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

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CHAPTER 9

PART 2, DIVISION 3A OF THE ANTI-DISCRIMINATION ACT 1977 (NSW)—OPERATION

1. INTRODUCTION

In addition to having the oldest racial vilification legislation in Australia, New South Wales can also lay claim to having the most ‘active’ regulatory regime—if activity is measured in terms of the number of occasions on which the legislation has been formally invoked. Furthermore, New South Wales is one of only two Australian jurisdictions (the other being the Commonwealth) in which the legislative regime for the regulation of racial vilification has been the subject of a judicial or quasi-judicial determination. For these reasons the operation of the New South Wales regulatory regime established by the Anti-Discrimination (Racial Vilification) Amendment Act 1989 (NSW) will be closely examined in this chapter.

Section 2 will present and discuss relevant data published by the New South Wales Anti-Discrimination Board (ADB) on the complaint-handling and conciliation process. Section 3 will report and discuss the findings of a more detailed survey of a sample of racial vilification complaints received by the ADB. The specific objective of this section of chapter 9 is to shed light on the operation of a complaint-initiated and conciliation-based mechanism for the regulation of racial vilification, about which there is very little publicly available information. Section 4 will examine the way in

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1 Formal invocation, in this context, refers to the commencement of proceedings under racial vilification legislation, whether, depending on the options available in the various jurisdictions, in the form of a criminal prosecution, the commencement of civil proceedings, or the lodgement of a complaint with a human rights administrative body.

2 HREOC and Federal Court of Australia decisions on racial vilification complaints under s 18C of the Racial Discrimination Act 1975 (Cth) were examined in chapter 6 of this thesis.
which the Equal Opportunity Tribunal/Administrative Decisions Tribunal (Equal Opportunity Division) have handled complaints of racial vilification that have been resolved by adjudication. Section 5 will consider the operation of the s 20D criminal prosecution component of the New South Wales legislative regime for the regulation of racial vilification. Section 6 will examine the implications for the legislative regulation of racial vilification of the recommendations contained in the New South Wales Law Reform Commission’s recently released report on the Anti-Discrimination Act 1977 (NSW).3

2. OVERVIEW OF SECTION 20C COMPLAINTS

2.1 Complaints Received

Between October 1989—when the racial vilification amendments to the Anti-Discrimination Act 1977 (NSW) came into force—and 30 June 1999, 702 formal complaints of racial vilification contrary to s 20C have been received by the ADB (see Table 1). An average of 70 complaints have been made annually.4 In the last two years the annual average has been only 32, perhaps reflecting the fact that residents of New South Wales who are the target of racial vilification now have a choice between lodging a complaint with the ADB under s 20C of the Anti-Discrimination Act 1977 (NSW) or lodging a complaint with the Human Rights and Equal Opportunity Commission under s 18C of the Racial Discrimination Act 1975 (Cth).

Table I: Number of Complaints Received, 1989-1999

<table>
<thead>
<tr>
<th>89/90</th>
<th>90/91</th>
<th>91/92</th>
<th>92/93</th>
<th>93/94</th>
<th>94/95</th>
<th>95/96</th>
<th>96/97</th>
<th>97/98</th>
<th>98/99</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>72</td>
<td>94</td>
<td>77</td>
<td>113</td>
<td>85</td>
<td>55</td>
<td>83</td>
<td>62</td>
<td>38</td>
<td>26</td>
<td>702</td>
</tr>
</tbody>
</table>

The number of cases or complaints formally handled is, of course, only one indicator of the impact of a regulatory regime. This qualification is particularly important to bear in mind in the case of racial vilification legislation, the enactment of which is often as concerned with the largely symbolic (and therefore more intangible) regulatory objective of ‘sending a message’ about acceptable behaviour and community standards in a multicultural society. Nonetheless the number of formal applications of the racial vilification legislation in New South Wales is worthy of note because, with the acceptance of the national regulatory regime administered by HREOC under s 18C of the Racial Discrimination Act 1975 (Cth), it is significantly greater than the volume of matters handled by other regulatory regimes in Australia. As noted in chapter 6, the capacity for (relatively) high frequency invocation is one

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6 For example, during the second reading speech on the Anti-Discrimination (Racial Vilification) Amendment Bill 1989 the Attorney General, Mr Dowd, stated that “This bill is a clear statement by the Government that racial vilification has no place in our community”: New South Wales Hansard (Legislative Assembly), 4 May 1989, p 7491.

7 To date, HREOC has received an average of 117 complaints nationally under s 18C of the Racial Discrimination Act 1975 (Cth) each year (see chapter 6 of this thesis) compared to a New South Wales state annual average of 70 complaints under s 20C of the Anti-Discrimination Act 1977 (NSW).
of the distinctive features of regulatory regimes based on a combination of a broad definition, relatively low threshold and complainant-initiated civil human rights enforcement system—like those established by the *Anti-Discrimination (Racial Vilification) Amendment Act 1989 (NSW)* and the *Racial Hatred Act 1995 (Cth)*.

### Table 2: Types of s 20C Complaints Received, 1989-1999

<table>
<thead>
<tr>
<th>CATEGORY</th>
<th>89/90</th>
<th>90/91</th>
<th>91/92</th>
<th>92/93</th>
<th>93/94</th>
<th>94/95</th>
<th>95/96</th>
<th>96/97</th>
<th>97/98</th>
<th>98/99</th>
</tr>
</thead>
<tbody>
<tr>
<td>All media</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>— print</td>
<td>*</td>
<td>*</td>
<td>36</td>
<td>37</td>
<td>35</td>
<td>53</td>
<td>53</td>
<td>26</td>
<td>19</td>
<td>32</td>
</tr>
<tr>
<td>— media</td>
<td>*</td>
<td>*</td>
<td>19</td>
<td>15</td>
<td>14</td>
<td>9</td>
<td>15</td>
<td>8</td>
<td>13</td>
<td>8</td>
</tr>
<tr>
<td>Private dispute</td>
<td>17</td>
<td>20</td>
<td>14</td>
<td>12</td>
<td>7</td>
<td>9</td>
<td>4</td>
<td>21</td>
<td>24</td>
<td>28</td>
</tr>
<tr>
<td>Public conduct</td>
<td>N/A</td>
<td>N/A</td>
<td>17</td>
<td>8</td>
<td>27</td>
<td>13</td>
<td>20</td>
<td>39</td>
<td>26</td>
<td>16</td>
</tr>
<tr>
<td>Other public communication</td>
<td>N/A</td>
<td>N/A</td>
<td>4</td>
<td>17</td>
<td>10</td>
<td>13</td>
<td>--</td>
<td>--</td>
<td>19</td>
<td>8</td>
</tr>
<tr>
<td>Other</td>
<td>14</td>
<td>10</td>
<td>8</td>
<td>11</td>
<td>7</td>
<td>4</td>
<td>8</td>
<td>6</td>
<td>--</td>
<td>8</td>
</tr>
</tbody>
</table>


9 Categories used in this table have been taken from NSW Anti-Discrimination Board annual reports: *supra* note 3. The categories employed by the Anti-Discrimination Board to report data on types of complaints has varied over the last 10 years. The ‘*’ symbol in Table 2 denotes that the category was not used in that year. ‘N/A’ means that data for the category was not included in the relevant annual report. The ‘private dispute’ category includes complaints recorded in ADB annual reports as ‘neighbour dispute’ (17% in 89/90 and 20% in 90/91). The ‘other’ category includes complaints recorded in ADB annual reports as: ‘employment’ (14% in 89/90, 10% in 90/91, 1% in 91/92 and 4% in 92/93); ‘education’ (1% in 91/92); ‘accommodation’ (1% in 91/92); and ‘goods and services’ (2% in 92/93).
Mirroring the data on the types of complaints lodged with HREOC alleging a breach of s 18C of the *Racial Discrimination Act 1975* (Cth),¹⁰ incidents of racial vilification in the media have consistently represented a large proportion of complaints under s 20C of the *Anti-Discrimination Act 1977* (NSW) (see Table 2). Forty-six percent of complaints lodged in the decade from 1989 to 1999 have identified a media product (for example, newspaper article, comment broadcast on radio) as the context for the alleged racial vilification. The majority of these media complaints have related to the print media (on average,¹¹ 36% of the total complaints each year) with a smaller number relating to electronic media (annual average¹² – 13%).

The relatively high proportion of complaints recorded as arising out of a private dispute (annual average – 16%) is somewhat surprising given that the regulatory parameters of the NSW legislation are expressly limited to public conduct. In 1992, Ch’ang suggested that the significant number of racial vilification incidents which take the form of neighbour or private disputes suggests that the current regulatory regime may be under-inclusive vis-a-vis the nature of the problem of racial vilification in New South Wales.¹³ This data and analysis supports the argument advanced in this thesis that the shape of racial vilification legislative regimes is substantially influenced by factors other than the particular nature of the problem which has been identified as in need of regulation, including free speech sensitivity and the protection of privacy. The limitation of racial vilification legislation to public conduct, notwithstanding the evidence that a not insubstantial amount of harmful

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¹⁰ Discussed in chapter 6 of this thesis.
¹¹ In the period from 1991-1999.
¹² In the period from 1991-1999.
2.2 Limitations of Available Data

When considering the number and types of complaints which have been lodged alleging a breach of s 20C of the Anti-Discrimination Act 1977 (NSW) it is important to recognise a distinctive feature of the New South Wales experience: the vast majority of matters handled by the Anti-Discrimination Board have been dealt with by informal negotiation and confidential conciliation.

One consequence of the emphasis on informality and conciliation-based resolution in the handling of racial vilification complaints under the civil human rights model is that because of the 'private' nature of the proceedings (in contrast to public civil or criminal court proceedings), little information has been available about the pre-adjudication dimension of the civil human rights regulatory approach.

The main sources of relevant information have been the limited statistical information on racial vilification complaints contained in annual reports of the Anti-Discrimination Board (discussed above),¹⁴ and the decisions of the NSW Equal Opportunity Tribunal. The Tribunal's decisions are valuable in giving shape and

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¹⁴ In addition to the statistics on the number and type of racial vilification complaints formally lodged (which were examined above) Anti-Discrimination Board annual reports have, on occasion, included data on the proportion of complaints lodged by Indigenous persons and information on the race/ethnicity of complainants. Limited statistical information is also contained in 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 Minster for Ethnic Affairs and the Attorney General, August 1992), Appendix 3; see also Ch’ang, supra note 12; and N Hennessy and P Smith, “Have We Got it Right? NSW Racial Vilification Laws Five Years” (1994) 1 Australian Journal of Human Rights 249. The Anti-Discrimination Board does not publish data on the outcomes of racial vilification complaints equivalent to the statistical information published by HREOC, and examined in chapter 6 of this thesis. The Anti-Discrimination Board does, however, publish composite data on outcomes for all grounds of discrimination/vilification under the Anti-Discrimination Act 1977 (NSW). See, eg, ADB, Annual Report 1998/99, supra note 3 at 24. These data will be compared with the outcomes for specific racial vilification complaints as revealed by the survey of s 20C complaints which is reported and explained in the next section of this chapter.
clarification to the operation of the legislation and so will be examined later in this chapter. However, only a very small proportion of racial vilification complaints are adjudicated upon by the Tribunal (an even smaller proportion than the proportion of racial vilification complaints under s 18C of the *Racial Discrimination Act* 1975 (Cth) than have been decided by a HREOC public inquiry\(^{15}\), so that these decisions cannot be assumed to be representative of the majority of cases which are handled via the conciliation-based complaint-handling process.

The following section of this chapter aims to develop the quality of the data which is available on operation of conciliation-based civil human rights approaches to the regulation of racial vilification. The significance of the findings presented in the next section is not limited to what it reveals about the NSW regulatory regime, but may also be extrapolated (albeit with sensitivity to substantive and procedural variations) to other regulatory regimes which are based on complainant initiation and conciliation-based resolution—in Australia, the HREOC system for administration of Part IIA of the *Racial Discrimination Act* 1975 (Cth), and the Australian Capital Territory Human Rights Office system for the administration of s 66 of the *Discrimination Act* 1991 (ACT).\(^{16}\) These findings will also provide a foundation for comparing the operation of the civil human rights regulatory regimes with the operation of alternative regulatory models such as criminal prosecution and tort-based civil litigation.

\(^{15}\) See chapter 6 of this thesis.

\(^{16}\) As explained in chapters 6 and 8 of this thesis, the process for the enforcement of civil human rights racial vilification legislation in these three jurisdictions is very similar.
3. A PROFILE OF THE RACIAL VILIFICATION COMPLAINT-HANDLING PROCESS IN NSW

3.1 Introduction

This section presents and discusses the key findings of a survey of the operation of the process for handling complaints of racial vilification contrary to s 20C of the New South Wales Anti-Discrimination Act 1977 (NSW). The data source for the project consisted of all racial vilification files closed between 1 May 1993 and 30 April 1995. Of the total number of complaints finalised during this period 165 files were available for analysis. At the outset, it is important to recognise that the data offers a ‘snap shot’ of the operation of the NSW legislative regime for the regulation of racial vilification over a two year period, rather than a comprehensive account covering the legislation decade of operation. With this qualification in mind, the survey findings do offer a valuable and previously unavailable insight into the operation of the regulatory regime.

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18 It was determined that the individual case files maintained by the ADB represented the source most likely to yield the sought-after information. After a period of consultation and negotiation, permission was granted by the President of the ADB for a selection of files to be reviewed. Permission was granted only after appropriate measures had been put in place to ensure the confidentiality of the ADB’s case files and specifically, the anonymity of complainants and respondents. Approval for the project was obtained from the University of Wollongong’s Ethics Committee.
19 The total number of racial vilification files closed during the period was 182. However, a small number of these files were not included in the sample, because the files were unavailable during the data collection phase or contained insufficient data to be included. Relevant data was extracted from each file and entered into a customised computer database according to the following major categories: complainant; respondent; type of incident/conduct; complaint-handling process; and outcome. It is important to recognise the margin for error which is associated with reliance on the case file as the exclusive source of information included in the database. There was considerable file-to-file variation in the nature and volume of relevant information. There was a degree of inconsistency or overlap between the terminology used by the different Conciliation Officers and a number of files did not contain information in all relevant categories (resulting in a number of ‘unknown’ entries on the database). While problematic from the point of the researcher, these ‘barriers’ are to be anticipated as a result of both individual differences in file maintenance and record collection, and the informal, ‘low-level’ documentation nature of the complaint-handling process.
3.2 Complainant Profile

The first priority of the data collection exercise was to provide some answers to a basic, but very important question: by whom are complaints of racial vilification being lodged? In particular, data was gathered which shed light on the ethnic background and sex of complainants, and which indicated whether complaints were lodged by individuals or representative bodies.20

Before outlining the profile of complainants that the data revealed, it is important to note that while the sample consisted of 165 complaints/files, this figure cannot be taken to represent the number of alleged incidents of racial vilification which were the subject of complaint during the period. First, the sample was drawn from files closed (not opened) during the survey period, some of which had been lodged up to two years earlier (see below). Second, in a number of cases a single incident (for example, a newspaper column) prompted complaints from two or more different complainants. Twenty-seven incidents accounted for 64 (38.6%) of the total number of complaints in the sample. On 4 occasions a single incident prompted 4 or more complaints. The highest number of complaints lodged in relation to one incident was 8.21

While this degree of ‘overlap’ is mentioned here primarily to avoid misinterpretation of the data, it is also worth noting that multiple complaints over the one incident can create very real practical difficulties for the complaint-handling

20 As defined in s 88 of the Anti-Discrimination Act 1977 (NSW): see discussion of standing in chapter 8 of this thesis.
process. The problem is particularly acute where there is a considerable delay between the lodgement of the complaints and where the different complainants desire different outcomes.22

3.2.1 Race/Ethnicity

Complainants came from a wide variety of ethnic/racial groups—over 30 different ethnic identities were recorded (see Table 3).23 Somewhat surprisingly, however, a large proportion of complaints (22%) were lodged by people who identified as being of Anglo-Celtic origin (Anglo/British, Irish or Scottish). While the legislation is framed in terms which makes it available to all identifiable ethnic groups (in contrast to the 1987 Bill which proposed that only vilification of minority groups be rendered unlawful24) it is clear that one of the primary motivations for the 1989 amendments to the Anti-Discrimination Act 1977 (NSW) was a concern to provide redress for those minority ethnic or racial groups who were most likely to suffer harmful

22 In its submission to the New South Wales Law Reform Commission’s Review of the Anti-Discrimination Act 1977 (NSW) the ADB suggested that the availability of a class action option might be a solution to this problem (New South Wales Anti-Discrimination Board, Balancing the Act: A Submission to the NSW Law Reform Commission’s Review of the Anti-Discrimination 1977 (NSW) (Sydney: ADB, 1994) at 53-54). The Law Reform Commission’s final recommendations are discussed infra, section 6.

23 Because of the requirement that the complainant must be a member of the group which is alleged to have been vilified (see chapter 8 of this thesis), persons lodging racial vilification complaints with the ADB are required to identify their ethnicity. Despite this requirement a number of complaints were made by persons who did not belong to the racial/ethnic groups allegedly vilified. This anomaly is discussed further below. The categories of ethnicity used in Figure 2 are based on those recorded in the complaint files reviewed. There is a degree of inconsistency and overlap in the use of ‘categories’ of ethnicity—they range from specific nationalities (eg ‘Filipino’) to generalised regional terms (eg ‘Asian’). This reflects both the inherent ambiguity of ethnicity ‘labels’ and the divergent recording practices employed by ADB Conciliation Officers. That is, in many cases the recorded ethnicity appears to have been based on self-identification by the complainant, while in other cases ‘generic’ labels (eg ‘Other Asian’) appear to have been employed, presumably by the ADB officer who maintained the file. In line with the current project’s objective of ‘profiling’ racial vilification complaints no attempt has been made to re-categorise descriptions of ethnic identifiers in a more consistent manner. The use of the descriptor ‘Australian’ is another obvious anomaly (presumably based on complainant self-identification).

24 See chapter 8 of this thesis.
vilification. The high number of complaints of Anglo-Celtic vilification suggests that the intended ‘beneficiaries’ of the racial vilification legislation are not necessarily its most frequent users. However, no implications about the success/failure of the legislation can be drawn on the basis of this data alone—it is important to consider not only the

Table 3: Ethnicity of Complainants

<table>
<thead>
<tr>
<th>Ethnicity</th>
<th>No. of complaints</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unknown</td>
<td>36</td>
</tr>
<tr>
<td>Aboriginal/Torres Strait Islander</td>
<td>21</td>
</tr>
<tr>
<td>Anglo/British</td>
<td>21</td>
</tr>
<tr>
<td>Greek</td>
<td>14</td>
</tr>
<tr>
<td>Irish</td>
<td>13</td>
</tr>
<tr>
<td>Yugoslavian(former)</td>
<td>12</td>
</tr>
<tr>
<td>Jewish</td>
<td>4</td>
</tr>
<tr>
<td>Italian</td>
<td>4</td>
</tr>
<tr>
<td>Chinese</td>
<td>4</td>
</tr>
<tr>
<td>South East Asian</td>
<td>3</td>
</tr>
<tr>
<td>Other Asian</td>
<td>3</td>
</tr>
<tr>
<td>Macedonian</td>
<td>3</td>
</tr>
<tr>
<td>Australian</td>
<td>3</td>
</tr>
<tr>
<td>Polish</td>
<td>2</td>
</tr>
<tr>
<td>Filipino</td>
<td>2</td>
</tr>
<tr>
<td>African</td>
<td>2</td>
</tr>
<tr>
<td>Scottish</td>
<td>2</td>
</tr>
<tr>
<td>Middle Eastern/Arabic</td>
<td>2</td>
</tr>
<tr>
<td>Lebanese</td>
<td>1</td>
</tr>
<tr>
<td>Estonian</td>
<td>1</td>
</tr>
<tr>
<td>Hungarian</td>
<td>1</td>
</tr>
<tr>
<td>Japanese</td>
<td>1</td>
</tr>
<tr>
<td>Maltese</td>
<td>1</td>
</tr>
<tr>
<td>Chilean</td>
<td>1</td>
</tr>
<tr>
<td>Romanian</td>
<td>1</td>
</tr>
<tr>
<td>New Zealander</td>
<td>1</td>
</tr>
<tr>
<td>Fijian</td>
<td>1</td>
</tr>
<tr>
<td>Indian</td>
<td>1</td>
</tr>
<tr>
<td>Other Oceanian</td>
<td>1</td>
</tr>
<tr>
<td>Czechoslovakian</td>
<td>1</td>
</tr>
<tr>
<td>Turkish</td>
<td>1</td>
</tr>
<tr>
<td>Ukrainian</td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td>165</td>
</tr>
</tbody>
</table>

See NSW Parliamentary Debates (Legislative Council), 10 May 1989, p 7810ff.
number of complaints lodged by different ethnic groups, but in relative terms, how these complaints were handled and what outcomes were achieved (see below).

In addition to the high number of complaints from persons of Anglo-Celtic origin, a significant proportion of complaints were lodged by persons/organisations from what might be considered primarily ‘established’ ethnic communities (for example, Greek, former Yugoslavian, Italian, Jewish). For various reasons (including the formation of effective community organisations) these groups appears to be better placed to take advantage of the complaint process, not just in terms of initiating complaints, but in terms of successful outcomes (see below).

The high number of complaints from (the former) Yugoslavia, Greece and, to a lesser extent, Macedonia (accounting for 18% of the total number of complaints), suggests that the incidence of racial vilification/rate of complaint in New South Wales involving particular ethnic groups may by affected by current events (including ethnic tensions) in the countries of origin of ethnic groups in Australia.26

In light of the available evidence on the levels of racial harassment and violence experienced by Indigenous Australians,27 the relatively high number of complaints lodged by Indigenous persons was to be expected (13%). In fact, the proportion of complaints which related to the alleged vilification of Indigenous Australians was even higher than this figure suggests. Ten of the 36 files where the ethnicity of the complainant was recorded as ‘unknown’ involved an allegation that Indigenous people had been vilified. In two other cases the conduct complained of was alleged vilification of Indigenous people (the ethnicity of the complainant being

26 Four of the seven racial vilification complaints substantively determined by the EOT/ADT arouse out of Greek-Macedonian tensions: see infra section 4.
27 For example, the NIRV Report, supra note 21 at 387, found that “Racist violence is an endemic problem for Aboriginal and Torres Strait Islander people in all Australian States and Territories”: In the 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: supra note 21, vol 4 at 71; see also the discussion in chapter 2 of this thesis.
listed as ‘Australian’ and Anglo/British respectively). In total then 20% of complaints lodged related to the alleged vilification of Aboriginal and Torres Strait Islander people.

Eight point five per cent of complaints were lodged by complainants from various Asian ethnic backgrounds (including Indian). Vilification of Asians was alleged in a further 6 complaints from persons of unknown ethnicity so that 12% of the total number of complaints in the sample related to Asian vilification. This is a significant proportion of the total number of complaints in the sample. However, based on anecdotal evidence and the available information on the incidence of racial vilification/harassment/violence suffered by persons of Asian descent in Australia, the rate of complaint lodgement regarding Asian vilification is lower than anticipated. The rate of complaint with respect to vilification of persons of Middle Eastern ethnic backgrounds (including Lebanese) is also lower than anticipated in light of the available evidence on the incidence of racial vilification.

Given the requirement that complainants must belong to (or be a recognised representative organisation for) the ethnic group allegedly vilified, there was a surprisingly large number of complaints (22% of the total) where the ethnicity of the complainant was recorded on file as ‘unknown’. It is difficult to determine why the ethnicity of the complainant was not known in so many cases. One possible explanation is that the only information provided by the complainant was in the form of the initial written complaint which s/he lodged, and this correspondence did not specify the complainant’s ethnicity. Certainly, the vast majority of complaints where the ethnicity of the complainant was unknown did not proceed very far through the complaint-handling process with most such complaints being withdrawn, formally or informally, or declined by the ADB (see below).

28 See NIRV Report, supra note 21 at 140.
29 Ibid at 145; see also discussion in chapter 2 of this thesis.
There were also a number of complaints where the complainant's ethnicity was identified, but where the complainant did not belong to the ethnic group allegedly vilified. This finding focuses attention on the legitimacy of the standing 'filter' discussed in chapter 8—specifically, whether the requirement that only members of the vilified group may lodge a formal complaint is unduly restrictive. In light of the considerable barriers which may impede people from many groups from lodging formal complaints, rendering the availability of legal protection contingent on the lodgement of a complaint by an eligible person/organisation may be problematic. The fact that such a complaint is not lodged should not be treated as an indication that the alleged conduct is insufficiently serious to warrant being the subject of proceedings in the ADB, yet the current procedure for enforcing s 20C carries just such an implication.

It is also worth noting that an interpreter was used by a complainant in only one case. In 99% of cases the complainant used English in contact/correspondence with the ADB. This data may be a cause for concern in that it suggests that persons with poor English language skills (including recently arrived migrants) are not accessing the racial vilification complaint procedure, even though it is likely that such people may be the targets of a disproportionate amount of racial harassment and abuse.

3.2.2 Individual or Organisations
Although it is possible under the Anti-Discrimination Act 1977 (NSW) for complaints to be lodged by a representative organisation, almost three-quarters (72%) of the racial vilification complaints in the sample were lodged by individuals. Twenty-seven per cent of complaints were lodged by organisations. This finding raises doubt about whether the facility for representative complaints has been effective in

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30 One complaint was identified as having been lodged anonymously, although this is not consistent with the requirement of a formal complaint.
overcoming the heavy burden placed on the individual victim/target of racial vilification, with implications for the desirability and efficacy of this particular regulatory approach. Ch’ang has observed that:

... the apparently low incidence of complaints lodged by representative bodies raises several questions: for example, do potential and actual individual complainants know that their complaint may be lodged by a representative body? Are such organizations in fact able to assist the individual complainant when approached to do so? Are the complaints that have been lodged so far by representative bodies seen to be of a more severe nature than those lodged by individuals? Are complaints lodged by representative bodies more likely to fall within the ambit of the Act and therefore more likely to be conciliated or prosecuted, rather than declined or withdrawn?\(^{31}\)

The last of the questions posed by Ch’ang—whether the type of complainant had any impact on the complaint-handling process or the outcome achieved—will be considered below.

3.2.3 Sex

Men lodged twice as many complaints as women. Of the 119 complaints which were lodged by an individual, 61% were lodged by males and 31% were lodged by females. Six per cent of complaints were lodged jointly by a male/female couple. In four cases the sex of the complainant was unknown.

While the data reveals that there is a significant differential between the rate of complaint by men and women, further research would be required to explain the reasons for the differential. One tentative suggestion which way warrant investigation is that these findings suggest that men are more likely to suffer racial vilification (perhaps by virtue of greater exposure to the ‘public’ domains to which the legislation is limited). Alternatively, it may be that men and women do experience racial vilification at equivalent rates, and that the higher rate of complaint by males

\(^{31}\) Ch’ang, supra note 13 at 97-98.
suggests that men may generally be better positioned to take advantage of the complaint-making process. Further research would be necessary to determine the validity of these speculative explanations.

3.3 Respondent and Incident Profile

Figure 1: Type of Conduct

Figure 1 demonstrates that just under half of all racial vilification complaints involved the print media (45%). The type of incident which most commonly gave rise to a complaint was the publication of a newspaper/magazine article which contained material which allegedly vilified one or more ethnic groups (76% of the 75 print media complaints). The remaining print media complaints related to the publication of cartoons (11), advertisements (4) and photos (2). Electronic media complaints (15% of total) were similar to print media complaints, relating to allegedly vilifying comments and advertisements broadcast on radio, and to a lesser extent, television.
That 60% of the cases in the sample related to media conduct does not necessarily reflect the rate at which racial vilification occurs in various settings. Media conduct is more likely to be the subject of complaint because, by definition, the requirement that the conduct must be public will be satisfied, and the high exposure of comments made in the media greatly increases the chance of one or more complaints being lodged in relation to a single incident. However, as Ch’ang has observed the high proportion of complaints against the media does suggest that media organisations “constitute an obvious target for further education regarding compliance with the racial vilification law.” Consistent with this suggestion the ADB has produced, for the media, a set of guidelines on compliance with the racial vilification provisions of the *Anti-Discrimination Act 1977 (NSW).*

Personal abuse of individuals on the basis of their ethnicity (or perceived ethnicity) accounted for a significant number of the non-media complaints. Where racial slurs and insults were directed at the complainant in a public setting (for example, at a public meeting, sporting event, within sight or hearing of neighbours) conduct of this type was characterised as ‘public conduct’ (16%). Where the abuse did not take place in such a setting (or formed part of a history of personal conflict between the parties) it was categorised as being a ‘personal dispute’ (9%) and generally beyond the reach of the racial vilification legislation.

The remaining incidents fell into the category of ‘other public communication’ (17%). Complaints in this category related to the publication of books which allegedly contained vilifying materials, the circulation of racist pamphlets and ‘hate’ mail, the display of vilifying symbols and products, and the display of racist/vilifying graffiti and posters.

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32 Ibid at 101-102.
33 Ibid at 102.
34 New South Wales Anti-Discrimination Board, *Guidelines for Media (Vilification)* (Sydney: ADB, npd).
35 See *Anti-Discrimination Act 1977 (NSW)* s 20B, discussed in chapter 8 of this thesis.
The outcomes achieved in relation to complaints based on the different categories of allegedly vilifying conduct are discussed below.

More than two-thirds of respondents alleged to have engaged in conduct amounting to racial vilification were organisations. Frequently, the organisation was a newspaper publisher, television station or radio station (see above). In 30% of cases the respondent was an individual.

Individual respondents were four times more likely to be men than women. The respondent was male in 80% of the 50 cases where the respondent was an individual. In a further 2 cases the respondents were a male-female couple.

3.4 The Complaint-Handling Process

3.4.1 The Nature of Conciliation

Figure 2 shows that common assumptions about the nature of the conciliation process are inaccurate. For example, it is often assumed that conciliation by definition involves both parties sitting around a table ‘working it out’ with the assistance of a conciliator/mediator/facilitator. As discussed in the previous chapter
of this thesis, based on this stereotype, concerns have been raised about the fairness of the process from the point of view of the complainant, when there is likely to be a considerable 'power imbalance' in favour of the respondent. In fact, in only 9% of the racial vilification cases in the sample was there a conference which conformed to this scenario. In over 90% of cases not only was there no meeting between the parties, but the process consisted entirely of written and/or telephone correspondence between the Conciliation Officer and the parties. Apart from the cases in which a conference occurred, in only one case did the file record that one of the parties had been interviewed in person.36

3.4.2 Legal representation

![Figure 3: Legal Representation](image)

Given the informal and conciliation-based nature of the complaint lodgement and handling process the fact that lawyers were involved in only a small number of cases

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36 This may be an underestimate—interviews may have occurred in other cases without anything to signify this having been recorded on the file.
is unremarkable (see Figure 3). A somewhat surprising finding is that complainants were slightly more likely to have legal representation than respondents in racial vilification matters. Whether legal representation bore any particular relationship with the success of the complainant is discussed below.

3.4.3 Reliance on legal opinion

In at least 31% of cases the conciliation officer requested a legal opinion from an ADB legal officer. The questions on which a legal opinion were most commonly sought were (frequency in parentheses):

- Does the conduct incite hatred etc. (i.e. seriousness)? (35)
- Was the respondent’s conduct a public act? (21)
- Does the conduct fall within one of the statutory exceptions? (13)
- Is the complainant an eligible representative person/body? (7)
- Is the incident within the ADB’s jurisdiction? (5)
- Was the alleged vilification on the basis of race/ethnicity? (4)

The high number of cases in which a legal opinion was required as part of the complaint-handling process and the nature of the questions referred to legal officers, are suggestive of quite a high degree of uncertainty about the scope of the legislation and how it is to be interpreted. Some clarification has also been provided on the relatively infrequent occasions when matters have been the subject of a Tribunal

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37 These figures may slightly underestimate the prevalence of legal representation—a party may have been represented or in receipt of legal advice without this fact having been recorded on the file.
38 This figure may slightly underestimate the number of occasions on which legal advice was sought as part of the complaint-handling process—in some other cases particular legal issues were identified, although a legal opinion was not formally recorded on the file.
39 See NSW Anti-Discrimination Board, supra note 22 at 51–53; Hennessy and Smith, supra note 14 at 250–58.
determination, but legislative amendment may be required to overcome some of these problems.

3.4.4 Duration

While the most obvious indication of the success of the complaint-handling process is the outcome achieved (discussed below), both complainants and respondents are likely to also be keenly interested in the speed and efficiency of the process.

The average time from the lodgement of the complaint to the closing of the file was 6.7 months. As Figure 4 illustrates, almost two-thirds of complaints were completed within 6 months. Nine per cent of complaints were completed within one month. At the other end of the spectrum only a small proportion (8%) of complaints were completed after 21 months.

Figure 4: Duration of Complaint

For example, the decision of the Tribunal in Wagga Wagga Aboriginal Action Group v Eldridge (1995) EOC 92-701, discussed infra notes 83-102 (corresponding text) has helped to clarify the meaning of 'incitement' and the requisite mens rea for the purpose of s 20C of the Anti-Discrimination Act 1977 (NSW). However, the interpretation of these elements in subsequent EOT racial vilification matters has not always been consistent: see infra notes 124-180 (corresponding text).

See the recommendations of the New South Wales Law Reform Commission, discussed infra section 6.

Data on duration was calculated on the basis of 159 files only. In the remaining 6 cases, file information on the date the complaint was closed was incomplete.
took longer than 18 months. Of the 4 matters which took longer than 2 years, 3 (arising out of the same incident) remained unresolved after conciliation and were referred to the EOT. (see further, below).

When the complainant was an organisation (average duration – 10 months) the process took almost twice as long to complete than when the complainant was an individual (average duration – 5.5 months). However, rather than interpreting this data as suggesting that the involvement of representative organisations resulted in unnecessary delays, it is just as likely that the longer duration was indicative of a degree of endurance on the part of organisational complainants which may have been important to the achievement of a successful outcome (see below).

The engagement of legal representation by complainants was associated with an increase in the duration of the complaint handling process (average duration - 16.5 months where complainant only represented; 19.2 months when both parties represented).

It is unlikely that the general pattern of increased duration where parties were legally represented can be directly attributed to the participation of lawyers. Rather, parties are more likely to have been legally represented in particularly complex or serious matters, which too longer to resolve because of the complexity/seriousness. Also, a complainant with high motivation and sufficient resources to pursue the matter through to a successful conciliation outcome or to EOT adjudication is probably more likely to have engaged legal representation.

However, the statistics on duration do suggest that any further increase in the rate of participation of lawyers would likely have a detrimental effect on the speed of the process.\(^{43}\) Of course, this is only one measure of the effectiveness of the process. Parties may be inclined to endure a longer complaint-handling process if legal representation significantly increased the chance of a desirable outcome (see below).

\(^{43}\) See the discussion of the Law Reform Commission’s recent recommendations, *infra* section 6.
It is worth noting that in the small number of cases where the respondent was represented and the complainant was not, the complaint duration was shorter (average - 5 months) than the overall average (6.7 months). The significant power imbalance is likely to have been a major disincentive to persisting with the complaint on the part of the complainant.

When compared with the ADB’s Business Plan objectives the findings on the duration of racial vilification complaints—an average of 6.7 months—is suggestive of a high degree of efficiency. Certainly, instances of avoidable delay appear to have been rare. However, on closer analysis, it is worth observing that six and a half months is a substantial period for racial vilification complainants to be involved in what will often be a stressful and intimidating process, with no guarantee of a satisfactory outcome (see below).

These findings on duration lend support to the concerns raised in chapter 8 of this thesis about whether the current complaint-handling process represents the most effective mechanism for regulating racial vilification. The survey findings on the outcome of complaints under s 20C of the *Anti-Discrimination Act 1977* (NSW) add further weight to this argument.

### 3.5 Outcomes

In the context of an assessment of the operation of a legislative regime for the regulation of racial vilification, the outcomes achieved in cases where a complaint has been lodged are obviously a very important measure of the practical significance of the regime. In this section the findings on outcomes will be presented (see Figure 5) and analysed, with reference to the general (all grounds) data on outcomes published by the ADB, as well as the data (examined in chapter 6 of this thesis) on the outcomes of complaints under s 18C of the *Racial Discrimination Act 1975* (Cth).

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44 The ADB’s targets time-frames for finalisation of complaints are: 20% of complaints in two months; 60% in six months; and 85% in 12 months: NSW Anti-Discrimination Board, *Annual Report 1994-95*, supra note 4 at 28.
3.5.1 Complaints Declined

Over a third of complaints (38%) were formally declined by the ADB. Given the quite specific terms of the definition of unlawful racial vilification in s 20C of the Anti-Discrimination Act 1977 (NSW) it is not surprising that a large number of complaints would be declined. The most common reason provided for declining a complaint—often on the basis of an internal legal opinion (see above)—was that the conduct of the respondent described in the complaint did not contravene the legislation because, for example, it did not occur in public, or was too trivial to be considered to have incited hatred, serious contempt or severe ridicule.45

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45 It would be interesting to consider whether the ADB’s interpretation of the scope of the legislation has altered over time, but analysis of this type would require a larger sample of complaints extending over a longer period of time (ideally, back to the inception of the racial vilification amendments in 1989).
3.5.2 Settlement

The most striking aspects of the findings on outcomes was that only 10% of the complaints in the sample were settled. When complaints which were declined by the ADB (see below) are excluded from the calculations the settlement rate rises to a healthier (though still relatively low) 16%. The proportion of racial vilification complaints from the survey sample which were settled in the ADB is smaller than the proportion of complaints under s 18C of the Racial Discrimination Act 1975 (Cth) ‘conciliated’\(^\text{46}\) in HREOC—an average of 22% between 1996 and 1999, rising to 28% if complaints declined by HREOC excluded from the calculation.\(^\text{47}\)

Given that settlement is generally accepted as an important indicator of the success of the complaint handling process—particularly from the point of view of complainants—the low settlement rate is a concern. As discussed below, over-emphasis on settlement as the primary indicator of 'success' may be problematic in certain respects, but the low settlement rate lends further weight to the argument that the generic alternative dispute resolution processes of anti-discrimination law may not be perfectly attuned to the unique nature of racial vilification.

However, it would be premature to label the current racial vilification provisions of the Anti-Discrimination Act 1977 (NSW) as a ‘failure’ on the basis of the low settlement rate alone. Formal settlement is not the only indicator of success. Even where an apparently ‘negative’ outcome was recorded, the process might have 'worked' from the point of view of the interests of the particular complainant involved.

The point can be illustrated with an example. In a case where the complaint was recorded as 'formally withdrawn' the complainant had withdrawn his complaint

\(^{46}\) The two terms 'settled' and 'conciliated' are used respectively, by the ADB and HREOC, to describe the same outcome: resolution of the complaint in a manner agreed by the parties.

\(^{47}\) Although beyond the scope of the present study the reasons for the higher rate of conciliation/settlement of racial vilification under the Commonwealth regulatory regime warrants further investigation.
in the knowledge that a representative organisation was proceeding with a complaint against the same respondent in relation to the same incident. That complaint was settled with the respondent agreeing to publish articles on the danger of stereotyping, the contributions of ethnic communities, and racial vilification, as well as undertaking to improve editorial supervision and staff awareness. In a second case (actually four complaints in relation to the same issue) where the complainants did not proceed with the matter (recorded as ‘complaint not pursued’) the respondent, on its own undertaking, published an apology and an article on the problem of racism. In another case where the complaint was formally declined by the ADB as falling outside the legislation (the alleged vilification having occurred in private in the context of a long standing personal dispute between neighbours) the ADB nonetheless sent a letter to the police informing them of the situation, sent a letter to the respondent outlining the complainant’s concerns, and offered the complainant information on, and a referral to, a Community Justice Centre.

It is also important to recognise that the mere lodgment of complaints may have a specific deterrent effect on the named respondent even if no settlement is achieved, or even if little occurs in the way of conciliation (such as where the complainant does not pursue the complaint). Also, the wider educational and general deterrence benefits of the mere existence of the legislation and the complaint lodgement process (while very difficult to quantify in the absence of more accurate information on the incidence of racial vilification48) must also be taken into account.

3.5.3 Complaints Not Pursued

There was a high ‘drop-out’ rate among complainants. Just under half of the complaints were withdrawn, either formally (15%) or informally—in that the complainant did not pursue the matter, losing contact with the ADB, or otherwise not proceeding with the complaint (30%). The 45% of ADB complaints withdrawn

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48 See chapter 2 of this thesis.
or not pursued is slightly higher than the equivalent drop out rate for HREOC complaints (37%).

While, as noted above, outcomes which appear to be have been satisfactory to the complainant eventuated in a small number of the cases in which the complaint was not pursued, the rate of attrition is still very high and a cause for serious concern. However, as with the low settlement figure, 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. In the absence of adequate ‘de-briefing’ information (such as might be obtained by follow-up interviews with complainants who were recorded as having ‘not pursued’), it is generally impossible to determine how many complainants fell into either of these categories, or somewhere in between. Overall, however, the rate of drop-out once again raises the question of the appropriateness of the current civil human rights system complaint-handling process employed in the enforcement of Commonwealth, New South Wales and ACT racial vilification legislation, which places a very heavy onus on complainants to take responsibility for the carriage of the matter.

3.5.4 Referrals to the Equal Opportunity Tribunal

In 7 of the formally declined cases (11%) the complainant exercised the option available under s 91(1) of the Anti-Discrimination Act 1977 (NSW) of referring the

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49 See chapter 6 of this thesis.
50 See also Hennessy and Smith, supra note 14 at 259.
complaint direct to the EOT despite the decision of the President of the ADB to decline the complaint. In 7 other cases the complaint was referred to the Tribunal after the conciliation process had failed to yield an outcome acceptable to the parties, in accordance with s 94(1) of the Anti-Discrimination Act 1977 (NSW). In total then, 9% of all racial vilification complaints in the sample were referred to the EOT. This figure over-states the proportion of alleged incidents of racial vilification which are being assessed in a formal adjudicatory manner. In at least two cases, multiple complaints regarding the same incident were referred to the Tribunal.

3.5.5 Factors Associated with Outcomes

A small number of cross-tabulations were undertaken between outcomes achieved in racial vilification matters and various other factors regarding the complaint—namely, the ethnic identity of the complainant, the type of parties (that is, individuals or organisations), the type of allegedly vilifying incident, and legal representation. While the sample size is too small to support any firm conclusions about the nature of the relationship between these factors and outcomes achieved, some of the findings are deserving of comment.51

In the 26% of cases where the complainant was Aboriginal/Torres Strait Islander or of Anglo/British ethnicity (the two largest single groups of complainants) no settlements were achieved. Of the 21 Anglo/British complaints, 76% were declined by the ADB. This high rate of threshold exclusion is not surprising, likely reflecting the fact that people of this dominant ethnicity are simply not often subjected to the level of vilification with which the legislation is concerned. The zero settlement rate for Indigenous complaints is more disturbing, particularly when combined with the more than 50% ‘drop-out’ rate for this group of complainants. On the other hand, it should be noted that the three complaints by Aboriginal

51 In Figures 6-7 the category, ‘referred to EOT’ includes complaints referred directly to the EOT by the complainant after having been formally declined by the ADB, as well as complaints referred to the EOT after conciliation had failed to resolve the matter.
complainants which were referred to the EOT resulted in a decision in the complainants' favour.\textsuperscript{52}

The data presented in Figure 7 does not support the common assumption that the rate of 'drop-out' (particularly where due to 'fatigue'—limited resources, time, expertise etc.) can be expected to be much higher for individual complaints when compared with organisational complainants. Individuals and organisations formally withdrew at an almost identical rate (14\% and 16\% respectively), and individual complainants did not pursue the complaint in just over 30\% of cases while organisations did not pursue the complaint in 27\% of cases. However, where the complainant was an organisation the rate of settlement was close to three times the rate of settlement for individual complainants.

\textbf{Figure 6: Outcome x Ethnicity of Complainant}

Where the respondent was an organisation the complaint was five times as likely to be settled as where the respondent was an individual. (Of course, this major

\textsuperscript{52} Wagga Wagga Aboriginal Action Group \textit{v} Eldridge (1995) EOC 92-701. This decision is discussed \textit{infra} notes 83-102 (corresponding text).
differential needs to be considered in the context of the low rate of settlement overall.) Further, the likelihood of settlement was slightly increased if the complaint related to a media incident. Eleven point one per cent of media complaints were settled (compared to the overall rate of 9.7%).

Finally, legal representation of the complainant was associated with higher levels of settlement (25%) and, predictably, much higher levels of referral to the EOT (43.8%) As discussed above, it is impossible to determine on the available data, whether there is a causal link between the involvement of lawyers and the appearance of a greater rate of complainant success or whether it is simply that parties, and complainants in particular, employ legal representation only where they have what they consider to be a 'strong' case. Similarly it is unclear whether the involvement of lawyers increases the likelihood that the complaint will be referred to the EOT or whether complainants engage legal representation when it becomes clear that the matter is not going to be resolved without formal adjudication by the EOT.
3.5.6 Comparison With Discrimination Complaints

The argument has been advanced in this section that the low ‘success’ rate for racial vilification complaints raises doubts about the suitability of the current complaint handling/enforcement mechanism for regulating racial vilification. This argument finds further support in data published by the ADB on outcomes achieved in complaints relating to all grounds of unlawful conduct under the Anti-Discrimination Act 1977 (NSW)—predominantly discrimination complaints.\(^{53}\)

For all complaints finalised by the ADB in 1993/1995 (that is, the same period as that covered by the survey of racial vilification complaints) the rate of settlement was 27%.\(^{54}\) Even if this figure is adjusted to take account of the atypical occurrence that in 1993/94 560 sex discrimination complaints against one employer were settled,\(^{55}\) the overall rate of settlement was 18% compared to 10% for racial vilification complaints. As well as having lower rates of settlement, racial vilification complaints (38%) were also more likely to be declined (28% for all grounds\(^{56}\)) and the racial vilification complainant (45%) was more likely to ‘drop-out’ (38% for all grounds\(^{57}\)).

The overall pattern of these figures (high rate of exclusion, high drop-out, low settlement) could be interpreted as raising questions about the conciliation-based civil human rights methods of regulatory enforcement in general—that is, in relation to all grounds of unlawful conduct under the Anti-Discrimination Act 1977 (NSW) and not just in relation to vilification matters. However, the differential between the outcomes for discrimination and vilification matters suggests that flaws in the enforcement

\(^{53}\) For example, in 1994-95 of the 1698 complaints received by the ADB, 83% were discrimination complaints. Just 4% were vilification complaints (3% racial vilification complaints): see ADB, Annual Report 1994-95, supra note 4 at 29.


\(^{56}\) Supra note 54.

\(^{57}\) Ibid.
system may be magnified in the case of vilification matters, rendering the complaint-driven and conciliation-based civil human rights approach especially problematic as a mechanism for regulating racial vilification.

3.6 Concluding Observations on the Survey Findings

The profile of the operation of the NSW racial vilification complaint process presented in this section represents an important addition to the available information on the practical operation of racial vilification legislation in Australia—specifically, legislation which adopts the civil human rights system as the enforcement mechanism. The ‘snap shot’ nature of the survey (including the small sample size and the file-based data source) means that it does not, on its own, provide a sufficient foundation for a conclusive assessment of the approach to the regulation of racial vilification adopted in Part 2, Division 3A of the Anti-Discrimination Act 1977 (NSW). However, several general observations can be made.

First, the research findings suggest that the racial vilification provisions of the Anti-Discrimination Act 1977 (NSW) currently do constitute a valuable, but imperfect regulatory mechanism. While by no means a complete answer to the various forms of racial vilification which occur in Australian society, the New South Wales regime does provide a not insignificant measure of protection to targets and victims of racial vilification. Second, the shortcomings in the enforcement process which were identified in chapter 8 and further discussed in this section of chapter 9, suggest that the ‘generic’ conciliation-based complaint handling process which had been established primarily to handle complaints of discrimination, may have been adopted (without significant adjustment) for the enforcement of racial vilification legislation, without sufficient consideration of its suitability for the regulation of vilification. While the findings do not justify a wholesale rejection of the existing enforcement process, they do provide support for the conclusion that, when analysed from the perspective of its capacity to deliver an effective regulatory regime, the conciliation-based civil human rights model is not a perfect match with
the particular nature of racial vilification and the specific objectives of racial vilification legislation.

Finally, an important question which the present study was not equipped to answer is whether the existence of the legislation and the availability of the complaint-handling process has had any effect on the actual rate and nature of vilifying conduct which occurs in New South Wales. It can be safely assumed that there remains a significant degree of unreported racial vilification, although the size of the ‘hidden’ figure is impossible to quantify in the absence of relevant data. Future research could usefully be directed at obtaining a more accurate picture of the actual incidence of conduct amounting to racial vilification with a view to providing a baseline against which the current and prospective impact of the racial vilification complaint-handling process may be measured.

To this point, the focus of this chapter has been on the operation of the informal conciliation stage of the civil human rights process for the enforcement of the racial vilification provisions of the Anti-Discrimination Act 1977 (NSW). In the next section of this chapter, the focus will shift to the adjudicatory limb of the enforcement process. Although the jurisdiction of the EOT (now the ADT) has been invoked in only a small proportion of racial vilification complaints, the option of quasi-judicial determination remains an important part of the overall enforcement system for the regulation of racial vilification in New South Wales.

4. TRIBUNAL DECISIONS

4.1 Introduction

Eight racial vilification matters were decided by the NSW EOT in the nine year period from the enactment of the Anti-Discrimination (Racial Vilification) Amendment Act 1989 (NSW) to the abolition of the EOT in October 1998. At 31 December 1999,

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58 See chapter 2 of this thesis.
59 Survey-based research, including victim surveys and surveys of media output, appears to have the greatest potential for yielding the necessary information.
one decision dealing with a complaint of racial vilification had been handed down by
the successor to the EOT, the Administrative Decisions Tribunal (Equal
Opportunity Division).^  

In seven of the cases decided by the EOT/ADT, the Tribunal ruled
definitively on the substantive issue of whether the conduct the subject of the
complaint constituted unlawful racial vilification contrary to s 20C of the Anti-
Discrimination Act 1977 (NSW). In one case the complaint was dismissed without
hearing on the basis of the complainant’s failure to appear. In the other case the
Tribunal ruled on the procedural relationship between s 20C and s 20D and the
associated statutory responsibilities of the President of the Anti-Discrimination
Board.  

While small in number, the six substantive determinations made to date
provide a valuable source of information on the interpretation and application of
the racial vilification provisions of the Anti-Discrimination Act 1977 (NSW), and so each
will be discussed here. The analysis of these cases will focus on the way in which the
Tribunal has interpreted the regulatory scope of s 20C of the Anti-Discrimination Act
1977 (NSW), including an examination of the role which free speech sensitivity has

60 No public inquiry/tribunal decisions have been made under s 66 of the
Discrimination Act 1977 (NSW): personal communication (letter), Rosemary Follett,
gov.au/eot_judgments.nsf/c6f2702540c4b7a84a2567c5002d741a/1242872c6c03de3a
(case note). In refusing to adjourn the matter and reschedule the hearing the Tribunal
(Judge Patten, Mr L Law, Mr M Luger) took into account “not only what it regards as
an unsatisfactory explanation for the complainant’s failure to appear before the
Tribunal on previous occasions and today” (the complainant lived in Western
Australia) but also the submissions made by the respondent on the substance of the
matter. The Tribunal reached the conclusion that the publication in question was not
prima facie unlawful under s 20C(1), and even if it was, it was justifiable under s
20C(2). The judgement contains no details on the nature or contents of the publication
in question.
nsf/c6f2702540c4b7a84a2567c5002d741a/f92248f35393dc634a25665500071c0a?Op
enDocument] accessed 11 February 2000. This case is discussed infra notes 203-211
(corresponding text), in the context of an examination of the operation of s 20D of the
Anti-Discrimination Act 1977 (NSW).
played in this interpretative process. Attention will be directed at considering whether the tendency to narrowly construe the regulatory scope of racial vilification legislation evident in the decisions of the HREOC public inquiries discussed in chapter 6, has also been a feature of the EOT's resolution of racial vilification complaints in New South Wales.

4.2 Harou-Sourdon v TCN Channel Nine Pty Ltd (1994)

In Harou-Sourdon v TCN Channel Nine Pty Ltd\(^{63}\) the EOT\(^{64}\) considered a complaint based on comments by Clive Robertson during a television program called “Robbo’s World Tonight” on 23 April 1990 which were alleged to constitute racial vilification of persons of French origin. After noting that a French television network had broadcast the trial, execution and burial of Nicholas Ceaucescu (former President of Romania), Robertson stated: “I thought the French had class. I knew they weren’t too good on personal hygiene, but I thought at least they had class.”\(^{65}\) The complainant alleged that this comment constituted unlawful racial vilification contrary to s 20C of the *Anti-Discrimination Act 1977* (NSW).

The respondent advanced two arguments. First it advanced the federal constitutional argument that s 20C of the *Anti-Discrimination Act 1977* (NSW) was invalid (for the purpose of this complaint) because it purported to regulate a subject matter (that is, racial vilification in television broadcasting) that was already covered by Commonwealth legislation (specifically, Television Program Standard TPS2 and the *Broadcasting Act 1942* (Cth)).\(^{66}\) Because the Commonwealth legislation had effectively ‘covered the field’, thus bringing s 109 of the Constitution\(^{67}\) into play, the

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\(^{63}\) *Harou-Sourdon v TCN Channel Nine Pty Ltd* (unreported, 23 June 1994, EOT); (1994) EOC ¶92-604 (digest).

\(^{64}\) Ms Conway, Ms Tracey, and Mr McDonald.

\(^{65}\) *Supra* note 62 at 2.

\(^{66}\) The *Broadcasting Act 1942* (Cth) has since been superseded by the *Broadcasting Services Act 1992* (Cth). See chapter 1 of this thesis.

\(^{67}\) The operation of s 109 of the Australian Constitution is explained in chapter 1 of this thesis.
The civil racial vilification provisions of the *Anti-Discrimination Act 1977* (NSW) had no valid application to the present complaint and so the EOT had no jurisdiction to deal with the matter.

The Tribunal rejected this argument ruling that there was nothing in the *Broadcasting Act 1942* (Cth) or TPS2[^68] to indicate an intention on the part of the Commonwealth Parliament to 'cover the field':[^69] "The Tribunal is of the view that there is nothing in the BA and TPS2 to indicate that their provisions relating to racial vilification were intended to be an exhaustive, exclusive or a complete statement of the law for broadcasters in the context of conduct constituting racial vilification."[^70] Consequently, there was no s 109 inconsistency.

The Tribunal’s conclusion on this matter is undoubtedly correct and well supported by authority.[^71] However, it stands as an important acknowledgement of the scope of the regulatory regime established by the enactment of the *Anti-Discrimination (Racial Vilification) Amendment Act 1989* (NSW). Acceptance of the respondent’s (admittedly speculative) argument on this point would have significantly reduced the ‘reach’ of s20C of *Anti-Discrimination Act 1977* (NSW) (and consequently, of s 20D) bearing in mind that conduct in the form of print or electronic media has consistently constituted a large proportion of racial vilification complaints received by the ADB (see above).

The second argument advanced by the respondent was that the matter should be dismissed in accordance with s 111 of the *Anti-Discrimination Act 1977* (NSW) which provides that:

[^68]: The Tribunal, accepted for the purpose of argument, the respondent’s submission that TPS2 was a law of the Commonwealth for the purpose of constitutional validity and determining the applicability of s109. However, the Tribunal noted the complainant’s objection to this characterisation of an industry standard and found it unnecessary to rule on the matter: *supra* note 63 at 8.

[^69]: See chapter 1 of this thesis.

[^70]: *Supra* note 63 at 6-7.

Where, at any stage of an inquiry, the Tribunal is satisfied that a complaint is frivolous, vexatious, misconceived or lacking in substance, or that for any other reason the complaint should not be entertained, it may dismiss the complaint.

In support of this argument the respondent submitted that the statement made by Roberston was not capable of inciting the requisite degree of ill-feeling to fall within the parameters of s 20C (that is, hatred, serious contempt, or severe ridicule) was dismissed under section 111(1) of the Anti-Discrimination Act 1977 (NSW) on the basis that it was misconceived and lacking in substance.

In establishing the threshold imposed by the legislation the Tribunal: adopted the plain (dictionary) meaning of the key words in the definition of unlawful racial vilification: "incite", "hatred", "serious contempt" and "serious ridicule" (as these terms are not defined in the legislation); considered the intention of the NSW Parliament in the enactment the legislation (as reflected in the 1989 Bill’s second reading speech); and considered the manner in which related provisions in broadcasting industry standards dealing with racial vilification had been interpreted by the Australian Broadcasting Tribunal, and considered the manner in which s 9A of the Race Relations Act 1971 (NZ) had been interpreted by the New Zealand Equal Opportunities Tribunal.

72 Supra note 63 at 8.
73 Ibid at 9-10. See Mr Dowd, Attorney General, Second Reading Speech, Legislative Assembly: New South Wales Hansard (Legislative Assembly), 4 May 1989, p 7488; discussed in chapter 8 of this thesis.
75 Enacted in 1977, s 9A(1) of the Race Relations Act 1971 (NZ) provided that:

It is unlawful for any person —

(a) To publish or distribute written material which is threatening, abusive or insulting, or to broadcast by means of radio or televisions words which are threatening, abusive or insulting;
The Tribunal concluded that the conduct did not fall within the s 20C definition and ordered that the complaint be dismissed in accordance with s 111:

... [T]he Tribunal is of the view that the subject statement could not incite hatred, serious contempt or severe ridicule as alleged, bearing in mind the ordinary meaning of those words. It may well be that the statement could be said to be distasteful. However, that does not bring it within the terms of section 20C of the ADA and it is the Tribunal’s view that it is more properly classified as trivial ... and hence does not constitute the higher threshold conduct which section 20C proscribes.\(^77\)

In reaching this conclusion the Tribunal identified the factors which had influenced its decision:

- the fact that the statement comprised only a few seconds of a 40 minute television program;
- the humorous and light-hearted nature of the news program as presented by Clive Robertson;
- the statement was a “humorous or attempted humorous aside or throwaway line” which contrasted with the serious criticism which Robertson directed at the French television network for broadcasting the Ceaucescu affair;
- the “ordinary” nature of the language used;

This section was repealed in 1989, and then re-enacted, with a higher threshold (no references to “ill will” or “ridicule”) as s 61 of the Human Rights Act 1993 (NZ). See W Hirsh, “The New Zealand Experience: Exciting Racial Disharmony and the Law” (1990) 1 Without Prejudice 18 at 21; and J Moses, “Hate Speech: Competing Rights to Freedom of Expression” (1996) 8 Auckland University Law Review 185 at 186-187. Section 131 of the Human Rights Act 1993 (NZ) creates a criminal offence of intentionally inciting racial disharmony.

\(^77\) Supra note 63 at 14.
Like the first decision of the Human Rights and Equal Community Commission on s 18C of the *Racial Discrimination Act 1975* (Cth)—*Bryant v Queensland Newspapers Pty Ltd*—the case of *Harou-Sourdon v Channel* was a rather inauspicious quasi-judicial ‘debut’ for s 20C of the *Anti-Discrimination Act 1977* (NSW). That is, the case was not which involved the sort of racial vilification at which the regulatory regime was directed. Like *Bryant*, the conduct in question was very much at the lower end of the spectrum of racially offensive conduct, and so it was no surprise that the Tribunal did not fall within the definition of unlawful racial vilification.

On the other hand, the case made an important contribution to understanding of the scope of the legislative regulation of racial vilification effected by the 1989 amendments. It helped to allay fears that the racial vilification provisions would be ‘abused’ and extended to conduct with which the law was not designed to deal.

Unlike the first case (*Bryant*) to be determined by HREOC under s 18C of the *Racial Discrimination Act 1975* (Cth), there was minimal evidence of a tendency by the EOT to ‘read down’ the regulatory scope of the legislation. Two minor indications of this type were the Tribunal’s consideration that Robertson’s comment was a ‘one off which was not repeated — a somewhat curious observation given that there is no requirement in s 20C that the conduct in question be repetitive in order to

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constitute unlawful racial vilification.\footnote{This reference to the absence of repetition as a factor going to the characterisation of the conduct in question as outside the regulatory scope of the legislation, notwithstanding the fact that repetition is not an element of the definition of unlawful racial vilification, mirrors the interpretation and application of s 18C of the Racial Discrimination Act 1975 (Cth) by HREOC Commissioner Johnston in McGlade v Lightfoot [1999] HREOCA 1 (11 February 1999) [http://www.austlii.edu.au/au/cases/cth/HREOCA/1999/1.html] accessed 17 January 2000; (1999) EOC ¶93-002 (digest of decision). This case is discussed in chapter 6 of this thesis. Repetition is an element in some legislative formulations of unlawful racial vilification. For example, s 13 of the Canadian Human Rights Act 1977 renders unlawful the repeated telephonic transmission of hate messages: see the discussion of this provision in chapter 10 of this thesis.} The emphasis placed by the Tribunal on the fact that Robertson had a reputation as a 'humorous' news reader is also questionable in that it is not obvious how this is relevant to the question as the likely effect of the statement, and in any event it assumes that this would have been generally understood by viewers of the television program.

One final matter worth considering in relation to the EOT's handling of the complaint in Harou-Sourdon is the significance of the ethnic/national group at which the alleged racial vilification was directed. There is no consideration of this matter in the decision, so any examination of this issue must be speculative. However, it is worth speculating as to whether the fact that the group in question (persons of French origin) is not one of the groups most commonly or seriously targeted by racial vilification in Australia\footnote{See chapter 2 of this thesis, and discussion of the ethnicity of racial vilification complainants in NSW, discussed earlier in the chapter. The rate and seriousness of French vilification did appear to rise in the mid 1990s in Australia during the controversy and protests over the French Government's decision to conduct nuclear testing in the Pacific: see D Lewis, "It's racial hatred, say French-Australians", The Sydney Morning Herald, 19 June 1995, 1.} had (or should have had) any bearing on the Tribunal's application of the relevant legal statutory threshold to the facts of the case.

In light of the fact that the New South Wales Parliament expressly endorsed a statute that provided universal protection to all ethnic/racial groups (in contrast to the 'one-way' approach proposed in the 1987 Bill which extended selective protection to minority groups only) it might be assumed that the threshold is
obviously and necessarily constant, with no variation according to the particular ethnic/racial at which the alleged vilification was directed in any given case. To 'adjust' the threshold according to the circumstances of the ethnic/racial group in question would amount to the recasting of the universal protection to a protection extended only to selected (minority) groups—precisely the model proposed in the 1987 Bill and subsequently rejected.

However, following closer consideration it may be argued that the notion of a fluctuating threshold is entirely consistent with the adoption of as universal approach to the regulation of racial vilification. The universality of the current racial vilification provisions of the Anti-Discrimination Act 1977 (NSW) demand that no groups be denied the protection of the regulatory regime. However, it does demand that a constant and objectively assessed universal standard of gravity be applied in each and every case of alleged racial vilification. To approach the task of determining whether certain conduct falls within the definition of unlawful racial vilification in this way would be to ignore the relevance of the context in which the conduct in question occurred.

In Harou-Sourdon the 'humorous' context in which the statement was made by Roberston was clearly an influential factor in the Tribunal determination that the statement did not come within the s 20D definition. It follows that not only the immediate context, but the broader social context in which allegedly racially vilifying conduct occurred should be taken into account when determining the conduct falls within the category of unlawful racial vilification. Whether or not a particular act is likely to have the proscribed effect (that is, incitement of hatred, serious contempt or severe ridicule) may depend on the identity of the target group, including the history and current status of that group, in terms of its experience of racism, and the prevalence of negative stereotypes about, and underlying animosity or ill-feeling towards, that group. As discussed in chapter 2, the harmful effects of racial vilification are cumulative, so that where a particular ethnic/racial group has frequently been subjected to racism (including vilification and the perpetuation of
negative stereotypes) then a particular act (which might in isolation be considered relatively innocuous or trivial) might actually be sufficient to trigger the harmful effects (hatred, contempt and ridicule) which the legislation is specifically concerned to regulate. Conversely, a similar (or even more serious) act directed at an ethnic/racial group which is rarely the target of racial vilification, about which there are no or few negative stereotypes, and which does have a history as victims of racism, might be considered incapable of causing the requisite degree of harm to attract the protection of the regulatory regime.

These issues have been discussed because the decision in *Harou-Sourdon* provided a convenient ‘jumping off’ point. However, they are of general relevance to the question of how racial vilification regulatory regimes actually work in practice.

### 4.3 Wagga Wagga Aboriginal Action Group v Eldridge (1995)

Several complaints were lodged under section 20C of the *Anti-Discrimination Act 1977* in response to the conduct of Jim Eldridge, a Wagga Wagga City Council councillor, on three separate occasions in June and July 1993. The matter was dealt with by the EOT as a s88(1A) complaint—lodged by an organisation, the Wagga Wagga Aboriginal Action Group, acting on behalf of seven individuals.

The conduct complained of included comments made by the respondent:

(i) at the launch of the United Nations International Year for the World’s Indigenous People (IWIP) on 11 June;

(ii) at a meeting of the Wagga Wagga City Council on 28 June; and

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84 R Bartley (Judicial Member), L Farmer and M Luger.
85 The EOT adopted a flexible approach to the procedures and rules on standing in stark contrast to the approach adopted in the HREOC at first instance in *Executive Council of Australian Jewry v Scully* (1998) EOC ¶92-946 at 78,295, discussed in chapter 6 of this thesis. The complainants in *Wagga Wagga Aboriginal Action Group v Eldridge* erroneously styled the action as a s 88(1) representative complaint; the Tribunal permitted an amendment to the complaint into the formal of a s 88(1A) complaint by an organisation on behalf of named persons: (1995) EOC ¶92-701 at 78,264.
(iii) during an interview on the “Hinch” television program on 2 July.

The Tribunal did not consider the comments made by the respondent on this third occasion, on the basis that there was some dispute about the accuracy of the version of the interview that went to air.\textsuperscript{86}

During the IYWIP launch at the Wagga Wagga City Council chambers, Eldridge interrupted the proceedings and made the comments which formed, in part, the basis for the complaint of racial vilification. Apparently angered by a recently lodged land claim involving land in the Wagga Waggaregion, Eldridge made a number of comments critical of, and offensive to, Aboriginal people, including references to “half-caste radicals [who] had made a claim upon the city...” He claimed “to have a right to speak on behalf [of] the white people in this city, against these radical half-castes...” and said “I refuse to accept the situation and pay over to these half-castes.”\textsuperscript{87} During one of the references to “radical half-castes” he pointed to one of the complainants, Marianne Atkinson.

During a speech at the Wagga Wagga City Council on 28 June, Eldridge made the following comments:

My people came down the river and established this City when nobody other than savages had been here before... [F]or 30 years my people have been subject to a reign of terror the like of which has not previously been seen in this City. ...

You say white people are not being terrorised, but I say this Mr Mayor, I consider we have been patient, we have been kind, and have been tolerant. Now that these people have made claim to sovereignty over our land, that is the declaration of war, and you may rest assure[d] that my people understand that this is a war that they dare not lose and which they will win. These people think they are going to win this war. Let me remind you that my people have had their hearts and their arms made of steel, hardened and tempered in battles which were fought in Agincourt, Waterloo and even in modern times at Nui Dat, and they’re not going to give away the land that they have fought for ... I believe, Mr Mayor that in this war that with God’s help my people will win.\textsuperscript{88}

\textsuperscript{86} The Tribunal accepted Eldridge’s evidence that “the programme was a compilation of disparate parts, and the comments were taken out of the context in which they were made”: \textit{ibid} at 78,263.

\textsuperscript{87} \textit{Ibid} at 78,262.

\textsuperscript{88} \textit{Ibid} at 78,263.
For the EOT the main issue to be determined was whether the conduct ‘crossed the dividing line’ between conduct which conveys hatred towards, expresses serious contempt for, or severely ridicules a person or group of persons on the grounds of race—which may be “unpleasant and obnoxious” but would not be unlawful—and public conduct which incites others to have hatred towards, serious contempt for, or to severely ridicule a particular person or group of persons on the ground of race, which the Anti-Discrimination Act declares unlawful.

Resolution of this question involved a consideration of a number of substantive issues about the definition of unlawful racial vilification under s 20C. Specifically, the Tribunal considered the requirement of incitement, and the related issue of the mens rea under the definition of unlawful racial vilification. The Tribunal accepted the complainant’s submissions that under section 20C(1): it need not be established that the respondent intended to incite racial hatred; and it is unnecessary for the complainant to prove that any person was incited by the respondent’s conduct.

The EOT’s confirmation that the fault standard for unlawful racial vilification under the Anti-Discrimination Act 1977 (NSW) is not subjective, focusing instead on the likely effect of the respondent’s conduct provided an important clarification of the regulatory scope of the legislative restriction on racial vilification in NSW. As noted in chapter 8, these aspects of the definition of unlawful racial vilification were somewhat ambiguous on the face of the legislation. However, as will be shown

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89 Ibid at 78,266.
90 Ibid at 70,264. This interpretation of the incitement requirement was endorsed by the EOT (Mr Bitel, Ms Alt, Ms Toltz) at in R [complainant] v Marinkovic and Marinkovic (1996) EOC ¶92-841 79,240-79,241—a case of homosexual vilification and HIV/AIDS vilification under ss 49ZT and 49ZXB of the Anti-Discrimination Act 1977 (NSW) respectively, the legal elements of which mirror s 20C of the Act.
91 The interpretation endorsed by the EOT in Eldridge is consistent with the parliamentary intention expressed by the Attorney General, Mr Dowd, during the second reading speech on the Anti-Discrimination (Racial Vilification) Amendment Act Bill 1989: New South Wales Hansard (Legislative Assembly), 4 May 1989, p 7490.
below, subsequent Tribunal decisions have re-introduced some confusion into the interpretation of s 20C by suggesting that the definition of unlawful racial vilification does contain a subjective fault element.

_Eldridge_ did not dispute that he made the comments which formed the basis of the complaint. Nor did he dispute that the conduct came within the definition of ‘public act’. The respondent’s main arguments by way of ‘defence’ were that:

- section 20C of the _Anti-Discrimination Act 1977_ should be considered invalid on the basis that it derogated from the right to free speech; and
- the comments were made “in good faith”, and therefore, by virtue of section 20C(2) did not amount to racial vilification.

The EOT rejected both arguments. It held that “free speech” was not a defence to an action under section 20C of the _Anti-Discrimination Act 1977_ (NSW). The Tribunal noted that the racial vilification legislation had been drafted so as to avoid the likelihood of interference with freedom of expression, and that, in any event, the right to free expression “has never been an absolute or unequivocal right.”

The Tribunal’s handling of the respondent’s argument that s 20C was invalid by virtue of free speech invalidity is significant in light of the concerns of this thesis. Contrary to the pattern observed in the HREOC’s handling of racial vilification complaints under s 18C of the _Racial Discrimination Act 1975_ (Cth) the Tribunal showed no inclination to read down the legislation as a manifestation of free speech sensitivity. However, it is important to note that this is not what the respondent was asking the Tribunal to do: he was challenging the very existence of the legislation rather than advocating a narrow interpretation of its scope. In this regard Eldridge’s

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92 _Ibid_ at 78,266. The Tribunal relied specifically on the decision of the New South Wales Court of Appeal in _Ballina Shire Council v Ringland_ (1994) 33 NSWLR 680.
93 See the discussion of HREOC public inquiry decisions in chapter 6 of this thesis.
free speech submission more closely resembled the constitutional challenges to which racial vilification legislation has been exposed in countries such as the Canada\(^{94}\) and the United States\(^{95}\) where the right to free speech is constitutionally entrenched. In light of the absence of any equivalent constitutional or legislative basis in Australian law, it is not surprising that the Tribunal had little time for Eldridge's ambitious free speech-based challenge to the validity of the legislation.\(^{96}\)

From the point of view of assessing the impact of free speech sensitivity on the shape and operation of racial vilification legislation in Australia it is just as important to recognise the methods by which free speech sensitivity has not impacted on racial vilification legislation in this country: one such method is direct challenge to the validity of the legislation. As was noted in chapter 1 of this thesis, the likelihood, in the current Australian legal and constitutional environment, that a court or tribunal would invalidate an existing racial vilification statute is very low. What this means is that it is necessary to look not simply for signs of the obvious impacts of free speech sensitivity on the legislative regulation of racial vilification (that is, direct challenges to validity) but it is necessary to examine as this thesis aims to do, the more subtle, but not necessarily less significant or effective ways in which free speech sensitivity has influenced the shape and operation of racial vilification legislation.

\(^{94}\) See *Taylor v 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); and discussion in chapter 1 of this thesis.

\(^{95}\) See, for example, *RAV v St Paul*, 505 US 377 (1992) (United States Supreme Court), and discussion in chapter 1 of this thesis.

\(^{96}\) The poor quality of the submissions before the Tribunal on this issue is reflected in the fact, although a number of the High Court's implied freedom of communication decisions (see chapter 1 of this thesis) had been handed by the time of the EOT hearing (*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) none of these cases feature in the Tribunal's decision.
In *Eldridge* the Tribunal was not persuaded by the second argument advanced by the respondent: that he was “at all times motivated to bring to public attention [a land claim] to which he was vehemently opposed.” The Tribunal concluded that there were appropriate forums (including the National Native Title Tribunal) for the expression of opposition to the land claim.

The Tribunal held that the respondent’s conduct, both at the launch of the United Nations International Year for the World’s Indigenous Peoples and at the Wagga Wagga City Council meeting on 28 June 1993, crossed the line from “unpleasant and obnoxious” to unlawful. In relation to the first incident the Tribunal said:

> It is the view of the Tribunal Mr Eldridge’s actions were quite objectionable and unnecessary. His words were insulting (more especially having regard to the nature of the function) and were such as would incite others to have serious contempt for the Aboriginal population. He deliberately raised the issue of race, and the Tribunal is satisfied his actions fall within section 20C(1).

In relation to the second incident the Tribunal held that “Mr Eldridge’s behaviour was quite objectionable and his comments was unnecessary, and such that would incite serious contempt of the Aboriginal people.”

The Tribunal ordered that Eldridge:

- refrain from continuing or repeating any unlawful conduct under the *Anti-Discrimination Act 1977*;
- publish an apology in local newspapers; and
- pay one of the complainants, Marianne Atkinson, $3000 damages.

In light of the evidence that Indigenous people are amongst the most frequent targets of racial vilification in Australia, it is appropriate that the first claim of a

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100 The complainant requested that any damages awarded be contributed to the building of a resource centre in Wagga Wagga for the encouragement of Aboriginal cultural awareness.
breach of racial vilification in Australia to be upheld after adjudication involved a complaint by Aboriginal persons. The decision in *Wagga Wagga Aboriginal Action Group v Eldridge* demonstrates the capacity of the racial vilification legislation which is in operation in New South Wales to confront and offer some meaningful protection from the forms of racial vilification which are actually experienced by Indigenous peoples, as well as other racial and ethnic groups.

It is also significant that the first successful complaint in New South Wales did not involve the sort of extremist or organised racism which is associated with white supremacist and/or neo-Nazi groups. Indeed, it would be naive to assume that the views expressed by Jim Eldridge are all that exceptional. Certainly the conduct complained of cannot be neatly distinguished from the various manifestations of racism which have long been a feature of Australian social and political relations. That the EOT has effectively sanctioned the application of New South Wales’ racial vilification laws to conduct of this type is worthy of note. The decision suggests that the scope and form of s 20C of the *Anti-Discrimination Act* 1977 offers a broader and more effective level of protection to target groups than those racial hatred laws which are directed primarily at white supremacist organisations and individuals, and organised hate activity. Legislation of the latter type often ignores the more prevalent, insidious and harmful forms of racial vilification which are experienced by racial and ethnic minorities in Australia.  

Although *Eldridge* provided some valuable clarification regarding the scope of s 20C(1) of the *Anti-Discrimination Act* 1977 (NSW) it did not answer all remaining questions about the operation of racial vilification laws in New South Wales, let alone elsewhere in the country. For example, given Eldridge’s position as a member of a local government council, as well as the settings in which the conduct occurred, the

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102 See chapter 2 of this thesis, and discussion of data on the race/ethnicity of racial vilification complainants, *supra* section 3.2.1.

102 See the discussion of Western Australia’s racial vilification legislation in chapter 10 of this thesis.
decision does raise the interesting question of the latitude to be given to comments made in a political context, particularly in light of the High Court’s recognition of an implied constitutional freedom of communication on political affairs. On the facts of the case in Eldridge the EOT did not feel compelled to deliberate long on the “good faith” defence in s 20C(2) of the Anti-Discrimination Act 1977 (NSW). In contrast, in the HREOC public inquiry decision in McGlade v Lightfoot, the characterisation of Lightfoot’s comments as ‘political’ in nature (largely on the basis of the office which he held as a member of the Legislative Council of the Parliament of Western Australia, and subsequently, as a Senator in the Commonwealth Parliament) was an influential factor in Commissioner Johnston’s decision to dismiss the complaint.

On the strength of these two cases alone it is not possible to reach a firm conclusion on whether ‘political’ racial vilification enjoys greater protection from regulation under the Racial Discrimination Act 1975 (Cth) than it does under the Anti-Discrimination Act 1977 (NSW). However, the contrast between McGlade v Lightfoot and Wagga Wagga Aboriginal Action Group v Eldridge does encourage close analysis of just how the EOT, in subsequent cases, has interpreted the scope of the s 20C(2) defences in relation to political discourse.

4.4 Patten v New South Wales (1997)

The complainant, an Aborigine, lodged complaints in March 1992 alleging that he had been subjected to racial vilification contrary to s 20C and racial discrimination in the provisions of goods and services contrary to ss 7 and 19 during an incident in

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103 See chapter 1 of this thesis.
104 Supra note 80, examined in chapter 6 of this thesis.
105 Supra note 80.
107 The analysis of this case here focuses on the EOT’s treatment of the racial vilification complaint and does not discuss the racial discrimination complaint.
which the car in which he was travelling was pulled over by two NSW Police Service officers in Eveleigh Street, Redfern (in inner city Sydney). The incident was recorded by a film crew which was travelling in the police vehicle at the time and was included in the documentary film “Cop It Sweet” which was subsequently screened on the ABC national television network (on 4 March 1992 and again on 8 March 1992).

Two police officers (Constable Rose, the second respondent, and Constable Moffat, the third respondent) were driving down Eveleigh Street when they sought police radio advice on the ownership of a car which was preceding them down the street. They were advised that the car was registered in the name of the complainant, Wesley John Patten. The two officers then had the following conversation:

The Third Respondent said “I don’t know if that’s him driving it but”
The Second Respondent said “Is he a coon, is he or not”
The Third Respondent said “Yeah”
The Second Respondent then said “Might go and say g’day to him ah”
The Third Respondent said “Yeah”.108

The complainant submitted that, in the circumstances (particularly the fact that the police officers knew or should have known that they were being filmed and recorded and that their conversation was likely to be broadcast to the public) the conversation constituted racial vilification. In addition, the complainants submitted that his treatment by the police officers while they inspected his car (and in particular, the adequacy of the tread on the car’s tyres), amounted to racial vilification. Specifically, the complainants alleged that he was “made to stand by the car whilst the Third Respondent summarily perused the vehicle for faults” and “made to stand and be spoken to in a demeaning way simply because he is an Aboriginal”.109

108 Supra note 105.
109 Ibid.
The Anti-Discrimination Board’s attempt to conciliate the complaint was unsuccessful and the matter was referred to the EOT for hearing in accordance with s 94(1)(c) of the Anti-Discrimination Act 1977 (NSW). The first respondent was the New South Wales Government (liable for the actions of the NSW Police Service by virtue of the Crown’s Proceedings Act 1988 (NSW)).

In evidence given before the Tribunal both police officers stated that they had not consented to being filmed. The film-maker, Jenny Brockie, contradicted this evidence, stating that both Rose and Moffat had given their permission to be filmed, both orally and by signing a written release. Rose’s evidence that he had not consented was also contradicted by a statement he made during an internal police investigation on 31 March 1992—that he had been advised by Chief Inspector Peek that the District Commander had given permission for the ABC to film police operations.

Notwithstanding this evidence, Rose testified that did not know he was being filmed/recorded at the time he used the word “coon”, and that “he would not have used the word if he had known he was being filmed, as it could have been taken offensively.” Moffat conceded that the manner in which he spoken to Patten about his car’s tyres “could have been inappropriate and unprofessional at the time”.

The Equal Opportunity Tribunal ruled, by majority (Mr Biddulph and Ms Alt) that the complaint of racial vilification had been substantiated. The Tribunal identified two incidents of racial vilification. The first was the use by Rose of the racial epithet ‘coon’ to refer to Patten, which was described by the majority as “contemptuous” and considered to come within the definition of racial vilification. Even though the statement was made by Rose to his colleague in a police vehicle which contained three members of an ABC film crew, the conduct was rendered

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110 Ibid.
111 Ibid.
112 Ibid.
public (and therefore covered by s 20C), in the view of the majority, because the police officers were aware that they we being filmed and recorded at the relevant time, for the purpose of a documentary film which was to be broadcast to the public.

The majority also ruled that the treatment of the complainant by Moffat (the third respondent) during the vehicle inspection constituted racial vilification:

... [T]he Third Respondent, in speaking to and parading the Complainant around his motor vehicle, appeared to have a complete disregard for the Complainant’s rights as a citizen to be treated with respect and without harassment in front of the cameras or in a public place. And also the fact that he talked down to the Complainant in a hectoring manner and the fact that he summarily advised the Complainant of infringements of the traffic regulation without any proper investigation of the Complainant’s tyres, showed that the Third Respondent held the Complainant in contempt. By the fact that he did so in a public street and in front of the cameras, may stimulate other members of the public to hold the Complainant with the same disrespect, contempt and ridicule.\(^\text{113}\)

The third member of the tribunal, Mr McDonald, dissented from the majority’s decision on racial vilification.\(^\text{114}\) Mr McDonald found that neither the use of the word “coon” by Constable Rose nor the treatment of the complainant by Constable Moffat during the vehicle inspection constituted unlawful racial vilification as defined by s 20C(1) of the Anti-Discrimination Act 1977 (NSW). In both instances the essential requirement of incitement was considered to be missing. Significantly, Mr McDonald interpreted the incitement component of the definition of unlawful racial vilification as requiring evidence that the conduct in question was done with the objective of “urging or spurring on others to hatred of, serious contempt for, or severe ridicule of a person or group of persons on the grounds of race”.\(^\text{115}\) Mr McDonald observed that “mere demonstration of such attitudes to others is not sufficient unless the demonstration itself can be found to be seeking the support of

\(^{113}\) Ibid.

\(^{114}\) All three members of the EOT upheld Patten’s complaint of racial discrimination contrary to ss 7 and 19 of the Anti-Discrimination Act 1977 (NSW): Ibid.

\(^{115}\) Ibid (emphasis added).
Although not expressed as such, this interpretation appears to read in a requirement of a subjective mens rea component of intent. This interpretation would appear to be odds with the purpose of the legislation, the stated parliamentary intention, and the EOT's interpretation of the fault element of s 20C in *Eldridge* (discussed above). The approach mirrors the tendency in a number of HREOC public inquiry decisions on the equivalent provisions of the *Racial Discrimination Act 1975* (Cth) (s 18C) to 'read in' a subjective fault element in the form of an *intention* to incite.

Applying this extended definition of the incitement requirement, Mr McDonald concluded that, in relation to the conversation in which the word “coon” was used by Constable Rose, he could “find no evidence that the words were used or could have been interpreted as incitement — a call to the two or three ABC employees [the film crew] to take some action”. Implicit in this approach is a view that the conversation between the two police officers was not a public act because the words used were heard only by “two of three ABC employees”. Mr McDonald failed to even acknowledge that the incident was subsequently broadcast on national television to a somewhat larger audience.

Mr McDonald further stated that even if the public act and incitement requirements could have been satisfied, he would have concluded that Constable Rose’s use of the word “coon” fell outside the definition of unlawful racial vilification because it was “a brief remark in a conversation, not pursued in any further conversation” and therefore, “trivial conduct” not regulated by the legislation.

This is most unsatisfactory reasoning. Even if Mr McDonald’s interpretation of the incitement requirement is correct (which is unlikely) the suggestion that the use of a racial epithet that *did* incite hatred, serious contempt or serious ridicule could

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117 *Supra* note 91.
118 See chapter 6 of this thesis.
119 *Supra* note 106.
nonetheless be characterised as "trivial conduct" and therefore beyond the reach of s 20C is uncompelling and disturbing. Such an interpretation would seriously jeopardise the effective operation of the legislation. That is not to say that s 20C covers "trivial" conduct but that an incident should only be considered to be "trivial" if it is not considered to have the harmful effect at which the legislation is directed.

Mr McDonald held that Constable Moffat's treatment of the complainant was a public act but that there was no evidence of incitement (as broadly defined).

The final outcome of the EOT decision in Patten was both the vilification and discrimination complaints were upheld and the respondents were ordered to pay the complainant $25,000 damages.121

This case provides a useful illustration of the relative breadth of the regulatory scope of the racial vilification provisions of the Anti-Discrimination Act 1977 (NSW). The two acts which were ruled by the EOT to be in breach of s 20C were significantly different forms of racial vilification. The first act was the use by Constable Rose of an unequivocal racial epithet.122 The second act by Constable Moffat was a course of treatment of an Aboriginal person which, though not explicitly vilifying in form, had the effect of inciting hatred towards, serious contempt for, or severe ridicule of Aboriginal people by belittling a man, at least in part because of his Aboriginality, and by perpetuating negative stereotypes about the propensity of Aboriginal people to breach the law. The EOT decision in Patten confirms that the regulatory scope of the Anti-Discrimination Act 1977 (NSW) extends to a broad range of forms of racial vilification, including relatively subtle and implied forms of vilification.

121 Ibid. Patten also successfully sued the two police officers and the NSW Government for defamation in the conventional civil court system. In December 1999 he was awarded $25,000 in damages. However, the defendants successfully cross-sued the ABC, and the jury decided that 90% of the damages awarded to Patten should be paid by the ABC: see R Ackland, "How a white wedding killed the messenger", Sydney Morning Herald, 17 December 1999, 17.
On the other hand, the case also highlights the somewhat arbitrary of the limitation of the legislation to public conduct. But for the fact that they were recorded for the purpose of an ABC documentary film and subsequently broadcast on national television, it is unlikely that the events in question would have been considered to constitute "public acts" for the purpose of invoking the restrictions in the Anti-Discrimination Act 1977 (NSW) on racial vilification. There is no reason to assume that the police officers would not have treated Patten in the way that they did if the film crew had not been present, yet in such circumstances, neither incident is likely to have been considered to come within the definition of unlawful racial vilification.

Finally, the disagreement amongst members of the Tribunal in Patten on the interpretation of the mens rea and incitement elements of the definition of unlawful racial vilification reinforces the validity of the warning expressed during debate on the legislation in the NSW Parliament that these aspects of the legislation were lacking in clarity. As will be discussed below, this has been an ongoing problem in Tribunal interpretations of the definition of unlawful racial vilification under s 20C of the Anti-Discrimination Act 1977 (NSW).

4.5 Hellenic Council of NSW v Apoleski and the Macedonian Youth Association (1997)

In June 1992 the Hellenic Council of New South Wales lodged a representative complaint alleging that an advertisement which appeared in the Sun-Herald newspaper on 3 May 1992 constituted unlawful racial vilification contrary to s 20C(1). The advertisement was titled "'MACEDONIA' Land of legends! Land of glory! But NEVER Greek" and contained the following statements:

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123 ALP MLA Mr Aquilina, New South Wales Hansard (Legislative Assembly), 10 May 1989, p 7930, discussed in chapter 8 of this thesis.
Had the misguided Greek community known the truth of their history, they would never have infected Australia with the elements of a cancerous European epidemic known as nationalism, thereby transforming "The Lucky Country" into another arena for foreign dispute.

The tentacles of these policies have even reached Australia causing high profile politicians to side with the Greek community in the hope of gaining popularity and votes. This is all at the expense of the minority rights of the smaller Macedonian community which migrated to Australia to start a peaceful and happy life.

Fellow Australians, it seems this fanatical sect of the Greek community is scarring the face of the truly peaceful Greek-Australians when they foster and perpetuate hatred and violence within our society. Our multiculturalism decays into ethnic intolerance and hostility making social cohesion impossible and the one-nation Australia a hoax (the bulk of Greek community nominated Athens for the Olympics over Melbourne).

Well no more! We can only take too much!! Fellow Australians, you have read the facts, now its time we stood up to these hostile fascists. It's these radical community sects that entangle our politicians within the labyrinth of foreign policy, translating foreign issues into domestic ones, costing Australian taxpayers much more money than all the unemployed put together, when all the while foreign dilemmas should be resolved where they came from – overseas.124

The advertisement also contained a map depicting in barbed wire the borders between Greece and Bulgaria and Greece and the Former Yugoslav Republic of Macedonia (FYROM), accompanied by the caption "... This part of Macedonia is under the Greek terror of occupation since 1913."125

The context of this advertisement was tension between members of the Macedonian and Greek communities in Australia over the status and name of FYROM and a long history of cultural and territorial disputes between the European countries of Greece and Macedonia.126

125 Ibid.
126 The context also provided the back-drop to the litigation under the Racial Discrimination Act 1975 (Cth) in Australian Macedonian Human Rights Committee (Inc) v Victoria [1998] HREOCA 1 (8 January 1998) [http://www.austlii.edu.au/
The complaint was lodged against Gligor Apoleski (the primary author of the advertisement's content) the Macedonian Youth Association (which had placed and paid for the advertisement) and the publisher of the Sun Herald newspaper.

The complaint against the publisher of the Sun Herald was settled via conciliation in the Anti-Discrimination Board, but conciliation was unsuccessful in relation to the complaints against the remaining two respondents. The latter two complaints were referred to the EOT\(^{127}\) by the President of the Anti-Discrimination in accordance with s 94(1) of the Anti-Discrimination Act 1977 (NSW). The hearing was conducted over 5 days in February and August 1996—four years after the complaint had originally be lodged.

The complainant submitted that the advertisement, and in particular, the passages quoted above, “promoted or expressed hatred towards, serious contempt for, or severe ridicule of, Greeks and Australian citizens of Greek origin on the ground of their race.”\(^{128}\) Specifically, the complainants claimed that the advertisement was designed to encourage the general Australian community to form various negative opinions of Greeks and Greek Australians, including that:

- in conducting protests and rallies to attempt to influence Australian government policy on the recognition of FYROM as “Macedonia”, they had engaged in “unacceptable and/or socially destructive behaviour when exercising their democratic rights”;\(^{129}\)

\(^{127}\) Mr Biddulph (Judicial Member), Ms Alt, Ms Mooney.

\(^{128}\) Supra note 124.

\(^{129}\) Ibid.
• their allegiance to Australia was questionable, that they were “in effect, agents of a foreign power” and that Australian politicians were “courting the votes of the Greek community in an unscrupulous or unprincipled manner”;¹³⁰

• they were “perpetuating hatred and violence, ... undermining multiculturalism, responsible for ethnic intolerance and hostility, undermining the social cohesion of Australian society ...”,¹³¹

• they were “hostile fascists, being the cause of an unspecified huge drain on the public purse ...”,¹³² and

• Greece was an oppressive “illegitimate occupying force” in the province of Macedonia.

The complaints argued that these negative characterisations were designed to arouse hostility against Australians of Greek origin and “to incite unspecified action (violence being clearly not excluded) against the Greek community.”¹³³

The second respondent, the Macedonian Youth Association, advanced three primary arguments.¹³⁴ First, it argued that the advertisement had not been intended to incite hatred towards, serious contempt for, or severe ridicule of, Greeks and Australians of Greek origin, and did not have these effects. Rather, the advertisement:

constituted part of a legitimate political debate between representatives of the Macedonian community and representatives of the Greek community in regard to an issue of political importance to those communities and the Australian community generally namely the policy to be adopted towards Greece and Macedonia by Australia.¹³⁵

¹³⁰ Ibid.
¹³¹ Ibid. The complainants asserted that “The reference to the support within the Greek community in Australia for Athens staging the 1996 Olympics over the nomination of Melbourne was a deliberate attempt to provoke hostility and resentment towards Greeks amongst that section of society which is known for its intolerant, anti-migrant, chauvinist views and which is generally opposed to multi-culturalism”: ibid.
¹³² Ibid.
¹³³ Ibid.
¹³⁴ The first respondent relied on the arguments advanced by the second respondent.
¹³⁵ Supra note 123.
The second respondent further submitted that if the advertisement was considered to come within the s 20C(1) definition of racial vilification, it was not unlawful because the relevant conduct "was done reasonably and in good faith for academic, artistic, scientific or research purposes or for purposes in the public interest including discussion or debate about a matter within the terms of s 20C(2)(c)".  

Finally, the second respondent argued that it causing the advertisement to be published it had engaged in "political discussion" regarding the Australian Government's relations with the Government of Greece and the Government of FYROM. Therefore, the advertisement was "protected by the implied freedom of political discussion as described in Theophanous ... and Stephens ... guaranteed under the Constitution of Australia." In addition, the second respondent argued that "[p]ursuant to s 31(1) of the Interpretation Act 1987 (NSW), s 20C of the Anti-Discrimination Act 1977 should be construed so as not to limit the implied freedom of political discussion ... and the said section is capable of being so construed."  

In considering whether the respondents had breached s 20C, the Tribunal first ruled that the publication of the advertisement in the Sun Herald was a "public act" as defined in s 20B.

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136 Ibid.
137 Ibid.
138 Ibid. Section 31 of the Interpretation Act 1987 (NSW) provides that:

(1) An Act or instrument shall be construed as operating to the full extent of, but so as not to exceed, the legislative power of Parliament.

(2) If any provision of an Act or instrument, or the application of any such provision to any person, subject-matter or circumstance, would, but for this section, be construed as being in excess of the legislative power of Parliament:

(a) it shall be a valid provision to the extent to which it is not in excess of that power, and
(b) the remainder of the Act or instrument, and the application of the provision to other persons, subject-matters or circumstances, shall not be affected.

(3) This section applies to an Act or instrument in addition to, and without limiting the effect of, any provision of the Act or instrument.
The Tribunal then turned to the meaning of incitement. Surprisingly, particularly in light of earlier EOT decisions to the contrary,\textsuperscript{139} the Tribunal ruled that "incite' implies an intentional act, in the sense that the incitement or creation of hatred must have been intentionally or foreseen".\textsuperscript{140} The interpretation of this one component of the definition of unlawful racial vilification is critical in determining the regulatory scope of the legislation. The Tribunal's interpretation of the incitement requirement in \textit{Hellenic Council of NSW No 1} results in substantially reduced regulatory parameters compared with the interpretation preferred and applied by the EOT in \textit{Eldridge} and \textit{Patten}. The intentional incitement of hatred, contempt or ridicule represents only a narrow sub-set of the category of conduct amounting to racial vilification. It is submitted that the broader interpretation preferred in \textit{Eldridge}—which focuses on the likely effect of the act rather than the intention of the actor—is both desirable from the perspective of effective regulation of racial vilification, and correct in light of the stated parliamentary purpose in enacting the legislation.\textsuperscript{141} However, the fact that two differently constituted three member EOT panels could interpret a key element of the legislation so differently highlights the need for legislative clarification.\textsuperscript{142} Continuing uncertainty and inconsistency on this matter will obviously be harmful to integrity of the regulatory regime and will negatively impact on its effective operation.

The discrepancy between the interpretation of the mens rea/incitement requirement in \textit{Eldridge v Wagga Wagga Aboriginal Action Group} and \textit{Hellenic Council of NSW v Apoleski and the Macedonian Youth Association} is also a consequence of the non-applicability of the doctrine of precedent in the EOT/ADT.


\textsuperscript{140} \textit{Supra} note 124 (emphasis added).

\textsuperscript{141} \textit{Supra} note 91; see also discussion of the enactment of the \textit{Anti-Discrimination (Racial Vilification) Amendment Act} 1989 (NSW) in chapter 8 of this thesis.

\textsuperscript{142} See the discussion of the recent recommendation of the New South Wales Law Reform Commission, \textit{infra} section 6.
While it may be reasonable that Tribunal members are not bound to follow previous Tribunal decisions, the fact that key statutory provisions can be interpreted without reference to earlier Tribunal decisions on precisely the same point is a cause for concern. It undermines the regulatory objective of setting clear and consistent standards of community behaviour.

While the EOT’s questionable interpretation of the incitement requirement of the definition of unlawful racial vilification is partly explained by these factors, its application of this interpretation to the fact and evidence of the case in *Hellenic Council of NSW v Apoleski and the Macedonian Youth Association* defies explanation. The Tribunal found that the Macedonian Youth Association had not intended to incite hatred, but was “unable to make any such finding as to Mr Apoleski’s state of mind, in the absence of any evidence from him on this point, it being essentially a subjective question”. The troubling implication of this reasoning is that no adverse finding could be made against the first respondent in the absence of a ‘confession’ from Apoleski that he had acted with what the Tribunal had interpreted as the requisite mental element. This is an unacceptable approach to the Tribunal’s inquiry and decision-making functions. It further compounds the tendency of the Tribunal’s approach to the interpretation of s 20C(1) of the *Anti-Discrimination Act 1977* (NSW) to narrow the regulatory scope of the legislation and reduce the protection afforded to victims of racial vilification.

While these aspects of the decision in *Hellenic Council of NSW v Apoleski and the Macedonian Youth Association* are arguably the most significant, they were not

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143 In chapter 5, *supra* note 116 (corresponding text) it was noted that one of the reasons that the President of HREOC had warmly greeted the transfer of HREOC’s public inquiry functions under the *Racial Discrimination Act 1975* (Cth) (and other Commonwealth anti-discrimination statutes) to the Federal Court of Australia was her view that the change would “result in strong and influential body of discrimination law and precedent being developed by the Federal Court”: HREOC, “Commission welcomes legislative change passed by the Senate”, Media Release, 21 September 1999 [http://www.hreoc.gov.au/news_info/mediareleases/99_40.html] accessed 20 January 2000.

144 *Supra* note 124.
relied upon as determinative of the matter. The Tribunal ruled that it was unnecessary to “reach a decision as to whether they [the respondents] breached s 20C(1)" because it decided the matter on other grounds. Specifically, the Tribunal ruled that the respondents’ conduct was not unlawful by virtue of s 20C(2):^146:

It is the view of the Tribunal that the Respondents have satisfied the requirements of section 20C(2)(c) of the Act in that the public act was done reasonably and in good faith, for academic and research purposes and for other purposes in the public interest including discussion and debate about the Macedonian issue. The “defence” having been successfully made out, the Tribunal has not considered it necessary to make a determination under section 20C(1).^147

An important factor in the EOT’s assessment that the advertisement fell with s 20C(2) was that it formed part of an ongoing debate regarding the relationship between Macedonia-Greece. The Tribunal observed that “all of the evidence pointed to there being sometimes intense discussion and debate as to matter contained in the article, both in the academic and general communities, over a considerable period of time”.^148 The debate was one in which the complainants had regularly participated. The impression gained from the Tribunal’s identification of this context is that it considered the jurisdiction of the EOT under the Anti-Discrimination Act 1977 (NSW) an inappropriate forum for continuing this debate.

The Tribunal did not specifically respond to the second respondent’s free speech arguments—that is, that its conduct was protected by the implied

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^145 Ibid.

^146 This is a curious reversal of the order in which the provisions of s 20C would normally be applied. Logically, s 20C(2) should only come into play if the respondent’s conduct satisfies the ‘threshold’ definition of unlawful racial vilification in s 20C(1).

^147 Supra note 124.

^148 Ibid.

constitutional freedom of political communication and that s 20C of the *Anti-Discrimination Act 1977* (NSW) should be construed so as to avoid infringement of the implied freedom. However, there is some evidence to support the conclusion that these factors were an influence on the Tribunal’s decision that the respondents’ conduct fell outside the regulatory scope of the legislation. Immediately prior to the passage in the written decision where the Tribunal stated its finding on the applicability of s 20C(2)(c), the Tribunal quoted from the final submission made by counsel for the second respondent:

“One could not imagine a clearer case of the legitimate exercise of that freedom of political speech, which we all value so highly, and which is guaranteed by the Constitution than the article the Second Respondent caused to be published in the present case.”\(^{150}\)

While the written decision did not provide an explicit indication that the Tribunal accepted or endorsed this argument, the Tribunal’s decision to quote from the respondent’s submission on this point as a preface to the statement of its determinative finding, implies endorsement. It would have been desirable if the Tribunal had been more explicit in this respect and had subjected the respondent’s free speech arguments to closer scrutiny.

For a variety of reasons the decision of the EOT in *Hellenic Council of NSW No 1* is unsatisfactory. The problem lies not in the ultimate decision to dismiss the complaint—which is defensible on the basis that the content of the publication did not amount to *racial* vilification. The main problem is that the process of reasoning by which the Tribunal reached and supported its decision is cursory and uncompelling. Specific problems were:

\(^{150}\) *Ibid.*
i) the interpretation of the incitement requirement in s 20C(1) as involving a subjective mens rea component with sufficient rationalisation and without reference to the directly contrary view of earlier EOT decisions;

ii) the failure to make a decision on the substantive issue of whether the respondents' conduct came within the s 20C(1) definition;

iii) the application of the s 20C(2)(c) defence without first having addressed the logically prior s 20C(1) threshold issue; and

iv) the failure to explicitly articulate the EOT's response to the respondents' free speech submissions regarding the scope of the legislation.

The problems of inadequate reasoning and inconsistency between EOT decisions on key elements of the scope of the racial vilification provisions, which this case highlights, require close attention in the context of an examination of the operation of the civil human rights approach to the regulation of racial vilification. The objective of setting clear standards of acceptable behaviour in the area of communication regarding race and ethnicity are confounded by the sorts of problems identified above. Whether there is reason to conclude that there is a general problem with the reliance on quasi-judicial tribunals as the key adjudicative bodies in the enforcement of racial vilification legislation will be considered further below (section 4.9).

4.6 Hellenic Council of NSW v Apoleski (No 2) (1997)

The Hellenic Council of NSW and the Order of AHEPA lodged representative complaints alleging that an article titled “Macedonia: History and Reality”, written by the respondent and published in the Macedonian Weekly Herald on 12 August 1992 breached s 20C(1) of the Anti-Discrimination Act 1977 (NSW). The
complainants argued that statements made in the article “were deliberately made to incite hatred against the Greek community and Greeks generally”.

Attempts to conciliate the matter were unsuccessful and the matter was referred to the EOT for hearing.

The complainants identified the following passages as constituting unlawful racial vilification, because they incited hatred towards, serious contempt for, or severe ridicule of, Greeks and Australian citizens of Greek origin:

Slavicism is one of the three fundamental causes of the misfortunes and catastrophes of the Macedonian nation, without the merciless extirpation of Slavicism, Hellenism and Communism – these viruses on the body of our nation – there is no change (sic) of building a newborn Macedonia. ...

Ever since the Greeks arrived on the Balkans, they have been nothing but trouble. In contrast to Macedonian culture and morality (Christianity), the Greeks have brought to mankind everything that is today considered to be evil:

1. Slavery, which modern Greek scholars call a “democracy”.
2. Homosexuality, of which Plato is a fine example.
3. Lesbianism, which is named after the island of Lesbos.
4. Prostitution.
5. Human sacrifices to the gods. ...
6. Pedigrees. ...
7. Futile wars and feuds, such as the Peloponnesian Wars.
8. Education exclusively for the rich. ...
9. And much, much more!...

It is by no means coincidence that “Grk” in Ancient Macedonian means “one who suck the blood of another”. In Latin, “Graeciano” means “thief!”...

We know that Hellenism is our enemy.

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152 Mr Biddulph (Judicial Member), Ms Alt, Ms Mooney.

153 Supra note 151.
At the outset of its decision, the Tribunal quickly disposed of the respondent’s argument that the article in question was not a “public act” for the purpose of s 20C(1) of the *Anti-Discrimination Act 1977 (NSW)* because it was published in a minority ethnic language newspaper. The Tribunal rejected this argument:

Although the Macedonia Weekly Herald may be a newspaper of limited circulation, it is presumably available for purchase by any member of the public, as indicated by its use of the English language as well as Macedonian.\(^{154}\)

The respondent denied that he was the author of the article, describing it as a “complete bastardisation”\(^{155}\) of an essay which he had prepared for a person he met at church who wanted some information on different perspectives on Macedonian history. While the Tribunal expressed some reservation about the respondent’s denial of responsibility for the article,\(^{156}\) it concluded that the complainants had “not demonstrated that the Respondent committed the public act of publishing the article or causing it to be published.”\(^{157}\)

This finding being fatal to the complainant’s case, the Tribunal did not formally consider whether conduct violated s 20C(1) or whether it was ‘protected’ by s 20C(2).\(^{158}\) However, the Tribunal drew attention to the context of debate and dispute between the Greek and Macedonian communities in Australia in which the article was published,\(^{159}\) and “foreshadow[ed] that the Respondent could have successfully

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\(^{154}\) *Ibid.*  
\(^{155}\) *Ibid.*  
\(^{156}\) The Tribunal observed that it “had considerable difficulty with the apparent inconsistency between the Respondent maintaining his ignorance of the authorship and cause of publication of the article and his insistence that it was done reasonably and in good faith”: *ibid.*  
\(^{158}\) *Ibid.*  
\(^{159}\) The Tribunal (*ibid*) identified the following aspects of the context in which the article had been published and the complaints made:

- a heated political debate was occurring in the Australian community at the time the article was being published, between representatives of the
relied upon the public interest provisions of s 20C(2)(c) in accordance with the Tribunal’s reasoning in *Hellenic Council of NSW (No 1)* (discussed above).

The Tribunal’s willingness to again express a view as the applicability of the s 20C(2)(c) defence without any consideration of whether the conduct came with the substantive definition of unlawful racial vilification (s 20C(1) is of concern. There is a worrying implication in the Tribunal’s approach that if the context for the public act in question is an ongoing “heated public debate” between two ethnic communities, then the parties are largely immune from the limitations imposed on public racial vilification by the *Anti-Discrimination Act 1977* (NSW). This is a very expansive view of the scope of the s 20C(2) defences for which the Tribunal provided practically no justification in *Hellenic Council of NSW (No 2)*. It is of particular concern in light of the seriousness of some of the statements made in the *Macedonia Weekly Herald* article. For example, it is not immediately obvious how the assertion that “the Greeks have brought to mankind everything that is today considered to be evil” and the implication that Greeks are “blood suckers” and “thieves” could be considered to have been done “reasonably and in good faith” and “in the public interest”.

As in *Hellenic Council of NSW (No 1)* the Tribunal appears to have been (legitimately) concerned about the use of s20C of the *Anti-Discrimination Act 1977* (NSW) as a ‘tool’ and the EOT as another forum for the continuation of an ongoing Macedonian community and the Greek community and is to some extent continuing;

- the public debate touches upon, among other concerns, issues regarding the nature of Macedonian ethnic identities, nationalism and human rights;
- both sides of the debate utilised various public forums to put forward their views, including the Sun-Herald newspaper and street rallies;
- the Greek community had successfully lobbied the Federal Government and Mr Gareth Evans, regarding the use of the term “Slav-Macedonians” to refer to the people of the former Yugoslav Republic of Macedonia.

160 Ibid.
161 Supra note 124.
dispute between members of the Greek and Macedonian communities in Australia. However, it would have been preferable if the Tribunal had articulated these concerns rather than allowing them to be manifested in a cursory and questionable application of the relevant provisions which effectively further narrows the scope of the legislative regime for the regulation of racial vilification in New South Wales.

4.7 Malco & Others v Massaris & Others (1998)

Like the earlier EOT decisions in Hellenic Council of NSW No 1 and Hellenic Council of NSW No 2 this case arose out of the dispute between members of the Greek and Macedonian communities in Australia, and in particular the controversy over the naming of the Former Yugoslavian Republic of Macedonia (FYROM). On this occasion the conduct which gave rise to the proceedings was an article published in the Greek language newspaper which the complainant’s claimed constituted the vilification of persons of Macedonian ethnicity. An added complication to the context for the EOT decision was that the article which was the subject of the complaint was, in fact, a response to a letter written and circulated by two of the three Macedonian complainants. The letter, written on behalf of the Macedonian-Australian People’s Ex-Servicemen League, was addressed to the then Prime Minister of Australia, Paul Keating, and was distributed to all members of the New South Wales Parliament. The letter, written with an aggressive and hostile tone, made various claims in relation to the dispute between Greece and FYROM, criticised the actions of the government in the terms of its recognition of FYROM, and implicitly leveled various allegations at members of the Greek community regarding strategies used to persuade governments to support them in their disputes with members of the Australian Macedonian community.

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163 Ibid.
The complainants alleged that the article published in *O Kosmos* on 6 May 1994 breached s 20C of the *Anti-Discrimination Act* 1977 (NSW) by vilifying persons from FYROM. The complainants argued that:

The article contains or is based on a number of false statements or inaccurate statements or contains false statements or inaccurate statements. The purpose of these false or inaccurate statements is to incite hatred of, serious contempt for, and ridicule of, Macedonians.164

Specifically, the complainants objected to the use of the term “Skopjans” to refer to Macedonians on the basis that it was a derogatory ethnic epithet. In addition the complainants alleged that the article contained false and inaccurate statements about Macedonians and about the political activities of members of the Australian Macedonian community, the purpose of which were to vilify Macedonians.

The complaint was lodged with the ADB in October 1994 and almost two years later, in September 1996, the complaints were referred to the EOT for hearing.

The threshold issue considered by the Tribunal165 was whether Macedonians are a racial group for the purpose of s 20C, as defined in s 4 of the *Anti-Discrimination Act*.166 The respondents argued that “Macedonians do not constitute a separate race known to anthropologists and they are not a race as defined in the *Anti-Discrimination Act*.167 The Tribunal observed that “the concept of race is a broad one”,168 and noted that for the purpose of the *Anti-Discrimination Act*, includes “ethnic or national origins”. Following the approach adopted by the New Zealand Court of Appeal in *King-Ansell v Police*169 and the House of Lords in

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165 Mr Raphael (Judicial Member), Ms Greenhill, Mr McDonald.
166 Section 4 of the *Anti-Discrimination Act* 1977 (NSW) defines “race” as including “colour, nationality, descent and ethnic, ethno-religious or national origin”. See the discussion of the evolution of this definition in chapter 8 of this thesis.
167 *Supra* note 162.
169 [1979] 2 NZLR 531.
Mandla v Dowell Lee,170 and accepting the evidence given by an academic expert, Dr Peter Hill, the Tribunal found that “Macedonians including those persons of Greek nationality who identify as Macedonians constitute a race for the purposes of the Anti-Discrimination Act.”171

The broad definition of “race” for the purpose of the Anti-Discrimination Act 1977 (NSW) was never really in doubt, but the EOT ruling on this point in Malco provides clear confirmation.

On the key question of whether the use of the term “Skopjans” in the context of the article constituted racial vilification, the complainants submitted that this term was derogatory because it was specifically used to identify and criticise persons were “agents or supporters”172 of FYROM and disloyal to Greece. Dr Peter Hill, an academic who gave evidence in support of the complainant’s position, testified that:

To use the word ‘Skopjan’ to refer to an Australian who identifies as a Macedonian is highly offensive and a deliberate insult. It intends to refer to them as lackeys of the foreign government. Further, it denies them their right to identify themselves as Macedonians.173

The Tribunal held that the use of the word ‘Skopjan’ did not violate s 20C(1). The Tribunal reasoned that:

There is no objective evidence that the word was deliberately chosen to have [the effect identified by the complainants] and the result is that any description of these people other than Macedonian would be claimed to have the same effect.174

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171 Supra note 162.
172 Ibid.
173 Ibid.
174 Ibid (emphasis added).
This a curious statement, with two problems. First, the suggestion that a term used to describe a particular ethnic group could not amount to vilification unless it was “deliberately chosen” to effect vilification perpetuates the questionable assumption that evidence of subjective intent is an element of the statutory definition of unlawful racial vilification. The Tribunal correctly emphasised that the mere expression of hatred, contempt or ridicule does not amount to unlawful racial vilification unless the incitement requirement is satisfied. However, it by no means follows that a subjective mens rea element should be read into the s 20C(1) definition of unlawful racial vilification.

Curiously the Tribunal quoted from the earlier EOT decision in Eldridge,' purportedly in support of the approach adopted in the present case. However, as discussed above, in Eldridge, the Tribunal had unequivocally confirmed that under s 20C(1) it is not necessary to establish that the respondent intended to incite racial hatred, contempt or ridicule. In addition, the Tribunal in Eldridge, ruled that it is not necessary for the complainant to prove that any person was incited by the respondent’s conduct; evidence that the conduct was reasonably likely to incite will be sufficient. The Tribunal is to be commended for taking into account earlier EOT ‘authority’ on a matter of interpretation on which it was deliberating (a practice which, as noted above, could usefully be employed routinely by the EOT). However, the reliance on an earlier decision in purported support of an interpretation almost diametrically opposed to the interpretation unequivocally approved in the earlier decision is concerning. It offers further evidence of the frequent poor quality of EOT written reasons for decision.

The second problematic aspect of the reasoning adopted by the EOT in Malco is the statement by the Tribunal that the use of any word other than ‘Macedonian’ to describe the group to which the complainants belonged would have

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176 Ibid at 70,264.
been considered by the complainants to amount to vilification—an assertion for which there would appear to be little basis. Indeed, the comment is an insensitive and inappropriate response to the complaint before Tribunal.

The Tribunal further held that none of the other allegedly vilifying passages in the article published by the respondents in *O Kosmos* amounted to racial vilification contrary to s 20C; nor was the overall effect of the article unlawful. The Tribunal formed the view that the purpose of the *O Kosmos* article:

was to show outrage at the letter produced by two of the complainants and in that succeeded. Whilst it is always possible for an article expressing outrage to cross the line into itself inciting hatred or contempt this Tribunal believes that ... it avoids the trap.

Although this conclusion made it strictly unnecessary for the Tribunal to rule on the applicability of the defences in s 20C(2) of the Anti-Discrimination Act 1977 (NSW), it did rule on this matter. The Tribunal ruled that the article was a “fair report” of a public act—the public act being the originally written and circulated by two of the complainants. The Tribunal further held that portions of the letter were also protected by s 20C(2)(c), in that they were reasonable comments made in good faith in the context of a debate over matters raised about Greeks in the letter. In support of this conclusion, the Tribunal expressed the opinion that the contents of the *O Kosmos* article were “not as inflammatory” as the *Sun-Herald* advertisement which the EOT had ruled in *Hellenic Council of NSW No 1* was not in breach of the Anti-Discrimination Act 1977 (NSW).

Despite its reliance on this earlier decision to support its ruling, the Tribunal in *Malco* implicitly questioned the correctness of the EOT’s interpretation of s 20C(2)(c) in *Hellenic Council of NSW No 1* when it observed that:

177 *Supra* note 162.
178 *Ibid*.
179 *Ibid*.
180 *Ibid*.
The Tribunal in that case did not appear to have the benefit of having read the 
Wagga case [Eldridge v Wagga Wagga Aboriginal Aboriginal Action Group] 
and had it done so might have taken a less robust view of that provision.\footnote{181}

The Tribunal’s willingness in Malco to supports it ruling by reference to an earlier 
EOT decision (Hellenic Council of NSW No 1), while simultaneously doubting the 
correctness of that decision and its consistency with earlier decisions, is a cause for 
concern. The Tribunal is to be commended for recognising the importance of 
consistency in the interpretation of the legislation; but it must also be criticised for 
missing to prepare its decision in a manner which contributes to this consistency.

Overall, this decision is another example of the variable quality of EOT decisions 
on s 20C of the Anti-Discrimination Act 1977 (NSW). It highlights the need for 
greater clarity and consistency in order to provide as unequivocal a message as 
possible regarding the dividing line between unlawful racial vilification and ‘lawful’ 
racial vilification.

\section{4.8 Aegean Macedonian Association of Australia v Karagiannakis (1999)}

In December 1996 a number of complaints were lodged with the Anti-Discrimination 
Board regarding an article written by George Karagiannakis on behalf of the Hellenic 
Council of NSW and published in O Kosmos on 19 April 1994.\footnote{182} The article was 
essentially a defence of the role played by the Greek community in lobbying 
governments in Australia to adopt the term “Slav-Macedonian” to refer to persons 
from FYROM.\footnote{183} The article predicted that the effect of the official use of the term 
“Slav-Macedonian” would put an end to “the 20 year propaganda campaign of using

\footnote{181}{Ibid.}
\footnote{182}{Aegean Macedonian Association of Australia v Karagiannakis, supra note 149.}
\footnote{183}{See supra note 126 for details on the litigation which has been generated by this issue.
the ‘Macedonian’ term\textsuperscript{184} by the Macedonian community in Australia in support of territorial and cultural claims against Greece.

On 22 November 1999, more than five years after the publication of the article, and almost three years after the original complaints were lodged with the ADB, the matter came before the Equal Opportunity Division of the Administrative Decisions Tribunal (ADT).

Before the ADT, the complainants claimed that the article carried various imputations regarding Macedonians which amounted to racial vilification contrary to the Anti-Discrimination Act 1977 (NSW). Counsel for the complainants submitted\textsuperscript{185} that the article had this effect because it misrepresented the nature of and motivation for the Federal Government’s decision to prefer the term “Slav-Macedonian”, including an implication that the government has been motivated by an assessment that “Macedonians call themselves Macedonians to create instability in Australia and in other parts of the world”. The complainants further submitted that the article suggested that the any person who self-described as “Macedonian” necessarily held a range of views regarding the territorial and cultural dispute between Macedonia/FYROM and Greece which were hostile to the Greek position, and that the substitution of the term “Slav-Macedonian” would automatically results in the demise of these views and claims. Finally, the complainants submitted that the article’s suggestions that the “decision of the Government is meant to put a stop to the abominable creation of so called “Aegean Macedonian” groups and that this term had been “concocted by the Yugoslav communists”, amounted to the unlawful racial vilification of Macedonians.\textsuperscript{186}

The ADT\textsuperscript{187} ruled that the article did not violate s 20C(1) of the Anti-Discrimination Act 1977 (NSW):

\textsuperscript{184} Supra note 149 at para 3.  
\textsuperscript{185} Ibid at para 7.  
\textsuperscript{186} Ibid at para 3.  
\textsuperscript{187} R Bartley (Judicial Member), L Farmer and S Clayton.
The Tribunal is of the view this article taken as a whole is not an act of incitement, it is more a part of the continuing acrimonious debate between the parties and those they represent. ... The Tribunal is of the view that the article whilst possibly upsetting to some does not incite hatred towards, serious contempt for, or severely ridicule a particular person or group of persons on the grounds of race.188

The Tribunal noted that the complainants' submissions on errors and misrepresentations in the article were not, in themselves, sufficient to support their claim that the article constituted unlawful racial vilification.189

_aegean macedonian association of australia v karagiannakis_ was the first racial vilification complaint to be decided by the administrative decisions tribunal (equal opportunity division)—the successor to the EOT. Apart from this distinction, the case adds little to our understanding of the scope of s 20C(1) and the nature of the adjudication process, given that the substance of the complaint was slight and the issues before the tribunal relatively straightforward.

4.9 Analysis of the Tribunal Decisions

A number of general observations can be made about the small body of EOT/ADT decisions which have been handed down over the last decade in relation to complaints under s 20C(1) of the _Anti-Discrimination Act_ 1977 (NSW).

First, mirroring the low success of complaints under s 18C of the _Racial Discrimination Act_ 1975 (Cth) handled by way of HREOC public inquiry,190 only two of the seven racial vilification substantively determined by way of a tribunal decision have the complaints been upheld. In both cases the acts ruled to breach the legislative standard involved the vilification of Aboriginal people. In light of the

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188 Supra note 149 at paras 22, 24. Counsel for the respondents cited the EOT decision in _eldridge_ in support of his submission that s 20C prohibits the incitement, and not the mere expression of, hatred, contempt or ridicule: _ibid_ at para 19.

189 Ibid at para 23.

190 See chapter 6 of this thesis.
available evidence on the relatively high levels of racial vilification and racist violence\(^\text{191}\) experienced by Aboriginal people in Australia,\(^\text{192}\) the success of these complaints suggests that the existing regulatory regime in New South Wales has provided an important avenue of legal redress for Aboriginal victims of racial vilification.

Another striking feature of the tribunal decision on s 20C complaints is that a majority of the cases (four of seven) have arisen out of an ongoing dispute between members of the Greek and Macedonian communities in New South Wales, focusing specifically on the controversy over the labelling of the former Yugoslavian Republic of Macedonia (FYROM). In two cases complaints were lodged by members of the Greek community against members of the Macedonian community in relation to newspaper publications for which the latter were responsible. In two cases, the positions were reversed—the complaints were lodged by members of the Macedonian community in relation to newspaper articles published by the respondents from the Greek community. In all four cases the complaint was dismissed.

It is difficult to draw any firm conclusions about this aspect of the operation of the adjudication component of the NSW civil human rights system for the regulation of racial vilification. However it is reasonably clear that in each of the four cases (three in the EOT, one in the ADT(EO)) the Tribunal members felt some disquiet about the use of the racial vilification regulatory regime as a forum for an ongoing political dispute. Moreover, it would appear that the context out of which the individual complaints emerged appears to have a significant bearing on the Tribunal’s determination as to whether the conduct which was the subject of the complaint fell within the definition of unlawful racial vilification in s 20C(1) and/or whether the conduct was ‘protected’ by the defences in s 20C(2). The fact that in

\(^\text{191}\) NIRV Report, supra note 21 at 387.
\(^\text{192}\) See supra section 3.2.1; and discussion in chapter 2 of this thesis.
each of the cases, the complainants were, directly or indirectly, participants in the hostile debate out of which the allegedly vilifying conduct had occurred appears to have been taken into account by the Tribunal members as a factor tending to decrease the likelihood that the conduct would be considered to be ‘caught’ by the regulatory net cast by Part 2 Division 3A of the *Anti-Discrimination Act 1977* (NSW).

This is not necessarily problematic. However, in a number of the cases (specifically, the three cases decided by the EOT) the Tribunal appears to have engaged in a less than thorough examination of the substance of the complaint on the basis of an unstated but implied reservations about the bona fides of the complainants’ claims and about the appropriateness of the Tribunal ‘taking sides’ in a dispute in which both sides actively participated.

The most significant broader consequence of the way in which the EOT, in particular, handled the Greek-Macedonian debate cases that came before it is that there are now a number of ‘precedents’ for a narrow construction of the scope of the regulatory parameters of s 20C of the *Anti-Discrimination Act 1977* (NSW). Specifically, the EOT decisions in *Hellenic Council of NSW No 1*, *Hellenic Council of NSW No 2* and *Malco* (as well as the minority decision in *Patten*) support a narrow interpretation of the scope of the definition of unlawful racial vilification by interpreting the definition as containing a subjective fault element so that only *intentional* racial vilification is considered to be legislatively proscribed. This approach cannot be reconciled with the broader interpretation preferred in *Eldridge* and *Patten* (majority) under which is the *effect* of the respondent’s conduct, and not the respondent’s subjective intention, which determines whether this conduct comes within the definition of unlawful racial vilification. Even though the latter interpretation would appear to be more consistent with the stated intention of the NSW Parliament in enacting the *Anti-Discrimination (Racial Vilification) Amendment Act 1989* (NSW), and in line with the approach commonly preferred in anti-
discrimination statutes, \(^{193}\) it has only been expressly endorsed in a minority of the tribunal cases decided to date.\(^ {194}\) On this basis it might be argued that the weight of quasi judicial opinion supports a narrow definition of unlawful racial vilification—with serious adverse consequences for the effective operation of the regulatory regime.

The tendency towards a narrowing of the regulatory parameters of s 20C(1) of the *Anti-Discrimination Act 1977* (NSW) is exacerbated by another feature of the approach adopted by the EOT in the Greek-Macedonian racial cases—a broad interpretation of the scope of the s 20C(2) defences. In the cases of *Hellenic Council No 1, Hellenic Council No 2* and *Malco* the EOT endorsed a broad category of protected expression. In contrast, in *Eldridge*, the EOT preferred a relatively strict interpretation of the breadth of the s 20C(2) defences when it rejected the respondent’s attempts to rely on s 20C(2) to place his conduct outside the reach of the legislation. In addition to magnifying the concern expressed earlier regarding interpretative inconsistency, the main concern about the approach taken in the three cases which have broadly interpreted s 20C(2) is not the scope of the immunity from the regulatory impact of s 20C(1) thereby endorsed by the EOT, but the absence of substantive and compelling reasoning in support of this interpretation.

It appears that free speech sensitivity was at least one of the factors which led to the adoption of this approach. This suggestion is somewhat tentative. In only one of these cases (*Hellenic Council of NSW No 1*) did the respondent expressly submit that the scope of the regulatory regime should be determined with a view to limited intrusion on the right to free speech. Moreover, the Tribunal did not unequivocally endorse these submissions, although the implication from the text of the decision is that these submissions were influential factors in the decision to broadly interpret the defences submissions and ultimately dismiss the complaint.


\(^{194}\) The issue was not specifically addressed in *Harou-Sourdon*, supra note 63.
Although not expressly addressed in the subsequent cases of *Hellenic Council of NSW No 2* and *Malco* the reliance on the *Hellenic Council of NSW No 1* formulation of the scope of s 20C(2) supports the conclusion that free speech was also an important, albeit indirect, influence in these cases.

The only other case in which the significance of free speech ‘rights’ and principles was specifically raised was *Eldridge*. In contrast to the apparent receptiveness of the EOT to arguments drawn from free speech sensitivity in *Hellenic Council of NSW No 1*, the (differently constituted) tribunal in *Eldridge* was clearly not persuaded by the respondent’s submissions on this question.

Two observations may be made based on a comparison of the handling of explicit free speech arguments in these two cases. First, the significantly different responses by the Tribunal to free speech arguments highlight the uneven and somewhat unpredictable nature of free speech sensitivity as an influence on the regulatory shape of racial vilification legislation. Second, the comparison of these two cases supports the argument advanced in this thesis that the effective influence of free speech sensitivity is not to be found in direct challenges to the validity of free speech legislation, but in the more subtle manifestation of a tendency towards interpretations which narrow the regulatory scope of the legislation. In *Eldridge*, free speech sensitivity took the former approach, and was categorically dismissed by the EOT. In *Hellenic Council of NSW No 1* (and indirectly in *Hellenic Council No 2* and *Malco*) free speech sensitivity took the latter approach, and appears to have been an important influence on the EOT’s circumscription of the regulatory scope of s 20C.

In 1990, shortly after the enactment of the *Anti-Discrimination (Racial Vilification) Amendment Act 1989* Seeman predicted that one of the consequences of the representative complaint option would be an increase in the number of judicial decisions under the *Anti-Discrimination Act 1977* (NSW) in the form of “appeals from the EOT to the court.”\(^{195}\) Seeman implicitly endorsed the view expressed by the

\(^{195}\) Seeman, *supra* note 21 at 615.
then President of the Anti-Discrimination Board, Steve Mark, that this would be a “welcome development” because it would “prompt valuable discussion of anti-discrimination law; an area which at present suffers from a dearth of case law.”

A decade later, no court in New South Wales has yet been called upon to adjudicate on any aspect of the racial vilification provisions of the Anti-Discrimination Act 1977 (NSW). On its own, the absence of judicial authority is not necessarily suggestive of any deficiency in the legislative regime for the regulation of racial vilification established by Part 2, Division 3A of the Anti-Discrimination Act 1977 (NSW). On the contrary one of the distinguishing features and supposed benefits of the alternative civil human rights law enforcement system is that it largely obviates the need to victims of discrimination/vilification to ‘enter’ the formal, costly, time-consuming and adversarial conventional court system. However, the above analysis of EOT and ADT decisions has revealed a number of weaknesses in tribunal decisions handed down to date, including in the key areas of adequacy of reasoning and consistent interpretation. Given that the EOT has not played an effective role in providing valuable quasi-judicial explication of the nature and scope of the NSW legislative regime for the regulation of racial vilification, enhanced opportunities for judicial interpretation of the legislation might be desirable. While the uncertainty of the incitement and mens rea requirements under the definition of unlawful racial vilification is probably best addressed by way of legislative amendment, one of the areas in which judicial exegesis might be of particular value is a coherent and comprehensive analysis of the significance of free speech for the interpretation and operation of the racial vilification provisions of the Anti-Discrimination Act 1977 (NSW).

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196 Ibid.
197 See chapter 8 of this thesis.
198 Given that it has been in operation for only two years, in which time it has handed down only one racial vilification decision, it would be inappropriate to offer an assessment of the relative effectiveness of the ADT (EO).
199 See the discussion of the New South Wales Law Reform Commission’s recommendations on this point: infra section 6.
5. THE OPERATION OF SECTION 20D

As explained in chapter 8 of this thesis, the offence of serious racial vilification under s 20D of the *Anti-Discrimination Act 1977* (NSW) does not criminalise racial vilification as such. It criminalises acts of racial vilification which are aggravated by virtue of the fact that they involve threats of, or incitement to, violence against the individual target, or members of the group target. However, the operation of s 20D will be reviewed here on the basis that the criminal offence of serious racial vilification forms part of the overall legislative regime for the regulation of racial vilification in New South Wales. The operation history of s 20D also provides support for the argument advanced in this thesis that a feature of the Australian experience with the legislative regulation of racial vilification is a reluctance to invoke the criminal law as the enforcement mechanism.

In the ten years since the enactment of the *Anti-Discrimination (Racial Vilification) Amendment Act 1989* (NSW) there have been no criminal prosecutions for serious racial vilification under s 20D of the *Anti-Discrimination Act 1977* (NSW). 200 Nine complaints 201 have been referred to the Attorney General by the

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200 Personal communication (letter), Director General, New South Wales Attorney General’s Department, 22 December 1999, based on written advice from Catherine Duff, Acting Manager, Legal and Policy Branch, Anti-Discrimination Board of New South Wales, 14 December 1999. In the Australian Capital Territory, there have been no prosecutions for serious racial vilification under s 67 of the *Discrimination Act 1991* (ACT); personal communication (phone), Librarian, Office of the Director of Public Prosecutions (ACT), 13 December 1999.

201 The accuracy of this figure is not assured, but it is the most likely estimate that the Anti-Discrimination Board was able to provide. The ADB advised that “\(\text{[u]}\)nfortunately due to limitations with the Board’s database, we are unable to give an accurate picture of the information” requested: Duff, supra note 197. A database search identified only five referrals: personal communication (phone), Eric Poulos, Senior Policy Officer, Anti-Discrimination Board of NSW, 4 November 1999. However, the ADB estimated that there had been a further 4-5 referrals: ibid; and Duff, supra note 197. In November 1999 the New South Wales Law Reform Commission reported (on the basis of “\(\text{[I]}\)information supplied by the ADB (17 September 1998)” that “fifteen matters have been referred to the Attorney General by the President under s 20D(2) for prosecution”: supra note 3 at 551. The most likely explanation for the discrepancy is that the higher figure cited by the Law Reform Commission includes referrals in relation to *all grounds* of alleged serious vilification, and not only serious racial vilification. This interpretation is supported by statistics recorded in the ADB’s
President of the Anti-Discrimination Board in accordance with s 89B of the *Anti-Discrimination Act* 1977 (NSW). None of these referrals have resulted in the laying of criminal charges by the Director of Public Prosecutions.\(^{202}\)

In the absence of further information on the actual incidence of aggravated (that is, violent) racial vilification, the nature of these complaints and on the reasons why they did not result in prosecutions, it is difficult to make a meaningful assessment of the finding that after ten years of operation, s 20D of the *Anti-Discrimination Act* 1977 (NSW) has not yet been formally invoked. In 1992 Ch‘ang identified the following reasons for the lack of criminal prosecutions for serious racial vilification: “the complainant’s unwillingness to participate in the prosecution of the offence, inability to identify the offender, or pursuit of an action for assault or other criminal offence instead of racial vilification.”\(^{203}\) While these factors may partially explain the low number of referrals to the Attorney General, they are unlikely to account for the zero rate of translation of referrals into prosecutions (with the possible exception of the last factor identified by Ch‘ang: the laying of ‘conventional’ criminal charges).

Another factor that should be considered in the context of the present assessment of legislative regimes for the regulation of racial vilification is the legislatively prescribed procedure by which matters come to the attention of the DPP. As explained in chapter 8 of this thesis, the criminal enforcement mechanism for s 20D of the *Anti-Discrimination Act* 1977 (NSW) is linked with the civil human rights enforcement mechanism for s 20C of the Act via a statutory requirement that

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\(^{202}\) *1998/99 Annual Report*, supra note 4 at 24, which indicate that in that 12 month period ten transgender vilification complaints were referred to the Attorney General to be considered for criminal prosecution.

\(^{203}\) *Ibid*; see also *New South Wales Law Reform Commission*, supra note 3 at 550-551; and *NSW Anti-Discrimination Board*, supra note 22 at 54.

\(^{203}\) Ch‘ang, supra note 13 at 9, citing on advice from the then Senior Legal Officer at the ADB, Nancy Hennessy.
the President of the ADB consider, in relation to all complaints received, whether the offence of serious racial vilification may have been committed.\textsuperscript{204}

The limitations imposed by this procedure (including its legislatively prescribed time frames) were illustrated in the case of \textit{Davis v Nunn}.\textsuperscript{205} On 22 August 1995 a complaint was lodged\textsuperscript{206} alleging that the complainant had been subjected to unlawful racial vilification when “in a public place at Orange the complainant was subjected to racist taunts and was the object of a racially motivated assault by the respondent and others.”\textsuperscript{207} On 15 September 1995 the President of the Anti-Discrimination Board ‘conditionally’ referred the matter to the Attorney General in accordance with s 89B(2) of the \textit{Anti-Discrimination Act 1977} (NSW) because he had formed the view that an offence of serious racial vilification contrary to s 20D may have been committed. The referral was made at that time to comply with the President’s statutory obligation to make such referrals within 28 days of receipt of the complaint.\textsuperscript{208} However, the President requested that the Attorney General take no further action and defer making a determination until the President could complete investigations into the matter and advise the Attorney General of “the full details of this matter and the complete wishes of the complainant”.\textsuperscript{209} The President supported this request with the observation that:

I believe that your agreeing to my request will in no way prejudice the interests of any of the parties concerned and will allow the Board adequate time to complete its investigations and provide you with further advice.\textsuperscript{210}

\begin{footnotes}
\item[204] \textit{Anti-Discrimination Act 1977} (NSW), s 89B(1)(b).
\item[205] \textit{Davis v Nunn, supra} note 62.
\item[206] The complaint was lodged by the complainant’s mother in accordance with s 88(2) of the \textit{Anti-Discrimination Act 1977} (NSW).
\item[207] \textit{Supra} note 62 at para 1.2.
\item[208] \textit{Anti-Discrimination Act 1977} (NSW), s 89B(3).
\item[209] \textit{Supra} note 62 at para 1.3.
\item[210] \textit{Ibid}.
\end{footnotes}
Section 89B(4) of the Act provides that, on making a referral to the Attorney General, the President shall notify the complainant of the referral and of the complainant’s entitlement under s 91(1) to request that the racial vilification complaint be referred to the EOT for inquiry and determination. Under s 91(1) a complaint has 21 days from the date of receiving a s 89B(4) notification to advise the President that s/he wants the matter to be referred to the Tribunal.

However, in Davis v Nunn the President did not formally provide the complainant with a s 89B(4) notification until 17 December 1996, more than 12 months after the purported ‘conditional’ s 89B(3) referral. In addition, the President did not advise the complainant that a response was required within 21 days, instead advising that if the President had not heard from the complainant within 21 days he would assume that the complainant wanted the matter referred to the Tribunal in accordance with s 91(1). It appears that the reason that the President opted for this irregular course of action was that the complainant had written to the President on 23 May 1996 giving permission for the referral of the matter to the Tribunal. On 5 February 1997 the complainant wrote a letter to the President which, inter alia, requested that the complaint be referred to the EOT for hearing.

In the EOT the respondent sought a ruling that the Tribunal had no jurisdiction to inquire into and adjudicate upon the s 20C complaint because there had not been compliance with ss 89B(4) and 91(1) of the Anti-Discrimination Act 1977 (NSW). Judge Murell (the EOT’s Senior Judicial Member) accepted the respondent’s submissions and ruled that the complaint now fell outside the jurisdiction of the EOT, and, therefore, effectively outside of the parameters of the civil human rights regulatory regime.

Judge Murell explained the rationale for the legislative foreclosing of attempts to resolve by conciliation a matter that had been referred to the Attorney General and the DPP to be considered for criminal prosecution:

211 Ibid at para 6.9.
The purpose of sections 89B and 91(1) is clear. Once it appears that an offence may have been committed, it is inappropriate that the President endeavour to resolve a complaint by conciliation. ... It would be inappropriate that a complaint that may be prosecuted as an offence should simultaneously be the subject of an investigation by the Attorney General and/or prosecuting authorities, and be the subject of a conciliation process conducted by the President, in the course of which the President may require the respondent to appear for the purpose of endeavouring to resolve the complaint by conciliation: see section 92(2). Once a matter has been identified as potentially suitable for prosecution, there must be particular regard for the rights of the respondent, who is a potential defendant. One could not expect a potential defendant to participate in a conciliation process in which there was discussion of the subject matter of a potential criminal prosecution.\textsuperscript{212}

Judge Murrell noted that s 89B does not provide for “conditional” referrals to the Attorney General and there was no basis for considering the President’s referral to the Attorney General on 15 September 1995 to be conditional. Judge Murrell ruled that the President had not complied with the requirement under s 89B(4) to notify the complainant “on making” the referral to the Attorney General. In addition, Judge Murrell ruled that “[t]he 21 day period prescribed by section 91(1) is not flexible”\textsuperscript{213} so that at the expiration of this period the complainant’s entitlement to have the complaint referred to the EOT expired.

The case illustrates the restrictive nature of the legislative rules governing the procedural relationship between the two limbs of the racial vilification regulatory regime in NSW: the civil human rights complaints process and the criminal prosecution process. In particular, the President’s statutory authority to refer appropriate matters to the Attorney General within 28 days of receiving a complaint, notwithstanding the fact that the President appeared not to have had the opportunity to complete appropriate investigations, was instrumental in precipitating the subsequent failure to comply with the procedural requirements of the Act. When this

\textsuperscript{212} \textit{Ibid} at paras 6.2-6.3.

\textsuperscript{213} \textit{Ibid} at para 6.7.
case is considered alongside the data on the low rates of referral and zero rate of prosecution, and the criticisms contained in the Samios Report, there are strong grounds for questioning the adequacy of the current procedure for enforcing the criminal prohibition on serious racial vilification in NSW. Not surprisingly, this aspect of the NSW legislative regime was identified as in need of reform in the New South Wales Law Reform Commission’s recent review of the Anti-Discrimination Act 1977 (NSW) (see below).

Overall, the experience of a decade of operation of the criminalisation component of the NSW regulatory regime suggests that, in practice, the criminal law may have limited value as an enforcement mechanism for regulating even the most serious forms of aggravated racial vilification. Certainly, in terms of the level of protection afforded to racial and ethnic groups by racial vilification legislation, the cliché assumption that the relatively punitive nature of the criminal law renders it the ‘ultimate’ form of regulation is not supported by the available evidence on the operation of s 20D of the Anti-Discrimination Act 1977 (NSW) to date. It may be that the regulatory value of criminalisation is not just primarily symbolic, but exclusively symbolic.214

This suggestion should not be seen as justifying the inactivity of the criminalisation component of the NSW legislative regime for the regulation of racial vilification. Further research could usefully be undertaken with the aim of revealing the full range of factors that currently contribute to the failure to initiate criminal prosecutions for serious racial vilification. Some of the substantive definitional and procedural limitations have been considered in this thesis, but the impact of other impediments including explicitly acknowledged legal barriers (such as difficulties associated with the gathering of evidence or onerous proof requirements) and possible unacknowledged attitudinal barriers (such as ambivalence on the part of key

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214 This observation will be developed further in chapter 10 of this thesis, where the decision of the Western Australian parliament to rely exclusively on the criminal law to regulate racial vilification will be analysed.
criminal justice system decision-makers about the role of the criminal law as an anti-racism mechanism) warrant specific investigation.

6. NEW SOUTH WALES LAW REFORM COMMISSION REPORT 92

6.1 Introduction

In its *Review of the Anti-Discrimination Act 1977 (NSW)*, released in November 1999, the New South Wales Law Reform Commission (NSWLRC) made a number of specific recommendations on the vilification provisions of the Act. In addition, the Commission proposed a number of changes to the general procedure for handling all complaints under the Act, including racial vilification complaints. In this section, relevant substantive and procedural recommendations from the NSWLRC will be reviewed. Attention will be focused on examining whether the proposed legislative changes are desirable from the point of view of the effective regulation of racial vilification. In particular, this analysis will consider the extent to which the Commission’s recommendations, if implemented, would adequately address the weaknesses in the existing civil human rights regulatory regime which have been identified in this chapter and the previous chapter of this thesis.

6.2 Definition of Unlawful Racial Vilification Under Section 20C

The NSWLRC recommended three changes to the statutory definition of unlawful racial vilification under s 20C(1) of the *Anti-Discrimination Act 1977 (NSW)*.

First, the Commission recommended that “[t]he prohibition on vilification in the ADA should not be limited by reference to “the public” but by reference to a

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216 The recommendations apply not only to the racial vilification provisions of the *Anti-Discrimination Act 1977 (NSW)*, but also to the provisions dealing with homosexual vilification, HIV/AIDS vilification and transgender vilification.
"public communication". The rationale for this minor amendment was that the current statutory terminology regarding the "public" requirement was unclear, and could be interpreted in an unnecessarily narrow manner, so as to apply only to conduct which occurred in public. The Commission took the view that it was more appropriate to focus on the concept of public communication for the purpose of defining the regulatory scope of the legislation:

... [T]he Commission recommends that the reference in the vilification provisions to "the public" should be deleted, but that the communication should be one which is intended or likely to be received by someone other than a member of the group being vilified.\[218\]

The second, and most valuable, amendment to the statutory definition of unlawful racial vilification proposed by the NSWLRC was that the legislation should "provide expressly that proof of specific intention to incite is not required for establishing vilification." In light of the confusion and inconsistency on this matter, reflected in EOT decisions, this simple alteration will play an important role in confirming the (relatively broad) regulatory scope of the civil racial vilification provisions of the Anti-Discrimination Act 1977 (NSW).

The third definitional amendment proposed by the NSWLRC relates to the audience in relation to whom the public communication’s effect should be assessed. In Harou-Sourdon\[220\] the EOT endorsed the standard of the ordinary reasonable person who did not hold "racially prejudiced views".\[221\] The question has not been squarely addressed in any other EOT/ADT decisions.

\[217\] Recommendation 92, supra note 3 at 541. On the interpretation of this requirement, see Hennessy and Smith, supra note 14 at 251-252; also Ch’ang, supra note 13 at 93-95.

\[218\] NSWLRC, supra note 3 at 540-541; clause 91 of the Commission’s Draft Anti-Discrimination Bill 1999, ibid at 8454-845.

\[219\] Recommendation 93, ibid at 544; clause 91(3) of the Draft Anti-Discrimination Bill 1999, ibid at 845.

\[220\] Supra note 63.

\[221\] Ibid.
The Commission concluded that the approach taken in *Harou-Sourdou* was unnecessarily restrictive, but was unwilling to endorse a proposed test at the other end of the spectrum which would consider whether “anybody, even the most malevolent or unthinking person, ... might be inspired to treat the targets with hatred or contempt”.\(^{222}\) The NSWLRC opted for an approach which requires consideration of the issue in the circumstances and context of the conduct in question.\(^{223}\) The Commission recommended that the legislation should “[p]rovide that the capacity to incite should be assessed in the circumstances of the particular case and without assuming that the audience is either malevolently inclined or free from susceptibility to prejudice”.\(^{224}\)

The NSWLRC acknowledged that it was possible to provide only limited assistance “by way of definition in the legislation” to help the tribunal of fact to resolve the question of the “capability of incitement in the circumstance of the case.”\(^{225}\) However, the Commission concluded that “some reformulation of the relevant provisions ... [was] necessary in order to clarify these matters.”\(^{226}\) To this end, clause 91(4)(b) of the NSWLRC’s Draft Anti-Discrimination Bill 1999 provides that a public communication may satisfy the requirements of the definition of unlawful vilification:

> whether or not it would be likely to have that effect on a firm-minded member of the community if a person who is intended or likely to receive the communication has a special susceptibility to that effect and the communication would be likely to have such an effect on that person.\(^{227}\)

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\(^{222}\) Hennessy and Smith, *supra* note 14 at 253, quoted in NSWLRC, *supra* note 3 at 544.

\(^{223}\) On the relevance of context, see Ch’ang, *supra* note 13 at 96.

\(^{224}\) Recommendation 94, *ibid* at 545.

\(^{225}\) *Ibid* at 545.

\(^{226}\) *Ibid*.

\(^{227}\) *Ibid* at 845.
The NSWLRC did not recommend any change to the scope of the defences in s 20C(2) of the Anti-Discrimination Act 1977 (NSW), acknowledging that the inclusion of these defences/exceptions was “an attempt to strike an appropriate balance between freedom of expression and freedom from vilification.”

However, in relation to the s 20C(2)(a) “fair reports” defence, the Commission did recommend that “[t]he ADB should have express power to formulate guidelines including guidelines as to what constitutes a ‘fair report’ under the exception to the vilification provisions.” Unfortunately, the Commission did not explain why it deemed guidelines to be necessary and, apart from an implicit endorsement of the approach adopted in relation to the equivalent defence under defamation law, the Commission declined to provide any indication as where the limits of fair reporting might appropriately be set in relation to vilification.

The thrust of the NSWLRC’s recommendations on the definition of unlawful racial vilification is unequivocally, albeit modestly, in the direction of a broadening of the regulatory scope of the legislation. From the point of view of effectively regulating racial vilification and providing adequate protections to victims of racial vilification this is an encouraging development. Implicit in the Commission’s approach to this aspect of the regulatory regime is an assessment that a number of the features that had been built into the original legislation to constrain its regulatory scope (for reasons including minimisation of the curtailment of free speech) have proven, over the course of the last decade, to be unnecessarily restrictive. However, the modest nature of the NSWLRC’s proposals reveals a continuing awareness of

\[\textit{Ibid} at 547.\]
\[\text{Recommendation 95, \textit{ibid} at 549.}\]
\[\text{The NSWLRC, \textit{ibid} at 547-548, quoted from the decision of Thom v Associated Newspapers Ltd (1964) 64 SR (NSW) 376 at 380 where it was stated that a fair report “must accurately express what took place. Errors may occur; but if they are such as not substantially to alter the impression that the reader would have received had he present ... the protection is not lost”.}\]
free speech sensitivity as a significant influence on the parameters of the legislative regime for the regulation of racial vilification.

6.3 Civil Human Rights Enforcement of Section 20C

The NSWLRC made 60 recommendations on the enforcement procedure for complaints under the *Anti-Discrimination Act 1977* (NSW). A comprehensive analysis of all recommendations is beyond the scope of this chapter. Attention will be focused on the most significant proposed changes from the perspective of their implications for the handling of racial vilification complaints, and in light of the systemic weaknesses identified earlier in this chapter and in chapter 8 of this thesis.

With respect to the complaint-handling process administered by the ADB (including the receipt, acceptance, investigation and conciliation of complaints) the NSWLRC’s main recommendations were:

- there should not be requirement that a complainant’s original letter of complaint must establish a prima facie case;
- the entitlement of complainants to require the President to refer the complaint to the Tribunal should be expanded to include cases in which the complaint is declined because the President has formed the view that it does not reveal a contravention of the Act;
- the President should normally be required to decide whether to accept a complaint within 28 days of receipt of the complaint, and should notify the complainant within 28 days of the decision;
- the President should notify the parties at least every 60 days as to the progress of the complaint-handling process;

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233 Recommendation 106, *ibid* at 603.
234 Recommendation 112, *ibid* at 618.
235 Recommendation 113, *ibid* at 621.
236 *Ibid*. 
• the investigation and conciliation stages of the complaint-handling process should be handled by different ADB officers (unless the parties consent);\textsuperscript{237}
• the President should have the power to refer complaints to the ADT, even before the investigation and conciliation stages have taken place,\textsuperscript{238} and
• the President should have the power to recommend that the Minister refer a matter to the President for investigation.\textsuperscript{239}

The NSWLRC also proposed a number of changes to the operation of the adjudication phase of the civil human rights enforcement process in the ADT, including:

• the ADT should be required to provide reasons within 28 days of handing down a decision;\textsuperscript{240}
• the representative complaint procedure should be expanded;\textsuperscript{241}
• as a general rule, parties in the ADT should be required to pay their own costs;\textsuperscript{242}
• parties should have a direct avenue of appeal from the ADT to the Supreme Court of NSW on questions of law;\textsuperscript{243}
• the President of the ADB should be able to intervene on behalf of a complainant in ADT proceedings, with the leave of the Tribunal;\textsuperscript{244} and
• there should be an express legislative statement that the respondent carries the burden of proving a relevant exception.\textsuperscript{245}

\textsuperscript{237} Recommendation 114, \textit{ibid} at 624.
\textsuperscript{238} Recommendation 121, \textit{ibid} at 647.
\textsuperscript{239} Recommendations 125-126, \textit{ibid} at 672. This recommendation would appear to be a partial, and rather circuitous response to proposals that the President have the power to self-initiate an investigation: see discussion in chapter 8 of this thesis.
\textsuperscript{240} Recommendation 139, \textit{ibid} at 714.
\textsuperscript{241} Recommendation 140-141, \textit{ibid} at 722-723.
\textsuperscript{242} Recommendation 141, \textit{ibid} at 723.
\textsuperscript{243} Recommendation 145, \textit{ibid} at 744.
\textsuperscript{244} Recommendation 146, \textit{ibid} at 747.
\textsuperscript{245} Recommendation 147, \textit{ibid} at 748.
Finally, the NSWLRC recommended that amendments be made to the remedies available under the civil human rights regulatory regime, including:

- the ceiling on damages awarded to the complainant for a breach of the *Anti-Discrimination Act 1977* (NSW) should be increased from $40,000 to $150,000 (or $750,000 where the presiding member is a District Court judge),\(^{246}\)

- the ADT should have the power to make a declaration that the respondent’s conduct was unlawful, even if no other substantive relief is granted;\(^{247}\)

- the ADT’s existing power under s 113(2)(iiiib) of the *Anti-Discrimination Act 1977* (NSW) to order a respondent in vilification matters to implement a program for the elimination of unlawful *discrimination* should be amended to refer to programs for the elimination of unlawful *vilification*;\(^{248}\)

- the relief available in representative actions should be the same as the relief available in representative proceedings under the *Federal Court of Australia Act 1976* (Cth);\(^{249}\)

- the President of the ADB should have the power to act in a representative capacity in Tribunal proceedings and should have standing to seek relief on behalf of a representative group;\(^{250}\) and

- the President of the ADB should have enhanced power to take steps to enforce Tribunal orders on behalf of complainants.\(^{251}\)

\(^{246}\) Recommendation 148, *ibid* at 762. The Commission concluded that “[t]he current low limit discredits the significance of anti-discrimination laws, and has the potential to frustrate the provision of adequate remedies under the ADA”: *ibid* at 759.

\(^{247}\) Recommendation 151, *ibid* at 773.

\(^{248}\) Recommendation 154, *ibid* at 776. The Commission supported the principle of s 113(2)(iiiib) but noted that, in its current form, the provision is “curiously worded” given that discrimination and vilification are differently defined: *ibid* at 775-776. The Commission recommended that the ADT should have the power to make equivalent orders in relation to all forms of unlawful conduct under the *Anti-Discrimination Act 1977* (NSW): recommendation 154, *ibid* at 776. The Commission also recommended that the other order currently available only in vilification matters—an apology or retraction (s 113(2)(iiiia))—should be available to the ADT in relation to all forms of unlawful conduct under the Act: recommendation 152, *ibid* at 774.

\(^{249}\) Recommendation 155, *ibid* at 777.

\(^{250}\) Recommendation 156, *ibid* at 778.

\(^{251}\) Recommendation 160, *ibid* at 784.
Consistent with the nature of the substantive recommendations discussed above, the general tenor of the recommendations on the procedures for civil human rights enforcement is to increase the likelihood that the fate of a complaint will turn on its merits. If implemented, the NSWLRC's recommendations on the complaint-handling process have the potential to address a number of the weaknesses in the complaint-handling process identified earlier in this chapter and in chapter 8. One of the recurring themes in the recommendations is the increased responsibility given to the President of the ADB to effectively enforce the legislation. There is still a heavy emphasis on complainant initiation and carriage, but the burden is reduced in important respects. For example, the proposal for statutory time-frames for various stages of the complaint-handling process goes some way towards addressing the concerns raised above the duration of the enforcement process. Improvements in this regard may have a positive flow-on effect with regarding to other identified weaknesses, such as the rate of complainant 'drop out'.

6.4 Criminal Enforcement of the Offence of Serious Racial Vilification

The NSWLRC recommended that:

- section 20D should be removed from the *Anti-Discrimination Act 1977* (NSW), and the offence of serious vilification should be located in the *Crimes Act 1900* (NSW),

- the President of the ADB should have the power to refer a matter to the Director of Public Prosecutions (whether or not the ADB has received a formal complaint

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252 Recommendation 96, *ibid* at 553.
in relation to the matter) where the President is of the view that it may constitute the offence of “serious” vilification.\(^{253}\)

These two recommendations relating to the relocation of the offence of serious racial vilification and modification of the procedure for initiating s 20D prosecutions closely resemble, but are not identical to, the changes recommended in the 1992 *Samios Report*.\(^{254}\) Like the *Samios Report* the Law Reform Commission concluded that the requirement for the Attorney General’s consent was problematic:

> The need to obtain the consent of the Attorney General was seen as an important reassurance for those doubting the wisdom of having a criminal provision in the ADA. However, it has serious problems. First, in practical terms, there is some doubt as to whether the police can arrest when an offence has obviously been committed without first seeking the necessary consent to prosecute. Referral could also politicise the use of the section and allow it to be seen as an instrument of executive oppression (or protection) for certain groups. ... If the complainant chooses not to have the complaint referred, it is not clear whether the civil aspect of the complaint lapses or whether it can still be the subject of a conciliated complaint.\(^{255}\)

The legislative changes proposed by the NSWLRC are designed to address each of these concerns. The proposed relocation of the offence of the serious racial vilification to the *Crimes Act* 1900 (NSW) is appropriately designed to “highlight the seriousness of the offence”\(^{256}\) and to clarify that the offence should be investigated and prosecuted in the same way as other criminal offences involving the police and the DPP. However, the NSWLRC’s recommendation that the President of the ADB continue to have the power to refer matters to the DPP (as opposed to exclusive

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\(^{253}\) Recommendation 97, *ibid* at 553; clause 92(1) of the Draft Anti-Discrimination Bill 1999, *ibid* at 845.

\(^{254}\) See discussion in chapter 8 of this thesis. For example, where the *Samios Report* recommended that the offence defined by s 20D of the *Anti-Discrimination Act* 1977 (NSW) be relocated to the *Summary Offences Act* 1988 (NSW), the NSWLRC recommended relocation to the *Crimes Act* 1900 (NSW).

\(^{255}\) NSWLRC, *supra* note 3 at 551-552.

\(^{256}\) *Ibid* at 552.
authority for this referral decision) involves a recognition that it would be inappropriate to completely isolate the civil human rights enforcement process for s 20C of the *Anti-Discrimination Act* 1977 (NSW) from the enforcement procedure for the criminal offence of serious racial vilification under the *Crimes Act* 1900 (NSW). Indeed, the Commission emphasised that the two limbs of the regulatory regime should not be seen as mutually exclusive and concluded that “[n]either the referral [by the President], nor any action taken by the DPP, should preclude the matter also being the subject of a complaint under the ADA which can be dealt with in accordance with the procedures available under that Act.”^{257}

Implementation of the changes to the enforcement procedure for the offence of serious racial vilification proposed by the NSWLRC would be an improvement on the current system. The involvement of the police is likely to increase the chance of detection and adequate investigation of incidents, and the removal of the mandatory filtering role (in a restrictive time frame) of the President of the ADB may increase the likelihood of a larger proportion of meritorious complaints coming to the attention of the DPP. Although desirable for the reasons identified by the *Samios Report* and the NSWLRC, removal of the statutory requirement for the Attorney General’s consent and the confirmation of the DPP as the relevant decision-making authority is unlikely, on its own, to increase the likelihood of charges being laid, given that, as a matter of practice, the DPP is already the relevant decision-making authority and has been responsible for the decision, in all referrals to date, not to lay charges.

The main thrust of the NSWLRC’s recommendations on the existing legislative regime for the regulation of aggravated racial vilification is that the statutory offences should be ‘mainstreamed’ into the conventional body of criminal and the regular processes for criminal law enforcement. In light of the ongoing controversy in Australia about the role of the criminal law in regulating racial

^{257} *Ibid* at 552-553.
vilification, it remains to be seen whether the NSW Government will be prepared to take this step and whether the NSW Parliament will allow it to do so.

6.5 Anticipated Impact of the NSWLRC Recommendations

The changes proposed by the NSWLRC would not substantially change the nature of the legislative regime for the regulation of racial vilification in New South Wales. The primary emphasis would be on the resolution of complaints within a conciliation-based civil human rights system. However, the modified legislative regime (including both substantive and procedural aspects) endorsed by the NSWLRC would be an improved regulatory mechanism from the perspective of the level of protection afforded to victims of racial vilification.

7. CONCLUDING OBSERVATIONS ON THE ANTI-DISCRIMINATION ACT 1977 (NSW) APPROACH TO THE REGULATION OF RACIAL VILIFICATION

The terms in which the Anti-Discrimination (Racial Vilification) Amendment Act 1989 (NSW) was enacted, and the operation of Part 2 Division 3A of the Anti-Discrimination Act 1977 (NSW) over the past ten years reinforce the view that civil human rights law is the predominant legislative approach to the regulation of racial vilification in Australia. Although, the NSW regulatory regime includes both civil human rights law and criminal law regulatory mechanisms, in practice, the former has overwhelmingly been the preferred vehicle for regulating racial vilification. In this regard, the New South Wales experience mirrors the Commonwealth experience examined in Part II of this thesis—criminal law has effectively been placed 'off limits' as a legislative mechanism for regulating racial vilification. While the influence of free speech sensitivity in this respect has been less obvious in NSW than it was in the case of the Commonwealth Racial Hatred Act 1995 (Cth)—primarily because, in contrast to the Racial Hatred Bill 1994, no attempt was ever made to criminalise
rational vilification per se in NSW, in either the Anti-Discrimination (Racial Vilification) Amendment Bill 1989 or the earlier 1987 bill\textsuperscript{258}—it is reasonable to conclude that free speech sensitivity was an important influence on the terms in which the \textit{Anti-Discrimination (Racial Vilification) Amendment Act} 1989 (NSW) was enacted, and has been an influence on the operation of Part 2 Division 3A of the \textit{Anti-Discrimination Act} 1977 (NSW).

Assessed in terms of the effective regulatory scope of the legislation and the degree of protection afforded to victims of racial vilification, the civil human rights regulatory regime in NSW has proven to have particular strengths and weaknesses. The definition of unlawful racial vilification is relatively broad, although some uncertainty, particularly with respect to the incitement requirement, appears to have effectively narrowed the potential breadth of the legislation. If implemented, the recommendations of the NSWLRC will substantially address this problem and will effect a modest expansion of the scope of the definition.

In procedural terms, the NSW experience confirms that one of the major benefits of the civil human rights approach is the relative ease with which the enforcement mechanism can be invoked. However, whereas the emphasis on complainant responsibility is a strength in terms of the complaint \textit{lodgement} process, the data on the nature of the conciliation process and the outcomes achieved reveal that, complainant responsibility can, paradoxically, represent a procedural weakness. The proportion of cases in which an unequivocally successful outcome is achieved by the complainant is small. A high proportion of complaints are excluded at an early stage in the process, the process is often lengthy, very few complainants actually have the experience of participating in a conciliation session with the respondent, a large number of complainants ‘drop out’ before the process is complete, only a small proportion of complaints result in settlements and the success rate of cases which proceed to tribunal adjudication is low.

\textsuperscript{258}See the discussion of these bills in chapter 8 of this thesis.
Considered in isolation these conclusions might be considered to support a negative overall assessment of the current approach to the legislative regulation of racial vilification in NSW. There are two reasons why such a conclusion should be resisted. First, although the analysis of the NSW legislative regime presented in this chapter and the previous chapter of this thesis has identified a number of flaws in the civil human rights enforcement process it did not purport to produce a definitive answer on the overall effectiveness of the regulatory regime, the net impact on the prevalence and seriousness of incidents of racial vilification. In 1992 Ch’ang observed:

> It would be ideal if one could identify specific criteria for objectively measuring the impact and success of the Racial Vilification Amendment since its introduction in October 1989. This is not possible for many reasons, not the least of which is the lack of data on the incidence of racial vilification pre-October 1989.259

Eight years later, and a decade after the enactment of the Anti-Discrimination (Racial Vilification) Amendment Act 1989 (NSW), a good deal more is known about the operation of the NSW legislative regime for the regulation of racial vilification. However, the barriers to a definitive assessment of the legislation’s impact on the experience of racism in NSW still remain.

In light of the difficulty of assessing the success of racial vilification regulatory regimes in these terms, it is appropriate to assess the NSW civil human rights approach, not in isolation, but in relation to other modes of legal regulation. Measured in these terms, the NSW experience supports the tentative conclusion that legislation based on the civil human rights complaint model, while imperfect, would appear to offer targets of racial vilification a more valuable degree of protection that legislation which adopts criminal law or conventional tort-based civil law approaches. This tentative conclusion will be examined in the next two chapters of this thesis.

259 Ch’ang, supra note 13 at 104.
with reference to the origin and operation of these alternative approaches in the two other jurisdictions which have enacted racial vilification: Western Australia and South Australia.
CHAPTER 10

CHAPTER XI OF THE \textit{CRIMINAL CODE} 1913 (WA)—THE NATURE AND OPERATION OF THE REGULATORY APPROACH

1. INTRODUCTION

As the second Australian state to enact racial vilification legislation (in 1990), Western Australia adopted a very different regulatory model than New South Wales. The most distinctive feature of the Western Australian approach to the legislative regulation of racial vilification is the exclusive reliance on the criminal law as the enforcement mechanism. Since 1995 the state criminal law regulatory regime has been supplemented by the national civil human rights regime established by the \textit{Racial Discrimination Act} 1975 (Cth). This development notwithstanding, the Western Australian Parliament’s decision to rely exclusively on the criminal law—an approach unique amongst Australian jurisdictions—makes it a particularly important component of a study of the diversity of Australian legislative models for the regulation of racial vilification.

Western Australia is distinguished not only by its \textit{exclusive} reliance on the criminal law, but by the \textit{scope} of the criminal offences created. While the offences contained in Chapter XI of the \textit{Criminal Code} 1913 (WA) are relatively narrow in a number of respects (which will be discussed below), they are not limited to racial vilification which incites or threatens some further harm, in the form of personal
violence or property damage (like the criminal offences created in New South Wales, the Australian Capital Territory, and South Australia) or in the form of unlawful discrimination (as in Queensland). Therefore, Western Australia is the only Australian jurisdiction to have criminalised (particular forms of) racial vilification per se.

This chapter will examine why this unique regulatory approach was adopted, and will analyse the significance of this approach. Consideration will be given to what the Western Australian experience reveals about the relationship between free speech sensitivity and the legislative regulation of racial vilification in Australia, and about the practical operation and effectiveness of particular regulatory models.

Section 2 of this chapter considers the context out of which racial vilification emerged in the state of Western Australia, focusing on concern over the activities of the Australian Nationalist Movement throughout the 1980s, and considers two reports which set the scene for the legislation ultimately enacted. Section 3 outlines the legislative history of Chapter XI of the *Criminal Code* 1913 (WA), which was added with the passage of the *Criminal Code Amendment (Racist Harassment and Incitement to Racial Hatred) Act* 1990 (WA). It also examines the record of debates in the Western Australian Parliament with the aim of revealing what motivated the unique approach to the regulation of racial vilification, including an examination of the impact of free speech sensitivity and other factors. Section 4 critically examines the regulatory framework established by Chapter XI of the *Criminal Code* 1913 (WA).

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1 See chapter 8 of this thesis.
2 See chapter 8 of this thesis.
3 See chapter 11 of this thesis.
4 See chapter 7 of this thesis.
Section 5 reviews the operation of Chapter XI in the nine years in which it has been in operation.

In light of the fact that no prosecutions have ever been initiated under Chapter XI of the *Criminal Code* 1913 (WA), analysis of the operation of the criminalisation model of racial vilification regulation will be facilitated by a consideration (in section 6) of the operation of regulatory legislation based on this model in Canada. While there are some significant differences between the racial vilification provisions of the Canadian *Criminal Code* (introduced in 1970) and the racial vilification provisions of the Western Australian *Criminal Code* 1913, an analysis of the operation of the Canadian regime will provide further insight into the practical operation of the criminal law as a mechanism for regulating racial vilification.

2. BACKGROUND

2.1 The ANM Campaign

The specific motivation for serious consideration of racial vilification legislation in Western Australia was concern over the activities of a white supremacist group, the Australian Nationalist Movement (ANM), commencing around 1983. For several years in the 1980s ANM, led by Jack Van Tongeren, was responsible for a racist poster and graffiti campaign, along with acts of vandalism and intimidation, and violence directed primarily at persons of Asian ethnicity. In a study of racist far

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5 RSC 1990, c C-46.
right organisations in Australia, David Greason stated that ANM "saw itself as fighting a ‘race war’ to keep Australia white, and launched a campaign of terror against Asians and anti-racists in Perth in the late 1980s, including bashings, murders and the firebombing of Chinese restaurants."^8

One of the primary methods of communication used by the ANM was the public display of racist posters. Statements contained in the posters included:

Asians Out or Racial War
400,000 Jobless 400,000 Asians Out!
7800,000 Unemployed 700,000 Asians Why More Asians?
Jews Are Ruining Your Life
No Asians
No Coloureds
White Revolution The Only Solution
Media Cover-Up Holocaust A Lie! Seek the Truth
12 Million Jews Never Died
The Facts About Jewish Zionism and Freemasons.9

The Law Reform Commission of Western Australia (WALRC), in an issues paper released as part of its inquiry into whether racial vilification laws should be enacted (see below, section 2.2), summarised the themes of the posters as follows:

Some posters prominently display a gross caricature of what purports to be a member of the targeted group. One recent poster attempts to blame Australians of Asian origin for problems such as AIDS, heroin use and organised crime. In brief, the contents of the posters consist of messages which express causal links between unwanted economic and social phenomena, such as

unemployment, and the presence of members of the community from, for instance, Asian backgrounds.\textsuperscript{10}

In an interesting merging of ‘real life’ racism in Western Australia and the academic analysis of racism and racial vilification laws, Mari Matsuda, a leading critical race scholar\textsuperscript{11} and advocate of racial vilification legislation in the United States, employed the story of a personal experience during a visit to Perth in 1987 in a seminal critical race theory contribution to the ongoing debate in the USA over the regulation of racist speech:

A Japanese-American professor arrives in an Australian city and finds a proliferation of posters stating “Asians Out or racial war” displayed on telephone poles. She uses her best, educated inflection in speaking with clerks and cab drivers, and decides not to complain when she is overcharged.\textsuperscript{12}

References to the activities of the ANM were a common feature of parliamentary debates on proposed racial vilification legislation in 1989 and 1990. For example, during the second reading speech on the Criminal Code Amendment (Incitement to Racial Hatred) Bill 1989 (see below), Mr Hill, the Minister for Multicultural and Ethnic Affairs observed in the Legislative Assembly that:

Members would be aware of the ugly face of racism that has appeared in Perth in the form of a prolonged, highly-organised and large-scale racist propaganda poster and graffiti campaign. This campaign has had a deleterious effect on individuals and community groups who have been the target of such material. The principal evils of these campaigns are two-fold: They incite groups of citizens to hate each other, which affects community relations generally, and they make the people who are targets greatly alarmed and afraid, and at risk of

\textsuperscript{10} \textit{Ibid} at 6.
harassment from those mindless members of the community, or those who do not think for themselves. Neither of these evils is tolerable in Western Australian society. In addition this campaign has had clearly adverse effects on our State’s business migration and investment programs throughout the world and in South East Asia particularly.13

In the Legislative Assembly in September 1990 during debate on the Criminal Code Amendment (Racist Harassment and Incitement to Racial Hatred) Bill, ALP MLA Mr Donovan recalled comments he had made in the Assembly on 28 May 1987 expressing his “outrage … at the recent poster campaign by the extremist so-called Australian Nationalist Movement.”14 In the Legislative Council Liberal MLC Mr Pendal stated that he had been one of the target’s of ANM’s activities:

13 ALP MLA Mr Gordon Hill, Minister for Multicultural and Ethnic Affairs, Western Australia Hansard (Legislative Assembly), 26 October 1989, p 3950. See also Mr Hill, Minister for Multicultural and Ethnic Affairs, during the second reading speech on the Criminal Code Amendment (Racist Harassment and Incitement to Racial Hatred) Bill: Western Australia Hansard (Legislative Assembly), 27 September 1990, p 5914, and at p 5933 where the Minister spoke of the importance of “approach[ing] this issue in a unified manner and to say to the extremists in the community, such as the Australian Nationalist Movement, that Western Australia is not a racist society.” Mr Hill observed (at p 5935) that the Government’s proposed legislation had wide support, including the support of the mother of Jack Van Tongeren, leader of the ANM. See S Van Tongeren, “Problems Associated with Intercultural Relationships” in G Bird (ed), Racial Harassment (Melbourne National Centre for Crosscultural Studies in Law and Centre for Migrant and Intercultural Studies, Monash University, 1992) 7. See also Liberal MLC George Cash, Western Australian Hansard (Legislative Assembly), 19 June 1990, p 2134.

14 Western Australian Hansard (Legislative Assembly), 27 September 1990, p 5924. In contrast to the condemnation of racist organisations by Mr Donovan, National Party MLC, EJ Charlton expressed the rather bizarre view that it was the policies of the (then) ALP Federal Government that caused the rise in racist activity: “The extremists are being encouraged to take that view [ie anti-Asian sentiment] because of Federal Government policies. …A number of people in this nation have been encouraged to have negative attitudes towards people from other countries because they have been continually given an advantage over other groups by the Australian Taxation Office. Many of them have the advantage of establishing themselves in this country when others cannot”: Western Australian Hansard (Legislative Council), 19 June 1990, p 2132. In response to interjections which queried the correlation between taxation and racial hatred, Mr Charlton persisted: “Obviously some people in the Labor Party do not believe that taxation has anything to do with racial hatred or poverty, but it is the bottom line in this issue”: ibid at 2133.
In some respects I could claim to be one of the reasons why this legislation is in the House now, because I had the dubious honour of being a victim of that ratbag organisation, the Australian Nationalist Movement. For my efforts in taking its members to task, I found my office in Como was plastered with some of these offensive messages.  

However, unlike the position taken by Helen Sham-Ho MLC in the New South Wales Parliament after she was targeted by the racial vilification of National Action, Mr Pendal was not persuaded by the experience that racial vilification was necessary, taking the view that “there may be other ways of achieving the same ends ... [under] current provisions in the law ...”

As in New South Wales, then, the activities of an organised racist group were a significant motivation for the enactment of racial vilification legislation in Western Australia. However, whereas the nature of the racial vilification engaged in by National Action was one of the influences on the shape of the legislation enacted in New South Wales—which encompassed, but was not limited to, those forms—the shape of the racial vilification legislation enacted in Western Australia was heavily influenced by, and ‘customised’ to deal with, the particular forms of racial vilification

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15 Ibid at 2121. See also National Party MLA Mr Ainsworth, Western Australia Hansard (Legislative Assembly), 27 September 1990, p 5927.
16 Ibid. Mr Pendal advocated (Western Australia Hansard (Legislative Council), 19 June 1990, pp 2121-2122) a significant increase in the penalty for the offence of unsolicited distribution of publicity materials as defined by regulation 7 of the Litter Regulations 1981 made under the Litter Act 1979 (WA): “Except with the consent of the owner or occupier a person shall not leave or post publicity material in any building, fence, furniture, pillar, screen, structure or wall on or adjacent to a public place or vacant land or on or in any unoccupied vehicle in a public place”. Responding to this suggestion, ALP MLC, Tom Helm, stated that “Anyone who says that we can deal with this problem by amending the Litter Act must have his head in the sand. What an insult to the people of ethnic origins to say that a problem such as racial hatred can be addressed by amending the Litter Act”: ibid at 2126; see also ALP MLA Mr Catania, Western Australian Hansard (Legislative Assembly), 27 September 1990, p 5931.
in which the ANM were engaging during the 1980s.\textsuperscript{17} It will be argued in this chapter, that as a result, racial vilification is regulated at the state level in Western Australia in a rather idiosyncratic way which renders it difficult to categorise in terms of regulatory form. On the one hand, the Western Australian Parliament has taken the unprecedented step in Australia of \textit{criminalising} racial vilification—the form of regulation which is generally, though perhaps erroneously, considered as the most ‘serious’ form of regulation.\textsuperscript{18} Yet, on the other hand, the legislative definitions of those forms of racial vilification which are proscribed by the criminal law are very narrow and very specific—with the result that under Western Australian law, only a narrow sub-set of conduct which comes with the definition of racial vilification adopted in chapter 2, is regulated under Western Australian law.\textsuperscript{19} The origins and evolution of this unique approach to the regulation of racial vilification will now be considered.

\section*{2.2 Reports of Commissions}

In 1988 the Attorney General requested reports from both the WA Commissioner for Equal Opportunity and the WALRC on the need for legislative reform to combat this activity.

\paragraph*{\textsuperscript{17}} Greason reports that the Australian Nationalist Movement was formed by a “breakaway” group from National Action: Greason, \textit{supra} note 8 at 202.

\paragraph*{\textsuperscript{18}} See chapter 9 of this thesis.

\paragraph*{\textsuperscript{19}} Of course, since 1995 a civil human rights regulatory regime with a broad definition of unlawful racial vilification, has operated in western Australia (and all other Australian jurisdictions) by virtue of Part IIA of the \textit{Racial Discrimination Act 1975}: see Part II of this thesis.
2.2.1 WA Commissioner for Equal Opportunity

In May 1988 the WA Commissioner for Equal Opportunity submitted a report to the Attorney General of Western Australia on *Legislation Against Incitement to Racial Hatred* which considered "whether a legislative solution to incitement to racial hatred is appropriate". The Commissioner identified as a motivation for this inquiry the fact that:

> [s]ince its inception in July, 1985 the Equal Opportunity Commission has received many inquiries and complaints concerning racist propaganda. Most of these involved unsolicited distribution of racist material such as pamphlets, posters, letters and poems. Concern was also raised about news media reporting of incidents involving Aboriginal people or people of Asian descent, and about radio and television programmes with a racist content.

The report canvassed various arguments for and against the legislative regulation of racial vilification, considered the experience of a selection of other jurisdictions and examined the status of existing laws in Western Australia which might be utilised to regulate forms of racial vilification. The report did not make specific recommendations for the enactment of racial vilification legislation, but concluded that:

> It is apparent that criminal sanctions against incitement to racial hatred have proven to be ineffective and inappropriate, and that conciliation procedures would be preferable. However, the effectiveness of conciliation in dealing with 'hard-core' racists must also be questioned. Community education and community relations programmes may be more effective long term strategies for endeavouring to change racist attitudes.

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21 *Ibid* at i.

22 *Ibid* at 1.


24 *Ibid* at 51-60.
As will be discussed below, the regulatory approach ultimately adopted by the Western Australian Government and the Parliament of Western Australia ran directly counter to this conclusion: exclusive reliance on criminalisation and no facility for conciliation. This was the approach recommended by the WALRC.

2.2.2 Law Reform Commission of Western Australia

After considering the Equal Opportunity Commission report, in November 1988 the Government asked the WALRC to report on “what changes to the law, if any, are needed to deter adequately acts which incite racial hatred”.26 In an issues paper (May 1989) prepared to facilitate discussion and consultation on the question, the Commission explained the specific motivation for the consideration of law reform:

The immediate problem giving rise to the reference is the placing of inflammatory posters (and graffiti) in public places in Perth, Fremantle and metropolitan suburbs from 1983 to the present time. The posters appear to be part of a campaign to ensure a continuing level of racism in the community. They refer to three particular groups: Asians, “Coloureds” and Jews.27

Concern for the impact of regulatory legislation on free speech was an important factor influencing the Commission’s approach to the question of what form of legislative regulation, if any, was to be recommended:

The Commission has given serious consideration to the question of freedom of speech and its relationship to the present reference. The relationship is controversial and complex. In the Commission’s view the issue is not adequately defined by putting speech rights in one side of the balance and other human rights in the other, since there is evidence that in the case of the

25 Ibid at viii.
immediate targets of racist propaganda their speech right requires legal protection. In the Commission's view two balances are at stake here. Not only must proposed legislation strike a balance between freedom of speech generally and the right to a dignified and peaceful existence free from racist harassment and vilification, but it must also strike a balance between the principle of free speech and the duties and responsibilities which properly attach to the exercise of that freedom.28

The Commission canvassed the merits of a range of models of legislative regulation, including amendments to existing public order legislation,29 the creation of criminal offences of racial incitement, the creation of a statutory tort of group defamation, and the addition of "racial harassment" as a ground of complaint under the Equal Opportunity Act 1984.30 The Commission concluded that the "large scale public display of racially inflammatory material and its attendant harms, is so serious as to warrant legislative intervention by way of amendments to the Criminal Code."31

The Commission's conclusion that the use of the regulatory tool of the criminal law was warranted by the seriousness of the problem,32 is worthy of comment. It reflects the conventional understanding that there is a correlation between the 'seriousness' of the harm in question and the appropriate method of regulation. More specifically, it reflects that assumption that the criminal law (and the creation of indictable offences in particular) is the appropriate form of regulation for harm at the high end of the seriousness spectrum. However, in light of the experience of reliance on the criminal law for the regulation of racial vilification in other jurisdictions, including Canada (see below), and in light of the practical operation of the Western Australian legislation which was ultimately enacted in

28 Ibid at 13.
30 WALRC, supra note 27 at 4.
31 WALRC, supra note 26 at 10.
32 Ibid.
accordance with the Law Reform Commission’s recommendations (see below) this assumption is open to question. This will be discussed further below.

The Commission proposed “a legislative response to the problem of incitement of racial hatred on a limited, rather than a general, basis. The proposed laws are intended to stop the visual propaganda campaign demonstrated by racist posters and graffiti.” Specifically, the Commission recommended the introduction of four new criminal offences to the *Criminal Code* 1913 (WA) which would criminalise the publication, distribution or display (and possession for these purposes) of written material which was “threatening, abusive or insulting” with the intention of promoting hatred against a racial/ethnic group, and the display (and possession for this purpose) of written material with the intention of causing “serious harassment, alarm, fear of distress” to a racial/ethnic group. The Commission decided that it would be unacceptable to criminalise only conduct which threatened personal violence or property damage (that is, the approach ultimately adopted in New South Wales, the Australian Capital Territory and South Australia). It concluded that:

In the present context, to require proof of such threats of harm as an essential part of the definition of any proposed offences would defeat the fundamental purpose of having such offences [:] ... the prevention of public disorder, and ... the prevention of serious interference with the right to a dignified and peaceful existence free from racist harassment and vilification.

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33 *Ibid* at 18 (emphasis added).
34 *Ibid* at 16.
35 *Anti-Discrimination Act* 1977 (NSW) s 20D: see chapter 8 of this thesis.
36 *Discrimination Act* 1991 (ACT), s 67: see chapter 8 of this thesis.
37 *Racial Vilification Act* 1996 (SA) s 4: see chapter 11 of this thesis.
38 WALRC, *supra* note 26 at 11.
The Commission identified as a primary reason for limiting the regulatory scope to communication via written materials (excluding other forms of racial vilification, such as a speech at a public meeting or rally, or comments made during a radio broadcast) "its concern for the implications of any restrictions on concepts of freedom of speech". The other major reason given by the Commission for its novel approach was that:

It is necessary to ensure that only actual problems so far apparent in this State be subject to a legislative response. Trying to enact a comprehensive legislative solution to 'hypothetical' situations risks over-reaction or overkill, and this would unnecessarily inhibit acceptable forms of expression or action.

In addition, the Commission also took into account the fact that "the major acts which incite race hatred are already regulated to a substantial degree". Specifically, the Commission justified the exclusion of racial vilification in the form of oral expressions and other behaviour from the scope of the proposed new criminal offences on the basis that "where these activities are threatening, abusive or insulting ... they already constitute breaches of the criminal law [under public order legislation] ... and, unlike clandestine racist billposting and graffiti-writing activities, there is no problem of detecting offenders."

What is absent from the Commission's analysis is any consideration of whether the forms of public order regulation which it characterised as 'covering' racial vilification, have been mobilised or are likely in the future to be mobilised

39 Ibid at 18.
40 Ibid at 18-19.
41 Ibid at 18, with specific reference to "criminal laws such as those regulating disorderly conduct including threatening, abusive or insulting (spoken) words and behaviour". See Police Act 1892 (WA) ss 44, 54 and 59.
42 Police Act 1892 (WA) ss 54, 59.
43 WALRC, supra note 26 at 25.
against racial vilification in the form of "oral expressions and other behaviour". It is naïve and misleading to characterise such laws as regulating forms of racial vilification in the absence of any evidence that such laws were designed, or have been adapted for, this purpose. In addition, racial vilification which is "threatening, abusive or insulting" is not exhaustive of the category of racial vilification which is susceptible to regulation. This would appear to be a narrower category than the definition of conduct which "incites hatred, severe ridicule or serious contempt", which, since the enactment of the Anti-Discrimination (Racial Vilification) Amendment Act 1989 (NSW) has emerged as the 'baseline' definition of racial vilification for the purpose of legislative regulation.

One of the most distinctive features of the regulatory approach recommended by the WALRC is that having specifically identified concern for free speech as a factor influencing the regulatory shape of proposed legislation, the Commission opted for the criminalisation of certain forms of racial vilification, notwithstanding that the criminal law is commonly regarded as representing the greatest threat to, and the regulatory approach least compatible with, free speech principles.

The Commission did not expressly address this apparent paradox in its report, but it is likely that this unconventional approach was motivated by a desire to establish a regulatory regime which was suitable for responding to the particular types of racial vilification which had specifically prompted calls for racial vilification legislation in Western Australia: the display of unequivocally racist posters and other forms of written material by an incontrovertibly racist organisation (the ANM).

There is evidence to the contrary. For example, the available evidence suggests that offensive language laws are more likely to be used to prosecute Aboriginal people than to protect them from racial vilification: see chapter 1 of this thesis, note 37.
Having selected the criminal law as the most appropriate regulatory model, the Commission's concern for free speech sensitivity was manifested in the adoption of a narrow definition of unlawful conduct which was constructed so to impact as little as possible on 'legitimate' forms of expression and communication, in contrast with the 'illegitimate' methods and messages of the ANM. The influence of free speech sensitivity took a unique form in Western Australia. The dominant pattern in Australia has been that free speech sensitivity has prompted legislators to prefer the less punitive end of the spectrum of models of legislative regulation—most notably illustrated in the evolution of the Racial Hatred Bill 1994 (based on a combination of criminal and civil human rights regulatory methods into the *Racial Hatred Act 1975* (Cth) (which relies exclusively on the civil human rights method).

That is not to say that, in Western Australia, free speech sensitivity did not have a profound effect on the regulatory shape of the legislation regime proposed by the WALRC. However, whereas the primary consequence of free speech sensitivity in other Australian jurisdictions has been a preference for a non-criminal *enforcement mechanisms* (with criminalisation reserved for 'aggravated' forms of racial vilification), the most significant manifestation of free speech sensitivity in the course of action recommended by the Commission was a very narrow definition of the forms of racial vilification which were legislatively proscribed. As will be discussed below, this unique manifestation of free speech sensitivity in the drafting of Western Australia's racial vilification legislation continued in the Western Australian Parliament, where both sides of politics supported the exclusive focus on

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45 The WALRC was aware that this standard had been adopted in the proposed legislation in New South Wales: WALRC, *supra* note 27 at 35.
46 See Part II of this thesis.
criminal law, with the (Liberal Party-National Party Coalition) Opposition expressing its concerns (successfully in the end) for free speech sensitivity in the form of a strategy of narrowing the scope of the regulatory regime.

Another feature of the ‘unconventional’ adoption of the criminalisation model by the Commission is that it did not endorse the ‘brake’ of Attorney General’s consent often applied to criminal law-based regimes for regulating racial vilification. The Commission decided that there was nothing about the proposed new offences to justify a fetter on prosecutorial discretion which did not apply generally to other criminal offences. The Commission implicitly endorsed the criticisms levelled at the requirement of Attorney General consent for criminal racial vilification prosecutions where such laws operate based on its identification as “a major barrier to prosecutions ... and as one of the principal reasons for their apparent under-utilization, lack of success and thus inefficacy.” The Commission concluded that “the location of such a power to prosecute in the Attorney General of such laws is selective, reluctant, ambivalent or lacking in genuine concern.”

On the question of other (non-criminal) forms of legal regulation the Commission specifically rejected the option of creating a group defamation, inter alia, because of the then unsatisfactory state of Australian defamation laws, on which such a statutory tort would be based.

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47 That is, racial vilification associated with incitement to, or threats of personal violence or property damage.
48 See, eg, s 20D(2) of the Anti-Discrimination Act 1977 NSW); also s 319(6) of the Canadian Criminal Code RSC 1990, c C-46 (discussed infra section 6).
49 WALRC, supra note 26 at 19-20.
50 Ibid at 20.
51 Ibid at 24.
The Commission noted that the addition of a “racial harassment” ground to the Equal Opportunity Act 1984 had “considerable merit”. However, the Commission did not recommend this course of action, suggesting that a further inquiry would be necessary to determine the appropriateness of different forms of dispute resolution and mediation for “racial harassment and abuse in schoolyards and neighbourhoods” (presumably examples of what the Commission saw as the type of racial vilification with which a conciliation-based system (either within or outside the Equal Opportunity Commission) could deal. This decision is another consequence of the Commission’s decision to focus its investigation on, and construct a highly ‘customised’ regulatory regime in response to, the particular types of racial vilification in which the ANM had primarily engaged.

With reference to the work of the WALRC (specifically, the issues paper) and the report of the WA Equal Opportunity Commission on racial vilification laws, Jayasuriya made the significant observation that:

Unfortunately, these two West Australian documents make only a passing reference to the Greiner government’s legislation in New South Wales, and fails to acknowledge that in many ways the terms of debate may have been changed as a result of this bold initiative by the New South Wales government.

The Law Reform Commission, in particular, appears to have approached the task of identifying an appropriate regime for the regulation of racial vilification, without serious regard to the range of regulatory methods which might be suitable for the

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52 Ibid.
53 Ibid.
54 WALRC, supra note 27.
55 Jayasuriya L, *Legislating Against Racial Incitement: Strategies and Rationales* Occasional Paper No 5 (Perth: University of Western Australia, 1989). This paper was published in June 1989 prior to the release of the WALRC’s final report (supra
task; including, as Jarasuriya suggests, the statutory model of a reasonably broad
definition of unlawful racial vilification coupled with a conciliation-based civil human
rights enforcement mechanism.

The Commission appears to have approached the task of formulating a
regulatory regime with limited tools for the enforcement of the legislative standards,
(including an assumption that criminalisation is the 'default' option) yet with the
same concern for free speech sensitivity that have consistently influenced the shape
of legislative regimes in Australian jurisdictions. In large part this appears to have
been mandated by the identity of the organisation at which the legislation was
specifically directed and the nature of the activities in which the ANM
engaged—which rendered adoption of the conciliation-based civil human rights
regulatory option politically and practically inappropriate. The result is that
notwithstanding that the Commission’s recommendations formed the basis for the
only Australian legislation to criminalise racial vilification per se, the Commission’s
recommendations formed the basis of the most narrow legislative definition of (non-
aggravated) unlawful racial vilification.

3. CRIMINAL CODE AMENDMENT (RACIST HARASSMENT AND
INCITEMENT TO RACIAL HATRED) ACT 1990

3.1 Legislative History

In October 1989, just a week after the release of the WALRC’s final report,\(^{56}\) the
Criminal Code Amendment (Incitement to Racial Hatred) Bill 1989 was introduced

\(^{56}\) WALRC, \textit{supra} note 26.
by the ALP Government into the Western Australian Parliament. The 1989 Bill provided for four new criminal offences closely modelled on the offences recommended by the WALRC. The Liberal Party-National Party Coalition Opposition opposed the bill in its original form and proposed a number of amendments including:

- exemption of “any lawfully published book or magazine”;57
- limitation of the legislation to material which was “threatening or abusive” (excluding material which was “insulting”);58
- removal of the alternative objective fault component (“reasonably likely to”) so that the legislation applied only to situations in which the communication of the material which was intended to cause one of the proscribed consequences;59 and
- limitation of the proscribed consequence for the “display” offences to “harassment, alarm or fear” (excluding “distress”).60

The Opposition advanced proposed these amendments on the basis that while it supported the “principles” behind the Government’s bill it had “some grave reservations about the method by which those principles are to be applied”.61

The Government rejected the Opposition’s proposed amendments and the bill was passed in the Legislative Assembly on 6 December 1989.62

57 Western Australia Hansard (Legislative Assembly), 6 December 1989, p 6172.
58 Ibid at 6174.
59 Ibid at 6177.
60 Ibid at 6180.
61 Liberal Party MLA Mr Kierath, ibid at 6154.
62 Ibid at 6184.
The bill was introduced into the Legislative Council on 7 December 1989 and debate was scheduled for 21 December, the Government's apparent attention being to have the legislation enacted before the Christmas recess. However, the Coalition again opposed the legislation in the Legislative Council, where the Coalition held the majority, and adjourned debate, which then did not commence until 29 May 1990.

On the bill's second reading in the Legislative Council the Minister for Planning, Kay Hallahan stated that the bill, in its original form, was an attempt to protect all residents within the community while ensuring that individuals' rights of freedom of speech were maintained.63 The Minister conceded, however, that concerns had been expressed in some quarters about whether the right balance had been achieved or whether "innocent parties" (such as booksellers) might be caught within the legislation's regulatory net.64 The Minister advised the members of the Legislative Council that the Government had agreed to make amendments to the legislation to narrow its scope. Specifically, the amendments would delete the words "insulting" from all four proposed offences so that only material which was "threatening or abusive" would be covered by the legislation and remove the word "distress" from the two racial harassment offences so that only material which was intended or likely to cause "serious harassment, alarm or fear" would be covered.65 In addition a defence to the two racial harassment offences would be created in the following terms: "It is a defence to a charge of the offence defined in the section to

63 Western Australia Hansard (Legislative Council), 29 May 1990, p 1227.
64 Ibid.
65 Ibid; see also, ALP MLA Mr Donovan, Western Australia Hansard (Legislative Assembly), 27 September 1990, p 5925.
prove that the accused person did not know that the material was threatening or abusive.\footnote{Western Australia Hansard (Legislative Council), 29 May 1990, p 1227.}

The Minister stated the Government’s position that these amendments were sufficient to address the concerns which had been raised about the breadth of the regulatory regime to be established by the legislation and concluded that “we will not be amending the Bill any further.”\footnote{Ibid at 1229.} The Government was confident that the amended bill achieved “the right balance between protecting our basic rights of freedom of speech and freedom of security and the protection of all members of our community.”\footnote{Ibid.}

Despite these amendments, which narrowed the regulatory scope of the legislation, the Opposition continued to oppose the bill. An Opposition motion to refer the bill to the Legislative Council Standing Committee on Legislation for further consideration was passed on party lines.\footnote{Western Australia Hansard (Legislative Council), 19 June 1990, p 2151.}

The report of the Legislation Committee was tabled in the Legislative Council on 18 September 1990.\footnote{Western Australia Hansard (Legislative Council), 18 September 1990, p 5193.} The major change, unanimously recommended by the cross-party committee, was the limitation of the prohibition on causing “alarm or fear” to a racial group to conduct which was intended to have this effect,\footnote{Mr Kelly, ALP MLC, Chair of the Legislation Committee, \textit{ibid} at 5196.} deleting the lower alternative objective threshold of conduct which was likely to have this effect. Other recommendations included that the definition of “written material” be expanded to

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\item prove that the accused person did not know that the material was threatening or abusive.\footnote{Western Australia Hansard (Legislative Council), 29 May 1990, p 1227.}
\item The Minister stated the Government’s position that these amendments were sufficient to address the concerns which had been raised about the breadth of the regulatory regime to be established by the legislation and concluded that “we will not be amending the Bill any further.”\footnote{Ibid at 1229.} The Government was confident that the amended bill achieved “the right balance between protecting our basic rights of freedom of speech and freedom of security and the protection of all members of our community.”\footnote{Ibid.}
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include newspapers, and that the bill be renamed the Criminal Code Amendment (Racist Harassment and Incitement to Racial Hatred) Bill.

On 19 September 1990 the Minister for Planning, Ms Hallahan, advised the Legislative Council that "the Government reluctantly accepts the amendments put forward by the Legislation Committee which found agreement in this Chamber." The bill, renamed and amended in accordance with the report of the Standing Committee was passed by the legislative Council and transmitted to the Legislative Assembly.

On 27 September 1990 the Criminal Code Amendment (Racist Harassment and Incitement to Racial Hatred) Bill 1990 was introduced into the Legislative Assembly. During the bill's second reading speech, the Minister Assisting the Minister for Multicultural and Ethnic Affairs, explained that the Government had agreed to support the further amendments made to the legislation in the Legislative Council in order "to meet concerns expressed by members of the Opposition, representatives of the legal groups, media and other community groups." The 1990 Bill differed from the 1989 Bill in the following respects:

- inclusion of the phrase "racist harassment" in the short title and Criminal Code chapter heading;
- removal of the objective standard established by the phrase "or would likely to" in the racist harassment offences, thereby requiring that intent must be established, as required for the incitement to racial hatred offences;

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72 Ibid.
73 For a more detailed explanation of the amendments which resulted from the legislation Committee report, see infra note 72-74 (corresponding text).
74 Western Australia Hansard (Legislative Council), 19 September 1990, p 5310.
75 Ibid at 5318.
76 Western Australia Hansard (Legislative Assembly), 27 September 1990, p 5915.
• elevation of the relevant harm consequence threshold in the racist harassment offences from “serious harassment, alarm or fear” to harassment;

• adoption of the term “racial group” instead of “identifiable group” with a revised definition that excludes the terms “nationality” and “citizenship”; and

• adoption of an exhaustive definition of “written or pictorial materials” (by replacing the word “includes” with “means” and including “newspaper” as one of the defined forms of material, effectively excluding books and magazines from the definition.

The statutory defences earlier proposed by the Government were not included in the final version of the bill, presumably on the basis that they were superfluous, in light of the various other amendments made in the legislative Council. The majority of these changes effectively narrowed the regulatory scope of the legislation.

The Criminal Code Amendment (Racist Harassment and Incitement to Racial Hatred) Bill 1990 was passed in the Legislative Assembly on 27 September 1990.

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77 Ibid at 5915-5916.
78 See Liberal Party MLA Mr Kierath, ibid at 5929; also Liberal Party MLA, Mr Strickland, ibid at 5938.
79 Western Australia Hansard (Legislative Council), 29 May 1990, p 1227.
80 Mr Kierath stated that “this Bill includes all the amendments proposed by the Opposition when the original Bill was debated”: Western Australia Hansard (Legislative Assembly), 27 September 1990, p 5915. ALP MLA, Mr Pearce conceded that “The Government has had to compromise in order to pass the legislation”: ibid at 5930.
81 Ibid at 5938.
3.2 The Impact of Free Speech Sensitivity on the Shape of the Legislation

From the time the ALP Government first introduced the Criminal Code Amendment (Incitement to Racial Hatred) Bill in October 1989, to the enactment of the Criminal Code Amendment (Racist Harassment and Incitement to Racial Hatred) Act 1990 (WA) the dominant theme in parliamentary debates was the need to find the right ‘balance’ between protecting free speech and protecting victims of racial vilification. Yet, throughout this period, the consistent trajectory of the bill was in the direction of a narrowing of its regulatory scope. At each stage in the bill’s passage through the Parliament the breadth of conduct to be legislatively proscribed as ‘criminal’ was reduced. Free speech sensitivity was a critical influence on this pattern of evolution, unequivocally manifested in debates in both houses of the Western Australian Parliament.

In the second reading speech on the 1989 Bill the Minister for Multicultural and Ethnic Affairs explained that concern for ‘safeguarding’ free speech had been an important consideration in the drafting of the proposed legislation:

Freedom of speech is an ideal which is cherished in our democratic society. In this Bill, the Government has ensured that freedom of speech is not only not endangered but promoted. The Government recognises that the immediate targets of racist propaganda need their own rights of free speech to be protected by the law. Racist propaganda might interfere with freedom of speech by intimidating to silence those members of the community who are the butt of it. The free speech rights of citizens who are publicly harassed or terrorised or intimidated by hate propaganda are as important as those of people who create such propaganda or inflict it on the community.\(^2\)

\(^2\) Mr Hill, Minister for Multicultural and Ethnic Affairs, Western Australia Hansard (Legislative Assembly), 26 October 1989, p3951.
Note that the Minister used the concept of free speech as an argument in support of the legislative regulation of racial vilification, in contrast to the more common usage of the concept of free speech to oppose or restrict racial vilification legislation. (This matter is discussed further below.)

In addition to arguing that the proposed racial vilification legislation 'enhanced' free speech, the Minister asserted that the proposed legislation "does not extend generally the thresholds by which speech is regulated under existing law"\(^\text{83}\) and that it "does not limit academic or scientific discourse in the public interest, nor does it discourage reasonable public discussion in related matters."\(^\text{84}\) The first of these assertions is a version of the 'no implications for free speech' argument which has been advanced on a number of occasions in Australian legislatures during debate on racial vilification legislation.\(^\text{85}\) The Minister's strategic employment of free speech sensitivity in support of the bill is not uncommon. It was employed in the Commonwealth Parliament in support of the Racial Hatred Bill 1994,\(^\text{86}\) and was also used in the course of parliamentary debate on racial vilification legislation in New South Wales.\(^\text{87}\)

As noted in chapter 8 of this thesis,\(^\text{88}\) it is a nonsense to speak of racial vilification having no impact on free speech, or as extending no further than existing legal regulations on speech. What such statements usually mean is that the impact or

\(^{83}\) Western Australia Hansard (Legislative Assembly), 26 October 1989, p 3952.

\(^{84}\) Ibid.

\(^{85}\) For example, this argument was advanced in support of the Racial Vilification Bill during debate in the South Australian Parliament: see chapter 11 of this thesis, note 81.

\(^{86}\) See chapter 5 of this thesis, note 45 (corresponding text).

\(^{87}\) See chapter 8, notes 15-16 (corresponding text); see also the examination of a similar line of argument advanced by proponents of the South Australian racial Vilification Act 1996: see chapter 11 of this thesis.

\(^{88}\) Chapter 8, notes 15-16 (corresponding text).
extension is considered necessary and acceptable and compatible with maintaining a
general commitment to free speech principles. The tendency of proponents of
legislative regimes for the regulation of racial vilification to designate proposed
legislation as ‘no impact’ vis-à-vis free speech highlights the significance of free
speech sensitivity and demonstrates the risk which proponents of regulation see in
an admission of free speech erosion or diminution.89

As argued in chapter 8 of this thesis, the fact that the concept of free speech
has been used as a ‘weapon’ by proponents and opponents of racial vilification
legislation alike, is evidence of the malleability and adaptability of the concept of free
speech. This is particularly so in the Australian context where the concept of free
speech lacks a clear and unequivocal legal foundation, with the consequence that there
is a lack of consensus on the parameters of the category of speech which be legally
recognised as ‘free’ or ‘protected’.

The central theme of the Opposition’s objection, as expressed in the debate in
the Legislative Council on 29 May, was the view that the regulatory net cast by the
proposed new offences was “too broad”90 and “too powerful”91, and that the impact
on free speech was too great.92 Liberal Party MLC, Mr Foss, adopted a broad
conception of free speech in support of this argument, arguing that “there must be a
free exchange of ideas in our society” and that “It is philosophy within our society

89 Curiously, the ‘no impact’ argument was adopted by Coalition MLA, Mr Ainsworth in relation to the 1990 Bill when he stated that “The Bill in no way will infringe on the freedom of speech which it is so vital to protect”: Western Australia Hansard (Legislative Assembly), 27 September 1990, p 5927. ALP MLA Mr Catania interjected that “The original Bill did not infringe on freedom of speech”: ibid.
90 Liberal Party MLC Mr Foss, Western Australia Hansard (Legislative Council), 19 June 1990, p 2118.
91 Liberal Party MLC Mr Wordsworth, ibid at 2119.
92 Mr Foss, ibid at 2115.
that people have the right to express views freely." He advanced the position that legislative restrictions should be limited to situations where racist ideas are "forced onto other people." For example, a racist poster at a bus stop should be regulated because "people waiting at the bus stop for the legitimate reason of catching a bus are exposed to racist posters and have no choice in the matter. They should have a choice ..." However, legislative restrictions should not extend to "the sale of a book or the private distribution of pamphlets. If people want to take a pamphlet, it is up to them whether they take it."

Mr Foss argued, therefore, that the legislation should not be directed at possession or publication but only display — that is, the legislation should be directed very specifically at the precise mode of racial vilification, the incidence of which had originally prompted calls for legislative regulation in Western Australia. In addition Mr Foss asserted that conduct that was "abusive" was not sufficiently serious to warrant criminalisation: "I believe the word ‘abusive’ is far too mild a term to bring in the full panoply of the criminal law." The Government's Bill was, it was submitted, a case of "a very large sledgehammer being used to crack a nut."

The Government rejected this characterisation of the proposed legislation. ALP MLC Mr Helm suggested that it demonstrated "no understanding of the

93 Ibid. ALP MLC Mr Helm countered that "many actions in our society quite necessarily impinge on our right to free speech" and that "this Bill is not about the right to free speech; this Bill is about people who are constantly harassed and subjected to verbal expressions of hatred and about people who are subjected to expressions which reflect upon their jobs": ibid at 2129.
94 Ibid.
95 Ibid.
96 Ibid.
97 Ibid at 2116.
98 Ibid at 2117.
99 Ibid.
difficulties suffered by the people the Bill is trying to help. On the specific issues of the bill’s free speech implications Mr Helm advanced two familiar (though not necessarily consistent) arguments employed regularly by proponents of racial vilification legislation—that free speech is not an absolute right, and the particular bill in question has no impact of free speech:

Many actions in our society quite necessarily impinge on our right to free speech. Examples of this concern [are] court cases and matters to do with libel. However, this Bill is not about the right to free speech; this Bill is about people who are constantly harassed and subjected to verbal expressions of hatred and about people who are subjected to expressions which reflect upon their jobs and professions.

While the basic thrust of these comments is clear, it contains some questionable observations. First, the attempt to attribute a single character to the proposed legislation as ‘about’ racial vilification and ‘not about’ free speech is simplistic. To the extent that the bill carried implications for free speech (and there can be no question that it did) it was a bill about free speech and, simultaneously, a bill about racial vilification. Second, the comment gives the erroneous impression that “verbal expressions” fall within the definition of racial vilification contained in the bill, when they clearly did not. Indeed, the placing of “verbal expressions” outside the reach of the regulatory regime was motivated in large part by free speech sensitivity—the very thing which Mr Helm claimed the bill was “not about”.

100 Ibid at 2129.
101 Ibid.
102 A subsequent (Opposition) speaker in the Legislative Council picked up this error, stating, “[Mr Helm] claimed this Bill would take into account oral utterances. That is clearly not the case ...”: ibid at 2134.
During his second reading speech in the Legislative Assembly on the revised 1990 Bill, Mr Hill, the Minister assisting the Minister for Multicultural and Ethnic Affairs stated that:

The Government believes that concessions given in this Bill will adequately address the concerns of those who believe the legislation is too wide in its breadth. It is in the interest of all persons, groups and institutions in our society to get the balance right between protecting our basic rights of freedom of speech and freedom of security and protection of all members of our community. The Government is confident that this Bill, with its amendments, will achieve this balance.  

During the subsequent second reading debate on the Criminal Code Amendment (Racist Harassment and Incitement to Racial Hatred) Bill Liberal Party MLA Mr Strickland reiterated what had motivated the Opposition to oppose the original bill and seek amendments:

The Minister’s goal in implementing the original legislation was correct, noble and reasonable, but the Bill was not properly constructed and was rushed into Parliament. The original legislation would have been too much of an imposition on the basic rights of people and their freedom of speech. That is what this legislation has been about. The Opposition has genuinely tried to amend the legislation so it would not impinge on people’s freedom of speech but focus on the problem of racist harassment by allowing the law to address that problem.

Similarly, National Party MLA, Mr Ainsworth explained that the amendments advocated by the Opposition “addressed some of the problems which we saw in

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103 Western Australia Hansard (Legislative Assembly), 27 September 1990, p 5916. ALP MLA, Mr Catania specifically stated that amendments had been necessary to avoid infringement of free speech: “the previous Bill that we introduced, and fortunately also this Bill, had no intention of traversing the right of freedom of speech”: ibid at 5932.
104 Ibid at 5920.
relation to civil rights liberties and freedom of speech and which may have been curtailed by the wording of the Bill.\cite{105}

These parliamentary statements, from representatives of all three political parties, leave no doubt that free speech sensitivity was the key influence on the shape of the racial vilification legislation ultimately enacted by the Western Australian Parliament. Notwithstanding the fact that some proponents of the original 1989 bill drew on the concept of free speech in support of their position, the overwhelming influence of free speech sensitivity was as a limiting device on regulatory scope of the legislation. Commencing with the WALRC report and recommendations\cite{106} and continuing through the drafting, debating and amending of the bill in the Western Australia Parliament, concern about the infringement of free speech resulted in a consistent pattern of narrowing the scope of the legislation. The effect of free speech sensitivity was consistent and cumulative: the relatively limited scope of the legislation proposed by the WALRC was narrowed by amendments moved by the Government, and further narrowed at the insistence of the Opposition.

The specific form of the regulatory regime which ultimately emerged from this process will now be examined.

4. THE REGULATORY REGIME ESTABLISHED BY CHAPTER XI OF THE CRIMINAL CODE 1913 (WA)

4.1 Introduction

The legislative effect of the enactment of the *Criminal Code Amendment (Racist Harassment and Incitement to Racial Hatred) Act 1990* (WA) was to add a new

\footnote{\textit{Ibid} at 5925.}
Chapter XI, ("Racist Harassment and Incitement to Racial Hatred") to the Criminal Code 1913 (WA) which creates four criminal offences (ss 77-80) which deal specifically with various types of racial\textsuperscript{107} vilification involving "written or pictorial material that is threatening and abusive". The four offences fall into two categories, distinguished primarily in terms of the relevant consequence. There are two offences in each category: one dealing with the relevant mode of communication, the other covering possession for these purposes.

The relevant consequence in the first category of offences (ss 77-78) is the intentional creation, promotion or increase of hatred of any racial group. The full text of s 78 of the Criminal Code 1913 (WA) is illustrative:

Any person who—

(a) publishes, distributes or displays written or pictorial material that is threatening or abusive; and

(b) intends hatred of any racial group to be created, promoted or increased by the publication, distribution or display of the material,

is guilty of a crime and is liable to imprisonment for 2 years.

Summary conviction penalty: imprisonment for 6 months or a fine of $2000.

Section 77 is in substantially the same terms, except that it specifically criminalises possession of material with the intention of engaging in the conduct defined in s 78.\textsuperscript{108}

\textsuperscript{106} WALRC, supra note 26.

\textsuperscript{107} Section 76 of the Criminal Code 1913 (WA) adopts the standard definition of race, providing that "racial group" means any group of persons defined by reference to race, colour or ethnic or national origins".

\textsuperscript{108} Section 77 of the Criminal Code 1913 (WA) provides that:

Any person who—

(a) possesses written or pictorial material that is threatening or abusive; and
The relevant act in the second category of offences (ss 79-80) is the display of offending material and the relevant consequence is the intentional harassment of any racial group. Section 80 provides that:

If—

(a) any person displays written or pictorial material that is threatening or abusive; and

(b) that person intends any racial group to be harassed by the display of the material,

that person is guilty of a crime and is liable to imprisonment for one year.

Summary conviction penalty: $1000.\(^{109}\)

(b) intends that material to be published, distributed or displayed whether by that person or another person; and

(c) intends hatred of any racial group to be created, promoted or increased by the publication, distribution or display of the material,

is guilty of a crime and is liable to imprisonment for 2 years.

Summary conviction penalty: imprisonment for 6 months or a fine of $2000.

\(^{109}\) Section 79 is in substantially the same terms as s 80, except that it specifically criminalises possession of material with the intention of engaging in the conduct defined in s 80:

If—

(a) any person possesses written or pictorial material that is threatening or abusive; and

(b) that person intends the material to be displayed whether by that person or another person; and

(c) that person intends any racial group to be harassed by the display or the material,

that person is guilty of a crime and is liable to imprisonment for one year.

Summary conviction penalty: $1000.

The summary conviction penalty for the ss 79 and 80 offences was originally 3 months prison or a fine of $1000. However, in 1995 the prison sentencing option was repealed: No 78 of 1995, s 147.
The most significant features of the regulatory regime established by the *Criminal Code Amendment (Racist Harassment and Incitement to Racial Hatred) Act 1990* (WA) are that it:

- relies exclusively on the criminal law;
- criminalises (forms of) racial vilification *per se*, without the need to prove that violence was threatened or incited;
- only regulates the communication (display, distribution or publication\(^{110}\)), and associated possession, of "written or pictorial material";
- applies to such material where it is objectively considered to be "threatening or abusive";
- is directed primarily at public conduct (like all other Australian racial vilification statutes), although it extends to private possession where possession is for the purpose of one of the proscribed forms of public communication;
- establishes a relatively high threshold in terms of the proscribed consequences: promotion of hatred or harassment (when compared with the civil human rights standards of "hatred, serious contempt or severe ridicule"\(^{111}\) and "offence, insult, humiliation or intimidation"\(^{112}\); and
- requires, in relation to all four offences, that the accused acted with the intention of causing the proscribed consequence (that is, subjective mens rea).

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\(^{110}\) Section 76 of the *Criminal Code 1913* (WA) provides that, for the purpose of Chapter XI, "display" means display in or within view of a public place; ‘distribute’ means distribute to the public or a section of the public; ‘publish’ means publish to the public or a section of the public.

\(^{111}\) See, eg, *Anti-Discrimination Act 1977* (NSW), s 20(C)(1); discussed in chapter 8 of this thesis.

\(^{112}\) *Racial Discrimination Act 1975* (Cth), s 18C; discussed in chapter 6 of this thesis.
The most unique of these features is the regulatory regime’s application to only a particular sub-set of modes of communicating racially vilifying content: “written or pictorial material”. According to s 76 of the *Criminal Code* 1913 (WA) “written or pictorial material’ means any poster, graffiti, sign, placard, newspaper, leaflet, handbill, writing, inscription, picture, drawing or other visible representation”. The limitation of the legislation to such modes of communication reflects the degree to which the establishment of a regulatory regime in Western Australia was overwhelmingly a response to the Australian Nationalist Movement poster campaign of the 1980s.\(^\text{113}\)

During the course of debate on the 1990 Bill, ALP MLC Tom Helm “ask[ed] members of the Opposition to open their eyes, to look around and to get away from thinking only of those posters. They should be aware of other incitements to racial hatred, for various reasons.”\(^\text{114}\) Mr Helm might have delivered the same exhortation to his own side of the House. Although the Government advocated a broader definition of unlawful racial vilification than the Opposition was willing to accept, even the Government’s original 1989 Bill proposed to regulate a relatively narrow sub-set of conduct amounting to racial vilification. As discussed above, before the legislation was passed by the Parliament, the definition was narrowed even further, 

\(^{113}\) At the conclusion of the second reading debate on the 1990 Bill the Minister assisting the Minister for Multicultural and Ethnic Affairs, Mr Hill, articulated this relationship when he observed that “[t]he Bill … targets the activities of extremists whom through their actions, have tried to spread hatred in the community and to cause alarm and severe distress to the community”: Western Australia Hansard (Legislative Assembly), 27 September 1990, p 5936.

\(^{114}\) Western Australia Hansard (Legislative Council), 19 June 1990, p 2126. This comment was specifically prompted by the suggestion from Liberal Party MLC Mr Pendar that the *Litter Act* was an adequate legislative measure and that no specific racial vilification legislation was necessary: *ibid* at 2121-2122; discussed *supra* note 16.
but it would be misleading to lay responsibility for the ultimate scope of the regulatory regime at the feet of the Coalition Opposition alone.

Having said that, Mr Helm's comment did effectively highlight the extent to which the parliamentary debate in Western Australia over the appropriate form of racial vilification legislation focused on a particular form of racially vilifying conduct to the exclusion of other forms of racial vilification (most notably oral communication—in person, on the radio or on television).

In the Legislative Assembly of the Western Australian Parliament, the Minister assisting the Minister for Multicultural and Ethnic Affairs, Mr Hill, summarised the final version of the legislation in terms which highlight its narrow scope, both in terms of the conduct and fault elements of the offences:

The main aims and objectives of the Bill are to prosecute those people who intentionally and knowingly are producing and publicly circulating literature and materials aimed at inciting racial hatred and racial harassment that is threatening and abusive among residents of Western Australia.\(^\text{115}\)

While the focus of the Western Australian legislation on the regulation of particular modes of communication is unique in Australia, it is not unprecedented. There is an interesting parallel with the approach adopted in a number of Canadian statutes. The most direct comparison is with s 13(1) of the Canadian Human Rights Act 1977 which provides that:

It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

\(^{115}\) Western Australia Hansard (Legislative Assembly), 27 September 1990, p 5915 (emphasis added).
Like the offences defined in Chapter XI of the Western Australian *Criminal Code* 1913, only a particular mode of communication of racial vilification is rendered unlawful (and pursuable as a complaint to the Canadian Human Rights Commission).

In the case of the *Canadian Human Rights Act* 1977 the regulated mode of communication is *telephone* communication. Just as the narrow focus of the Western Australian legislation reflected Parliament’s decision to respond specifically to the types of activities in which the ANM had engaged during the 1980s, so too the *Canadian Human Rights Act*’s focus on telephone communication was a response to the use of this mode of communication by organised racist groups in Canada.\(^\text{117}\)

\(^{116}\) In addition to being limited to telephone communication, s 13(1) of the *Canadian Human Rights Act* 1977 is further limited by the requirement that the communication of hate messages must be *repeated* before coming within the definition of unlawful conduct.

\(^{117}\) During 1975-76 when federal human rights legislation was being drafted, telephone hate lines became a popular technique employed by right wing racist organisations, notably the Western Guard, particularly in the province of Ontario: see W Tarnopolsky and W Pentney, *Discrimination and the Law* (Toronto: Carswell, revised ed, 1994) at para 1-21. The desirability of the specific legislative regulation of this practice was first raised in the Canadian House of Commons in 1975. At that time Lincoln Alexander (Member for Hamilton West) asked the then Minister for Justice, Ron Basford, whether he proposed to amend the *Criminal Code* to prohibit the practice: Canada Hansard (House of Commons), 13 November 1975, p 9012. The Minister of Justice replied that the matter was under consideration: *ibid*. On 17 December 1975 Alexander asked the Minister whether telephone hate messages would be covered by the proposed new federal human rights legislation: Canada Hansard (House of Commons), 17 December 1975, p 10093. The Minister again replied that this was under consideration: *ibid*. On 25 October 1976, following further media coverage and controversy regarding the use of a telephone hate line by the Western Guard in Toronto, the Minister of Justice explained that the new federal human rights legislation would "contain certain provisions prohibiting the sending of hate messages over the telephone ...": Canada Hansard (House of Commons), 25 October, p 418. According to the Minister the new legislative measures were "designed to provide an effective supplement to the provisions in the Criminal Code for combatting this particularly revolting ... practice of tape-recorded, racially biased messages going out over the telephone.": *ibid*. However, in his second reading speech the Minister made reference to the hate propaganda provisions of the Criminal Code and indicated that they were inadequate to deal with this new method of racial
Despite its limited scope s 13 of the Canadian Human Rights Act 1977 has been specifically enforced on a number of occasions to prevent racist organisations from engaging in the proscribed form of racial vilification. The operation of ss 77-80 of the Criminal Code 1913 (WA) will now be examined.

vilification: “I think those of us who were here in Parliament at the time, felt that we had dealt with this issue in the amendments to the Criminal Code which were passed relating to hate, but new practices have emerged. Under this bill the sending of repeated hate messages over federally-regulated telephones would be prohibited. The measure is more rigorous than section 281.1 [now s 319] of the Criminal Code, but it avoids—or I have endeavoured to draft it in such a way as to avoid—interference with legitimate expression of opinion”: Canada Hansard (House of Commons), 11 February 1977, p 2976. Interestingly, one commentator has argued recently for the ‘transfer’ of the prohibition on telephonic hate messages from the Canadian Human Rights Act to the Criminal Code: see E Taylor, “Hanging up on Hate: Contempt of Court as a Tool to Shut Down Hatelines” (1995) 5 National Journal of Constitutional Law 163.

5. THE OPERATION OF THE LEGISLATION

There have been no prosecutions under any of the racial vilification provisions of the Criminal Code 1913 (WA). No charges were ever laid under Chapter XI against the primary targets of the legislation—members of the Australian National Movement, whose activities had been the chief motivation for legislative regulation. Even before the Criminal Code Amendment (Racist Harassment and Incitement to Racial Hatred) Act 1990 (WA) was enacted by the Western Australian Parliament, the ANM's racist campaign was effectively ended when several members of the ANM, including leader Jack Van Tongerern, were convicted for a range of criminal offences in 1990.

What significance, if any, should be attached to the fact that in nine years there have been no prosecutions under the racial vilification provisions of the Criminal Code 1913 (WA)? On the face of it, this finding could support radically divergent assessments: that the legislation has been inadequate because it is too narrow in scope; or that the legislation has been very successful having completely deterred the forms of racial vilification at which it was directed. Certainly, the Minister for Police, when advising that there had been no summary prosecutions

119 Personal communication (letter), Cheryl Edwards, Attorney General, 17 January 1994; personal communication (letter), Bob Wiese, Minister for Police, 14 March 1994; personal communication (letter), Anne Longden, Professional Assistant, Director of Public Prosecutions, 14 November 1996; personal communication (letter), Bob Wiese, Minister for Police, 4 December 1996; personal communication (letter), Kevin Prince, Minister for Police, 23 September 1999; personal communication (letter), Robert Cock, Director of Public Prosecutions, 26 October 1999

120 Van Tongerern and a number of ANM members were convicted of a number of offences including breaking, entering and stealing; arson; wilful damage, assault and conspiracy: Greason, supra note 8 at 202; "Racists guilty of 100 offences", The Sydney Morning Herald, 15 September 1990, 5; see also Human Rights and Equal Opportunity Commission, National Inquiry into Racist Violence, Racist Violence: Report of National Inquiry into Racist Violence in Australia (Canberra: Australian Government Publishing Service (AGPS), 1991) at 200.
under Chapter XI preferred the positive assessment, stating that “this result is very encouraging and both the Police Service and I are hopeful this trend will continue”.\textsuperscript{121}

Neither of these radically different assessments can be endorsed with any degree of certainty, particularly in the absence of reliable data on the actual prevalence and nature of racial vilification in Western Australia over the course of the last decade.

When the Minister of Planning, Ms Hallahan, announced in the Legislative Council that the Government would reluctantly accept the recommendations of the Legislation Committee that the scope of the legislation be narrowed, she called on the Opposition to support ongoing monitoring of the legislation’s first two years of operation, and to give an undertaking that amendments would be considered should the legislation “prove to have shortcomings”.\textsuperscript{122} No specific undertaking was forthcoming at the time,\textsuperscript{123} and no formal review of the legislation has been completed by the current Liberal Party-National Party Coalition Government.\textsuperscript{124}

One observation may confidently be made about the absence of racial prosecutions under the \textit{Criminal Code} 1913 (WA): this outcome is hardly surprising. The legislation was specifically drafted with reference to the particular types of

\textsuperscript{121} Personal communication (letter), Kevin Prince, Minister for Police, 23 September 1999, Similarly, in 1996, the Police Minister noted that the absence of prosecutions was “encouraging and hopefully will continue to be the case”: personal communication (letter), Bob Wiese, Minister for Police, 4 December 1996.

\textsuperscript{122} Western Australia Hansard (Legislative Council), 19 September 1990, p 5310; see also Minister assisting the Minister for Multicultural and Ethnic Affairs, Western Australia Hansard (Legislative Assembly), 27 September 1990, p 5916. The Government proposed that the State Ministerial Advisory Council on Community Relations be asked to complete a report on the first two years of operation of Chapter XI of the \textit{Criminal Code} 1913 (WA): \textit{ibid.}

\textsuperscript{123} Liberal Party MLC, Mr Foss, Western Australia Hansard (Legislative Council), 19 September 1990, p 5313.

\textsuperscript{124} Personal communication (email), Dr Jim Thomson, Legal Officer, Office of the Attorney General for Western Australia, 10 December 1999.
vilification engaged in by a specific racist organisation. By the time the legislation came into force, the ANM was no longer active in the state. Consequently, it is difficult to draw from the Western Australia experience with Chapter XI of the Criminal Code 1913 (WA) general conclusions about the operation of the criminal law model of racial vilification regulation. In order to facilitate a more fruitful analysis of the practical operation of the criminal regulation model, including for the purpose of comparison with the other regulatory models examined in this thesis, the operation of the racial vilification provisions of the Canadian Criminal Code will be briefly examined. Although the Canadian legislation differs significantly from the provisions of Chapter XI of the Criminal Code 1913 (WA), it nonetheless provides a valuable comparative reference point.

6. A COMPARATIVE PERSPECTIVE ON THE CRIMINALISATION MODEL: SECTION 319(2) OF THE CANADIAN CRIMINAL CODE

6.1 Introduction

The original motivation for the criminalisation in Canada of racial vilification (more commonly known as ‘hate propaganda’) was similar to the motivation for the addition of Chapter XI to the Criminal Code 1913 (WA). In 1965 the Canadian Minister of Justice, Guy Favreau established a special committee “to study and report upon the problems related to the dissemination of varieties of ‘hate
propaganda’ in Canada. The Cohen committee was established as a response to concern about a rise in hate propaganda activity by neo-Nazi organisations in Canada at the time and concern about the inadequacy of existing legal measures. The Cohen Committee concluded that hate propaganda was a serious enough problem in Canada to warrant criminal regulation and proposed a number of new offences be added to the Criminal Code.

125 Special Committee on Hate Propaganda in Canada, Report of the Special Committee on Hate Propaganda in Canada (Ottawa: Queen’s Printer, 1965) (‘Cohen Committee Report’) at 1; see J Ross, “Hate Crime in Canada: Growing Pains With New Legislation” in M Hamm (ed). Hate Crime: International Perspectives on Causes and Control (Cincinnati: ACJS/Anderson Monograph Series, 1994) 151 at 152.

126 The committee came to be named after its chair, Maxwell Cohen, then Dean at the Law School, McGill University.

127 Kayfetz has explained the increase on racist activity which occurred in 1963-64:

A small band of neo-Nazis in Toronto, with co-conspirators in Montreal and a few other centres, undertook a campaign of distributing leaflets and brochures planned and executed in expert and terrorising fashion. All available means were used: the mails, hand distribution, placarding fences, scrawlings on bridges and underpasses, mass stuffing of mail-boxes, even showering the streets from skyscraper windows.


128 For example, in March 1964 an editorial in the Toronto Star expressed concern about the “stream of violently anti-Semitic and anti-Negro material ... circulating the mails in Toronto”: “Antidotes for Poison”, Toronto Star, 4 March 1964, 4, quoted in W Kaplan, “Maxwell Cohen and the Report of the Special Committee on Hate Propaganda” in W Kaplan and D McRae (eds), Law, Policy, and International Justice: Essays in Honour of Maxwell Cohen (Montreal & Kingston: McGill-Queen’s University Press, 1993) 243 at 245. This perceived inadequacy was underlined by the gap between existing Canadian laws and the international obligations which Canada had recently assumed as a signatory to the International Convention on the Elimination of All Forms of Racial Discrimination. In fact pressure for the legislative regulation of hate propaganda had been building since the early 1950s since which time the Canadian Jewish Congress had lobbied for legislative reform: see Kayfetz, supra note 127 at 5. According to Kaplan, supra note 128 at 269 (note 4), based on a review of Department of Justice archival material, “the Canadian government briefly considered draft legislation in 1953 but did not proceed”.

In light of the centrality, in the legislative history of racial vilification laws in Australia, of debate over whether the procedures and sanctions for dealing with racial vilification should be criminal/civil, formal/informal (court/tribunal), adjudicated/mediated, one cannot help but be struck by the Cohen Committee's singular focus on the criminal law as the only appropriate regulatory framework for dealing with hate propaganda. There appear to have been a variety of relevant factors, including the relative seriousness of the incidents of racial vilification which prompted the establishment of the Cohen Committee and upon which the committee focused in its deliberations (including the 'organised' nature of the perpetrators). In addition, at the time when the Cohen Committee was making its recommendations on the appropriate legal response to hate propaganda, civil human rights law (both substantive and procedural) was in a fledgling state in Canada, and did not offer an obvious alternative regulatory regime to the criminal justice system in the way that the established anti-discrimination enforcement regimes have offered an alternative to Australian legislators proposed to regulate racial vilification in the 1980s and 1990s.

However, the primary reason for the Cohen Committee's focus on criminal law as the legal vehicle for the regulation of framework is that it was a special committee established by the Federal Minister of Justice, charged with federal legislation, and under the constitutional division of powers in the Canadian federation, criminal law is a federal responsibility\(^{129}\) and human rights (or "egalitarian

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\(^{129}\) Under s 91(27) of the Constitution Act 1867, the federal Parliament has the power to make laws in relation to "The Criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters."
civil liberties\textsuperscript{130} were considered to be primarily a provincial responsibility.\textsuperscript{131} In its report the Cohen Committee offered the following explanation:

The Committee considered its terms of reference to include all legal aspects that might be relevant to a Canadian system of correction or control should the facts seem to warrant such recommendations. Such a view, of course, made it necessary to have some limited interest in those non-criminal legal aspects essentially under provincial jurisdiction. Since at least one Canadian Province — Manitoba — had enacted legislation as early as 1934 attempting to deal with "group libel", essentially through restraining orders, this was an experience which the Committee could not ignore. Nevertheless, for obvious reasons the Committee's primary focus tended to be directed to areas within federal jurisdiction wherever legal controls were involved and essentially this meant a concentration on the criminal law.\textsuperscript{132}

Five years after the Cohen Committee made its recommendations to the Minister of Justice the \textit{Criminal Code}\textsuperscript{133} was amended to provide for three new offences modelled on the draft legislation proposed by the Cohen Committee.

First, s 318 of the Code creates an offence of advocating genocide.\textsuperscript{134} Second, s 319(1) creates an 'aggravated' hate propaganda where the aggravating factor is an increased likelihood of public disorder.\textsuperscript{135} The third offence, defined by s 319(2) criminalises racial vilification per se:

\textsuperscript{130} W Tamopolsky, \textit{Discrimination and the Law in Canada} (Toronto: Richard De Boo Limited, 1982) at 25.
\textsuperscript{131} Under s 92(13) of the \textit{Constitution Act} 1867 the provinces have the power to make laws in relation to "property and civil rights in the province". See P Hogg, \textit{Constitutional Law of Canada} (Toronto: Carswell, 2nd ed, 1985) at 635, 787; and Tamopolsky, \textit{supra} note 126 at 38ff, 25-37.
\textsuperscript{132} \textit{Cohen Committee Report}, note 125 \textit{supra} at 4. Manitoba was the province that enacted Canada's first 'racial vilification' statute in 1934 (An Act to amend "The Libel Act", SM 1934, c 23) which added a new s 13A to the \textit{Libel Act} 1913 (Manitoba). This legislation is examined in chapter 11 of this thesis.
\textsuperscript{133} RSC 1990, c C-46.
\textsuperscript{134} Section 319(1) of the Canadian \textit{Criminal Code} provides that "Every one who advocates or promotes genocide is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years."
\textsuperscript{135} Section 319(1) of the Canadian \textit{Criminal Code} states:
Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or

(b) an offence punishable on summary conviction.

An "identifiable group" is defined as "any section of the public distinguished by colour, race, religion or ethnic origin." The Attorney General's consent is required for a prosecution under s 319(2). Section 319(3) provides for a number of defences including truth, good faith religious debate, and public interest comment based on a reasonably held genuine belief.

The offence created by s 319(2) of the Canadian Criminal Code is similar to the offences created by ss 77-78 of the Criminal Code (WA) with respect to the fault component and the relevant harm consequence: it is the intentional promotion of

1{\textsuperscript{36}} Canadian Criminal Code RSC 1990, c C-46, s 318(4).
1{\textsuperscript{37}} Canadian Criminal Code RSC 1990, c C-46, s 319(6).
1{\textsuperscript{38}} Section 319(3) of the Canadian Criminal Code RSC 1990, c C-46 provides that:

No person shall be convicted of an offence under this section

(a) if he establishes that the statements communicated were true;
(b) if, in good faith, he expressed or attempted to establish by argument an opinion on a religious subject;
(c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or
(d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.
racial hatred that is prohibited. However, s 319(2) covers a potentially very wide range of modes of communication whereas ss 78-79 are limited to communication via “written or pictorial materials”.

6.2 The Operation of Section 319(2)

In its 30 years of operation, s 319(2) of the Canadian Criminal Code has been invoked in the form of a prosecution in six cases. Convictions have been secured in five of these cases. In these cases the racial vilification which was ruled to violate s 319(2) took a number of forms:

- Over a number of years a high school teacher in Alberta included racist and anti-Semitic statements in his lessons;

- Members of a white supremacist organisation in Ontario, the Nationalist Party of Canada, published a newsletter which vilified people of colour and Jews;

In the other case (the first s 319(2) ever prosecuted) the defendants were convicted at first instance, but successfully appealed and had their conviction overturned on the basis that they had not wilfully promoted racial hatred: R v Buzzanga and Durocher (1979), 101 DLR (3d) 488 (Ontario Court of Appeal). The defendants were charged with violating s 319(2) after circulating anti-French Canadian pamphlets during a local controversy over whether the local school board should build a French-language high school. The defendants were, in fact, members of the French Canadian community whose objective in circulating the pamphlets was to expose local prejudice and prompt the government to support the campaign for the French language school. The Ontario Court of Appeal ruled that in these circumstances the defendants could not be convicted of wilfully promoting racial hatred, because it was not their intention to produce the consequence of promoting hatred. Martin JA, for the court, concluded that “an intention to create ‘controversy, furore and an uproar’ is not the same thing as intention to promote hatred”: ibid at 506.

• A man in Prince Edward Island sent numerous letters to Christian churches and religious organisations (as well as police and governments agencies) which ostensibly vilified Christianity. The letters has been prepared so as to appear as if they had been written by a Jewish individual or organisation and were designed to give the impression that Jewish people had made the attacks on Christianity and thereby to effect the promotion of hatred of Jews;^2

• A teenager in Nova Scotia used his father's computer to generate racist white supremacist notices which he circulated in the school yard;^3

• A man in Ontario wrote and distributed pamphlets and set up a recorded phone message that promoted the hatred of Muslims.^4

The first of these cases, involving James Keegstra, prompted more than a decade of litigation. The case provides a useful focal point for a number of general observations about the criminalisation of racial vilification. The Supreme Court of Canada's 1990 decision in R v Keegstra^45 is the most significant judicial ruling on s 319(2) to date, particularly on the question of the relationship between free speech sensitivity (and

141 R v Andrews (1990), 77 DLR (4th) 128 (SCC).
142 R v Safadi (1993), 108 Nfld & PEIR 66 (Prince Edward Island Supreme Court). On appeal the conviction was affirmed: R v Safadi (1994), 121 Nfld & PEIR 260 (Prince Edward Island Supreme Court (Appeal Division)).
in the Canadian context, the *constitutional right* to freedom of expression\textsuperscript{146} and the legislative regulation of racial vilification.

**6.2.1 Keegstra**

In 1985 Keegstra was convicted in the Alberta Court of Queen’s Bench of wilfully promoting hatred contrary to s 319(2) of the *Criminal Code*. He was sentenced to five months imprisonment and fined $5,000.\textsuperscript{147} He appealed successfully to the Alberta Court of Appeal\textsuperscript{148} on the basis that section 319 offended the rights guaranteed by section 2(b)—freedom of expression—and section 11(d)—presumption of innocence—of the Canadian *Charter of Rights and Freedoms*.\textsuperscript{149} However, the Supreme Court of Canada overturned the decision of the Alberta Court of Appeal and upheld the constitutional validity of s 319(2) of the Canadian *Criminal Code*.\textsuperscript{150}

In *Keegstra*, by a four-three majority the Court concluded that while section 319(2) of the *Criminal Code* did contravene the freedom of expression protected by section 2(b) of the Charter this infringement was justifiable under section 1 of the Charter.\textsuperscript{151} Section 1 of the Charter states that:

\begin{itemize}
  \item \textsuperscript{146} Section 2(b) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B of the Canada Act 1982 (UK), 1982, c 11.
  \item \textsuperscript{147} *R v Keegstra* (1984) 19 CCC (3d) 257 (Alberta Queen’s Bench).
  \item \textsuperscript{148} *R v Keegstra* (1988), 60 Alta LR (2d) 1.
  \item \textsuperscript{150} The *Keegstra* appeal was heard in conjunction with two other appeals: *R v Andrews* (1990), 77 DLR (4th) 128; and *Taylor v Canadian Human Rights Commission* (1990), 75 DLR (4th) 577. In *Taylor* the Court upheld the racial vilification provisions contained in s 13 of the *Canadian Human Rights Act* 1977.
  \item \textsuperscript{151} The Court adopted the same analysis in response to Keegstra’s claim that the defence of truth contained in s 319(3)(a), which involved a reverse onus of proof, was inconsistent with the presumption of innocence guaranteed by s 11(d) of the Charter.
\end{itemize}
The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

At the core of the majority's analysis\(^\text{152}\) is a conviction that the conduct at which section 319(2) is directed has only a tenuous connection with the values underlying the protection offered by section 2(b) of the Charter.\(^\text{153}\) Dickson CJC concluded that the *Criminal Code*’s provisions constituted an appropriate and acceptable means for furthering the important objective of preventing the dissemination of hate propaganda.\(^\text{154}\) According to Dickson CJC:

> Few concerns can be as central to the concept of a free and democratic society as the dissipation of racism, and the especially strong value which Canadian society attaches to this goal must never be forgotten in assessing the effects of an impugned legislative measure. When the purpose of s 319(2) is thus recognized, I have little trouble in finding that its effects, involving as they do the restriction of expression largely removed from the heart of free expression values, are not of such a deleterious nature as to outweigh any advantage gleaned from the limitation of s 2(b).\(^\text{155}\)

However, he concluded that the objective behind the enactment of anti-hate laws such as s 319(2) of the *Criminal Code* was “... of such magnitude as to support even the severe response of criminal prohibition.”\(^\text{156}\)

Having upheld the constitutional validity of Canada’s criminal racial vilification legislation the majority was at pains not to overstate the regulatory effectiveness of criminalisation. Dickson CJC acknowledged the limitations of criminal legislation as a mechanism for “advancing the goals of equality and multicultural tolerance in

\(^{152}\) Dickson CJC; Wilson, L’Heureux-Dube, and Gonthier JJ concurring.

\(^{153}\) *R v Keegstra* [1991] 2 WWR 1 at 73.

\(^{154}\) Ibid at 79.

\(^{155}\) Ibid at 73.

\(^{156}\) Ibid at 73.
Canada..."\(^{157}\) observing that "[i]t is important in my opinion, not to hold any illusions about the ability of this one provision [s 319(2)] to rid our society of hate propaganda and its associated harms."\(^{158}\)

In the dissenting judgment,\(^{159}\) McLachlin J was particularly concerned by what she saw as the breadth, vagueness and subjectivity inherent in s 319(2). According to McLachlin J.

... [T]he broad criminalization of virtually all expression which might be construed as promoting hatred effected by s. 319(2) of the Criminal Code is not, in my view, a proportionate and appropriate means of achieving the end to which the legislation is directed. The breadth of the category of speech it catches, the absolute nature of the prohibition it applies to such speech, the draconian criminal consequences it imposes coupled with the availability of preferable remedies, and finally, the counterproductive nature of its actual effects — all these features of s. 319(2) of the Criminal Code combine to make it an inappropriate means of protecting our society against the evils of hate propaganda.\(^{160}\)

McLachlin J’s concern about the breadth of section 319(2) is not supported by the section’s history, which, as noted above, has seen very few prosecutions even initiated.\(^{161}\) The requirement, under section 319(6) of the Code, that no prosecution take place without the consent of the relevant provincial Attorney General, has clearly had the effect of placing significant limits on the scope of the Code’s hate propaganda provisions.

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\(^{157}\) *Ibid* at 71.

\(^{158}\) *Ibid*.

\(^{159}\) La Forest and Sopinka JJ concurring.

\(^{160}\) *R v Keegstra* [1991] 2 WWR 1 at 134. For McLachlin J., human rights instruments, which do not involve the possibility of criminal sanctions, may offer a more acceptable means of giving effect to Parliament’s objective in enacting hate propaganda laws: *ibid* at 130.

The Supreme Court of Canada’s split on the issue of the constitutionality of criminal hate propaganda laws reflects two fundamentally different conceptions of the value underlying the constitutional guarantee of free expression. According to Weinrib, the minority approach is based on McLachlin J’s conception of freedom of expression as the “pivotal Charter right” along the lines of the American model, while for Dickson C.J.C., the extent of the free speech guarantee must be considered within the context of “the Charter’s general concern for individual dignity and equality.”

The decision of the Supreme Court of Canada in *Keegstra* made an important contribution to clarifying the relationship between the legislative regulation of racial vilification and the right to free expression. From an Australian comparative perspective the sophisticated and thorough nature of the Supreme Court of Canada’s resolution of this issue contrasts strikingly with the relatively unsophisticated and superficial analysis of this question in Australia. A central explanation for this difference is the express and unequivocal constitutional foundation for free speech sensitivity in Canada compared to the relatively vague common law and limited implied constitutional foundations for free speech sensitivity in Australia. Consequently, in Canada, the Supreme Court of Canada was able to draw on (and develop) a recognised jurisprudential discourse relating to the nature of rights under the Canadian Charter of Rights and Freedoms. By contrast, in Australia there is no equivalent discourse.

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162 *Ibid* at 1434.
163 *Ibid* at 1436.
available for the resolution of the free speech/racial vilification regulation tension and the legal context in which the debate has primarily taken place (legislatures rather than the courts) has not fostered the developments of such a discourse. Further, Canada has proved to be a more receptive legal and political environment for the employment of criminal law in the regulation of racial vilification than Australia. Intuitively, it might be assumed that a right to free speech which enjoyed express constitutional protection (as in Canada) would be more likely to constitute an insurmountable barrier to the criminalisation of racial vilification than a ‘right’ to free speech which received no equivalent constitutional (or statutory) protection (as in Australia). In fact, when the history and operation of Australian and Canadian racial vilification laws is compared the opposite appears to be true. It is in Australia that an apparently enlarged conception of free speech sensitivity has been pivotal in the confinement of criminal law regulation to a marginal and practically inoperative status vis-à-vis other Australian racial vilification statutes.

After upholding the constitutional validity of s319(2) of the Canadian Criminal Code the Supreme Court of Canada remitted the matter back to the Alberta Court of Appeal for determination of other (non-constitutional) grounds of appeal. The Court of Appeal quashed Keegstra’s conviction and ordered a new trial. The successful ground of appeal was that the trial judge had erred in not allowing Keegstra to challenge potential jurors for cause on account of significant pre-trial publicity: R v Keegstra (1991), 114 AR 288. At the second trial Keegstra was again found guilty. His sentence was a $3000 fine. He appealed successfully to the Alberta Court of Appeal on the ground that the trial judge in the second trial had erred in refusing to accede to a request made by the jury during their deliberations for copies of (i) the transcript of a witness’s evidence; and (ii) section 319(2) and (3) of the Criminal Code. Keegstra’s conviction was quashed and a new trial was ordered: R v Keegstra (1994), 92 CCC (3d) 505. However, on Crown appeal, the Supreme Court of Canada set aside the judgement of the Alberta Court of Appeal and restored the conviction: R v Keegstra [1996] 1 SCR 458. The matter was again remitted to the Alberta Court of Appeal for disposal of Keegstra’s appeal against his (second trial) sentence. The Alberta Court of Appeal increased Keegstra’s sentence to one year imprisonment (suspended), one year probation and 200 hours of community service: R v Keegstra (1996) 44 Alta LR (3d) 16. See generally S Suriya, Combatting Hate: A Socio-Legal
6.3 Criminalising Racial Vilification: Insights from the Canadian Experience

The prosecution of Keegstra ultimately resulted in a conviction, and so might reasonably labelled a successful episode in the legal regulation of racial vilification. However, the case generated a great deal of controversy about the appropriateness of legislative restrictions on racial vilification generally, and, in particular, about the criminalisation of racial vilification. The duration of the litigation and the intensity of the media coverage of the matter (particularly surrounding Keegstra’s appeal to the Supreme Court of Canada) meant that the operation of s 319(2) of the Canadian Criminal Code attracted close critical attention in a way that has no parallel in the case of any of the Australian regulatory regimes. The case, along with other cases in which s 319(2) has been invoked (as well as a number of cases in which it has not been invoked—see below) provides a useful point of reflection for commenting on the implication of using the criminal law to regulate racial vilification.

The most obvious effect of reliance on criminal laws to regulate racial vilification is that, notwithstanding considerable concern about the incidence of racial vilification and ‘hate crimes’ in Canada,167 only an extremely small proportion of

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167 A 1995 study conducted for the Canadian Department of Justice estimated that the number of hate crimes committed annually in Canada was approximately 60,000: J Roberts, *Disproportionate Harm: Hate Crime in Canada – An Analysis of Recent Statistics*. Working Document WD1995-11e (Ottawa: Research, Statistics and Evaluation Directorate Department of Justice Canada, 1995). Roberts also found that of the small proportion of crimes that were reported to police, 89 per cent were racist hate crimes—that is, crimes motivated by the victim’s race, religion or ethnicity: *ibid.* The Federal-Provincial-Territorial Working Group on Multicultural and Race Relations in the Justice System, *Survey of Hate-Motivated Activity* (Ottawa: Justice
alleged incidents of racial vilification actually trigger the formal invocation of the legislative prohibition,\textsuperscript{168} because the threshold for criminal prosecution is high. This threshold is set by a combination of: the elements of the offence defined by s 319(2) (specifically the subjective mens rea requirement that the accused must be shown to have \textit{intended} to promote hatred),\textsuperscript{169} stringent evidentiary and proof requirements, including the need to establish the prosecution case beyond reasonable doubt; and, although it is difficult to accurately quantify, a political reluctance to invoke a criminal regulatory regime to restrict speech, notwithstanding the established validity of the relevant legislation (see above, \textit{Keegstra}).


\textsuperscript{169} \textit{Ibid} at 216-219.
These influences have been felt in the practical operation of the requirement under s 319(6) of the Canadian Criminal Code for the consent of the Attorney General before a prosecution can be commenced. Attorneys-General across the country have, on occasion, demonstrated a reluctance to institute criminal proceedings against some persons allegedly responsible for racial vilification. For example, the refusal of the Attorney General of Ontario to consent to a s 319(2) prosecution of Ernst Zundel—probably Canada's most active and infamous organised racist and hate propagandist—saw Zundel prosecuted under the much less appropriate "false news" provisions contained in section 181 of the Criminal Code. Zundel's conviction was subsequently overturned by the Supreme Court of Canada when it held that section 181 of the Code was invalid because it infringed section 2(b) of the Canadian Charter of Rights and Freedoms.

One of the identified reasons for this reluctance is concern about the implications of providing racists with a forum for their views. As Kallen has commented:

The extensive publicity afforded the hate propagandizing activities of Keegstra and Zundel through the considerable media coverage of their trials provoked heated controversy over the appropriateness of a criminal charge and a public trial as a means of deterring hate propagandists.

—E Kallen, "Never Again: Target Group Responses to the Debate Concerning Anti-Hate Propaganda Legislation" (1991) 11 Windsor Yearbook of Access to Justice 46 at 52. There is certainly something unpalatable about the profile and notoriety achieved by defendants in such cases, but it is difficult to determine whether 'trial publicity' does advance the cause of vocal racists, and whether it detracts from the effectiveness of the regulatory regime.

170 One of the identified reasons for this reluctance is concern about the implications of providing racists with a forum for their views. As Kallen has commented:

Similarly, the anti-Semitic activities of Malcolm Ross, a school teacher from Moncton, New Brunswick, were examined in 1991 by the New Brunswick Human Rights Commission under the general race discrimination provisions contained in s5(1) of the *New Brunswick Human Rights Act 1973*.\(^2\) No provincial racial vilification legislation had been enacted in New Brunswick, and successive Attorneys-General had refused to consent to the prosecution of Ross under s 319(2) of the Canadian *Criminal Code*.\(^3\)

The special consent requirement has been criticised as an unnecessary and inappropriate ‘brake’ on the effective regulation of racial vilification, prompting calls for the repeal of this requirement.\(^4\) Such criticisms and recommendations are not without merit. They tend to vindicate the recommendation of the WALRC, and the decision of the Parliament of Western Australia, that there should be no special Attorney General’s consent requirement in relation to the racial vilification offences.

\(^1^2\) A Board of Inquiry ruled that Ross (and the school board) had discriminated against Jewish students. An appeal by Ross against this finding and the Board of Inquiry’s order that the school board remove Ross from his teaching position was rejected by the Supreme Court of Canada: *Ross v New Brunswick School District No. 15* (1996), 133 DLR (4th) 1. However the Court ruled that a “gag order” made by the Board of Inquiry (which required the school board to terminate Ross’s employment if at any time he distributed anti-Jewish literature) was an undue restriction on free expression and therefore violated Ross’ rights under s 2(b) of the Canadian Charter of Rights and Freedoms.


in Chapter XI of the *Criminal Code* 1913 (WA), and are also consistent with the position adopted by the *Samios Report*\textsuperscript{175} and the New South Wales Law Reform Commission\textsuperscript{176} in relation to the requirement for the Attorney General's consent to prosecutions for serious racial vilification under s 20D of the *Anti-Discrimination Act* 1977 (NSW).\textsuperscript{177}

However, notwithstanding the strength of the case against the special consent requirement for racial vilification prosecutions it is important not to overstate the limiting impact of this constraint. In Western Australia, where there is no such requirement, there have been no prosecutions under Chapter XI of the *Criminal Code* 1913 (WA). Where the decision whether to prosecute is made by a Director of Public Prosecutions, Crown Prosecutor or other relevant prosecuting authority it may be less likely that political considerations will impact on the decision than where the decision is made by the Attorney General—an elected politician. However the onerous substantive, evidentiary and procedural requirements of criminal racial vilification prosecutions are just as like to deter a DPP or Crown Prosecutor from commencing a prosecution in a given case as they would an Attorney General. Of particular significance in the case of both s 319(2) of the Canadian *Criminal Code* and the offence defined by Chapter XI of the Western Australian *Criminal Code* 1913 is


\textsuperscript{177} *Anti-Discrimination Act* 1977 (NSW) s 20D(2), discussed in chapters 8-9 of this thesis.
the subjective mens rea requirement, which represents a central constraint on the
regulatory scope of these criminal offences.178

The Canadian experience with s 319(2) of the Criminal Code suggests that
criminal sanctions, while commonly perceived (and criticised) as a heavy handed
approach to regulation, may in fact be a very limited legal response from the
perspective of the objective of extending protection to victims of racial vilification
and the wider community. Citing the very small number of convictions in Canadian
courts, Raymaker and Kilgour have argued that the impact of the current legislation
as a curb on the promotion of hate against identifiable groups is severely limited.179

The most serious questions raised about the criminalisation model of
regulating racial vilification in light of the Canadian experience with s 319(2) of the
Canadian Criminal Code are its individualising and marginalising effects. Criminal
prosecutions of individuals like Jim Keegstra have the effect of removing racial
vilification from its social context, and deflecting attention from the harm suffered by
members of the relevant group and the wider community. In the context of such
cases, the legal system’s attention is focused almost exclusively on the specific
conduct of the accused which is the basis of the charge. This focus seems somewhat
misplaced, or at least, too narrow. As Moon has argued, “... it is impossible to isolate
clearly the offensive claims of Keegstra ... from ordinary public discourse. Racial and
other stereotyping in different degrees is pervasive in our community.”181

178 In Canada, the Special Committee on Participation of Visible Minorities in Canada
Society, supra note 167 at 70-71, and the Special Committee on Pornography and
Prostitution, supra note 174 at 317-323. See Anand, supra note 168 at 216-219; and
Suriya, supra note 166 at 61-62.
179 Raymaker and Kilgour, supra note 173 at 329.
180 Moon, supra note 164 at 139.
181 Ibid at 135.
The type of matters selected for prosecution contributes to this dislocation of ‘unlawful’ acts of racial vilification from the more prevalent current of racist violence, racial harassment and racial intimidation. As only the most ‘serious’ cases are prosecuted under criminal statutes, the defendants actions can be marginalised and considered to be distinct from the attitudes and conduct of others in a given society. McKenna has argued that the effectiveness of existing Canadian racial vilification laws is seriously impaired because they are based on a defective analysis of the nature of hate propaganda and racial hatred in Canada. Specifically, existing laws reflect the assumption that racial hate propaganda is “firmly rooted in the anti-social conduct of extremist groups marginal to Canadian society.”

This is the most fundamental criticism which has been levelled at the criminalisation model: that it misconceives the nature of the problem of racial vilification in countries such as Australia and Canada, by focusing on the ‘extreme’ end of the spectrum. By focusing on the atypical activities of marginal individuals and groups of the ultra-right (such as the Australian Nationalist Movement in Western Australia) legal responses based on the criminalisation model are rendered incapable of dealing with


\[^{183}\] Ibid at 15.

\[^{184}\] Ibid at 20.

\[^{185}\] Ibid at 15.
the more prevalent 'mundane' forms of racial vilification which occur in the 'mainstream' of racist societies, the cumulative harm of which can be significant.

The Canadian experience suggests that criminal racial vilification laws are only ever likely to be mobilised in response to those extreme forms of vilification and hate propaganda primarily associated with the activities of organised white-supremacist groups.186 Although such extremist activity may fuel (and be fuelled by) widely held racist sentiments in society, it is largely peripheral to the more common and insidious forms of racial vilification which are encountered on a daily basis.

In Australia, as in Canada, there is a need to challenge the myth that racist conduct is characterised only by the activities of right-wing extremists. Equally, the assumption that racist conduct is "... a manifestation of deviant, aberrant, pathological behaviour"187 must be challenged. Jayasuriya has argued that this assumption, which underlies:

the recourse to specific legal remedies for the problems of racial conflict ... is of limited value in combating racism as a social problem. It needs to be complemented by locating the so-called individual pathological behaviour or racism in its broader social, historical context.188

To the extent that racial vilification laws endorse or perpetuate this assumption they may be, to some extent, counterproductive. This problem is most acute in relation to criminal laws (which draw heavily on principles of individual responsibility) but needs also to be addressed in relation to other approaches to the legal regulation of

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186 Clearly, conciliation-based processes (which are central to civil human rights regulatory regimes in Australia) would have been inappropriate as a mechanism for regulating the conduct of Jack van Tongeren and the ANM. However, it should be noted that the human rights model is not based entirely on conciliation, but includes the option of quasi-judicial adjudication where conciliation is unsuccessful or inappropriate: see chapter 5 and 8 of this thesis.

187 Jayasuriya, supra note 55 at 16.
racial vilification. An individualised regulatory approach to the problem of racial vilification risks failing to adequately assess the harm caused by such conduct. As McKenna has noted, “the pervasive, rather than peripheral character of attitudes of racial hatred in Canadian [or Australian] society extends the dimension of the social harm caused by the public expression of racial hatred”.

The emphasis, under civil human rights regulatory regimes, on the effect on the conduct in question (in contrast to the focus in criminal matters on the intention of the accused) suggests that this approach has an improved capacity for more adequately taking into account the nature and extent of harm caused to the target group by the offending conduct. This is particularly so in the case of the regulatory regime established by s 18C of the Racial Discrimination Act 1975 (Cth), where there is no incitement requirement, and where the unlawfulness of the conduct is assessed in terms of whether it is “reasonably likely … to offend, insult, humiliate or intimidate” the individual or group target of the vilification.

The problems associated with criminal law’s narrow scope and limited application are particularly acute in jurisdictions (for example, the majority of Canadian provinces) where human rights legislation—by virtue of narrow scope or limited application—does not effectively regulate the large proportion of acts of racial vilification which fall outside the reach of the criminal law regulatory regime.

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188 Ibid.
189 McKenna, supra note 182 at 20.
190 Racial Discrimination Act 1975 (Cth) s 18C, discussed in chapter 5 of this thesis. Cf the incitement requirement (that is, the requirement that the respondent’s conduct did, or was likely to, encourage others in the community to ‘hate’ members of a particular racial or ethnic group) in s 20C(1) of the Anti-Discrimination Act 1977 (NSW), and s 66 of the Discrimination Act 1991 (ACT).
191 See chapter 7 of this thesis.
7. CONCLUDING OBSERVATIONS ON THE CRIMINAL CODE 1913 (WA) APPROACH TO THE REGULATION OF RACIAL VILIFICATION

Reid and Smith have argued, in relation to criminal racial vilification laws, that "[i]f these laws are to be of practical utility and more than a statement of the unacceptability of racist conduct, the legislation needs to be clear and not act as an impediment to those intent on taking action." Yet, the analysis of the origins, form and operation of criminal racial vilification in Western Australia presented in this chapter suggests that it is unlikely that criminal laws were ever seriously intended to have "practical utility". The purpose of the addition of Chapter XI to the Criminal Code 1913 (WA) appears to have been largely symbolic.

During debate on the Criminal Code Amendment (Incitement to Racial Hatred) Bill in the Legislative Council of the Western Australian Parliament, Liberal Party MLC, Mr Pendal lamented that Parliament was "spending an inordinate amount of time, with goodwill on both sides of politics, trying to arrive at a destination on which we all agree, but by no means on which we do not agree." But this is too simplistic an analysis of the relationship between regulatory objectives and regulatory method and does not adequately account for the Government/Opposition dispute in 1989-1990 over the form of racial vilification legislation in 1889 and 1990. It fails to recognise that the regulatory outcome (in terms of the level and quality of regulation of racial vilification) is largely determined by the shape of the regulatory regime—both with respect to scope of the conduct defined as unlawful, and the nature of the legal enforcement mechanism. Following

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192 Reid and Smith, supra note 6 at 5.
the lead of the WALRC, both the Government and the Opposition accepted that *criminal law* was the appropriate regulatory vehicle in the circumstances—that is, in circumstances where the specific target of the proposed racial vilification was a particular racist organisation, the ANM. The central issue in the parliamentary dispute was the appropriate regulatory *scope* of the criminal offences to be created. Free speech sensitivity had a major impact on the terms in which this dispute was ‘resolved’: the creation of four narrowly defined criminal offences\(^{194}\) with onerous proof requirement in relation to both actus reus and mens rea components.

The practical consequence of the approach ultimately adopted by the Western Australian Parliament was that with the demise of the Australian Nationalist Movement, even before Chapter XI of the *Criminal Code* came into operation the regulatory regime thus established was rendered largely redundant. As noted above, in relation to the Canadian experience with the criminalisation of racial vilification, the inadequacies of limited criminal racial vilification laws are pronounced where victims do not have the benefit of any other forms of racial vilification legislation. Prior to the enactment of the *Racial Hatred Act* 1995 (Cth) such a situation prevailed in Western Australia. However with the establishment of a national civil human rights regulatory regime in 1995 the weaknesses of the state-level regulatory regime are of less practical significance in light of the capacity of Western Australia victims of racial vilification to invoke the protection of Part IIA of the *Racial Discrimination Act* 1975 (Cth).

\(^{193}\) Western Australia Hansard (Legislative Council), 19 June 1990, p 2122.

\(^{194}\) *Criminal Code* 1913 (WA), ss 77-80.
CHAPTER 11


1. INTRODUCTION

In 1996 South Australia became the fifth (and to date, last) Australian jurisdiction to enact legislation for the regulation of racial vilification. In the context of a study of the diversity of Australian legislative models for the regulation of racial vilification the South Australian experience is a particularly important component, for at least three reasons.

First, as the most recent jurisdiction to enact racial vilification legislation the South Australian Parliament had the benefit of almost a decade of operation of various regulatory models in Australia from which to draw lessons. The extent to which the regulatory approach ultimately adopted in South Australia reflects this opportunity for learning or ‘borrowing’ is worthy of consideration. Second, South Australia was the first (and, to date, only) jurisdiction to enact racial vilification after the enactment of Commonwealth legislation (the Racial Hatred Act 1995 (Cth)) allowing for an examination of the way in which the interrelationship between Commonwealth and state legislation was a factor in the choice of regulatory approach. Third, South Australia is the only jurisdiction in Australia to have opted for the regulation of racial vilification via the creation of a statutory tort enforceable in the conventional civil court system. Each of these factors will be discussed in this
chapter in the context of an examination of the nature and operation of the regulatory
regime established by the Racial Vilification Act 1996 (SA).

Section 2 of this chapter considers the context out of which racial vilification emerged in the state of South Australia. Section 3 explains the legislation history of the Racial Vilification Act 1996 (SA) and examines the impact of free speech sensitivity and other factors on the form in which this statute was ultimately enacted by the South Australian Parliament. Section 4 provides an overview of the legislation and critically examines the regulatory framework established by the Racial Vilification Act 1996 (SA), which is based on a unique blend of criminal and civil modes of regulation and enforcement. Section 5 briefly reviews the first 18 months of operation of the South Australian legislation. In light of the infancy of the legislation, which renders anything other than the most provisional assessment of the practical significance of the legislation impossible, an examination of similar (statutory tort-based) legislation in two Canadian provinces will also be presented in order to provide some guidance as to likely impact of the distinctive South Australian approach to the regulation of racial vilification.

2. BACKGROUND

2.1 Recommendations for Reform

The enactment of the Racial Vilification Act by the South Australian parliament in 1996 followed calls over a number of years for specific racial vilification legislation in the state. During the second reading speech on the Racial Vilification Bill 1995, Premier Dean Brown explained the lead up to the eventual enactment of legislation:

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1 See Part II of this thesis.
2 Though passed in 1996, the Racial Vilification Act 1996 (SA) did not commence operation until July 1998; see infra section 5.1
3 The Bill was introduced by a Liberal Party-National Party Coalition Government.
In 1991 the report of the Community Relations Advisory Committee recommended that the Equal Opportunity Act be amended to outlaw racial vilification. In recent annual reports, the Commissioner for Equal Opportunity has recommended that the Equal Opportunity Act be amended to include a general provision prohibiting racial vilification. She has noted that a number of complaints in this regard are made to the Commission each year. In a report prepared for the Government by Mr Brian Martin QC, it was recommended that the Government await the outcome of the then proposed Federal legislation before moving in this area.4

The Community Relations Advisory Committee recommended the adoption of a civil human rights approach to the regulation of racial vilification, based on the New South Wales model. Specifically, the Committee recommended that racial vilification, as defined in s 20C of the Anti-Discrimination Act 1977 (NSW),5 be added to the Equal Opportunity Act 1984 (SA) as a ground of complaint.6 In addition, the Community Relations Advisory Committee recommended that an individual should be permitted to take defamation proceedings in the conventional civil court system in circumstances where s/he "claims to have been defamed by a publication which does not refer to that person specifically but refers to a racial group to which that person belongs".7 The Committee did not support the criminalisation of racial vilification in any form.8

In his Legislative Review of Equal Opportunity Act report,9 Brian Martin QC canvassed the range of legislative options for the regulation of racial vilification. Apart from expressing reservations about reliance on the criminal law,10 the report

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5 See chapter 8 of this thesis.
7 Ibid.
8 Ibid at 95-96.
10 Ibid at 70. Martin noted "a distinct trend to enact criminal offences, but that trend could be seen as fundamentally a response to a general feeling of outrage rather than a considered and targeted response to actual social problems in light of a genuine analysis of the role and functions of criminal law": ibid.
did not endorse or recommend a particular approach. On the specific issue of whether racial vilification should be added to the *Equal Opportunity Act* 1984 (SA) as a ground of complaint, Martin concluded in the negative:

I recommend against amending the Act to include a general provision prohibiting racial vilification or racial harassment and that further consideration of these issues be undertaken subsequent to the introduction of any relevant laws by the Federal Government.\(^{11}\)

The advice to ‘wait and see’ what form the federal legislation ultimately took before drafting state legislation, which was accepted by the Government, had a significant bearing on the regulatory shape of the legislation ultimately adopted in South Australia (see below).

### 2.2 Racist Activity by National Action

As was the case in New South Wales when the *Anti-Discrimination (Racial Vilification) Amendment Act* 1989 (NSW) was introduced, and in Western Australia when the *Criminal Code Amendment (Racist Harassment and Incitement to Racial Hatred) Act* 1990 (WA) was enacted, one of the specific motivations for the legislative regulation of racial vilification was concern over the activities of a right-wing racist organisation.\(^{12}\) As in New South Wales, the group was National Action.\(^{13}\)

During the course of debate on the Racial Vilification Bill 1995 in the South Australian Parliament a number of members outlined the sort of incidents and

\(^{11}\) *Ibid* at 75.
\(^{13}\) In a recent defamation action by the leader of National Action, Michael Brander, against the author and publisher of a newspaper article which negatively portrayed Brander, Magistrate Andrew Cannon catalogued the sorts of racist activities in which National Action has engaged in recent years: see *Brander v Ryan and Messenger Newspapers Pty Ltd* (unreported, 19 January 1999, Magistrates Court (Civil), File No ALC No 8944 of 1997).
activities which had prompted calls for legislation. In the Legislative Council, Liberal Party MLC Mr Lawson observed that:

It is worth stating for the record that over the years in South Australia there have been a number of incidents of racial violence. For example, it is well documented in the late 1980s that there was a citizenship ceremony for Asian migrants in West Torrens ... [which] was disturbed by a number of demonstrators [from National Action] shouting "Asians out" ... In the western suburbs of Adelaide in the late 1980s, a number of members of Federal Parliament had electoral office windows smashed and they received threats such as: "If a [named member] does not stop Asian immigration, it will be a bomb next time." Between June 1987 and August 1988 the Torrensville Primary School and surrounding areas were attacked with racist graffiti. ... The member for Reynell, Julie Greig, has experienced significant racial vilification in her own electorate. In January last year [1995] National Action began a concerted recruitment drive in the Noarlunga area and plastered its stickers and anti-Asian posters around the district. It decided to target Mrs Greig as her anti-racist views were well known in the area because of her involvement with Noarlunga council. National Action held a well publicised rally outside her office on 28 January 1995, when she was organising an anti-racist rally.14

Other incidents which attracted attention included rallies held by National Action in Prospect in April and May 1994 and the disruption of an Immigration Conference in

14 South Australia Hansard (Legislative Council), 20 March 1996 [http://203.17.199.126/ISYSquery/IRL87C0.tmp/4/doc] accessed 2 March 2000; see also Liberal Party MHA Mrs Hall, South Australia Hansard (House of Assembly), 6 February 1996 [http://203.17.199.126/ISYSquery/IRL878E.tmp/1/doc] accessed 2 March 2000; ALP MHA Mr Atkinson, ibid; ALP MHA Ms Stevens, ibid; ALP MHA Mr Foley, ibid. During debate on the Racial Vilification Bill, ALP MHA Mr Quirke, whose "principal reason" for voting for the legislation was that "it is Party policy", offered a rather different perspective on the relationship between the activities of National Action and its leader Michael Brander on the one hand, and the move to enact racial vilification legislation on the other:

Let us make no bones about that: this is the Brander Bill. I would think that Michael Brander and his little bunch are very happy. They are very happy because he got his mug on the front page of today's paper because some of his mates are allegedly gun-runners.

—Ibid. In Mr Quirke's opinion the Parliament was giving Brander and national Action far more attention that was warranted, because "there is no grass roots support for the sort of stuff that Mr Brander and his friends espouse. ... I offer this bit of advice: if we all ignored Mr Brander we would never hear from him again": ibid. Similar sentiments were expressed by Labor MHA Mr Blevins, who also supported the legislation only because it was party policy: ibid.
February 1995. The first Prospect rally was primarily a protest against the introduction of racial vilification laws by the Commonwealth Parliament. During the course of the rally a racist anti-Asian poster was displayed and some participants wore clothing bearing the Nazi symbol (swastika). These scenes were photographed and subsequently published in a wide circulation Adelaide newspaper, *The Sunday Mail*. The German National anthem was played over the public address system. In 1995 a pamphlet prepared and circulated by nation Action, titled “Sink Them!” described “[s]o-called boat people” as “thousands of disease-ridden ethnic Chinese. In addition to hepatitis B, C, E, tuberculosis and AIDS, they bring with organised crime and spies for Asian governments.” The pamphlet continued:

If Australia were ever to be a victim of a military Asian invasion the present “boat people” invasion would be its prelude. Australian nationalists demand increased resources for our Armed Forces to deal with the assault upon our independence. The invaders must not be treated as if they were potential Australians (they will never be). None are refugees. They are human trash — hungry for YOUR country — manipulated by Asian governments to weaken Australia’s national sovereignty. We demand the appropriate response from those services dedicated to our national well-being: SHOOT THEM OUT OF THE WATER!

This pamphlet, described by a South Australian magistrate as “a nasty bit of work” and the other activities of National Action have been discussed in some detail because the serious and premeditated nature of the racial vilification in which

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15 *Brander v Ryan*, supra note 13 at 11-12.
16 See chapter 5 of this thesis.
17 As described by Magistrate Cannon in *Brander v Ryan*, supra note 13 at 8, the poster consisted of “a crude caricature of a person of Asian extraction wearing a coolie hat, with buck teeth and slanting eyes surrounded in a circle with a bar across it with a small caption ‘Stop the Asian Invasion!’ On the poster there was a Australian National Action Eureka flag symbol.”
18 Ibid.
19 Ibid at 9.
20 Ibid.
21 Ibid.
22 Ibid at 15.
this organisation has engaged appears to have been a significant influence on the shape of the regulatory regime advocated by the South Australian Government and, after protracted negotiations with the Labor Party and the Australian Democrats who advocated a different regulatory approach, ultimately enacted. In particular, the refusal of the South Australian Government to accept the Opposition’s proposal for a conciliation-based civil human rights regulatory option appears to have been motivated to a considerable extent by the view that such an approach was inappropriate in light of the particular nature of the problem of racial vilification which South Australia was experiencing at the time. This debate over the regulatory form of racial vilification will be discussed below.

In addition, the question as to whether the approach ultimately was capable of effectively regulating the sorts of activities in which National Action had engaged will be considered. This represents part of a broader theme in the history of the enactment of racial vilification laws in Australia. While the activities of organised racist groups has been a significant motivation for the legislative regulation of racial vilification, it is questionable whether the forms of regulation adopted to regulate these groups have been effective. This dissertation will explore the argument that other influences, including free speech sensitivity, have had a counter-influence on the shape of racial vilification legislation with the net result of an ill-fit between the regulatory regimes in place and the nature of the activities and actors which were the original primary motivation for the legislative regulation.

2.3 The ALP Private Member’s Bill

On 12 October 1995 the Leader of the (Labor Party) Opposition, Mr Rann, introduced a private member’s bill into the House of Assembly (the lower house of the South Australian Parliament).23 The Statutes Amendment (Racial Vilification) Bill proposed the establishment in South Australia of a regulatory regime modelled

on the New South Wales legislation;\(^{24}\) that is, a two pronged structure consisting of a
civil human rights racial vilification ground of complaint (to be added to the *Equal
Opportunity Act 1984* (SA)), and a criminal offence of serious (aggravated) racial
vilification (to be added to the *Criminal Law Consolidation Act 1935* (SA)). The bill
was effectively ‘superseded’ by the Government’s own Racial Vilification Bill,
introduced shortly after the private member’s bill.\(^{25}\)

3. **THE RACIAL VILIFICATION ACT 1996**

3.1 Legislative History

On 29 November 1995 the Government introduced the Racial Vilification Bill into
the House of Assembly.\(^{26}\) The bill proposed the adoption of a three-pronged
approach to the regulation of racial vilification:

(i) a criminal offence of racial vilification (modelled on s 20D on the *Anti-
Discrimination Act 1977* (NSW));

(ii) provision for the victim to recover civil damages in cases of a conviction for
the criminal offence of racial vilification;

(iii) a statutory tort of racial victimisation, the definition of which was modelled
on the definition of racial vilification in s 20C of the *Anti-Discrimination Act
1977* (NSW), but which would be enforceable in the conventional civil court
system rather than in the ‘alternative’ conciliation-based civil human rights
system administered in South Australia by the Equal Opportunity Commission.

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\(^{24}\) *Ibid*; see chapter 8 of this thesis.

\(^{25}\) The Opposition’s Statutes Amendment (Racial Vilification) Bill 1995 was read and
discharged on 8 February 1996: South Australia Hansard (House of Assembly), 8
March 2000.

\(^{26}\) South Australia Hansard (House of Assembly), 29 November 1995
During the parliamentary debate on the Racial Vilification Bill the major point of division between the Coalition Government and the Labor Opposition was the question of whether the South Australian legislation should provide for the regulation of racial vilification via the civil human rights regime administered by the Equal Opportunity Commission (that is, to adopt the same enforcement model employed for racial discrimination (as well as discrimination on other grounds) consistent with the approach preferred under Commonwealth, New South Wales and Australian Capital Territory legislation.

During the second reading debate in the House of Assembly the Leader of the Opposition, Mr Rann expressed the Opposition's position as follows:

While the Opposition supports much of the thrust and intent of the Government's Bill, we have some concerns about some of the methodology used ... The greatest difficulty that I see with the Government Bill relates to the fact that it provides no direct provision or effective fora for conciliation of matters which can be resolved without the involvement of the courts.27

Consistent with the terms of the Statutes Amendment (Racial Vilification) Bill 1995 (discussed above) the Opposition took the position that the legislation should provide for the option of conciliation-based regulation of racial vilification, along the lines of the New South Wales system. During his second speech the Premier of South Australia, Dean Brown, acknowledged that the Opposition's preferred approach to the regulation of racial vilification included the option of complaint lodgement and conciliation-based resolution in the Equal Opportunity Commission and adjudication by the Equal Opportunity Tribunal.28 However, he explained that "The Government takes the view that the ordinary courts of law should have jurisdiction in this important area both in relation to the criminal offence and civil redress."29 At the end of the second reading debate in the House of Assembly the Premier provided more

29 Ibid.
substantive (though not necessarily compelling) reasons for rejecting the civil human rights model for regulating racial vilification.

First, the Premier questioned the effectiveness of the civil human rights approach, suggesting that the New South Wales experience revealed the limitations of this approach. No evidence was provided in support of this negative assessment of the New South Wales civil human rights regulatory regime other than the observation (of dubious relevance/accuracy) that "there have been no court cases and only one tribunal" since the *Anti-Discrimination (Racial Vilification) Amendment Act 1989* (NSW) came into force, and that the regulatory system has been "a rather expensive process with very little being achieved."

It is disingenuous to rely on the small number of tribunal decisions as evidence of the weakness of the failure of the system, when, as discussed in chapter 8 and 9 of this thesis, the NSW civil human rights system is one which explicitly aims to resolve as many matters as possible by conciliation and to keep tribunal adjudications to a minimum. The identification of the absence of court decisions as an indicator of system weakness is even more curious because the conventional civil courts play no part in the administration of the NSW legislative regime for the regulation of racial vilification. The reference to the cost of the civil human rights approach is also curious, given that one of the reasons for the evolution of the ‘alternative’ structure for the administration of justice in the areas of anti-discrimination/equal opportunity law was that this was a cheaper (and therefore more accessible) option for persons wishing to invoke the protections provided by these laws. Indeed, one of the bases upon which the ALP and the Australian

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30 Ibid. The Premier told the House of Assembly that the “cost” since 1989 had been $288 000. The source of this figure is not provided, nor is there an indication as to the costs to which it relates, or of the basis on which this figure was determined to be expensive. Martin, supra note 9 at 68, identified this amount as the proportion (14.5%) of the NSW Anti-Discrimination Board’s 1992 budget which was allocated to the handling of racial vilification matters.

Democrats opposed the Government's proposal for the location of jurisdiction for the determination of alleged breaches of the racial vilification legislation in the conventional civil courts was that this would act as an impediment to potential plaintiffs/complainants by virtue of barriers such as the additional costs associated with this form of dispute resolution.\(^2\)

Perhaps the Premier's concern about the costs associated with the administration of the alternative civil human rights system was the burden placed on government to operate this system rather than the burden placed on victims of vilification. However, the oblique reference to the "cost" of administering the New South Wales racial vilification legislation certainly does not support the implication that the creation of a new civil cause of action in the conventional court system would necessarily be a cheaper regulatory than the creation of an additional ground of complaint (that is, racial vilification) in the alternative civil human rights system administered by the Equal Opportunity Commission of South Australia.

The second (and more legitimate) argument advanced by the Premier in defence of the Government's proposal to give jurisdiction to the conventional civil courts rather than the alternative civil human rights system of the Equal Opportunity Commission/Equal Opportunity Tribunal, was that a regime of this type was

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\(^2\) See Leader of the Opposition, Mr Rand, South Australia Hansard (House of Assembly), 6 February 1996 [http://203.17.199.126/ISYSquery/IRL878E.tmp/1/doc] accessed 2 March 2000; ALP MLC Mr Nocella, South Australia Hansard (Legislative Council), 11 April 1996 [http://203.17.199.126/ISYSquery/IRL87C0.tmp/8/doc] accessed 2 March 2000; and Australian Democrats MLC Ms Kanck, South Australia Hansard (Legislative Council), 20 March 1996 [http://203.17.199.126/ISYSquery/IRL87C0.tmp/4/doc] accessed 2 March 2000. During debate on the Racial Vilification Bill in the Legislative Council Ms Kanck observed that "While the court process may well be appropriate and possibly effective for serious cases of racial vilification-and I emphasise 'possibly'—the costs alone for employing a lawyer and taking a matter to court are likely to be prohibitive for average Australians. Therefore, it is likely that only serious issues will be dealt with at best and the less serious issues will fall by the wayside": ibid.
established by the Commonwealth in Parliament in 1995, which “applies to everyone in Australia.” In defending his Government’s decision not to enact ‘mirror’ legislation, Mr Brown asked the rhetorical question, “Therefore, what is the point of duplicating what is already available at the national level.”

Third, the Premier asserted that “the more effective way of dealing with this issue is through tort. In fact, if one thinks about it, tort gives greater protection to the victim who might experience real hardship through racial vilification.” The argument advanced here is that the statutory tort approach is capable of adequately compensating victims of racial vilification where they suffer a range of harms including economic loss and “psychological hardship and stress”. However, the same sorts of losses (with an identical damages ceiling) are compensable in the NSW civil human rights system under the Anti-Discrimination Act 1977 (NSW).

The Premier’s overall assessment of the regulatory regime proposed by the Racial Vilification Bill was that:

... the steps we are taking here not only introduce for the first time racial vilification legislation to stop hatred in South Australia but, particularly through the tort action, it is taken further than any other State legislation in Australia. We believe, therefore, that it gives greater protection to the victim than can be found in any other legislation in Australia.

35 Ibid. The Premier emphasised the financial cost of this duplication: “Frankly, the assessment of the Premiers, both Liberal and Labor around Australia, is that we are wasting tens of millions of dollars and, quite possibly, hundreds of millions of dollars through that duplication”: ibid.
36 Ibid (emphasis added).
37 Ibid.
38 See chapters 8 and 9 of this thesis.
This is a very substantial claim, which is of particular interest in the context of a comparative study of different regulatory models. The Premier’s claim that the inclusion of a tort remedy, pursuable through the conventional civil court system, will be critically analysed below (section 4) in the context of an analysis of the nature of the regulatory regime established by the *Racial Vilification Act 1996 (SA)*. Whether the claim that the statutory tort approach “gives greater protection to the victim” (specifically, relative to the civil human rights approach) will also be considered below in section 5, which reviews the operation of the *Racial Vilification Act 1996 (SA)* and section 6, which examines the operation of similar legislative tort-based approaches in Canada. It will be argued, that both in principle and practice, there is little support for the Premier’s optimism about the capacity of tort-based regulation to increase the level and quality of protection afforded to victims of racial vilification over and above that provided by civil human rights approaches to regulation.

The Opposition sought to amend the Racial Vilification Bill in the House of Assembly so that the civil liability provisions of the proposed legislation would be administered by the Equal Opportunity Commission, thereby transforming the regulatory model to be established by the legislation from the conventional civil regulatory model into the ‘alternative’ (though, well established) conciliation-based civil human rights approach. The Government did not support this proposed amendment.40 The Premier repeated his earlier arguments that this change was

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40 In addition to the specific to the factors expressly identified by the Premier and other Government Members of Parliament, comments made during the course of debate on the Racial Vilification Bill 1995 in the House of Assembly, implied that resistance to the option of state-level regulation of racial vilification via the conciliated-based civil human rights system, was also motivated, to some extent, by antagonism towards, or ambivalence about, the South Australian Equal Opportunity Commission. ALP MHA, Mr Atkinson stated:

I share the problems that the Liberal Party has with the Equal Opportunity Commission in handling the matter. I listened very carefully to the retiring speech of the Chief Justice, Len King, at his farewell dinner. I thought he made some very compelling points against quasi judicial tribunals such as the Equal Opportunity Tribunal. We only have to remember its mishandling of the Jobling case to know why parliament
unnecessary because of: the availability of an equivalent enforcement mechanism via HREOC; the flawed nature of the civil human rights model as it had operated in NSW;\(^\text{41}\) and the view that “tort action gives more protection than in New South Wales.”\(^\text{42}\) The Bill was passed in the House of Assembly on 6 February 1996.\(^\text{43}\)

On 7 February 1996 the Racial Vilification Bill was introduced into the Legislative Council. During debate on the bill following second reading, the

might be reluctant to give the Equal Opportunity Tribunal any further jurisdiction.

---Ibid. No government member expressly stated that negative perceptions of the EOC were a factor in the formation of the regulatory model proposed in the 1995 Bill. However, in the Legislative Council Liberal Party MLC Mr Lawson implied as much, noting the comments made by the member for Spence (Mr Atkinson) in the House of Assembly: “I note that the member for Spence in another place expressed disquiet about the activities of the Equal Opportunity Tribunal and mentioned, for example, that the tribunal’s decision in the celebrated Jobling case hardly covered the tribunal with any glory in the manner in which it discharged its functions”: South Australia Hansard (Legislative Council), 20 March 1996 [http://203.17.199.126/ISYSquery/IRL87C0.tmp/4/doc] accessed 2 March 2000. Mr Lawson stated that “There is a great deal to be said for allowing the ordinary courts of law to determine these matters rather than to have them determined by the Equal Opportunity Commission or tribunal. This Government has gone about a program of reintroducing to the ordinary jurisdiction of the courts many of the specialist functions previously carried out by specialist tribunals”: ibid. In the House of Assembly, Mr Atkinson went on to state that notwithstanding these reservations, the Opposition’s preferred approach of giving the Equal Opportunity Commission jurisdiction over racial vilification was the right approach “because conciliation is an important element in this new and experimental areas of law on racial vilification”: South Australia Hansard (House of Assembly), 6 February 1996 [http://203.17.199.126/ISYSquery/IRL878E.tmp/1/doc] accessed 2 March 2000.

\(^{41}\) The Premier suggested that complainants in New South Wales were dissatisfied with the civil human rights system administered by the Anti-Discrimination Board because it “takes it [the matter] out of their hands, and in many cases they have found that it has exacerbated rather than rectified the problem”: ibid. No source or evidence is provided in support of this assessment of the NSW enforcement process. The suggestion that the conciliation-based civil human rights approach carries a greater risk of complainants ‘losing control’ of the matter is puzzling. The complainant’s key role in the initiation and pursuit of the matter is one of the commonly identified hallmarks of the complaint-driven, conciliation-focused civil human rights approach to the enforcement of legislative standards on racial vilification: see chapter 8 and 9 of this thesis.

\(^{42}\) Ibid

\(^{43}\) Ibid.
Government further explained the rationale for the regulatory model proposed. During the second reading debate on the Racial Hatred Bill in the Legislative Council, the Minister for Education and Children's Services, Mr Lucas, outlined why the Government had opted for a regulatory regime based on a statutory tort actionable in the civil courts rather than an "equal opportunity approach" (that is, a human rights ground of complaint which would be handled by conciliation in the Equal Opportunity Commission and, if necessary adjudicated by the Equal Opportunity Tribunal).

The Minister identified four arguments:

1. South Australians already had access to an "equal opportunity remedy" in the form of s 18C of the Racial Discrimination Act 1975 (Cth) and South Australian legislation should complement rather than duplicate federal racial vilification legislation;

2. A regulatory approach based on conciliation and education would be inappropriate for dealing with acts of vilification by "extreme groups" such as National Action with which the South Australian legislation is especially concerned;

3. The requirement of confidentiality in the conciliation process under the "equal opportunity remedy" is a disadvantage from the point of view of the effective


45 Ibid.

46 Mr Lucas specifically mentioned National Action as an organisation which would be unlikely to be responsive to a conciliation/education approach: "[T]he Government’s view is that conciliation and education will not be successful remedies for combatting the types of extremist groups that have been indicated to be the targets of this legislation, for example, the Mr Branders of this world who have been highlighted in some of the second reading contributions": South Australia Hansard (Legislative Council), 11 April 1996 [http://203.17.199.126/ISYSquery/IRL87C0.tmp/8/doc] accessed 2 March 2000 (emphasis added). This comment underscores the extent to which the particular form of the regulatory regime established in South Australia was heavily influenced, as in Western Australia (see chapter 10 of this thesis) by the organised and serious nature of the racial vilification in response to which it was enacted.
regulation of racial vilification; the regulatory process should be "all out in the open" (particularly as the conduct which is the subject of regulation is public conduct) so that the alleged racial vilification may be countered with "more speech" and to maximise the public education potential of the enforcement process;

4. In a conventional civil proceeding the plaintiff had greater control over the progress and direction of the matter than a complainant in a human rights conciliation process; in the latter case "another decision maker" (that is the Equal Opportunity Commissioner) is placed "in the path of resolution".

Two general comments may be made about these arguments advanced by the Government in the Legislative Council. First, they reveal that the debate, in the South Australian Parliament, on the relative merits of the various regulatory approaches, was of a higher quality than the debates over proposed racial vilification legislation which have taken place in other Australian legislatures, in that the debate featured some valuable analysis of the implications of the available regulatory alternatives. Second, and by way of partial explanation for the first observation, the South Australian parliamentary debate drew, to a significant extent, from the experience of the operation of racial vilification legislation in other Australian jurisdictions.

For example, the third argument advanced by Mr Lucas—that the largely 'private' nature of civil human rights regulatory approaches constrains the community standard capacity of the legislation and is illogical if the focus of the regulatory regime is public conduct—is a valuable insight on one of the weaknesses of informal conciliation-based dispute resolution processes as a mechanism for enforcing racial vilification legislation. It contrasts with the very cursory treatment which

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48 Ibid.
49 This weakness is discussed in chapter 8 of this thesis, with reference to the complaint-handling process administered by the NSW Anti-Discrimination Board for
such issues have received during equivalent parliamentary debates in other Australian jurisdictions. However, by way of response to this particular argument, it is important to note that the enforcement process under civil human rights law is not entirely private and ‘behind closed doors’. A small proportion of matters are determined via public adjudication in quasi-judicial tribunals. These decisions play an important role in clarifying the effective scope of the legislative restrictions on racial vilification.\(^50\) In addition, drawing on the examination of the practical operation of the New South Wales civil human rights regime presented in chapter 9 of this thesis, Mr Lawson’s fourth argument would appear to overstate the extent to which the relevant administrative agency (such as the NSW Anti-Discrimination Board or the South Australian Equal Opportunity Commission) represents a ‘barrier’ to the resolution of complaints and ‘disempowers’ the complaint. On the contrary, the available evidence on the handling of racial vilification complaints under s 20C of the Anti-Discrimination Act 1977 (NSW) suggests that complainants maintain a considerable degree of control over the proceedings. In fact, as argued in chapters 8 and 9 of this thesis, from the point of view of the effective enforcement of racial vilification legislation, the degree of complainant control (and responsibility) may be onerous and counterproductive, contributing, for example, to high rates of ‘drop-out’.\(^51\)

Another example of the relative sophistication of the South Australian parliamentary debate on the appropriate approach to the legislative regulation of racial vilification is the critique by Liberal Party MLC Mr Lawson of the position advanced by the Opposition. Mr Lawson argued that the ALP’s preference for conciliation-based civil human rights regulation failed to recognise the difference dealing with complaints of racial vilification under s 20C of the Anti-Discrimination Act 1977 (NSW).

\(^50\) See the discussion of the racial vilification decisions of the NSW Equal Opportunity Tribunal and Administrative Decisions Tribunal in chapter 9 of this thesis.

\(^51\) See chapter 9 of this thesis; see also chapter 6, which reports a similar phenomenon in relation to the HREOC civil human rights complaint-handling process for resolution of complaints under s 18C of the Racial Discrimination Act 1975 (Cth).
between racial discrimination and racial vilification. Having accurately explained that the Equal Opportunity Act 1984 (SA) was concerned specifically with discrimination, Mr Lawson noted that:

The amendments proposed by the Hon. Paolo Nocella [ALP MLC] will seek to introduce into the Act an entirely different notion, namely that of vilification on the ground of race. It is my view that it is more appropriate to have provisions prohibiting vilification in the criminal law and also in the civil law to give appropriate redress in a criminal sense and in a civil sense to those harmed by acts of racial vilification.52

Mr Lawson's distinction between discrimination and vilification is, potentially, of great value in the context of consideration of appropriate modes of regulation. It mirrors the argument advanced in chapter 8 of this thesis in adopting for the regulation of racial vilification the existing civil human rights enforcement system—which had been developed primarily to address discrimination matters—the NSW Parliament had given insufficient consideration to the differences between discrimination and vilification, including the nature of the harms associated with these respective manifestations of racism. Unfortunately, having raised this matter in Legislative Council debate, Mr Lawson did not elaborate on the nature of the distinction between discrimination and vilification, nor did he explain why vilification was more appropriately regulated in the conventional civil and criminal justice systems.

Notwithstanding the rationale advanced by the Government, the ALP Opposition, joined by the Democrats, opposed the exclusive vesting of civil jurisdiction in the conventional civil court system and continued to argue in support of the adoption of the civil human rights model. ALP MLC Mr Nocella expressed the concern that while the proposed legislation was appropriate for dealing with serious forms of racial vilification, it lacked a mechanism for dealing with less serious matters. So as to “make the Bill a finer instrument for dealing with the different

52 Ibid.
degrees of racial vilification"\textsuperscript{53} the Opposition advocated the amendment of the \textit{Equal Opportunity} Act 1984 (SA) to provide for the making of complaints to the Equal Opportunity Commission. Mr Nocella expressed the Opposition's view that "mediation can in many cases be a more useful tool than the court process for both the perpetrator and the victim."\textsuperscript{54} The Opposition's position, as advanced by Mr Nocella was that "[t]here is no organisation better situated, more experienced and more prepared to deal with these cases than the Equal Opportunity Commission."\textsuperscript{55}

Mr Nocella rejected the Government's argument that conciliation-based resolution of racial vilification matters was available to those South Australians that desired it—in the form of Part IIA of the \textit{Racial Discrimination Act} 1975 (Cth) and the complaint process administered by the Human Rights and Equal Opportunity Commission. He advanced the Opposition's view that the state of South Australia should have a comprehensive regime for the regulation of racial vilification, and that it was inappropriate to require a person to deal with a different regulatory bodies in relation to different forms of racial vilification:

It is far better that one level of Government is capable of adequately responding to a social problem in all its dimensions. It is far more logical that the State Government take responsibility for the entire issue of racial vilification.\textsuperscript{56}

In response to the Minister for Education's argument that, from a public education point of view, public adjudication in the conventional civil court system was preferable to the privacy and confidentiality which is a requirement of the conciliation process in the Equal Opportunity Commission, Mr Nocella argued that:

\textsuperscript{54} Ibid.  
\textsuperscript{55} Ibid.  
\textsuperscript{56} Ibid.
It very much depends: it may well be that in a number of cases the complainant may not want the proceedings to be all out in the open, so I do not think that is a black and white situation where total confidentiality is an advantage or total openness is a disadvantage; it depends on the case.\textsuperscript{57}

Mr Nocella's point was well made. Under civil human rights enforcement processes, complaints may be resolved, as appropriate, by private conciliation or public quasi-judicial determination. The flexibility of this enforcement structure enhances the capacity of the legislative regime to regulate a broad range of racially vilifying acts, in a variety of circumstances.

The "centre piece" of the Opposition's package of amendments was the addition of a provision to the Racial Vilification Bill which would amend the \textit{Equal Opportunity Act} 1984 (SA) by adding racial vilification (defined in the same terms as the Government's proposed tort of racial victimisation) as a ground of complaint. Under the Opposition's proposal the creation of a civil human rights ground of complaint would not replace the proposed statutory tort but would complement it. That is, although the scope of the ground would be identical to the tort, victims of racial vilification would have a choice as to their preferred enforcement method. Mr Nocella explained that under the Opposition's proposed legislation "Persons or groups wishing to take civil action will need to choose between the remedies under the Wrongs Act and the Equal Opportunity Act."\textsuperscript{58} Thus, the three-pronged regulatory strategy proposed by the Government's Racial Vilification Bill would, if amended in accordance with the Opposition's proposal, become a four-pronged strategy.

The Racial Vilification Bill was referred by the Legislative Council to the Legislative Review Committee on 11 April 1996 on a motion from Mr Nocella.\textsuperscript{59} The Committee's report, which focused specifically on the amendments proposed by the


\textsuperscript{58} \textit{Ibid}.

\textsuperscript{59} \textit{Ibid}.
Opposition in the Legislative Council, was tabled in the Legislative Council on 1 August 1996. The Legislative Review Committee recommended, by majority, that “In order to see the earliest possible introduction of some form of racial vilification legislation, the original Bill should be enacted without delay.” In addition, the Committee recommended (unanimously) that after two years of operation the Legislative Review Committee should review its operation with a view to remedying any weaknesses that may become apparent.

However, when the Bill was returned to the Legislative Council, the Opposition’s amendments were passed with the support of the Australian Democrats. The amended Racial Vilification Bill was read a third time and passed by the Legislative Council on 16 October 1996. On 5 November 1996 the amended bill returned to the House of Assembly, where it was rejected on the basis that the House did not agree with the Legislative Council’s amendments. On 7 November 1996 the Government moved a motion in the Legislative Council that the Council not insist on its amendments. The Minister for Education Mr Lucas explained that if the motion was not passed, the bill would either be lost or an attempt would have to be made to resolve the deadlock by a ‘conference of managers’. However, the motion was opposed by the ALP and the Australian Democrats and was defeated.

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61 Ibid.
62 Ibid.
66 South Australia Hansard (Legislative Council), 7 November 1996 [http://203.17.199.126/ISYSquery/IRL87C0.tmp/16/doc] accessed 2 March 2000. The conference consisted of five members of the House of Assembly and five members of the Legislative Council. At the time the prospect of resolution seemed poor. In rejecting
On 15 November a conference was held, and on 26 November both the House of Assembly and the Legislative Council agreed to the recommendation of the conference. The recommendation was that the Government’s version of the bill should be passed (that is, without provision for complaint to the South Australian Equal Opportunity Commission) with an undertaking from the Government that South Australians would have access to a civil human rights regulatory system. Specifically, the Government guaranteed that South Australians would enjoy the same degree of access to the complaint-based civil human rights regime under the Commonwealth *Racial Discrimination Act 1975* (recognising that there was no HREOC office in Adelaide) as they would have had if racial vilification had been added as a ground of complaint to the *Equal Opportunity Act 1984* (SA). In the House of Assembly, the Premier, Mr Brown, made the following statement:

The South Australian Government will forthwith approach the Federal Government with the objective of delegating to the South Australian Equal Opportunity Commission jurisdiction in relation to the Federal *Racial Discrimination Act* as amended by the *Racial Hatred Act* which will provide for conciliation. If after 12 months the delegation has not occurred, then the State Government will review the operation of the relevant State law with a view to introducing legislation to provide for conciliation.

The motion, Democrat MLC Ms Kanck stated that “All the Government wants to do is to try to put any complaints through the courts system. It will turn these people into martyrs, which is exactly what they want. It is just a stunt. If members opposite want a deadlock conference I can assure the Council that I will not accept anything that will keep this entirely in the Court’s domain. This is just a waste of time: *ibid.*


3.2 The Impact of Free Speech Sensitivity on the Shape of the Legislation

Notwithstanding the bipartisan support for racial vilification legislation, the principle of free speech featured prominently in debate on the Racial Vilification Bill in the South Australian Parliament.\(^2\) Although, as discussed above, there was significant disagreement on the most appropriate model of regulation, no members opposed the bill on the basis that it was insufficiently sensitive to the principles of free speech, although a number of members of parliament expressed reservations about the proposed legislation, fearing that it would have a deleterious effect on the enjoyment of free speech by South Australians.\(^3\)

In an interesting observation on the absence of significant opposition to the bill ALP MLA Mr Atkinson observed that:

... it is a shame that the dictates of political correctness within the two major parties, particularly the Government, have resulted in a very narrow and inadequate debate on this Bill. I would like to hear a member of the Parliament make a speech against this Bill. As it happens, I support the Bill but many members of the Government and perhaps one or two of the Opposition would like to speak in a full-blooded way against the principle of this Bill and I believe they could make a quite compelling case.\(^4\)

\(^2\) During debate in the Legislative Council, Liberal Party MLC Ms Pfitzner observed that:

Debates and arguments have raged on the impact of this Bill saying that it impinges on freedom of speech and that perhaps through conciliation and education and through the more gentle are of the Office of Equal Opportunity we can address this most horrendous and pernicious of all community ills: racial vilification and racial victimisation.


ALP MHA, Mr Blevins, took up this challenge to some extent. After indicating that his reason for supporting the bill was that it was “party policy”, Mr Blevins seriously criticised the very idea of racial vilification legislation stating his view that “this Bill and Bills like it are an insult to the Australian people.” In his view the fact that the legislation was before the Parliament was evidence of the lack of courage of both major parties in the face of unreasonable demands from the “ethnic industry.” He continued:

Because some people do not like being called names by Michael Brander [the National Action leader], all of us have to restrict our right to free speech. … To have these pipsqueaks [“Michael Brander and others of his character”] used as an excuse for restricting my right is outrageous, and the political parties are spineless for being blackmailed by these characters.

Liberal MLC Mr Brindal also expressed some reservations about the implications of the proposed legislation for free speech:

… the Bill worries me because, on the one hand, many of the points raised by the members may well be right—and I accept that they are right—but, on the other hand, we have the problems that this country has always held dear: freedom of speech and freedom of association.

While stating that he thought the bill was “a very good attempt” and that he would “support it into law”, Mr Brindal suggested that the constitutional validity of the

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75 Ibid.
76 Ibid.
77 Ibid.
78 Ibid. With reference to the amendments made to the Racial Hatred Bill 1994 in the Commonwealth Senate which removed the proposed criminal offences and limited the regulatory regime to a civil human rights ground of complaint (see chapter 5 of this thesis), Mr Blevins expressed the view that “what the majority of Senators did in moderating the Government’s Bill was worthwhile—if we can improve something that I believe is pretty awful, anyway”: ibid.
79 Ibid.
80 Ibid.
legislation would remain in doubt until the High Court had had an opportunity to adjudicate on whether it was invalid by virtue of the implied freedom of communication on political affairs.

As noted in chapter 1 of this thesis, there is little likelihood that racial vilification will be ruled invalid as an unjustifiable infringement of the implied rights to freedom of communication, particularly where the legislation provides for the regulation of racial vilification (per se) via a civil human rights regime rather than via criminalisation. However, during his speech on this issue in the House of Assembly, Mr Brindal offered an interesting perspective on the locus of decision-making authority on the question of the balance to be struck between free speech sensitivity and the legislative regulation of racial vilification. Mr Brindal observed that “The only way to test that correct balance between freedom of association, freedom of speech and what this parliament does tonight is probably, in the end, in the High Court, which may be where this legislation ends.”

This stereotypical characterisation of where free speech scrutiny ‘happens’ elevates the role of judicial (and in particular, High Court) scrutiny to a level of prominence that is contradicted by the (short) history of racial vilification in Australia. On the surface, Mr Brindal’s analysis appears to be obviously correct: to the extent that the free speech protections which Australians enjoy are sourced in the common law, the High Court is the highest appellate court in the country; to the extent that Australians enjoy certain protections against the limitation of free

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81 See chapter 1 of this thesis, section 2.2.
84 Mr Brindal’s characterisation of where free speech scrutiny happens has greater currency in Canada, where the Supreme Court has ruled specifically on the relationship between racial vilification legislation and the constitutional rights to freedom of expression: R v Keegstra [1991] 2 WWR 1; R v Andrews (1990), 77 DLR (4th) 128; and Taylor v Canadian Human Rights Commission (1990), 75 DLR (4th) 577; and see discussion in chapter 10 of this thesis.
speech/communication by virtue of the Australian Constitution (and specifically, the implied freedom of communication in political affairs) the High Court is the arbiter of constitutional validity of legislation which is alleged to offend this freedom.

However, at least on the specific question of characterising the relationship between free speech principles and racial vilification legislation it would be misleading to overstate the role of the High Court or the judiciary generally. In the ten years since the first racial vilification statute was introduced in 1989, no Australian court has yet been asked to rule on the validity of any such statute or to determine the appropriate balance between free speech principles and restrictions on expression in the form of racial vilification regulatory legislation. To date, Australian legislatures have played a much more significant role in determining the acceptable level of infringement of free speech in pursuit of the objective of protecting and providing relief to victims of racial vilification than have the courts. This is an insight which is important in order to appreciate the nature and practical impact of free speech sensitivity in Australia. The institutions and the processes by which racial vilification legislation is assessed for free speech sensitivity have a significant bearing on the shape and scope of the definition of ‘protected’ free speech which emerges. Because free speech scrutiny in Australia has occurred primarily at the legislative stage, one of the major manifestations of free speech sensitivity has been the choice of definitional scope and method of enforcement. To a significant extent this has diminished the likely impact of subsequent judicial scrutiny because the legislation has already been heavily influenced (that is, constrained) by free speech sensitivity.

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85 _Anti-Discrimination (Racial Vilification) Amendment Act_ 1989 (NSW); see chapter 8 of this thesis.

86 The issues has been briefly considered in a small number of tribunal/public inquiry decisions on complaints under s 18C of the _Racial Discrimination Act_ 1975 (Cth) and s 20C of the _Anti-Discrimination Act_ 1977 (NSW); discussed in chapters 6 and 9 of this thesis, respectively.
In contrast to the contributions from MLCs Blevins, Atkinson and Brindal, the majority of contributors to the parliamentary debate on the Racial Vilification Bill (from all political parties) took the position that, to the extent that the proposed legislation would curtail free speech, this was necessary, acceptable and desirable—implicitly supporting the proposition that the regulation of racial vilification was compatible with continued commitment to free speech principles.

Mirroring one of the themes of the contributions to debate on the Racial Hatred Bill 1994 in the Commonwealth Parliament from supporters of the original bill, a number of members (both Government and Opposition) emphasised that free speech was not absolute. For example, MHA, Mr Atkinson responded to the argument that the proposed legislation would unjustifiably infringe on free speech by asserting that “Although free speech is important to a democratic society under the rule of law, it is not an absolute value.”

Liberal Party MHA, Ms Greig stated that “Laws against racial vilification make us a better multicultural society and do not inhibit free speech. There can be a properly adjudicated boundary between the vital principles and values of free speech and the unacceptable extension of this into racial vilification and the promotion of racial contempt and hatred.”

ALP MHA Ms Stevens adopted a similar approach, although she stated a stronger view of the relative importance on the right to free speech and the right not to suffer harassment/vilification: “In my view, the right of all individuals in a society to be free to go about their daily lives without harassment, and without harassing others, really must take precedence over the right of us all to have free speech.”

Similar comments were made in the Legislative Council. For example, Liberal Party MLC Mr Lawson commented that:

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87 See chapter 5 of this thesis.
89 Ibid.
90 Ibid.
Some people are fond of speaking of the right to free speech but I take the view that the right of free speech is tempered by responsibilities, and on some occasions the right of free expression should be tempered provided always that bonafide debate on matters of public interest is protected—and that is what is done in this legislation.  

The use of free speech as a 'slogan' was specifically criticised. For example the Minister for Education and Children’s Services, Mr Lucas, began his contribution to the debate on the bill in the Legislative Council by:

... rejecting what I regard as extremist position in this debate ... Extreme views are held by those who I believe to be the tiny minority in the community who wave the banner of what they are pleased to call free speech—their free speech, of course—to say what they like, no matter how odious, inflammatory and abusive it may be.  

With specific reference to the creation of a criminal offence of (aggravated) racial vilification, the Premier Dean Brown, stated in his second reading speech that “There are no ramifications for freedom of speech ... No person can claim that threatening violence to person or property, or inciting others to do so, is a form of exercise of freedom of expression.” The Premier offered no similar defence of the


92 In the Commonwealth Parliament in 1995 Democrat Senator Spindler made a similar criticism of the way in which the concept of free speech has been used to modify the nature of the regulatory regime established by the Racial Hatred Act 1995 (Cth): Commonwealth Hansard (Senate), 23 August 1995, p 213; discussed in chapter 5 of this thesis.


other major limb of the regulatory regime: the statutory tort of racial victimisation, presumably on the basis that it was ‘self-evident’ that the creation of a civil remedy did not raise any question of free speech interference. In fact, surprisingly, the question of the relationship between tort-based civil regulation and free speech was not expressly addressed by any member of either house.

One observation by Liberal Party MLC Mr Lawson during debate in the Legislative Council implied that civil tort-based regulation of racial vilification was compatible with free speech. Mr Lawson observed that the bill “contains provisions which create a criminal offence, which provide civil remedies and which do not infringe anyone’s fair right to free speech”. Again, compatibility is assumed rather than explained or substantiated.

It is implicit in this assumption that only regulatory regimes which carry the threat of criminal conviction and punishment resent a significant constraint on free speech. The unique stigma and ultimate sanction of imprisonment (that is, deprivation of liberty by the state) may unequivocally be considered to represent the greatest potential infringement of free speech. However, it would be artificial and misleading to make this assessment without taking into account the very high threshold established by criminal racial vilification laws, and the consequently reduced likelihood that the regulatory regime will be invoked in any given case. It may reasonably be argued that given the lower threshold, broadened scope and relative ease of invocation of the enforcement process associated with civil regulatory approaches, the practical degree of free speech infringement may be just as great, if not greater, in the case of tort-based civil regulation (as well as civil human rights regulation). Certainly, the common assumptions that criminal racial vilification laws necessarily impose the greatest restriction on free speech, and that free speech


95 Ibid.
somehow remains unaffected by civil racial vilification laws are not supported by the available evidence on the operation of Australian laws to date, and should not be accepted at face value.

The assumption that tort-based civil regulation does not have any impact on free speech is also hard to reconcile with the claim made by the Government on a number of occasions during parliamentary debates that the inclusion of a tort-based civil remedy within the South Australian legislative regime for the regulation of racial vilification made it the 'best' and the 'toughest' of any legislative regime in Australia. In a strong defence of the Government’s preferred regulatory model, Liberal Party MHA Mr Cummins stated that:

I believe that civil remedies under new section 37 go a lot further than most legislation in this country. Most people do not like it when their pockets are affected, and to be subjected to damages of $40 000 will make people think twice before they run around vilifying people.96

There is no basis for claiming that the availability of a maximum damages award of $40 000 under s 37 of the Wrongs Act 1936 (SA) renders the civil statutory tort approach a more effective deterrent than the civil human rights approach, under which damages of the same magnitude may be ordered. For example, under the Anti-Discrimination Act 1977 (NSW) the Administrative Decisions Tribunal (Equal Opportunity Division) may award a successful complainant up to $40 000.97

On the face of it, one might be tempted to conclude that the issue of free speech sensitivity was a 'non-issue' in the evolution of the South Australian approach to the legislative regulation of racial vilification. It would appear that the primary (and only significant) point of dispute was the question of whether the regime should include a state-based civil human rights element. The difference of opinion on this issue not obviously turning on the question of the relative implications for free speech sensitivity of the civil statutory tort approach and the complaint-based civil human rights approach.

However, this would too simplistic a conclusion—it is clear that free speech sensitivity was an influence on the regulatory form adopted. The most obvious manifestation of free speech sensitivity in the regulatory approach adopted by the Racial Vilification Act 1996 (SA) is the criminalisation, as in NSW and the ACT, of only 'aggravated' forms of racial vilification—that is, racial vilification accompanied by threats/incitement of violence. In the Legislative Council Liberal Party MLC Mr Lawson erroneously described s 4 of the Racial Vilification Act 1996 as "comparable" to the regulatory approach taken in the United Kingdom, Canada and New Zealand where it is a criminal offence to incite racial hatred. The key distinction between the criminal offence under s 4 of the Racial Vilification Act 1996 (SA) on the one hand, and criminal offences such as those defined by s 319(2) of the Canadian Criminal Code on the other, is that the latter criminalises racial vilification per se, without requiring as an element of the offence that the accused threatened or incited personal violence or property damage.

Mr Lawson implicitly (though vaguely) recognised this key distinction, and the pivotal role which free speech sensitivity played in the decision of the South

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98 See chapter 8 of this thesis.
100 Section 319(2) of the Canadian Criminal Code is examined in chapter 10 of this thesis; see also, Human Rights Act 1993 (NZ) s 131, discussed in chapter 9 of this thesis.
Australian Government (and subsequently, the Parliament) on the degree of reliance on criminal law in establishing its legislative regime for the regulation of racial vilification. After observing that the Racial Vilification Bill "follows in the footsteps of comparable legislation in other parts of the world"\(^{101}\) Mr Lawson noted that "The provisions of the South Australian Bill are perhaps not as wide-ranging because of the view we take about freedom of expression. In my view, they are entirely appropriate."\(^{102}\) In addition Mr Lawson expressly approved of the position taken by the Federal Coalition during debate on the Racial Hatred Bill 1994 that criminalisation was an unacceptable way of regulation racial vilification (in the absence of violence, or threats/incitement of violence):

The provisions [of the Racial Hatred Bill 1994] which caused greatest concern were those which made it an offence to passively incite racial hatred, even by non-violent words or gestures. It was said—I think correctly—that those measures would infringe the right of free speech.\(^{103}\)

In conclusion, while free speech sensitivity did not have the same obvious and decisive influence on the shape of South Australia's legislative regime for the regulation of racial vilification as it had on the legislation enacted by the Western Australian Parliament and the Commonwealth Parliament, it was nonetheless one of the factors which played a part. Specifically, as in New South Wales, free speech sensitivity was an important factor in the decision not to rely on the criminal law to regulate racial vilification per se, and to rely exclusively on civil law regulation. Free speech sensitivity cannot, however, be identified as the explanation of the adoption in South Australia of a unique approach to civil regulation—the creation of a statutory tort.

\(^{102}\) Ibid.
\(^{103}\) Ibid.
4. THE REGULATORY REGIME ESTABLISHED BY THE RACIAL VILIFICATION ACT 1996 (SA) AND THE WRONGS ACT 1936 (SA)

The Racial Vilification Act 1996 (SA) established a three limb legislative regime for the regulation of racial vilification. Each of the three limbs will be discussed, followed by an overall analysis of the totality of the regulatory regime.

4.1 The Criminal Offence of Racial Vilification

Section 4 of the Racial Vilification Act 1996 (SA) creates a criminal offence of (aggravated) racial vilification:

A person must not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of their race by—

(a) threatening physical harm to the person, or members of the group, or to property of the person or members of the group; or

(b) inciting others to threaten physical harm to the person, or members of the group, or to property of the person or members of the group.  

The penalty for this criminal offence is a $5000 fine and/or 3 years imprisonment (or $25 000 if the offender is a corporation).

The substantive offence defined by s 4 is identical to the offence of serious racial vilification defined by s 20D of the Anti-Discrimination Act 1977 (NSW) and s 67 of the Discrimination Act 1991 (ACT). In addition, the South Australian legislation provides a statutory definition of a "threat" as including "conduct in which a threat is implicit" and "a conditional threat". Commencement of a

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104 Under s 3 of the Racial Vilification Act 1996 (SA) "public act" is defined as meaning "(a) any form of communication with the public; or (b) conduct in a public place". Section 3 provides that "'race' of a person means the nationality, country of origin, colour or ethnic origin of the person or of another person with whom the person resides or associates".

105 See chapter 8 of this thesis.

106 Racial Vilification Act 1996 (SA) s 3.
prosecution under s 4 requires the consent of the South Australian Director of Public Prosecutions.

4.2 Civil Damages as a Remedy for the Criminal Offence

The second limb of the South Australian regulatory regime is established by s 6 of the *Racial Vilification Act* 1996 (SA). Section 6(1) provides that where a person is convicted of the offence of racial vilification (as defined in s 4), the court may award damages, including punitive damages, against the defendant.\(^\text{107}\) The maximum damages amount is $40 000.\(^\text{108}\) Section 6 is designed to enable a victim of the criminal offence of racial vilification to recover damages, without the need for that person or group to commence separate civil proceedings under the *Wrongs Act* 1936 (SA).\(^\text{109}\)

\(^\text{107}\) Section 6 of the *Racial Vilification Act* 1996 (SA) provides that:

1. A court by which a person is convicted of an offence against this Act may award damages (including punitive damages) against the defendant.

2. Damages may be awarded under subsection (1)—
   (a) if the offence was directed at a specific person—in favour of that person; or
   (b) if the offence was directed at the members of a particular racial group—in favour of an organisation formed to further the interests of the relevant group.

3. The total amount of the damages that may be awarded for the same act, or series of acts, cannot exceed $40 000.

4. In applying the limit fixed by subsection (3), the court must take into account damages awarded in civil proceedings for the tort of racial victimisation in respect of the same act or series of acts.

5. Before a court awards damages under this section, the court must—
   (a) take reasonable steps to ensure that all persons who may have been harmed by the defendant’s conduct are given a reasonable opportunity to claim damages in the proceedings; or
   (b) take other action that appears reasonable and necessary in the circumstances to protect the interests of possible claimants who are not before the court.

\(^\text{108}\) *Racial Vilification Act* 1996 (SA) s 6(3).

\(^\text{109}\) Section 6(4) of the *Racial Vilification Act* 1996 (SA) is designed to prevent ‘double recovery’.
4.3 The Statutory Tort of Racial Victimisation

The third limb of the regulatory regime established by the Racial Vilification Act 1996 (SA) is the creation, with the addition of s 37 to the Wrongs Act 1936 (SA), of a statutory tort of racial victimisation. Section 37(2) of the Wrongs Act 1936 (SA) provides that “An act of racial victimisation that results in detriment is actionable as a tort by the person who suffers the detriment.” Section 37(1) defines an “act of racial victimisation” as:

... a public act inciting hatred, serious contempt or severe ridicule of a person or group of persons on the ground of their race but does not include-

(a) publication of a fair report of the act of another person; or

(b) publication of material in circumstances in which the publication would be subject to a defence of absolute privilege in proceedings for defamation; or

(c) a reasonable act, done in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest (including reasonable public discussion, debate or expositions).

This definition is based on the definition of unlawful racial vilification in s 20C of the Anti-Discrimination Act 1977 (NSW). With one important exception, the key definitional elements are identical, so that the scope of the tort-based civil regulatory regime in South Australia is very similar to that of the civil human rights regulatory regime in New South Wales. The exception, consistent with the basic principle of tort liability that a successful negligence action requires proof of damage, is that it is an element of the definition of the statutory tort of racial victimisation that the act in question must have resulted in detriment. There is no equivalent element of the definition of unlawful racial vilification under s 20C of the Anti-Discrimination Act 1977 (NSW). This requirement has the potential to render the scope of the South definition of racial victimisation narrower than the NSW equivalent. Whether this

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potential is realised in practice will depend on the judicial interpretation of the detriment requirement. However, it is anticipated that the limiting effect of this element will be minimal given that “detriment” is defined under s 37(1) of the *Wrongs Act* 1936 (SA) in broad terms: “(a) injury, damage or loss; or (b) distress in the nature of intimidation, harassment or humiliation”.

The primary difference between the South Australian tort-based regulatory regime and the civil human rights regime in NSW (as under Commonwealth and ACT legislation) lies in the method of enforcement of the legislative proscription. In South Australia, racial victimisation is actionable as a tort in the conventional civil court system, whereas in New South Wales, racial vilification is a ground of complaint pursuable in the Anti-Discrimination Board and the Administrative Decisions Tribunal (Equal Opportunity Division).

Section 37(3) of the *Wrongs Act* 1936 (SA) provides that “damages may be awarded to compensate any form of detriment.” The maximum amount of damages which may be awarded upon proof of the tort of racial victimisation is $40 000. These financial remedies are not significantly different from the financial remedies available under the NSW civil human rights regulatory regime. Section 37 of the *Wrongs Act* 1936 (SA) does not provide the making of any other court orders, apart from an award of damages to the plaintiff. By contrast, s 113 of the *Anti-Discrimination Act* 1977 (NSW) empowers the Administrative Decisions Tribunal to make a range of additional or alternative orders, including an order that the respondent not repeat or continue to engage in the unlawful racial vilification, and an order that the respondent publish an apology.

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111 “Detriment” is defined in s 37(1) of the *Wrongs Act* 1936 (SA) (see above).
112 *Racial Vilification Act* 1996 (SA), s 37(4). Section 37 (5) provides that “In applying the limit fixed by subsection (4), the court must take into account damages awarded by a court in criminal proceedings on convicting the defendant, in respect of the same act or series of acts, of the offence or a series of offences of racial vilification”.
113 See chapter 8 of this thesis.
114 *Anti-Discrimination Act* 1977 (NSW) s 113(1)(b)(ii).
115 *Anti-Discrimination Act* 1977 (NSW) s 113(2)(iiiia).
Although s 37 of the *Wrongs Act 1936* (SA) is limited to permitting individual victims of racial victimisation to seek a private compensatory remedy, the legislation also is clearly designed to pay a broader public regulatory function vis-à-vis the defendant’s conduct. This aspects of the legislation is manifested in the obligation imposed on judges by s 37(6):

Before a court awards damages for an act of racial victimisation, the court must—

(a) take reasonable steps to ensure that all persons who may have been harmed by the act are given a reasonable opportunity to claim damages in the proceedings; or

(b) take other action that appears reasonable and necessary in the circumstances to protect the interests of possible claimants who are not before the court.

### 4.4 Overall Assessment

Throughout the course of the passage of the *Racial Vilification Act 1996* (SA) through the South Australian Parliament, the Government asserted, on a number of occasions, that the legislative regime for the regulation of racial vilification established by the Act, (combined with the national regime established by the *Racial Hatred Act 1995*) delivered to South Australians a more effective regulatory strategy than any other jurisdiction in Australia. Superficially, this would be appear to be an accurate claim. Residents in no other state/territory have the benefit of a ‘choice’ (depending on the nature of the conduct in question) between three different regulatory enforcement methods:

(i) civil human rights complaint to HREOC;¹¹₆

(ii) civil statutory tort action in the Magistrate’s Court;¹¹⁷

(iii) criminal prosecution for ‘aggravated’ racial vilification (with the availability of civil damages upon conviction of the defendant).¹¹⁸

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¹¹₆ *Racial Discrimination Act 1975* (Cth) s 18C.

¹¹⁷ *Wrongs Act 1936* (SA) s 37.

Yet, care needs to be taken not to assume too readily that a diversity of enforcement options necessarily represents a more comprehensive or effective regulatory regime. As noted above, the scope of the legislative regulation of racial vilification is no greater in South Australia than it is in, for example, New South Wales. The South Australian definition of racial victimisation is equivalent to the NSW definition of unlawful racial vilification (the “detriment” element of the definition of the statutory tort perhaps rendering it slightly narrower in scope). The South Australian definition of (criminal) racial vilification is identical to the NSW definition of (criminal) serious racial vilification.

It is the procedural enforcement options in South Australia which appear to offer victims of (unaggravated) racial vilification greater choice. For example, where conduct amounting to racial vilification (or, in the terms of the South Australian legislation, racial victimisation) is alleged to have occurred, members of the target racial/ethnic group may choose to lodge a human rights complaint with HREOC (which would be handled according to the process described in chapter 5 of this thesis), or commence torts proceedings in the South Australian civil court system. Whether this enhanced procedural ‘choice’ leads to more effective regulation or improved protection for victims of racial vilification can only meaningfully be assessed after consideration of the practical operation of the South regulation regime established by the Racial Vilification Act 1996 (SA). Finally the remedies available under the Wrongs Act 1936 (SA) are more limited than those available under the Anti-Discrimination Act 1977 (NSW).

5. THE OPERATION OF THE LEGISLATION

5.1 Introduction

Although passed by the South Australian Parliament in 1996, the Racial Vilification Act 1996 (SA) was not proclaimed, and did not commence operation, until 7 July 1998. The Attorney General of South Australia, Trevor Griffin, has explained that
the starting date for the new regulatory regime was delayed while the South Australian Government attempted to negotiate an arrangement with the Commonwealth Government to allow the South Australian Equal Opportunity Commissioner to operate as an agent for HREOC in relation to racial vilification complaints under s 18C of the Racial Discrimination Act 1975 (Cth).\textsuperscript{119}

Unfortunately, these negotiations were unsuccessful. Once it had become clear that the negotiations would not be successful, the Government negotiated with the Commissioner for Equal Opportunity, who agreed to act as an initial contact point on racial vilification and to provide her staff with relevant information to enable them to provide basic advice and education and a reference point on the State Racial Vilification Act. However, because of the nature of the remedies provided in the Act, she would not receive complaints or conciliate on matters. Once arrangements with the Commissioner for Equal Opportunity had been finalised, the Government moved to procure the proclamation of the Act.\textsuperscript{120}

As noted above, the South Australian Government’s undertaking to negotiate a delegation of the responsibility for administration of HREOC’s complaint-handling function in relation to racial vilification complaints to the South Australian Equal Opportunity Commission was a key factor in the eventual acceptance by Parliament of the Government’s preferred regulatory model. However, comments made by the Attorney General in response to questioning in the Legislative Council and in the explanation of the 18 month delay in the implementation of the regulatory regime, suggest that, notwithstanding that no delegation has been arranged, the Government has no plans to modify the South Australia legislation to provide for a ground of complaint to the South Australian Equal Opportunity Commission.

On 2 December 1997, in the Legislative Council, Australian Democrat MLC Ms Kanck asked the Attorney General for a progress report on negotiations between the Federal Government and the Government of South Australia on the delegation of

\textsuperscript{119} Personal communication (letter), KT Griffin, Attorney General of South Australia, 13 December 1999.

\textsuperscript{120} Ibid.
South Australian complaint-handling responsibilities under the racial vilification provisions of the *Racial Discrimination Act* 1975 (Cth). The Attorney General, Mr Griffin, reported that while discussions had been held regarding the expansion of cooperation/delegation arrangements to include the handling of racial vilification complaints, “it has not been possible to include administration of the Racial Hatred Act in the new cooperative arrangement because the federal Government has made it clear that it will not play any additional moneys to South Australia to do so.”\(^{121}\) The Attorney General stated that the South Australian Government had offered to take on the responsibility of handling racial vilification complaints under the *Racial Discrimination Act* 1975 (Cth) on a free for service ($1100 per complaint) basis, but that no agreement was reached. The Attorney-General concluded: “I doubt if the Commonwealth will be prepared to take the matter any further.”\(^{122}\)

In response to a further question from Ms Kanck regarding the implications of this stalemate in light of the undertaking made by the South Australian Government at the time of the passage of the *Racial Vilification Act* 1996 (SA)—Ms Kanck asked whether the Government was “reneging on its undertaking to review the operation of the relevant State law with a view to introducing legislation to provide for conciliation”\(^{123}\)—the Attorney General gave a decidedly non-committal response, and adopted a rather narrow interpretation of the nature of that undertaking. He suggested that “the undertaking was not with a view to introducing additional State legislation: the undertaking was to review it after there had been negotiations that, regrettably, failed. It was quite a simple matter.”\(^{124}\) Despite substantially downplaying the nature of the Government undertaking, the Attorney General concluded by stating “I am quite prepared to look at the way in which that


\(^{122}\) Ibid.

\(^{123}\) Ibid.

[presumably, the South Australian legislation, or, alternatively, the handling of South
Australian racial vilification complaints by HREOC's central (Sydney) office] is
operating, obtain some advice and bring back a reply."125

The primary motivation for the terms of the undertaking which was
negotiated at the conference of managers back in November 1996 was to ensure that
South Australians had access to a conciliation-based complaint-handling regime for
the resolution for the racial vilification matters administered by the South Australian
Equal Opportunity Commission—either delegated authority to exercise HREOC's
administrative responsibility in relation to complaints under the Racial
Discrimination Act 1975 (Cth) or, if necessary, express statutory authority via an
amendment to the Equal Opportunity Act 1984 (SA). Neither of these steps have
been taken. However, this does not appear to have seriously compromised the
capacity of South Australians to access the Commonwealth's conciliation-based civil
human rights system for the regulation of racial vilification. For example, in the 12
months of 1996-1997 South Australian lodged 24 complaints with the Human Rights
and Equal Opportunity Commission alleging a contravention of s 18C of the Racial
Discrimination Act 1975.126

5.2 Criminal Prosecutions

In the first 17 months of operation (to 30 November 1999) the Director of
Prosecutions has commenced no prosecutions for the criminal offence of racial

125 South Australia Hansard (Legislative Council), 2 December 1997
126 Data (based on postcode) reported to the Legislative Council by the Attorney
General, K.T. Griffin, in response to a question asked by Australian Democrats
MLC on 2 December 1997: South Australia Hansard (Legislative Council), 17
March 2000. The 24 complaints represented 13% of the racial vilification complaints
received by HREOC in 1996/97: ibid. Eight South Australian complaints were
finalised in this period, five of which were conciliated and three of which were
denied: ibid. See chapter 9 of this chapter for data on racial vilification complaints
received by HREOC.
vilification under of s 4 of the *Racial Vilification Act 1996* (SA). This finding, particularly after only a very short period of operation, is not surprising, in light of the fact that in more than 10 years, no charges have been laid in relation to the equivalent NSW criminal offence: s 20D of the *Anti-Discrimination Act 1977* (NSW). It is likely that the criminal law, as defined in s 4 of the *Racial Vilification Act 1996* (SA), will play a primarily (perhaps exclusively) symbolic role in the regulation of racial vilification—as it has in the case of s 20D of the *Anti-Discrimination Act 1977* (NSW), s 67 of the *Discrimination Act 1991* (ACT) and ss 77-80 of the *Criminal Code 1913* (WA)—with little prospect of formal prosecution in the form of a prosecution.

5.3 Tort Actions

To date, no civil cases have been decided under the racial victimisation tort provision in s 37 of the *Wrongs Act 1936* (SA); in fact, no proceedings have yet been commenced. It is, of course, too early to conclude that the absence of civil litigation under s 37 reflects adversely on the effectiveness of the tort-based regulatory approach. However, based on the experience of other jurisdictions where this regulatory approach has been adopted (see below, section 6), its unlikely that the number of s 37 suits will be large.

Before turning to consider relevant Canadian experience, it is also worth noting that during the first twelve months of operation of the s 37 of the *Wrongs Act 1939* (SA)—July 1998-June 1999—four complaints of racial vilification contrary to s 18C of the *Racial Discrimination Act 1975* (Cth) were lodged with HRECOC (in

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127 Personal communication (email), Geraldine Davison, Director of Public Prosecutions (SA), 30 November 1999. Consent to prosecute has not been refused in any case: *ibid*.
128 See chapter 9 of this thesis.
129 See chapters 9-10 of this thesis.
130 Personal communication (email), Magistrate A Cannon, Magistrates Court (South Australia), 7 January 2000.
Further details on the reasons for the choice of forum and enforcement mechanism by these complainants would be needed to support a definitive conclusion on this significance of this finding, but some cautious speculation is in order. The utilisation of the civil human rights regime administered by HREOC in preference to the commencement of proceedings in the South Australian civil court system may be explained by the relative seriousness of the act of alleged racial vilification and the lower regulatory threshold under s 18C of the Racial Discrimination Act 1975 (Cth), where there is no incitement requirement, and the relevant harm consequence is “reasonably likely ... to offend, insult, humiliate or intimidate” (as opposed to incite “hatred, serious contempt or severe ridicule” under s 37 of the Wrongs Act 1936 (SA)).

However, if the differential between human rights complaints and tort suits remains as great in future years this explanation will be more difficult to sustain—there is no reason to believe that South Australia is unique amongst Australian jurisdictions in only experiencing racial vilification at the ‘lower’ end of the seriousness scale. It is more likely that the relative ease with which complaints can be lodged with HREOC (even in the absence of a ‘branch’ office or agency arrangement in the state of South Australia) will make this option more attractive to victims of racial vilification than the option of a civil suit in the South Australian civil court system.

This analysis of the likely impact of the South Australian legislation is, in the circumstances, unavoidably speculative. In order to provide a more solid basis for anticipating the operation of tort-based regulation of racial vilification in South Australia, the relevant experience of two Canadian jurisdictions will now be examined.

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131 Personal communication (email), Annette Bastaja, Senior Policy Officer, Race Discrimination Unit, Human Rights and Equal Opportunity Commission, 9 March 2000.
6. THE OPERATION OF STATUTORY TORT-BASED REGULATION OF RACIAL VILIFICATION IN CANADA

6.1 Introduction

Two Canadian provinces—Manitoba (in 1934) and British Columbia (1981)—have adopted the approach of attempting to regulate racial vilification by the creation of a statutory tort. In light of the very brief period for which the South Australian regulatory regime has been in operation, the operation of these two Canadian examples of tort-based legislative regulation will be briefly considered. Neither statute is identical to s 37 of the Wrongs Act 1936 (SA) nor are the legal, social, political and historical contexts of the respective provinces identical to that of South Australia. Consequently any simplistic attempt to extrapolate from the Canadian experience must be resisted. Nonetheless, this comparative analysis has the potential to contribute to a better understanding of the path of tort-based regulation of racial vilification down which South Australia has gone, in the same way that the operation of s 319(2) of the Canadian Criminal Code was examined in chapter 10 to shed light on the implications of the criminalisation approach to regulation which has been adopted in Western Australia.

6.2 Manitoba: 1934 Amendment to the Libel Act

6.2.1 The Legislation

In 1934 the Manitoba legislature amended the Libel Act 1913 (Manitoba) to create a cause of action for group libel as a response to racial vilification. Like so many racial vilification statutes this amendment was a direct response to the activities of a racist organisation, in this case the Brown Shirt Nationalist.

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132 RSC 1990, c C-46.
134 RSM 1913, c 113.
organisation, which was active in Winnipeg at the time.\textsuperscript{135} The provision is now found in s 19 of the Defamation Act 1987 (Manitoba)\textsuperscript{136} which provides that:

(1) The publication of a libel against a race or religious creed likely to expose persons belonging to the race or professing the religious creed to hatred, contempt or ridicule, and tending to raise unrest or disorder among people shall entitle a person belonging to the race or professing the religious creed to sue for an injunction to prevent the continuation and circulation of the libel; and the Court of King's Bench is empowered to entertain the action.

(2) The action may be taken against the person responsible for the authorship, publication, or circulation of the libel.

(3) The word "publication" used in the section shall be interpreted to mean any words legibly marked upon any substance or any object signifying the matter otherwise than by words, exhibited in public or caused to be seen or shown or circulated or delivered with a view of its being seen by any person.

(4) No more than one action shall be brought under subsection (1) in respect of the same libel.

The threshold established by the legislation is high. In addition to including what has become the conventional statutory formulation of unlawful racial vilification (conduct likely to expose to hatred, contempt or ridicule) the definition also requires that the conduct must have the tendency to "raise unrest and disorder". Unlike s 37 of the South Australian Wrongs Act 1936, s 19(1) of the Manitoba Defamation Act 1987 does not provide for the payment of damages; the only remedy available is an injunction to restrain the defendant from continuing to engage in the conduct in question.

In its 65 years of operation only two cases have ever been decided under the legislation. The first action was commenced on 30 October 1934, just six months after the amendments came into force on 7 April 1934. In \textit{Tobias v Whittaker}\textsuperscript{137} the plaintiff (WV Tobias) was a Winnipeg barrister and the defendant (William

\textsuperscript{135} M Fenson, "Group Defamation: Is the Cure Too Costly?" (1964-65) 1(3) \textit{Manitoba Law School Journal} 255 at 259.
\textsuperscript{136} RSM 1987, c D20. The same provision was originally added to the \textit{Libel Act 1913} (Manitoba) as s 13A (in 1934).
\textsuperscript{137} (unreported, 13 February 1935, Manitoba Court of King's Bench).
Whittaker) was the leader of the Brown Shirts and editor of *The Canadian Nationalist*. The plaintiff submitted that two articles published in *The Canadian Nationalist* on 30 October 1934, titled "The Murdering Jew, Jewish Ritual Murder" and "The Night of Murder ... Secret of the Purim Festival" constituted racial defamation of Jews contrary to the legislation. An injunction was granted which restrained the defendant:

... from continuing, writing, printing, or causing to be printed, circulating, distributing, or otherwise publishing the libel on the Jewish race and on those professing the Jewish creed, contained in the issue of *The Canadian Nationalist*, Volume 2, Number 6, or any similar libels injuriously affecting those belonging to the Jewish race or professing the Jewish creed.\(^{138}\)

Henson’s reflection on what this case said was “in its first ... test at bar, the Manitoba group defamation section proved effective.”\(^{139}\) However it was another 37 years before the legislation was invoked again.

In *Courchene v Marlborough Hotel Co* (1971)\(^ {140}\) the plaintiff brought an action for racial defamation contrary to s 19 of the Defamation Act\(^ {141}\) against a hotel, the manager of which had published a memo advising staff that “As we are having innumerable problems with the Indians and Metis coming into this hotel” they were to refuse accommodation to Indians and Metis customers.\(^ {142}\) The next day, when the President of the defendant company learned of the contents of the memo, it “was at once repudiated and suitable instructions given that it was to be ignored and that it was not hotel policy.”\(^ {143}\)

\(^{138}\) Record of unreported trial, quoted in Fenson, *supra* note 135 at 259. An interim injunction was issued on 4 November 1934, with a “perpetual injunction granted on 13 February 1935: *ibid.*

\(^{139}\) *Ibid* at 260. See also Special Committee on Hate Propaganda in Canada, *Report* (Ottawa: Queen’s Printer, 1966) at 43.

\(^{140}\) (1971), 20 DLR (3d) 107 (Manitoba Court of Queen’s Bench).

\(^{141}\) The plaintiff also alleged discrimination contrary to s 2(3) of the *Human Rights Act* 1970 (Manitoba).

\(^{142}\) (1971), 20 DLR (3d) 107.

\(^{143}\) *Ibid* at 110.
In the Court of Queen’s Bench, Tritschler CJQB ruled that the memo did not breach s 19 because it was not defamatory. Amongst the reasons relied upon by the judge were that the statement in the memo was “true and fair” – given that the hotel had been having the problems referred to in the memo\(^{144}\) – and “[w]hat is true cannot be defamatory.”\(^{145}\) In addition the judge categorically rejected the plaintiff’s submission that the memo carried an imputation that “Indians were ‘unsanitary, unfit, undesirable, troublesome and unsuitable as guests of the hotel’”.\(^{146}\) The judge further held that the memo was covered by qualified privilege.\(^{147}\)

The judge found for the defendant on the merits and also noted that even if the action had been successful, no injunction would have been “required or granted”\(^{148}\) because the memo had been revoked and repudiated within hours of having been produced. The judge also raised doubts about the constitutional validity of the legislation:

> I am ... of the opinion that the section is *ultra vires*, dealing as it does, with what is in essence criminal libel. Matters “tending to raise unrest or disorder among the people” are for Parliament – which has occupied the field in the *Criminal Code*, s 267B [now s 319(1)].\(^{149}\)

The plaintiffs appealed unsuccessfully to the Manitoba Court of Appeal.\(^{150}\) However, in contrast to the trial judge’s characterisation of the memo, the Court of Appeal agreed with the plaintiff that the memo was “defamatory on its face”.\(^{151}\) Freedman CJM specifically rejected the trial judge’s characterisation of the contents of the memo as truthful, stating, “Plainly there were many Indians coming to the

\(^{144}\) *Ibid* at 112.
\(^{145}\) *Ibid*.
\(^{146}\) *Ibid*.
\(^{147}\) *Ibid* at 112-113.
\(^{148}\) *Ibid* at 115.
\(^{149}\) *Ibid*.
\(^{150}\) Courchene *v* Marlborough Hotel Co Ltd [1972] 1 WWR 149 (Manitoba Court of Appeal).
\(^{151}\) *Ibid* at 151.
Marlborough Hotel who presented no problem whatever and who behaved themselves properly. The defence of truth is not available, and the memorandum remains defamatory.152 However, the Chief Justice of the Court of Appeal noted that “The sole remedy under s 19 is an injunction” and in the circumstances (the memo having been quickly withdrawn) “there was nothing to restrain”.153

Freedman CJ criticised Tritschler CJQB’s ‘ruling’ that s 19 was ultra vires and invalid describing this part of the trial judgment as “obiter opinion”154. Freedman CJ ruled that:

... it was not open to the learned trial Judge to adjudge the section to be constitutionally invalid until after notice of that issue had been given to the Attorney General of Canada and the Attorney General of Manitoba ... It is similarly not open to this Court to adjudge the section to be invalid. Since we are unable in this case to decide the constitutional question, we must proceed on the assumption that the legislation is valid until otherwise determined.155

No further cases have been decided under s 19 of the Defamation Act 1987.

Cohen has advanced two primary reasons for what he describes as the “dead letter”156 status of this particular form of legislative regulation of racial vilification. The first reason, reflected in Courchene, was doubts about the constitutional validity of the legislation on the basis that under Canada’s federal constitutional arrangements it might be beyond the power of the provinces, either on the basis that the legislation effectively criminalised racial defamation (a form of regulation which only the federal parliament could use157), or because it regulated freedom of speech, which was also considered to be the exclusive preserve of the federal Parliament. In 1964, in a report

152 Ibid at 153.
153 Ibid.
154 Ibid at 152.
155 Ibid.
157 Constitution Act 1867, s 91(27).
prepared for the National Joint Community Relations Committee in Toronto, Arthur Maloney expressed the opinion that the legislation was unconstitutional:

... since freedom of speech and freedom of press is involved, legislative jurisdiction upon such classes of subjects belongs to the Parliament of Canada under the peace, order and good government clause and under the criminal subsection in the British North America Act, and that a provincial legislature has no power to legislate in relation to such classes of subjects.¹⁵⁸

This view that provincial attempts to regulate free speech are invalid because freedom of speech is exclusively a federal matter no longer finds support.¹⁵⁹

The second reason identified by Cohen to explain the very infrequent use of this particular regulatory option is that the only remedy for racial defamation under the statute is an injunction and victims of racial defamation/vilification may feel that there is insufficient personal benefit in commencing an action:

Another factor might be that a plaintiff, suing as a member of a defamed group, wants more than the cessation of the material which is libelous. He wants monetary damages for the hurt he suffered because of the libel. However, to date, the courts have been unwilling to give such a plaintiff monetary damages because of a theory which has been elevated to an unspoken presumption which presumes that when groups are the victims of libelous actions, individuals within the group cannot be hurt simply because he is a member of the defamed group. Needless to say this presumption has been rebutted by

¹⁵⁸ Quoted in Fenson, supra note 135 at 260. See also Levesque and Tardif v The Daily Gleaner and Smith (unreported, New Brunswick Board of Inquiry, 3 June 1974).
scientific psychological experimentation. However, because the courts have not yet seen the light, it is not worth anyone’s while or expense to sue.¹⁶⁰

Notwithstanding the merit of the content of Cohen’s argument, its direction at the courts seems misplaced, at least in relation to the statutory cause of action for group racial defamation – the legislature has unequivocally chosen to limit the remedy to an injunction with no facility for the award of damages.

If the limited remedial options have, in fact, been an impediment to the utilisation of s 19 of the Defamation Act 1987 (Manitoba), then s 37 of the South Australian Wrongs Act 1936 should not be underused for the same reason. It specifically provides for the payment of compensation to a plaintiff who has suffered detriment.¹⁶¹ However, it is unlikely that this is the only reason why only two cases have ever been decided under s 19 of the Defamation Act 1987 (Manitoba). The narrow statutory definition of racial defamation (including the dual proof requirements that the publication: must be likely to expose members of the target group to hatred, and tend to raise “unrest or disorder”), as well as financial and other barriers to the commencement of civil proceedings can be assumed to have had an influence.¹⁶²

6.3 British Columbia: The Civil Rights Protection Act

6.3.1 Background: The KKK and the McAlpine Report

In 1980 the Ku Klux Klan began to work actively in Vancouver. In October 1980 Alexander McQuirter, one of the KKK’s chief organisers in Canada appeared on a Canadian Broadcasting Corporation (CBC) program and made a number of racially vilifying comments. For example, he observed that one of the Klan’s ‘belief’s’ was

¹⁶⁰ Cohen, supra note 156 at 750-751; see also E Mendes (ed), Racial Discrimination Law and Practice (Toronto: Carswell, 1997) para 4-44.
¹⁶¹ Wrongs Act 1936 (SA) s 37(3), discussed supra section 4.3.
¹⁶² Between 1976 and 1987, residents of Manitoba had the additional regulatory option of lodging a racial vilification complaint with the Manitoba Human Rights Commission; see chapter 7 of this thesis, note 4.
that "God created different races and put them in different parts of the world, and we feel it's evil and unchristian to race mix them ..."\textsuperscript{163} McQuirter explained that the Klan advocated a program whereby "all the money we've spent on the multi-racial crap already" could be used to "voluntarily repatriate" "non-whites" to the "land of their origin".\textsuperscript{164} He claimed to be "standing up for white people because whites are now facing reverse discrimination in this country ...".\textsuperscript{165}

McQuirter's comments prompted calls for legal redress. One complainant sought the British Columbia Attorney General's consent for a prosecution under s 319(2) of the Canadian Criminal Code,\textsuperscript{166} but consent was not granted.\textsuperscript{167} Other complainants alleged that McQuirter and the KKK had contravened the British Columbia Human Rights Code, specifically, the s 2(1) prohibition on discriminatory "signs and symbols".\textsuperscript{168}

In March 1981 the Minister of Labour, Mr Heinrich, appointed John McAlpine to "determine whether there was sufficient evidence against the Ku Klux Klan of its contravention of the Human Rights Code [1979], RSBC c186, to warrant the appointment of a board of inquiry."\textsuperscript{169} The \textit{McAlpine Report} concluded that "the


\textsuperscript{164} Ibid.

\textsuperscript{165} Ibid at 5.

\textsuperscript{166} See chapter 10 of this thesis. At the time, the offence currently defined s 319(2) was defined by 281.2(2) of the Canadian Criminal Code.

\textsuperscript{167} S Anand, "Expressions of Racial Hatred and Criminal Law: Proposals for Reform" (1997) 40 \textit{Criminal Law Quarterly} 215 at 220-221, see the discussion of the special consent requirement in chapter 10 of this thesis.

\textsuperscript{168} At the time, it was unlawful, under s 2(1) of the British Columbia Human Rights Code 1979 to "publish or display before the public, or cause to be published or displayed before the public, a notice, sign, symbol, emblem, or other representation indicating discrimination or an intention to discriminate in any manner prohibited by this Act." In 1993 this provision was replaced by a broader vilification provision: British Columbia Human Rights Code 1996, s 7; see chapter 7 of this thesis.

\textsuperscript{169} McAlpine Report, supra note 163 at 1.
Ku Klux Klan has not contravened the Human Rights Code, the reason being that the current provisions of the Code are framed too narrowly.”

McAlpine observed that s 2 of the British Columbia *Human Rights Code* was “the only section that affords any possible basis for proceeding against the Klan”. However, for a number of reasons he concluded that the conduct of McQuirter and the Klan could not be considered a contravention of s 2. First, the section was limited to particular modes of representation. In McAlpine’s view these did not include literature or statements made on television or radio. Second, in McAlpine’s view subsection 2(2) of the Code, which provided that “any person may, by speech or in writing, freely express his opinions on any subject”—necessitated a narrow reading of the scope of subsection 2(1). Third, the words “in any manner prohibited by this Act” “were intended to limit the scope of Section 2 by tying that Section directly to the proscribed areas of discrimination.”

170 *Ibid* at 1.
171 *Ibid* at 58.
172 *Ibid*.
173 *Ibid*. Subsequent academic commentary and case law supports the view that is an overly generous interpretation of the effect of free speech exemption provisions such as s 2(2) of the British Columbia *Human Rights Code* 1979. In 1982 Tarnopolsky argued that a free speech exemption provision such as s 2(2) is “superfluous, unless it is intended merely as an indication to Human Rights Commission that it is necessary to balance, on the one hand, the importance and the seriousness of the communication and, on the other hand, its effect on discrimination against those groups protected by the legislation”: W Tarnopolsky, *Discrimination and the Law in Canada* (Toronto: Richard De Boo Limited, 1982) at 338. This view was implicitly endorsed by the Supreme Court of Canada in *R v Taylor* (1990), 75 DLR (4th) 577. After noting that it was “the norm ... to include in human rights statutes an exemption emphasizing the importance of freedom of expression”, Dickson CJC concluded it would “mistaken to place too great an emphasis upon the explicit protection of expressive activity in a human rights statute”: *ibid* at 601-602.
174 *McAlpine Report, supra* note 163 at 58.
6.3.2 The Legislation

In response to the demonstrated inadequacy of existing modes of regulation, in 1981 the British Columbia provincial legislature enacted the *Civil Rights Protection Act*.\(^{175}\)

Section 2 of the Act provides:

A "prohibited act" is a tort actionable without proof of damage,

(a) by any person against whom the prohibited act was directed, or

(b) where the prohibited act was directed against a class of persons, by any member of that class.

A "prohibited act" is defined in s 1 of the Act:

In this Act, "prohibited act" means any conduct or communication by a person that has as its purpose interference with the civil rights of a person or class of persons by promoting

(a) hatred or contempt of a person or class of persons, or

(b) the superiority or inferiority of a person or class of persons in comparison with another or others on the basis of colour, race, religion, ethnic origin or place of origin.

Like s 37 of the *Wrongs Act* 1936 (SA) vis-à-vis Australian racial vilification laws, the *Civil Rights Protection Act* 1981 (BC) is unique among Canadian racial vilification laws in that it creates a ‘customised’ statutory tort. Unlike the South Australian statutory tort, damage is not an element of the tort created by the *Civil Rights Protection Act*. In addition the tort created by s 2 of the *Civil Rights Protection Act* 1981 (BC) is not limited to public acts—it covers “any conduct or communication”.

For these two reasons, the regulatory scope of the British Columbia torts is somewhat broader than its South Australian equivalent. In addition, the range of

\(^{175}\) RSBC 1996, c 49.
remedial options is also wide under the British Columbia legislation, including damages and exemplary damages\textsuperscript{176} and injunctive relief.\textsuperscript{177}

In certain procedural and substantive respects the regulatory scope of the tort created by the \textit{Civil Rights Protection Act} 1981 (BC) is narrower than the tort created by s 37 of the \textit{Wrongs Act} 1936 (SA). Where a tort action is commenced under s 2 of the \textit{Civil Rights Protection Act} 1981, the plaintiff is obliged to notify the Attorney General within 30 days.\textsuperscript{178} Under s 3 of the Act the Attorney General may intervene\textsuperscript{179} and become a party to the proceedings.\textsuperscript{180}

The definition of the tort created by s 2 of the \textit{Civil Rights Protection Act} 1981 (BC) is limited to conduct which is done for the “purpose” of bringing about one of the proscribed consequences. The use of this phrase to express the fault element of the tort indicates that the fault component is subjective, requiring proof that the defendant \textit{intended} to bring about the relevant consequence or knew that the conduct would probably have this effect. By contrast, there is no explicit requirement in relation to the tort created by s 37 of the \textit{Wrongs Act} 1936 (SA) that the defendant must have acted intentionally. While the wording of s 37(1) is somewhat ambiguous (“a public act inciting hatred”), it is submitted that the appropriate interpretation of the fault element is that the assessment is an objective one, focusing on the likely effect of the conduct.\textsuperscript{181}

In addition to establishing that the conduct defined by s 1(1) is a tort, the \textit{Civil Rights Protection Act} 1981 (BC) also provides (s 5) that the conduct so defined also constitutes a criminal offence punishable by a $2000 fine or 6 months imprisonment (or a $10 000 fine in the case of a corporation or society). In this way, the \textit{Civil Rights Protection Act} 1981 (BC) adopts a ‘hybrid’ approach to the  

\textsuperscript{176} \textit{Civil Rights Protection Act} 1981, s 4(1).
\textsuperscript{177} \textit{Civil Rights Protection Act} 1981, s 4(3).
\textsuperscript{178} \textit{Civil Rights Protection Act} 1981, s 3(3).
\textsuperscript{179} \textit{Civil Rights Protection Act} 1981, s 3(1).
\textsuperscript{180} \textit{Civil Rights Protection Act} 1981, s 3(2).
\textsuperscript{181} See the discussion of the equivalent “incitement” and mens rea requirements of the \textit{Anti-Discrimination Act} 1977 (NSW) in chapter 9 of this thesis.
regulation of racial vilification relying on both civil (tort) and criminal approaches. This aspect of the legislation resembles the facility created by the *Racial Vilification Act* 1996 (SA) for civil damages to be recovered (s 6) in cases of a criminal prosecution under s 4 of the *Racial Vilification Act* 1996 (SA). However, one important difference between the two legislative regimes is that under the *Civil Rights Protection Act* 1981 (BC) racial vilification per se is regulated simultaneously by tort law and criminal law. The respective definitions of unlawful conduct are identical. By contrast, in South Australia, racial vilification per se is regulated only by the statutory tort created by s 37 of the *Wrong Act* 1936 (SA), and criminalisation is reserved only for *aggravated* racial vilification, in the form of the offence created by s 4 of the *Racial Vilification Act* 1996 (SA).

In his second reading speech on the Civil Rights Protection Bill the Attorney General of British Columbia, Mr Williams, explained that the legislation was designed to respond to racist activity by providing "a means of access to our courts, a means of remedy which is currently absent in our law."\(^{182}\)

Only one case has been decided under the *Civil Rights Protection Act* 1981. In *Brochu v Nelson and British Columbia Hydro and Power Authority*\(^{183}\) the plaintiff claimed that his employer and immediate supervisor had breached s 2 of the Act. The plaintiff cited the supervisor’s alleged conduct and communication with the plaintiff (specifically, the supervisor’s allocation of more lucrative tasks to other employees) as having the purpose of interfering with his civil rights by “promoting the superiority of others over him, or promoting his inferiority in comparison with others on the basis of his ethnic origin which is French-Canadian, or place of origin, which is Quebec.”\(^{184}\) Evidence was presented that Nelson had made disparaging remarks about French-Canadians referring to them as ‘frogs’ and expressing displeasure that a number of French-Canadians from Quebec had come to British

\(^{182}\) British Columbia Hansard (Legislative Assembly), 29 June 1981, p 6475.

\(^{183}\) [1986] BCJ No 998 (QL).

\(^{184}\) *Ibid* at para 2.
Columbia to work. The Court (McKenzie J in the BC Supreme Court) doubted the plaintiff’s evidence and was persuaded by the denial of the supervisor, ruling that “The plaintiff’s case fails at the threshold because he has not proven on a balance of probabilities that the supervisor committed any prohibited act”.

The action was dismissed with costs.

Mirroring Manitoba’s experience with s 19 of the Defamation Act 1987, it appears that one of the factors contributing to the minimal use of the Civil Rights Protection Act 1981 has been concern about its constitutional validity. At the time of its enactment the legislation was unanimously supported in the British Columbia Legislative Assembly. Records of the debate on second reading reveal no mention of concern that the legislation would adversely affect free speech.

However, in 1993, during debate on a bill to add a vilification ground of complaint to the British Columbia Human Rights Act 1979, Government (New Democratic Party) MLA Mr Dosanjh observed that although the Civil Rights Protection Act 1981 had never been subject to a constitutional challenge it was “wide open to challenge under the Charter” on the basis of an infringement of the right to freedom of expression. In particular Mr Dosanjh suggested that the Civil Rights Protection Act was actually too broad in its regulatory scope because it covered both public and private communications. Mr Dosanjh continued (obviously not aware of the decision in Brochu):

I don’t remember the Civil Rights Protection Act being used in the last 12 years in British Columbia, because in the form it was brought to this House it was unusable. It was a laudable piece of legislation, but unusable. It was impractical because it criminalized the process, which meant you had a higher onus of proof. In the civil aspect of it, it also took the matter into the jurisdiction of the Supreme Court rather than the lower courts, which are much simpler for people to deal with.

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185 Ibid at para 14.
186 British Columbia Hansard (Legislative Assembly), 29 June 1981, pp 6474-6477.
187 British Columbia Hansard (Legislative Assembly), 10 June 1993, p 7061.
188 Ibid at 7062.
189 Ibid.
Although the Civil Rights Protection Act has not been repealed, it has effectively been replaced as the preferred legislative regime for the regulation of racial vilification by a civil human rights regulatory approach in the form of s 7 of the British Columbia Human Rights Code, which was introduced in 1993.

6.4 Implications of the Canadian Experience With Tort-Based Regulation

The Canadian experience with the regulation of racial vilification via statutory torts actionable in the conventional civil courts system provides little reason for optimism that s 37 of the Wrongs Act 1936 (SA) will constitute an effective legislative mechanism for the regulation of racial vilification. Given the relatively weak formal legal status of the ‘right’ to free speech in Australia, it is very unlikely that in

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190 The Deputy Premier and Minister Responsible for Multiculturalism and Human Rights explained during the second reading speech on the Human Rights Amendment Bill that the new vilification ground of complaint (see infra note 191) would “replace” the Civil Rights Protection Act 1981: British Columbia Hansard (Legislative Assembly), 10 June 1993, p 7057.

191 RSBC 1996, c 210. Section 7 of the British Columbia Human Rights Code 1996 provides that:

A person must not publish, issue or display or cause to be published, issued or displayed any statement, publication, notice, sign, symbol, emblem or other representation that

(a) indicates discrimination or an intention to discriminate against a person or a group or class of persons,

(b) is likely to expose a person or a group or class of persons to hatred or contempt

because of the race, colour ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or that group or class of persons.

(2) Subsection (1) does not apply to a private communication or to a communication intended to be private.

192 Human Rights Amendment Act 1993 (BC).

193 See chapter 1 of this thesis.
South Australia free speech sensitivity (and consequent doubt about legislative validity) will operate to constrain the operation of the legislation to the extent that these factors have inhibited the utilisation of tort actions in Manitoba and British Columbia.

However, the very limited invocation of the tort-based regulatory regimes in Canada cannot simply be explained as a consequence of free speech sensitivity. It is likely that limitations inherent in the definition of the statutory torts and the relative inaccessibility (including high financial costs) of the conventional civil court system have also operated to minimise invocation of tort-based approaches to the regulation of racial vilification in Canada. On balance, the proof requirements associated with the tort created by s 37 of the Wrongs Act 1936 (SA) appear to be less onerous than those of its Canadian equivalent—there being no requirement to establish that that conduct promoted racial hatred and was likely to generate public disorder (as in Manitoba), or that the defendant intended to promote racial hatred, as in British Columbia). However, it is likely that the procedural disincentives associated with formal civil litigation, as well as the relatively limited remedial options available under the South Australian legislation will result in a pattern of infrequent invocation of the tort-based regulatory mechanism similar to that which has occurred in Canada.

7. CONCLUDING OBSERVATIONS ON THE WRONGS ACT 1936 (SA) / RACIAL VILIFICATION ACT 1996 (SA) APPROACH TO THE REGULATION OF RACIAL VILIFICATION

The South Australian Government can rightly lay claim to having introduced “a novel regime for dealing with racial vilification.” In particular, the tort created by s 37 of

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the Wrongs Act 1936 (SA) is unique amongst Australian racial vilification statutes. However, the analysis presented in this chapter supports the conclusion (albeit, tentatively, given the very limited period for which the South Australian legislation has been operational) that despite its novelty, the legislative approach of a statutory tort enforceable via civil action in the conventional civil court system is unlikely to play a significant practical role in the regulation of racial vilification. Like the limited criminal racial vilification laws which has been enacted in Australia it is likely that the tort-based approach will play a largely symbolic role. Particularly given that South Australians have the option of invoking the national civil human rights regulatory regime in cases of alleged racial vilification, it can reasonably be anticipated that very few complainants will choose to rely instead on the option of commencing a tort action in the South Australian Magistrates Court.

Apart from the enhanced capacity of conventional civil litigation to educate the community by virtue of its 'public' nature (at least, compared with the conciliation phase of the complaint-handling process under the civil human rights model), there are very few significant advantages which might encourage a racial vilification victim to sue in tort in the state civil court system rather than lodge a complaint with HREOC. In the case of attempts to enforce racial vilification legislation against racist organisations such as National Action (which was a significant factor influencing the shape of the legislation ultimately enacted in South Australia), the formalities of a tort action in the civil court system might be considered more appropriate than a conciliation-based process. However, it is important to recognise that civil human rights regimes do not rely exclusively on conciliated resolution, but also provide for (quasi-judicial) adjudication in cases where conciliation is unsuccessful or considered inappropriate.

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195 Racial Discrimination Act 1975 (Cth), Part IIA; see chapter 5 of this thesis.
196 See infra section 2 of this chapter.
CHAPTER 12

SUMMARY AND GENERAL CONCLUSIONS

1. INTRODUCTION

This thesis has presented an analysis of the origins, nature and operation of racial vilification legislation in Australia. In this final chapter the major findings on the scope and enforcement method of existing legislative regimes for the regulation of racial vilification in Australia will be summarised. In addition, general conclusions will be presented on the two primary arguments which have been advanced throughout the thesis regarding: the limitations of existing legislative regimes for the regulation of racial vilification; and the impact of free speech sensitivity on the scope, form and operation of these regulatory regimes.

2. COMPARING EXISTING REGULATORY REGIMES

2.1 Scope

The regulatory scope of legislative restrictions on racial vilification in Australia—that is, the respective definitions of conduct proscribed as unlawful—varies from the relatively narrowly scope of Chapter XI of the Criminal Code 1913 (WA) to the relatively broad scope of Part IIA of the Racial Discrimination Act 1975 (Cth). Listed in order, from broadest scope to narrowest scope, the existing Australian legislative schemes are:

- *Criminal Code* 1913 (WA), Chapter XI;
- *Wrongs Act* 1936 (SA) s 37;
- *Anti-Discrimination Act* 1977 (NSW), Part 2 Division 3A and *Discrimination Act* 1991 (ACT), s 66; and
- *Racial Discrimination Act* 1975 (Cth), Part IIA.
The key points of variation in the respective legislative definitions of (unaggravated) racial vilification are:

i) the types of communication to which the regulatory regime applies;

ii) the nature of the proscribed consequence or harm; and

iii) the 'fault' element.

In each of these respects, the Western Australian regime is the narrowest. The offences created by ss 77-80 of the Criminal Code 1913 (WA) are limited to "written or pictorial material that is threatening or abusive" and require proof of subjective intention to, alternatively, promote hatred against or harass a racial group. The limited scope of the Western Australian legislation has rendered it practically redundant: there have been no prosecutions for offences under Chapter XI of the Criminal Code 1913 (WA) in the nine years during which it has been in operation.

At the opposite end of the spectrum, the proscription of racial vilification in Part IIA of the Racial Discrimination Act 1975 (Cth) covers a broader range of forms of communication (excluding only acts done in private), and establishes a significantly lower harm threshold—a likelihood of causing offence, humiliation or insult to a racial group. In addition, there is no requirement under the Commonwealth legislation that the person responsible for the racial vilification intended to cause the harm. Under s 18C of the Racial Discrimination Act 1975 (Cth) conduct that, on an objective assessment, is reasonably likely to have this effect, is covered by the legislation. However, in practice, this aspect of the definition of unlawful racial vilification has been effectively narrowed in a number of Human Rights and Equal Opportunity Commission public inquiry decisions, where there has been a tendency to raise the harm threshold by reference to the concept of "hatred", and where emphasis has been

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1 Consistent with the approach taken throughout this thesis, the focus in this conclusion chapter is on legislation which regulates racial vilification per se, without requiring proof of threats of, or incitement to, personal violence or property damage, as required under 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).
placed on the relevance of the respondent's intention in determining whether the respondent's conduct falls within the definition of unlawful. Another operational influence which has resulted in a reduction in the overall breadth of the Part IIA of the *Racial Discrimination Act 1975* (Cth) is a liberal interpretation of the breadth of the exemptions in s 18D of the Act.

Slightly narrower in scope than Part IIA of the *Racial Discrimination Act 1975* (Cth) are the almost identical provisions contained in the New South Wales *Anti-Discrimination Act 1977* and the Australian Capital Territory *Discrimination Act 1991*. There are two key differences between the NSW/ACT legislative model and the Commonwealth approach. First, in the case of the former, the capacity of the respondent's conduct to incite the requisite ill-feeling is an element of the definition (in s 20C(1) of the *Anti-Discrimination Act 1977* (NSW) and s 66(1) of the *Discrimination Act 1991* (ACT). Second, the harm threshold for the former is expressed in legislative terms which suggest that it is limited to more serious forms of ill-will against a racial group than the Commonwealth legislation—hatred, serious contempt or severe ridicule (compared to offence, humiliation or insult).

To some extent the potential effect of the differences between the NSW/ACT legislation and the Commonwealth legislation have been nullified by the 'narrowing' tendencies in HREOC public inquiry interpretations (noted above) which appear to have effectively reduced (without completing removing) the gap between the two regulatory regimes in terms of operational scope. However, the available evidence is inconclusive as to whether this definitional difference remains significant from the point of view of the operational scope of the respective regimes, and consequently, from the point of view of the extent of the protection afforded to victims of racial vilification.

The scope of the definition of unlawful "racial victimisation" under s 37 of the *Wrongs Act 1936* (SA) is essentially the same as the scope of the proscription under the NSW/ACT legislative model. The regulatory scope of the South Australian legislation may be slightly narrower than the equivalent NSW/ACT legislation
because of the requirement that defendant’s conduct must have caused damage (or, in the language of s 37 of the *Wrongs Act* 1936 (SA), “detriment”) to the plaintiff.

### 2.2 Enforcement Mechanisms

This thesis has shown that, with the exception of Western Australia, where Chapter XI of the *Criminal Code* 1913 (WA) creates four narrowly defined *criminal* offences, Australian legislators have avoided the use of the criminal law as a mechanism for regulating racial vilification. The primary reason for the marginalisation of criminal law as a mechanism for regulating racial vilification in Australia has been the concern that criminalisation represents an unjustifiable infringement of free speech (see section 3 below).

The ‘alternative’ civil human rights complaint-handling regime, originally developed (and still used mainly) for the resolution of unlawful discrimination complaints, has emerged as the most favoured legal mechanism for the enforcement of legislative standards on racial vilification.

The scope of the respective legislative regimes, discussed above, is a significant factor in the degree of protection afforded to victims of racial vilification. The analysis of all Australian legislative regimes for the regulation of racial vilification presented in this thesis has been presented on the basis that a comprehensive evaluation of racial vilification legislation must also take into account the nature of the enforcement mechanism by which the legislative standards and protections are invoked.

This thesis has demonstrated that each of the three major enforcement models currently operative in Australia—criminal prosecution, statutory tort civil suit, and civil human rights complaint—suffers from various flaws which weaken the capacity of the respective regulatory regimes to provide protection and a legal remedy to victims of racial vilification.

The criminal law is commonly regarded (albeit simplistically) as the ‘strongest’, and, therefore, most effective, form of legal regulation. However, the
operation of criminal racial vilification legislation in Western Australia (and Canada) reveals that this particular regulatory approach is primarily a symbolic measure, which offers little practical protection to victims of racial vilification. Criminal racial vilification laws are characterised by significant operational constraints (both substantive and procedural) which render the formal invocation of the legislation in the form of a criminal prosecution difficult and unlikely, except perhaps against the most extreme forms of organised racial vilification.

The most recent addition to the range of Australian approaches to the regulation of racial vilification—a statutory tort—might provide a satisfactory outcome for a very small number of victims of racial vilification, but there is little basis for optimism that it will offer meaningful protection or redress to the majority of those who suffer harm as a result of the expression and incitement of racial hatred. As with criminal law, tort law is only ever likely operate at the margins of the problem of racial vilification.

In terms of scope, the South Australian statutory tort approach offers no advantages over the civil human rights legislative regime. In terms of enforcement procedure, except in circumstances where the publicity that is possible in the conventional civil justice administration process is considered desirable by the victim/plaintiff, the commencement of civil proceedings is likely to be a less attractive option than the lodgment of a complaint with a human rights agency. The positions of inequality which may compromise the effectiveness of a conciliation-based approach are likely to be even more pronounced and disadvantageous to victims of racial vilification in the context of formal civil proceedings. As Thornton has noted, one of the strong motivations for increasing reliance on bureaucratic or administrative forms of legal regulation (such as the complaint initiated, conciliation-based civil human rights system) has been:

... a general degree of dissatisfaction with modes of formal justice, perceived by litigants to be hostile and alienating. Women and minorities have remained at the periphery of the white, Anglo-Celtic, male matrix of legal values which are manifested in the courtroom, together with its often distressing style of cross-
examination and oppressive discourse. ... Furthermore, the cost of litigation has removed it from the realm of possibility for most individuals, let alone the poor oppressed ... ²

It is surprising, therefore, that South Australia has opted to rely exclusively on the tort law and the conventional civil court system to regulate racial vilification. The stated South Australian Government's stated rationale for taking this 'unconventional' approach to the regulation of racial vilification was that it aimed to complement rather than duplicate the Commonwealth civil human rights regime established by Part IIA of the Racial Discrimination Act 1975 (Cth), to which South Australians could also turn for protection or redress. It is not yet possible to determine which regulatory regime is preferred by victims of racial vilification, but the limited data available to date (along with the experience of equivalent legislative regimes in Canada) support the conclusion that the tort-based civil regulation approach is likely to pay a much less significant role in the practical regulation of racial vilification than civil human rights regulation.

Three Australian legislatures, including the Commonwealth Parliament, have opted for an approach to the legislative regulation of racial vilification which centres around the creation of a statutory entitlement to complain to a human rights agency. This approach is by no means perfect. Its main flaws are that it:

• places too heavy a burden on the victim or target group to initiate and pursue enforcement proceedings;

• purports to rely on conciliation as a process of dispute resolution without adequate regard to either the suitability of this method of handling of racial vilification complaints, or the feasibility of conducting genuine conciliation sessions in the significant number of complaints that are received in each year;

fails, due to its private and confidential nature, to advance the educational and 'standard setting' objectives of racial vilification regulation; and

achieves an unequivocal 'good' outcome for complainants in only a small minority of cases.

In the majority of cases where a mutually acceptable settlement is not negotiated, the complainant is required to endure a protracted process (consisting of complaint-lodgment, investigation, negotiation and 'conciliation' phases) before gaining access to a forum (a tribunal or court) where a binding and 'public' decision can be made on the key questions of whether the respondent's conduct constituted unlawful racial vilification, and whether the complainant is entitled to a remedy.

Notwithstanding these weaknesses, the civil human rights regulatory model has been shown in this thesis to represent the most significant and most valuable legislative approach to the regulation of racial vilification of the range of approaches utilised to date in Australia. However, contrary to a common assumption, it is not the emphasis on conciliation which renders the civil human rights systems the most appropriate regimes for the regulation of regulation. Rather, it is the relative ease with which proceedings to invoke the legislative standards can be commenced and conducted under this model, combined with the relatively broad operational scope of the relevant legislation that render the civil human rights approach to the legislative regulation of racial vilification preferable to attempt to regulate racial vilification via the criminal law enforceable in the criminal justice system, or tort law actionable in the conventional civil justice system.

3. THE IMPACT OF FREE SPEECH SENSITIVITY

Though no racial vilification statute in Australia has been formally invalidated for infringing legally protected free speech rights, free speech sensitivity has had a profound impact on the form, substance and practical operation of Australian racial
vilification laws. This thesis has shown that concern about the implications for free speech has been a recurring theme in the story of the enactment, operation and interpretation of racial vilification legislation in Australia over the course of the last 10 years. While its influence has been most explicit in the case of the Commonwealth and Western Australian legislation—where it resulted in the excision and narrowing respectively, of proposed criminal offences—free speech sensitivity has impacted on all Australian racial vilification statutes.

The consistent effect of free speech sensitivity has been to operate as a 'brake' on racial vilification legislation. This effect has been manifested in two significant ways. First, free speech sensitivity has limited the scope of the legislative proscription, both at the stage of initial parliamentary enactment and, where the opportunity has arisen, at the point of (quasi) judicial interpretation. Second, and more significantly, free speech sensitivity has been a central factor behind the distinctive pattern in Australia of minimal reliance on the criminal justice system, and primary reliance on the civil human rights regime.

While this thesis has revealed a consistent pattern with respect to the impact of free speech sensitivity on the shape of racial vilification legislation, it has also shown that there has been considerable jurisdictional and temporal variation in the magnitude and precise outcomes of this influence. Over a ten year period and in five different jurisdictions the importance of upholding the value of 'free speech' has been routinely affirmed in the context of the evolution of racial vilification regulatory regimes. However a wide range of views have been advanced on the breadth of the category of speech which should, in a democratic society such as Australia, remain 'free'—that is, unregulated by legislation—and a diversity of conclusions have been reached on the appropriate shape of racial vilification legislation which is intended to respect this value.

The review of the enactment and operation of Australian racial vilification statutes in this thesis has revealed that the limited legal foundation for free speech 'rights' in this country has not served to minimise the impact of free speech
sensitivity on the shape of racial vilification laws. On the contrary, the absence of clear parameters for 'free speech', in the form of constitutional, legislative or common law guidelines, has allowed for the exercise of considerable discretion in the interpretation (most notably by legislators and quasi-judicial adjudicators) of a category of protected speech upon which racial vilification laws should not be permitted to infringe. One important consequence of this latitude is that there has been an absence of consistency, both between Australian jurisdictions and amongst different decision-makers within jurisdictions. In this context, political ideology, reflected in party political affiliation, has played a significant part in determining the 'version' of free speech sensitivity against which proposed racial vilification legislation has been measured. It is reasonable to assume, with more disturbing implications for fairness and consistency, that personal political attitudes also constitute at least part of the explanation for the divergent ways in which different members of the New South Wales Equal Opportunity Tribunal/Administrative Decisions Tribunal (Equal Opportunity Division) and different Commonwealth HREOC inquiry commissioners have interpreted the respective racial vilification statutory provisions in light of free speech sensitivity.

These findings suggest that the express constitutional or statutory recognition of a right to free speech in Australia, rather than representing a threat to the validity of racial vilification laws, may actually consolidate the legitimacy of the legislative regulation of racial vilification laws by defining with a greater degree of precision than is currently possible, and with improved consistency, the forms of communication upon which it is impermissible for racial vilification (and other) regulatory regimes to infringe. An enhanced role for courts in the interpretation and application of racial vilification (as is likely in the case of Part IIA of the Racial Discrimination Act 1975 (Cth) with the imminent relocation of adjudicative responsibilities from HREOC to the Federal Court of Australia) can also be expected to contribute to greater clarity and consistency.
4. CONCLUSION

This thesis has demonstrated that racial vilification laws based on the civil human rights model, while far from a panacea for the various manifestations of underlying and widespread racism in Australian society, represent the legislative approach to the regulation of racial vilification which is most likely, in practice, to provide victims with a means of legal redress. If racial vilification laws are assessed in terms of the protection afforded to victims of hate-related activity (as it is asserted they should), as opposed to the size of the political point which is made by their enactment, then the analysis of the first ten years of the operation of racial vilification legislation which has been presented in this thesis suggests that civil human rights regulatory regimes—based on an accessible complaint-handling process, with the option of binding determination by a quasi-judicial tribunal or court—should remain the primary form of legal regulation.

This thesis had also demonstrated that the primary emphasis on regulation via civil human rights law in Australia has resulted not, as might be considered appropriate and desirable, from a thorough consideration and assessment of the most effective legislative approach to the regulation of racial vilification. The emergence of civil human rights law as the predominant form of legislative regulation in Australia with regard to racial vilification, owes at least as much to free speech sensitivity as it does to the criterion of optimal regulation. The relatively innocuous nature of civil human rights law procedures and remedies—particularly given the preference for ‘conciliated’ dispute resolution rather than third party adjudication, and the unavailability of punitive sanctions—has been a decisive factor in rendering this regulatory approach the most favoured of the available options. Civil human rights legislative regulation has been embraced as the preferred approach in Australia because it delivers on the goal of minimal free speech impairment: a key objective in the evolution of racial vilification laws in Australia. Fortuitously, the civil human rights approach has also proven to most adequately satisfy demands for the legislative proscription of certain harmful manifestations of racism.
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