in the media had a strong influence on the shape of the parliamentary debate with a number of parliamentarians expressly referring to, and endorsing arguments advanced by media commentators: see, eg, Liberal Party MHR, Mr Nugent, Commonwealth Hansard (House of Representatives), 16 November, 1994, pp 3424-3425, quoting from R Merkel, "Race education better path than prohibition", The Australian, 2 November 1994, 13. The argument that racial vilification laws should be opposed because they represented a threat to the 'right of free speech' was articulated on numerous occasions by media commentators during the time in which national racial hatred legislation was emerging between 1994-1995. Not all print media commentary was opposed to the legislation—some commentators expressly supported it: see, for example, R Castan, "Targets of race hate entitled to redress", The Australian, 15 November 1994, 17; N Dan, "Shift focus of race hate debate to victims, The Australian, 3 November 1994, 9; and C Rubenstein, "Legislating an end to racism", The Sydney Morning Herald, 23 May 1995, 13. However, the majority of comments published in the mass print media opposed the legislative regulation of racial vilification (particularly the criminalisation of forms of racial vilification) and the primary argument advanced in support of this position was that the Racial Hatred Bill 1994 represented an unacceptable infringement of free speech principles. For example, Frank Devine argued that "Australia will suffer intellectual atrophy until freedom of speech is established as the cornerstone of society, and government attempts to curtail it are resisted as unconstitutional and unacceptable": F Devine, "Divisive racial hatred Bill an insult to us all", The Australian, 14 November 1994, 11. One commentator expressed his concerns for free speech in the following manner:
The core argument was that the Racial Hatred Bill (and the proposed criminal
offence of racial incitement in particular) was an unacceptable infringement on the right
to free speech. For example, Liberal Party MHR Mr Connolly, described the restriction
on freedom of speech as "the major objection of the opposition parties to the
legislation".57

Adoption of a very broad conception of free speech was common. For example,
National Party Leader Tim Fisher observed that "This bill quite simply should not be
before this House—not tonight, not tomorrow, not in the future—in this form or in any

What counts as a work of art? What is an academic or scientific purpose;
what is a "fair" comment on a matter of "public interest"? Doubt about
the definitions of such terms has a chilling effect on free speech, for
people may decide it is prudent to say nothing rather than risk legal
action. ... Marginalised groups would be well advised to stick to the
principles of free speech, rather than the principle that the government of
the day decides what kinds of speech are acceptable.

— A Norton, "Speech censors can hurt a precious right", The Sydney Morning
Herald, 18 July 1994, 15. The author of one letter to the editor described the Racial
hatred Bill 1994 as "a powerful attack on free speech carefully plotted by venal
men"; J Cosgrove, Letter to the Editor, Sydney Morning Herald, 12 November 1994,
38. See also M Carlton, "Lawyers join angels shock", The Sydney Morning Herald,
12 November 1994, 40; J Button, "When banter crosses the border of the vilification
bill", The Sydney Morning Herald, 5 September 1994, 13; F Brennan, "Law won't
soften the hearts of racists", The Australian, 12 August 1994, 13; Editorial, "Hatred
and free speech", The Sydney Morning Herald, 11 November 1994, 12; P
McGuiness, "Lying by legislation", The Sydney Morning Herald, 12 November 1994,
38; D Grace, "Legislation the wrong path for a liberal society", Sydney Morning
Herald, 4 April 1995, 15. Elsewhere I have critically evaluated the arguments
advanced by media commentators opposing the original Racial Hatred Bill, and have
identified the following weaknesses: denial or underestimation of the harm caused by
racist speech and behaviour; failure to appreciate the extent of the problem of racial
vilification; ignorance of the evidence on the operation of racial hatred laws, and a
tendency to make self-serving assumptions about the nature and effect of such laws;
reliance on inappropriate criteria for assessing the effectiveness of racial vilification
laws; use of absolutist rhetoric in relation to the concept of free speech; and
simplistic preference for reliance on education and 'more speech' rather than
regulation as the solution to the problem: Luke McNamara, "The Merits of Racial

57 Commonwealth Hansard (House of Representatives), 16 November 1994, p 3441.
form encroaching on freedom of speech."\(^{58}\) Liberal Party MHR Mr Filling described “freedom of speech, thought and expression” as “an integral part of our vibrant democracy” and stated that “The coalition will have no part in threatening or curbing the these fundamental underpinnings of the Australian way of life.”\(^{69}\) In a similar vein National Party MHR Mr Forrest stated:

I have got some concerns about how this bill basically neuters what I consider to be the reasonable expectation which all Australians have come to treasure—the right to free speech. That right preserves the capacity for people to speak out on a whole range of issues which they consider to be in the public interest.\(^{60}\)

Another dimension of the free speech-based opposition to the Racial Hatred Bill 1994 was the raising of doubt about the constitutional validity of the proposed legislation in light of the High Court’s recognition of an implied freedom against restrictions on political discourse. For example, Liberal Party MHR Mr Williams advanced the questionable\(^{61}\) argument that “Racist comments that contain an element of criticism of government policy or actions such as immigration policy or administration are likely to be protected by this implied freedom.”\(^{62}\)

\(^{58}\) Commonwealth Hansard (House of Representatives), 15 November 1994, p 3351 (emphasis added).
\(^{59}\) Commonwealth Hansard (House of Representatives), 16 November 1994, p 3414; see also Liberal Party MHR Ms Worth; Commonwealth Hansard (House of Representatives), 15 November 1994, p 3376; Liberal Party MHR Mr Slipper, Commonwealth Hansard (House of Representatives), 16 November 1994, p 3498; Liberal Party MHR Mr Somlyay, Commonwealth Hansard (House of Representatives), 16 November 1994, p 3506.
\(^{60}\) Commonwealth Hansard (House of Representatives), 16 November 1994, p 3429; see also Liberal Party MHR Mr Charles, Commonwealth Hansard (House of Representatives), 16 November 1994, p 3437.
\(^{61}\) See the discussion of the implied freedom in chapter 1 of this thesis.
While the Opposition voted against the totality of the Racial Hatred Bill 1994 (that is, both arms of the proposed regulatory framework — the amendments to the Crimes Act and the amendments to the Racial Discrimination Act), criticism was primarily directed at the bill’s adoption of the criminal law as one of the modes of regulation. For example, Liberal Party MHR Mr Ruddock, who led the Opposition in the House of Representative debate, was specifically critical of the fact that the Racial Hatred Bill 1994 would create ‘a new crime which impacts upon expression of opinions’ and indicated that “some people do have grave reservations about the fact that people can be gaoled for what they say as distinct from what they do.” He indicated that the Liberal Party’s preferred approach to the regulation of racial vilification was “the New South Wales model” which relies primary on civil human rights law and reserves criminal regulation for circumstances where the racial vilification involves a threat to person or property.

While the use of the criminal law to regulate racial vilification was the primary target of Opposition speeches, criticism was also directed at the breadth of the proposed addition to the Racial Discrimination Act. Mr Ruddock claimed that the “standard of ‘insult and offend’ is both broad and vague in our view in that an

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63 Commonwealth Hansard (House of Representatives), 15 November 1994, p 3347.
64 Ibid at 3344; see also Liberal Party MHR Mrs Sullivan, Hansard MHR Commonwealth Hansard (House of Representatives), 15 November 1994, p 3366; and Liberal Party MHR Mr Filing, Commonwealth Hansard (House of Representatives), 16 November 1994, p 3415; Liberal Party MHR Ms Worth, Commonwealth Hansard (House of Representatives), 15 November 1994, p 3375; also National Party MHR Mr Cobb, Commonwealth Hansard (House of Representatives), 15 November 1994, p 3381; National Party MHR Mr Nehl, Commonwealth Hansard (House of Representatives), 16 November 1994, p 3454.
65 Commonwealth Hansard (House of Representatives), 15 November 1994, p 3345. The ‘NSW model’ is examined in detailed in chapters 8-9 of this thesis. However, the Opposition was not consistent in this regard, at times suggesting or implying that any form of legislative regulation was unacceptable: see, eg, Liberal Party MHR Mr
extraordinary range of statements are likely to be included under this definition.”66 Similarly, Liberal Party MHR Mr Williams argued that “the low threshold of relevant behaviour ... would allow a multitude of complaints of a trivial nature to be made to the commission.”67 Liberal Party MHR Mr Cameron criticised the adoption of the HREOC as the body responsible for the adjudication of racial vilification complaints arguing that “Instead of being heard by partisan commissioners [in “politically correct tribunals”], these cases should be heard by judges with a wide range of experience of real crimes so as to be able to keep in perspective a complaint of hurt feelings.”68 Some Coalition MHRs were opposed to any form of legislative regulation of racial vilification. For example, Liberal Party MHR Mr Charles stated that “Racial hatred and vilification are to be deplored, but anti-racial hatred cannot be legislated against; we can only educate.”69

Finally, Independent MHR Mr Cleary made a unique contribution to the debate on the Racial Hatred Bill and the proposed amendments to the Racial Discrimination Act 1975. He argued, drawing extensively on the views expressed by the Australian

Charles, Commonwealth Hansard (House of Representatives), 16 November 1994, p 3439.
66 Commonwealth Hansard (House of Representatives), 15 November 1994, p 3347. See also National Party MHR Mr Nehl, Commonwealth Hansard (House of Representatives), 16 November 1994, p 3455.
68 Commonwealth Hansard (House of Representatives), 16 November 1994, p 3489.
Arabic Council, that the regulatory scope of the legislation was too narrow. He criticised the Government for “run[ning] the line that it is neo-Nazi skinheads with swastikas on their heads, rather than the respectable, who engage in the practice of racial vilification...”\textsuperscript{70} Specifically he questioned why section 18D extended free speech protection only to academics, artists and the media, while the “ordinary punter” was left exposed to the full weight of s 18C.\textsuperscript{71} The result, according to Mr Cleary, is that “The bill enshrines free speech for the powerful.”\textsuperscript{72} Mr Clearly also criticised the opposition for choosing to “hide behind the banner of free speech and focus on the alleged mechanical deficiencies and complexities of the bill”\textsuperscript{73} rather than focus on exposing “the bill’s inability to confront the real and varied sources and uses of racism.”\textsuperscript{74}

3.2 Senate

As in the House of Representatives, the threat to free speech was a recurring feature of the Senate debate on the Racial Hatred Bill 1994. The Coalition’s rejection of the bill was expressly stated, by then Shadow Attorney-General, Amanda Vanstone, to be based on a concern that the legislation represented a threat to free speech,\textsuperscript{75} which was

\textsuperscript{69}Commonwealth Hansard (House of Representatives), 16 November 1994, p 3439. Mr Charles also made the curious observation that any attempt to “regulate social behaviour through legislation... is doomed to failure” \textit{ibid}.

\textsuperscript{70}Commonwealth Hansard (House of Representatives), 16 November 1994, p 3501.

\textsuperscript{71}\textit{Ibid at} 3502-3505.

\textsuperscript{72}\textit{Ibid at} 3505.

\textsuperscript{73}\textit{Ibid at} 3502.

\textsuperscript{74}\textit{Ibid}.

\textsuperscript{75}The Coalition’s formal position during debate on the Racial Hatred Bill 1994 was unclear and contradictory. In the House of Representatives it indicated it would introduce its own legislation based on the model of ss20C-20D of the Anti-Discrimination Act 1977 (NSW) which creates a civil human rights ground of complaint (s 20C) and creates a criminal offence of serious racial vilification which is defined as including incitement to violence: see Liberal Party MHR Mr Ruddock,
given as the Coalition’s primary reason for opposing the criminal provisions contained in the bill, and was implicit in the Coalition’s refusal to support the amendments to the Racial Discrimination Act 1975 on the stated basis that they were poorly drafted and overbroad.

The position adopted by the two WA Greens Senators—whose position was to have a decisive impact on the form in which the Racial Hatred Act 1995 (Cth) was ultimately enacted—did not directly replicate the free speech-based opposition of the Coalition. WA Greens Senator Christobel identified the proposed legislation’s threat to free speech as a relevant argument. However, she suggested that this was not the primary motivation for her (ultimately successful) motion that the bill be amended to remove the proposed amendments to the Crimes Act 1914 (Cth):

If this legislation is passed it will create a crime of words. This will take the legislation across a certain threshold into the realm of thought police—the most commonly voiced concern in the community and one which I share.

My major concern lies elsewhere. I do not believe that we will become a less racist, more tolerant society by passing a law that imitates exactly the type of intolerance that we are trying to readdress—that is, intolerance of people expressing racial sentiments. We would be guilty of doing just what we are accusing racists of doing—singling out groups of people by labelling them unacceptable. It is a them and us adversarial way of thinking that underlies this bill. It is the same them and us attitude that underlies racism within our community.

Commonwealth Hansard (House of Representatives), 15 November 1994, p 3342. In the Senate the stated Opposition position is that it would introduce legislation which would criminalise the incitement of violence, but would not create a separate offence of inciting racial hatred, and would not provide for the making of complaints to HREOC, or any other civil sanctions: see Commonwealth Hansard (Senate), 23 August 1995, pp 169-170.

Ibid at 168-169.

Ibid at 169-170.

Commonwealth Hansard (Senate), 24 August 1995, p 315.
Senator Chamarette introduced a relevant and potentially very constructive critique of the effectiveness of criminalisation as a means of social regulation and incarceration as a means of ‘reforming’ offenders. However, this valuable contribution was undermined by Senator Chamarette’s attempt to justify her party’s opposition to criminal sanctions by reference to the value of ‘tolerance’. The ultimately determinative position adopted by the WA Greens was that it would be contrary to the principle of tolerance to criminalise racial vilification as originally proposed in the Racial Hatred Bill 1994. The WA Greens’ position involved a curious use of the principle of ‘tolerance’—as synonymous with non-responsiveness and non-regulation. Somewhat ironically, this involves labelling the act of regulation as ‘intolerant’ rather than the undesirable behaviour (racial vilification) as which it is directed, with the result that attention is deflected from appreciating the harm caused by the conduct in question. Rather than inquiring as to whether the conduct is sufficiently harmful or otherwise undesirable to warrant regulation, this approach focuses on the virtue in a democratic society of tolerating offensive (and harmful) ideas.

The WA Greens’ equation of the intolerance inherent in expressions of racial hatred with the supposed ‘intolerance’ associated with the sanctioning (via criminal laws) of those who engage in such conduct is also questionable. The criminal provisions of the Racial Hatred Bill 1994 did not single out groups of people by virtue of their inherent, unchangeable, personal characteristics and label them as ‘unacceptable’. Instead, the proposed legislation targeted *behaviour* which was unacceptable.

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72 Ibid.

Senator Chamarette’s argument that society should tolerate the promotion of racial hatred in the interests of a just society suggests that the appearance of a fresh perspective on the legitimacy of racial hatred laws on the part of the WA Greens may have been illusory. In fact her position appears to be heavily derived from a near absolute conception of the right to free expression which is elevated to a position of authority. Faith in a ‘free market’ of ideas in which ‘truth’ will triumph is central to this approach. Despite Senator Chamarette’s express rejection of the suggestion that the WA Greens’ support for the deletion of criminal provisions from the legislation indicated that ‘the freedom of speech supporters had won’ the assertion appears well-founded.

Supporters of the bill in the Senate were certainly of the view that ‘free speech’ arguments had ultimately been fatal to the passage of the bill in its original form. For example, following the passage of the amendments to the Racial Hatred Bill 1994 introduced by the WA Greens, which excised the criminal law provisions and reduced the legislation’s regulatory approach to complaint-based civil human rights law, Democrat Senator Sid Spindler (who supported the original bill) described the bill as a ‘gutted ruin’. Senator Spindler lamented that:

This parliament will actually be saying to the community that we place greater value on protecting the free speech of those, who, on racial grounds, ... threatened personal violence, damage to property and incitement to hatred, rather than those who are likely to be the victims of those actions. I think that is rather regrettable.  

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81 It is worth noting that during the House of Representatives debate, the National Party leader expressed the view that “free speech is the essence of democracy and democracy is the essence of tolerance. I agree with [Thomas] Jefferson that free speech provides our best defence against intolerance in all its guises”: Commonwealth Hansard (House of Representatives), 15 November 1994, p 3353.
82 Commonwealth Hansard (Senate), 24 August 1995, pp 364-365.
ALP Senator and Minister for Immigration and Ethnic Affairs, Nick Bolkus expressly shared the concerns of Senator Spindler.\textsuperscript{84}

4. THE REGULATORY REGIME ESTABLISHED BY THE RACIAL HATRED ACT 1995

The Racial Hatred Act 1995 (Cth) added a new Part IIA to the Racial Discrimination Act 1975 (Cth). This section will explain and analyse the scope of the legislation and the nature of the regulatory regime for its enforcement. The discussion will provide a baseline and a reference point for the comparative analysis of the various state/territorial regulatory regimes examined in Part III of this thesis.

4.1 The Scope of the Legislation

4.1.1 Definition of Unlawful Racial Vilification

Section 18C of the Racial Discrimination Act 1975 (Cth) provides that:

\begin{quote}
18C.(1) It is unlawful for a person to do an act, otherwise than in private, if:

(a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and

(b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.
\end{quote}

4.1.1.1 The Harm Threshold

By rendering unlawful conduct which is likely to offend, insult, humiliate or intimidate s 18C of the Racial Discrimination Act 1975 (Cth) adopts a relatively low threshold for regulatory intervention. In fact, this form of words is unique among

\textsuperscript{83} Ibid.
\textsuperscript{84} Commonwealth Hansard (Senate), 24 August 1995, p 360.
racial vilification statutes in Australia. The rationale for the adoption of this wording in the final version of the federal legislation was a desire to achieve consistency between the racial vilification provisions of the *Racial Discrimination Act* and the sexual harassment provisions contained in the *Sex Discrimination Act 1984* (Cth).  

To some extent this low threshold is balanced by the scope of the exemptions in s 18D (see below), but this low threshold, and the resulting breadth of regulatory scope, is a distinguishing feature of the approach to the legislative regulation of racial vilification in the *Racial Discrimination Act 1975* (Cth). The practical significance of this lower threshold, including the manner in which it has been interpreted by the HREOC, will be considered in chapter 6 of this thesis.

4.1.1.2 No Incitement Requirement

Another distinctive feature of s 18C of the *Racial Discrimination Act 1975* (Cth) is that the there is no incitement requirement. Many racial vilification statutes require, as the consequence component of the definition of unlawful racial vilification, that the conduct in question actually incited hatred or ill-feeling towards the target group, or that it was likely to have that effect. This approach is based on the view that legislative regulation is not justified unless the conduct in question is likely to encourage others to engage in similar behaviour or to manifest racism in some way, thus exacerbating the harmfulness of the original conduct in question. Section 18C contains no such requirement. The relevant consequence for the purpose of s 18C is

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85 The phrase, ‘offend, insult, humiliate or intimidate’ is taken from the definition of sexual harassment in s 28 of the *Sex Discrimination Act 1984* (Cth). In the House of Representatives second reading speech on the Racial Hatred Bill the Attorney General Michael Lavarch noted that HREOC “is familiar with the scope of such language and has applied it in a way that deals with serious incidents only”: Commonwealth Hansard (House of Representatives), 15 November 1994, p 3341.
the reasonable likelihood of offending, insulting, humiliating or intimidating an individual or group target. The absence of an incitement requirement, combined with the low threshold discussed above, renders the potential scope of s 18C broader than any other racial vilification statutory provision in Australia or Canada. Whether this potential has been realised in practice will be considered in chapter 6.

4.1.1.3 Public/Private

Section 18C(1) applies only to conduct which is likely to have the effect of causing offence, insult, humiliation or intimidation if the conduct occurs “otherwise than in private” Section 18C(2)-(3) states that:

(2) For the purpose of subsection (1), an act is taken not to be done in private if it:
(a) causes words, sounds, images or writing to be communicated to the public; or
(b) is done in a public place; or
(c) is done in the sight or hearing of people who are in a public place.

(3) In this section:
‘public place’ includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.

Arguably this formulation of the legislation’s reach gives it a slightly wider application than those racial vilification which are stated to apply only to “public” conduct. While a limitation along these lines is a common feature of racial vilification legislation, the reasoning behind such an inclusion in s 18C if the Racial Discrimination Act 1975 (Cth) is less clear.

The most obvious reason for limiting legislative restrictions to public conduct is that an ‘audience’ is a necessary condition for fulfilment of the incitement
requirement in many statutes. Given that there is no incitement requirement in s 18C there would appear to be no logical reason for the limitation of the definition of unlawful racial vilification to public conduct. Arguably, racial vilification which occurs in private is just as (reasonably) likely “to offend, insult, humiliate or intimidate another person or a group of people” as racial vilification that occurs “otherwise than in private”. (On the other hand, it could be argued that exposure to racially vilifying comments in front of others or with the knowledge that the ‘message’ has been widely circulated may aggravate the effect on the target, causing, for example, greater humiliation or heightened intimidation.)

The exclusion of conduct which occurs in private from the regulatory reach of s 18C is a reminder that free speech sensitivity has not been the only restrictive influence on the shape of the regulatory regime established by the legislation. A concern for privacy protection has also been influential to some degree.86

4.1.1.4 Objective Fault Standard

There is not a subjective mens rea component in the s 18C definition of unlawful racial vilification: it is not necessary that the person performing the relevant act intends to cause, or is reckless about whether his/her conduct may cause a member of the relevant group to be offended, insulted, humiliated or intimidated. In assessing whether conduct amounts to racial vilification, section 18C requires the application of an objective test, so that community standards of behaviour are determinative, rather than the subjective views of the respondent (or indeed, the complainant). However, the legislation provides for a number of “genuine belief” and “good faith” exemptions (or ‘defences’) (discussed below) which substantially qualify the
objective nature of the inquiry as to the unlawfulness or otherwise of the respondent's conduct, by introducing a subjective component.

4.1.1.5 Motivation and the Relevance of the Victim's Characteristics

Section 18C(1)(b) provides that in order to constitute unlawful racial vilification the act in question must be done because of the (individual or group) target's race, colour, national origin or ethnic origin. The rationale for this provision is clear: to ensure that only racial vilification is regulated — not offence, insult, humiliation or intimidation prompted by other factors or identity characteristics. However, it is not clear on the face of the legislation precisely what relationship is required between the conduct and the racial/ethnic identity in question. If the phrase 'because of' imports a requirement for evidence that the conduct was caused or motivated by the target's race/ethnicity the regulatory scope of the legislation would be narrowed. If such evidence is required, an additional complication is that it may not be obvious or it may be difficult to establish why a person has engaged in the conduct which is the subject of the complaint. Section 18B offers a partial solution to this problem:

18B. If:

(a) an act is done for 2 or more reasons;

(b) one of the reasons is the race, colour or national or ethnic origin of a person (whether or not it is the dominant reason or a substantial reason for doing the act);

then, for the purpose of this Part, the act is taken to be done because of the person's race, colour, national or ethnic origin.

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86 Chesterman, supra note 30.

87 See Akmeemana and Jones, note 13 supra at 169.
Therefore, it is only necessary that the target’s race/ethnicity be one of the reasons for the conduct — it need not be the dominant or substantial reason.

4.1.2 Exemptions

Section 18D\(^{88}\) of the Act limits the scope of the proscription of racial vilification by providing that 18C does not render unlawful anything said and done ‘reasonably and in good faith’ where the conduct in question takes the form of an artistic work, is for academic, artistic, scientific or other ‘public interest’ purposes (s18D(a)-(b)). Fair and accurate reports of matters of public interest are also exempt from s 18C. Section 18D(c)(ii) provides that section 18C does not render unlawful anything said or done reasonably and in good faith which can be characterised as a ‘fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment’\(^{89}\).

Before the Senate Legal and Constitutional Legislation Committee, when it was considering the Racial Hatred Bill 1994, the Australian Arabic Council observed that:

Exemptions under section 18D present many problems, as the effects of the actions exempted are no less serious than the racist actions, and the grounds for exemptions do not mitigate the effect that the bill is ostensibly trying to address.\(^{90}\)

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\(^{88}\) See *supra* note 34 for the full text of section 18D of the *Racial Discrimination Act* 1975 (Cth).

\(^{89}\) Emphasis added.

\(^{90}\) *Supra* note 36 at 23.
The Committee recognised the validity of the argument in terms of the harm caused
to victims of racial vilification but supported the exemptions on the basis that they
were ‘necessary to support the constitutional validity of the Bill’.

The inclusion of extensive exemption provisions in the legislation is further
evidence of the extent to which ‘free speech sensitivity’ has remained a key influence
of the evolution of ‘acceptable’ racial hatred legislation from the time of the bill’s
original drafting to the time of the Act’s passage.

The inclusion of a ‘genuine belief’ defence seem to be based on a questionable
assumption that there is a relationship between ‘sincerity’ and social acceptability
when it comes to the expression of racist views, or between ‘genuine’ motivation and
minimisation of harm to the victims. Yet, when it comes to the promotion of racial
hatred or myths of racial inferiority there is no correlation between the sincerity of
the perpetrator’s beliefs and either the harm suffered by the target group or the value
of the speech to the wider community.

It remains to be seen whether the ‘belief in truth’ exemption constitutes a
‘escape route’ for respondents. Certainly, the emphasis on the respondent’s

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91 Ibid. The constitutionality of racial vilification legislation was considered to have
been placed in some doubt by the High Court of Australia’s rulings in a series of
cases beginning in 1992 that freedom of communication in relation to political
discourse is implicit in the Australian Constitution and so operates as a constraint on
the legislative regulation of communication: Australian Capital Television Pty Ltd v
Commonwealth (1992) 177 CLR 106; Nationwide News Pty Ltd v Wills (1992) 177
CLR 1; Theophanous v Herald & Weekly Times (1994) 182 CLR 104; Cunliffe v
Commonwealth (1994) 182 CLR 272; Stephens v West Australian Newspapers Ltd
(1994) 182 CLR 211; Lange v Australian Broadcasting Corporation (1997) 189 CLR
520; and Levy v Victoria (1997) 189 CLR 579. However, as discussed in chapter 1 of
this thesis, the narrow terms of the freedom implied by the High Court means that
the implied freedom does not seriously jeopardise the constitutionality of racial
vilification legislation.

92 See T Solomon, “Problems in Drafting Legislation”(1994) 1 Australian Journal of
Human Rights 265 at 276-277; Eastman, note 34 supra at 293-294; and Akmeemana
and Jones, note 13 supra at 172-173.
subjective state of mind in this particular exemption appears to be both inconsistent with the objective nature of the primary inquiry required by section 18C (‘reasonable likelihood’) and incompatible with the primary stated aim of the legislation: to protect individuals and groups from the harm of racial vilification and racial violence.93

4.1.3 Vicarious Liability
Section 18E of the Racial Discrimination Act 1975 (Cth) extends liability for racial vilification for unlawful vilification to employers and principals, where the racial vilifying conduct of an employee or agent occurs in connection with the person’s employment or agency. This section attempts to complement the obligations imposed on employers and others under the racial discrimination provisions of the Racial Discrimination Act94 by encouraging employers to establish their own internal regulatory systems to prevent racial vilification in the workplace.95

4.2 Enforcement Mechanism
4.2.1 The Existing Structure
The effect of adding Part IIA to the Racial Discrimination Act was that racial vilification became a recognised ground, allowing for complaints to be lodged with the HREOC. Racial vilification was, therefore, ‘grafted’ onto the regulatory framework which had originally been developed for handling complaints of racial discrimination.

93 See Mr Lavarch, Attorney General, Second Reading Speech, Commonwealth Hansard (House of Representatives) 15 November 1994, p 3336.
94 Racial Discrimination Act 1975 (Cth) s 18A.
The metaphor of ‘grafting’ has been deliberately chosen to draw attention to the need for scrutiny of the process by which frameworks for the regulation of racial vilification are chosen and adopted. Indeed, it will be argued in this thesis that one of the weaknesses in the civil human rights enforcement mechanism is that it is a system designed for the resolution of discrimination complaints which has been adopted for the regulation of racial vilification without significant modification. Insufficient consideration has been given to the particular demands of effective legislative regulation of racial vilification. This argument will be developed throughout the analysis of Australian racial vilification legislation in Parts II and III of this thesis.

There are a number of distinctive features of the regulatory framework for the operation of s 18C.\(^96\) First, there is an exclusive reliance on victim initiation as the trigger for the enforcement of the provisions of s 18C. Although the Racial Discrimination Act does provide for self-initiation of a complaint by the Race Discrimination Commissioner,\(^97\) or referral of a matter to HREOC by the Minister,\(^98\) in practice, HREOC accepts no jurisdiction to handle a matter until a written complaint has been lodged. As Ronalds has observed, generally in relation to the operation of anti-discrimination legislation in Australia, “[t]he complaint is a crucial document as it is on the basis of the complaint itself that the rest of the system flows. Absent a complaint, there is no jurisdiction to proceed.”\(^99\) Complaints may be lodged by an individual who is “a person aggrieved” by the conduct,\(^100\) or by

\(^{96}\) For a more detailed discussion of the complaint-handling process, see C Ronalds, Discrimination Law and Practice (Sydney: The Federation Press, 1998) at 161-179.

\(^{97}\) Racial Discrimination Act 1975 (Cth), s 23.

\(^{98}\) Racial Discrimination Act 1975 (Cth), s 25.

\(^{99}\) Ronalds, supra note 96 at 165.

\(^{100}\) Racial Discrimination Act 1975 (Cth), s 22. See chapter 6 of this thesis for discussion of how the definition of an “aggrieved person” has been interpreted in relation to complaints under s 18C of the Racial Discrimination Act 1975 (Cth).
a representative organisation. The latter option is a particularly important component of the enforcement structure in the case of race vilification, which is often directed at a racial or ethnic group rather than a particular individual.

As will be shown in subsequent chapters of this thesis, reliance on victim initiation (particularly individuals, but also organisations) as the trigger for the enforcement of the statute is a common feature of racial vilification legislation. It will be argued that this emphasis is problematic from the point of view of the effective regulation of racial vilification, and is, in large part, a product of free speech sensitivity. This approach makes the enforcement of the legislative standard adopted by the parliament dependent on victims of racial vilification to initiate and persevere with complaints. This is problematic and arguably inconsistent with one of the primary rationales for the regulation of racial vilification—that the conduct is harmful and unacceptable not only to the individual or group target, but to Australian society generally.

The second distinctive feature of the regulatory framework for the enforcement of s 18C is that the complaint-handling process aims for resolution of the complaint via private and confidential conciliation. It will be argued that this approach is also problematic from the point of view of effective regulation of racial vilification. In particular, the confidential nature of these proceedings seriously inhibits the capacity for the regulatory process to have a general educational impact on the broader community, as opposed to simply those parties directly involved in the proceedings as complainants or respondents. The practice of negotiating the lawfulness of racial vilification is also problematic. By treating the matter as a

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101 Racial Discrimination Act 1975 (Cth), ss 22(1A) and 25L.
102 See chapter 3 of this thesis.
dispute to be ‘resolved’ rather than a breach of a legislative standard, and in light of
the flexibility and ‘trade-offs’ which are inherent in a process of conciliation and
negotiated dispute resolution, the regulatory process is at odds with the objective
behind racial vilification legislation of setting clear community standards on
acceptable conduct.

The third important feature of the regulatory framework is that if resolution
by conciliation is unsuccessful or considered by the Race Discrimination
Commissioner to be inappropriate, the matter may be the subject of a quasi-judicial
public hearing and determination by the Commission.\(^{104}\) Also, if the Race
Discrimination Commissioner declines to investigate the complaint further on the
basis that the alleged conduct does not come within the parameters of s 18C the
complainant may, as of right, ask that the complaint be referred to HREOC for a
public inquiry and determination.\(^{105}\)

Under s 25Z(1) of the Act the Inquiry Commissioner is empowered to make
a range of declarations where the complaint is found to be substantiated, including
that the respondent should not repeat or continue the unlawful racial vilification,\(^{106}\)
and that the respondent should pay damages for the complainant’s loss or damage,\(^{107}\)
including injury to feelings or humiliation.\(^{108}\)

A significant weakness in the regulatory framework established by the *Racial
Discrimination Act 1975* (Cth) (not only for racial vilification complaints but for all
grounds of complaint under the Act) is that the HREOC’s determinations and

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\(^{103}\) *Racial Discrimination Act 1975* (Cth), s 25Q.
\(^{104}\) *Racial Discrimination Act 1975* (Cth), s25(1).
\(^{105}\) *Racial Discrimination Act 1975* (Cth), s 24(4)(a).
declarations are not binding or conclusive. If the respondent elects not to abide by the findings and declarations made by the Inquiry Commissioner the complainant must commence proceedings in the Federal Court of Australia for an order to enforce the Commission’s determination. Prior to the decision of the High Court of Australia in Brandy v Human Rights and Equal Opportunity Commission in 1995, enforcement had been a simple administrative process: upon registration of the HREOC determination in the Federal Court the determination took effect as if it was an order of the court. However, in Brandy the High Court ruled that this arrangement was unconstitutional because it effectively bestowed part of the Commonwealth’s judicial power on HREOC contrary to the separation of powers doctrine as reflected in s 71 of the Constitution.

The Racial Discrimination Act 1975 (Cth) was amended following Brandy so that now enforcement proceedings in the Federal Court must take the form of a hearing de novo (s 25ZC(5)). If the Federal Court determines that the conduct in question is unlawful under the Racial Discrimination Act it “may make such orders ... as it thinks fit” (s25ZC(2)). Obviously this process has the potential to be very burdensome for the complainant and may constitute a serious disincentive to pursuit of a racial vilification complaint. This feature of the regulatory system is ironic given that accessibility is commonly identified as one of the supposed advantages of utilising the statutory civil human rights mechanism as the procedural framework for the regulation of racial vilification instead of the conventional court system.

109 Racial Discrimination Act 1975 (Cth), s 25Z(2).
110 Racial Discrimination Act 1975 (Cth), s 25ZC(1).
112 Ronalds, note 96 supra at 181.
4.2.2 Changes to the Enforcement Structure

On 20 September 1999 the Commonwealth Parliament enacted the Human Rights Legislation Amendment Act 1999 (Cth). From 13 April 2000 HREOC will be responsible only for the conciliation phase of the civil human right law enforcement regime. HREOC will not conduct public inquiries. In cases where conciliation is unsuccessful or inappropriate, the only forum for adjudication will be the Federal Court.

This change may well have been a logical and unavoidable response to the High Court decision in Brandy. There will be some advantages for victims of vilification and discrimination specifically, and also more generally, in terms of the effective operation of the relevant statutes. The President of HREOC, Professor Alice Tay, has welcomed the changes stating:

Our work in human rights education and promotion and the investigation and conciliation of complaints of discrimination and human rights breaches will continue to be a priority.

Hearings in the Federal Court will benefit the parties by providing them with enforceable decisions, and will also result in strong and influential body of discrimination law and precedent being developed by the Federal Court.

Notwithstanding these likely benefits, it is difficult to predict the overall impact of the change on the effective regulation of racial vilification. Negative results may

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113 The Human Rights Legislation Amendment Act 1999 (Cth) received assent on 13 October 1999. Section 2(3) of the Act provides that the relevant amendments will come into force six months from the date of assent (or on an earlier date by proclamation: s2(2).
114 This change applies not only to racial vilification complaints but to all grounds of complaint under the Racial Discrimination Act 1975 (Cth), the Sex Discrimination Act 1984 (Cth) and the Disability Discrimination Act 1992 (Cth).
include a diminished perception of the 'status' of the HREOC in the absence of decision-making authority leading to a decreased willingness of parties to participate in conciliation. The prospect of pursuing an unconciliated complaint in the conventional court system may also represent a disincentive for complainants to proceed to the adjudication phase of the enforcement process.

5. CONCLUSION

As a result of the enactment of the Racial Hatred Act 1995 (Cth) racial vilification is, for the first time, the subject of a national scheme of legislative regulation. All victims of racial vilification (as defined under Part IIA of the Racial Discrimination Act 1975 (Cth)), regardless of state or territory of residence, are now entitled to seek redress through a conciliation-based complaint mechanism facilitated by the HREOC Race Discrimination Commissioner. The 'back-up' enforcement mechanism of non-binding adjudication by quasi-judicial HREOC public inquiry which has been in place since the legislation came into force, will be replaced in April 2000 by binding adjudication in the Federal Court of Australia.

The most significant feature of the legislative framework for the regulation of racial vilification established by the Racial Hatred Act 1995 (Cth) is exclusive reliance on civil human rights law. The approach is also distinguished by broad definition of unlawful racial vilification, including a low harm threshold (offend, insult, humiliate or intimidate), no incitement requirement, and the absence of a subjective fault element (the inquiry instead being directed to an objective assessment as to the likelihood of the harm being caused). However, in assessing the scope of the legislation, s 18C must be read in conjunction with s 18D which provides for a
relatively broad list of exemptions—that is, circumstances in which conduct which would otherwise come within the s 18C definition of unlawful conduct will be considered to fall outside the regulatory boundaries.

Equally important in understanding the story of the enactment of national racial vilification in Australia is to recognise what is not included in the regulatory regime—no criminal offences have been created, and the role that free speech sensitivity played in determining the ultimate shape of the legislation.

During the course of Senate debate on the Racial Hatred Bill 1994, one supporter of the legislation noted with disapproval that ‘free speech’ had been ‘used like a club as an absolute, self-evident truth and a more than sufficient reason to reject the bill.’116 A lesson that must be taken from the story of the passage of the Racial Hatred Act 1995 in the Commonwealth Parliament is that, absent legislative or constitutional definition, the concept of free speech is a highly malleable concept. In the present context an enlarged concept of free speech (encompassing an idiosyncratic version of the concept of ‘tolerance’) had a decisive impact on the ultimate regulatory shape of Australia’s first racial vilification statute. The exclusive reliance on conciliation-based civil human rights law under the Racial Discrimination Act 1975 (Cth) resulted not so much from a thorough inquiry as to the most effective way of

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116 Australian Democrats Senator Spindler, Commonwealth Hansard (Senate), 23 August 1995, p 213.
regulating racial vilification, but rather, was motivated by a desire to cause minimal impairment of a broadly constructed entitlement to free expression.\footnote{Reid and Smith have noted proponents of the inclusion of criminal sanctions in federal racial vilification legislation were, in part, motivated by reservations about “whether or not civil sanctions are able to achieve attitudinal change by sending a strong enough message as to the unacceptability of racist conduct”: S Reid and R Smith, Regulatory Racial Hatred. Trends and Issues in Crime and Criminal Justice No 79 (Canberra: Australian Institute of Criminology, 1998) at 6.}

As will be shown in the next chapter, the impact of free speech sensitivity on the regulatory shape of Australia’s national racial vilification legislation did not stop in the Commonwealth Parliament with the exclusion of criminal sanctions from the Racial Hatred Act 1995 (Cth). Free speech sensitivity has continued to operate as a limiting influence on the operation of the civil human rights law regulatory mechanism which was retained in the legislation.

\footnote{During the House of Representatives debate, Liberal Party MHR Mr Connolly observed that attention should be directed at determining the “fair level of legal involvement where involvement could well result in a diminution in the rights of the citizen to freedom of speech ...”: Commonwealth Hansard (House of Representatives), 15 November 1994, p 3442.}
CHAPTER 6

PART IIA OF THE RACIAL DISCRIMINATION ACT 1975 (CTH)—OPERATION

1. INTRODUCTION

The racial vilification provisions of the Racial Discrimination Act 1975 (Cth) have been in operation for just over four years.\(^1\) In this relatively short period of time a large number of complaints have been handled by the Race Discrimination Commissioner, and the Human Rights and Equal Opportunity Commission (HREOC) has handed down a number of illuminating public inquiry decisions. Section 2 of this chapter will examine available statistical information on racial vilification complaints handled under s 18C of the Racial Discrimination Act 1975 (Cth). Section 2 will examine the s 18C public inquiry determinations made to date by HREOC Commissioners. The purpose of this examination will be to analyse how the racial vilification provisions of the Racial Discrimination Act 1975 (Cth) have been interpreted and applied by the HREOC with a focus on determining the impact of free speech sensitivity and evaluating the capacity of the provisions of the Racial Discrimination Act 1975 (Cth) to effectively regulate racial vilification.

\(^1\) At 31 December 1999.
2. DATA ON COMPLAINTS

2.1 Complaints Received

Table 1: Number of s 18C Complaints Received, 1995-1999

<table>
<thead>
<tr>
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<tbody>
<tr>
<td></td>
<td>63</td>
<td>186</td>
<td>94</td>
<td>82</td>
<td>425</td>
</tr>
</tbody>
</table>

Table 2: Types of s 18C Complaints Received, 1996-1999 (% of total)

<table>
<thead>
<tr>
<th></th>
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<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Media</td>
<td>17</td>
<td>18</td>
<td>30</td>
<td>20</td>
</tr>
<tr>
<td>Neighbourhood dispute</td>
<td>30</td>
<td>52</td>
<td>29</td>
<td>35</td>
</tr>
<tr>
<td>Personality conflict</td>
<td>12</td>
<td>2</td>
<td>5</td>
<td>8</td>
</tr>
<tr>
<td>Employment</td>
<td>3</td>
<td>4</td>
<td>6</td>
<td>4</td>
</tr>
<tr>
<td>Racist propaganda</td>
<td>11</td>
<td>1</td>
<td>2</td>
<td>7</td>
</tr>
<tr>
<td>Entertainment</td>
<td>1</td>
<td>3</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Sport</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Public debate</td>
<td>19</td>
<td>9</td>
<td>6</td>
<td>13</td>
</tr>
<tr>
<td>Other</td>
<td>7</td>
<td>10</td>
<td>20</td>
<td>10</td>
</tr>
</tbody>
</table>


Categories taken from HREOC annual reports.
Between 13 October 1995—when the racial vilification amendments to the *Racial Discrimination Act* 1975 (Cth) legislation came into force—and 30 June 1999 the HREOC received 425 complaints under s 18C of the *Racial Discrimination Act* 1975 (Cth) (see Table 1). The annual number of complaints received has fluctuated from a high of 186 in 1996/97 (the first full year of operation of the legislation) to a low of 86 in 1998/99. The average number of complaints received each year has been 117.

This is a substantial number of complaints from a range of contexts (see Table 2)—particularly when compared with the very small number of matters formally handled under racial vilification legislation in most other Australian jurisdictions (with the exception of New South Wales). In part, the relatively large number of complaints handled under s 18C is a product of the legislation’s national coverage (the potential number of complaints, thereby, being much higher than in any one state or territory). It is also indicative of the relative ease of ‘triggering’ the conciliation-based enforcement process, and the also relative breadth of the regulatory scope of Part IIA of the *Racial Discrimination Act* 1975 (Cth). The fact that ‘neighbourhood disputes’ have provide the context for 35% of s 18C(2) complaints is illustrative in this regard, reflecting, in part, the relatively broad definition of “otherwise than in private” contained in s 18C of the *Racial Discrimination Act* 1975 (Cth).

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5 This assessment excludes the part-year from 1 November 1995 to 30 June 1996.
6 This figure is calculated using the nine month period in 1995/96 as 0.66 of one year.
7 See Part III of this thesis.
8 See Chapter 5 of this thesis; cf the requirement in section 20C of the *Anti-Discrimination Act* 1977 (NSW) that the conduct must be a “public act” in order to constitute unlawful racial vilification: see chapters 8-9 of this thesis.
This data on the number and type of complaints received cannot be simplistically interpreted as directly reflective of the operational coverage of the regulatory regime established by the Racial Hatred Act 1995 (Cth). An appreciation of the outcomes of these complaints is necessary in order to accurately assess the role that the legislation is playing in the regulation of racial vilification.

2.2 Outcomes of Complaints

Table 3: Outcomes of s 18C Complaints Finalised 1996-1999

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Declined by HREOC</td>
<td>22 (22%)</td>
<td>40 (21%)</td>
<td>23 (27%)</td>
<td>85 (23%)</td>
</tr>
<tr>
<td>— not unlawful</td>
<td>13 (13%)</td>
<td>7 (4%)</td>
<td>7 (8%)</td>
<td>27 (7%)</td>
</tr>
<tr>
<td>— s 25X dismissal(^{10})</td>
<td>9 (9%)</td>
<td>29 (16%)</td>
<td>15 (17%)</td>
<td>53 (14%)</td>
</tr>
<tr>
<td>— more than 12 months old</td>
<td>0 (0%)</td>
<td>4 (2%)</td>
<td>1 (1%)</td>
<td>5 (1%)</td>
</tr>
<tr>
<td>Withdrawn/not pursued by complainant</td>
<td>22 (22%)</td>
<td>96 (51%)</td>
<td>21 (24%)</td>
<td>139 (37%)</td>
</tr>
<tr>
<td>— advised HREOC</td>
<td>15 (15%)</td>
<td>68 (36%)</td>
<td>17 (20%)</td>
<td>100 (27%)</td>
</tr>
<tr>
<td>— settled outside HREOC</td>
<td>1 (1%)</td>
<td>1 (1%)</td>
<td>0 (0%)</td>
<td>2 (1%)</td>
</tr>
<tr>
<td>— lost contact</td>
<td>6 (6%)</td>
<td>27 (14%)</td>
<td>4 (5%)</td>
<td>37 (10%)</td>
</tr>
<tr>
<td>Conciliated</td>
<td>27 (27%)</td>
<td>32 (17%)</td>
<td>21 (24%)</td>
<td>80 (22%)</td>
</tr>
<tr>
<td>Referred for public inquiry</td>
<td>7 (7%)</td>
<td>15 (8%)</td>
<td>17 (20%)</td>
<td>39 (11%)</td>
</tr>
<tr>
<td>Terminated</td>
<td>12 (12%)</td>
<td>4 (2%)</td>
<td>4 (5%)</td>
<td>20 (5%)</td>
</tr>
<tr>
<td>Transferred</td>
<td>8 (8%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>8 (2%)</td>
</tr>
<tr>
<td>Total</td>
<td>98</td>
<td>187</td>
<td>86</td>
<td>371</td>
</tr>
</tbody>
</table>

\(^9\) Categories taken from HREOC annual reports.

\(^{10}\) Section 25X of the Racial Discrimination Act 1975 (Cth) provides for the dismissal of any complaints which is deemed to be vexatious, misconceived, lacking in substance or frivolous.
The most significant features of these data are:

(i) the high proportion of complaints that are declined;
(ii) the high rate of complainant 'drop out';
(iii) the reasonably small proportion of complaints that are conciliated; and
(iv) the small proportion of complaints that are handled by way of public inquiry.

The high proportion (23%) of complaints which have been declined as falling outside of the regulatory parameters of Part IIA of the *Racial Discrimination Act 1975* (Cth) suggests that care must be taken not to overstate the characterisation of s 18C as establishing low threshold for regulatory intervention.

The significant proportion (37%) of racial vilification complaints that have been withdrawn (expressly or implicitly) by complainants necessarily raises questions about the nature of the complaint-handling process. Of course, the high drop-out rate is not necessarily an indication that there is a weakness in the system or that it has failed a large number of complainants. For some complainants the mere fact that they had been able to lodge a complaint with a ‘legal’ agency, and have their grievance taken seriously, might have been a sufficient form of legal intervention. In other cases, of course, complainants may have dropped out of the process for reasons that had nothing to do with being satisfied or feeling vindicated, and more to do with being intimidated or insufficiently resourced (particularly in terms of available time) to pursue the matter.

The limited nature of the available data does not allow for a definite conclusion as to how many complainants fell into either of these categories, or somewhere in between. However, the high rate of ‘drop-out’ does support the need
for scrutiny of the civil human rights complaint-handling process, which places a very heavy onus on complainants to take responsibility for the carriage of the matter.¹¹

The third important point to be made about the outcome data presented in Table 3 is that even though the strategy of dispute resolution via conciliation is promoted as one of the main virtues of the ‘alternative’ civil human rights regulatory framework, only 1 in 5 s 18C complaints (22%) have been conciliated. This observation is not meant to suggest that conciliation has proven ineffective in resolving racial vilification complaints, but rather, that assumptions about the centrality of conciliation to the civil human rights enforcement mechanism need be critically examined.¹²

Finally, 10% of racial vilification complaints have been referred by the Race Discrimination to a public inquiry for hearing and adjudication. The relatively small number of cases finalised in this way reflects a distinctive feature of the civil human rights regulatory model: an emphasis on resolution of alleged breaches of the relevant legislative standard by consensus without resort to formal objective adjudication. Though small in number, the matters handled by way of public inquiry have the potential to exert a significant influence on the practical or operational scope of the legislation. Because of their importance, the cases which have been finalised in this manner are discussed separately in the next section of this chapter (see below).

The aim of this brief discussion of the available data on the outcome of racial vilification complaints under s 18C of the Racial Discrimination Act 1975 (Cth) has been to raise a number of issues which pertain not only to the regulatory system

¹¹ See further discussion of this important issue in chapter 9 of this thesis on the operation of the New South Wales racial vilification legislation.
administered by HREOC at the national level, but which are relevant to other state/territorial jurisdictions where conciliation-based civil human rights dispute resolution processes are utilised in the enforcement of legislative standards on racial vilification. The observations made here, and other relevant issues, will be considered in more detail in chapter 9 of this thesis. Chapter 9 reports on the findings of a study of the operation of the racial vilification regulatory regime established by the *Anti-Discrimination Act 1977* (NSW), as amended by the *Anti-Discrimination (Racial Vilification) Amendment Act 1989* (NSW). The New South Wales scheme is centred on the conciliation-based civil human rights dispute resolution process administered by the New South Wales Anti-Discrimination Board, and closely resembles the Commonwealth system administered by HREOC.

### 3. HREOC PUBLIC INQUIRY DECISIONS

#### 3.1 Introduction

The HREOC has handed down eleven decisions following an inquiry into a complaint under s 18C of the *Racial Discrimination Act 1975* (Cth). In only two of these cases—*Rugema v J Gadsten Pty Ltd and Derkes*¹³ and *Jacobs v Fardig*¹⁴ was the complaint upheld. Each of these decisions will be discussed because they shed valuable light on the manner in which the legislation has been interpreted and applied.

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¹² See chapter 9.
3.2 Bryant v Queensland Newspapers Ltd (1997)

The first s 18C case decided by a HREOC public inquiry was Bryant v Queensland Newspapers Pty Ltd.15 Bryant lodged a complaint with HREOC claiming that the respondent had breached s 18C of the Racial Discrimination Act 1975 (Cth) by publishing articles and letters in the Sunday Mail newspaper which referred to English people as “Poms or Pommies”. In July 1996 the Race Discrimination Commissioner determined that the complaint should not be investigated because the conduct alleged did not fall within the boundaries of s 18C. Specifically, the Race Discrimination Commissioner ruled that the respondent’s conduct was not “reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate” as required by s 18C(a) of the Act.

The complainant exercised his right under s 24(4)(a) of the Racial Discrimination Act 1975 (Cth) option, to have the complaint referred to Commission for determination, and so in accordance with s 25(1) of the Racial Discrimination Act 1975 (Cth) an inquiry was conducted. The respondent applied to have the complaint dismissed under s 25X of the Racial Discrimination Act 1975 (Cth) on the basis that the complaint was “frivolous, vexatious, misconceived, lacking in substance or relates to an act that is not unlawful”.16 The HREOC President, Sir Ronald Wilson, dismissed the complaint, ruling that the acts complained of by Bryant did not did not fall within s 18C and therefore were not unlawful. The President agreed with the Race Discrimination Commissioner that the test is an objective one and that the

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16 Section 25X of the provides that “Where, at any stage of an inquiry, the Commission is satisfied that a complaint is frivolous, vexatious, misconceived,
words “Pom” and “Pommie” were not “reasonably likely to offend, insult, humiliate or intimidate the complainant or some other people of English origin”. The President stressed that the context in which certain words are used will be important to any determination as to whether they fall within s 18C:

I can imagine, albeit with some difficulty, that the words complained of in this case could be unlawful in the context of an article which was plainly malicious or scurrilous, designed to foster hatred or antipathy in the reader. However, I think it would be an extreme case where the use of the words “Pom” or Pommy” as such would attract such a degree of seriousness as to be unlawful within the meaning of the Act.

Superficially, President Wilson’s decision appears to be eminently sensible. It is quite clear that s 18C was not intended to outlaw the use of all ‘labels’ which identify a particular racial, ethnic or national group. In setting a threshold which places the term “Pom” outside of the scope of s 18C the President appears to have appropriately applied both the letter and spirit of the legislation. Indeed, in certain respects, it is unfortunate that the first HREOC determination under the grounds introduced to the Racial Discrimination Act 1975 (Cth) by the Racial Hatred Act 1995 involved alleged vilification of persons of English ethnicity. While the legislation provides protection to members of all ethnic groups, the available evidence is reasonably compelling that English-Australians are not amongst the most common victims of the sort of vilification which prompted the Parliament to regulate racial vilification in the first place.

lacking in substance or relates to an act that is not unlawful by reason of a provision of ... Part IIA it may dismiss the complaint”.
17 Supra note 15 at para 12.
18 Ibid at para 13.
19 See chapter 2 of this thesis.
Yet it appears that President Wilson’s determination of the scope of s 18C may have been influenced by the nature of the particular case before him. This is not surprising and not necessarily unreasonable in light of the accepted practices of judicial interpretation. However, what is of concern is that the ‘obvious’ conclusion that the conduct in question did not fall within s 18C was accompanied by a relatively narrow interpretation of the scope of s 18C which, apart from substantiating the specific decision in *Bryant* can be expected to have wider implications for the operation of s 18C. More specifically, the regulatory threshold appears to have been set at the lower end of the spectrum of possible interpretations of s 18C.

This is evident in two aspects of President Wilson’s reasoning. First, in suggesting that he could only contemplate the use of the words “Pom” or “Pommy” constituting unlawful racial vilification where they were used in a manner which was “plainly malicious or scurrilous” or “designed to foster hatred or antipathy” President Wilson has arguably imported something resembling a subjective mens rea component into the s 18C definition. In crimes of which ‘malice’ is a component, the prosecution must establish that the accused acted with intent or recklessness,20 and

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20 Section 5 of the *Crimes Act* 1900 (NSW) provides that:

> Every act done of malice, whether against an individual or any corporate body or number of individuals, or done without malice but with indifference to human life or suffering, or with intent to injure some person or persons, or corporate body, in property or otherwise, and in any case without lawful excuse or excuse, or done recklessly or wantonly, shall be taken to have been done maliciously, within the meaning of this Act, and of every indictment and charge where malice is by law an ingredient in the crime.

While this is a cumbersome and poorly drafted provision, its essence is that crimes for which malice is an element require proof of intent or recklessness (that is, subjective mens rea): *R v Coleman* (1990) 19 NSWLR 467; *R v Stones* (1956) 56
so the implication of the President’s comments is that the (albeit non-criminal) unlawful activity defined by s 18C requires evidence of subjective fault. Similarly, the President’s use of the word “designed”, though it does not have the legal status of the word ‘malicious’, suggests that the conduct of the respondent must have been consciously and deliberately engaged in for the purpose of fostering hatred or antipathy. And yet on the face of the legislation there is no such element of subjective fault. Section 18C render unlawful conduct which is reasonably (that is, objectively) likely to have the effect of offending, insulting, humiliating or intimidating a person or group. Now it may be that what President Wilson intended by his comments was not to read in a generally applicable subjective component into s 18C, but rather, that in the case of words like “Pom” that are relatively innocuous (vis-à-vis other ethnic labels or racial epithets), the threshold of reasonably likelihood would not be crossed unless the words were uttered with the intention of causing harm (in the form of generating hatred or antipathy). Even if this interpretation is accepted, there are two problems with this.

The first problem is that it is not readily apparent from the text of President Wilson’s decision that questions about subjective fault will only come into play as a second tier inquiry in the case of words or other conduct which would otherwise fall outside the limits of the objective test in s 18C. Therefore, there is a danger that his comments will be treated as an authoritative interpretation of s 18C in all cases, in which case the nature of s 18C and the threshold for the regulation of racial vilification established by the legislature would have been substantially altered by (quasi) judicial interpretation.

SR(NSW) 25; Mraz v R (1955) 93 CLR 493. See D Brown, D Farrier and D Weisbrot, Criminal Laws: Materials and Commentary on Criminal Law and Process
Second, it is questionable whether there is any justification for incorporating any form of subjective fault component into the elements of s 18C, even where the conduct involved is relatively innocuous or where there is little evidence that the ethnic group involved is disadvantaged by racist attitudes or stereotypes. That is not to say that these factors are irrelevant to a determination in any given case as to whether certain conduct is unlawful by virtue of s 18C. The specific and wider societal context in which the conduct is performed is certainly relevant to the inquiry as to whether the conduct is “reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate” But consideration of these factors in this way in very different to a consideration as to whether the respondent acted with “malice” or “design”. Arguably, s 18C has been drafted in a way which provides no scope for consideration of the respondent’s purpose, motivation or intention. The only possible textual basis for the approach is found in s18C(1)(b) which provides that the act must be done “because of the race, colour or national or ethnic origin”. However, even though the wording of the provision alludes to the relevance of the actor’s motivation, it would involve a rather significant distortion of this sub-section to interpret it as a requirement that the actor must have acted with an intention (that is, malice or design) to cause harm to the target person or group. It is much more likely that s18(1)(b) simply requires that the conduct in question must be directed at a person or group’s racial or ethnic identity rather than, say, an insult directed at a person because of one of his/her personality characteristics which has nothing to do with his/her ethnicity.

The second problem with President Wilson’s reasoning is that notwithstanding that the words used in s 18C suggest a relatively low threshold for

the regulation of racial vilification (to offend, insult, humiliate or intimidate) he effectively elevates the threshold by emphasising the concept of ‘hatred’. President Wilson states:

It may be helpful, in discussing the proper construction of the Racial Hatred Act, to note both the title and the heading of Part IIA. The heading of Part IIA is “Prohibition of Offensive Behaviour based on Racial Hatred”. The notion of “hatred” although not used in s 18C itself, suggests that the section allows a fair degree of journalistic licence, including the use of flamboyant or colloquial language.²¹

This is a cursory and somewhat curious approach to the interpretation of s 18C. Little attention is paid to the rules and protocols of statutory interpretation, including the necessity to identify ambiguity in the words before resorting to extrinsic materials, such as title and headings.²² There is no obvious ambiguity in s

²¹ Supra note 12 at para 15.
²² Section 15AB of the Acts Interpretation Act 1901 (Cth) provides, inter alia:

Subject to subsection (3), in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:

(a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or

(b) to determine the meaning of the provision when:

(i) the provision is ambiguous or obscure; or
(ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.

(2) Without limiting the generality of subsection (1), the material that may be considered in accordance with that subsection in the interpretation of a provision of an Act includes:
18C other than the general uncertainty associated with attempting to draw the line for unlawful conduct where the line is constituted by the phrase “reasonable likely to offend, insult, humiliate or intimidate”. It is questionable whether laying the concept of “hatred” over this phrase makes the line drawing task any easier other than by raising the threshold therefore placing certain forms of conduct outside of the heightened threshold. In any event, it is doubtful whether any such overlay is desirable or necessary. One might just as easily have concluded that for the purpose of s 18C the word “hatred” used in the statute title and part heading should be defined as “to offend, insult, humiliate or intimidate”. President Wilson’s willingness to make space in the definition of the proscribed activity for “journalistic licence”, “flamboyance” and “colloquial language” is also surprising, particularly on light of the fact that s 18D contains an extensive list of exemptions where values of this sort appear to be adequately covered. To incorporate these values into the core s 18C inquiry as to whether the conduct was likely to “offend, insult, humiliate or intimidate” confuses two distinct phases in the determination of liability for racial vilification under the Racial Discrimination Act 1975 (Cth).

It is clear that in many respects Bryant represented a poor first case for an adjudication under s 18C of the Racial Discrimination Act 1975 (Cth). Of course, there is no basis for criticising HREOC for the fact that the first s 18C case to be pursued to a formal inquiry involved the alleged vilification of English-Australians or that the conduct involved was at the very low end of the spectrum of racial vilification in terms of seriousness and harm. The Racial Discrimination Act 1975 (a) all matters not forming part of the Act that are set out in the document containing the text of the Act as printed by the Government Printer …
(Cth) provides for complainant initiation and carriage of matters in a manner which places responsibility for the selection of which matters are referred for public inquiry matters squarely outside the control of the race Discrimination Commissioner or HREOC. In addition, few would question the decision to dismiss the complaint in Bryant. However, as discussed, there are reasons to be concerned about the manner in which Sir Ronald Wilson justified this decision, and in particular, the elevated terms in which the limits of s 18C were constructed.

It is difficult to determine what role free speech sensitivity played in the interpretation of s 18C in this case. Certainly, there was no express discussion of free speech consideration in the brief reasons for decision. However, the President’s willingness to ‘read into’ s 18C room for “journalistic licence” and his expressly stated reluctance to inhibit colloquial expressions imply that concern for the principle of free expression played a part in this interpretation. More significantly, those same concerns appear to have contributed to the effective raising of the harm threshold (via the incorporation of the notion ‘hatred’) and the implication that, in some circumstances, it may be necessary to establish a subjective intent to cause harm before the relevant conduct will be treated as unlawful by virtue of s 18C.

While it may not be possible to determine the extent to which Sir Ronald Wilson was motivated by free speech sensitivity, the effect of the decision has been interpreted as a ‘win’ for free speech. Reid and Smith have implicitly endorsed the ‘raised’ threshold applied by Sir Ronald Wilson in Bryant, on the basis that the threshold established by s 18C may be too low “which may result in freedom of

23 See chapter 5 of this thesis.
expression being eroded”. They suggest that the legislation should be amended to reflect the higher threshold imposed in *Bryant*:

[F]or the purpose of clarity and to prevent an excessive number of complaints being lodged (particularly in view of the reduction in funding to the HREOC), it may be preferable for a higher threshold to be provided for in the legislation itself.\(^{25}\)

Irrespective of what assessment is made about the merits of raising the regulatory threshold, the analysis of *Bryant* by Reid and Smith supports the argument advanced in this thesis that there is a correlation between the demonstrated tendency to ‘read down’ the scope of s 18C and a concern for limiting the legislation’s impact on free speech.

One might reasonably suggest that the critique offered here attaches too much significance to one single decision – indeed, in a case which did not even proceed to a full inquiry but was summarily dismissed under s 25X of the *Racial Discrimination Act 1975* (Cth). However, as will be seen below, the interpretation of s 18C endorsed by the President of the HREOC, has subsequently been applied in a number of cases involving inquiries under s 18C. The cumulative impact of these cases may well be that the regulatory shape of s 18C is markedly different in 1999 than it was when first introduced in 1995.


3.3 Rugema v Gadsten Pty Ltd & Derkes (1997)

The second s 18C complaint to be determined by an inquiry the HREOC was Rugema v J Gadsten Pty Ltd and Derkes. In December 1995 the complainant lodged a complaint with HREOC alleging that he had been the victim of racial discrimination contrary to s 15 of the Racial Discrimination Act 1975 (Cth) and racial vilification contrary to s 18C. The complainant, a black-skinned French citizen of Ugandan extraction, was a machine operator employed by the first respondent. The second respondent, Derkes, was the complainant’s supervisor. The Inquiry Commissioner summarised the foundation of Rugema’s complaint as follows:

Mr Rugema alleges that between November 1995 and December 1995 Mr Rugema was subjected to racial abuse by Mr Derkes and taunted by Mr Derkes who called him a “black cunt”, and “a fucking black lazy bastard”, and “fucking black cunt”. Mr Derkes also made “monkey” gestures to Mr Rugema. He claims that signs were displayed at work with racist comments such as “Whites are Superior”.

Rugema gave evidence that he complained to his managers about the racial abuse but no action was taken. Expert psychiatric evidence was introduced by the complaint to support his contention that the racial discrimination and racial abused had caused him to suffer severe depression.

The second respondent denied that he had racially abused the complainant. He testified that he had had a number of disputes with Rugema regarding Rugema’s work performance. The first respondent denied any knowledge that the complainant had been racially abused. The company’s production manager gave evidence that when a foreman advised him “that there was a possible ‘racial problem’ between Mr

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26 Rugema v J Gadsten Pty Ltd and Derkes, supra note 13.
27 Ibid (no page or paragraph numbers).
Rugema and Mr Derkes'\textsuperscript{28} his investigation of the matter took the form of a discussion with Derkes who assured him that there was no problem. The manager did not speak to Rugema about his side of the story. There was no evidence of any other action taken by the company's management.

Commissioner Webster found that "on the balance of probabilities, ... Mr Rugema was subjected to racial abuse ... by Mr Derkes"\textsuperscript{29} and that the first respondent, even though aware that Rugema had complained of racial abuse took minimal steps to address the issue. The Commissioner concluded that the abuse to which the complainant had been subjected constituted racial discrimination contrary to ss 9 and 15 of the \textit{Racial Discrimination Act 1975} (Cth), and also breached s 18C. The Commissioner held that the use of terms like "black cunt" "black bastard" and "lazy black" was "reasonably likely to afford [sic – offend], insult, humiliate or intimidate Mr Rugema because of his colour or ethnic origin."\textsuperscript{30}

In addition to finding that the second respondent, Derkes, had breached s 18C by directing these abusive terms at the complainant, the Commissioner also concluded that the first respondent was vicariously liable for the conduct of Derkes by virtue of s18A(1) or s 18E of the Act. The Commissioner concluded that the company had not established that all reasonable steps were taken to prevent the racial vilification and so could not rely on the defence contained in ss 18A(2) and 18E(2) respectively.\textsuperscript{31}

\begin{itemize}
\item \textsuperscript{28} \textit{Ibid.}
\item \textsuperscript{29} \textit{Ibid.}
\item \textsuperscript{30} \textit{Ibid.}
\item \textsuperscript{31} For a discussion of what is required of employers in this respect see K Eastman, "Racial Hatred and Harassment in the Workplace", \textit{Law Society Journal}, December 1998, 46.
\end{itemize}
The Commissioner ordered that the respondents pay the complainant damages in the amount of $55,000 ($30,000 for the psychological injuries suffered by the complainant and $25,000 for loss of earning capacity).

As the first s 18C case in which a HREOC Inquiry found in favour of the complainant the case of Rugema is significant. And yet, it adds little to our understanding of the scope and operation of s 18C of the Racial Discrimination Act 1975 (Cth). In fact, one of the notable aspects of Commissioner Webster’s decision is that there is very little examination of the relevant legal questions. Most surprisingly there is no consideration at all as to whether the conduct engaged in by Derkes occurred “otherwise than in private” as required by s 18C(1). It is likely (although it is not absolutely clear from the evidence) that the verbal abuse directed at Rugema by Derkes occurred within the hearing, and perhaps the sight, of other employees. However, it is questionable whether this in itself would be sufficient to bring the conduct within the scope of s 18C, unless the factory floor was considered a “public place”. According to s 18C(3) “‘public place’ includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.” Although this definition is expressed as non-exhaustive it is questionable whether the particular workplace in which the conduct took place was a public place (although it is recognised that some workplaces, such as a retail store, will easily come within the definition). By assuming (rather than establishing) that the conduct engaged in by Derkes occurred “otherwise than in private” the decision in Rugema overlooks the difficulties associated with identifying the boundaries of the “otherwise than in private” threshold. This is unfortunate because from the point of view of evaluating the scope
of the regulation of racial vilification and the impact of free speech sensitivity on that
scope, the manner in which the public/private line is constructed for the purpose of s
18C is very significant.

On the other hand, the case is a good illustration of the fact that the degree of
harm associated with racial vilification may have little dependence on whether the
conduct occurs in public or in private, at least where the vilification is directed at an
individual. As noted in chapter 5 of this thesis, the limitation of the regulatory regime
to racial vilification which occurs in public (or ‘otherwise than in private’) is
puzzling given that there is no requirement in s 18C that the conduct actually incited,
or was likely to incite, ill-feeling towards the target individual/group by any other
person, and so it is not strictly necessary that there be an ‘audience’ for the racial
vilification. The inclusion of this requirement is illustrative of a tendency to build
‘safeguards’ against free speech encroachment (and the infringement of other liberties,
such as privacy) into the legislative formulation of racial vilification regulation,
without obvious regard to the practical significance of such safeguards for the
effective operation of the regulatory regime.

3.4 Combined Housing Organisation Limited v Hanson (1997)

In March 1996, shortly after her election as the member for Oxley in the Australian
House of Representatives, Pauline Hanson was interviewed by the journalist from
The Australian newspaper. An article based on the interview was published on 4
March 1996. A number of the comments made by Hanson related to her views about

32 See chapter 5 of this thesis.
Indigenous Australians. In response to these comments a number of complaints were lodged with HREOC.\textsuperscript{33}

In the interview Hanson expressed the view that Aboriginal people “have benefits that are only available to them because they’re Aboriginal and I don’t believe this is fair,”\textsuperscript{34} and indicated that in her parliamentary role she planned to represent or “fight for .. the white community, the immigrants, the Italians, Greeks, whoever, it really doesn’t matter, you know, anyone apart from the Aboriginal and Torres Strait Islanders.”\textsuperscript{35} While not forming part of the allegedly unlawful conduct it is also worth noting that in the course of the interview Hanson also stated that “I’m not trying to take anything away from the Aboriginal people. What I’m saying is all I want is equality. It doesn’t matter what colour your skin is, I think, you know, everyone should have a fair go.” The basic tenor of Hanson’s comments, therefore, was that Indigenous Australians received special benefit or rights and that this was unfair and unequal from the point of view of non-Indigenous Australians.

HREOC received six complaints alleging that by making these comments Hanson had breached, variously, ss 9(1), 13 and 18C of the \textit{Racial Discrimination Act} 1975 (Cth). The complaints were referred to the Commission for public inquiry after the Race Discrimination Commissioner determined that they were not amenable to conciliation. The President of HREOC decided that in accordance with s 25C of the Act the complaints should be dealt with together in a single inquiry. At the commencement of the hearing two of the original six complainants withdrew their

\textsuperscript{34} \textit{Ibid.}
\textsuperscript{35} \textit{Ibid.}
complaints, leaving four complainants. Neither the first complainant nor the respondent appeared at the hearing.

Although at least some of the complainants alleged that Hanson’s conduct was in breach of s 18C, President Wilson’s decision focuses almost exclusively on whether the conduct amounted to racial discrimination contrary to s 9. He held that it did not:

In light of my careful consideration of all that the respondent said in the interview she gave on the morning after her election, I find positively that her words are not capable of constituting an act involving a distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which had the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human rights or fundamental freedom in the political, economic, social cultural or any other field of public life.\textsuperscript{36}

President Wilson stated, without elaboration, that he had come to the “same conclusion” (that is, the conduct was not unlawful) in relations to ss 13 and 18C. Consequently, the complaints were summarily dismissed in accordance with s 25X of the \textit{Racial Discrimination Act 1975} (Cth).

President Wilson’s cursory treatment of the s 18C ground of complaint is surprising.\textsuperscript{37} One would have thought that the comments made by Hanson were more likely to run foul of s 18C than s 9. Bearing in mind that s 18C renders unlawful conduct reasonably likely to \textit{offend}, insult, humiliate or intimidate\textsuperscript{3}, Sir Ronald Wilson implied as much (probably unconsciously) when he stated: “I appreciate that the complainants and many other members of the community may find them

\textsuperscript{36} \textit{Ibid.}

\textsuperscript{37} President Wilson’s focus on the s 9 discrimination complaint may have reflected the emphasis in the complainant’s submission, but this explanation is speculative, gaining no explicit support in the reasons for decision.
[Hanson’s political views] misguided, unwarranted and offensive".\(^{38}\) However, he concluded that it did not follow that “giving expression to ... [those political views] as part of a political statement was an unlawful act contrary to s 9(1) or any other section of the Act.”\(^{39}\)

Lawrence McNamara has argued that Sir Ronald Wilson’s decision in Combined Housing Organisation Ltd v Hanson highlights the limitation of law and legal analysis as a response to racism.\(^{40}\) Specifically, McNamara argues that a comprehensive appreciation of the comments made by Hanson requires more than a superficial analysis of the actual words used on a particular occasion (as Sir Ronald Wilson offered):

... [T]here is more to Ms Hanson’s statement than the purely legal and literal interpretation uncovers, and in the context of other understandings about Ms Hanson’s project, her specific comments take on a meaning that is offensive because it is racist, or popularly perceived as racist. This latter interpretation could be supported by a widely held public perception that – in spite of her claims about a desire for equality – Ms Hanson’s agenda is in reality one which seeks the social, economic and political subordination of Aboriginal people.\(^{41}\)

The point of this analysis is not to suggest that Sir Ronald Wilson’s decision or reasoning was ‘wrong’, but to highlight the limitations of existing legislation for dealing with racism of the type associated with Pauline Hanson, and more recently, the One Nation Party, where overt and unambiguous expressions of racial antipathy are rare, much is said in “code”\(^{42}\) and the “social, cultural, political and historical

\(^{38}\) Supra note 30.

\(^{39}\) Ibid.


\(^{41}\) Ibid at 122.

\(^{42}\) See Stanley Fish’s discussion of “code” in There’s No Such Thing As Free Speech ... and it’s a good thing too (New York: Oxford University Press, 1994) at 89-101, discussed in Lawrence McNamara, note 40 supra at 100.
This is an interesting and important argument, worthy of close consideration. However, given the cursory attention which s 18C received in the case at hand, Lawrence McNamara's argument too readily accepts the legal position that comments of the sort made by Hanson are not unlawful. In his desire to highlight the limitation of legal regulations in dealing with racial hatred Lawrence McNamara has failed to assess the adequacy of the conclusion that Hanson's comments do not fall within the category of unlawful expressions of racism rendered unlawful by s 18C. In this way his argument is weakened by a gap in Sir Ronald Wilson's analysis. For example, one might have hoped for closer consideration of whether the objective standard and the inquiry "in all the circumstances" required by s 18C might have facilitated the taking into account of either Sir Ronald Wilson's conclusion that "many members of the community" would find Hanson's comments offensive, and/or Lawrence McNamara's identification of the context in which particular comments are spoken and received as all-important. The point is that Sir Ronald Wilson's decision provides a very weak foundation on which to base any sort of assessment of the capacity of s 18C to effectively regulate the sort of conduct engaged in by Pauline Hanson. Before 'writing off' this legislative attempt to regulate racial vilification a more comprehensive analysis of its application is necessary.

Finally, the willingness of the HREOC President to simultaneously consider the application of prohibitions in the Racial Discrimination Act 1975 (Cth) on discrimination (eg s 9) and vilification (s18C) as if there was substantial overlap between these two grounds is worrying. Section 18C is unique amongst the

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43 Ibid at 122.

44 The same tendency was evident in Rugema v J Gadsten Pty Ltd, supra note 13; and Australian Macedonian Human Rights Committee (Inc) v Victoria [1998] HREOCA 1 (8 January 1998) [http://www.austlii.edu.au/au/cases/cth/
provisions of the *Racial Discrimination Act* 1975 (Cth). It was introduced to deal with a particular form of racism. It is important that the distinction between conduct which is unlawful by virtue of s 18C and discrimination which is unlawful under other provisions in the *Racial Discrimination Act* 1975 (Cth) be reflected in the reasoning and decisions of HREOC Commissions of Inquiry, (even if the distinction is not drawn with great clarity by complainants). It is unfortunate that Sir Ronald Wilson did not take the opportunity in *Hanson* to shed further valuable light on the scope of s 18C by closely examining its application to the expressions of views such as those for which the (former) Member for Oxley and (current) President of the One Nation Party has become (in)famous. In the absence of such an examination the decision in *Hanson* gives the unfortunate impression that s 18C has no role to play whatsoever, in cases of political opinion or in cases where the tendency of the conduct to offend, insult, humiliate or intimidate arises by virtue of implication and contextualisation rather than expressly.

### 3.5 Executive Council of Australian Jewry v Scully (1997)

In August 1996 the Executive Council of Australian Jewry (ECAJ) lodged a complaint with HREOCOC alleging that “the respondent distributed offensive anti-Semitic literature in letterboxes in Launceston, Tasmania and sold anti-Jewish material at the Hart Street market in Launceston, Tasmania.”[^45] According to the complainant, the literature allegedly circulated by the respondent, inter alia,

- presents an image of Jews as ‘anti-freedom’, ‘prop-tyranny’, existentially opposed to ‘white people’

• posits Jews will turn ‘non Freemasons’, non-Jews and so on into a ‘grey slave mass’ ...

• claimed that there was no Nazi Holocaust and that Jews invented the ‘Holocaust Campaign’ to create ‘a feeling of collective indebtedness to the Jews’ and subsequently to obtain political and economic benefit ...

• maintained that those who are understood by the Australian community to be Jews are ‘lying frauds’ who ‘are trying to force the White Race to mongrelize’.

The complaint was referred to the Commission for inquiry. However, the merits of the complaint were not determined because Commissioner Nettlefold concluded that ECAJ did not have standing to make a representative complaint in accordance with ss 22 and 25L of the Racial Discrimination Act 1975 (Cth). Commissioner Nettlefold also ruled that Mr Jeremy Jones, the Executive Vice-President of ECAJ had no standing to pursue an individual complaint because “As a Jewish Australian living in Sydney, Mr Jones’ special interest or connection with the actions of the respondent in Launceston, Tasmania is too remote to give rise to a right of standing.” Consequently, the complaint was dismissed under s 25X of the Act.

The Commissioner was not oblivious to the apparent injustice in disposing of the matter in this way. However, he observed that:

Whilst it is unfortunate that the merits or substance of this matter have not been considered, it is not the function or place of the Commission to retrospectively rewrite complaints in order for them to fall within the operation of the Act.

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46 Ibid at 78,296.
47 Ibid at 78,297.
48 Supra note 9.
49 (1998) EOC ¶92-946 at 78,297.
This statement ignores the way in which the Commissioner’s interpretation and application of the standing rules has in fact contributed to the placement of the complaint outside of “the operation of the Act”.

The Commissioner identified two main objections to the acceptance of ECAJ’s representative complaint against the respondent. First, the Commissioner concluded that ECAJ was not an “aggrieved person” for the purpose of s 22(1) of the Act. The Commissioner ruled that “As an unincorporated association of representatives from the States of Australia and the Australian Capital Territory”, the Council is not a “juristic person” for the purposes of the Act but merely a changing body of representatives. This conclusion was also supported by reference to “general principles on standing” drawn from the decision of the High Court of Australia in *Australian Conservation Foundation v Commonwealth*[^50^] and *Onus and Alcoa of Australia Ltd.*[^51^] According to Commissioner Nettlefold the former case is authority for the proposition that “a representative complaint must demonstrate a special interest in the subject matter of the action which is more than a mere intellectual or emotional concern,”[^52^] while according to the later case “The asserted interest, whilst not necessarily unique to the complainant, must go beyond that of the general public in that the complainant is affected to a substantially greater degree or in a significantly different manner.”[^53^] Using either of these formulations of the requisite interest, one might readily conclude that an organisation like the ECAJ would have a sufficient interest in the unlawful distribution of anti-Semitic literature to be given standing to lodge a complaint with HREOC. However, Commissioner

Nettlefold preferred to apply the arguably less relevant test formulated by Gibbs J in *Australian Conservation Foundation Inc v Commonwealth* according to which:

A person is not interested within the meaning of the rule, unless he is likely to gain some advantage other than the righting of a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails.\(^5^4\)

The Commissioner ruled that “Applying this test to the circumstances of the case, it would appear that the Council do not have the requisite interest to lodge the complaint.”\(^5^5\) The Commissioner decided that it was unlikely that the Council would gain an advantage or suffer a disadvantage of the requisite kind and so it “cannot be said to be aggrieved under s 22(1) of the Act.”\(^5^6\)

This ruling can only be explained by a very narrow construction of the requisite advantage/disadvantage necessary for standing. Surely it is obvious that there is an advantage for the Executive Council of Australian Jewry in the sanctioning of those who distribute anti-Semitic materials in breach of s 18C of the *Racial Discrimination Act 1975* (Cth), thereby fulfilling its objectives as an advocate for the interests and concerns of Australian Jews, and that this advantage or interest is quite distinct from the interest of the general community in preventing racism and anti-Semitism. Moreover, this reasoning appears to involve a lack of appreciation of the combined effect of s 18C’s concern with regulating group harm and the complainant-centred human rights adjudication process which not only allows but requires an individual or appropriate representative to take primary responsibility for law enforcement via the lodgement and pursuit of a complaint in the HREOC.

\(^5^4\) (1980) 28 ALR 257 at 270.
\(^5^5\) (1998) EOC ¶92-946 at 78,297.
\(^5^6\) *Ibid.*
The secondary line of reasoning relied upon by Commissioner Nettlefold was that the members of the class of persons that the Executive Council of Australian Jewry sought to represent had not been “adequately described or otherwise identified ... for the purposes of s 25L of the Act.” The Commissioner was concerned that the class of “Australian Jews” was too broad and diverse, and that “many of ... [them] have presumably not even read the allegedly offensive material distributed by the respondent” so that it was unclear whether they “are also likely to be ‘aggrieved’ by her acts.” The Commissioner’s observation that a “representative complaint cannot be made on behalf of an unlimited class of persons” is undoubtedly correct. However, it has no particular relevance in the present case – the class of Australian Jews which the Council attempted to represent could hardly be considered to be unlimited. Moreover, the Commissioner places undue emphasis on the need for the class to be limited to a particular physical or geographical location. In the present case, the unavoidable implication of this approach is that only a Jew from Launceston (or possibly elsewhere in the state of Tasmania) would have been considered to have standing to pursue a complaint against Scully under s 18C of the Racial Discrimination Act 1975 (Cth). There is no reason in logic or law why the class must be defined in such terms. The setting of the relevant class in this manner is especially ill-suited to the nature of the harm at which s 18C is directed, and in which the complainant, on behalf of all Australian Jews, had an interest in preventing. While the literature in question may have circulated within a limited geographical area, the anti-Semitic attitudes which the literature was alleged to have expressed and

57 Ibid.
58 Ibid.
encouraged could hardly be considered to stop at the limits of the city of Launceston or be contained on the island of Tasmania.

The analogy used by Commissioner Nettlefold in purported justification of his denial of standing to the complainant reinforces the perception of a serious failure to grasp the nature of the ‘rights’ created by s 18C and of the workings of the complainant-initiated system of law enforcement. The Commissioner observed that in the case of *Ogle v Strickland*—a case in which a Catholic priest and an Anglican priest sought standing to challenge a Censorship Board decision to allow the importation of a film which the plaintiffs considered blasphemous—the Full Federal Court held that the priests’ vocation gave them a sufficient interest for the standing but that this interest (and therefore standing) did not extend to all members of the Christian community.

There is only a very crude analogy—based in the legal protection of offence to religious beliefs—between the circumstances of *Ogle v Strickland* and the present case. The most fundamental difference is that the complainants in the present case were attempting to enforce a statutory provision specifically aimed at the regulation of racism (including anti-Semitism) where the effective operation of the legislation is dependent on the individual or group at which the unlawful conduct is directed taking action in the form of lodging and pursuing a complaint in the HREOC. In *Ogle v Strickland*, the standards and decision-making processes of the censorship and

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60 The legal definition of the criminal offence of blasphemy is found at common law: *R v Ramsay and Foote* (1883) 15 Cox CC 231; *Bowman v Secular Society Ltd* [1917] AC 406; *R v Lemon* [1979] All ER 898; and *Choudhury* [1991] 1 QB 429; *Crimes Act* 1900 (NSW) s 574. See M Armstrong, D Lindsay and R Watterson, *Media Law in Australia* (Melbourne: Oxford University Press, 3rd edition, 1995) at 139-140.
classification system— which gave rise to the litigation in Ogle v Strickland—are not specifically directed at protecting particular religious groups from vilification nor does these bodies of law reserve a place for the target group in the adjudication or enforcement process. There is a perverse irony in the denial of standing to a ethno-religious representative organisation which was attempting to enforce a legal standard which was established, for the benefit of the members of the group which it represented (along with other groups targeted by racism in Australia).

The decision to summarily dismiss the complaint of the Executive Council of Australian Jewry against Scully for the alleged distribution of anti-Semitic raised some doubt about the capacity of s 18C and the current complaint process to provide the sort of legal regulation and protection with which the Racial Hatred Act was assumed to be concerned.

However, in 1998 ECAJ and Jeremy Jones successfully challenged the Commissioner Nettlefold’s decision to dismiss the complaint. On the question of the standing of ECAJ, the Federal Court of Australia Wilcox J confirmed that Commissioner Nettlefold had been correct in concluding that ECAJ could not be a "person aggrieved" for the purpose of s 22(1) of the Racial Discrimination Act 1975 (Cth) because it “is not a ‘person’ in the eyes of the law.” However, Wilcox J stated that this was not conclusive of the matter:

It is necessary to go behind the name and consider whether the juristic persons who constitute the unincorporated association are “persons aggrieved” by the

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61 See Classification (Publications, Films and Computer Games) Act 1995 (Cth) which provides the basis for the classification scheme administered by the Office of Film and Literature Classification: D Butler and S Rodrick, Australian Media Law (Sydney: LBC Information Services, 1999) at 327.
63 Ibid at 78,305.
allegedly unlawful act. If they are, the complaint is competent because in law, though not in name, it was made by them.\(^4\)

Wilcox J concluded that at least one of the constituents of ECAJ, namely, the Hobart Hebrew Congregation (HHC), “clearly has the requisite interest”:\(^5\):

[D]espite its name, the Hobart Hebrew Congregation represents the Jewish community throughout Tasmania, including in the Launceston district. If there is truth in the allegations made against Ms Scully, her actions must have had a special impact on members of the Launceston Jewish community. According to the complaint, some of those people received Ms Scully’s material in their letter boxes. Probably all of them have come into contact with non-Jews who have received the material and whose attitude to Jews may thereby have been adversely affected. It seems beyond contest that, if the acts occurred, they affected members of the Launceston Jewish community in a manner different in kind to the way they affected non-Jews, or even Jews living outside the Launceston area. Given the recognition in the authorities of the entitlement of representative bodies to obtain relief on behalf of members who have a special interest in a matter, I see no reason to doubt that the Hobart Hebrew Congregation is a “person aggrieved” by the alleged acts.\(^6\)

Wilcox J further ruled that as the HHC was competent to lodge a complaint under s 22(1)(a) of the *Racial Discrimination Act 1975* (Cth), it followed that ECAJ (‘the Council’) was also competent to do so under s 22(1)(b):

As the Hobart Hebrew Congregation is a constituent of the Council, the Council represents at the national level those members of the Launceston Jewish community who were specifically affected by Ms Scully’s actions.\(^7\)

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\(^4\) Wilcox J stated that this approach was well supported by authority: *Devane v Gati* (1956) 95 CLR 174 (HCA); *Re Independent Schools’ Staff Association (ACT) ex parte Hubert* (1986) 60 ALJR 450 (HCA); and *Arnold v Queensland* (1987) 73 ALR 607 (FCA FC).


\(^7\) *Ibid* at 78,307. Wilcox J observed that ECAJ was “not itself a ‘person’, it is an agglomeration of ‘persons’, so any complaint is legally the complaint of its members. In their representative role, if not on an individual basis, those persons were ‘personally aggrieved’ by the alleged unlawful acts": *Ibid*. 
Wilcox J ruled that Commissioner Nettlefold has also erred in denying standing to Jeremy Jones. In the Commission’s determination of whether Jones was a “person aggrieved” (that is someone who was specially affected by the alleged conduct) the emphasis given to Mr Jones’ city of residence (that is, Sydney) was misplaced:

... Mr Jones’ claim of special affection did not depend on his place of residence. He offered himself as a complainant because he was the Executive Vice President of a body that represented 85% of the Jewish population of Australia. He was a senior officer of the Council with major responsibility for the achievement of its objects. They included representing Australian Jewry, including Jews resident in the Launceston district. To describe Mr Jones’ connection with the matter simply as “a Jewish Australian living in Sydney” was to ignore his representative role.

Wilcox J found it unnecessary to decide whether this complaint constituted a representative complaint in accordance with s 25L of the Racial Discrimination Act 1975 (Cth), having reached the conclusion that Jones was a “person aggrieved” as required by s 22(1)(a) of the Act by virtue of his representative role in ECAJ.

Wilcox J ordered that Commissioner’s Nettlefold’s decision be set aside and that the matter be returned to HREOC “to hear and determine the complaint according to law.”

It is ironic that extensive litigation on the procedural question of standing has meant that, to date, the merits of the complaint of racial vilification contrary to s 18C have yet to be determined. The irony lies in the fact that one of the reasons for the

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68 Ibid.
69 Ibid.
70 Following the decision of the Federal Court of Australia, solicitor for ECAJ, Peter Wertheim, observed that “Now that we have disposed of the preliminary question of the ECAJ’s right to bring a complaint of this nature to the Commission, the way is open for the real issues to be determined and for the ECAJ’s complaint to be decided on its merits”: ECAJ, “ECAJ Victory in Federal Court”, Media Release, 18 February 1999. A HREOC hearing was conducted in November 1998, but no decision has yet been handed down: personal communication (email), Jeremy Jones, Executive Vice-
utilisation of the human rights decision-making process as the regulatory process for racial vilification is to avoid the expense and time associated with conventional litigation. In the long term the resolution of the standing matter improves the quality of the regulatory process for racial vilification, certainly when compared with the narrow construction adopted at first instance. However, in the short term and with reference to the specific facts of this case, it is of concern that more than three years after the matter was first brought to the attention of HREOC, ECAJ advises that “Ms Scully continues the activities which were the subject of our complaint.” From the point of the objective of effective regulation of racial vilification this delay must be of concern.

Nonetheless, the Federal Court’s correction of the Inquiry Commissioner’s unduly narrow interpretation of standing eligibility for the purpose of a s 18C complaint is a significant development in the evolution of the legislative framework for the regulation of racial vilification. In light of the critical role that the formal complaint plays in triggering the enforcement mechanism, a restrictive approach to standing would have had a serious impact on the potential effectiveness of the regulatory process. The Federal Court’s affirmation of the legitimate role for


71 Ibid.

72 The significance of delay in racial vilification proceedings is discussed further in chapter 9, with specific reference to the civil human rights regulatory process for handling complaints under s 20C of the Anti-Discrimination Act 1977 (NSW), established by ss 20B-20D. The problem of delay is aggravated further under the current (but soon to be superseded—see chapter 5) regime whereby HREOC’s declarations are non-binding and the complainant/plaintiff must commence fresh proceedings in the Federal Court should the respondent refuse to abide by any such. This specific aggravation will be remedied under the new division of conciliation/adjudication responsibilities which comes into operation in April 2000.
representative organisations in initiating and pursuing s 18C complaints goes some way towards alleviating concerns about the problems associated with victim-initiated regulation.

3.6 Shaikh v Campbell and Nivona Pty Ltd (1998)

In Shaikh v Campbell and Nivona Pty Ltd the complainant alleged that the respondents had breached various section of the Racial Discrimination Act 1975 (Cth) including s 18C. Shaikh and Campbell were residents of a boarding house owned by the second respondent. With respect to the complaint of racial vilification the alleged conduct was that in had made a number of allegations against Shaikh, including that he has stolen property belonging to Campbell, spilt water on the floor of the kitchen, and failed to flush the toilet. The complainant alleged that the last allegation took the form “that fucking bastard didn’t flush the toilet”. In addition, the complainant claimed that after he brought these incidents to the attention of the landlord’s representative, he overhead Campbell telling someone else in the boarding house that “that Paki bastard, he has complained to the landlord”, and that on other occasion, in the presence of Shaikh and another person, Campbell has said “Paki bastard, he has complained to the landlord.” Various other similar incidents as well as a number of threats were also alleged, including a threat of physical violence by Campbell.

but the customary delays of the mainstream civil court system make also extend the complaint-handling process.

74 Ibid.
75 Ibid.
76 Ibid.
The Race Discrimination Commissioner referred the matter to the Commission for inquiry and determination. The first respondent could not be located and so was not served with notice of the proceedings. The inquiry therefore proceeded only against the second respondent. At the hearing, the second respondent applied for the s 25X summary dismissal of the complaint on the basis that it lacked substance.

On the complaints under s 18C Commissioner Innes observed that “Mr Campbell’s actions may well have fallen within this section.” However, there was no basis for holding the second respondent vicariously liable under s 18E because Campbell was not the second respondent’s employee or agent. Consequently the complaint was dismissed as lacking in substance.

The case highlights one of the practical limitations of a victim initiated complaint-based regulatory mechanism where there is very limited capacity for investigation and detection of persons alleged to have breached s 18C. The HREOC obviously has limited resources to engage in this sort of investigation. One of the benefits of most criminal racial vilification laws is that the police have a role to play in the detection and investigation of persons suspected of having committed the relevant offence.

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77 Ibid.
78 Ibid.
79 New South Wales appears to be an exception: see chapter 8 of this thesis.
3.7 *Australian Macedonian Human Rights Committee (Inc) v Victoria* (1998)

On 21 July 1994 the Premier of Victoria announced that for all governmental purposes the language spoken by people in the Former Yugoslav Republic of Macedonian (FYROM) would be referred to as “Macedonian (Slavonic)”\(^{80}\) A complaint was lodged with HREOC on 15 August 1995 by the Australian Macedonian Human Rights Committee (AMHRC) and the Macedonian Community Council of Australia. The complainants alleged that the conduct breaches various sections of the *Racial Discrimination Act 1975 (Cth)* and in particular that it constituted racial discrimination contrary ss 9(1) and 13, and racial vilification contrary to s 18C.\(^{81}\)

In June 1997 the Race Discrimination Commissioner declined to conduct further inquiries into the complaint in accordance with s 24(2)(a) having determined that the conduct in question was not unlawful. Subsequently the AMHRC requested that the matter be referred to HREOC for public inquiry and determination, in accordance with s 24(4)(a).

The substance of the complainant’s argument was that:

> the addition of the word ‘Slavonic’ to the word ‘Macedonian’, as the language has always been known here in Australia and internationally, is insulting and offensive. It holds Macedonian linguistic and ethnic identification in contempt and that no other language has been treated by the Victorian Government in a similar way.\(^{82}\)

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\(^{80}\) *Australian Macedonian Human Rights Committee (Inc) v Victoria, supra* note 44.

\(^{81}\) Section 18C of the *Racial Discrimination Act 1975 (Cth)* did not come into force until 13 October 1995 – more than a year after the Victorian Premier’s directive – is not retrospective in its operation. Presumably, in alleging that s 18C had been breached by the respondent, the complainants were characterising the relevant conduct as the continuing operation of the practice established by the directive rather than the simply the initial announcement.

\(^{82}\) *Supra* note 44.
It is important to recognise the context in which the directive was issued. The use of the word “Macedonian” to describe language is a matter of ongoing dispute between the people of FYROM and an ethnic Macedonian community in northern Greece. Substantial numbers of people from both ethnic groups reside in Victoria and in 1994 a number of violent incidents took place, reflecting a rise in tensions between the two groups. Against this background, as Sir Ronald Wilson noted,

The members of the Slav Macedonian community saw it as a deliberate assault on their rights taken by a Government which in their view had demonstrated a sympathy for members of the Greek community in the problems that had arisen over the use of the word “Macedonian”. 83

In determining the merits of the complainant’s allegation that the Victorian Government’s directive breached the Racial Discrimination Act 1975 (Cth) President Wilson focused exclusively on the complaint of racial discrimination contrary to s 9. The reasons for this are unclear, although it appears to be based on the (ultimately erroneous 84) assumption that the primary basis upon which the merit of the discrimination ground was assessed was equally applicable to the racial vilification complaint under s 18C. (This matter will be discussed further below.)

For Sir Ronald Wilson the determinative issue was whether the Victoria Government’s directive that word Macedonian be qualified by Slavonic for the purpose of describing the language spoken by people in FYROM was “based on race, colour, descent or national or ethnic origin” as required by s 9 of the Racial Discrimination Act 1975 (Cth). For the President this involved an investigation into the “true basis for the directive”. 85 He ruled that:

83 Ibid.
84 See infra note 88.
85 Supra note 44.
... [N]otwithstanding that the directive has an intimate relation to the ethnic origin of the members of the complainant body, I find that the true basis of the decision is found in the Government imperative to take action to restore peace and harmony to the community. In my view ... the racial distinction implicit in the directive was not a material factor in the making of the relevant decision. The unfortunate impact of the directive on the members of the complainant body was a fortuitous by-product of the performance by the respondent of its duty to advance the peace, order and good government of Victoria attracted by reasons of the acts of violence already occurring and the potential for further tension between the Greek and Slav-Macedonian communities ... The fact remains that the impugned conduct was not based on ethnic origin. Ethnic origin was not the reason giving rise to the directive; the need to alleviate community tension was.86

Having reached this conclusion, the President ruled that the complaint had not been substantiated and ordered that it should be dismissed.

The Macedonian Teachers Association of Victoria Inc applied for judicial review87 of the Commission’s decision to dismiss the complaint. In the Federal Court of Australia Weinberg J granted the application.88 Weinberg J ruled that the Hearing Commissioner had erred in his construction of the phrase “based on” in s 9(1) by treating it “as being equivalent to other expressions such as ‘by reason of’ or, ‘on the ground of’, commonly found in other anti-discrimination legislation89, and thereby requiring that there be a “causal nexus”90 between the ethnicity in question and the Victorian Government’s directive. Rather, Weinberg J ruled that “the phrase ‘based on’ in s 9(1) of the Act should be construed as encompassing the broader, non-necessarily causative, relationship expressed in the phrase ‘by reference to’”.91 The judge noted that adoption of the narrower construction preferred by the Hearing

86 Ibid.
87 Pursuant to s 5 of the Administrative Decisions (Judicial Review) Act 1977 (Cth).
89 Ibid at 79,430.
90 Ibid.
91 Ibid at 79,434.
Commissioner “would be likely to significantly diminish the scope for protection ...
...
Specifically, Weinberg J noted that the narrower construction risked importing a requirement of “improper motive” into the statutory definition, and in fact, concluded that this had occurred in the present case:

The Commissioner himself stated that his inquiry was not one as to motive. That statement was undoubtedly correct, having regard to the state of the authorities. However, in construing s 9(1) as though the expression “based on” required proof of a causal nexus, the Commissioner seems to me, with great respect, to have permitted considerations of motive to have intruded into his determination, albeit indirectly, and under the rubric of causation.

Weinberg J stated that if the correct test had been applied than the allegation of discrimination contrary to s 9 could have been substantiated notwithstanding the Hearing Commissioner’s conclusion that the purpose of the Victorian Government’s directive was the preservation of peace and harmony.

Weinberg J ordered that the matter be remitted to the HREOC for hearing according to law. An appeal by the Victorian Government to the Full Court of the Federal Court was unsuccessful.

The significance of all of this for the racial vilification component of the complaint is unclear. It remains to be seen, when the matter is re-heard in the HREOC, whether the s 18C complaint is pursued. Although the status of the s 18C complaint was not addressed by Weinberg J, it would appear to follow from the Federal Court decision that the Hearing Commissioner’s ‘de facto’ dismissal of the racial vilification ground (along with the racial discrimination grounds) was well

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92 Ibid at 79,437.
93 Ibid at 79,441.
founded given the requirement in s 18C(b) that the act must be done “because of”, and in light of the judge’s recognition that this phrase does involve a causal inquiry. This is precisely the basis upon which Sir Ronald Wilson dismissed the s 9 complaint, and while the Federal Court has determined that this was an error in relation to s 9, it implicitly endorses this approach in relation to s 18C.

In conclusion, this case is another example of a failure to adequately distinguish between the racial discrimination and racial vilification components of a complaint where a complainant decides to pursue these two grounds simultaneously. This case, following the Federal Court’s correction, clearly illustrates that the fate of a discrimination complaint is by no means determinative of the fate of a vilification complaint. This should hardly be surprisingly. The respective statutory provisions are markedly different. It is important that complaints are adjudicated upon in a way which recognises these differences and is mindful to the fact that one ground may succeed while the other fails.

3.8 *Shron v Telstra* (1998)

In 1997 Telstra issued a phone card which carried a picture of a World War II German fighter plane. The Nazi swastika symbol appeared on the plane’s tail. The Jewish complainant claimed that the publication of the image on the phone card constituted racial vilification contrary to s 18C of the *Racial Discrimination Act 1975* (Cth). The Race Discrimination Commissioner declined to investigate on the basis that the conduct in question did not come within the statutory definition on the basis


that it was not “reasonably likely ... to offend, insult, humiliate or intimidate” as required by 18C(a). The complainant asked that the complaint be referred to the Commission for adjudication. The respondent applied to have the complaint summarily dismissed in accordance with s 25X of the *Racial Discrimination Act 1975* (Cth) on the basis that the complaint was lacking in substance.

Commissioner Innes agreed that the complaint should be dismissed concluding that neither the objective test in s 18C(a) nor the s 18C(b) requirement that the act be done “because of” Jewish origin was satisfied. In relation to the test of reasonable likelihood the Inquiry Commissioner emphasised the importance of the context in which the conduct (that is, the publication of the swastika image) occurred:

I can imagine that the depiction complained of in this case could be unlawful in the context of some form of depiction or publication which was plainly malicious or scurrilous, designed to foster hatred or antipathy in the viewer. The swastika symbol could, for many, revive memories of the appalling atrocities carried out by the regime which it represented.

However, in this case, Telstra has depicted the plane as part of a series of four of the best known World war II fighters. The swastika on the tail simply identifies it as a Nazi German fighter. In my view, the context would need to be very different to be unlawful within the meaning of the Act.\(^\text{96}\)

Commissioner Innes was undoubtedly correct in emphasising the importance of context in determining whether conduct constitutes unlawful racial vilification. However, the manner in which the Commissioner identified relevant contextual factors arguably reflects a narrow interpretation of the scope of s 18C in the same manner as the decision of Sir Ronald Wilson in *Bryant*.\(^\text{97}\) In fact, Commissioner Innes quoted from and expressly relied upon the *Bryant* interpretation of s 18C, in concluding that Telstra had not exceeded the “licence” allowed by s 18C.

\(^{96}\) *Ibid.*

\(^{97}\) *Supra* note 12.
Perhaps even more significantly, by suggesting that evidence that the conduct was accompanied by malice or design to foster hatred (that is, intentionally or recklessly\textsuperscript{98}) would be necessary before it could be characterised as unlawful, Commissioner Innes, like President Wilson in Bryant, appears to have introduced a subjective fault element for which there appears to be no basis in the legislation. It is as if common sense perceptions of where the regulatory boundary should lie, based on unarticulated notions of what constitutes legitimate expression. The point here is that the scope ‘in practice’ of the regulatory legislation appears to have been influenced by concerns about free speech similar to those which influenced the shape of the legislation when enacted. However, it appears that this did not signal the end of the impact of free speech sensitivity on the regulatory shape of the racial vilification legislation. Moreover, the effect of free speech sensitivity is unacknowledged (perhaps unconscious) making critical response more difficult.

The point is that while, on the surface it would appear that free speech sensitivity has had little or no effect on the post-enactment shape of the racial vilification provisions of the \textit{Racial Discrimination Act 1975} (Cth)—certainly there have been no expressly articulated challenges to the legislation, whether based on the implied freedom of political discourse\textsuperscript{99} or on common law free speech principles)—in fact, the way in which the legislation has been interpreted shows the continuing effect of free speech sensitivity. This analysis supports the argument advanced in this thesis that free speech sensitivity has had a significant impact on the practical regulatory shape of racial vilification legislation in Australia,

\textsuperscript{98} See \textit{supra} note 17.

\textsuperscript{99} See chapter 1 of this thesis.
notwithstanding the absence of a firm statutory or constitutional foundation for the ‘right’ to free speech.

3.9 De La Mare v SBS (1998)

On 29 June 1997 Special Broadcasting Service (SBS) television broadcast a film called “Darkest Africa”. De La Mare lodged a complaint with the HREOC alleging that the film was “an anti-white hate film”. This complaint was interpreted by the Race Discrimination Commissioner as constituting a s 9 complaint of racial discrimination and a s 18C complaint of racial vilification. The complaint was declined under s 24(2) on the basis that the conduct in question was not unlawful. The complainant exercised his right under s 24(4)9a) to have the matter referred to the Commission for a public inquiry.

At the hearing on 27 January 1998 the complainant alleged that the film attributed numerous negative characteristics to “white people” including that they are “xenophobic, racist, and without morality or meaningful religion”, alcoholic, greedy, selfish, belligerent, “infantile in their pursuit of leisure” and promiscuous. De La Mare stated that “in his view the racial overtones of the film were clear even though there was an attempt to hide then ‘under a very thin veil of humour’”.

The film depicts a team from “AllAfricanTelevision” headed by a black narrator dressed in “African” clothing who introduces the film as presented by the “Kinshasa University Institute of Ethnology”. The film documents “various

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101 Ibid.
102 Ibid.
‘expeditions’ to ‘the heart of Europe’ to study customs and practices”\textsuperscript{103} including a variety of observations about Austrian/European society—with which the complainant takes issue.

For the respondent, the SBS Director of Network Programming, Rod Webb, explained that the film, actually made in Austria,\textsuperscript{104} was a work of satire which was designed to ridicule the way in which European documentaries had routinely depicted African societies. In her reasons for decision Commissioner McEvoy noted that in an earlier on-air response to criticisms of the film by SBS viewers

Mr Webb describes the film as a “joke” made by an Austrian company which “takes the mickey out of European ethnographers who used to go to darkest Africa and film all these traditions with breathless voices and wide eyes”. Mr Webb describes the film as having “turned the tradition around” by having an African film go to film Austrian customs.\textsuperscript{105}

The Commissioner found as a matter of fact that the film was “presented and intended as a satire” on ethnographic documentaries.\textsuperscript{106} On this basis she concluded that the objective standard in s 18C(1)(a) was not satisfied:

It is my view that it is not reasonably likely that the broadcast of the film Darkest Austria would have offended, insulted, humiliated or intimidated any person or group of persons. It is my view that what was reasonably likely was that the film would be regarded as a satirical, somewhat pointed and amusing “spoof” on ethnographic documentaries. While I accept that Mr De La Mare felt offended at some of the analysis and comments made in the course of the film, I find it extremely difficult to accept that he did not appreciate or that any reasonable person would not appreciate, that the film was presented as a satire or joke.\textsuperscript{107}

\textsuperscript{103} Ibid.
\textsuperscript{104} Curiously, the complainant questioned whether the film was really an Australian production — in his view the film was “African”. In support of this position he observed that “if the film had been made by Austrians a black presenter who could speak “Austrian” was more likely to have been used”: *ibid.*
\textsuperscript{105} Ibid.
\textsuperscript{106} Ibid.
\textsuperscript{107} Ibid.
Having found against the complainant on this threshold issue, the Commissioner deemed it unnecessary to consider the requirements of s 18C(1)(b) or to rule on the respondent’s submission that the screening of the film was protected by s 18D. She did, however, “comment in passing that it appears to me that even if the requirements of s 18C were made out it is most likely that there would be an exemption established under s 18D.”\(^\text{108}\) Specifically, Commissioner McEvoy indicated that the exemption for artistic works contained in s 18d(a) would be applicable, as would the “genuine purpose in the public interest” exemption in s 18D(b), on the basis of the SBS Charter as a multicultural broadcaster.\(^\text{109}\)

The most significant contribution which the decision of *De La Mare v SBS* makes to our understanding of the regulatory framework established by s 18C of the Racial Discrimination Act 1975 (Cth) is that the legislation is sufficiently sensitive to allow for a distinction to be drawn between unlawful racial vilification and legitimate artistic expression generally, and satire in particular. Granted, this distinction will not always be as easy to make as it was in the present case, but it does indicate that the ‘tools’ provided by the legislation—particularly the objective test in s 18C(1)(a) and the s18D exemptions—are capable of establishing the scope of the legislation in a manner which counters concern about regulatory legislation being too blunt an instrument to deal with such matters.

\(^\text{107}\) ibid.

\(^\text{108}\) ibid.

\(^\text{109}\) See *Special Broadcasting Service* 1991 (Cth) s 6.
3.10 McGlade v Lightfoot (1999)

On 9 May 1997 an article was published in the *Australian Financial Review* which attributed the following statements to Ross Lightfoot, who was at the time, a member of the Western Australian Parliament:

"Aboriginal people in their native state are the most primitive people on Earth."

"If you want to pick up some aspects of Aboriginal culture which are valid in the 21st Century, that aren't abhorrent, that don't have some of the terrible sexual and killing practices in them, I would be happy to listen to those."

These comments were also reported in the *West Australian* newspaper on 13 May 1997.

On 16 May 1997 the complainant, an Aboriginal woman, lodged a complaint with HREOC alleging that in making these statements Lightfoot has breached s 18C. The respondent replied that his statements were exempt from the coverage of s 18C by virtue of ss 18D (b) which provides that s 18C “does not render unlawful anything said or done reasonably and in good faith in the course of any statement … made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest”, and sub-section (c) which extends this expiation to the fair and accurate reporting of such statements. In written responses to the Race Discrimination Commissioner the respondent stated:

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My statement, ‘Aboriginal people in their native state are the most primitive people on Earth’ is a legitimate opinion based on research and observation.

[Lightfoot’s comments are] a legitimate, considered opinion based on research and my observations, and is a view held by many respected historians and anthropologists. In this regard, exemption under section 18D(b) and (c) of the Act is clearly appropriate.\(^\text{113}\)

The respondent also argued that those of his comments that had been made during proceedings in the Senate were protected by parliamentary privilege. The Race Discrimination Commissioner consequently limited her investigation to the statements made by the respondent outside the Senate, that is, those statements reported in the newspaper article referred to above. The matter could not be resolved by conciliation and was referred to HREOC for inquiry and determination. However, prior to the scheduled date for the hearing (21 January 1999) the respondent advised the Commission that he would not be attending the hearing, primarily because the relevant evidence was “privileged” and therefore “it would be unlawful and improper to hold a hearing.”\(^\text{114}\)

Inquiry Commissioner Johnston subsequently directed the complainant to show cause as to why the complaint should not be dismissed under s 25X of the Racial Discrimination Act 1975 (Cth). This decision appears to have been promoted by the inference by the respondent that all of the statements in question were covered by parliamentary privilege coupled with uncertainty as to the setting and context in which the statements reported in the newspaper articles had been made by the respondent. Following clarification of certain relevant matters by the journalist to whom the comments were made by Lightfoot (specifically evidence that the comments in question were made to the journalist during an interview in the

\(^{113}\) Ibid at 3.

\(^{114}\) Ibid at 5.
respondent's office, and not during the course of a parliamentary proceeding - thereby answering the Commissioner’s primary threshold concerns regarding whether the comments were covered by parliamentary privilege and whether the conduct occurred “otherwise than in private”) Commissioner Johnston concluded that there were no grounds for summarily dismissing the complaint on the basis that it was lacking in substance or that the alleged conduct was not unlawful.

However Commissioner Johnston went on to consider whether, in light of events that had taken place since the lodgement of the complaint, “to continue with it would be misconceived” and therefore, it should still, be dismissed under s 25X, notwithstanding his assessment that it was not lacking in substance.115

On 28 May 1997, two days after having become a Senator in the Commonwealth Parliament, the respondent made a comment in the Senate which implicitly reaffirmed the views reported in the earlier Australian Financial Review article.116 Later the same day, after considerable pressure had been exerted by Opposition Senators, including calls for Senator Herron, the Minister for Aboriginal and Torres Strait Islander Affairs to repudiate the views which had been expressed,117 Senator Lightfoot made the following statement in the Senate:

I refer to a statement I made earlier today. I wish to unreservedly apologise to any Australians who may have been given offence by the remarks I made. I regard all Australians, irrespective of their race or ethnic background, as being completely equal and entitled to equality of treatment without discrimination of any kind. Any views to the contrary which I may have expressed in the past I no longer hold. I respect the Aboriginal people of Australia and strongly

115 Ibid at 9.
117 Ibid at 3869-3870.
support practical measures to address their disadvantage. I wish to make it clear that I did not intentionally wish to give offence to anyone.\textsuperscript{118}

The Commissioner held that these comments constituted a public "repudiation of views of the kind implicit in the statements which form the grounds of this complaint."\textsuperscript{119} The Commissioner also noted that as far as he was aware the respondent had not publicly repeated the views the subject of the complaint and the apology. (It is worth noting that repetition is not an element of s 18C of the \textit{Racial Discrimination Act} 1975 (Cth).)

The complainant argued strongly against the summary dismissal of the complaint, stressing the symbolic value of a clear statement from the Commission that the respondent had engaged in unlawful conduct contrary to s 18C of the \textit{Racial Discrimination Act} 1975 (Cth), even in the absence of any other remedies or sanctions. The complainant argued that such a declaration would "provide a measure of relief not only to herself, but to other Aboriginal persons who have long been burdened with the hurt, intimidation, lack of esteem and disrespect for dignity that is the product of racial vilification."\textsuperscript{120}

Notwithstanding the complainant's submissions, Commissioner Johnston ruled that the complaint should be dismissed under s 25X. His reasoning raises some important questions about the operation of the s 18C regulatory system and so will be quoted at some length:

I recognise the force of the complainant's contentions and do not seek to dismiss the issues raised in this complaint as trivial or without substance. I am prepared to accept that if this inquiry proceeded to a hearing it might well lead to a finding that the respondent relevantly engaged in racial discrimination. But,

\textsuperscript{118} Liberal Party Senator Lightfoot, \textit{ibid} at 3898.

\textsuperscript{119} \textit{Supra} note 109 at 10.

\textsuperscript{120} \textit{Ibid} at 11.
nevertheless, I am satisfied that, in this instance, the attempt to continue to engage the processes available under the RDA is misconceived.

My decision to dismiss the complaint on that ground is founded on reasons which are specific and only relate to the case in question. Given that the respondent’s remarks were made in a political context and were the subject of a later apology in the Commonwealth Parliament, representing a rejection of opinions of the kind that had given offence in this case, and balancing that in the situation where such matters are accessible to public debate and repudiation by right-thinking persons, it seems to me inappropriate and an exercise in futility to proceed to a determination of this complaint.

... This decision does not constitute a statement of principle that politicians are immune from the RDA because they are subject to and accountable to the democratic process and parliamentary scrutiny. Nor does it represent a finding that simply because an apology is made it is totally dispositive of the matter. ... But in the circumstances of the present case, as offensive and abhorrent as the views expressed by the respondent were to the complainant and other persons such as the witnesses she proposed to call and, indeed, arguably to all right-thinking people, it is misconceived, in my view, to pursue the matter by way of further inquiry into the complaint.

In so dismissing it, I should make it perfectly clear that I do not regard the matter as either trivial or vexatious, nor that it was necessarily misconceived at the time of its inception. It is based on the view I have formed that the matter has been appropriately dealt with under the processes of Parliament and that it should be laid to rest.\(^{121}\)

From the point of view of the concern in this thesis with the impact of free speech sensitivity on the operation of regulation regimes for racial vilification this is a significant decision. The Commissioner’s decision to terminate the adjudication process without assessing the merits of the complaint (that is, whether the conduct in question was unlawful under s 18C and whether any of the s 18D exemptions were applicable) appears to have been influenced to a substantial degree by free speech sensitivity. There are two clear manifestations of this in the Commissioner’s judgement. First, the Commissioner reasoned that special considerations applied in

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\(^{121}\) *Ibid* at 11-12 (emphasis added).
the present case because the conduct in question occurred “in a political context”.\textsuperscript{122} It is not entirely clear what the Commissioner meant by this phrase, but in light of the evidence that the comments in question were made to a journalist during an interview in the respondent’s office, and not in a formal political setting, the Commissioner was presumably referring primarily to the identity of the respondent as an elected state (and later federal) politician. There is also an implication that the comments by Lightfoot attracted the character “political” because they were related in some way to debate over Aboriginal affairs policy. Whether either of these is sufficient to support the designation of the matter as “essentially political”,\textsuperscript{123} as the Commissioner concluded, is questionable. However, having attributed to the respondent’s comments a political character, the Commissioner appears to have brought into operation the view that all the various categories of expression, political expression is the most deserving of protection from legislative regulation.\textsuperscript{124} In this way, the Commissioner appears to have introduced into the regulatory framework an additional ‘de facto’ exemption for ‘political’ expression for which there is no obvious support in the legislation.

The second manifestation of free speech sensitivity in the Commissioner’s reasoning is that in justifying his decision to summarily dismiss the complaint (notwithstanding its substantive merit) the Commissioner utilised the classic ‘more speech’ or ‘fresh air’ argument commonly advanced by opponents of free speech

\textsuperscript{123} Supra note 109 at 11.
\textsuperscript{124} This priority does find some support in the form of the implied freedom of political discourse recognised by the High Court during the 1990s: see discussion in chapter 1 of this thesis.
restriction in the form of racial vilification legislation. That is, because the respondent’s expressed views of Aboriginal people had been ‘addressed’ in the Commonwealth Parliament (specifically in the form of the respondent’s apology on 28 May 1997), the Commissioner implied that “public debate and repudiation by right-thinking persons” rather than enforcement of legislative standards was the appropriate way of responding to the racial vilification in question. The Commissioner’s stated preference for ongoing debate would appear to be inconsistent with the Commissioner’s final conclusion that “the matter has been appropriately dealt with under the processes of Parliament and that it should be laid to rest”. In any event, one of the major weaknesses of the ‘more speech’ argument against racial vilification legislation is that it fails to recognise that victims of racial vilification, even if inclined to respond, may not enjoy the same access to the means of ‘being heard’ as their vilifiers.

Commissioner Johnston attempted to limit his reasoning to the facts of this particular case, but it is difficult to see how this could be sustained. One of the key justifications advanced by the Commissioner for dismissing the complaint was the

125 Supra note 109 at 12.
'political' nature of the conduct in question. It is by no mean clear why the same considerations which prompted the Commissioner to effectively raise the threshold for s 18C regulatory intervention in this case would not apply equally to future cases of alleged racial vilification by politicians or by other others purportedly commenting on a 'political' matter.

Whatever the merits of the decision in this case, it is revealing in light of the primary concerns of this thesis. In particular, it indicates that the same regulatory flexibility which allowed for a necessary distinction to be made between unlawful racial vilification and legitimate artistic satire in *De La Mare*, also allows for the incorporation of more controversial factors to limit the scope of the legislation. In *McGlade v Lightfoot* the additional factor was the Commissioner's assessment of the special considerations that applied in the case of political speech. Arguably, this amounted to interpreting the legislation (not necessarily the specific substantive provisions of s 18C, but rather the procedural provisions of s 25X) in light of an 'enlarged' conception of protected or non-regulatable speech—enlarged when compared with the limits already established by the legislature given the terms in which it enacted the *Racial Hatred Act 1995* (Cth).\(^{127}\) The case stands as a vivid illustration of the ongoing impact of free speech sensitivity on the operation of racial vilification legislation. Specifically, it demonstrates that free speech sensitivity has had the effect of narrowing the regulatory scope and reach of the legislation, with a

\(^{127}\) As discussed in chapter 5, free speech sensitivity had already had a major affect on the shape of the legislation, most dramatically in the exclusion of criminal sanctions and the inclusion of broad exemptions (s 18D) in the amended *Racial Discrimination Act*. 
resulting reduction in the legislation’s capacity meet the objective of providing legal protection to victims of racial vilification.\textsuperscript{128}

\section*{3.11 Jacobs v Fardig (1999)\textsuperscript{129}}

In January 1997 the complainant, an Aboriginal man and a Councillor on the Swan Shire Council in Western Australia, lodged a complaint against a fellow Councillor.\textsuperscript{129} The complainant alleged that the respondent had breached s 18C of the \textit{Racial Discrimination Act} 1975 (Cth) in the course of a meeting on 2 October 1996 attended by the complainant, the respondent and two members of the senior management of the Swan Shire Council, the respondent. In response to a question by one of the managers as to what should be done about a particular Nyungar (Aboriginal) community in Swan, the respondent stated “either ‘Ah, shoot them’ or “we shoot them’”.\textsuperscript{130} Despite being encouraged to do so by the Shire President and CEO of the Swan Shire Council when they became aware of the matter, Fardig initially refused to apologise to Jacobs. Subsequently, some time after Jacobs lodged his complaint with HREOC and after Fardig’s comments attracted media attention (in the form of coverage in the local newspaper and the \textit{West Australian}), Fardig did apologise to Jacobs at a council meeting. However, Jacobs refused to accept the apology. After Fardig was re-elected to Swan Shire Council (Jacobs was not) Fardig issued a public apology for his comments at a council meeting on 8 October 1997.

\textsuperscript{128} Mr Lavarch, Attorney General, Commonwealth Hansard (House of Representatives), 15 November 1994, p 3336.


\textsuperscript{130} \textit{Ibid} at 3.
The Race Discrimination Commissioner's attempt to conciliate the matter was unsuccessful and on 23 July 1998 the matter was referred to the Commission for hearing.

The respondent sought to have the complaint dismissed summarily under s 25X on the bases “that the remark was made in private, that it was frivolous, vexatious and lacking in substance.” Commissioner Innes ruled that the complaint should not be dismissed.

Of particular significance is the Inquiry Commissioner’s consideration of the substantive legal issue as to whether the conduct in question occurred “otherwise than in private” as required by s 18C(1). Commissioner Innes ruled that the conduct did not occur in private, notwithstanding the fact that the meeting at which the comments were made was not a formal Council meeting and was not open to members of the public.

At the full hearing on 27 April 1999 the Commissioner identified two main issues for consideration. The first issue was whether, as required by s 18C(1)(a) Fardig’s conduct was “reasonably likely to offend, insult, humiliate or intimidate”. Commissioner Innes held that there was no doubt that Jacobs had been offended, insulted and humiliated. He rejected the respondent’s evidence that the remark was “flippant”, although noted that even if he accepted that the respondent was being flippant when he made the remarks “suggesting the use of a gun to injure or kill a group of people is so odious as to make it offensive even if said flippantly.”

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131 Ibid at 2.
132 Ibid at 4.
Commissioner Innes noted, in accordance with Sir Ronald Wilson’s ruling in *Bryant v Queensland Newspapers Pty Ltd,*{supra note 12} that his conclusion that the complainant (and the witnesses) had been offended by the conduct was not determinative of the first legal issue—the test was an objective one. Commissioner Innes ruled that the objective test was satisfied:

Suggesting that a particular group of people, whether because of their race or not, should be shot is simply offensive. It is made more so when such a suggestion is made by the holder of a public office who has no doubt sworn an oath to appropriately serve all of the people in the ward which he represents. Although this was not a meeting of the Council, the remark was made to two staff who were his subordinates and demonstrates a disregard for the office which Mr Fardig held.{supra note 12}

This aspect of the decision in *Jacobs v Fardig* stands in stark contrast to the application of s 18C to ‘political’ conduct in *McGlade v Lightfoot.*{supra note 13} Whereas in *McGlade* the identity of the actor was a factor in effectively raising the s 18C threshold (with the result that the complaint was dismissed), in the present case, the Commissioner suggests that the regulatory threshold should effectively be lower in the case of politicians because we are entitled to expect higher standard of propriety on the part of elected politicians. At the heart of these radically different conceptions of the application of s 18C to comments made by politicians appears to be very different orientation on the part of the respective commissioners to free speech sensitivity issues. This basic difference highlights one of the distinctive features of the Australian experience regarding the impact of free speech sensitivity on the shape of racial vilification legislation: variability and inconsistency. In the absence of an express legal (statutory of constitutional) statement of the scope of speech or

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{supra note 12}  
{supra note 13}
expression which should be seen as beyond the reach of legislative restrictions, and with minimal and limited guidance from the High Court, individual decision-makers (in the present context, HREOC Commissioners) have considerable latitude to bring their own conception of ‘protected speech’ to bear on their interpretation of the legislation. A similar phenomenon could be observed in the passage of the Racial Hatred Bill 1994 and its transformation into the *Racial Hatred Act 1995*.¹³⁷

Getting back to the specific decision in *Jacobs v Fardig*, the second legal issue addressed by Commissioner Innes at the full hearing was whether, as required by s 18C(1)(b) the respondent’s conduct was “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”. The Commissioner ruled that it was, stating:

> Again, there is no doubt in my mind on this issue. Whether Mr Foley’s question referred to Aboriginal people, or to the group in Lord Street, it is clear from the context that the conversation related to Aboriginal people. I can draw no other conclusion than that Mr Fardig made the comment because of their race.¹³⁸

Commissioner Innes concluded that the respondent had breached s 18C of the *Racial Discrimination Act 1975* (Cth), and ordered that he pay the complainant $1000. In assessing the appropriate amount of damages Commissioner Innes took into account as aggravating factors the psychological impact on Jacobs and the fact that the respondent was “the holder of an important public office,”¹³⁹ which rendered the breach more serious. On the other hand, Commissioner Innes took into account the

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¹³⁵ *Supra* note 109.
¹³⁶ See discussion of the implied freedom of communication cases in chapter 1 of this thesis.
¹³⁷ See chapter 5 of this thesis.
¹³⁸ *Ibid* at 5.
¹³⁹ *Ibid* at 6.
fact that subsequent to the incident Jacobs asked Fardig to run on the same ticket (as they had done in the past) at the upcoming election (which the Commissioner saw as contradicting the complainant’s evidence that the incident had had a serious adverse effect on him) had not lodged his complaint for three months after the incident and refused to accept Fardig’s personal apology when it was offered.

Finally, in declining to make any other orders (namely, that the respondent apologise and/or undertake cultural sensitivity training) the Commissioner took account of the fact that Fardig had privately (to Jacobs) and publicly (at a Council meeting) apologised for his conduct and had “recently completed cultural awareness training”.

Commissioner Innes’ handling of the significance of the respondent’s apology stands in contrast to the handling of a similar issue by Commissioner Johnston in McGlade v Lightfoot. Whereas in the earlier case the respondent’s apology was a central factor in the decision to dismiss the complaint as “misconceived”, in the present case there is no suggestion that the apology was relevant to the substance of the complaint. Rather, it would considered relevant to the decision on what remedial orders the Commissioner should make having established that s 18C had been breached.

\footnote{Ibid.}

\footnote{Note that the respondent did not apologise specifically for the comments reported in the original newspaper article which were the subject of the complaint, but rather, for similar attitudes expressed subsequently on another occasion: see supra note 113.}

In June 1996 the complainants lodged a complaint with HREOC alleging that the play, “Miss Bosnia”, written by Louis Nowra and produced by the Melbourne Theatre Company (MTC), constituted racial vilification contrary to s 18C. The complainants claimed that the play was offensive insulting, humiliating and intimidating to people who were “loyal to the lawful republic of Bosnia-Herzegovina”. The Race Discrimination Commissioner declined to investigate the matter further after forming the view that the conduct in question was not unlawful by virtue of the exemption provisions of s 18D relating to artistic works. In accordance with a request by the complainants under s 24(4)(a) the complaint was referred to the HREOC for public inquiry and determination under s 25A(1). The second respondent submitted that the matter should be summarily dismissed under s 25X on the basis that the complaint was misconceived.

At the s 25X hearing the complainants argued that the play breached s 18C because of the negative traits attributed to the Bosnian characters, the impact of which was exacerbated by the fact that the play was set in Sarajevo during the violent conflict in 1994, Commissioner Johnston summarised the substance of the complaint as follows:

... [T]he complainants claim that the characters and their situation have been grossly and offensively misrepresented in the following ways:

The reason for the aggression against them was misrepresented in the play as being their ethnicity rather than the expansionist will of the aggressor.

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The aggression was trivialised; and instead, the characters were presented as victims of each other and themselves.

The characters were represented as ranging from morally weak to immoral. In turn this denigrated their ability to function as citizens, denied that they have a consciousness of unity, and undermined their right to nationhood and especially their claim for nations of the world to honour their national status and rights.

In portraying them as morally weak characters, the play repeated and reinforced specific accusations and slanders which were broadcast against the people in Sarajevo by their aggressors. In so doing, the playwright reduced the characters to stereotypes and personifications which amounted to offensive slanders against themselves.\(^1\)

The complainants argued that the respondents could not rely on the exemption for artistic works in s 18D(a) because the relevant conduct (that is, the writing of the play and its production) was not done reasonably or in good faith. In support of this submission the complainants argued that:

… the scale of responsibility required of a writer or producer, in order to act reasonably and in good faith, was to meet a higher standard of fidelity according to the gravity of the subject matter of the play. They point out that the siege in Sarajevo – the setting of the play – has been recognised by the International Court of Justice and the international community as constituting an act of genocide, involving leading persons being indicted for crimes against humanity. The complainants argue that due to the extraordinary nature of the play’s subject matter, and the temporal context of its presentation, a higher responsibility was placed on the respondents to exercise care in dealing with the gravity of the situation, in order not to cause further injury or offence to persons like those depicted in the play.\(^2\)

The complainants argued that the respondents had failed to meet this standard. They were particularly critical of the fact that Nowra had written a “comedy” about a gravely serious situation which effectively belittled the Bosnian characters. The complainants submitted that the playwright intentionally or recklessly misrepresented the characters and the nature of genocide, and that the respondents

\(^1\) Ibid at 4-5.
had “failed to present the play without causing gross injury and offence, based on their ethnicity, to the already injured community of Bosnians and Herzegovians.”

In response, the MTC advanced two primary arguments in support of the respondents’ submission that the complaint should be dismissed as misconceived. First, the second respondent argued that the complainants had not established, as is required by s 18C(1)(c) that the writing and performance of the play was done “because of the race, colour, or national or ethnic origin” of the complainant. In the MTC’s view the complaint as formulated was actually a complaint about “political discrimination” which is not covered by s 18C. The second argument advanced by the MTC was that by virtue of the exemption for artistic works in s 18D, the performance of the play was not unlawful, having been done reasonably and in good faith. According to the MTC in order to establish that the respondents lacked good faith it would be necessary to establish that “the respondents did not act ‘honestly, without fraud, collusion or participation in wrong doing’”, and that this had not been established by the complainants. The MTC argued that “even if the play could be criticised as being in bad taste and did in fact give cause for insult or humiliation of certain persons, that could not of itself amount to either unreasonableness or bad faith.”

Before addressing to the main substance of the complaint the Commissioner resolved two ‘threshold issues’. The first such issue addressed by the Inquiry

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144 *Ibid* at 5.
146 The first respondent, Louis Nowra, did not appear at the hearing, but indicated to the Commission his agreement with the submissions made by the second respondent, the Melbourne Theatre Company.
The Commissioner was whether the writing of the play (as distinct from its performance) was conduct "otherwise than in private" as required to bring the conduct within the scope of s 18C. While expressing some doubt about whether it did ("Ostensibly, writing is something that takes place in private") the Commissioner decided not to "draw an artificial distinction between the writing and the performance of the play". The practical result of this decision was that the merits of the complaint against both respondents (author and producer) were considered.

The second threshold issue considered was whether the allegation related to vilification of a group defined by race, colour national origin or ethnicity as required by s 18C, or whether, as submitted by the respondents, the allegation was of vilification of a political group (bearing in mind that the complainants had defined the relevant group as "people loyal to the lawful republic of Bosnia-Herzegovina"). The Commissioner noted that there was some ambiguity but decided "for the purposes of this application, that the 'group' the complainants belong to and which they alleged to be vilified within section 18C of the RDA, consists of people of Bosnian-Herzegovinian national or ethnic origin".

The Commissioner then turned to consideration of whether the complainants had established that the conduct in question was done because of national or ethnic origin as required by s 18C(1)(b). The Commissioner noted that the phrase "because of" requires proof of a "causal connection" between the conduct and the race, colour, or national or ethnic origin in question:

It is not enough, however, that race etc. is merely part of the circumstances that form the background against which the events and incidents of the play are

149 Ibid at 4.
150 Ibid.
151 Ibid at 10.
written. On this narrower approach the inquiry becomes, relevantly: was national or ethnic origin a cause which contributed to the conduct in writing or presenting the play?  

The Commissioner found that the complainants had not satisfied this element of the definition of unlawful racial vilification, noting that evidence that offence had been caused to some members of the Bosnian community in Australia was insufficient, as was the mere fact that the characters in the play had a particular ethnic identity. On this basis the Commissioner summarily dismissed the complaint, making it unnecessary to consider whether the s 18C(1)(a) requirement that the conduct was reasonably likely to offend, insult, humiliate or intimidate.

Having decided to dismiss the complaint on the basis that the conduct did not come within the definition of s 18C it was also unnecessary for the Commissioner to reach a decision on the applicability of s 18D to the present case. Nonetheless he did address the merits of this issue. Indeed, from the point of view of this thesis’s concern with the regulatory scope of s 18C and the impact on that scope of free speech sensitivity in particular, the handling of this particular issue is perhaps the most significant aspect of the case.

The starting point for Commissioner Johnston’s examination of the scope of the s 18D exemption was the principle of free speech:

In the first place, as I read it, the exemption should be read broadly rather than narrowly. This is consistent with the presumption that a fundamental tenet of the common law is freedom of expression ... Incursions by statute into freedom of expression should not be lightly assumed. A statutory provision that purports to have that effect should be strictly construed ...

Freedom of expression is not, of course, absolute. It is, when viewed in relation to a provision like section 18D, a consideration to be taken into the balance

152 Ibid at 11, citing the decision of Weinberg J in Macedonian Teachers Association of Victoria Inc v Human Rights and Equal Opportunity Commission and Anor, supra note 88.
when determining whether conduct is exempt even if it otherwise would contravene section 18C. Section 18D is a corrective provision to prevent government from stifling non-conformity or ideas that may displease, or which some find offensive.153

In interpreting s 18D in light of free speech principles, Commissioner Johnston interpreted the requirement of “good faith” for the purpose of s 18D in a manner which renders the exemption provisions very broad in terms. The Commissioner accepted the respondents’ submission that:

... to make a finding that either of the respondents committed their respective acts lacking ... [good faith] requires the Commission to identify conduct that smacks of dishonesty or fraud; in other words something approaching a deliberate intent to mislead or, if it is reasonably foreseeable that a particular racial or national group will be humiliated or denigrated by publication, at least a culpably reckless and callous indifference in that regard. Mere indifference about, or careless lack of concern to ascertain whether the matters dealt with in the artistic work reflect the true situation, is not capable of grounding an adverse finding of bad faith for the purposes of section 18D.154

The Commissioner rejected the complainant’s argument that the requirement of reasonableness in s 18D imposed an obligation, in the present case, on the playwright, to exercise “diligence and care, through his or her research, to ensure that the playwright ‘understands the truth’”.155 The Commissioner found that the imposition of such a standard would inappropriately infringe free speech:

The problem, as I see it, is that to intrude into such matters as the state of knowledge or extent of research of the playwright comes close to an attempt to direct the way the playwright exercises his or her artistic insights. This takes the Commission into the crux of the classic confrontation between freedom of expression (artistic licence) and political censorship (dictating as to the topics about which, and the manner in which, the artist may write). As I understand the import of section 18D, it is not intended as a charter for governmental

153 Supra note 142 at 11.
154 Ibid at 13 (emphasis added).
155 Ibid at 12.
bodies like the Commission to draw up standards or a rule book laying down what is acceptable in the way an artistic work is produced …\textsuperscript{156}

Commissioner Johnston’s interpretation of s 18D was motivated specifically by a concern about the impact of the legislative regulation of racial vilification on artistic expression, noting that “Section 18D … reflects a recognition of the peculiar value to be placed on artistic expression”.\textsuperscript{157} An indication of the broad conception of free speech upon which the Commissioner relied is found in the fact that he supported this assessment of the purpose of s 18D by referring to a leading First Amendment decision of the United States Supreme Court—\textit{New York Times v Sullivan}.\textsuperscript{158}

However, it is important to recognise that the resulting broad interpretation of the scope of the s 18D exemptions (based at it is on the generally applicable tests of good faith and reasonableness) does not appear to apply only to artistic expression but to other grounds of exemption as well. Commissioner Johnston has effected a corresponding reduction in the breadth of the category of unlawful racial vilification. This case illustrates that the good faith element of s 18D effectively introduces a subjective mens rea component into the definition of racial vilification, as least in circumstances where the conduct in question comes within the forms of communication (including artistic, scientific or academic expression) included in s 18D(a)-(c). Arguably, this approach is inconsistent with the legislation’s primary focus on regulating conduct which has the effect of vilifying a particular racial or ethnic group, irrespective of the actor’s motive or intention.

\textsuperscript{156} Ibid.
\textsuperscript{157} Ibid.
This case stands as the most explicit example of the way in which free speech sensitivity has prompted statutory interpretations by the HREOC in a number of decided cases which effectively narrow the regulatory scope of restriction on racial vilification contained in the *Racial Discrimination Act 1975* (Cth).

### 3.13 Synthesis of the HREOC Decisions on Section 18C

The first general observation that can be made about the s 18C cases that have been handled by a public inquiry is that the complainant success rate has been low. Of the eleven racial vilification complaints determined by a HREOC Inquiry between October 1995 and December 1999, two were upheld, seven were summarily dismissed under s 25X of the *Racial Discrimination Act 1975* (Cth), and two were dismissed after a full hearing.

One of the summary dismissals—*ECAJ v Scully*[^59^]—and one of the dismissals—*Australian Macedonian Human Rights Committee v Victoria*[^60^]—were successfully appealed to the Federal Court and remitted to the HREOC for re-hearing. Discounting these cases (in which a final decision is pending[^61^]) the success rate for s 18C complaints in HREOC public inquiries has been 22%—the same figure as the proportion of s 18C cases that have been conciliated.

This finding would appear to reinforce the conclusion that the threshold of unlawful racial vilification is, in practice, substantially higher than appears from the face of the legislation. However, it is important to bear in mind that a number of the cases decided by a HREOC public inquiry were cases that the Race Discrimination Commissioner had declined to investigate but which were nonetheless pursued to

[^59^] *Supra* note 45.
[^60^] *Supra* note 44.
hearing by the complainant as is the complainant's entitlement under s 24(4)(a) of the Racial Discrimination Act 1975 (Cth). In Bryant, De La Mare, and Shron, the Race Discrimination Commissioner ruled that the alleged conduct did not fall with the definition of unlawful racial vilification. In Bryant the Race Discrimination Commissioner ruled that the alleged conduct was not unlawful by virtue of the exemption for artistic works in s 18D of the Racial Discrimination Act 1975 (Cth). While, of course, it remains open to the Inquiry Commissioner to reach a different conclusion to the view formed by the Race Discrimination (particularly after having had the benefit of a hearing), it is fair to assume that the complainants' chance of success in each of these cases was relatively weak. Therefore, to a considerable extent, the low success rate can be explained as a consequence of the weakness or inappropriateness of a number of the cases that have come before HREOC public inquiries for adjudication. If s 24(4)(a) complaints are removed from the calculations, the success rate of complainants at public inquiries increases from 22% to 40%.

The strongest evidence in support of the characterisation of the operational scope of Part IIA of the Racial Discrimination Act 1975 (Cth) as narrower than anticipated is found not in the outcomes of decided cases. With the exception of McGlade and Australian Macedonian Human Rights Committee, no doubts have

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161 At 31 December 1999, no decision had been handed down in either case.
162 Supra note 15.
163 Supra note 100.
164 Supra note 95.
165 The Race Discrimination Commissioner declined to investigate the complaint in Australian Macedonian Human Rights Committee, supra note 44, for the same reasons, but a public inquiry decision in this case has yet to be handed, following the delay caused by litigation in the Federal Court of Australia: see text at supra notes 87-94.
166 Supra note 112.
been raised in this chapter about the correctness of the public inquiry decisions on whether the conduct in question constituted a breach of s 18C of the Racial Discrimination Act 1975 (Cth).  

However, the critical analysis of s 18C public inquiry decisions presented in this chapter has demonstrated that even where the correct result has been achieved, the reasoning and interpretation adopted in support of this result has frequently reflected a preference for a narrow construction of the regulatory scope of the prohibition on racial vilification contained in Part IIA of the Racial Discrimination Act 1975 (Cth).

Free speech sensitivity has been a significant feature of the interpretive environment in which this tendency to ‘read down’ s 18C can been observed. The extent of the influence of free speech sensitivity has not been uniform, but has varied from case to case and Commissioner to Commissioner. Also variable has been the extent to which free speech has been explicitly identified as a relevant factor in the interpretation of s 18C (and s 18D).

This is perhaps the most important point about the influence of free speech sensitivity on the quasi-judicial interpretation of the breadth and nature of the legislative regime for the regulation of racial vilification established by the Racial Hatred Act 1995 (Cth). It is not that it is necessarily inappropriate for the implications for free speech to be taken into account in the interpretation and application of a legislative regime which aims specifically to restrict racist expressive conduct.

\[167 \text{Supra note 44.} \]

\[168 \text{In addition, the decision in Executive Council of Australian Jewry, supra note 45, on the standing of the complainants, was criticised—an assessment that has been} \]
However, in the absence of legislative or other generally accepted guidelines as to the degree of immunity against restriction to which speech is entitled, the degree to which free speech sensitivity has been brought to bear on the interpretation of the racial vilification provisions of the *Racial Discrimination Act 1975 (Cth)* has been somewhat unpredictable. Also, the quality of the associated analysis and reasoning in public inquiry decisions is questionable, tending towards relatively cursory treatment of a vaguely defined conception of ‘free speech’. The transfer of the adjudicative function in relation to complaints under the *Racial Discrimination Act 1975 (Cth)* from HREOC to the Federal Court of Australia, commencing in April 2000,\(^\text{169}\) can be expected to improve the quality and consistency of free speech analysis.\(^\text{170}\)

The end result is that one of the significant effects of HREOC public inquiry decisions on s 18C complaints is that the restrictive influence of free speech sensitivity—already apparent in the ‘shaping’ of the *Racial Hatred Act 1995 (Cth)* in the Commonwealth Parliament—has been replicated and magnified, without significantly enhancing the quality of analysis of the relationship between free speech principles and the legislative regulation of racial vilification.

\(^{169}\) See chapter 5.

\(^{170}\) See the views to this effect expressed by the President of HREOC: chapter 5 of this thesis, *supra* note 115.
4. CONCLUDING OBSERVATIONS ON THE RACIAL DISCRIMINATION ACT 1975 (CTH) APPROACH TO THE REGULATION OF RACIAL VILIFICATION

The story of the enactment and operation of national racial vilification legislation in chapters 5 and 6 of this thesis introduces three of the major themes of Australia’s experience with the legislative regulation of racial vilification.

The first, and perhaps most significant, of these themes is a reluctance to employ the criminal law to regulate racial vilification and a preference for civil law regulation. The history behind, and eventual enactment of, the Racial Hatred Act 1995 (Cth) is a classic illustration of this theme, but, as will be shown in Part III of this thesis, it is one that can be observed, in varying degrees, in each of the state/territorial jurisdictions where racial vilification legislation has been enacted.

The second major theme is that one of the major influences on the scope and nature of the regulatory regime established by the Commonwealth Parliament has been free speech sensitivity. Given that the ‘right’ to free speech finds no express support in Australian legislation, and only limited implied constitutional protection, it might be assumed that free speech sensitivity would have exerted only a relatively minor influence on the shape of the national racial vilification legislation. In fact, from May 1975—when a proposed prohibition on racial vilification was excluded from the original Racial Discrimination Act 1975 (Cth)—to June 1999—when in Bryl and Kovacevic v Nowra and Melbourne Theatre Company HREOC Commissioner Johnston broadly interpreted the exemption for artistic expression in s 18D of the Racial Discrimination Act 1975 (Cth)—free speech

171 See chapter 1 of this thesis.
sensitivity has been a consistently powerful influence on the terms of the legislative regulation of racial vilification. Like the reluctance to criminalise racial vilification, the influence of free speech sensitivity is not a phenomenon that is limited to the federal sphere. Part III of this thesis will show that the influence of free speech sensitivity has also been significant at the state/territorial level.

Finally, the operation, to date, of Part IIA of the Racial Discrimination Act 1975 (Cth) suggests that, at least in terms of the number and types of racial vilification incidents in relation to which it can be invoked, the civil human rights dispute resolution process makes a valuable contribution to the regulation of racial vilification. However, the high level of complainant ‘drop-out’ and the relatively small number of complaints that are actually conciliated raise some questions about the efficacy of the complainant-driven and conciliation-focused nature of the civil human rights law enforcement mechanism. These issues will be examined in more detail in chapter 9 with reference to the civil human rights law regulatory regime which operates under the New South Wales Anti-Discrimination Act 1977.

172 Supra note 142.
PART III – STATE/TERRITORIAL LEGISLATION
CHAPTER 7

INTRODUCTION TO EXAMINATION OF
STATE/TERRITORIAL LEGISLATION

1. INTRODUCTION

Section 18F of the Racial Discrimination Act 1975 (Cth) states that Part IIA of the Act “is not intended to exclude or limit the concurrent operation of any law of a State or Territory.” Therefore the racial vilification provisions added to the Racial Discrimination Act in 1995 (examined in Part II of this dissertation) did not supersede pre-existing state/territorial racial vilification laws nor did they prevent the subsequent enactment of racial vilification by state/territorial legislatures. Consequently, a comprehensive examination of the legislative regulation of racial vilification in Australia necessitates a review of the statutes which have been enacted by state/territorial legislatures.

Currently, racial vilification legislation operates in New South Wales, Western Australia, the Australian Capital Territory and South Australia.

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1 Section 18F of the Racial Discrimination Act 1975 (Cth) is designed to ensure that there is no question of inconsistency between the Commonwealth legislation and similar state legislation which might result in the invalidation of the state legislation under s 109 of the Australian Constitution. Section 109 of the Constitution provides that “When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid”. A provision like 18F of the Racial Discrimination Act 1975 (Cth) is included in Commonwealth legislation where the Commonwealth Parliament wants to make it clear that, in enacting the legislation, it has not intended to “cover the field”—a test of inconsistency adopted by the High Court: Clyde Engineering v Cowburn (1926) 37 CLR 466; Viskauskas v Niland (1983) 153 CLR 280; and University of Wollongong v Metwally (1984) 158 CLR 447. See P Hanks, Constitutional Law in Australia (Sydney: Butterworths, 2nd ed, 1996) at 267-279.
Queensland has not been included in this list, notwithstanding the inclusion of s 126 in the *Anti-Discrimination Act* 1991 (Qld), the state’s first comprehensive anti-discrimination statute. Section 126 provides that "a person must not, by advocating racial or religious hatred or hostility, incite unlawful discrimination or another contravention of the Act." This statutory offence falls outside the scope of the present study because it does not proscribe racial vilification as such. Rather it proscribes the incitement of unlawful discrimination where the method used to achieve this end involves the advocacy of racial or religious hatred or hostility.

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2 The maximum penalty is 35 penalty units (currently $2625) for an individual) and 170 penalty units ($12750) for a corporation. One penalty unit is $75: *Penalties and Sentences Act* 1992 (Qld).


4 In this respect s 126 of the *Anti-Discrimination Act* 1991 (Qld) resembles the very limited restrictions on particular forms of racist expression found in the majority of human rights statutes in Canada. For example, Section 18 of the Manitoba *Human Rights Code* 1987 provides that:

> No person shall publish, broadcast, circulate or publicly display, or cause to be published, broadcast, circulated or publicly displayed, any sign, symbol, notice or statement that
> (a) discriminates or indicates intention to discriminate in respect of an activity or undertaking to which this Code applies; or
> (b) incites, advocates or counsels discrimination in respect of an activity or undertaking to which this Code applies;

unless bona fide and reasonable cause exists for the discrimination.

Fair Practices Act 1988. A small number of complaints have been successfully lodged and pursued under these provisions (see Association of Black Social Workers v Art Plus (unreported, 29 March 1994, Nova Scotia Board of Inquiry); Kane et al v Church of Jesus Christ Christian-Aryan Nations (1992) 18 CHRR D/268 (Alberta Board of Inquiry); Rasheed and Black United Front of Nova Scotia v Bramhill (1981) 2 CHRR D/249 (Nova Scotia Board of Inquiry); Singer v Iwasyk (unreported, 5 November 1976, Saskatchewan Human Rights Commission). On other occasions the subject of the complaint has been held to fall outside the regulatory parameters given the narrow scope of the legislation and/or based on a narrow interpretation of the regulatory scope: see Lam v McCaw (unreported, 15 August 1977; Ontario Board of Inquiry); Levesque and Tardif v The Daily Gleaner and Smith (unreported, 3 June 1974, New Brunswick Board of Inquiry); Linklater et al v The Winnipeg Sun et al (1984) 5 CHRR D/2098 (Manitoba Board of Adjudication); and Ukrainian Canadian Professional and Business Association of Vancouver v Konyk and Winnipeg Garlic Sausage Co Ltd [1983] 6 WWR 204 (Supreme Court of British Columbia). Overall, these provisions have played a very minor role in the legislative regulation of racist expression. For example, s 13(1) of the Ontario Human Rights Code, which provides that “A right under [the Code] is infringed by a person who publishes or displays before the public or causes the publication or display before the public of any notice, sign, symbol, emblem, or other similar representation that indicates the intention of the person to infringe a right under [the Code] or that is intended by the person to incite the infringement of [such] a right”, has been described as “only useful in addressing a narrow range of circumstances that might fall within the general category of hate motivated activities” with the result that the Ontario Human Rights Code “... has a very limited capacity for dealing with hate propaganda.”: Personal communication (letter), Calvin Bernard, Acting Director, Ontario Human Rights Commission, 18 February 1994. An important practical consequence of the Code’s limited anti-hate laws is that complaints concerning hate propaganda are “typically referred by [Ontario Human Rights Commission] staff to the Ministry of Attorney General” for handling under the Canadian Criminal Code provisions: ibid.

A number of provinces have enacted broader statutes which regulate racial vilification per se, in terms generally equivalent to the scope of s 20C of the Anti-Discrimination Act 1977 (NSW), s 66 of the Discrimination Act 1991 (ACT) and s 37 of the Wrongs Act 1939 (SA): see s 14 of the Saskatchewan Human Rights Code 1979, s 7 of the British Columbia Human Rights Code 1996, and s 2 of the Alberta Human Rights, Citizenship and Multiculturalism Act 1996. Racial vilification was proscribed by provincial legislation in Manitoba between 1976 and 1987 (s 2 of the Human Rights Act 1974 as amended by the Human Rights Amendment Act 1976) but in 1987 this legislation was repealed and Manitoba reverted to the more common limited regulation of conduct which indicates intention to discriminate or which incites discrimination: s 18 of the Human Rights Code 1987. The Yukon Territory is the only Canadian jurisdiction where legislation currently proscribes neither racial vilification nor the even the narrow category of intention to/incitement of discrimination: see Yukon Human Rights Act 1986. Between 1963-1976 a narrow discrimination-based regulatory provision was in operation: s 5 of the Yukon Fair Practices Ordinance 1963.
No complaints received by the Queensland Anti-Discrimination Commission have been considered to satisfy the very high threshold established by s 126 and so no prosecutions have taken place.\(^5\) In 1996 the Queensland Anti-Discrimination Commissioner described s 126 as “effectively useless”.\(^6\) Given that s 126 is essentially concerned with the regulation of incitement to discrimination rather than racial vilification it will not be examined further in Part III of this dissertation.\(^7\)

No form of racial vilification legislation has been enacted in Victoria, Tasmania and the Northern Territory. In Victoria proposed legislation was tabled in the Victorian Parliament in 1992\(^8\) following recommendations from the Committee to

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\(^5\) Personal communication (letter), Zrinka Johnston, Queensland Anti-Discrimination Commissioner, 25 January 1994; personal communication (email), Robyn Cochran, Queensland Anti-Discrimination Commission, 16 September 1999.

\(^6\) J Briton, The Courier Mail, 2 October 1996, 8, quoted in B White “The Case for Criminal and Civil Sanctions in Queensland’s Racial Vilification Legislation” (1997) 13 Queensland University of Technology Law Journal 235 at 235. White has argued (ibid) that Queensland does not have effective racial vilification legislation. Its only provision related to hate speech, s 126 of the Anti-Discrimination Act 1991 (Qld), is poorly drafted and places an onerous burden of proof on the complainant. If Queensland is going to address the issue of racial vilification, then its hate speech provisions must be improved.

Specifically, White has recommended the adoption in Queensland of legislation which establishes civil and criminal regimes, the latter not limited only to “aggravated” forms of racial vilification (that is the NSW s 20D model) but extended also to “repeat offender[s] who refuse to stop their hate speech”: ibid at 246.

\(^7\) It might be considered that, adopting this rationale, s 20D of the Anti-Discrimination Act 1977 (NSW), s 67 of the Discrimination Act 1991 (ACT) and s 4 of the Racial Vilification Act 1996 (SA) should also be excluded from the present study in that they are primarily concerned with regulating threats of/incitement to personal violence and property damage. The key difference is that each of these statutory provisions forms part of a broader regulatory regime in the respective regime which is specifically concerned with racial vilification per se. Failure to consider the regulation of aggravated racial vilification in these jurisdictions would result in a distortion and misrepresentation of the regulatory regime currently in operation in those jurisdictions.

Advise the Attorney-General on Racial Vilification. However, the Racial and Religious Vilification Bill 1992 lapsed with the election of a Liberal Government which decided not to proceed with the enactment of racial vilification legislation. Racial vilification provisions were not included in the *Equal Opportunity Act* 1995 (Vic). It remains to be seen whether the newly elected Labor Government (October 1999) will move to reintroduce racial vilification legislation into the Victorian Parliament. There is likely to be considerably less pressure on the new government to do so since the enactment of national legislation in 1995, although the South Australian experience (discussed in chapter 12) suggests that state legislatures may still be motivated to pass their own racial vilification legislation, notwithstanding the existence of a national regulatory regime.

In recent years both the Northern Territory and Tasmania have enacted the respective jurisdiction's first anti-discrimination statutes, but neither statute contains racial vilification provisions.

Of those state/territorial jurisdictions that *have* enacted racial vilification legislation, the majority of these statutes (those enacted in New South Wales, 1992) 5 *Without Prejudice* 20; and R Merkel, “Racial and Religious Vilification Law: Creating One Problem Without Solving Another” (1992) 8(3) *Civil Liberty* 10. See also Commissioner for Equal Opportunity, Victoria, “Would Victoria Be a Fairer Place if Racial Vilification was Unlawful?” A Forum held by the Commissioner for Equal Opportunity, Victoria, sponsored by the Law Foundation of Victoria (21 June 1989).

9 Committee to Advise the Attorney-General on Racial Vilification, Racial Vilification in Victoria (Melbourne, March 1992).

10 Personal communication (letter), Margaret Pitt, Manager, Executive Office, Department of Justice Victoria, 21 January 1994.


12 Tasmania's legislation applies only to sex discrimination; it does not extend to racial discrimination or vilification: *Sex Discrimination Act* 1995 (Tas).

13 *Anti-Discrimination Act* 1977 (NSW), ss20C-20D (as amended by the *Anti-Discrimination (Racial Vilification) Amendment Act* 1989 (NSW)).
Western Australia, and the Australian Capital Territory, were enacted prior to the enactment of the Racial Hatred Act 1995 (Cth). Only the South Australian legislation was enacted after the enactment of federal legislation. This distinction is significant because, as will be discussed later in chapter 11, one of the major influences on the shape of the regulatory framework established by the Racial Vilification Act 1996 (Cth) was the objective of complementing rather than duplicating the human rights complaint-based racial vilification provisions added to the Racial Discrimination Act 1975 (Cth).

In the case of the other state/territorial regulatory regimes the degree of overlap and compatibility with the federal legislation varies from statute to statute. Indeed, one of the most immediately striking insights to emerge from a comparative examination of state/territorial statutes is that a diversity of legislative models have been adopted in pursuit of the objective of the regulation of racial vilification. With the exception of ss 66-67 of the Discrimination Act 1991 (ACT) (which are practically identical to ss 20C-20D of the Anti-Discrimination Act 1977 (NSW)), each of the statutes adopts a substantially different approach to the regulation of racial vilification, both in terms of the regulatory scope of the legislation (that is, the definition of racial vilification that is proscribed as unlawful—the regulated 'sub-set' of the conduct defined in chapter 2 as coming within the term racial vilification), and the enforcement mechanism. Three different enforcement mechanisms for the regulation of racial vilification have been established at the state/territorial level:

14 Criminal Code 1913, ss77-80 (as amended by the Criminal Code Amendment (Racist Harassment and Incitement to Racial Hatred) Act 1990 (WA)).
(i) a civil human rights ground of complaint (enforceable via conciliation/adjudication) combined with a criminal offence of aggravated racial vilification (New South Wales and the Australian Capital Territory);

(ii) a series of narrowly defined racial vilification criminal offences (Western Australia);

(iii) a statutory tort of racial vilification (enforceable by civil suit) combined with a criminal offence of aggravated racial vilification (South Australia).

The rationale for, and significance of, these three approaches will be critically examined in the chapters that follow in this Part. In particular, the implications of the fact that the legislatures of three Australian states have established three quite different legislative regimes for the regulation of racial vilification—demonstrating a lack of consensus on the most appropriate approach to legally regulating this particular form of anti-social behaviour—will be examined.

Part III of this thesis, then, will present a comprehensive analysis of all racial vilification statutes enacted by state and territorial legislatures in Australia. Statutes will be examined in the chronological order in which they were enacted. Essentially the same structure that was adopted in Part II for analysing the racial vilification provisions of the Commonwealth Racial Discrimination Act 1975 will be utilised for the examination of each of the relevant state/territorial provisions: the background to the legislation will be considered, including a discussion of motivating incidents, relevant inquiries and reports and legislative history; an analysis of the key features of the regulatory framework and an analysis of the way in which free speech sensitivity and other factors impacted on the regulatory form ultimately adopted, as reflected in the parliamentary debates; and an examination of the operation of the
legislation including a review of relevant statistical data and tribunal/court decisions, focusing on what is revealed about the significance of the particular regulatory approach adopted and the impact of free speech sensitivity.

In the analysis of the operation of racial vilification legislation particular attention (and two chapters) will be focused on New South Wales because, for a variety of reasons, this state jurisdiction provides the richest source of data on the operation of racial vilification legislation in Australia. New South Wales' racial vilification legislation is the oldest of all Australian racial vilification statutes, has been invoked far more frequently than any other regulatory regime and is the only state/territorial legislation to have resulted in formal adjudications by a quasi-judicial tribunal. Chapter 8 examines the nature of the regulatory approach adopted in New South Wales when the *Anti-Discrimination Act* 1977 (NSW) was amended in 1989 with the enactment by the New South Wales Parliament of the *Anti-Discrimination (Racial Vilification) Amendment Act* 1989 (NSW). Chapter 9 reviews the practical operation of these legislative provisions in the last decade, focusing on the complaint-handling process administered by the New South Wales Anti-Discrimination, and the determination of complaints by the Equal Opportunity Tribunal and the Administrative Decisions Tribunal (Equal Opportunity Division).  

Because the racial vilification provisions of the Australian Capital Territory’s *Discrimination Act* 1991 essentially replicate the NSW legislation and examination of the nature and operation of the regulatory approach which operates in the ACT will be offered within chapters 8 and 9 rather than in a separate chapter.

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17 In October 1998 the Equal Opportunity Tribunal was replaced by the Administrative Decisions Tribunal (Equal Opportunity Division).
Chapter 10 reviews the origins, regulatory scope and operation of the racist incitement and racial harassment provisions (ss 77-80) of the Western Australian Criminal Code 1913, where the regulatory approach is a combination of a very narrow definition of the proscribed conduct and an exclusive reliance on criminal law enforcement.

Chapter 11 examines the most recent addition to the list of racial vilification laws in Australia: the South Australian Racial Vilification Act 1996. The regulatory approach preferred by the South Australian Parliament adds a new dimension to the range of approaches to the regulation of racial vilification in Australia. Like the approach adopted in New South Wales and the ACT, the South Australian legislation adopted a multi-pronged approach. However, South Australia has taken a unique approach to the creation of a civil regulatory regime, declining to establish a ground of complaint enforceable within a specialist civil human rights enforcement system, preferring the creation of a statutory tort justiciable through the conventional civil court system.

Throughout these chapters, the factors that have influenced the various state/territorial regulatory approaches will be considered. In particular, the role that free speech sensitivity has played in the formulation of the relevant legislation will be assessed. The practical significance of the respective statutory regimes from the point of view of effective regulation of racial vilification will also be examined.
CHAPTER 8

PART 2, DIVISION 3A OF THE ANTIDISCRIMINATION ACT 1977—THE NATURE OF THE REGULATORY APPROACH

1. INTRODUCTION

Both in terms of the number of years for which it has been in operation, as well of the volume of cases formally handled, the New South Wales legislative regime for the regulation of racial vilification is, arguably, the most extensive form of legislative regulation currently in operation in Australia. In combination with the racial vilification provisions of the Racial Discrimination Act 1975 (Cth), the racial vilification provisions of the Anti-Discrimination Act 1977 (NSW) have established the civil human rights regulatory approach as the most prominent form of legal regulation in Australia. The purpose of this chapter is to outline and examine the nature of Australia’s first legislative regime for the regulation of racial vilification, focusing on identifying and analysing the factors which have influenced the adoption of this particular approach.

Section 2 outlines the background to the enactment of racial vilification legislation in New South Wales in 1989, including a discussion of the impact of concerns about the activities of organised racist groups, and a discussion of the 1987 bill which was the precursor to the legislation ultimately enacted, and which controversially proposed the extension of protection against racial vilification to minority ethnic groups only. Section 3 examines the impact of free speech sensitivity and other factors on the form in which racial vilification legislation was ultimately
enacted in New South Wales with the enactment of the *Anti-Discrimination (Racial Vilification) Amendment Act* 1989 (NSW). Section 4 will describe and analyse the regulatory regime which currently operates under Part 2, Division 3A of the *Anti-Discrimination Act* 1977 (NSW), focusing on the scope of the conduct defined as unlawful and the nature of the civil human rights enforcement.

2. BACKGROUND

2.1 Racist Activity

During the mid-late 1980s the activities of right-wing racist organisations, particularly National Action, attracted media attention and became a cause of political concern.1 Racist comments by media commentators (such as radio announcer, Ron Casey) also generated controversy.2 Recognition of the limitations of existing criminal law and anti-discrimination law, prompted calls (including from the ADB which administered the *Anti-Discrimination Act* 1977 (NSW)), 3 for the enactment of legislation specifically directed at the regulation of racial vilification and racist violence.

During the second reading debate in the New South Wales Parliament’s Legislative Council on the *Anti-Discrimination (Racial Vilification) Amendment Act* 1989 (NSW), Liberal Party MLC Mr Samios outlined the sorts of incidents which had prompted the Parliament to pass legislation rendering racial vilification unlawful:

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2 See Liberal Party MLC Helen Sham-Ho, New South Wales Hansard (Legislative Council), 10 May 1989, p 7818; and ALP MLC Ian McDonald, *ibid* at 7823.
Today social tensions based on the miasma—the foul stench—of racism are manifesting themselves in a more strident manner based on positive racial vilification that challenges the multi-cultural nature and social cohesion of our society. Examples may be found in an article in the Sunday Telegraph of 23rd April which refers to events in New South Wales, mainly in Sydney, in recent months. Jewish schools in Sydney’s eastern suburbs have been fire bombed. Jewish shopkeepers have had yellow stickers with the word “Jew” plastered in their door. Real estate agents on Sydney’s north shore have received death threats because they sold properties to Asian families. An Italian girl was badly beaten because she had an Asian boyfriend. A homosexual group meeting was raised by 10 men dressed in black and wearing balaclavas. A Liberal party meeting honouring the State’s first Asian member of Parliament, who is here this evening, the Hon Helen Sham-Ho, a Liberal party member of the coalition team, was stormed and its guests were terrorized. A store dummy was set alight outside the home of an outspoken church leader, the Reverend Dorothy McMahon, who had preached against hate. Her parishioners were followed home and had their tyres slashed and their windows smashed, and paint was daubed on the doors of their houses. A floating Chinese restaurant was attacked and had bottles hurled through its windows.4

In her contribution to the debate in the Legislative Council Helen Sham-Ho MLC described the conduct of the National Action members who interrupted the Liberal party function at which she was the guest speaker:

The topic of my speech was multiculturalism and a non-discriminatory immigration policy. The members of National Action distributed pamphlets that advocated racist policies and opposed multiculturalism. They marched round us and chanted, ‘Death to Sham-Ho’, and ‘Shame on you, Sham-Ho’. Their threatened physical use of violence and intimidation were most objectionable. I was scared and shocked.5

The activities of organised racist groups do not, of course, constitute the sum total of the incidence of racial vilification. However, the high profile and often extreme nature of the type of racial vilification engaged in by such organisations has been a

4 New South Wales Hansard (Legislative Council), 10 May 1989, p 7815. See also, the speech of Mr McDonald MLC, which describes the racist campaign of violence and intimidation which were waged on a number of years by National Action against anti-racism activists including Reverend Dorothy McMahon of the Pitt Street Uniting Church, and Bronwyn Ridgway of the Combined Union Against Racism: ibid at 7821.
significant motivation for the legislative regulation of racial vilification, not only in New South Wales, but also in Western Australia\(^6\) and South Australia.\(^7\) This factor has clearly had an influence on the shape of the regulatory regimes established, but this influence has varied from jurisdiction to jurisdiction.\(^8\)

### 2.2 Legislative History

#### 2.2.1 The 1987 Bill

In response to concerns about the level and seriousness of racial vilification, in November 1987 the Anti-Discrimination (Amendment) Bill was introduced into the New South Wales Parliament by the then Labor Government. The bill proposed an amendment the *Anti-Discrimination Act 1977* (NSW) to render unlawful the vilification of “minority groups” and to allow for the making of complaints to the New South Wales Anti Discrimination Board.

Section 4(1) of the Bill defined “minority group” as:

> A group of people within New South Wales who are members of that group because of their race or the possession in common of linguistic, religious, social or cultural features and who are numerically inferior to the rest of the population of New South Wales and in a non-dominant position.

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\(^5\) *Ibid* at 7819.

\(^6\) See chapter 10 of this thesis.

\(^7\) See chapter 11 of this thesis.

\(^8\) When compared with the role it has played at the state level, concern over the activities of racist organisations was a relatively minor influence on the *Racial Hatred Act 1995* (Cth): see, eg, ALP Senator Chris Evans, Commonwealth Hansard (Senate), 23 August 1995, pp 224, 226-227; and chapter 5 of this thesis. This is to be expected—the activities of such groups is usually localised and state legislation is, by its nature, more likely to be a response to local factors: see chapter 3 of this thesis.
Section 20B(1) defined the public acts directed at minority groups which would be rendered unlawful by the proposed legislation. They were:

- causing or threatening physical harm to person or property;\textsuperscript{9}
- engaging in any act of intimidation;\textsuperscript{10}
- promotion or expression of hatred, serious contempt or severe ridicule;\textsuperscript{12}
- exposure to hatred, serious contempt or severe ridicule.\textsuperscript{13}

Section 20B(3) of the Bill proposed a range of defences designed to ensure that the regulatory coverage did not extend to acts "done reasonably and in good faith, for academic, scientific, research or religious purposes or for other purposes in the public interest" or "fair reports" of acts of racial vilification.\textsuperscript{14} In explaining the nature of, and rationale for these defences, Mr Aquilina emphasised that:

... it is not the Government's intention through this legislation to place a fetter in the rights of free speech of the citizens of this State. Accordingly, careful consideration has been given to conduct which would not amount to serious vilification. A number of defences have been included in the proposed legislation.\textsuperscript{15}

This particular 'take' on the relationship between free speech and the legislative regulation of racial vilification—that the latter has no impact on the enjoyment of the former—is a common theme of comments from some proponents of racial vilification.

\textsuperscript{9} The 1987 Bill was limited to public acts in the same was as the legislation ultimately enacted in 1989: see infra note 51 (corresponding text).
\textsuperscript{10} Anti-Discrimination (Amendment) Bill, s 20B(1)(a).
\textsuperscript{11} Anti-Discrimination (Amendment) Bill, s 20B(1)(b).
\textsuperscript{12} Anti-Discrimination (Amendment) Bill, s 20B(1)(c).
\textsuperscript{13} Anti-Discrimination (Amendment) Bill, s 20B(1)(d).
\textsuperscript{14} This provision was in the same terms as the current s 20C(2) of the Anti-Discrimination Act 1977 (NSW): see infra note 57 (corresponding text).
\textsuperscript{15} New South Wales Hansard (Legislative Assembly), 20 November 1987, p 16731.
legislation, and recurs regularly in legislative debates on racial vilification legislation in
Australia.\textsuperscript{16} It is strictly, of course, an inaccurate characterisation of the relationship:
racial legislation is specifically designed to constrain expression of particular types. However, what such assertions usually reveal is that the maker believes the degree of
constraint is acceptable and desirable. However, the manner in which this judgment is
commonly expressed (ie, that the model of legislative regulation of racial vilification
adopted in a particular jurisdiction has no free speech implications) is further
evidence of the malleable and ill-defined nature of the notion of free speech under
Australian law. Where legislators speak of a particular legislative regime having no
impact on free speech there is an implicit judgment being made about the scope of the
definition of speech which should remain ‘free’.

Just as the absence of an agreed definition of free speech under Australian law
has allowed some opponents of legislative regulation to draw on a very broad or
absolutist conception of free speech, so too can the lack of definition be
‘manipulated’ by proponents of legislative regulation who therefore define free
speech in narrow or restricted speech so as to marginalise free speech concerns on the
basis that the proposed regulatory system will have no impact on this (narrowly
defined) sub-set of expressions. The concept of ‘free speech’ is then, highly
relative—it is that expression which is untouched or normatively untouchable by
legislative restrictions. The malleability of the concept of free speech in Australia
was clearly evident in the debate over the Racial Hatred Bill 1994/Racial Hatred Act
1995, and, as will be discussed throughout Part III, is also evident in the discourse
over state/territorial racial vilification legislation.

\textsuperscript{16} See the analysis of the parliamentary debate leading to the enactment of the \textit{Racial Vilification Act} 1996 (SA) in chapter 11 of this thesis.
Perhaps the most significant procedural feature of the enforcement regime proposed by the 1987 Bill was that, under s 88, complaints of a breach of 20B could be lodged with the President of the ADB not only by an individual, but also by a minority representative group (as defined in s 87 of the Bill\textsuperscript{17}). A representative group would have standing to lodge a complaint in relation to both complaints of vilification and discrimination. During the second reading speech on the Anti-Discrimination (Amendment) Bill 1987 the Minister for Youth and Community Services and Assistant Minister for Ethnic Affairs explained the rationale for this move:

It is clear that many individuals who are suffering racial discrimination require the practical support of their own community and community organizations to enforce their rights. The Government is aware of cases where Aboriginal people or people of non-English speaking background have been reluctant to pursue their rights ... because they do not speak English or they are afraid of approaching government organizations, or are afraid of reprisal to themselves or to their families. ... Various cultural values may give rise also to a need for some organizations to rely on and work closely with their community organizations when asserting those rights. This measure will overcome these hurdles. An individual will now be able to entrust his or her feelings and share his or her hurt.\textsuperscript{18}

The option of a representative complaint was particularly appropriate in the case of vilification where the conduct in question is commonly directed generally at an ethnic/racial group rather than at a particular individual, in contrast to discrimination matters. As discussed below, the legislation ultimately enacted limited the availability of the representative complaint mechanism option for vilification complaints without extending this option to discrimination also, as originally proposed in the 1987 Bill.

\textsuperscript{17} Anti-Discrimination (Amendment) Bill, s 4(1) (discussed above).
\textsuperscript{18} New South Wales Hansard (Legislative Assembly), 20 November 1987, p 16729.
The significance of the representative complaint option for the practical operation of the racial vilification regulatory regime will be examined in chapter 9.

Under the 1987 bill it was proposed that vilification complaints would be handled in the same way as discrimination complaints under the *Anti-Discrimination Act 1977* (NSW). That is, an attempt would be made to resolve the complaint by conciliation. If this was ineffective or considered to be inappropriate the complaint could be referred to the EOT for hearing and determination.

A more detailed discussion and analysis of the complaint handling/regulatory enforcement process is provided below in relation to the current racial vilification legislation in NSW. Here, attention will be focused on the key features of the 1987 Bill and main points of distinctive vis-à-vis the 1989 Bill/Act.

First, the 1987 Bill did not propose the criminalisation of any forms of racial vilification. It relied exclusively on the existing civil human rights complaint-handling apparatus of the New South Wales Anti-Discrimination Board (ADB)/EOT as the legal framework for the regulation of racial vilification. During the bill’s second reading speech the Minister for Youth and Community Services and Assistant Minster for Ethnic Affairs, Mr Aquilina, (who introduced the bill on behalf of the Premier, Barry Unsworth), noted that:

This bill is the first attempt by any government in Australia to tackle the problem of racial vilification. Great Britain, New Zealand, Canada and two states of the United States of America—Illinois and Rhode Island—have already introduced legislation dealing with racial vilification. However, though some of these jurisdictions regard such issues as incitement to racist hatred as a criminal offence, the Government does not believe that is the way to overcome the problem of racial vilification. That is why the measures in this bill are based on conciliation and education.
Mr Aquilina explained that complaints under the proposed legislation would be handled by the ADB which would “use the existing investigation and conciliation framework and attempt to conciliate all complaints of racial vilification before a complaint will be referred to the Equal Opportunity Tribunal.”\(^\text{20}\) It is unfortunate that the Minister did not articulate the basis on which this judgment about the most appropriate regulatory mechanism was made. What it is about the conduct of racial vilification that renders conciliation and education appropriate regulatory mechanisms and criminalisation an inappropriate regulatory mechanism is not articulated.

As will be discussed below, the approach adopted in the 1987 Bill—a preference for conciliation-based resolution and a disinclination to rely on criminal prosecution as the legal mechanism for regulating racial vilification was retained in the 1989 legislation. In combination with the shape in which Commonwealth legislation emerged, the NSW experience has seen this pattern emerge as a defining feature of Australian approaches to the legislative regulation of racial vilification.

Second, all forms of racial vilification, including those which involved actual or threatened physical harm\(^\text{21}\) would be handled using the same regulatory process: civil human rights conciliation quasi-judicial adjudication. Given that threats of harm or actual harm were already criminal offences,\(^\text{22}\) the proposal that serious racial vilification could be regulated using the informal conciliation-based methods of the civil human rights system was surprising and carried the problematic implication that

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\(^{19}\) Ibid at 16732. The racial vilification provisions of the Canadian *Criminal Code* RSC 1990, c C-46 are examined in chapter 10 of this thesis.
\(^{20}\) New South Wales Hansard (Legislative Assembly), 20 November 1987, p 16731.
\(^{21}\) Under s 20B(1)(a) of the 1987 Bill “to cause or threaten physical harm towards, or towards any property of, a minority group or members of a minority group” constituted unlawful vilification.
racially-motivated threats or actual harm could be legitimately regulated in manner widely considered to be a less onerous form of regulation (for the alleged offender) than criminal prosecution.

Third, the 1987 Bill only regulated vilification of minority groups; it do not render unlawful the vilification of majority racial or ethnic groups (such as the Anglo-Celtic population of New South Wales). This approach to the regulation of racial vilification has been described as “one-way” or “asymmetrical” regulation. The primary rationale for this approach is that the harm of racial vilification is greater when it is directed at groups who have traditionally or most seriously been the targets and victims of racial vilification, and in relation to whom the need for protection is greater and, therefore, the case for legal regulation is more compelling.

Another valid argument, advanced by Sadurski, is that:


group-based insults, such as racist epithets ... are social constructs, and they acquire their meaning from social contacts. Their contexts are characterized by past and present discrimination, domination and stereotyping. What makes a given statement ‘racist’ is that it directly relies upon the resources of discrimination, domination and stereotyping. ‘Words’ themselves do not ‘wound’; what does wound is the fact that some words come in a package recognizable both by the speakers and the hearers as conveying contempt, hostility and domination. ... [Racist hate speech ... can be defined only in a context-sensitive way, and the relevant context focuses on the place of the

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22 See Crimes Act 1900 (NSW) Part 3 Offences Against the Person.
25 Sadurski argues for the regulation of only a narrow subset of conduct defined in chapter 2 of this thesis as racial vilification—that is, speech which constitutes “fighting words”: supra note 23 at 116.
victims in the overall pattern of discrimination, stigmatizing and powerlessness.  

During the bill’s second reading Mr Aquilina explained that the proposed legislation would only render unlawful vilification of minority groups because:

[the Government believes that majority groups do not suffer from racial discrimination in the same way as minority groups. Therefore the measures will allow only racial minority groups to bring complaints concerning racial vilification.]

The ‘one-way’ nature of the proposed regulatory regime was one of the most controversial aspects of the 1987 Bill. While it was motivated by a realistic assessment of the nature of racism in New South Wales (including which groups are most likely to be the subject of harmful racial vilification) it was considered to demonstrate a biased, even discriminatory, approach to the regulation of racial vilification. That the legislative framework for this form of regulation would be the *Anti-Discrimination Act*—which was, of course, based in the principle of non-discrimination—made this perceived anomaly even more acute. The regulation of racial discrimination was not limited to minority groups and so it was seen as both illogical and unfair to deny ‘majority’ ethnic groups the protection of racial

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26 *Ibid* at 117-118.
27 New South Wales Hansard (Legislative Assembly), 20 November 1987, p 16730.
28 At the time, s 4 of the *Anti-Discrimination Act 1977* (NSW) provided that “‘race’ includes colour, nationality and ethnic or national origin”. (The definition has subsequently been expanded to include ethno-religious identity: see *infra* note 49 (corresponding text).) During the second reading speech on the 1987 Bill, Mr Aquilina argued that the bill’s extension of protection to minority groups only was “entirely within the spirit of the Anti-Discrimination Act, which allows minorities such as homosexuals and the disabled to complain, rather than heterosexuals and the able, respectively”: New South Wales Hansard (Legislative Assembly), 20 November 1987, p 16730. However, these analogies fail to explain why it was proposed that protection against vilification would be limited to “minority” racial groups while the
vilification legislation, notwithstanding that there was little evidence that such groups were in need of protection.\(^{29}\)

Finally, the definition of unlawful vilification of a minority groups under the 1987 Bill included, but was not limited to, the conduct was intended or likely to have the effect of inciting others to hold or demonstrate ill-feeling towards the racial/ethnic group in question. The mere expression of "hatred, serious contempt or severe ridicule" would be unlawful under the proposed legislation.

During the second reading speech Mr Aquilina indicated that the Government was open to the possibility that the bill could be improved prior to enactment via incorporation of "constructive amendments that ... emerge in the course of debate in Parliament and from discussion by the community at large."\(^{30}\) However, the Bill lapsed when Parliament was prorogued for the 1998 NSW state election.

During the election campaign both the Australian Labor Party and the Liberal Party-National Party Coalition promised to introduce racial vilification if elected. A Liberal-National Coalition Government led by Premier Nick Greiner was elected.

3. THE \textit{ANTI-DISCRIMINATION (RACIAL VILIFICATION) AMENDMENT ACT 1989 (NSW)}

3.1 Introduction

In May 1989 the Liberal-Coalition Government introduced the Anti-Discrimination (Racial Vilification) Amendment Bill into the New South Wales Parliament. During existing protection against discrimination applied to all racial groups: \textit{Anti-Discrimination Act 1977 (NSW)} s 7(1).

\(^{29}\) However, surprisingly, persons of Anglo-Celtic ethnicity have constituted a significant proportion of racial vilification complainants under s 20C of the \textit{Anti-Discrimination Act 1977 (NSW)}. See chapter 9 of this thesis.
the second reading speech in the Legislative Assembly, Attorney General, Mr Dowd, noted that "... the issue of racial vilification or incitement to racial hatred has been the subject of debate in New South Wales and in the federal sphere for more than a decade. It has been the concern of successive governments." Like the 1987 Bill the 1989 Bill proposed to amend the *Anti-Discrimination Act* to regulate racial vilification. There were, however, a number of significant differences in the regulatory approach adopted in the 1989 Bill. Most significantly the bill proposed that the vilification of all racial/ethnic groups would be unlawful—protection was not limited to minority groups. In addition, as well as proposing the creation of a civil human rights ground of complaint of racial vilification, the bill provided for the creation of a criminal offence of serious racial vilification.

In one important respect, the scope of the 1989 bill was narrower than its 1987 predecessor. The definition of unlawful racial vilification under the 1989 Bill required that the conduct in question must *incite* hatred, serious contempt or severe ridicule: a higher threshold than the requirement in the 1987 Bill which proposed that the mere *expression* of hatred, serious contempt or severe ridicule would be unlawful under the proposed legislation.

The 1989 bill received bipartisan support and was passed on 10 May 1989. The *Anti-Discrimination (Racial Vilification) Amendment Act* 1989 (NSW) came into operation on 1 October 1989.

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30 New South Wales Hansard (Legislative Assembly), 20 November 1987, p 16731.
31 New South Wales Hansard (Legislative Assembly), 4 May 1989, p 7488; see also Mr Pickering, Minister for Police and Emergency Services, New South Wales (Legislative Council), 10 May 1989, p 7810.
3.2 The Impact of Free Speech Sensitivity on the Shape of the Legislation

In stark contrast to the party-line division over the Racial Hatred Act 1995 in the Commonwealth Parliament, the Anti-Discrimination (Racial Vilification) Amendment Act 1989 (NSW) received bipartisan and (with one exception)\(^{32}\) unanimous support in the New South Wales Parliament. Consequently there was very little debate in the legislature. The most significant reason for the absence of disagreement was that, on the issue of the legislation’s implications for free speech, both the NSW Government and Opposition concluded that the legislation struck an acceptable balance between the objective of providing protection to victims of racial vilification and the objective of respecting free speech. During the second reading speech in the Legislative Assembly of the New South Wales Parliament, Attorney General Mr Dowd indicated that the bill had been prepared with an awareness that:

> legislation against racial vilification must involve a balancing of the right to free speech and the right to a dignified and peaceful existence free from racist harassment and vilification.\(^{33}\)

Liberal Party MLA, Mr Zammit, noted that the legislation had been drafted so as to “guarantee that ... freedom of expression is maintained”\(^{34}\) and so “civil libertarians need have no fears or concerns.”\(^{35}\) In the Legislative Council, Liberal Party MLC Ms Bignold opposed the legislation on the basis that it was an “unnecessary addition” to existing state and federal racial discrimination law, criminal laws dealing with violence and threats and defamation laws, and that it would be counterproductive, causing disharmony and emphasis on racial differences:

\(^{32}\) Call to Australia Party MLC Ms Bignold opposed the legislation on the basis that it was an “unnecessary addition” to existing state and federal racial discrimination law, criminal laws dealing with violence and threats and defamation laws, and that it would be counterproductive, causing disharmony and emphasis on racial differences: New South Wales Hansard (Legislative Council), 10 May 1989, p 7837.

\(^{33}\) New South Wales Hansard (Legislative Assembly), 4 May 1989, p 7488; see also Mr Pickering, Minister for Police and Emergency Services, New South Wales Hansard (Legislative Council), 10 May 1989, p 7810.

\(^{34}\) New South Wales Hansard (Legislative Assembly), 10 May 1989, p 7923.

\(^{35}\) Ibid at 7924.
Samios asserted that “The measures in this bill are not meant to be a clog on free speech. Rather, they are meant to provide us with parameters that will further ensure fair speech—the fair speech that is the heritage of all Australians.”

From the other side of the chamber there was equal confidence that the proposed legislation was not a threat to free speech. The then Leader of the ALP Opposition (now Premier) Mr Carr observed that:

In considering this legislation the Parliament is being asked to strike a balance; a curb on the freedom of expression on the one hand, with the right of an individual to build his or her life in an atmosphere of mutual tolerance, understanding and respect on the other hand. That is the kind of balance which has challenged democratic societies for hundreds of years. Canada, Belgium, New Zealand and Great Britain have been willing to limit that freedom of expression to the extent that it is necessary to protect the intricate fabrics of their society and the equal opportunities of all their members. Freedom of expression in those countries does not appear to have suffered.

Fellow ALP MLA, Mr Newman, expressed the view that:

I am sure that the ethnic communities of this State, and all notable groups, will regard the amending legislation not as a repressive law on the freedom of speech but as a conciliatory, educational guide to ensure that anti-discrimination safeguards are provided for people from all walks of life. ... The Opposition supports completely the freedom of speech of all Australians, new and old, and the right of all people to live in racial harmony.

In the Legislative Council ALP MLC Mr Kaldis stated that”

... it came as no surprise to me to learn that a few organizations expressed opposition to the bill, claiming that the new would restrict free speech. I do not believe that free speech will be affected by the passing of this law. I do not believe that free speech will be restricted if we prohibit acts that incite racial hatred and vilification. I do not believe that free speech will be restricted if we

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36 New South Wales Hansard (Legislative Council), 10 May 1989, p 7817.
37 New South Wales Hansard (Legislative Assembly), 10 May 1989, pp7921-7922; see also Mr Kaldis MLC, New South Wales Hansard (Legislative Council), 10 May 1989, p 7814.
38 New South Wales Hansard (Legislative Assembly), 10 May 1989, p 7928.
attempt to protect victims of racism. After all, the bill makes provision for exceptions.\(^39\)

Of course, as the final observation made by Mr Kaldis suggests, the fact that there was broad support for the legislation and satisfaction that the legislation did not interfere inappropriately with free speech, does not mean that free speech sensitivity had no impact on the shape of the regulatory regime. The most significant manifestation of free speech sensitivity in the legislation is the inclusion of a list of exceptions or defences.\(^40\) During the second reading speech in the Legislative Assembly the Attorney General, Mr Dowd, explained that “these exceptions have been included in the bill to achieve a balance between the right to free speech and the right to an existence free from racial vilification and its attendant harms.”\(^41\) Significantly, the Attorney added that requirements of “reasonableness” and “good faith” had been included to “the possibility of undue reliance by potential respondents on these exceptions …”\(^42\)

It is also important to observe that the regulatory model established by the legislation (with a primary emphasis on conciliation) was adopted with concern for minimal intrusion on free speech. During the course of the second reading debate Coalition MLC Mr Samios, observed that “the Bill, by providing a package of reliefs, draws on overseas experience, and by including the conciliatory process and civil and criminal sanctions is a moderate and balanced approach to the vexatious issue of racism.”\(^43\) Thus, the (assumed) centrality of conciliation to the civil human rights

\(^{39}\) New South Wales Hansard (Legislative Council), 10 May 1989, p 7813.
\(^{40}\) *Anti-Discrimination Act 1977* (NSW), s 20C(2) (discussed below).
\(^{41}\) New South Wales Hansard (Legislative Assembly), 4 May 1989, p 7490.
\(^{42}\) *Ibid*.
\(^{43}\) New South Wales Hansard (Legislative Council), 10 May 1989, p 7816 (emphasis added).
regulatory model is identified as an argument in support of the ability to regulate racial vilification using this particular model, with sensitivity to free speech. Support for this analysis of the influence of free speech sensitivity on the shape of the NSW regulatory regime is found in the analysis advanced by Cha’ng’s that concern for the free speech implications of regulation led the ADB to recommend that the legislation should not rely exclusively on criminal law for the regulation of racial vilification per se:

Prior to enactment of the racial vilification law, certain ethnic community organizations argued that only criminal sanctions would satisfactorily curtail racial extremists. However, widespread concern for the preservation of civil liberties in general and freedom of speech in particular, led the ADB to conclude that if only criminal sanctions for racial vilification were available, a community backlash would likely result. Summarizing the experience of the United Kingdom, New Zealand and Canada, where racial vilification is treated as a criminal offence only, the ADB stated that: “present enforcement problems, particularly where complaints are investigated by the police, lead to a tendency towards narrow interpretation by the courts; and reveal a general reluctance to convict.”  

S Ch’ang, “Legislating Against Racism: Racial Vilification Laws in New South Wales” in S Coliver (ed), Striking A Balance: Hate Speech, Freedom of Expression and Non-Discrimination (London and Colchester: Article 19, International Centre Against Censorship and Human Rights Centre, University of Essex, 1992) 87 at 99, quoting from NSW Anti-Discrimination Board, Proposal to Amend the Anti-Discrimination Act to Render Racial Vilification Unlawful (July 1988). The suggestion that the countries mentioned by Ch’ang rely exclusively on the criminal law to regulate racial vilification is misleading. For example, in addition to the racial vilification provisions of the Canadian Criminal Code RSC 1990, c C-46 (see chapter 10 of this thesis) various forms of racial vilification are regulated by civil legislation federally and in a number of provinces: see chapter 7 of this thesis. The other point worth noting about the analysis offered by Ch’ang is that the tendency towards narrow judicial interpretation of racial vilification legislation is not limited to criminal legislation. In chapter 6 of this thesis, a similar tendency was noted in the quasi-judicial interpretation of Part IIA of the Racial Discrimination Act 1975 (Cth). Whether the same tendency can be observed in the interpretation of the civil human rights provisions of the Anti-Discrimination Act 1977 (NSW) will be examined in chapter 9 of this thesis.
The practical implications of this preference for non-criminal modes of regulation will be considered in chapter 9 of this thesis. First, however, the nature of the regulatory regime established by the *Anti-Discrimination (Racial Vilification) Amendment Act* 1989 (NSW) will be examined in more detail.

4. THE REGULATORY REGIME ESTABLISHED BY DIVISION 3A OF PART 2 OF THE *ANTI-DISCRIMINATION ACT* 1977 (NSW)

4.1 Introduction

The *Anti-Discrimination (Racial Vilification) Amendment Act* 1989 (NSW) amended the *Anti-Discrimination Act* 1977 (NSW) by adding a new Division 3A to Part 2 of the Act. The legislative amendments established a two tiered approach to the regulation of racial vilification:

- a ground of complaint enforceable in the specialist civil human rights system constituted by the ADB and the EOT (now the Administrative Decisions Tribunal (Equal Opportunity Division));

- a criminal offence of serious racial vilification (that is, vilification aggravated by a threat of personal violence or property damage) to be prosecuted in the conventional criminal justice system but procedurally ‘linked’ to the complaint-based civil human rights system.

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45 See chapter 7, *supra* note 17.
4.2 The Scope of the Legislation

4.2.1 Section 20C

The first limb of the regulatory regime established by the Anti-Discrimination (Racial Vilification) Amendment Act 1989 (NSW) is based on s 20C of the Anti-Discrimination Act 1977 (NSW). Section 20C(1) provides:

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.46

At the time of the enactment of the Anti-Discrimination (Racial Vilification) Amendment Act 1989 (NSW), s 4 of the Anti-Discrimination Act 1977 (NSW) defined race as “colour, nationality, descent and ethnic or national origin”.47 In 1994 this definition was broadened48 to include ethno-religious origin following a recommendation from the Samios Report in 1992.49

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46 Section 66(1) of the Discrimination Act 1991 (ACT) is identical to s 20C(1) of the Anti-Discrimination Act 1977 (NSW). The Samios Report, infra note 49 at 20, recommended that the legislation be extended to render unlawful vilification because of the target’s perceived race/ethnicity. This suggestion has not been incorporated into the Anti-Discrimination Act 1977 (NSW).
47 During debate on the Anti-Discrimination (Racial Vilification) Amendment Bill in the Legislative Assembly of the New South Wales Parliament, Opposition Leader, Mr Carr, expressed concerns about whether the legislation was deficient by virtue of failing to clearly extend to ethno-religious vilification: New South Wales Hansard (Legislative Assembly), 10 May 1989, pp 7920-7921.
48 Anti-Discrimination (Amendment) Act 1994 (NSW), Schedule 1.
49 Report of the Review by the Hon James Samios, MBE, MLC into the Operation of the Racial Vilification Laws of New South Wales (Sydney: A Report to the Minister for Ethnic Affairs and the Attorney General, August 1992) (‘Samios Report’) at 20. At the time of the enactment of the Anti-Discrimination (Racial Vilification) Amendment Act 1989 (NSW) the Government had responded to the concerns of opponents to the legislation by undertaking to “review its operation after an appropriate period of time had elapsed”: Samios Report, ibid at 1. In 1991 a review of the first two years of operation of the NSW racial vilification law was undertaken by Jim Samios MLC. Samios presented his report to the Attorney General and the Minister for Ethnic Affairs in August 1992. It was based on submissions and
Like s 18C of the *Racial Discrimination Act 1975* (Cth), s 20C of the *Anti-Discrimination Act 1977* (NSW) applies only to *public* conduct—racial vilification which occurs in private is not unlawful in New South Wales. Under s 20B of the *Anti-Discrimination Act 1977* (NSW) “public act” is defined as including:

(a) any form of communication to the public, including speaking, writing, printing, displaying notices, broadcasting, telecasting, screening and playing of tapes or other recorded material, and

community consultations: *ibid* at 1. In addition to the recommendation that the statutory definition of “race” be extended, the report contained a number of other recommendations for the amendment of the racial vilification provisions of the Act which were designed to improve the effectiveness of the regulatory regime. A consistent theme of the recommendations contained in the *Samios Report* was that the scope of the regulatory scheme needed to be broadened in definitional terms and strengthened in enforcement terms. However, only 3 of the report’s 15 recommendations have been implemented. The most significant of the *Samios Report* recommendations (including both implemented and unimplemented recommendations) will be discussed throughout this chapter.

The broadening of the legislative definition of “race” to include ethno-religious was effectively a case of the legislature formally catching up with the interpretation adopted by the EOT and courts. In the second reading speech on the Anti-Discrimination Bill 1994 in the Legislative Council, the Attorney General John Hannaford explained that “The amendment is in line with existing judicial authority from both New South Wales and overseas which indicates that ethno-religious background is included in the legal concept of race”: New South Wales Hansard (Legislative Council), 4 May 1994, pp 1827-1828. The Attorney General pointed out that the amendment did not render unlawful discrimination or vilification on the basis of religion: *ibid*. See also N Hennessy and P Smith, “Have We Got it Right? NSW Racial Vilification Laws Five Years” (1994) 1 *Australian Journal of Human Rights* 249 at 255-256. In its November 1999 report on the *Anti-Discrimination Act 1977* (NSW), the New South Wales Law Reform Commission recommended that “ethno-religious origin” be *removed* from the definition of race in the Act, concluding that “the insertion of this term in the definition in 1994 was almost certainly unnecessary” and has resulted in confusion as to the scope of the term: New South Wales Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*. Report No 92 (Sydney: New South Wales Law Reform Commission, November 1999) at 233-234. The Commission also rejected calls for the creation of separate ground of religious vilification: *ibid* at 533. Those of the Commission’s recommendation which impact on the legislative regulation of racial vilification in New South Wales are examined in more detail in chapter 9 of this thesis.

50 See chapter 5 of this thesis.
(b) any conduct (not being a form of communication referred to in paragraph (a)) observable by the public, including actions and gestures and the wearing or display of clothing, signs, flags, emblems and insignia, and

(c) the distribution or dissemination of any matter to the public with knowledge that the matter promotes or expresses 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.\(^{51}\)

The words used in s 20C(1) to define the scope of unlawful racial vilification—hatred, serious contempt or severe ridicule—are based on the common law definition of defamation\(^{52}\) with the threshold raised by the inclusion of the adjectives “serious” and “severe” to qualify contempt and ridicule respectively.

The parameters of the definition of unlawful racial vilification under s 20C(1) of the *Anti-Discrimination Act 1977* (NSW) are narrower than those established by s 18C of the *Racial Discrimination Act 1975* (Cth) in two important respects.

First, the harm threshold of *hatred, serious contempt or severe ridicule* in the New South Wales legislation is higher than the threshold of offend, insult, humiliate or intimidate under the Commonwealth legislation. Whether this apparent difference in the regulatory scope of the respective statutes is of great practical significance will be considered in chapter 9 in the context of a review of the operation of s 20C of the *Anti-Discrimination Act 1977* (NSW). Particular attention will be focused on whether the lower threshold in New South Wales has obviated any tendency in the EOT to restrictively interpret the scope of the legislation in the way that HREOC public

\(^{51}\) Section 65 of the *Discrimination Act 1991* (ACT) is in essentially the same terms as s 20B of the *Anti-Discrimination Act 1977* (NSW), except that s 65(c) of the former (the equivalent of s 20B(c) of the latter) refers simply to “the distribution or dissemination of any matter to the public”.

\(^{52}\) In *Parmiter v Coupland* (1984) M & W 105 at 108, Parke B defined a defamatory imputation as “matter ... calculated to injure the reputation of another, by exposing him to hatred, contempt or ridicule”. See also *Tournier v National Provincial &
inquiries have ‘read down’ the scope of s 18C of the *Racial Discrimination Act* 1975 (Cth).

The second way in which the regulatory scope of s 20C of the *Anti-Discrimination Act* 1977 (NSW) is narrower than its Commonwealth counterpart is that incitement is an element of the definition of unlawful racial vilification. Whereas the reasonable likelihood of offending, insulting, humiliating or intimidating is the fault component under s 18C of the *Racial Discrimination Act* 1975 (Cth), under the New South Wales legislation, only conduct which incites hatred, serious contempt or severe ridicule is unlawful.\(^5\)

The legislation is silent on whether satisfaction of the incitement element of unlawful racial vilification requires proof of subjective intention to incite, or whether the relevant standard is objective—in which case the relevant inquiry would be directed at the reasonable likelihood that others would be encouraged to hate, hold in serious contempt or severely ridicule the (individual or group) target of vilification. In the second reading speech on the Anti-Discrimination (Racial Vilification) Amendment Bill 1989, the Attorney General Mr Dowd indicated that, in contrast, to the criminal offence of serious vilification under s 20D, of which subjective intention was an element (see below), the fault element of the definition of unlawful racial vilification under s 20C was objective.\(^5\) However, this explanation was insufficient to overcome the ambiguity in the wording, and the consequent uncertainty

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\(^{5}\) *Union Bank of England* [1924] 1 KB 461; and *Ettingshausen v Australian Consolidated Press Ltd* (1991) 23 NSWLR 443.

\(^{53}\) This is also a higher threshold than that proposed under the 1987 Bill (discussed above) under which the mere expression of hatred, serious contempt or severe ridicule would have been unlawful. Ch'ang has argued that this broader definition could have been maintained “without changing the spirit, purpose and operation of the racial vilification law: *supra* note 44 at 95.

\(^{54}\) New South Wales Hansard (Legislative Assembly), 4 May 1989, p 7490.
surrounding the scope of the legislation, and consequent uncertainty. An additional uncertainty caused by the drafting of the incitement element in the s 20C is that it is not obvious, on the face of the legislation, whether there must be evidence that one or more persons was actually incited by the respondent's conduct, or whether the relevant question is whether the conduct was reasonably likely to incite. As will be discussed in chapter 9, inconsistency on these issues has been a feature of decisions of EOT decisions on racial vilification complaints.

Section 20C(2) of the *Anti-Discrimination Act 1977* (NSW) creates a number of defences, in identical terms to those proposed in the 1987 Bill:

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.

As noted above, s 20C(2) of the *Anti-Discrimination Act 1977* (NSW) is a clear statutory manifestation of the impact of free speech sensitivity on the introduction of the legislative regime for the regulation of racial vilification. The defences cover much of the same territory as the exemptions contained in s 18D of the *Racial Discrimination Act 1991* (ACT) is identical to the *Anti-Discrimination Act 1977* (NSW) except that subsection 66(2)(b) does not refer to the *Defamation Act*, as in NSW.

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55 During his contribution to the second reading debate on the 1989 Bill, ALP MLA, Mr Aquilina, expressed a concern that the incitement requirement would act as a brake on the legislation's capacity to effectively regulate racial vilification: New South Wales Hansard (Legislative Assembly), 10 May 1989, p 7930.

56 Discussed in chapter 9 of this thesis.

57 Section 66(2) of the *Discrimination Act 1991* (ACT) is identical to the *Anti-Discrimination Act 1977* (NSW) except that subsection 66(2)(b) does not refer to the *Defamation Act*, as in NSW.
Discrimination Act 1975 (Cth). However, in light of the fact that s 20C(2) does not contain an equivalent of the controversial “genuine belief” defence in s 18D, it would appear that the NSW legislation strikes a more appropriate balance between free speech and the provision of legal remedies for victims of racial vilification.

4.2.2 Section 20D

The second limb of the regulatory regime established by the enactment of the Anti-Discrimination (Racial Vilification) Amendment Act 1989 (NSW) is the creation of a criminal offence under s 20D of the Anti-Discrimination Act 1977 (NSW). Under section 20D the act of vilification (as defined in s 20C) will be a criminal offence (‘serious racial vilification’) if the means adopted include:

(a) threatening physical harm towards, or towards any property of, the person or group of persons, or

(b) inciting others to threaten physical harm towards, or towards any property of, the person or group of persons.

The maximum penalty for the offence of serious racial vilification is 50 penalty units ($5500) or six months imprisonment, or 100 penalty units ($11000) in the case of a corporation.

See chapter 5 of this thesis.


Section 67 of the Discrimination Act 1991 (ACT) is identical to s 20D(1) of the Anti-Discrimination Act 1977 (NSW). However, there is no statutory requirement for the Attorney General’s consent to a prosecution under s 6, as in s 20D(2) of the Anti-Discrimination Act 1977 (NSW).

The current value of a penalty unit is $110: Interpretation Act 1987 (NSW), s 56. When s 20D was originally added to the Anti-Discrimination Act 1977 (NSW) in 1989, the pecuniary penalty for an individual was 10 penalty units. The penalty was increased to 50 penalty units in 1994: Anti-Discrimination (Amendment) Act 1994.
While it is appropriate to include s 20D within the present study on the basis that it is a component of the NSW legislative regime for the regulation of racial vilification, it is important to recognise that s 20D does not criminalise racial vilification (defined as the promotion of hatred or ill-feeling) as such. An act of racial vilification will only fall into the category of serious racial vilification if it is aggravated by threats of, or incitement to, more serious physical harms (personal violence or damage to property. Threats of this kind are already prohibited under the criminal law and so s 20D does not substantially extend the regulatory net over such conduct.

It is important to appreciate the precise nature of the reliance on criminal law in the NSW scheme, particularly in the context of the analysis in this thesis of the relative merits of various legislative approaches to the regulation of racial vilification. As will be discussed in chapter 10, Western Australia is the only Australian jurisdiction to have criminalised racial vilification, as such, without any requirement that the conduct include threats of, or incitement to, physical harm.

The 1992 Samios Report recommended that the “incitement” and “public act” elements of the definition of serious racial vilification be modified. Specifically, the report recommended the removal of both the requirement that threats of violence must occur in the presence of others (that is, the incitement requirement) and the requirement that incitement to violence must occur in public. The rationale for these recommendations was that the “threat of imminent violence on racist grounds” was sufficiently serious to warrant criminalisation irrespective of whether the

\footnote{(NSW), Schedule 1. See the discussion of this reform, infra notes 68-72 (corresponding text).}

\footnote{62 See Crimes Act 1900 (NSW), ss 31, 33B, 545B.}

\footnote{63 Supra note 49.}
relevant conduct occurred in conduct or involved incitement. The Government has not acted on this recommendation.

The Samios Report considered submissions which called for an expansion of the use of the criminal law as a mechanism for regulating racial vilification by criminalising racial vilification *per se*, rather than only invoking the criminal law to deal with *aggravated* racial vilification (that is, where associated with threats of violence). However, no extension in the degree of reliance on criminal law was recommended. Free speech sensitivity was identified as a major influence on the decision to maintain the primary reliance on civil human rights law rather than criminal law for the regulation of ‘non-violent’ racial vilification:

After giving the matter some considerable thought, it is the view of this Report that these changes should *not* be recommended. Given that the racial vilification provisions infringe upon free speech, it is essential that they be kept in check as much as possible.

The report did, however, propose a number of procedural changes designed to remove restrictions on the commencement of criminal prosecutions for the offence of serious racial vilification (discussed below).

The Samios Report also recommended that the penal and pecuniary penalties for the criminal offence of serious racial vilification be doubled. This recommendation was partially implemented by the NSW Government in 1994. The pecuniary penalty for the offence was increased (by 400% to 50 penalty units rather than

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64 *Ibid* at 21.
65 *Ibid*.
67 *Ibid*.
than the recommended 100% increase\textsuperscript{69}, but the maximum prison term was not doubled as recommended.

In light of the Government's rejection of the majority of the \textit{Samios Report} recommendations (the \textit{Anti-Discrimination (Amendment) Act} 1994 (NSW) adopted only three of the 15 recommendations contained in the report\textsuperscript{70}), it was somewhat curious that the Government was prepared to support the increase of the (pecuniary) penalty for the criminal offence of serious racial vilification. One could not have imagined a more cosmetic change to the legislation, particularly in light of the fact that no charges had been laid under s 20D at the time of the \textit{Samios Report} (and no charges have been laid since).\textsuperscript{71}

At best, it might be said that the increased penalty sent a stronger message about society disapproval of racial vilification which threatens or incites racial vilification. This was the claim made by the Attorney General John Hannaford during the second reading speech on the \textit{Anti-Discrimination (Amendment) Bill} 1994 in the Legislative Council when he explained that the purpose of the amendment was to "indicate the seriousness with which this Government views serious acts inciting racial hatred and violence."\textsuperscript{72} However, arguably this 'message' of heightened

\textsuperscript{69} See \textit{supra} note 61.

\textsuperscript{70} This point was noted by Mr Samios during debate on the \textit{Anti-Discrimination (Amendment) Bill} in the Legislative Council: New South Wales Hansard (Legislative Council), 10 May 1994, pp 2117-2118. However, Mr Samios observed that "it is pleasing to note that the most pivotal of those recommendations are now included in the bill": \textit{ibid} at 2118.

\textsuperscript{71} See chapter 9 of this thesis.

\textsuperscript{72} New South Wales Hansard (Legislative Council), 4 May 1994, p1828. The Attorney General overstated the scope of s 20D by referring to the incitement of "racial hatred and violence". Section 20D criminalises only racial vilification which incites (or threatens) violence; it does not criminalise the incitement of racial hatred per se, although such conduct is unlawful and a ground of complaint under s 20C of the \textit{Anti-Discrimination Act} 1977 (NSW). Helen Sham-Ho, Liberal Party MLC, explained that "The penalty increase is designed not only to deter offenders but also
disapproval is effectively neutralised by the ‘message’ that the criminal limb of the regulatory regime is very unlikely to be ever activated (a point which will be developed in chapter 9 of this thesis) so that the size of the maximum penalty for which the legislation provides is essentially irrelevant.

The Government’s simultaneous rejection of the Samios Report recommendation that the offence defined by s 20D be moved to the Summary Offences Act 1988 (NSW)—a proposal which, as discussed below, was motivated by a desire to increase the likelihood that the police would investigate allegations of serious racial vilification, and as appropriate, lay charges—reinforces the validity of the assessment that the increased penalty was largely a cosmetic change.

4.3 The Nature of the Enforcement Procedure

4.3.1 Unlawful Racial Vilification

The enforcement system for alleged breaches of s 20C of the Anti-Discrimination Act 1977 (NSW) closely resembles the enforcement system for alleged breaches of s 18C of the Racial Discrimination Act 1975 (Cth). In chapter 5 of this thesis a number of issues were raised about the appropriateness of the HREOC civil human rights enforcement process which is reliant on victim initiation and complaint carriage, conciliation-based outcomes (including negotiated determination of whether the relevant legislative standard had been breached), and confidentiality. These concerns apply with equal force to the process administered in New South Wales by the ADB and will be expanded upon in this section.

to educate and change community attitudes”: New South Wales Hansard (Legislative
4.3.1.1 Standing to Invoke the Legislation

The primary trigger for the enforcement of the regulatory framework is a complaint to the President of the ADB (the state equivalent of HREOC), which must be lodged within six months of the alleged contravention of the Act.\textsuperscript{73} More specifically, s 88(1) of the \textit{Anti-Discrimination Act 1977 (NSW)} provides that a complaint must be made in writing, and may be submitted by:

(a) a person on the person’s own behalf, or
(b) a person on the person’s own behalf and on behalf of another person or other persons, or
(c) 2 or more persons on their own behalf, or
(d) 2 or more persons on their own behalf and on behalf of another person or other persons.\textsuperscript{74}

Significantly, only a victim or target of the alleged racial vilification may lodge a complaint. That is, the complainant must have “the characteristic that was the ground for the conduct that constitutes the alleged contravention concerned.”\textsuperscript{75} In addition a complaint may be lodged by a representative body on behalf of a named person or persons.\textsuperscript{76}

Council), 10 May 1994, p 2120.
\textsuperscript{73} \textit{Anti-Discrimination Act 1977 (NSW)} s 88(3). The President retains a discretion to accept a complaint lodged more than six months after the alleged breach of the legislation “on good cause being shown”: s 88(4).
\textsuperscript{74} The mechanism for representative complaints in racial vilification matters has been described by Ch’ang as “relatively innovative”: Ch’ang, \textit{supra} note 44 at 97.
\textsuperscript{75} \textit{Anti-Discrimination Act 1977 (NSW)} s 88(1C)(a).
\textsuperscript{76} Section 88(1A) of the \textit{Anti-Discrimination Act 1977 (NSW)} provides that the representative body must first satisfy the President that the persons represented consent (s 88(1A)(a)) and that “the body has a sufficient interest in the complaint” (s 88(1A)(b)). Section 88(1B) provides that “A representative body has a sufficient interest in a complaint only if the conduct that constitutes the alleged contravention concerned is a matter of genuine concern to the body because of the way conduct of that nature adversely affects or has the potential to adversely affect the interests of the body or the interests or welfare of the group of people it represents.”
The question of standing to invoke the enforcement process of unlawful racial vilification was closely considered by the *Samios Report*. Ultimately the report made the modest recommendation that organisations be allowed to play an advocacy role, and that the option of complaint lodgement by representative organisations be expanded to allow ‘peak’ ethnic organisations to lodge complaints in their name.

The decision to recommend only a minor liberalisation of the rules on standing to lodge a complaint was made after the *Samios Report* considered a range of issues surrounding the question of who should be entitled to lodge a complaint and thus invoke the racial vilification regulatory regime. Under the original legislation only an individual who belonged to the racial/ethnic group which had been vilified (or a corresponding representative organisation) was entitled to lodge a complaint, thus ‘filtering’ access. In a submission to the review by Mr Samios MLC, the Ethnic Affairs Commission submitted that the filter should be removed completely, allowing anyone to lodge a complaint of racial vilification. The ADB advocated a more modest adjustment to the standing rules, submitting that the President of the ADB should be given the power to self-initiate an investigation into an incident of racial vilification and attempt conciliation.

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77 *Supra* note 49.

78 *Ibid* at 23. In the Legislative Council Mr Samios explained that this change was a response to the fact that “many people of ethnic background may feel dislocated from due legal process because of language barriers and restrictions. Peak umbrella organisations will have a better understanding of the application of these laws and will make such legal recourse more accessible to individuals who are vilified”: New South Wales Hansard (Legislative Council), 10 May 1994, p 2118.


The *Samios Report* rejected both of these options, considering that broadening the definition of “representative body” was the appropriate response to concerns about restricted access to the regulatory regime.\(^8\) It is worth noting that one of the reasons for rejecting proposals for a significant liberalisation of standing to lodge complaints was that “the procedure for dealing with complaints of racial vilification is heavily conciliatory”.\(^8\) According to the *Samios Report* “It would be reasonable to expect a sharp decline in the rate of disposal by conciliation processes, if those without a direct stake in the outcome were allowed to complain”.\(^8\) This prediction and argument is predicated on the assumption that conciliation is a very prominent part of the complaint-handling process. However, as will be discussed in chapter 9, data collected on the complaint handling process does not support this assumption, thus weakening this particular argument for the maintenance of restricted access to the complaint process. The data also provides reason to question another argument advanced by the *Samios Report* in support of filtered access – that a person “with a direct interest” in the alleged vilification (by virtue of being a member of the target group) is more likely to pursue the complaint “energetically” and “keenly”.\(^8\) In addition to failing to take account of the high ‘drop-out’ rate among racial vilification complainants,\(^8\) this argument also reflects a very narrow conception of the nature of racism as a social problem and of the basis on which a person will be assumed to have a “direct interest”. The suggestion that only the specific targets of racism have a sufficient interest in the matter to warrant the right to trigger the regulatory regime reinforces a disturbing conception of whose problem

\(^8\) *Samios Report*, supra note 49 at 23.
\(^8\) Ibid at 22.
\(^8\) Ibid.
\(^8\) Ibid.
racism is, that is problematic in relation to both acts of discrimination and acts of vilification. It is particularly problematic in the latter case where the requirement of "public act" and "incitement" and the fact that the conduct will commonly be directed at a group rather than an individual.

The *Samios Report* also cited the very pragmatic reason for the maintenance of the filter that if anyone could lodge a complaint: the ADB would not be able to handle the anticipated increase in the number of complaints. The troubling implication of this argument is that the current regulatory scheme is deliberately designed to ensure that not all incidents of racial vilification come to the attention of the authority responsible for the administration of the regulatory regime – a very curious state of affairs, and hardly inspiring confidence that the current system is adapted to the effective regulation of racial vilification.

**4.3.1.2 Complaint-Handling and Conciliation**

Following complainant initiation by the individual or group target of the alleged racial vilification, the primary method for resolving complaints is investigation followed by conciliation, facilitated by the ADB. The President of the ADB has statutory power to compel both parties to attend a conciliation conference. The contents and outcomes of the conciliation process are confidential.

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85 See chapter 9 of this thesis.
86 *Samios Report, supra* note 49 at 21-22.
87 *Anti-Discrimination Act 1977* (NSW) s 92(1).
88 *Anti-Discrimination Act 1977* (NSW) s 92(2). Failure to comply with a notice under s 92(2) is an offence, punishable by a fine of 10 penalty units ($1100) or 50 penalty units ($5500) in the case of a corporation.
89 Section 94(2) of the *Anti-Discrimination Act 1977* (NSW) provides that “Evidence of anything said or done in the course of conciliation proceedings under section 92 shall not be admissible in subsequent proceedings under this Part relating to the complaint".
A commonly asked question with respect to the complaint-handling process administered by the ADB (and other equivalent agencies) is whether conciliation is an appropriate dispute resolution mechanism in discrimination/human rights matters. While it is widely accepted that as a form of legal intervention conciliation represents a cheaper and quicker alternative to traditional litigation, concerns have been raised about its effectiveness in a variety of contexts and its appropriateness as a means of achieving the particular objectives of human rights law.

In the context of racial vilification complaints, conciliation attracts similar scrutiny. Indeed the same core questions—about the effectiveness/appropriateness of conciliation as a complaint-handling mechanism—need to be addressed. However, when undertaking this assessment, it is important to take account of the particular nature of racial vilification incidents and the particular dynamics of racial vilification ‘disputes’ when compared to ‘conventional’ discrimination matters—such as racial discrimination in employment. Thorough examination of the differences between discrimination and vilification as forms of racism is beyond the scope of this thesis, but one obvious difference is that whereas in discrimination cases there is commonly some sort of existing, and more or less direct, relationship between the parties (for example, employer/employee, service provider/customer) in the context of which discrimination occurs, there is frequently no such relationship in vilification cases; indeed, the parties are often total strangers and the respondent’s conduct is, in the

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92 Thornton, *supra* note 90; Astor and Chinkin, *supra* note 90; and D Fraser, “It’s Alright Ma, I’m Only Bleeding” (1989) 14 *Legal Service Bulletin* 69.
majority of cases, not directed personally at the complainant, but at an ethnic or racial group to which the complainant belongs.

The point here is that it should not simply be assumed that the core questions about the conciliation process will yield the same answers irrespective of the specific human rights context under examination. That is, even if it is considered that conciliation—based on victim-initiation and directed towards negotiated agreement—is suitable for handling, for example, complaints of employment discrimination on the basis of race, it does necessarily follow that the same model of dispute resolution is appropriate for handling complaints of racial vilification. In the context of the present study of the range of existing models in Australia for the regulation of racial vilification, it is appropriate to subject to close scrutiny the application to vilification matters of a grievance resolution model which has evolved specifically to resolve allegations of discrimination.

The most obvious advantage of the conciliation-based human rights model is that it substantially increases the potential breadth of the protection afforded by racial hatred laws, at least when measured by the (admittedly crude) indicator of 'number of matters handled'. The relative ease with which a victim of racial vilification can 'ask the law for help' by lodging a complaint with a human rights agency such as the ADB (or following the enactment of the Racial Hatred Act 1995 (Cth), the Human Rights and Equal Opportunity Commission) contrasts strikingly with other potential forms of legal intervention, such as criminalisation. As will be shown in chapter 9 (in relation to s 20D of the Anti-Discrimination Act 1977 (NSW)) and chapter 10 (in relation to the criminal racial vilification offences contained in

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93 Relevant data is discussed in chapter 9 of this thesis.
94 See Part II of this thesis.
Chapter XI of the Criminal Code 1913 (WA)\(^95\) the threshold for commencement of criminal prosecutions is prohibitively high.

A system based on confidential conciliation is also inherently more flexible than other forms of racial hatred laws (such as criminal laws or laws which provide only for formal civil proceedings in the conventional court system\(^96\)) and therefore, more capable of responding to a wide range of forms of racial vilification. The nature of the process avoids, to a considerable extent, the possibility that a complainant’s request for help will go unanswered because of rigidly specified elements such as are likely to be crucial to a criminal trial or a tort action.

Reliance on a process based on private conciliation is not without its problems. Many of Margaret Thornton’s “equivocations of conciliation”\(^97\) are as applicable to the handling of racial vilification complaints as to the other areas of anti-discrimination law with which her important research was primarily concerned. For example, the private and confidential nature of the process whereby, in Thornton’s terms, “violations are treated not as public transgressions in the way that crimes are treated, but as private pecadilloes”\(^98\) seriously inhibits the community education potential of anti-discrimination laws, including racial vilification laws. Thornton rightly describes as “excessively optimistic” the view that “each complaint

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\(^95\) The operation of the racial vilification provisions of the Canadian Criminal Code RSC 1990, c C-46 will also be examined in chapter 10 to supplement the limited available data on the operation of the criminalisation approach to the regulation of racial vilification in Australia.

\(^96\) See chapter 11 of this thesis which examines the recent adoption of this model in South Australia, and also reviews the operation of similar approaches in two Canadian provincial jurisdictions: Manitoba and British Columbia.

\(^97\) Thornton, supra note 90, chapter 5.

\(^98\) Ibid at 144.
to an appropriate agency has a positive ripple effect in reducing the overall incidence of discrimination in the community.\textsuperscript{99} Further, Thornton states:

The secrecy surrounding conciliation precludes group empowerment to a marked degree ... The outcome of conciliation is invisible and is perceived to be of relevance to the parties only; it cannot be used as a model for others, or as a means of developing a collective lobby to change policy if policy changes have not resulted as a condition of settlement.\textsuperscript{100}

The private nature of the complaint handling process is particularly difficult to reconcile with racial vilification laws, which by statutory definition, are concerned with \textit{public} conduct. The ADB has sought to broaden the regulatory impact of racial vilification laws beyond the boundaries of the individual parties to specific complaints by means including community awareness strategies, and by incorporating, as appropriate, community education components into the terms of settlement of complaints.\textsuperscript{101} Nonetheless, the inconsistency between the regulatory objectives and scope, and the enforcement method remains problematic.

Another clear disadvantage of the conciliation model is that it does place a heavy onus on the aggrieved individual (or a representative organisation) to initiate the complaint and undertake substantial responsibility for the carriage of the matter. A variety of factors, including a lack of awareness of the legislation, language, and physical distance (particularly outside major urban centres) represent significant access impediments for many victims of racial vilification. The 'filters' on complaint initiation discussed above, including the fact that the \textit{Anti-Discrimination Act 1977}

\textsuperscript{99} \textit{Ibid} at 147.
\textsuperscript{100} \textit{Ibid} at 151.
\textsuperscript{101} A common example is the publication of an apology or a story about racism by a newspaper which has been the subject of a complaint. See the examples in \textit{Anti-Discrimination Board of New South Wales, Annual Report 1992-1993} (Sydney: ADB, 1993) at 28.
(NSW) does not allow for the self-initiation of complaints/investigations by the President of the ADB has been rightly criticised.\textsuperscript{102} The capacity for representative bodies to lodge complaints\textsuperscript{103} offers only a partial solution to this significant access problem.\textsuperscript{104}

Where a complaint is lodged, the most commonly raised concern about conciliation-based proceedings is that complainants are likely to be intimidated or otherwise disadvantaged by their relative powerless vis-a-vis the respondent. While it is clearly part of the role of the human rights agency and its officers to take steps to realign this "asymmetry", that inequality may remain part of the environment in which conciliation takes place is a cause for serious concern.\textsuperscript{105} At the same time, to see this ‘flaw’ as fatal to the very idea of conciliation in the context of racial vilification overstates the problem.

The criticism may reflect a stereotypical view of the nature of conciliation which assumes that complainant and respondent are sitting at a table ‘sorting the matter out’, with the assistance of a neutral conciliator or mediator. This scenario is actually played out in only a relatively small proportion of discrimination matters, and in an even smaller proportion of racial vilification matters. In a study of the use of conciliation in sex discrimination cases, Hunter and Leonard found that in more than half of the cases examined no conciliation conference was held.\textsuperscript{106} Consistent with this finding, Bailey and Devereux have noted, based on a study of discrimination complaints handled by HREOC, that “[p]erhaps surprisingly, the parties are brought

\begin{footnotesize}
\textsuperscript{102} See, for example, ADB, supra note 80 at 53.
\textsuperscript{103} \textit{Anti-DiscriminationAct} 1977 (NSW), s 87.
\textsuperscript{104} ADB, supra note 80 at 53.
\textsuperscript{105} Thornton, supra note 90 at 155.
\end{footnotesize}
together for a conference in only a minority of cases conciliated by anti-discrimination bodies.” Data on the role and prevalence of conciliation meetings in the handling of racial vilification complaints under 20C of the *Anti-Discrimination Act 1977* (NSW) will be examined in chapter 9 of this thesis.

These research findings highlight the need to analyse specific practices rather than to question certain forms of dispute resolution based on stereotypes or generalisations about what is going on in the name of ‘conciliation’. They provide additional support for the observation by Thornton that:

All the Australian agencies accept that a conference between the parties is not essential to the conciliation process, ... For the most part, the conciliation officer acts as a ‘go-between’, resorting to telephone, correspondence and personal visit to investigate, to clarify the facts and to conduct negotiations with an eye to settlement. Thus ‘conciliation’ within Australian anti-discrimination legislation tends to be a generic term which embraces a wide range of functions and styles at the informal level.108

Such evidence on the practical workings of the civil human rights conciliation-based enforcement process certainly does not completely negate the concerns that have been raised about conciliation. For example, a power imbalance may impact adversely

108 Thornton, *supra* note 90 at 157. Bailey and Devereux, *supra* note 107 at 302 have similarly observed that “It is somewhat difficult to talk of a conciliation process per se since ‘conciliation’ is an imprecise term, permitting a variety of applications. ...
on complainants even in the absence of a person-to-person meeting with the respondent. However, it does indicate that a useful examination and comparison of various forms of legal intervention requires that the working models considered are accurately depicted. The *operational* nature of the process for the handling of racial vilification complaints in New South Wales will be examined in chapter 9 of this thesis.

Under s 90(1) of the *Anti-Discrimination Act* 1977 (NSW) the President of the ADB may decline to entertain a complaint “[w]here, at any stage of the President’s investigation of a complaint, the President is satisfied that the complaint is frivolous, vexatious, misconceived or lacking in substance, or that for any other reason the complaint should not be entertained.”\(^\text{109}\) When the President decides that a complaint should be rejected s/he must notify the complainant in writing\(^\text{110}\) with reasons.\(^\text{111}\) The President must also notify the complainant\(^\text{112}\) that under s 91(1) the complainant has a statutory right to require the President to refer the complaint to the Tribunal for adjudication.\(^\text{113}\) Where the complainant exercises this right the President must refer the matter to the Tribunal with a report detailing any inquiries.

The elusiveness of the term has also been noted in reviews of anti-discrimination bodies.”

\(^\text{109}\) Section 90(3) of the *Anti-Discrimination Act* 1977 (NSW) provides that “If the President declines under subsection (1) to entertain a complaint for any reason other than that the complaint is vexatious, misconceived or lacking in substance, the complainant may apply to the Tribunal for a review.”

\(^\text{110}\) *Anti-Discrimination Act* 1977 (NSW), s 90(1).

\(^\text{111}\) *Anti-Discrimination Act* 1977 (NSW) s 90(2)(a).

\(^\text{112}\) *Anti-Discrimination Act* 1977 (NSW) s 90(2)(b).

\(^\text{113}\) The complainant must give this direction within 21 days in writing: *Anti-Discrimination Act* 1977 (NSW) s 91(1). Under s 91(1A) “Subsection (1) does not apply to a notification in which the President has given, as a reason for declining to entertain a complaint, that what has been alleged in the complaint does not disclose any contravention of this Act.”
into the complaint that the President has made. In addition, where the complaint is accepted by the President, but conciliation is ineffective/inappropriate, the matter may be referred to the Tribunal for determination.

4.3.1.3 Tribunal determinations

Section 113(1)(b) of the *Anti-Discrimination Act 1977* (NSW) outlines the orders which the Administrative Decisions Tribunal (Equal Opportunity Division) may make where it finds that a complaint of racial vilification contrary to s 20C has been substantiated:

- order the respondent to pay compensation to the complainant (maximum $40,000) “for any loss or damage suffered by reason of the respondent’s conduct”, or to “perform any reasonable act or course of conduct to redress the loss or damage;”

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114 *Anti-Discrimination Act 1977* (NSW) s 91(2).
115 *Anti-Discrimination Act 1977* (NSW) s 94(1). In addition, s 95 of the Act provides that “The Minister may refer any matter to the Tribunal for inquiry as a complaint …”
116 Formerly, the EOT.
117 Of course, the Tribunal has the power to dismiss the complaint where it is not substantiated: *Anti-Discrimination Act 1977* (NSW), s 113(1)(a).
118 *Anti-Discrimination Act 1977* (NSW) s 113(1)(b)(i). In the case of a representative complaint damages are not payable to the representative organisation (s 113(2)), but the Tribunal may award damages to the person or persons on behalf of whom the complaint was made (s 113(3)). A further limitation on the damages payable in vilification matters is s 113(4):

If 2 or more vilification complaints are made in respect of the same public act of the respondent and those complaints are found to be substantiated, the Tribunal must not make an order or orders for damages under this section that would cause the respondent to pay more than $40,000 in the aggregate in respect of that public act.

• order the respondent not to continue or repeat the unlawful conduct;\textsuperscript{120}

• decline to take any further action.\textsuperscript{121}

Each of these powers applies not only to racial vilification complaints, but to all complaints of unlawful conduct (discrimination) under the \textit{Anti-Discrimination Act 1977} (NSW). Section 113(2) of the Act provides that in the case of a vilification complaint\textsuperscript{122} the Tribunal may also:

\begin{itemize}
  \item [(iiiia)] ... order the respondent to publish an apology in respect of the matter the subject of the complaint or order the respondent to publish a retraction in respect of the matter (or order both) and, as part of the order, give directions concerning the time, form, extent and manner of publication of the apology or retraction (or both),
  \item [(iiib)] ... order the respondent to develop and implement a program or policy aimed at eliminating unlawful discrimination.
\end{itemize}

The types of tribunal orders that have been made, to date, in racial vilification matters will be examined in chapter 9 of this thesis.

\textbf{4.3.1.4 Enforcement in the Australian Capital Territory}

Complaints of unlawful racial vilification contrary to s 66 of the \textit{Discrimination Act 1991} (ACT) are handled in a manner which closely resembles the New South Wales approach described above.\textsuperscript{123} The equivalent authority to the President of the ADB is the Discrimination Commissioner,\textsuperscript{124} the equivalent agency to the NSW ADB is the ACT Human Rights Office, and the equivalent adjudicative body to the NSW

\begin{itemize}
  \item \textit{Anti-Discrimination Act 1977} (NSW) s 113(1)(b)(ii).
  \item \textit{Anti-Discrimination Act 1977} (NSW) s 113(1)(b)(v).
  \item These additional orders are available in relation to all grounds of unlawful vilification: racial, homosexual, HIV/AIDS and transgender.
  \item \textit{Discrimination Act 1991} (ACT) Part VIII.
  \item \textit{Discrimination Act 1991} (ACT) Part X.
\end{itemize}
Administrative Decisions Tribunal (Equal Opportunity Division) is the ACT Discrimination Tribunal.\textsuperscript{125}

\textbf{4.3.2 Serious Racial Vilification}

The enforcement process for the criminal offence of serious racial vilification under s 20D of the \textit{Anti-Discrimination Act} 1977 (NSW) is distinguished from the standard process for criminal offence generally by significant constraints in the initiation constraints on the initiation of a prosecution. First, no person can be prosecuted for an offence under s 20D without the consent of the Attorney General of New South Wales.\textsuperscript{126} (The Attorney General has delegated this task to the New South Wales Director of Public Prosecutions.\textsuperscript{127}) The rationale for the inclusion if this requirement in the legislation was not specifically stated during the course of parliamentary debate on the Anti-Discrimination (Racial Vilification) Amendment Bill 1989.\textsuperscript{128} However, such a provision has often been included in criminal racial vilification legislation on the basis that it is necessary to minimise both the risk of frivolous or malicious prosecutions, and the degree of free speech impairment.\textsuperscript{129}

\begin{footnotesize}
\begin{enumerate}
\item \textit{Discrimination Act} 1991 (ACT) Part IXA, and Division 3-4 of Part VIII.
\item \textit{Anti-Discrimination Act} 1977 (NSW) s 20D(2). There is no equivalent restriction in relation to the identical offence of serious racial vilification under s 67 of the \textit{Anti-Discrimination Act} 1991 (ACT).
\item Pursuant to s 11(2) of the \textit{Director of Public Prosecutions Act} 1986 (NSW): \textit{Government Gazette}, 10 July 1990.
\item See Attorney General Mr Dowd, 2nd reading speech, New South Wales Hansard (Legislative Assembly), 4 May 1989, pp7488-7491.
\end{enumerate}
\end{footnotesize}
Second, the police play no formal role in the detection, investigation or prosecution of commissions of the offence of serious racial vilification.\textsuperscript{130} Third, while there is not express statutory barrier to a direct application to the Attorney General/Director of Public Prosecutions for consent to a prosecution,\textsuperscript{131} or self-initiation of a prosecution by the Director of Public Prosecutions, the procedures established by the \textit{Anti-Discrimination Act} 1977 (NSW) clearly contemplate that the President of the ADB will play a ‘filtering’ role, determining which complaints of racial vilification lodged with the ADB should be considered for criminal prosecution for the offence of serious racial vilification.

When the President of the ADB receives and investigates a complaint of racial vilification, before attempting to resolve the matter via conciliation, s/he is required to consider whether the offence of serious vilification may have been committed.\textsuperscript{132} If so, the complaint must be referred to the Attorney General\textsuperscript{133} within 28 days after receipt of the complaint.\textsuperscript{134} The President must advise the complainant that the referral has been made (complainant’s consent is not required)\textsuperscript{135} and advise the complainant that s/he it is entitled under s 91(1) of the \textit{Anti-Discrimination Act} 1977 (NSW) to direct that the complaint be referred to the Tribunal.\textsuperscript{136} Where this option is pursued, s 89B(5) aims to avoid parallel proceedings (that is, criminal prosecution and civil human rights conciliation/adjudication) by empowering the Tribunal to stay an inquiry into the complaint until the conclusion of proceedings for the alleged offence under section 20D ...”.

\textsuperscript{130} See New South Wales Law Reform Commission, \textit{supra} note 49 at 551-552.
\textsuperscript{131} \textit{Samios Report}, \textit{supra} 49 at 29.
\textsuperscript{132} \textit{Anti-Discrimination Act} 1977 (NSW) s 89B(1)(b).
\textsuperscript{133} \textit{Anti-Discrimination Act} 1977 (NSW) s 89B(2).
\textsuperscript{134} \textit{Anti-Discrimination Act} 1977 (NSW) s 89B(3).
\textsuperscript{135} \textit{Anti-Discrimination Act} 1977 (NSW) s 89B(4)(a).
During the second reading speech on the Anti-Discrimination (Racial Vilification) Amendment Bill 1989 in the Legislative Council, the Attorney General, Mr Dowd, explained the inclusion of the President of the ADB in the decision-making process in relation to s 20D prosecutions:

Given the unique expertise of the Anti-Discrimination Board in the area of racial vilification and the fact that most instances of racial vilification will come first to the attention of the board, it is considered essential that the board be involved in the prosecution process.\(^{137}\)

The *Samios Report* was critical of the legislative limitations on the enforcement of s 20D of the *Anti-Discrimination Act 1977* (NSW), including the requirement for the Attorney General’s consent and the role of the President of the ADB.

The report acknowledged that the s 20D(2) consent requirement “was no doubt an important reassurance at the time the measure was passed, for those doubting the wisdom of having any criminal provisions.”\(^{138}\) However, two major problems with the requirement were identified:

First, the “prior consent” rule means that there is some doubt as to whether the police can arrest a suspected offender, without first seeking the necessary consent to prosecute. In practical terms, that doubt must translate into a

\(^{136}\) *Anti-Discrimination Act* 1977 (NSW) s 89B(4)(b).

\(^{137}\) New South Wales Hansard (Legislative Assembly), 4 May 1989, p 7490-7491. The Attorney General continued (*ibid* at 7491):

However, the possible conflict between the role the board plays in conciliating complaints and also in the role of prosecutor requires that the president of the board be involved in the prosecution process only in reporting capacity. The measures provided for in proposed section 89B have been adopted to ensure that no such conflict can arise and to maintain a clear distinction between the functions of conciliation and prosecution.

\(^{138}\) *Samios Report*, *supra* note 49 at 29.
general willingness to arrest when an offence is obviously being committed, for fear that there is no power so to arrest.

Secondly, given the necessity to obtain the consent of the Attorney or the DPP, the police must get the impression that this is one criminal offence which has nothing to do with them. That impression would be heightened by the location of the offence [in the Anti-Discrimination Act rather than legislation, such as the Summary Offences Act or the Crimes Act, which it is clearly the responsibility of the police to administer].

The Samios Report also found that the part played by the President of the ADB in relation to the enforcement of s 20D was "unclear, and unnecessarily constrained."¹⁴⁰

The Samios Report made the following recommendations for modifications to the procedures for enforcement of 20D of the Anti-Discrimination Act 1977 (NSW):

- relocation of the offence of serious racial vilification to the Summary Offences Act 1988 (NSW);¹⁴¹
- extension of the power of the President of the ADB to commence a prosecution or refer a matter (to the police or the Director of Public Prosecution) for investigation/prosecution;¹⁴²
- replacement of the requirement for the Attorney General's with a statutory vesting of the power to take over (and terminate) any prosecutions commenced in the Director of Public Prosecutions;¹⁴³
- repeal of the 28 day time limit for referrals of potential s 20D matters from the President of the ADB to the Attorney General/Director of Public Prosecutions.¹⁴⁴

¹³⁹ Ibid.
¹⁴⁰ Ibid at 28.
¹⁴¹ Ibid at 30.
¹⁴² Ibid.
¹⁴³ Ibid.
¹⁴⁴ Ibid.
These recommendations, along the Samios Report recommendations on the matter of standing to lodge a complaint of s 20C(1) racial were designed to broaden the operational scope of the legislative regime for the regulation of racial vilification established by the Anti-Discrimination Act 1977 (NSW). The Samios Report explained the overall thrust of the recommendations as follows:

If the recommendations in this Report are accepted, the filters upon accessing both the civil and criminal provisions relating to racial vilification will be removed. More people and groups will be able to complain of the civil wrong, even if they are not members of the target. The criminal offence will become arrestable, and anyone will be able to launch a prosecution. Some technical restrictions on the definition of the criminal offence will be removed, relating to the need for non-target witnesses (in the case of threats) and the need for the offence to be committed in public. The offence itself will be relocated into the Summary Offences Act 1988, thereby increasing its visibility from the perspective of the police. The general impact of these changes upon the criminal offence will be to “mainstream” the criminal offence, whilst at the same time retaining its special association with the Anti-Discrimination Board.\(^{145}\)

\(^{145}\) Ibid at 30-31. In debate on the Anti-Discrimination (Amendment) Bill 1994 in the Legislative Council of the New South Wales Parliament, ALP MLC Franca Arena expressly supported the Government’s rejection of the Samios Report recommendation that the offence be relocated into the Summary Offences Act 1988. She observed that “If racial vilification were under the Crimes Act [sic – Summary Offences Act], the police would have the right to prosecute. Police officers are not the least racist people in our society and certainly would not have the years of experience and expertise accumulated by members of the Anti-Discrimination Board. Also, police would not have the option of conciliation by the Anti-Discrimination Board, an option which is taken up by all complainants”: New South Wales Hansard (Legislative Council), 10 May 1994, p 2112. Ms Arena’s criticism overstated the likely impact of the relocation proposal – it only related to the very small proportion of cases which could potentially give rise to criminal liability for serious racial vilification, not the large majority of incidents where there is an alleged breach of s 20C of the Act. Even if the relocation recommendation was implemented, the latter would continue to be handled using the complaint-based civil human rights dispute resolution process administered by the Anti-Discrimination Board. Ms Arena also exaggerated the role of conciliation in the Anti-Discrimination Board’s complaint-handling process when she suggested that conciliation is “taken up by all complainants”: see chapter 9 of this thesis. These criticisms notwithstanding, Ms Arena’s scepticism about the desirability of locating law enforcement authority and prosecutorial discretion for the offence of serious racial vilification with the police is
The decision of the New South Wales Government to decline to implement the majority of the *Samios Report* recommendations, which would have modestly broadened the scope of the legislative regime for the regulation of racial vilification in New South Wales, highlights a recurring feature of Australia’s experience with racial vilification legislation: significant containment of the parameters of racial vilification legislation via a combination of narrow substantive definitions and/or restrictive enforcement procedures. Whether this tendency has also been reflected in the practical operation of Part 2, Division 3A of the *Anti-Discrimination Act* 1977 (NSW) will be considered in chapter 9 of this thesis.

4. CONCLUSION

In contrast to the circumstances of the enactment of racial vilification by the Commonwealth Parliament in 1994-1995 (examined in chapter 5 of this thesis), the enactment of the *Anti-Discrimination (Racial Vilification) Amendment Act* 1989 (NSW) did not involve parliamentary disagreement and opposition. Largely reflecting this bipartisan support, concern over the free speech implications of the proposed

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146 As noted *supra* note 49, the New South Wales Government implemented only 3 of the 15 major recommendation made by the *Samios Report*. The *Anti-Discrimination (Amendment) Act* 1994 (NSW), inter alia, expanded the definition of race to include ethno-religious origin, and broadened the rule on standing to allow peak ethnic organisations to lodge complaints in their own name, and increased the pecuniary penalty for the offence of serious racial vilification.
legislation did not feature prominently in the debates in the New South Wales Parliament. The party political affiliation of the government responsible for introducing the bill is likely to have been an influence in this regard—the New South Wales legislation was introduced by a Liberal Party-National Party Coalition Government and supported by an Australian Labor Party Opposition, while the Commonwealth legislation was introduced by a ALP Government and opposed by a Coalition Opposition (and partially opposed by the Western Australian Greens).\textsuperscript{147}

A more substantial explanation for the relative absence of parliamentary controversy in New South Wales is the nature of the regulatory regime established by the \textit{Anti-Discrimination (Racial Vilification) Amendment Act 1989} (NSW), particularly the degree of reliance on criminal regulation. The NSW legislation criminalises \textit{aggravated} racial vilification only, while the Commonwealth Racial Hatred Act 1994 proposed the criminalisation of racial vilification per se. It was this aspect of the Commonwealth bill that was considered to represent the greatest threat to free speech and which was ultimately excised from the \textit{Racial Hatred Act 1995} (Cth).\textsuperscript{148}

Although free speech sensitivity did not have the obviously dramatic impact in the New South Wales Parliament as it had in the Commonwealth Parliament, it would be a mistake to assume too hastily that the influence of free speech sensitivity on the shape of the regulatory regime now established by the \textit{Anti-Discrimination Act}

\textsuperscript{147} See chapter 5 of this thesis. The circumstances of the enactment of racial vilification in Western Australia (see chapter 10) and South Australia (see chapter 11) respectively support the tentative suggestion that parliamentary dispute and obvious manifestations of free speech sensitivity have been associated with legislation introduced by ALP governments, where the Coalition parties, which have generally demonstrated a higher degree of free speech sensitivity, and a greater reluctance to invoke regulatory legislation as an anti-racism strategy, have been in opposition.

\textsuperscript{148} See chapter 5 of this thesis.
1977 (NSW) has been insignificant. As discussed in this chapter, free speech sensitivity has been an important, though not an exclusive, influence on both the substantive and procedural aspects of the New South Wales regulatory regime—such as the inclusion of an incitement requirement in the definition of racial vilification, the inclusion of a number of defence, primary reliance on conciliation-based civil human rights enforcement and the constraints on invocation of the criminal prosecution branch of the enforcement mechanism. It is to the practical operation of this regime over the last decade that attention will be turned in the next chapter of this thesis.