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SO FAR SO GOOD?: A CRITICAL EVALUATION OF RACIAL VILIFICATION LAWS IN AUSTRALIA

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It may be true that morality cannot be legislated, but behaviour can be regulated. The law may not change the heart, but it can restrain the heartless.¹

I INTRODUCTION

There is a range of meritorious reasons why Parliaments enact laws to regulate racial vilification. These include but are not limited to the following:

- The need to provide a remedy to persons who suffer the often extremely harmful psychological and physical effects resulting from racial vilification.
- To nip in the bud racist words or conduct that if left unchecked may fester and sprout as serious or even deadly violence at a later time.
- To further the value of legal equality through substantive and meaningful legal measures.
- To send a strong state-sanctioned message that, in a pluralist society politically committed to multiculturalism, racist words and conduct are unacceptable, harmful, dangerous and will not therefore be tolerated.
- To fulfil our international law obligations.
- To provide an environment where information and ideas can be proffered and exchanged in a civil and respectful manner. Such societal conditions are more conducive to personal development, meaningful democracy and a tolerant citizenry.

The law is, however, just one of the tools available to combat racial vilification. Others include primary and secondary school education programs, government-sponsored advertising campaigns, affirmative action policies and opportunities for counter-

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¹ Martin Luther King, 'An Address Before the National Press Club' in James Melville Washington (ed), *A Testament of Hope: The Essential Writings of Martin Luther King Jr* (1986) 99, 100.

speech either in conjunction with or in the alternative to legal measures.² However, as Luke McNamara correctly points out, racial vilification laws are now a fixture on the Australian legal and political landscape.³ More importantly, the time has long gone where dogmatic assertions of the need for free speech absolutism can or ought to carry the day. Three landmark reports on racist violence and race relations in Australia more generally written during the 1990s and the work of the critical race theorists and other American scholars have documented in stark and often disturbing detail the very real harms caused by racist words and conduct.⁴ Whilst I do not share the view of some scholars that free speech concerns and arguments in the area are no more than 'philosophical meanderings'⁵ and 'superficial talk'⁶ about 'traditional abstract values',⁷ they should neither *presumptively* trump other relevant values and interests nor stifle appropriate legislative initiatives to combat racial vilification. Therefore, a more constructive approach and contribution to the debate is to accept the (most likely) long-term legal and political reality of racial vilification laws in Australia and consider how these laws might be further refined and improved.⁸ This article is offered in that spirit.

Moreover, for the following three reasons, the time is ripe to reflect on our laws — on the clarity of their content, on the coherence of the cases they have generated and ultimately on their long-term utility. Firstly, it is 15 years since the passage of the *Anti-Discrimination (Racial Vilification) Amendment Act 1989 (NSW)*, the first Australian law

² For a detailed account of using counter-speech as a method for addressing race hate speech see Katharine Gelber, *Speaking Back: The Free Speech Versus Hate Speech Debate* (2002).

³ Luke McNamara, *Regulating Racism: Racial Vilification Laws in Australia* (2002) 3–4 where the author writes that

[b]ecause racial vilification laws are a feature of the Australian legal system, scholarly analysis need not be limited to the conventional threshold question regarding the philosophical compatibility of racial vilification legislation with philosophical, political or legal commitments to free speech. Indeed, the existence of racial vilification laws in Australia *demands* that additional lines of research inquiry be pursued.

⁴ The three reports were: Human Rights and Equal Opportunity Commission, *Racist Violence: Report of National Inquiry into Racist Violence in Australia* (1991), Australian Law Reform Commission, *Multiculturalism and the Law*, Report No 57 (1992), Human Rights and Equal Opportunity Commission, *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (1997). A selection of Critical Race Theory writings are contained in Mari Matsuda, Charles Lawrence, Richard Delgado and Kimberle Crenshaw, *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (1993).

⁵ Melinda Jones, 'Empowering Victims of Racial Hatred by Outlawing Spirit-Murder' (1994) 1 *Australian Journal of Human Rights* 299, 302.

⁶ Luke McNamara, 'The Merits of Racial Hatred Laws: Beyond Free Speech' (1995) 4 *Griffith Law Review* 29, 29.

⁷ Kathleen Mahoney, 'Hate Vilification Legislation and Freedom of Expression: Where is the Balance?' (1994) 1 *Australian Journal of Human Rights* 353, 369.

⁸ In accepting that existing racial vilification laws are a fixture on the Australian legal landscape and taking them as the starting point of my analysis, I am not suggesting that philosophical issues are now foreclosed for discussion. On the contrary, free speech considerations, for example, are a continuing focus of this article. This recognises the inextricable link and possible conflict between racial vilification laws and speech and communication interests and the ongoing dialogue that must necessarily occur between them.

to proscribe racial vilification. Since the passage of that landmark law all Australian jurisdictions, with the exception of the Northern Territory, have followed suit, albeit employing a range of divergent regulatory mechanisms.⁹ Secondly, the continuing controversy in Australia surrounding the dissemination of holocaust-denial material through the internet, pamphlets, books and videos brings into sharp relief the pervasive tension between racial vilification laws and freedom of speech.¹⁰ This tension was recently highlighted by the storm that surrounded the ultimately unsuccessful attempt by the Melbourne Underground Film Festival to screen the David Irving film *The Search for Truth in History*.¹¹ Thirdly, we have already witnessed an upsurge in racial vilification against Australian Muslims, Arabs and Jews since the September 11 attacks on the World Trade Center in New York City and the ongoing 'war against terrorism' that they triggered.¹²

(b) The problem with current Australian racial vilification laws

Whilst there is a need for effective racial vilification laws in Australia, the current laws lack sufficient precision and clarity in key respects. Of particular concern are the amendments made by the *Racial Hatred Act 1995* (Cth) ('RHA') to the *Racial Discrimination Act 1975* (Cth) ('RDA') and the 'free speech/public interest' exemptions found in the RDA and the racial vilification laws of New South Wales, South Australia, Australian Capital Territory, Queensland, Victoria and Tasmania.¹³ An incoherent body of case law has developed as a consequence, where too much is left open to the decision-maker in each individual case. Many judgments are often little more than a series of findings of fact rather than reasoned pronouncements of the law. It has left the law in a state of unprincipled fluidity, where the good faith but ad-hoc assessment by individual judges and administrators of subjective, value-laden concepts determines

⁹ *Criminal Code* (WA) ss 76–80; *Racial Vilification Act 1996* (SA) ss 4, 6; *Wrongs Act 1936* (SA) s 37; *Discrimination Act 1991* (ACT) ss 65–7; *Anti-Discrimination Act 1991* (Qld) ss 124A, 131A; *Racial and Religious Tolerance Act 2001* (Vic) ss 7–12, 24–5; *Anti-Discrimination Act 1998* (Tas) ss 17, 19. For a detailed account of the different types of regulatory mechanisms implemented in Australian racial vilification laws see McNamara, above n 3.

¹⁰ The Australian holocaust-denial cases are examined below in Part III(c)(2)(ii).

¹¹ In *Lipshutz v Melbourne Underground Film Festival* (Unreported, Victorian Civil and Administrative Tribunal, Higgins J, 7 July 2003) the applicant unsuccessfully sought an injunction to prevent the screening of the David Irving documentary *The Search for Truth in History*. However, the Melbourne Underground Film Festival chose not to screen the film after protests from the Jewish and wider community.

¹² At the time of writing Judge Michael Higgins of the Victorian Civil and Administrative Tribunal was hearing *Islamic Council of Victoria v Catch the Fire Ministries Inc*. The matter involves members of a conservative Christian group at a seminar describing Muslims as rapists and terrorists: see Barney Zwartz, 'Group Wants Vilification Law Axed', *The Age* (Melbourne) 16 October 2003, 6. See further William Jonas, 'Listen – National Consultations on Eliminating Prejudice against Arab and Muslim Australians' (Speech delivered at the launch of the Isma Project, Sydney, 21 March 2003); John Lyons, 'Terror Target no 1: the Jewish Community', *Channel Nine Sunday Program*, 7 September 2003, <http://sunday.ninemsn.com.au/sunday/cover_stories/transcript_1376.asp> at 22 June 2004.

¹³ *Anti-Discrimination Act 1977* (NSW) s 20C(2); *Wrongs Act 1936* (SA) s 37(1); *Discrimination Act 1991* (ACT) s 66(2); *Anti-Discrimination Act 1991* (Qld) s 124A(2); *Racial and Religious Tolerance Act 2001* (Vic) s 11; *Anti-Discrimination Act 1998* (Tas) s 55.

controversies not the application of reasonably precise and knowable legal standards. This is problematic for a number of reasons. They will be detailed shortly.

But first it should be noted that indeterminacy in the law is not unique¹⁴ nor is precision and clarity always a virtue. Timothy Endicott has persuasively argued that vagueness in the law is on occasion unavoidable¹⁵ and sometimes desirable.¹⁶ However, what remains centrally important is that 'the law must be capable of guiding the behaviour of its subjects'.¹⁷ In the area of racial vilification however there are compelling reasons why enhancing the precision and clarity of legislation is desirable.

Firstly, and most importantly, is the capacity of indeterminate racial vilification laws to unreasonably interfere with or pre-emptively chill the legitimate speech and communication interests of others. Whilst broad-ranging defences (the norm in Australian law¹⁸) may allay some of these speech and communication concerns, this species of indeterminacy in turn has the capacity to erode the efficacy of such laws by failing to provide a remedy or meaningful protection to victims of racial vilification. Consequently, the primary goal of racial vilification laws in Australia – to regulate racial vilification without curbing legitimate public communication – is compromised when the laws themselves lack sufficient precision and clarity. Improving their precision and clarity would make these laws more accessible and, in this instance, strengthen the rule of law.¹⁹ With a firmer understanding of their legal rights and obligations the citizenry can plan their communicative conduct accordingly. This has an added importance with citizens now increasingly willing and able to seek legal redress for racial vilification.

Secondly, laws which 'leave too much to be decided by persons other than the people's representatives'²⁰ can be rightly criticised as undemocratic. This is not to suggest that reserving a measure of discretion for decision-makers in this area is objectionable. Indeed it is both inevitable and desirable with racial vilification laws as

¹⁴ Indeterminacy occurs in a number of areas including, but not limited to, the law of obscenity and blasphemy, the scope of the implied constitutional right to freedom of political communication in Australia, what constitutes jurisdictional error in administrative law, the law of incitement and sedition and even the concept of the reasonable person so central to the law of torts and aspects of the criminal law.

¹⁵ Timothy Endicott, 'The Impossibility of the Rule of Law' (1999) 19 *Oxford Journal of Legal Studies* 1, 4–6 where the author gives the example of definitions of offences of violence in the criminal law and torts.

¹⁶ Ibid 7–8 where the author argues for example that putting a precise time limit on criminal prosecutions would increase precision but also increase arbitrariness.

¹⁷ Joseph Raz, *The Authority of Law* (1979) 214 cited in Endicott, above n 15, 2.

¹⁸ See below Part III 'Free Speech/Public Interest Defences' under the RDA and State and Territory Racial Vilification Laws'.

¹⁹ On this point see Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (1994) 357–8 and Justice Michael McHugh, 'The Growth of Legislation and Litigation' (1995) 69 *Australian Law Journal* 37, 40. For a detailed discussion on this aspect of the rule of law see Geoffrey de Q Walker, *The Rule of Law: Foundation of Constitutional Democracy* (1988) 25–7. But see Ronald Dworkin, *Political Judges and the Rule of Law* (1978) 261–2 where the author outlines a substantive, 'rights' conception of the rule of law in contrast to a more 'rule-book' account. My above analysis is probably consistent with the 'rule-book' conception of the rule of law.

²⁰ Antonin Scalia, 'The Rule of Law as a Law of Rules' (1989) 56 *University of Chicago Law Review* 1175, 1176.

explained below.²¹ It is problematic however when the putative legal standards contained in a law provide little interpretive guidance in most cases to the relevant decision-maker. It is undemocratic because judges and administrators are, in effect, exercising legislative power by determining the substantive content of the laws they are to apply.²² This argument suggests that courts should limit 'themselves to the accurate application of general rules, rules which should be clear, precise and empirically applicable expressions of the political will of the people's representatives.'²³ It 'is democratic in that it affirms that the source of these authoritative rules is empirically identifiable institutional acts which are the outcome of democratic procedures'²⁴ not the subjective conceptions of justice of judges and administrators articulated on a case by case basis. My analysis will show that too often the application of racial vilification laws in Australia has exhibited this undemocratic quality. Consistent with democracy and the principle of popular sovereignty that underpins the *Australian Constitution*, legislative power ought to be exercised by our elected not unelected representatives.²⁵ Moreover, Geoffrey de Q Walker has noted that when 'law is simply a series of patternless exercises of state power ... the outcome of any encounter with government can no longer be predicted and equality before the law is also lost.'²⁶

Thirdly, laws which lack sufficient precision and clarity obfuscate and complicate the role of those public officials charged with their interpretation and execution. For example, this may manifest as an unwillingness on behalf of prosecutors to mobilise indeterminate criminal racial vilification laws where the higher standard of proof required compounds the problem of legislative imprecision.²⁷ In the long-term, citizens (including public officials) may accord less respect to such laws which can undermine their efficacy, enforceability and ultimately their legitimacy.²⁸

21 See Endicott, above n 15, 17–18 for an argument that '[t]here is no coherent way to characterize the rule of law as an ideal that is intrinsically opposed to discretion'. But see Ronald Dworkin, *Taking Rights Seriously* (1977) 81 where the author rejects the positivist use of discretion to resolve hard cases and argues that even hard cases have a 'right' outcome. On the nature of judicial discretion generally see Aharon Barak, *Judicial Discretion* (1987).

22 For an account of this argument see Scalia, above n 20, 1176.

23 Tom Campbell, 'Democracy, Human Rights and Positive Law' (1994) 16 *Sydney Law Review* 195, 196.

24 Tom Campbell, 'Democratic Aspects of Ethical Positivism' in Tom Campbell and Jeffrey Goldsworthy (eds), *Judicial Power, Democracy and Legal Positivism* (2000) 3, 4.

25 See *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 137–8 (Mason CJ); *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 176 (Deane J); *Leeth v Commonwealth* (1992) 174 CLR 455, 484 (Deane and Toohey JJ); *McGinty v Western Australia* (1996) 186 CLR 140, 230 (McHugh J); *Kirmani v Captain Cook Cruises Pty Ltd (No 1)* (1985) 159 CLR 351, 383 (Murphy J); Chief Justice Murray Gleeson, *The Rule of Law and the Constitution* (2000) 6. But see Simon Evans, 'Why is the Constitution Binding? Authority, Obligation and the Role of the People' (2004) 24 *Adelaide Law Review* (forthcoming).

26 Walker, above n 19, 25 (footnote omitted).

27 For further discussion on this point see Ian Freckelton, 'Censorship and Vilification Legislation' (1994) 1 *Australian Journal of Human Rights* 327, 340–3.

28 On this point see McHugh, above n 19, 40.

But the concept of racial vilification is hard to pin down.²⁹ Not least because reasonable minds will differ as to what level of racist conduct *ought* to constitute vilification for legal purposes and *how* one can determine with some predictability when that harm threshold is reached. It is a concept with a subjective component meaning that some degree of indeterminacy will necessarily characterise racial vilification laws. Indeed, it is no bad thing that decision-makers in this area have a level of discretion, so long as sufficient criteria exist to guide the exercise of that discretion. This guards against arbitrariness. It is a complex, emotive and delicate area where free speech and other legitimate concerns may be trammelled if the laws are enforced in a mechanistic or unthinking manner. Moreover, laws are more likely to be respected and therefore effective when applied, so far as possible, in a *just* as well as principled manner.

However, notwithstanding the elusive nature of racial vilification, my analysis will show that it is possible and desirable to frame more precise laws than currently exist. To this end, the article concludes with two proposals for legislative reform. If adopted, these measures ought to secure a measure of consistency in how cases are determined, in doing so addressing aspects of the predictability, democracy and equality concerns outlined above.

II RACIAL DISCRIMINATION ACT 1975 (CTH) – S 18C

The provisions proscribing racial vilification were added to the *RDA* by the *RHA*. The key provision is s 18C. It reads:

- (1) It is unlawful for a person to do an act, otherwise than in private, if:
 - (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
 - (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.
- (2) For the purposes of subsection (1), an act is taken not to be done in private if it:
 - (a) causes words, sounds, images or writing to be communicated to the public; or
 - (b) is done in a public place; or
 - (c) is done in the sight or hearing of people who are in a public place.
- (3) In this section:

public place includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.

The critical problem with s 18C is that its key words and phrases are sufficiently imprecise in both their definition and application as to make the putative legal standards they embody largely devoid of any core and ascertainable content.³⁰ Of most

²⁹ See McNamara, above n 3, 9 where the author noted but did not explore the problem of defining racial vilification.

³⁰ See also Sally Reid and Russell Smith, *Regulating Racial Hatred*, Paper no 79, Australian Institute of Criminology Trends and Issues in Crime and Criminal Justice Series (1998) 5 where the authors suggest that 'for the purpose of clarity and to prevent an excessive number of complaints being lodged (particularly in view of the reduction in funding to HREOC), it may be preferable for a higher threshold to be provided for in the legislation itself.'

concern are the phrases 'offend, insult, humiliate or intimidate' and 'the act is done *because of* the race ... of the other person'. The former phrase, in particular the meaning of the words 'offend' and 'insult', is so open-ended as to make any practical assessment by judges and administrators as to when conduct crosses this harm threshold little more than an intuitive and necessarily subjective value judgement. The fact that an act must be 'reasonably likely' to cross this harm threshold, though importing an objective test of liability, does not cure the definitional indeterminacy of these words that a decision-maker must objectively apply. Moreover, these words and the harm threshold they establish may capture a range of conduct which was arguably never intended by the Parliament to be regulated; an important point to which I shall shortly return.³¹ The latter phrase is less problematic. At first glance it would appear clear enough. It seems to require some causative link between the act and race or ethnicity of the relevant person(s) or group. But when coupled with the indeterminate harm threshold its application has been uneven. This is reflected in the disagreement evident in the jurisprudence regarding the strength of the causal connection required by s 18C. It seems no coincidence that a stronger connection has been required in cases involving less serious conduct that may otherwise have crossed the s 18C harm threshold.³²

Indeed, with the possible exception of cases involving extreme racist conduct, the indeterminacy of s 18C is such that too many determinations could comfortably and justifiably have been decided the other way. This should come as no surprise as the legal standards in s 18C are sufficiently malleable to allow a judge or administrator to employ them to facilitate a decision which accords with their intuitive conception of what 'justice' requires in that case. It has resulted in a body of judicial and quasi-judicial decisions that often lack a coherent, underpinning principle.

(a) The RDA harm threshold: 'insult, offend, humiliate or intimidate'

The indeterminacy of the harm threshold has become manifest in the case law in two ways. Firstly, in a series of s 18C determinations the judge or administrator has, 'effectively elevated the threshold by emphasising the concept of "hatred"'.³³ Secondly, in a smaller but still significant number of cases there has been a finding that s 18C has been offended without any harm threshold analysis or reasoning whatsoever.

(1) *Elevating the s 18C harm threshold: parliamentary intent and the interpretative malady*

The root cause of this phenomenon is the considerable dislocation that exists between the stated intent of the Parliament regarding the Racial Hatred Bill 1994 (Cth) ('RHB') and the provisions which ultimately constituted the RHA. On one level this is unremarkable as the RHB was significantly amended during its passage through the Parliament. Arguably the centrepiece provisions, those which criminalised a range of serious racist conduct, were deleted from the RHB in the Senate.³⁴ However the problems run deeper than this. In choosing terms like 'insult' and 'offend' to effect its intentions, the Parliament has created an interpretive malady for the relevant decision-

³¹ See below Part II(a)(1) 'Elevating the s 18C harm threshold'.

³² See below Part II(b) 'The causal connection: When is an act done *because of* the race, colour or national or ethnic origin of another person or group'.

³³ McNamara, above n 3, 82.

³⁴ For a detailed discussion on the legislative history of the RHB see *ibid* 40–9.

makers. This problem also plagues the 'free speech/public interest defences' contained in s 18D which are examined below.³⁵ The clear intent of Parliament regarding the RHB was to criminally *and* civilly prohibit acts of *racial hatred*. It is erroneous to suggest that parliamentary intent as evidenced in the second reading speech of then Attorney-General Michael Lavarch and the explanatory memorandum is no longer instructive regarding the meaning of s 18C as this provision formed an integral part of the RHB as the following passages from those sources underline.

This Bill makes provision in relation to *racial hatred* amending the *Crimes Act 1914* to provide for three criminal offences and the *Racial Discrimination Act 1975* to provide for a civil prohibition ... In doing so, the Bill closes a gap in the legal protection available to the victims of *extreme racist behaviour*.³⁶

The explanatory memorandum made these further, specific comments on the civil prohibition in the RHB which became s 18C, unaltered.

The proposed prohibition on offensive behaviour based on *racial hatred* would be placed within the existing jurisdiction of HREOC to conciliate and/or determine complaints alleging breaches of the *Racial Discrimination Act*.³⁷

These comments were largely reproduced by the Attorney-General in his second reading speech.³⁸ Even the long title of the *RHA* emphasised the centrality of racial hatred to the new civil provisions: 'An Act to prohibit certain conduct involving the hatred of other people on the ground of race, colour or national or ethnic origin, and for related purposes.'

But it is clear enough that one can racially insult or offend another without ever expressing or intending hatred for that person's race or ethnicity. Consider a claim by a politician that '[h]ome invasions are ethnically based, Lebanese or Iranian, not Australian'.³⁹ Or when Australian cricketer Darren Lehmann called a Sri Lankan opponent 'a black cunt' upon dismissal. These racial epithets no doubt offended and insulted the relevant victims and, moreover, may well be reasonably likely to elicit the same response from most members of the relevant race or ethnic group if not the wider community.⁴⁰ It is submitted, however, that in both cases the conduct *of itself* did not amount to an expression of racial hatred. These words do not suggest an intense dislike or detestation of that person(s) *on account of* their race or ethnicity. Arguably, this sort of low-end racist conduct does not constitute the kind of *extreme racist behaviour* that Parliament intended the *RHA* to regulate.

Moreover, judicial and administrative attempts to define words like 'insult' and 'offend' with a degree of precision become a circular and question-begging exercise. The best that can usually be done is to outline the Macquarie and/or Oxford English

³⁵ See below Part III "'Free Speech/Public Interest Defences" under the *RDA* and State and Territory Racial Vilification Laws'.

³⁶ Explanatory Memorandum, Racial Hatred Bill 1994 (Cth) 1 (emphasis added).

³⁷ Ibid 9 (emphasis added).

³⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 15 November 1994, 3336-7, 3342 (Michael Lavarch, Attorney-General).

³⁹ *Feghaly v Oldfield* [2000] EOC ¶93-090, 74346 ('Feghaly').

⁴⁰ This is the s 20C objective standard and indeed in the former case the conduct was held to offend s 20C. The Lehmann incident resulted in match referee Clive Lloyd reporting him under the International Cricket Council's Code of Conduct and the imposition of a five match ban from one day internationals. No s 20C complaint was, however, lodged by the victim.

Dictionary definitions of the terms as Hely J did in *Jones v Scully*.⁴¹ But these dictionaries define the words using synonyms, which is of little use when the task of the decision-maker is to elucidate and then apply a reasonably precise legal standard. It simply raises the same definitional question for the synonyms used, and so on. For example, the difficulty in ascribing a clear meaning to the word 'insult' was illustrated by the 1972 House of Lords decision in *Brutus v Cozens*.⁴² The case concerned the interpretation of s 5 of the *Public Order Act 1936* (UK).⁴³ Lord Reid wrote:

We were referred to a number of dictionary meanings of 'insult' such as treating with insolence or contempt or indignity or derision or dishonour or offensive disrespect. Many things otherwise unobjectionable may be said or done in an insulting way. *There can be no definition.* But an ordinary sensible man knows an insult when he sees or hears it... *Insulting means insulting and nothing else.*⁴⁴

The indeterminate nature of the s 18C harm threshold is manifest. In such circumstances it is appropriate for a judge or administrator to seek recourse to extrinsic materials such as the second reading speech and the explanatory memorandum to help ascertain the meaning of s 18C.⁴⁵ As outlined above, these extrinsic materials suggest that Parliament intended the racial vilification provisions in the RDA including s 18C to prohibit acts of *racial hatred* in an attempt to curb extreme racist behaviour. This may explain why in at least six s 18C determinations the judge or administrator has 'effectively elevated the threshold by emphasising the concept of "hatred"'.⁴⁶

In the first s 18C determination then President of the Human Rights and Equal Opportunity Commission Sir Ronald Wilson, whilst dismissing the complaint, said the words 'pom' and 'pommy' used in a newspaper article to describe English persons 'could be unlawful in the context of an article which was *plainly malicious or scurrilous, designed to foster hatred or antipathy* in the reader.'⁴⁷ These words, suggesting that the s 18C harm threshold embodies a notion of racial hatred, were expressly endorsed in *Shron v Telstra Corporation*⁴⁸ and *De La Mare v Special Broadcasting Service*.⁴⁹

Similarly, in the matters of *Creek v Cairns Post Pty Ltd*⁵⁰ and *Scully* the relevant judges considered that the harm threshold denotes 'profound and serious effects, not to be likened to mere slights'.⁵¹ This conclusion was drawn in both cases after recourse

⁴¹ (2002) 120 FCR 243, 269–70 [103] ('*Scully*').

⁴² [1972] 2 All ER 1297.

⁴³ In addition to the summary offence created by s 5 for conduct which is or likely to cause harassment, alarm or distress, the *Public Order Act 1936* (UK) s 64 also contains another summary offence for conduct which is or likely to cause fear or provocation of violence and six criminal offences (ss 18–23) which proscribe conduct intended or likely to stir up racial hatred. A common threshold component of each of these offences is the need for conduct that is 'threatening, abusive or *insulting*' (emphasis added). See further J C Smith and Brian Hogan, *Criminal Law* (7th ed, 1992) 757–61 and Anne Twomey, 'Laws Against Incitement to Racial Hatred in the United Kingdom' (1994) 1 *Australian Journal of Human Rights* 235.

⁴⁴ *Brutus v Cozens* [1972] 2 All ER 1297, 1300 (emphasis added).

⁴⁵ *Acts Interpretation Act 1901* (Cth) s 15AB. But see McNamara, above n 3, 82.

⁴⁶ McNamara, above n 3, 82.

⁴⁷ *Bryant v Queensland Newspaper Pty Ltd* [1997] HREOCA 23 (emphasis added) ('*Bryant*').

⁴⁸ [1998] HREOCA 24 (Commissioner Innes,) ('*Shron*').

⁴⁹ [1998] HREOCA 26 (Commissioner McEvoy) ('*De La Mare*').

⁵⁰ (2001) 112 FCR 352 (Kiefel J) ('*Cairns Post*').

⁵¹ *Cairns Post* (2001) 112 FCR 352, 356 [16]; *Scully* (2002) 120 FCR 243, 269 [102].

was had to the *RHA* explanatory memorandum and second reading speech to shed light on the meaning of s 18C.⁵²

On the other hand, the Federal Court in *Jones v Toben*⁵³ and the Full Court on appeal in the same matter⁵⁴ clearly rejected this reading of s 18C. In *Toben No 1*, Branson J stated '[i]t would be wrong ... to place a gloss on the words used in s 18C of the RDA.'⁵⁵ Indeed, although she took issue with the above analysis of *Cairns Post*,⁵⁶ she understood Kiefel J to have elicited

a legislative intent to render unlawful only acts which fall squarely within the terms of the section and not to reach to 'mere slights' in the sense of acts which, for example, are reasonably likely to cause *technical, but not real*, offence or insult.⁵⁷

By these words I understand Branson J to be saying that a minor though technical breach of the s 18C harm threshold should not be actionable because this is what *Parliament* intended. But if the ordinary meaning of the words in s 18C are clear enough then so too must be the intent of Parliament⁵⁸ — that is, an act, irrespective of its seriousness or otherwise, which is reasonably likely to offend, insult, humiliate or intimidate because of the person's race or ethnicity infringes s 18C and *is* actionable. A minor or technical breach of s 18C is therefore, by definition, still an act that falls within the terms of the section. Consequently, to draw a distinction between a *technical* and *real* breach of s 18C based upon a judicial understanding of parliamentary intent is to implicitly acknowledge the indeterminacy of the s 18C harm threshold and to effect the same interpretive result that Branson J expressly eschewed, namely to 'place a gloss on the words used in s 18C of the RDA.'⁵⁹ In other words, no distinction between a technical and real breach of s 18C need be drawn if the terms and scope of the section were clear and readily ascertainable.

The reality is, however, that without the notion of racial hatred colouring the interpretation of the harm threshold, the opposite conclusions regarding this part of

⁵² See also the comments in *McLeod v Power* (2003) 173 FLR 31 (Brown FM) [67] ('*McLeod*'). But see *Cairns Post* (2001) 112 FCR 352, 357 [18] where Kiefel J stated that '[w]hilst one may accept that hatred of other races is an evil spoken of in the statute, I do not consider that the heading creates a separate test — one which requires the behaviour to be shown as having its basis in actual hatred of race.'

⁵³ [2002] FCA 1150 (Branson J) ('*Toben No 1*').

⁵⁴ *Toben v Jones* (2003) 199 ALR 1 ('*Toben No 2*').

⁵⁵ *Toben No 1* [2002] FCA 1150 [92].

⁵⁶ *Ibid* where Branson J stated that

[i]n *Creek v Cairns Post Pty Ltd* Kiefel J observed: 'To offend, insult, humiliate or intimidate' are profound and serious effects, not to be likened to mere slights." I do not understand her Honour to have intended by the above observation to imply that a gloss should be placed on the ordinary meaning of the words that Parliament chose to include in s 18C of the RDA.

⁵⁷ *Ibid* (emphasis added).

⁵⁸ *Acts Interpretation Act 1901* (Cth) s 15AA. In *R v L* (1994) 122 ALR 464, 468–9 Burchett, Miles and Ryan JJ stated that '[t]he requirement of s 15AA(1) that one construction be preferred to another can have meaning only where two constructions are otherwise open, and s 15AA(1) is not a warrant for redrafting legislation nearer to an assumed desire of the legislature.'

⁵⁹ *Toben No 1* [2002] FCA 1150 [92].

s 18C were reasonably open and defensible in *Bryant, Shron*⁶⁰ and possibly even *De La Mare*,⁶¹ cases involving the sort of low-end conduct that based on the explanatory memorandum and second reading speech for the RHA the Parliament, arguably, had no intention of legally proscribing. Moreover, if the harm threshold were not elevated in these matters the further danger is the possibility that the efficacy of the law will be undermined if seen to operate on conduct most would consider slight and lacking the degree of seriousness necessary to warrant state intervention.

(2) *No s 18C harm threshold analysis or reasoning*

In at least five matters there has been a s 18C finding without any supporting harm threshold analysis or reasoning.⁶² This practice alone gives the *appearance* of arbitrary and unprincipled decision-making. However it may be the regrettable but inevitable consequence of having to apply an indeterminate harm threshold to a range of controversies of varying degrees of seriousness. The relevant determinations state what the law directs in each matter without disclosing the legal reasons why. In this regard they more closely resemble an intuitive, result-orientated finding of fact based upon the decision-maker's conception of what justice required. In some cases it may be that the judge or administrator considered it to be self evident that the conduct crossed the harm threshold.⁶³ But the other cases, where the illegality of the conduct was not so clear-cut, are more problematic.

For example, *Combined Housing*⁶⁴ involved a statement made in a newspaper interview by Pauline Hanson. In response to the question as to whom she represented in the seat of Oxley, she replied: 'Yeah, look, the white community, the immigrants, the Italians, Greeks, whoever, it really doesn't matter, you know, *anyone apart from Aboriginal and Torres Strait Islanders*, you know.'⁶⁵ In dismissing the complaint, Sir Ronald Wilson stated that 'I appreciate that the complainants and *many other members of*

⁶⁰ In *Shron* [1998] HREOCA 24, Commissioner Innes held that a Telstra phone card containing 'a picture of a World War II German fighter plane with a Nazi swastika on its tail' was not "reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate" the complainant or some or all of a group whose origin is Jewish.'

⁶¹ *De La Mare* [1998] HREOCA 26 concerned a television program called 'Darkest Austria' which satirised the content and stereotypes of ethnographic documentaries that examine African culture and traditions. The program amongst other things discussed 'expeditions' to 'the heart of Europe' and 'the natives' (Austrian men) love of 'magic paper' (money) and the ritual of 'drinking festivals' and the 'state of trance' (drunkenness) they induced. Commissioner McEvoy at [5.2.2] held that 'it [was] not reasonably likely that the broadcast of the film *Darkest Austria* would have offended, insulted, humiliated or intimidated any person or group of persons.'

⁶² *Rugema v J Gadsten Pty Ltd* [1997] EOC ¶92-887 ('*Rugema*'); *Combined Housing Organisation Ltd v Hanson* [1997] HREOCA 58 ('*Combined Housing*'); *Feghaly* [2000] EOC ¶93-090; *McMahon v Bowman* [2000] FMCA 3 (Raphael FM) ('*McMahon*'); *Horman v Distribution Group* [2001] FMCA 52 (Raphael FM) ('*Horman*').

⁶³ This may explain the determinations in *Rugema* and *McMahon* where the relevant statements involved were respectively you 'lazy black bastard' uttered by an employer to an employee and 'get off my property you black bastard' from one neighbour to another.

⁶⁴ [1997] HREOCA 58.

⁶⁵ *Ibid* 2 (emphasis added).

the community may find them misguided, unwarranted and *offensive*'.⁶⁶ The point is not that the decision ultimately made was perverse or erroneous, but the complete absence of harm threshold analysis and justificatory legal reasoning when the opposite conclusion was reasonably open, is problematic.⁶⁷

This absence can be explained in two ways. Firstly, it implicitly acknowledges that the legal rule in s 18C is closer to a 'personal discretion to do justice'.⁶⁸ Indeed the enjoiner in s 18C to assess the conduct *in all the circumstances* may positively direct this conclusion. The open-ended nature of the s 18C harm threshold makes its application in cases 'not so much pronouncing the law in the normal sense as engaging in the less exalted function of fact-finding'⁶⁹ – a function the discharge of which legal reasoning can play no meaningful part. It may explain why in these matters the s 18C determinations were simply *asserted* rather than arrived at by way of principled legal analysis. Justice Scalia of the United States Supreme Court explains the repercussions when a law, such as s 18C, in truth amounts to a 'personal discretion to do justice'.⁷⁰

[A]t the point where ... [a decision-maker] says that the remaining issue must be decided on the basis of the totality of the circumstances, or by a balancing of all the factors involved, he begins to resemble a finder of fact more than a determiner of law. To reach such a stage is, in a way, a regrettable concession of defeat — an acknowledgment that we have passed the point where 'law', properly speaking, has any further application. And to reiterate the unfortunate practical consequences of reaching such a pass when there still remains a good deal of judgment to be applied: equality of treatment is difficult to demonstrate and, in a multi-tiered judicial system, impossible to achieve; predictability is destroyed; judicial arbitrariness is facilitated; judicial courage is impaired.⁷¹

Secondly, if, as suggested above, legal reasoning can play no meaningful role in making a s 18C determination, then the absence of analysis in these matters is understandable, inevitable even. This point is really a corollary of the first. It means that in many cases harm threshold analysis is a futile exercise for it cannot assist nor direct the decision-maker in pronouncing the law with any degree of certainty or predictability. The disposal of the legal issue in s 18C boils down to a judge or administrator making a good faith but subjective value judgment as to whether or not the impugned conduct crosses the harm threshold.

Moreover, the indeterminacy of s 18C is further compounded through its incorporation of an objective test of liability. As earlier noted, the harm threshold is crossed when 'the act is *reasonably likely*, in all the circumstances, to offend, insult,

⁶⁶ Ibid. For a detailed critique of *Combined Housing* see Lawrence McNamara, 'The Things You Need: Racial Hatred, Pauline Hanson and the Limits of the Law' (1998) 2 *Southern Cross University Law Review* 92.

⁶⁷ A similar criticism can be levelled at the decision in *Horman* [2001] FMCA 52. In that case, Raphael FM held that a number of racial epithets directed at an employee breached s 18C without addressing the respondent's argument that they were made in jest and with the consent of the complainant.

⁶⁸ Scalia, above n 20, 1176.

⁶⁹ Ibid 1180–1. It should be noted that a bright line cannot be drawn between law and fact in many instances. But the use of 'in all the circumstances' in s 18C makes clear that liability will turn on a factual determination not the application of an existing legal standard to those facts. In other words, in this situation the factual determination *is* the law not the precondition for the application of the law.

⁷⁰ Ibid 1176.

⁷¹ Ibid 1182.

humiliate or intimidate another person or a group of people'.⁷² The "reasonable man" standard⁷³ has been called 'the most venerable totality of the circumstances test of them all'.⁷⁴ The problem lies not so much in what that standard entails but achieving a degree of consistency in its application. There now seems to be some consensus that the relevant standard is closer to the reasonable victim rather than reasonable person 'of the generic, ostensibly "neutral" kind'.⁷⁵ In the cases this usually translates to an assessment of the impugned conduct against the likely effect in all the circumstances on a reasonable person of the same relevant race or ethnicity.⁷⁶ On this point, the Federal Court matter of *Hagan*⁷⁷ is instructive. The case concerned the name of a grandstand at a sports field (The ES 'Nigger' Brown Stand) that was named after a local, white sporting identity in 1960. The origins of the name were not certain but it was likely that it referred not to Brown's skin colour but his reputation for smart dressing and wearing dark brown shoes, a colour apparently then known as 'nigger brown'.⁷⁸ In dismissing the complaint, Drummond J held that the act was not 'reasonably likely in all the circumstances to offend, insult, humiliate or intimidate *an indigenous Australian or indigenous Australians generally*'.⁷⁹ But surely the opposite conclusion was reasonably open,⁸⁰ the point being that the application of this legal standard still left the decision-maker with much, if not all, to do. The critical decision is in truth a question of fact for which 'there is no single "right" answer'.⁸¹

When the outcomes arising from the application of a legal rule are not in most cases directed, or at least suggested, as a matter of law and are not therefore susceptible to ordinary, justificatory legal reasoning, the relevant law lacks sufficient precision and clarity.

(b) The causal connection: when is an act done because of the race, colour or national or ethnic origin of another person or group?

This issue requires that a decision-maker be satisfied that a causal connection exists between the impugned conduct and the race or ethnicity of the complainant. However the cases are conflicting as to the *strength* of the causal connection required. The

⁷² RDA s 18C(1)(a) (emphasis added).

⁷³ Scalia, above n 20, 1181.

⁷⁴ Ibid.

⁷⁵ McNamara, above n 3, 88.

⁷⁶ See, eg, *Bryant* [1997] HREOCA 23 (President Wilson); *Shron* [1998] HREOCA 24 (Commissioner Innes); *Cairns Post* (2001) 112 FCR 352, 356–7 [16] (Kiefel J); *Corunna v West Australian Newspapers Ltd* (2001) EOC ¶93–146, 75468 ('Corunna'); *McLeod* (2003) 173 FLR 31 [65] (Brown FM); *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615 [16] (Drummond J) ('*Hagan*'). But see *De La Mare* [1998] HREOCA 26 [5.2.2] where Commissioner McEvoy stated that the relevant test was 'whether a reasonable person in all the circumstances would be likely to have been offended, insulted, humiliated or intimidated.'

⁷⁷ *Hagan* [2000] FCA 1615 (Drummond J).

⁷⁸ Ibid [10]–[13].

⁷⁹ Ibid [31] (emphasis added).

⁸⁰ For detailed discussion of *Hagan* see Ernst Willheim, 'Australia's Racial Vilification Laws Found Wanting? The "Nigger Brown" Saga: HREOC, the Federal Court, the High Court and the Committee on the Elimination of Racial Discrimination' (Speech delivered at the International Law/Public Law Seminar, Canberra, 5 August 2003).

⁸¹ Scalia, above n 20, 1181.

problem is that in some cases involving less serious conduct (and therefore the more difficult, borderline controversies) a pattern seems to have emerged where the decision-maker *in fact* requires the establishment of a stronger causal connection. This of course reduces the chance of a complaint being substantiated. There are at least four cases where this has occurred.⁸² The clearest examples were *Hanson* and *Korczak*.

Hanson concerned comments made in a book entitled *Pauline Hanson – The Truth: on Asian Immigration, the Aboriginal Question, the Gun Debate and the Future of Australia*.⁸³ The book included a number of speeches made by Pauline Hanson and detailed commentary by the author of the book, George Merritt. These contained a range of assertions including that Aboriginals were 'unfairly favoured by governments and courts',⁸⁴ that Aboriginal Australians had also behaved badly in the past and 'that the alleged genocide of Aboriginal people [was] a myth'.⁸⁵ In addition, tracts in the book suggested that Aborigines had engaged in cannibalism of their young and some Chinese persons.⁸⁶ Commissioner Nader held that s 18C was not breached as

the statements made were not made 'because of the race, colour or national or ethnic origin' of the complainants. They were made because the respondents were of the opinion that the Aboriginal community as a whole were being unfairly favoured by governments and courts. On the evidence before me, it was not the race or colour of Aboriginal people that was the cause of what the respondents said but the alleged fact that Aboriginal people were being unfairly favoured.⁸⁷

In a case that the decision-maker thought involved borderline conduct (not a view shared by this writer at least so far as s 18C is concerned) a very strong causal connection between the conduct and the person's race or ethnicity was required. Indeed on these particular facts, one is left to ponder what kind of additional conduct *could* have established the required causal connection in s 18C.

Korczak, on the other hand, involved a number of instances of workplace abuse of an employee of Polish origin. Whilst Commissioner Innes considered 'that race was a factor in the work environment',⁸⁸ he nonetheless dismissed the complaint because 'Mr Korczak [had] not established that the conduct he [alleged] could be said to have occurred "by reason of" or "because of" his race or national origin'.⁸⁹ This notwithstanding that s 18B states that an 'act is taken to be done because of the person's

⁸² *Korczak v Commonwealth* (Unreported, Human Rights and Equal Opportunity Commission, Commissioner Innes, 16 December 1999) ('*Korczak*'); *Walsh v Hanson* (Unreported, Human Rights and Equal Opportunity Commission, Commissioner Nader, 2 March 2000) ('*Hanson*'); *Cairns Post* (2001) 112 FCR 352 (Kiefel J); *McLeod* (2003) 173 FLR 31 (Brown FM).

⁸³ George Merritt (ed), *Pauline Hanson – The Truth: on Asian Immigration, the Aboriginal Question, the Gun Debate and the Future of Australia* (1997).

⁸⁴ *Hanson* (Unreported, Human Rights and Equal Opportunity Commission, Commissioner Nader, 2 March 2000) 23.

⁸⁵ *Ibid* 24.

⁸⁶ *Ibid* 4–7.

⁸⁷ *Ibid* 28 (emphasis in original).

⁸⁸ *Korczak* (Unreported, Human Rights and Equal Opportunity Commission, Commissioner Innes, 16 December 1999) 30–1.

⁸⁹ *Ibid*.

race, colour, national or ethnic origin' if *one* reason for the act is a person's race or ethnicity whether or not it is the dominant or substantial reason.⁹⁰

The problem is that in other cases where the seriousness of the racist conduct is more clear-cut, the decision-makers have not insisted upon such a strong causal connection.⁹¹ On one level this is unremarkable, as the more serious the conduct, the more self-evident the causal connection will usually be. This is particularly so, since, as noted above, s 18C requires that race or ethnicity need only be *a* reason, not even the primary or dominant one, for the act. For example, it could not be reasonably argued that race or ethnicity was not at least *a* reason for the impugned conduct in *Toben No 2*⁹² or *Scully*.⁹³ These cases involved the publication of vicious anti-Semitic propaganda on the internet and in a pamphlet respectively.⁹⁴ But if one were to *apply* the test in the strict manner evident in *Hanson* and *Korczak* there is, bizarrely, an argument that no causal connection exists between these seemingly serious and clear-cut examples of racist conduct and the race or ethnicity of those persons involved.⁹⁵

It is possible that the emerging pattern of a stricter causation test being applied in cases involving less serious conduct may be another manifestation of the relevant decision-makers endeavouring to read the open-ended terms in s 18C in a manner that honours parliamentary intent. That is, seeking to limit the operation of the provision to acts of racial hatred.⁹⁶

However, the practice of applying the same causation test differently depending on the seriousness of the impugned racist conduct is problematic. In practical terms, it makes it increasingly difficult for lawyers to provide sound and prudent advice in this area and for citizens to arrange their affairs accordingly. Inconsistent and unpredictable decision-making is the handmaiden of inequality before the law. It is the situation which regrettably pertains to the application of the causation test in the above controversies and, as suggested in preceding parts of this article, to s 18C determinations more generally.

⁹⁰ Commissioner Innes did, however, expressly acknowledge that race need only be one reason for the respondent's act: *ibid* 30.

⁹¹ See, eg, the matters of *Toben No 2* (2003) 199 ALR 1 and *Scully* (2002) 120 FCR 243 (Hely J) that involved the publication of vicious anti-Semitic propaganda on the internet and in a pamphlet respectively. It could not be reasonably argued that race or ethnicity was not at least *a* reason for the conduct in these cases.

⁹² (2003) 199 ALR 1.

⁹³ (2002) 120 FCR 243 (Hely J).

⁹⁴ It included that Jews 'have their snout in the trough ... called, "The Holocaust Racket": *Toben No 2* (2003) 199 ALR 1, 7 (Carr J); and that 'the philosophy and teachings and practice of Jews ... promotes ... paedophilia ... [and] is worse than a satanic cult': *Scully* (2002) 120 FCR 243, 248 [46].

⁹⁵ For example, in *Toben No 2* (2003) 199 ALR 1, 18 (Allsop J), the appellant argued that he was motivated by the search for historical truth not a desire to convey a message about Jews. See also *Scully* (2002) 120 FCR 243, 273 [115].

⁹⁶ In *Korczak* (Unreported, Human Rights and Equal Opportunity Commission, Commissioner Innes, 16 December 1999) 30 Commissioner Innes stated that 'an allegation of racial discrimination is an *extremely serious one* and I must have sufficient evidence before me of the appropriate nexus between the conduct and the complainant's race before I can make a finding that race discrimination has occurred.' On this point see above, Part II(a)(1) 'Elevating the s 18C harm threshold.'

III 'FREE SPEECH/PUBLIC INTEREST DEFENCES' UNDER THE RDA AND STATE AND TERRITORY RACIAL VILIFICATION LAWS

(a) Criticisms and sources of interpretative guidance

The primary concern of Australian Parliaments that have proscribed racial vilification has been to draft laws that do not unduly infringe upon freedom of speech.⁹⁷ To this end, the State and Commonwealth racial vilification laws incorporate a range of defamation-style defences⁹⁸ which if successfully pleaded relieve the respondent of liability, notwithstanding that their conduct has crossed the relevant harm threshold.⁹⁹ The only exception to this common legislative framework is the racial vilification provisions in the Western Australian *Criminal Code*.¹⁰⁰ They create four specific *criminal* offences which cannot be resisted by claims that the criminal acts were committed as a legitimate exercise of free speech¹⁰¹ or in the public interest.¹⁰²

Whilst minor differences do exist between the jurisdictions regarding the precise content of the 'free speech/public interest defences', s 20C(2) of the *Anti-Discrimination Act 1977* (NSW) is fairly representative of what these provisions contain. It reads:

Nothing in this section renders unlawful:

(a) a fair report of a public act referred to in subsection (1), or

⁹⁷ For a more detailed discussion on this point see McNamara, above n 3, 43–9, 127–30, 234–7, 272–9, 304–7.

⁹⁸ On the similarities between defamation defences and those available under Australian racial vilification laws see Michael Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant* (2000) 204–10.

⁹⁹ *Anti-Discrimination Act 1977* (NSW) s 20C(2); *Wrongs Act 1936* (SA) s 37(1); *Discrimination Act 1991* (ACT) s 66(2); *Anti-Discrimination Act 1991* (Qld) s 124A(2); *Racial and Religious Tolerance Act 2001* (Vic) s 11; *Anti-Discrimination Act 1998* (Tas) s 55. In each of these laws the defences need only be considered once a decision-maker determines that the impugned conduct has in fact crossed the relevant harm threshold. In some cases (*De La Mare* [1998] HREOCA 26 [5.2.2] (Commissioner McEvoy); *Bryl v Nowra* [1999] HREOCA 11 [4.3]–[5] (Commissioner Johnston) ('*Bryl*'); *Hanson* (Unreported, Human Rights and Equal Opportunity Commission, Commissioner Nader, 2 March 2000) 25–9) the decision-makers have examined the defences without making this logically prior holding. On this point see McNamara, above n 3, 96–9. As earlier noted, this clearly goes against the order logically mandated by the text and structure of the relevant laws.

¹⁰⁰ *Criminal Code* (WA) ss 77–80.

¹⁰¹ For a discussion on the relationship between the implied constitutional right to freedom of political communication and the inclusion of the 'free speech/public interest defences' see below Part III(b) 'The impact of the free speech cases on the content of the racial vilification defences.'

¹⁰² This reflects the common distinction in content between criminal laws and human rights laws. The former is determined in courts, primarily punitive, concerned with more serious conduct and therefore unlikely to provide a defence(s) on public interest grounds. The latter is designed to promote and secure human rights through a variety of non-criminal and often non-judicial measures such as private conciliations, public inquiries and administrative orders to desist from racially offensive conduct. Human rights law also seeks to strike an appropriate balance between a range of different rights. This explains why an act of racial vilification may still be protected on 'free speech/public interest grounds'.

- (b) a communication or the distribution or dissemination of any matter comprising a publication referred to in Division 3 of Part 3 of the *Defamation Act 1974* or which is otherwise subject to a defence of absolute privilege in proceedings for defamation, or
- (c) a public act, done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter.

Indeed, close to identical defence provisions have been enacted in South Australia, the Australian Capital Territory, Queensland and Tasmania, whilst the Victorian equivalent differs a little in form but not substance.¹⁰³

However, a number of commentators have criticised the overly broad nature of the defences.¹⁰⁴ For example, in relation to the RDA Melinda Jones writes that

among the exemptions in s18D is the statement that s 18C does not render unlawful anything said or done reasonably and in good faith in making or publishing a fair comment 'on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment'. It is possible that this section may provide a defence to the most extreme racists, who are truly convinced of the truth of 'white supremacy'. A further problem potentially arises with respect to the defence for artistic works, which may provide a shield behind which to present material which would otherwise be unlawful.¹⁰⁵

A very similar criticism has been made by Luke McNamara and Tamsin Solomon,¹⁰⁶ whilst Ian Freckelton argues that the broad sweep of the RDA defences was designed to compensate for the open-ended nature of the s 18C harm threshold.¹⁰⁷ It should, however, be noted that in one respect the criticism made by Jones, Solomon and McNamara is probably overstated. The additional requirement that a fair comment on a matter of public interest must be made 'reasonably and in good faith' has operated *in practice* to limit the likelihood of this defence protecting the most extreme examples of racial vilification. This is a point examined in more detail below.¹⁰⁸

In any event, the essence of these criticisms is that due to the subjective and indeterminate nature of the language used in these provisions, on at least one reading of these 'free speech/public interest defences', there is a danger that the exceptions

¹⁰³ Unlike the racial vilification laws in New South Wales, the Australian Capital Territory, South Australia, Queensland and Tasmania, the provisions in the *Racial and Religious Tolerance Act 2001* (Vic) do not protect conduct that is absolutely privileged under defamation law. This is of no great practical import as it is unlikely that racist conduct which attracts absolute privilege could then be the subject of a complaint under the relevant racial vilification provisions in the absence of express legislative sanction.

¹⁰⁴ See Melinda Jones, 'The Legal Response: Dealing with Hatred — a User's Guide' in Chris Cunneen, David Fraser and Stephen Tomsen (eds), *Faces of Hate: Hate Crime in Australia* (1997) 214, 218–19; Freckelton, above n 27, 327, 349–50; Tamsin Solomon, 'Problems in Drafting Legislation Against Racist Activities' (1994) 1 *Australian Journal of Human Rights* 265, 276–7; Kelly-Anne Collins and Karen Sampford, *Laws Against Inciting Racial or Religious Vilification in Queensland and Australia: The Anti-Discrimination Bill 2001*, Research Bulletin No 1/01 (2001) 18–19. But see Russell Blackford, 'Free Speech and Hate Speech' (2001) 45 *Quadrant* 10, 14–16.

¹⁰⁵ Jones, 'The Legal Response: Dealing with Hatred — a User's Guide' above n 104, 219.

¹⁰⁶ Luke McNamara and Tamsin Solomon, 'The Commonwealth Racial Hatred Act 1995: Achievement or Disappointment?' (1996) 18 *Adelaide Law Review* 259, 269–70.

¹⁰⁷ Freckelton, above n 27, 327, 350.

¹⁰⁸ See below Part III(c)(2) 'Reasonably'.

may well swallow the rule.¹⁰⁹ If even approximating the truth, such an outcome would condemn racial vilification laws to the dustbin of legal history. Of course in practice, the decision-makers charged with the interpretation and application of these racial vilification laws ensure that such an unacceptable interpretive deadlock will not occur. Their judgments fashion an outcome that gives the laws an effective sphere of operation.¹¹⁰ The common law interpretive principle that all statutory words and phrases (and therefore provisions) have meaning and effect guarantees as much.¹¹¹ But the open-ended nature of these defences would still seem problematic for the same reasons earlier outlined in the RDA 'harm threshold' analysis – that a law lacking sufficient precision and clarity results in unpredictable decision-making and the development of an unprincipled body of case law. However, though the language employed may be indeterminate, to a significant extent this interpretive malady is assuaged by the concrete guidance that decision-makers can obtain from the rich and extensive defamation law jurisprudence from which the 'free speech/public interest defences' largely originated.¹¹²

In relation to the New South Wales defences (and by implication the identical or closely-related provisions in the Australian Capital Territory, South Australia, Queensland, Victoria and Tasmania) Michael Chesterman notes that 'the three grounds of exoneration have parallels amongst the defences to an action for defamation.'¹¹³ There are defences under these racial vilification laws for communications that would constitute a fair report on any public act, attract absolute privilege or were made reasonably and in good faith for an academic, artistic, scientific, research or any other purpose in the public interest.¹¹⁴

There are, however, significant differences between the defamation and vilification defences. Particularly in regards to 'fair report privilege' in defamation law which 'is almost entirely concerned with reports of the proceedings of, or formal documents put out by, official bodies such as courts and houses of parliament.'¹¹⁵ Its racial vilification law 'equivalent' is considerably wider in covering a fair report of any 'public act'. Moreover, Commissioner Innes in *Corunna* suggests that the different focus of defamation law (individual reputation protection) and racial vilification law

¹⁰⁹ A similar point was made by Michael Cobb during the parliamentary debates for the RHB. See Commonwealth, *Parliamentary Debates*, House of Representatives, 15 November 1994, 3383 (Michael Cobb).

¹¹⁰ This important point is simply illustrated by the growing body of racial vilification case law. Though not always coherent and principled, the laws have nonetheless been interpreted and applied.

¹¹¹ *Commonwealth v Baume* (1905) 2 CLR 405, 414 (Griffith CJ); *Minister for Resources v Dover Fisheries Pty Ltd* (1993) 116 ALR 54, 63 (Gummow J). See further Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (4th ed, 1996) 35.

¹¹² See further Chesterman, above n 98, 208.

¹¹³ *Ibid* 206.

¹¹⁴ But see *ibid* 204–5 where Chesterman notes that in relation to the New South Wales-based legislation '[t]he contribution of defamation law ... resides chiefly in the substantive provisions defining liability.' In particular, 'the statutory formula defining the reaction which must be "incited" within the third party – namely, "hatred", "serious contempt" or "severe ridicule" – echoes the "classic" definition, now more than 150 years old, of the term "defamatory".'

¹¹⁵ *Ibid* 206 (footnote omitted). See further 211–16 regarding the differences between the RDA defences and those available under civil defamation law.

(individual and racial group protection) should result in a narrower reading of what is in the 'public interest' for purposes of the latter as it 'has the potential to be more socially divisive than ... an attack against an individual's reputation'.¹¹⁶

The important point however is that, these differences notwithstanding, decision-makers, in being able to draw upon this extensive body of defamation jurisprudence, can at least bring a level of certainty and predictability to the interpretive task which in turn assists the citizenry in the organisation of their affairs and lawyers in the provision of sound advice. Not surprisingly, it is a reference tool that judges and administrators have regularly employed in the interpretation and application of the 'free speech/public interest defences' in the cases.¹¹⁷

(b) The impact of the free speech cases on the content of the racial vilification defences

The recognition by the High Court in 1992 that the *Australian Constitution* contained an implied right to freedom of political communication appeared to play a role in the width of the 'free speech/public interest defences', at least in the case of the *RDA*.¹¹⁸ The most likely concern to the Parliament at the time of drafting were the views expressed by Mason CJ and McHugh J in *Australian Capital Television Pty Ltd v Commonwealth* that a law which sought to restrict the *content* as opposed to the *mode* of a political communication would be extremely hard to justify.¹¹⁹ This approach created a two-tiered test of validity. Laws incorporating content-based restrictions are more strictly scrutinised for their object is the direct curtailment of the freedom. These laws require a 'compelling justification' to be valid, whilst a less stringent test is applied to laws which serve a legitimate public interest but burden the freedom as an incidental effect of their operation. These laws need only be reasonably appropriate and adapted to achieving that legitimate interest to be valid. However, the later unanimous decision in *Lange v Australian Broadcasting Corporation*¹²⁰ endorsed a single test of validity irrespective of the law's content.¹²¹ But, the two-tiered scrutiny standard resurfaced in

¹¹⁶ *Corunna* (2001) EOC ¶93-146, 75472.

¹¹⁷ For example, for the *RDA* see *Cairns Post* (2001) 112 FCR 352, 360 [32] (Kiefel J); *Corunna* (2001) EOC ¶93-146, 75469-75; *Wanjurri v Southern Cross Broadcasting Ltd* [2001] EOC ¶93-147, 75487-9 (Commissioner Innes) ('*Wanjurri*'); *Scully* (2002) 120 FCR 243, 274-5 [122]-[124]; New South Wales — see *Western Aboriginal Legal Service Ltd v Jones* [2000] NSWADT 102 (Judicial Member Rees and Members Silva and Luger) [79]-[127] (Judicial Member Rees and Member Silva) ('*Jones*'); *Malco v Massaris* [1998] NSWEO 226-9 of 1996 (Judicial Member Raphael and Members Greenhill and McDonald) 10-11; Queensland — see *Deen v Lamb* [2001] QADT 20 MIS01/109 (President Sofronoff) 2 ('*Deen*').

¹¹⁸ On this point see McNamara, above n 3, 53; Jones, 'The Legal Response: Dealing with Hatred — a User's Guide' above n 104, 214, 235-6; Saku Akmeemana and Melinda Jones, 'Fighting Racial Hatred' in HREOC, *Race Discrimination Commissioner* (ed), *Racial Discrimination Act 1975: A Review* (1995) 156, 156-7.

¹¹⁹ (1992) 177 CLR 106, 143 (Mason CJ), 234-5 (McHugh J). For a detailed discussion on the scope of 'communication on government or political matters' protected by the *Australian Constitution* see Chesterman, above n 98, 44-63.

¹²⁰ (1997) 189 CLR 520 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) ('*Lange*').

¹²¹ *Ibid* 567.

*Levy v Victoria*¹²² when at least four members of the Court appeared to favour this approach.¹²³

In any event, the view that sufficient width in the 'free speech/public interest defences' was needed to ensure the constitutionality of racial vilification laws has received administrative¹²⁴ and judicial endorsement.¹²⁵ Interestingly however, the New South Wales Parliament, whilst it acknowledged that the defences were included to ensure that free speech was not unduly infringed, was concerned that their potential width could be unscrupulously exploited. The requirement that an act be done 'reasonably and in good faith' was included in the New South Wales defences as a consequence.¹²⁶

The incorporation of this additional requirement (that public acts be done 'reasonably and in good faith' for academic, artistic, scientific or research purposes or other purposes in the public interest) has been replicated in the racial vilification laws of the Australian Capital Territory, South Australia, Queensland and Tasmania.¹²⁷ In the Commonwealth and Victorian laws, the 'reasonably and in good faith' requirement qualifies *all* the 'free speech/public interest defences', not just for the species of public acts noted immediately above. However, what the New South Wales Parliament (and other State and Commonwealth Parliaments by implication¹²⁸) clearly intended to be a limiting requirement has in fact only succeeded in adding another layer of uncertainty to an already indeterminate set of defences. The uncertainty surrounding the proper meaning of 'reasonably', in particular, has compounded the concerns detailed above surrounding the 'free speech/public interest defences'. This uncertainty is amplified in Victoria and at the Commonwealth level where the 'reasonably and good faith' requirement also qualifies the other defamation-style defences. This serves to further

¹²² (1997) 189 CLR 579 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

¹²³ Ibid 614 (Toohey and Gummow JJ), 619 (Gaudron J), 647 (Kirby J). On the scope of the implied constitutional freedom of political communication after *Lange* and *Levy* see Adrienne Stone, 'Case Note: *Lange*, *Levy* and the Direction of the Freedom of Political Communication under the *Australian Constitution*' (1998) 21 *University of New South Wales Law Journal* 117 and Adrienne Stone, 'The Freedom of Political Communication since *Lange*' in Adrienne Stone and George Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (2000) 1.

¹²⁴ See *Deen* [2001] QADT 20 MIS01/109 (President Sofronoff).

¹²⁵ See *Scully* (2002) 120 FCR 243, 306 [240] where Hely J stated that the 'exemptions provide an appropriate balance between the legitimate end of eliminating racial discrimination and the requirement of freedom of communication about government and political matters required by the *Constitution*.' On the constitutionality of Australian racial vilification laws more generally see Chesterman, above n 98, 237–43; McNamara, above n 3, 2–3 and 53; Jones, above n 104, 235–6; McNamara and Solomon, above n 106, 278–83.

¹²⁶ See New South Wales, *Parliamentary Debates*, Legislative Assembly, 4 May 1989, 7490 (John Dowd, Attorney-General).

¹²⁷ *Discrimination Act 1991* (ACT) s 66(2)(c); *Wrongs Act 1936* (SA) s 7(1)(c); *Anti-Discrimination Act 1991* (Qld) s 124A(2)(c); *Anti-Discrimination Act 1998* (Tas) s 55.

¹²⁸ Whilst there is no express mention in the parliamentary debates of the Commonwealth, Australian Capital Territory, South Australia or Queensland as to *why* the 'reasonably and in good faith' requirement were similarly incorporated, it is reasonable to assume that in replicating the New South Wales legislation these Parliaments intended the phrase to connote the same meaning.

convolute the precise content of the defences and in doing so limits the practical utility of the related defamation law jurisprudence to decision-makers.

(c) When is conduct that occasions racial vilification done 'reasonably and in good faith'?

(1) 'Good faith'

This aspect of the additional requirement has been uncontroversial.¹²⁹ The case law reveals reasonably widespread agreement that 'good faith' in the context of these defences 'appears to imply the absence of "spite, ill-will or other improper motive".'¹³⁰ This definition again owes a significant debt to defamation law, in particular, the definition of 'good faith' in the statutory qualified privilege defences available under the defamation laws in Queensland and Tasmania.¹³¹ However, this definition (spite, ill-will or other improper motive) does not constitute the full meaning of 'good faith' for purposes of those laws. For example, the definition of 'good faith' in Tasmania further requires that 'the manner and extent of the publication does not exceed what is reasonably sufficient for the occasion' and that the defendant 'does not believe the defamatory matter to be untrue'.¹³²

Interestingly, the 'manner and extent of the publication' aspect of this 'good faith' definition closely approximates to one of the interpretations given to the term 'reasonably' for the purposes of the 'free speech/public interest defences'. That is, 'reasonably' relates to the *manner* or *method* of the conduct which occasioned the racial vilification not the *message* that the conduct conveyed.¹³³ Why then, one might ask, did the parliaments choose to incorporate an additional term ('reasonably') when a natural reading of 'good faith' may have covered the necessary definitional ground and fulfilled their legislative purpose? Considering the stated intention of the New South Wales Parliament outlined above, it is reasonable to assume that they wanted to make clear that an honest belief *of itself* (arguably one possible reading of 'good faith') was not enough to bring conduct that occasions racial vilification within the province of the 'free speech/public interest defences'. However, the addition of 'reasonably' into the legislative mix has unfortunately served to confuse rather than clarify the precise scope of the defences as is detailed below.

¹²⁹ But see McNamara, above n 3, 94–102.

¹³⁰ Jones [2000] NSWADT 102 [122] (Judicial Member Rees and Member Silva). This definition or close approximations thereof have been endorsed in *Corunna* [2001] EOC ¶93–146, 75447, 75470; *Bryl* [1999] HREOCA 11 [4.3] (Commissioner Johnston); *Wanjurri* [2001] EOC ¶93–147, 75488–9 (Commissioner Innes); *Deen* [2001] QADT 20 MIS01/109, 2 (President Sofronoff); *Toben No 2* (2003) 199 ALR 1, 38–9 (Allsop J).

¹³¹ *Defamation Act 1889* (Qld) s 16; *Defamation Act 1957* (Tas) s 16. At common law the defence of qualified privilege is also defeated if the plaintiff can establish that the publication was for an improper purpose. As Professor Fleming has noted, this is a wider notion than 'malice', 'because the immunity is defeated not only by spite or a desire to inflict harm for its own sake, but by the misuse of the privileged occasion for some other purpose than that for which it was given by law' — John Fleming, *The Law of Torts* (9th ed, 1998) 637.

¹³² *Defamation Act 1957* (Tas) s 16.

¹³³ See below Part III(c)(2) 'Reasonably', where it is suggested that this represents the preferred interpretation of what 'reasonably' means in regards to the racial vilification defences.

McNamara has, however, criticised the meaning ascribed to 'good faith' detailed above. He considers that it

effectively introduces a subjective mens rea component into the definition of racial vilification — at least in circumstances where the conduct in question comes within the forms of communication (including artistic, scientific or academic expression) included in section 18D(a)–(c).¹³⁴

To be sure, the incorporation of 'good faith' in s 18D and the other related provisions imports a subjective notion into the content of the 'free speech/public interest defences'. But this does not change the definition of *racial vilification* nor the objective nature of the test used for determining whether conduct crosses the relevant harm threshold. For it is only when that objective harm threshold is crossed that the defences may come into play. In other words, the relevant conduct has *by definition* (in an objective sense) occasioned racial vilification but may nevertheless escape legal sanction if one of the defences can be established.

Moreover, to interpret 'good faith' in a manner that strips it of any subjective connotation (which is what I understand McNamara to be suggesting in the context of racial vilification law) would fly in the face of both the natural meaning of the words and the technical meaning the phrase has acquired over time in this area of law and a range of others besides.¹³⁵ A reasonable definition of 'good faith' lacking a subjective component seems a contradiction in terms. McNamara further argues that to interpret 'good faith' in this manner 'is inconsistent with the legislation's primary focus on regulating conduct which has the effect of vilifying a particular racial or ethnic group, irrespective of the actor's motive or intention'.¹³⁶ This may of course represent McNamara's view that *no* defences should be available to a person whose conduct crosses the objective harm threshold. But to my knowledge he has not expressly made this argument. His primary concern is that decision-makers may in some instances have given the defences an overly broad reading which could seriously undermine both the substantive content of the racial vilification laws and their long-term utility.¹³⁷ Understood in this context, McNamara's criticism of the 'good faith' definition seems misconceived. For it falls on the *respondent* to establish that, amongst other things, he or she acted in 'good faith'.¹³⁸ The opposite is true in defamation law where a heavy onus falls on the plaintiff to establish that a defendant acted maliciously or for an improper purpose in order to defeat an otherwise arguable claim of qualified privilege.¹³⁹ Indeed, in an important respect the 'good faith' requirement *narrows* the scope of the

¹³⁴ McNamara, above n 3, 98.

¹³⁵ See *Deen* [2001] QADT 20 MIS01/109 2 where President Sofronoff surveys the meaning of 'good faith' in a range of different areas of law and concludes that although 'it is difficult to find a definite exposition of the term', the common thread in every field is 'the use of a power for an improper purpose'. The *Butterworths Concise Australian Legal Dictionary* defines 'good faith' to mean 'propriety or honesty', see Peter Nygh and Peter Butt (eds), *Butterworths Concise Australian Legal Dictionary* (2nd ed, 1998) 194. It is submitted that for a person to do an act for an improper purpose requires that person to make a considered (necessarily subjective) decision.

¹³⁶ McNamara, above n 3, 98 (emphasis in original).

¹³⁷ *Ibid* 94–102; McNamara and Solomon, above n 106, 269–70.

¹³⁸ See *Toben No 1* [2002] FCA 1150 [101].

¹³⁹ *Horrocks v Lowe* [1975] AC 135, 149 (Lord Diplock); *Howe & McColough v Lees* (1910) 11 CLR 361, 373 (O'Connor J). See further Fleming, above n 131, 638.

'free speech/public interest defences' as a respondent will not avoid liability for conduct that occasions racial vilification which otherwise satisfies one of the defences and was reasonable in the circumstances if the actions were motivated by spite, ill-will or any other improper purpose.

(2) 'Reasonably'

(i) *Message or method?*

Whilst the term 'reasonably' was included to narrow the scope of the 'free speech/public interest defences' it has, in fact, only succeeded in adding another layer of uncertainty to the provisions: not such a curious result when one considers the indeterminacy of the word. In any event, two views as to the correct meaning of the term have been advanced in the case law. One set of decisions considers the term to refer to the reasonableness of the *message* that a respondent's conduct has conveyed.¹⁴⁰ Whilst another considers it to refer not to the content of the message per se, but to the reasonableness of the respondent's *method* or *manner* by which they have conveyed their message.¹⁴¹

At first blush, both views are consistent with the stated parliamentary purpose of narrowing the scope of the defences. But an interpretation that requires the *message* to be reasonable rather than the *method* would clearly effect a more significant narrowing.¹⁴² This prima facie precludes from protection conduct which conveys an extreme racist message whereas under the *method* interpretation there is scope for such conduct to be protected so long as the method or manner for conveying the message is reasonable. To this extent, the parliamentary purpose for including 'reasonably' is better secured by the *message* interpretation. Moreover, considering, as was noted above, that one interpretation of 'good faith' may include the method/manner requirement, it could be argued that as a matter of interpretive logic and principle, the

¹⁴⁰ Commonwealth: *Bryl* [1999] HREOCA 11 [4.3] (Commissioner Johnston); *Corunna* [2001] EOC ¶93-146, 75470 (Commissioner Innes); *Wanjurri* [2001] EOC ¶93-147, 75488-9. New South Wales: *Kazak v John Fairfax Publications Ltd* [2000] NSWADT 77 [86]-[92] (Deputy President Hennessy, Members Farmer and Jowett) ('Kazak'); *Jones* [2000] NSWADT 102 [121], [150]-[154] (Judicial Member Rees and Member Silva).

¹⁴¹ Commonwealth: *Scully* (2002) 120 FCR 243, 286 [159]; *Warner v Kucera* [2001] EOC ¶93-137, 75374 (Commissioner Johnston); *Toben No 2* (2003) 199 ALR 1, 13 (Carr J), 19 (Kiefel J), 38 (Allsop J); New South Wales: *Wagga Wagga Aboriginal Action Group v Eldridge* (1995) EOC ¶92-701, 78268 (Judicial Member Bartley and Members Farmer and Luger); *Hellenic Council of NSW v Apoleski* [1997] NSW EOT 9-11 of 1995 16 (Judicial Member Biddulph and Members Alt and Mooney) ('Hellenic Council No 1'); *Hellenic Council of NSW v Apoleski* [1997] NSW EOT 10 of 1995 10 (Judicial Member Biddulph and Members Alt and Mooney). Queensland: *Deen* [2001] QADT 20 MIS01/109, 2 (President Sofronoff).

¹⁴² See, eg *Kazak* [2000] NSWADT 77 (Deputy President Hennessy, Members Farmer and Jowett). The case concerned an article in the *Australian Financial Review* written by the respondent which stated amongst other things that 'the Palestinians cannot be trusted in the peace process' and 'remain vicious thugs who show no serious willingness to comply with agreements.' The article was found to incite an ordinary reasonable reader to hatred or serious contempt of the Palestinians and was not held to be an act done reasonably and in good faith for a purpose in the public interest including discussion or debate about and exposition of any act or matter. For a criticism of this decision see Blackford, above n 104, 14-15.

Parliament must have intended 'reasonably' to possess a different meaning, one that was not totally subsumed by the phrase it immediately precedes.¹⁴³

It is submitted, however, that when one considers why the defences were included in the first place and then reads the racial vilification provisions as a whole, the better view is that 'reasonably' refers to the *method* by which the message is conveyed not the content of the *message* itself. This interpretation is supported by a closer examination of the extrinsic parliamentary materials.

For example, the explanatory memorandum to the RHB stated in relation to the proposed s 18D that

[i]t [was] not the intention of that provision to prohibit a person from stating in public what may be considered generally to be an *extreme view*, so long as the person making the statement does so reasonably and in good faith and genuinely believes in what he or she is saying.¹⁴⁴

In his second reading speech for the RHB, then Attorney-General Michael Lavarch said that '[t]he bill does not prohibit people from expressing ideas or having beliefs, no matter how unpopular the views may be to many other people.'¹⁴⁵ In a similar though more subtle vein, Steve Bracks said in his second reading speech for the Racial and Religious Tolerance Bill 2001 (Vic) in relation to the exemptions for conduct or discussion done for an artistic, academic, religious, scientific or any other purpose in the public interest, 'that the requirement that the conduct be done "reasonably and in good faith" prevents *immoderate or inflammatory conduct* from being protected.'¹⁴⁶

These parliamentary materials suggest that even *extreme* racist messages can be protected if the method or manner in which they are made is reasonable. Indeed the whole point of the defences is to protect debate on sensitive matters of academic, scientific and public interest even when some points of view may be for some (by definition) offensive, humiliating or even intimidating. This point was illustrated in *Deen*. The case involved a pamphlet distributed within an electorate by a political candidate that was critical of the teachings of the Koran, particularly its purported edict to Muslims not to obey secular governments. The President of the Queensland Anti-Discrimination Council in dismissing the application said:

The public has an interest in knowing the opinions of candidates, even when those views are *unreasonable*, unsupportable, one sided or even plainly wrong; and *perhaps particularly when they are of that character*. ... It is enough for this case to observe that the pamphlet has been written in *moderate language*. It is concise and there is no suggestion that it has been published or disseminated other than in the electorate.¹⁴⁷

Moreover, it is submitted that an *extreme* racist message is necessarily unreasonable if it is the *content* of the message that is being assessed as to its reasonableness. Therefore,

¹⁴³ In *Minister for Resources v Dover Fisheries Pty Ltd* (1993) 116 ALR 54, 63 Gummow J stated that because it is 'improbable that the framers of legislation could have intended to insert a provision which has virtually no practical effect, one should look to see whether any other meaning produces a more reasonable result.'

¹⁴⁴ Explanatory Memorandum, Racial Hatred Bill 1994 (Cth) 10-11 (emphasis added).

¹⁴⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 15 November 1994, 3337 (Michael Lavarch, Attorney-General).

¹⁴⁶ Victoria, *Parliamentary Debates*, Legislative Assembly, 17 May 2001, 1286 (Steve Bracks, Premier) (emphasis added).

¹⁴⁷ *Deen* [2001] QADT 20 MIS01/109, 2 (emphasis added).

for better or worse, if the purpose of the 'free speech/public interest defences' is to protect *in certain circumstances* even extreme and unpopular racist messages, the provisions would come to naught if the *message* must be reasonable rather than the *method* of conveying that message. As the Equal Opportunity Tribunal of New South Wales wrote in *Hellenic Council No 1*:

The Tribunal agrees that the words 'done reasonably' relate to the nature of the public act and the way in which it was done and do not require consideration of whether in this case the beliefs stated in the article were in fact reasonable. As argued by counsel for the Second Respondent, 'It is usually the very reasonableness of any particular position which is what is most hotly contested at the front line of any academic discipline'.¹⁴⁸

(ii) *Consequences of the method interpretation*

This interpretation of 'reasonably' (*method* rather than *message*) is consistent with the view that Australian racial vilification laws are primarily concerned with 'incivility' in the style and content of publication of racist material, not racist content as such.¹⁴⁹

But this preferred and apposite interpretation of the 'free speech/public interest defences' creates a further, some argue more sinister, problem for the operation of Australian racial vilification laws.¹⁵⁰ For 'if we limit censorship to the epithet, we create a two-tier approach: chilling of blue-collar muck and preservation of upper-crust mud'.¹⁵¹ In other words, protection is accorded to a racist communication so long as it is made articulately, using scholarly language or socially acceptable conventions. It amounts to a triumph of form over substance if the method rather than the content of the message determines the availability or otherwise of a defence. Whilst this dichotomy may be consistent with the underlying purpose of the racial vilification provisions, the protection of 'upper-crust mud' represents for some a serious and dangerous flaw in Australian racial vilification laws:

[It is a] clear manifestation of the social reality that racist acts of social elites are privileged, even though the harm occasioned by such acts may be more pervasive than that arising from a crude tract.¹⁵²

This is a complex issue in its own right, one of significant theoretical and practical importance to the trajectory and long-term utility of Australian racial vilification laws, an examination of which is beyond the scope of this article. But for the sake of improved legislative clarity Australian Parliaments ought to employ words and phrases when drafting racial vilification provisions that make as plain as possible their specific policy choices. This, in turn, will better facilitate the discharge of their legislative purpose by providing clear guidance to decision-makers as to the proper meaning of these laws. In this regard, adding the word 'reasonably' has served only to confound rather than clarify the proper scope of the 'free speech/public interest defences'. The *extent* to which the Parliament sought to narrow the defences cannot be

¹⁴⁸ *Hellenic Council No 1* [1997] NSWEO 9-11 of 1995 (Judicial Member Biddulph and Members Alt and Mooney) 16 (emphasis added).

¹⁴⁹ Chesterman, above n 98, 226 (emphasis added). Chesterman notes that this situation pertains because, unlike civil defamation law, 'the [racial vilification] legislation requires no consideration of truth or falsity'. On this point see further 215-17.

¹⁵⁰ Ibid 227 quoting Margaret Thornton, *The Liberal Promise* (1990) 50.

¹⁵¹ Nicholas Wolfson, *Hate Speech, Sex Speech, Free Speech* (1997) 48.

¹⁵² Chesterman, above n 98, 227 quoting Thornton, above n 150, 50.

readily ascertained when an indeterminate term like 'reasonably' is chosen to perform that task.

In addition, the preferred *method* interpretation would do little to allay the fears of those commentators concerned that the defences may be given an overly broad reading.¹⁵³ Indeed they would be positively alarmed if I am correct in suggesting that, properly interpreted, the defences will, in some circumstances, protect extreme and unpopular racist messages that are necessarily offensive, humiliating and even intimidating. It appears to protect vile and hateful acts of racial vilification so long as they are communicated in a civil manner.

However in practice, the 'good faith' requirement has operated to preclude the availability of a defence in most cases involving extreme racist conduct. For example in *Scully*, Hely J did not doubt the sincerity of the particularly extreme views expressed by the respondent which, amongst other things, included that the Jews controlled global pornography, had invented the holocaust for financial and political gain and engaged in sexual practices against their children. These were the reasons the respondent proffered to justify the distribution of her leaflets. But as Hely J considered that vilification of Jews was the underlying purpose behind the distribution of the leaflet, 'then reasonableness, good faith and genuineness of purpose would not be found.'¹⁵⁴ Similarly, in *Toben No 2*, Carr J considered that in the appellant's circumstances, 'a reasonable person acting in good faith would have made every effort to express the challenge and his views with as much restraint as was consistent with the communication of those views.'¹⁵⁵

These cases, whilst tending to conflate the 'reasonably' and 'good faith' analysis, suggest that the more extreme the racist message the more likely a decision-maker will find that the conduct was *in fact* done for a purpose other than to further public debate on a matter of academic, artistic, scientific or public interest. In other words, the application of the 'good faith' requirement has served to evaluate the racist *content* of a message and effectively limited how extreme it can be.

But the precise scope of the defences will remain elusive and contested so long as the word 'reasonably' constitutes a key legal standard. And without legislative clarification the interpretive schism that has developed in the case law is likely to deepen. In blurring the line between lawful and unlawful racial vilification and leaving so much of the interpretive work to the relevant decision-makers in individual cases, we can conclude that the 'free speech/public interest defences' lack sufficient precision and clarity. It denies to the citizenry ascertainable racial vilification laws and, therefore, the ability to arrange and conduct their affairs accordingly. Moreover, the indeterminacy of the defence provisions compounds the unpredictable nature of the decision-making process. It leaves more to intuition (and therefore subjective conceptions of justice) than principled legal reasoning. Equality before the law is lost and our system of parliamentary democracy undermined when so much law is left to unelected judges and administrators to create *then* apply on an individual case basis.

¹⁵³ See above Part III(c)(2) 'Reasonably'.

¹⁵⁴ *Scully* (2002) 120 FCR 243, 293 [186] (emphasis added).

¹⁵⁵ *Toben No 2* (2003) 199 ALR 1, 13.

IV CONCLUSION

(a) The important role of racial vilification laws in Australia

It has not been the purpose of this article to suggest that racial vilification laws have no place on the Australian legal landscape. To the contrary, they represent an important recognition by the state that acts of racial vilification inflict real and serious harm upon its victims and, left unchecked, have the capacity to undercut the vibrant but fragile multicultural community that has developed in Australia since World War II. Moreover, core democratic principles such as legal equality, personal liberty and freedom of speech become empty, rhetorical slogans if routinely denied (by law) to minority racial and ethnic groups who lack political clout. But law is just but one of the many tools that can and should be utilised to regulate and combat racial vilification and one should not overestimate its ability to effect grass roots attitudinal changes.¹⁵⁶

However, as difficult as the task most certainly is for legislators, the answer lies not in drafting broad-brush laws that leave too much to the good sense and intuition of individual judges and administrators. In the area of racial vilification, where emotions run high and the legal, cultural and physical consequences deep for the perpetrator, victim and the wider community, we are best served by legislative pronouncements that are sufficiently clear and precise.

(b) The need to amend the wording of the harm threshold in s 18C of the RDA

My analysis has shown that the harm threshold and causation test in s 18C of the RDA lack sufficient precision and clarity. This is problematic for the reasons earlier outlined. There is an argument that over time the development of the case law may endow words such as 'insult' and 'offend' with concrete meaning. This could in turn secure a level of clarity in the harm threshold and predictability in the decision-making process.¹⁵⁷ But there are two reasons that suggest otherwise. Firstly, as earlier noted, the interpretive malady that has plagued the interpretation and application of s 18C stems from a dislocation between parliamentary intent and the words chosen to realise that intent.¹⁵⁸ Indeed my case analysis shows that decision-makers have attempted to rectify the problem by effectively elevating the harm threshold. Whilst this approach may have delivered just and reasonable results in individual cases, it cannot secure the long-term interpretive clarity that is needed as not all decision-makers subscribe to this harm threshold interpretation.¹⁵⁹ Secondly, s 18C is now ten years old. The harm threshold has already been the subject of considerable case law analysis but the indeterminacy that has plagued its interpretation still persists. The interpretive malady is a legislative creation that judicial and administrative exegesis has not resolved. It is therefore sensible to consider the repeal or significant amendment of the current harm threshold.

¹⁵⁶ On this point see Jones, 'Empowering Victims of Racial Hatred by Outlawing Spirit-Murder' above n 5, 313–17.

¹⁵⁷ Thanks to one of the anonymous referees for pointing out this argument to me.

¹⁵⁸ See above Part II(a)(1) '*Elevating the s 18C harm threshold: parliamentary intent and the interpretive malady*'.

¹⁵⁹ See, eg, above Part II(a)(1) for a discussion of the judgment of Branson J in *Toben No 1* [2002] FCA 1150.

One option available to the Commonwealth Parliament is to expressly incorporate the notion of racial hatred into the harm threshold. This could be achieved by adopting the classic defamation standard of 'hatred, serious contempt or severe ridicule', one already present in the racial vilification laws of New South Wales, the Australian Capital Territory, South Australia, Queensland, Victoria and Tasmania. This would not completely solve the harm threshold indeterminacy concerns as the precise meaning of words such as 'hatred' and 'contempt' can be similarly elusive.¹⁶⁰ But these concerns would be substantially eased with the Commonwealth decision-makers able to draw upon both the developing body of harm threshold determinations in the States and the Australian Capital Territory and the extant rich and extensive defamation law jurisprudence. In addition, it is probably easier for both citizens and decision-makers to identify with some confidence an act of racial hatred as opposed to one that may cause insult or offence. It is certainly arguable that the subjective component of racial vilification is likely to lessen the more extreme its form. Though a pragmatic point, it may assist citizens in better understanding the scope of racial vilification laws and their corresponding legal rights and obligations and facilitate more consistent and predictable judicial and administrative decision-making. Such an amendment would also align the law with the putative intention of the Parliament when they enacted the racial vilification provisions and remove or nullify the current interpretive malady. Finally, elevating the harm threshold in this manner would reduce the likelihood of the law unreasonably interfering with or pre-emptively chilling the legitimate communication interests of others.

(c) Low-end racial vilification should remain unregulated

A corollary of the harm threshold proposal is that low-end racial vilification should remain unregulated. The less serious the conduct the more subjective the notion of racial vilification tends to become. For example, with the so-called 'war on terror' in full swing and the political prominence of border protection issues, the publication of a strong anti-Arab immigration tract constitutes perfectly legitimate communication for some. But for others, it represents classic racial vilification and for the same reasons. The task of objectively identifying racial vilification at the lower end is more difficult and contested.¹⁶¹ Also, as noted above, a law that attempts to regulate low-end racial vilification is far more likely to unreasonably interfere with or pre-emptively chill the legitimate communication interests of others. The fields of science, academia and public affairs are replete with instances of vigorous but honest opinions that are clearly racist.¹⁶² Whilst these views *will be* insulting and offensive to some, free speech and

¹⁶⁰ See, eg, *R v Keegstra* [1990] 3 SCR 697, 855-6 (McLachlin J) where her Honour outlined the difficulties and dangers associated with seeking to interpret the word 'hatred'. '[It] is a broad term capable of catching a wide variety of emotion. It is not only the breadth of the term "hatred" which presents dangers; it is its subjectivity.'

¹⁶¹ See Chesterman on this point, above n 98, 227 where he notes that '[e]stablishing the right boundary between the forceful expression of biased but honest opinions and blatant racist ideology is one of the hardest tasks of any law dealing with racial vilification.'

¹⁶² Margaret Thornton offers the example of Professor Geoffrey Blainey and his views on Asian immigration articulated in his book, *All for Australia* (1984), see Thornton, above n 150, 50. Other examples of forceful expressions of biased but probably honest opinions that also encompass a racist ideology could include George Merritt (ed), *Pauline Hanson – The Truth: on Asian Immigration, the Aboriginal Question, the Gun Debate and the Future of Australia* (1997); Carl Campbell Brigham, *A Study of American Intelligence* (1923); Madison

communication interests ought to prevail at the lower end of the racial vilification spectrum.

(d) Legislative clarification required as to the scope of the defences, in particular, the meaning of 'reasonably and in good faith'

In addition, the RDA harm threshold problem is compounded by the language of the 'free speech/public interest defences' and the indeterminacy they engender. It stems from the requirement that public acts be done 'reasonably and in good faith' for academic, artistic, scientific or research purposes or other purposes in the public interest. This is a standard (and therefore problem) reproduced in the racial vilification laws of the Australian Capital Territory, New South Wales, South Australia, Queensland, Victoria and Tasmania. On a broad view of the 'reasonably and good faith' requirement and the defences more generally, there is the danger that the exceptions may in fact swallow the rule.

There must therefore be, at minimum, legislative clarification of the meaning of 'reasonably' and, inferentially, the precise content of the 'reasonably and good faith' requirement. This must necessarily follow the antecedent procedure of parliamentary re-evaluation of to what extent acts of racial vilification *should* receive legal protection – a process of added significance in the States and the ACT where, by definition, extreme acts of racial vilification (those that incite *hatred* towards, *serious contempt* for, or *severe ridicule* of a person or group on the grounds of race or ethnicity) can still be lawful. There is an argument that racial vilification which reaches this level of seriousness should never be excused, or at least only in the most exceptional of circumstances. It is hard to think what compelling public interest is served by the legal sanction of such extreme racist conduct.