Five Years On: A Critical Evaluation of the *Racial Hatred Act 1995*

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I Introduction

In 1995 the Commonwealth introduced laws that made racial vilification unlawful. Five years on, and with recent procedural changes affecting the Human Rights and Equal Opportunity Commission (HREOC),[1] it is an opportune time to reflect upon and evaluate the provisions of the *Racial Hatred Act 1995* (Cth). The laws were aimed at protecting groups and individuals from abuse, threats of violence and the incitement of racial hatred. They represented an acknowledgment at the federal political level that the goal of attitudinal change in Australians and the ideals of equality could not be met by pre-existing laws.

The law's objective of protecting individuals and groups from abuse and racist violence is a difficult one to assess. The quantitative data available — i.e. the statistics concerning complaints compiled by HREOC — should be used cautiously. An increase in complaints, for instance, may support an argument that there is greater hatred being expressed in the community. Conversely, the same figures could validly be used to support a claim that the community is becoming aware of the operation of the laws and has utilised them to overcome long-standing hatred. The former proposition suggests a failure of the laws to meet their objectives, while the latter indicates success. For this reason the author does not rely solely on the statistics provided by HREOC about numbers of complaints to conclude upon the effectiveness of the laws. The next possible measure would be the outcomes of the

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* BSc (Hons) (Mon), LLB student (Mon). This article is a revised version of a research paper submitted in partial fulfilment of the Monash University law subject: Law and Discrimination. The author would like to thank Beth Gaze, Senior Lecturer, Faculty of Law, Monash University for her assistance and support in preparing this paper for publication.

[1] *Human Rights Legislation Amendment Act (No 1) 1999* (Cth) moves the determinations function from HREOC to the Federal Court and the Federal Magistrates Service. The Amendment Act was introduced to overcome the Constitutional problems with the previous procedure highlighted in *Brandy v HREOC* (1995) 183 CLR 245. There it was held that HREOC, by delivering binding determinations, was exercising Commonwealth judicial power in breach of the doctrine of separation of powers.

majority of accepted cases which are resolved in some way at conciliation, but this information is not publicly available, so cannot be used. Instead, the best indicator of success in meeting the law's objectives is to analyse the determinations of complaints, both in terms of outcomes and of reasoning and interpretation of the legislation.

The reasoning of HREOC in these determinations is significant, as they set the framework in which the conciliation process operates and the standard for the community of what is and is not acceptable behaviour. Whether the laws have met their objective will be answered by evaluating their interpretation by the Hearing Commissioners ('the Commissioners'). This article will investigate whether the Commissioners' interpretations of the laws accord with the intent of the law makers to rid the community of racial hatred or whether the laws have been interpreted so as to limit the success of a legitimate complainant and in doing so send the message to the community that the expression of offensive views may be acceptable.

This article will analyse the complaint statistics and interpretation of the Commonwealth's racial vilification laws. Commencing with an overview of the debate that accompanied the long process of enacting the laws and an introduction of the reader to the provisions of the *Racial Hatred Act 1995* (Cth), an analysis of the statistics concerning the claims and outcomes under the provisions will follow. They will establish that the area of racial hatred is one that produces a growing proportion of racial discrimination complaints and increasingly that determinations made by HREOC under the *Racial Discrimination Act 1975* (Cth) ('RDA') are racial hatred complaints. While there has been many complaints made under the provisions in the first five years of their operation, there have been very few determinations and even fewer successful outcomes for complainants. An examination of the determinations will reveal that the lack of success is in part due to the frivolity of some claims and to the narrow interpretation given to the substantive provisions by the Commissioners and the liberal reading of the exemption provisions. The findings in these cases bear out the initial fears expressed by some commentators critical of the expansive exemptions provided by the laws and are reason to re-evaluate our understanding of the laws. There is, however, hope that the approach adopted by the Commissioners in the most recent cases will continue to be applied in the resolution of future disputes.

II COMMONWEALTH RACIAL HATRED LAWS

A *Background: Motivations and Fears*

It has been acknowledged at the international level[2] that anti-discrimination laws that 'provide for a minimum equality of opportunity ... only scratch the surface of

[2] The *International Convention on Civil and Political Rights* (ICCPR), Article 20, provides that racist speech that constitutes incitement to discrimination, hostility or violence shall be prohibited. Article 4(a) of the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) obliges signatories to declare the dissemination of ideas based on racial superiority or hatred or incite-

the underlying problem of racism'.[3] Racist actions are cultivated by the acceptability of racist speech and if people are to be treated with equal dignity and equal respect, such speech must be curtailed. In Australia this has been expressed in three individual reports: HREOC's *National Inquiry into Racist Violence* (1991), the *Royal Commission into Aboriginal Deaths in Custody* (1991) and the Australian Law Reform Commission Report into *Multiculturalism and the Law* (1992). They all identified racial vilification as a serious problem in Australia and argued for an extension of the Commonwealth's laws to protect victims of racism, particularly from that conduct which is often a pre-condition to racial violence.[4]

It was in response to these three reports, with the goal of eliminating racist speech and accepting the assertion that such an elimination was required to afford all Australians the right to equal respect and dignity, that the Commonwealth Government first proposed racial hatred laws in 1992. The initial amendments proposed changes to the RDA along with the introduction of criminal offences in the *Crimes Act 1914* (Cth). These amendments were suspended when Parliament was dissolved in 1993. They were reintroduced in a slightly different form in 1994.[5] The Bill prompted fierce debate, particularly within the media.[6]

The debate leading up to the introduction of the laws was described as 'very narrow and limited'.[7] It focussed almost exclusively on the relationship between racial vilification laws and the 'right' of free speech.[8] Media commentators, such as Manne, claimed that the enactment of the laws would mean that 'the sphere of free speech in this country will have been considerably narrowed'.[9] Proponents claimed

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ment to racial violence a punishable offence. Both conventions require criminal punishment. Australia has signed the two conventions with reservations to both of the above articles, Melinda Jones in Beth Gaze and Melinda Jones, *Law, Liberty and Australian Democracy* (1990).

[3] Melinda Jones, above n 2.

[4] Michael Lavarch, 'Racial Hatred Bill 1994: Second Reading Speech' (15 November 1994) *Hansard: House of Representatives* (1994) 3336–7. The *National Inquiry into Racial Violence* was particularly scathing. It found that 'there is ample evidence to suggest that racial vilification against Aboriginal people is endemic in Australia' (Nick Poynder, 'Racial Vilification Legislation' (1994) 3 (71) *Aboriginal Law Bulletin* 4, 4). The Inquiry received 1447 reports of racially motivated acts of violence or harassment (Luke McNamara, 'The Merits of Racial Hatred Laws: Beyond Free Speech' (1995) 4 (1) *Griffith Law Review* 29), described in one analysis as 'only a fraction of the incidents actually occurring' (Rubenstein in McNamara, above 42). Aboriginal people identified the media as their 'number one enemy' (Poynder, above 4). The *Royal Commission into Aboriginal Deaths in Custody* found that 'language is one of the forms of violence that has the most impact on relations' between Aboriginal people and police officers (Poynder, above 4).

[5] Ray Jureidini, 'Origins and Initial Outcomes of the *Racial Hatred Act 1995*' (1997) 5 (1) *People and Place* 30.

[6] For a more detailed commentary on the debate and arguments see the entire journal (1994) 1 (1) *Australian Journal of Human Rights*.

[7] Luke McNamara, 'Confronting the Reality of Hate Speech' (1995) 20 (5) *Alternative Law Journal* 231, 231.

[8] Anne Flahvin, 'Can Legislation Prohibiting Hate Speech Be Justified in Light of Free Speech Principles?' (1995) 18 (2) *University of New South Wales Law Journal* 327, identified the two stances as: civil libertarian and civil rights. The former upholds the concept of freedom of speech and dismisses the harm caused by vilifying words, the latter gives utmost importance to equality and as such believes that the right to free speech must accede to this fundamental human right to the extent of racial vilification.

[9] Robert Manne, 'Mr Lavarch and Free Speech' (1994) 38 (12) *Quadrant* 2, 2. The fact that this implied constitutional right was in its infancy did not dissuade the critics, said McNamara (above n 7), 'from

that the laws necessarily recognise that racist words do cause considerable harm to the targets. McNamara, for instance, stated that:

> it is far easier to oppose legal proscriptions of expressions of racial hatred *in practice* than to maintain this opposition when faced with the *reality* of the conduct at which hate laws are directed, and of the harm which such conduct causes.[10]

He implored the critics to look elsewhere to see if free speech had been overly constrained. NSW, he said, had introduced racial vilification laws in 1989 and 'the media in NSW has survived without undue restriction. Political, social and intellectual debate have not been stifled or curtailed'.[11]

The government's response was to say that freedom of speech needed to be balanced against the rights of all Australians to live free of fear and racial harassment. Mr Lavarch said that although the laws would constrain freedom of speech, they would place no limits on genuine public debate, nor prohibit people from expressing their reasonably held ideas or beliefs.[12]

The judgment to constrain the implied freedom of political communication was made by the Parliament and it has not been challenged. Therefore, as the Commissioners did in *Hobart Hebrew Congregation v Scully*[13] and *Jones and the Executive Council of Australian Jewry v the Adelaide Institute*,[14] The writer accepts that the legislation is valid and analyses the cases in that context. This paper is not intended to revisit the debate as to whether a person's freedom of speech should be infringed by the laws, except where the concept of freedom of speech is used by the Commissioners to support their interpretation of the laws.

In August 1995 a revised Bill passed through the Senate, 10 months after passing through the House of Representatives.[15]

B *The Racial Hatred Act*

Section 3 of the *Racial Hatred Act 1995* (Cth) inserted Part IIA (ss 18B-E) 'Prohibition of Offensive Behaviour Based on Racial Hatred' into the RDA.

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drawing on the rhetoric of absolute rights in order to question the legitimacy of laws designed to provide protection from harassment, abuse and vilification on the basis of race'. In Australia the High Court has identified an implied constitutional right to freedom of communication in relation to political and public matters. See *Nationwide News v Wills* (1992) 177 CLR 1 and *Australian Capital Television v Commonwealth* (1992) 177 CLR 106.

[10] McNamara, above n 7, 233.

[11] Rubenstein and Kapel in McNamara, above n 4, 39.

[12] Lavarch, above n 4.

[13] Unreported, HREOC, Commissioner Cavanough, 21 September 2000.

[14] Unreported, HEEOC, Commissioner McEvoy, 5 October 2000.

[15] Amendments in the Senate removed the criminal offences. They were considered inappropriate by the Coalition and WA Greens. The bases of their arguments were that criminal offences make martyrs of those prosecuted, proof would be difficult and successful prosecutions rare. The final Act did not contain those provisions that would have created the criminal offence of racial hatred. Some commentators believed that the absence of criminal provisions weakened the Act's ability to bring about significant behavioural change and would impede its ability to achieve the goals of racial tolerance in Australia. See Jureidini, above n 5.

Section 18C makes certain conduct unlawful.[16] It defines an unlawful act as an act that is not done in private and is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or group. This creates an objective test that imposes community standards on the alleged conduct.[17] There is no need to prove an intention to incite racial violence.

The conduct must be associated with the complainant's race, colour or national or ethnic origin. Pursuant to s 18B, the race etc. of the complainant need not be the only reason for the doing of the act by the respondent, so long as it is one of the reasons. The connection between conduct and race will likely need to be established on the circumstances of each case. The process for such determination must be adduced through judicial interpretation.

Exemptions are created by s 18D.[18] They cover acts done reasonably and in good faith: in the performance of an artistic work; for a genuine purpose in the public interest (eg. political, academic debate); or in publishing a fair and accurate report of a matter in the public interest. The exemptions were acknowledged as very broad and supported on this basis by Mr Lavarch when introducing the Bill to Parliament. They represented the government's efforts to ensure that the laws did not impinge upon an individual's freedom of speech.[19] The onus is on the respondent to show that they come within one of the exemptions.

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[16] (1) It is unlawful for a person to do an act, otherwise than in private, if:

1. the act is reasonably likely, in all the circumstances, to offence, insult, humiliate or intimidate another person or a group of people; and
2. the act is done because of the race, colour or ethnic origin of the other person or of some or all of the people in the group.

Note: Subsection (1) makes certain acts unlawful. Section 22 allows people to make complaints to the Human Rights and Equal Opportunity Commission about unlawful acts. However, an unlawful act is not necessarily a criminal offence. Section 26 says that this Act does not make it an offence to do an act that is unlawful because of this Part, unless Part IV expressly says that the act is an offence.

I. 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.

II. 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.

[17] Luke McNamara and T Solomon, 'The Commonwealth *Racial Hatred Act 1995*: Achievement or Disappointment?' (1996) 18 *Adelaide Law Review* 259.

[18] Section 18C does not render unlawful anything said or done reasonably and in good faith:
(a) in the performance, exhibition or distribution of an artistic work; or
(b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or
(c) in making or publishing:
(i) a fair and accurate report of any event or matter of public interest; or
(ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

[19] Lavarch, above n 4, 3341.

Section 18E makes employers vicariously liable for the conduct of their employees. An employer must demonstrate that it has taken all reasonable steps to prevent acts of racial hatred.[20]

C Claims and Outcomes Under the Act

1 Table 1 — Racial hatred complaints received and finalised[21]

	1995–96	1996–97	1997–98	1998–99	1999–2000
Received	112	186	94	82	75
Finalised	35	98	187	86	95

Table 1 shows a peak in racial hatred complaints received in 1996–97 and finalised complaints in the following reporting year. This trend is also seen more generally with complaints under all provisions of the Act in Table 2. No explanation is offered by HREOC for variations in complaints. It is left to the reader to speculate.[22] Interestingly, almost all of the complaints that constituted the increase in 1996–97 were declined by HREOC the following year. Of those complaints 'declined' 70% were withdrawn, which is considerably higher than the 47% average for all other years.[23]

The most recent figures show a gradual decrease over the past three reporting years in overall and racial hatred-specific complaints. Racial hatred complaints as a proportion of all complaints received, however, are increasing. It is difficult to understand the reasons for the overall decrease in complaints, although it would be premature to claim that the reduction is a result of changing community attitudes and behaviour. The trends suggest when a prominent political figure, such as Ms Hanson, expresses their views opposing indigenous and ethnic Australians, there is a corresponding increase in media exposure reporting on race-related views and there is a greater likelihood of there being an expression of racial hatred and discrimination in the community. These figures support the views expressed by indigenous and ethnic Australians in the *National Inquiry into Racist Violence* that wide dissemination of racist opinion through mainstream media encourages the expression of racial denigration in the community.[24]

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[20] Kate Eastman, 'Workplace Relations: Racial Hatred and Harassment in the Workplace' (1998) 36 (11) *Law Society Journal* 46.

[21] Jureidini, above n 5 [1995–96 figures]; HREOC, *Annual Report 1996–7* (1997); HREOC, *Annual Report 1997-98* (1998); HREOC, *Annual Report 1998-99* (1999); HREOC, *Annual Report 1999-2000* (2000).

[22] One explanation for the large increase in the 1996–97 period could be the rise of Pauline Hanson, as 1996 was the year she came to prominence and many of her comments would have spurred racial hatred complaints.

[23] HREOC (1997), above n 21.

[24] See National Inquiry into Racist Violence in Australia (NIRVA), *Racist Violence* (1991), chs 5 and 6.

2 *Table 2 — Outcomes of finalised complaints under the RDA*[25]

	1995–96	1996–97		1997–98		1998–99		1999–2000	
	RH claims	Total	RH	Total	RH	Total	RH	Total	RH
Declined	27	354	44	454	136	271	44	244	48
Conciliated	8	110	27	71	32	83	21	304	30
Referred to hearing	-	60	7	42	15	33	17	35	15
Terminated	-	35	12	16	4	9	4	16	2
Transferred	-	31	8	18	-	5	-	-	-
TOTAL	**35**	**590**	**98**	**601**	**187**	**401**	**86**	**599**	**95**

3 *Table 3 — Areas of complaint*[26]

	1995–96	1996–97	1997–98	1998–99	1999–2000
Media	28	32	17	25	11
Neighbourhood	23	55	49	24	19
Personal conflict	14	22	2	4	2
Employment	17	6	4	5	7
Propaganda	10	21	1	2	-
Entertainment	3	1	3	1	4
Sport	-	1	1	-	10
Public debate	6	35	8	5	3
Other	11	13	9	16	19
TOTAL	**112**	**186**	**94**	**82**	**75**

Table 3 displays a large increase in complaints in the area of public debate in 1996–97. This increase supports the assertion that the increase in claims was at least partly attributable to the rise of 'Hansonism'. The doubling of neighbourhood and propaganda claims, together with an increase in personal conflict claims, may reflect the expression of Hanson-inspired feeling in the local context. The high

[25] Above n 21.
[26] Ibid.

levels remain in the next year before returning to lower levels, reflecting the demise of the One Nation Party.

The media is consistently a large source of complaints, as would have been expected in light of the findings of the *National Inquiry into Racist Violence* that indigenous and ethnic Australians consider the media the cause of much of the hatred directed towards them. In the report it was stated that through sensationalist and biased reporting the 'media may generate a climate which provides legitimacy for racist violence'.[27] Disappointingly, and perhaps as a consequence of the wide exemptions afforded to the media (s 18D(c)), the figures – which show a high proportion of complaints are media-related – indicate that at least some of the concerns that ethnic and indigenous groups have with the media continue to persist. This sustained high proportion brings into question the effectiveness of the laws to meet their objectives.

4 *Table 4 — Determinations of HREOC under the RDA*

Year	Total determinations under the RDA	Racial hatred determinations	% Racial hatred determinations
1996	5	0	0%
1997	16	3	19%
1998	9	2	22%
1999	8	4	50%
2000*	14	6	43%
TOTAL	**52**	**15**	**29%**

* to 10 November 2000

Table 4 shows an increase in racial-hatred related hearings since 1999 relative to overall hearings under the RDA. Possible reasons for an increasing proportion of all complaints heard under RDA being racial hatred cases are that: there is a 'catch up' period for the complaint to reach determination stage and respondents may be less likely to conciliate with respect to racial hatred claims. Some respondents may seek to make martyrs of themselves rather than conciliate a claim, use the generated publicity to peddle their cause and seek to use a public forum to validate their claims. Such actions of a respondent are more likely in a racial hatred claim (as opposed to a racial discrimination claim) because such respondents with a 'cause' direct their statements of hate towards a racial or ethnic group generally rather than a specific person. Three of the successful complaint determinations were lodged against this type of respondent. In *Fegaly v Oldfield* [28] the respondent, in evidence, conceded that he sought to generate publicity by making emotive statements to the press. His refusal to conciliate the claim made against him may also have been because of the publicity he saw he could attain through defending the action. In the

[27] NIRVA, above n 24, 117.
[28] Unreported, HREOC, Commissioner Beech, 19 April 2000.

cases against *Scully* [29] and the *Adelaide Institute* [30] the respondents intended to use the hearing as a forum to substantiate their claims of Holocaust 'revisionism' so as to give them legitimacy and publicity. In both cases when the respondents became aware that they could not use the Commission hearings in such a manner they walked out of the hearing claiming that the Commission was acting 'immorally'.

Complainants may also persist with frivolous claims, particularly those applicants claiming 'reverse racism'. Table 5 shows that of the nine rejected determinations four had already been rejected by HREOC, but the complainants persisted with their claims.

The four determinations were dismissed under s 25X of the Act, which allows a complaint to be discontinued at any stage where it is frivolous, vexatious, misconceived or lacking in substance. Two cases were dismissed as frivolous[31] and the other two for being misconceived or lacking in substance.[32] Three of the cases had initially been declined by HREOC and the fact that they ended up at the determination stage diminishes the credibility of and public confidence in the laws. Furthermore, it hinders the ability of the resolution system to effectively deal with complaints identified as worthy of investigation by HREOC. Such complaints make it to the determination stage because all complainants, pursuant to s 24(4)(a) of the Act, can exercise their right to have their complaint referred to a public inquiry — a necessary provision to protect legitimate complainants but also one which is capable of being abused and incapable of weeding out all frivolous claims.

In *McGlade v Lightfoot* [33] the Commissioner dismissed the complaint because the respondent had made an apology in the Senate that amounted to a public repudiation of his earlier views. Consequently, it was held that any further investigation was meaningless. The Senator's actions were never held to be unlawful. Though

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[29] *Hobart Hebrew Congregation v Scully* (Unreported, HREOC, Commissioner Cavanough, 21 September 2000).

[30] *Jones and the Executive Council of Australian Jewry v the Adelaide Institute* (Unreported, HREOC, Commissioner McEvoy, 5 October 2000).

[31] The complaint in *Shron v Telstra* [1998] HREOCA 24 (Unreported, Commissioner Innes, 10 July 2000), based on the sale of a telephone card featuring a picture of a World War II German fighter plane bearing a swastika, was rejected pursuant to s 25X of the Act. Commissioner Nadar dismissed the complaint in *D'oliveira v The Australian Democrats* (Unreported, HREOC, Commissioner Nadar, 23 March 2000) that the Democrats, anti-Hanson election billboard in the 1998 election was offensive on the basis that the complaint was frivolous. It was held that the 'anti-racist' billboard was not 'reasonably likely to offend'.

[32] In *De La Mare v SBS* [1998] HREOCA 26 (Unreported, Commissioner McEvoy, 18 August 1998), despite HREOC declining the complainant's complaint Mr De La Mare sought a determination. The basis of this complaint was the screening of the movie *Darkest Austria* by television station SBS, a movie the complainant described as 'an anti-white hate film'. The respondent described the movie as a comedy: a satire on a particular style of ethnographic documentary. Commissioner McEvoy denied the complaint. She held that the screening of the film was not reasonably likely to have offended, insulted, humiliated or intimidated a person or group of persons. She believed that 'what was reasonably likely was that the film would be regarded as a satirical, somewhat pointed and amusing "spoof" on ethnographic documentaries'. In *McGlade v Lightfoot* [1999] HREOCA 1 (Unreported, Commissioner Johnston, 11 February 1999), Commissioner Johnston dismissed the applicant's complaint under s 25X, in that the complaint was misconceived.

[33] [1999] HREOCA 1 (Unreported, Commissioner Johnston, 11 February 1999).

important in this case, an apology will not always lead a Commissioner to dismiss the complaint.[34] The Commissioners did not question the sincerity of the apologies in these cases, but they ought to question the bona fides of any apology, in light of the circumstances surrounding the apology. An apology must not be capable of being used to short-circuit the complaint process. It is not unreasonable to anticipate a case where a respondent apologises solely for the purpose of escaping punishment. A public apology is an admission to the community of wrongdoing and an acceptance of the fact by the respondent that their actions have caused harm to another and is often a desired outcome and therefore should be encouraged. Respondents should not be able, however, to absolve themselves of all responsibility for the harm caused to the complainant and escape a finding of unlawfulness by merely uttering the word 'sorry'. The complainant challenged the finding of the Commissioner in a successful appeal to the Federal Court.[35] On appeal Carr J held that the Commissioner had erred in dismissing the complaint on the basis that an additional remedy to the apology was inappropriate without first determining the full nature of the unlawful conduct. Carr J suggested that during a hearing the respondent might be shown to maintain his earlier comments despite the Senate apology and in such circumstances an additional declaration may be necessary.

5 *Table 5 — Success of complaint determinations*

Total HREOC racial hatred determinations	**15#**
Complainant successful	**6**
Complainant unsuccessful	**9 (4)*#**
rejected for being frivolous, vexatious or misconceived	*4 (3)**
non-offensive	*2 (1)**
exempted categories	*1*
conduct not 'because of race etc.'	*1*
lack of standing	*1*

* Bracketed number indicates those complaints that were initially declined by HREOC and where the complainant subsequently exercised their right to have the complaint adjudicated.

One additional unsuccessful complaint has been heard at first instance by the Federal Court: *Hagan v Trustees of the Toowoomba Sports Ground* [2000] FCA 1615 (Unreported, Drummond J, 10 November 2000).

[34] In *Jacobs v Fardig* [1999] HREOCA 9 (Unreported, Commissioner Innes, 27 April 1999), despite the respondent making a private and public apology, the complaint was upheld, though the award of damages was significantly less than it would have been in the absence of an apology. The complainant was awarded $1000.

[35] *McGlade v HREOC and Lightfoot* (Unreported, Federal Court of Australia, Carr J, 18 October 2000).

6 *Table 6 — Successful racial hatred determinations by year*

Year	Total HREOC RH determinations	Successful complaints
1997	3	1
1998	2	-
1999	4	1
2000	6#	4
Total	**15#**	**6**

One additional unsuccessful complaint has been heard at first instance by the Federal Court: *Hagan v Trustees of the Toowoomba Sports Ground* [2000] FCA 1615 (Unreported, Drummond J, 10 November 2000).

Of the complaints to reach the determination stage, six (40%) have been successful. Even taking into account the determinations of the complaints previously rejected by HREOC as misconceived etc. and including the recent Federal Court case at first instance, just 50% of complaints acknowledged as being of a sufficiently serious nature to warrant investigation have been successful. This includes two successful outcomes to the Executive Council of Australian Jewry in unopposed hearings. Of the six successful complaints two sought only and received an apology, one received only an apology despite seeking damages and two complainants were awarded just $1000 each.[36] This is little compensation given the established damage sustained by the complainant, the time, possible legal costs, effort and emotions that would have been expended by following a complaint through to the determination stage. The third successful complainant was awarded $30,000.[37] If a complainant could possibly be in a poorer financial position for having pursued their complaint, they will be less likely to persist with their claim. Where this occurs the aggrieved party will be denied a resolution and a respondent refusing to conciliate may be able to avoid retribution, sending an inappropriate message to the community.

IV Applying and Interpreting the Laws[38]

Part 4 will evaluate the findings of the Commissioners at the determination stage. The interpretations given to key components of the laws in different cases and how they have affected the outcome of these cases will be analysed. The Commissioners have found consistently and within the intended meaning of the provisions on the issues of what amounts to acts done 'otherwise than in private'[39] and the extent an

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[36] *Feghaly v Oldfield* (Unreported, HREOC, Commissioner Beech, 19 April 2000) and *Jacobs v Fardig* [1999] HREOCA 9 (Unreported, Commissioner Innes, 27 April 1999).

[37] *Rugema v Gadsten* [1997] HREOCA 34 (Unreported, Commissioner Webster, 26 June 1997). The complainant received an additional $25,000 (for a total award of $55,000) for loss of earning capacity resulting from racial discrimination suffered.

[38] All HREOC decisions can be found at the HREOC website: <http://www.hreoc.gov.au/news_info/decisions/index.html>.

[39] See, for example, *Rugema v Gadsten* [1997] HREOCA 34 (Unreported, Commissioner Webster, 26 June 1997) and *Korczak v Commonwealth* (Unreported, HREOC, Commissioner Innes, 16 December

employer is liable for the expression of racial hatred in the workplace under s 18E.[40] These components of the laws have raised no controversy.

This section will focus on the more controversial interpretations of elements of the racial hatred laws. Issues concerning the correct respondent, what acts are reasonably likely to offend etc., the necessary connection between the complainant's race and the respondent's conduct and the width of the exemptions have led to controversial interpretations, at times inconsistent and sometimes inappropriate.

A *Standing*

The claimant must be a 'person aggrieved' pursuant to s 22(1) of the Act. Jureidini, referring to a personal communication with a Commissioner, stated that a person claiming racial hatred under the provisions does not need to be the direct victim, but would ordinarily need to be a member of the group vilified. That is, 'someone with a real and material interest in the subject matter of the complaint, and not merely a bystander who has a mere intellectual or emotional concern in the matter'.[41] More generally under the RDA French J in *Cameron v HREOC* [42] held that a person who has a close personal or economic connection with the victim will be able to make a complaint.

In the only case to be determined solely on the issue of standing, Commissioner Nettlefold, in *Executive Council of Australian Jewry v Scully*,[43] dismissed a complaint on the grounds of lack of standing. He held that the Council did not satisfy the test in *ACF v Commonwealth*[44] that a person aggrieved be 'likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest'. The Federal Court (Wilcox J) on appeal, however, overturned the Commissioner's decision and held that the Council may stand as a complainant, under s 25L of the Act, because it represented a group of persons who were individually aggrieved.[45]

B *The Correct Respondent*

The respondent can be the person who did the act or a person involved in the publication or broadcasting of the offensive material or statement. That includes the writer, publisher, printer or proprietor of the conduct.[46]

Given the wide scope anticipated by HREOC,[47] the finding by the Commissioner in *Walsh and others v Hanson* [48] was surprising. The basis of complaint in that case

1999).

[40] See, for example, *Rugema v Gadsten*, above n 39.

[41] Jureidini, above n 5, 40.

[42] (1993) 46 FCR 509, 519 (French J).

[43] [1997] HREOCA 59 (Unreported, Commissioner Nettlefold, 21 October 1997).

[44] (1980) 146 CLR 493, 530 (Gibbs J).

[45] *Executive Council of Australian Jewry v Scully* [1998] 66 FCA (Unreported, Wilcox J, 13 February 1998); (1999) 160 ALR 138.

[46] HREOC, *Media Guide: What is the Racial Hatred Act?* (1995) <http://www.hreoc.gov.au/racial_discrimination/act/whatis.html> [checked 4 April 2000].

arose out of the publication of the book: *Pauline Hanson: The Truth*. The complaints centred on claims in the book that Aboriginal people killed and ate their children, old people and Chinese gold-miners at the turn of the century. They were claims that the Commissioner did agree were reasonably likely to offend. But despite Ms Hanson having copyright in the book and profiting from its distribution and sale it was held that the comments in it could not be attributed to her because she was not the author of the section in question.[49] Commissioner Nadar held that there was 'no acceptable evidence ... adduced ... that could implicate either Ms Hanson or One Nation in the publication or distribution of the book'.

It is unlikely that the framers of the legislation would have contemplated such a result. Commissioner Nadar has found that a person profiting from the sale of racist publications can immunise themselves against claims of racial hatred and avert all responsibility for attacks on persons based on their race by disclaiming authorship to the offending work. In so finding, the Commissioner has severely undermined the spirit of the laws and limited the extent to which racist speech can be curtailed. Such a finding, along with the finding of Commissioner Johnson in *McGlade v Lightfoot* [50] that an apology will substantially reduce a respondent's liability under the laws, suggests that the interpreters of the provisions are excusing the actions of the respondent too readily and in circumstances beyond that justified in the terms of the legislation.

C Section 18C(1)(a): Reasonably Likely to Offend

In *Bryant v Queensland Newspapers* [51] Commissioner Wilson held that the use of the word 'Poms', given the context in which the word was used (in reference to English people in a daily newspaper), was not reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate. Though the Commissioner did accept that the complainant was offended, that was not enough. An objective standard had to be applied and in this case it was held that a reasonable person of English origin (i.e. the targeted group) on the individual facts in the case would not have been offended. The Commissioner did say that in extreme cases where a word that would not ordinarily offend was used in a context that 'was plainly malicious or scurrilous, designed to foster hatred or antipathy in the reader' a word, such as 'Pom', could be offensive. In such circumstances it would be more reasonable that a person of the targeted group be offended.

This dicta could be read as implying that the intention of the maker of the statement or performer of the act may be relevant in determining the applicability of s 18C. The provisions, however, are silent on the need to prove intention. The absence of such a component, claimed Mr Ruddock, meant that 'an extraordinary range of

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[47] Ibid.

[48] Unreported, HREOC, Commissioner Nadar, 2 March 2000.

[49] There was a disclaimer before the controversial section of the book stating that Ms Hanson was not the author of the writings that would follow.

[50] [1999] HREOCA 1 (Unreported, Commissioner Johnston, 11 February 1999).

[51] [1997] HREOCA 23 (Unreported, Commissioner Wilson, 15 May 1997).

statements would be included under this definition'.[52] Reid and Smith claimed that the section set the threshold for unlawfulness too low and did not reflect the standard recommended by those reports that formed the motivation for the laws.[53] The addition of an intention component to the substantive component of the laws, however, would make it extremely difficult for a complainant to be successful. As the laws currently stand a responsibility is placed on each member of the community to recognise conduct that may cause offence to others and avoid the commission of such acts. This position is necessary to educate the community to change its behaviour and to promote a more tolerant and accepting society. The objectivity within the reasonableness test in the section ensures that the Australian public becomes aware of the hurtfulness of conduct without the need to tiptoe on eggshells.

The 'reasonable person' against whom the question of offence is tested is a person of the race, ethnicity or nationality to which the conduct was directed. In *Bryant v Queensland Newspapers*,[54] Commissioner Wilson spoke of the act being reasonably likely to in all the circumstances offend, insult, humiliate or intimidate persons of English origin. Similarly, in *Shron v Telstra* [55] Commissioner Innes described the test in s 18C(1)(b) as whether the act complained of was reasonably likely to offend people of Jewish origin.[56]

The Commissioners have also developed a geographical connection requirement. In *Hobart Hebrew Congregation v Scully*,[57] where the respondent was disseminating anti-Semitic and Holocaust 'revisionism' material in Launceston, the reasonable person was a Jewish person 'who received the material or became aware of the campaign, *especially those living in or near Launceston*' (author's emphasis). Similarly, in *Warner v Kuchera* [58] (denigrating signs in a shop window) and *Hagan v Trustees of the Toowoomba Sports Ground Trust* [59] ('"Nigger" Brown Grandstand' sign in a local sports ground) the reasonable person was considered an Abo-

[52] Phillip Ruddock, 'Racial Hatred Bill 1994: Second Reading Response' (15 November 1994) *Hansard: House of Representatives* (1994) 3347.
[53] Sally Reid and Russell Smith, 'Regulating Racial Hatred' (1998) 79 *Trends and Issues in Crime and Criminal Justice* 1.
[54] [1997] HREOCA 23 (Unreported, Commissioner Wilson, 15 May 1997).
[55] [1998] HREOCA 24 (Unreported, Commissioner Innes, 10 July 1997). The applicant's complaint was based on the sale of a telephone card featuring a picture of a World War II German fighter plane bearing a swastika.
[56] Additionally, in *De La Mare v SBS*, [1998] HREOCA 26 (Unreported, Commissioner McEvoy, 18 August 1998), HREOC, when it initially declined the applicant's complaint, advised Mr De La Mare that the broadcast needed to be reasonably likely to offend 'a member of the relevant group (in this case Austrians, or more generally, racially "white" people)'. In dismissing the complaint at the determination, however, Commissioner McEvoy used a more general 'person'. She has not found support among other Commissioners. In *Feghaly v Oldfield* (Unreported, HREOC, Commissioner Beech, 19 April 2000), Commissioner Beech found the comment of the respondent: that 'home invasions are ethnically based, Lebanese or Iranian, not Australian' was unlawful under the Act. The test for offence was whether it was reasonably likely to offend, insult or humiliate members of the Lebanese and Iranian communities.
[57] Unreported, HREOC, Commissioner Cavanough, 21 September 2000.
[58] Unreported, HREOC, Commissioner Johnston, 10 November 2000.
[59] [2000] FCA 1615 (Unreported, Drummond J, 10 November 2000).

riginal person (the 'targeted racial group') who observed the sign in Geraldton or Toowoomba respectively.

The requirement is a sensible one. It operates to ensure that those persons most likely to be affected by acts of racial hatred are the group against whom the unlawfulness of the respondent's conduct is tested. In *Hagan* [60] the views of the local Aboriginal community — who did not find the grandstand sign offensive — were critical to the court finding against the complainant. Drummond J was rightly careful to ensure that these views were reflective of the community and that when the respondent was seeking views to make its decision whether to remove the sign that those views were of a representative group. It is foreseeable that such an approach would equally be applicable where a local group — the targeted group — is more sensitive to the conduct of a respondent than a wider racial or ethnic group. In such a case the respondent will have far greater difficulties defending the claim against them.

D Act Done Because of Race: Section 18(1)(b)

The complaint in *Bryl and Kovacevic v Nowra and Melbourne Theatre Company*[61] concerned the writing and performance of the play *Miss Bosnia*, considered by the complainants to be offensive to people loyal to the lawful republic of Bosnia-Herzegovina. Though the complaint was dismissed on the grounds that it was misconceived, the Commissioner nevertheless expressed his belief that the act done by the respondents was not 'because of race etc.'. The Commissioner distinguished this phrase from the phrase 'based on' used in s 9(1) of the Act. In his mind:

> to establish that something was done 'because of ...' it is necessary to show that a causal connection exists between the conduct and the element of race. ... It is not enough, however, that race etc. is merely part of the circumstances that form the background against which the events and incidents of the play are written.[62]

The question that needed to be asked, said Commissioner Johnston, was whether: 'national or ethnic [was] origin a cause which contributed to the conduct in writing or presenting the play?' Likewise, in *Korczak v Commonwealth*,[63] Commissioner Nadar found that the actions of the respondent in abusing, name-calling and mimicking the accent of the complainant did not satisfy the test required by s 18C as that the conduct was not done 'because of the race of the person'. Like Commissioner Johnson, Commissioner Nadar was explicit in distinguishing the phrases 'because of' used in s 18C and the term 'based on' used in s 9(1) of the RDA. The latter form of words in s 9(1), he said, are much broader and do not necessarily require a causative connection. To establish that the acts were done 'because of' race, the complainant must prove a 'relevant nexus' between the alleged conduct

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[60] Ibid.
[61] [1999] HREOCA 11 (Unreported, Commissioner Johnston, 21 June 1999).
[62] Ibid.
[63] Unreported, HREOC, Commissioner Nadar, 16 December 1999.

and the race or national origin of the person or group of persons to whom the act was directed.

It is asserted that any abuse or harassment that is directed to one identifiable person or group of persons of ethnic or indigenous origin that is not similarly directed to other persons or groups should send bells ringing in the minds of the Commissioners. They should be reminded of the s 18B provision, which states that race etc. need not be the only reason for the abuse. Where one person or group is singled out, even where the adverse treatment is not expressed to be because of their race etc., this should nevertheless be inferred as at least one of the reasons for the respondent's alleged conduct.

Commissioner Cavanough in *Hobart Hebrew Congregation v Scully* [64] recognised that the approach taken in *Bryl and Kovacevic v Nowra and Melbourne Theatre Company* [65] 'may not always be appropriate'. He said that

> in a case where the very thing complained of is the vilification of a person or group of persons expressly by reference to their race or ethnic origin, it is important not to over-analyse the case so as to discern a further or separate requirement that that act of racial/ethnic vilification be engaged in because of the race/ethnicity of the victim(s).[66]

It is likely that these comments were made to address the analysis undertaken by Commissioner Nadar in *Korczak*[67] and *Walsh and others v Hanson*[68] below. Commissioner Cavanough's discussion highlights a greater understanding of the laws and their desired effect than had been previously shown.

In *Walsh and others v Hanson*,[69] extraordinarily, and probably erroneously, the Commissioner held that the statements were not made '(?)because of the race, colour or ethnic origin' of the complainant but 'because the respondents were of the opinion that the Aboriginal community as a whole were being unfairly favoured by governments and courts'. This distinction, made by Commissioner Nadar, was an artificial one and the issue should have been determined in the manner of the more recent case of *Feghaly v Oldfield*.[70] In this case, Commissioner Beech held that 'where ... the act complained of is a statement singling out a particular ethnic group, in a way which satisfies s 18C(1)(a), and no other reason is advanced by the maker of the statement, satisfaction of the requirement of s 18C(1)(b) may readily be inferred'. This formulation puts the onus on the respondent to prove an alternative basis for the conduct and it is asserted that a claim that Aboriginal people gain

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[64] Unreported, HREOC, Commissioner Cavanough, 21 September 2000.

[65] [1999] HREOCA 11 (Unreported, Commissioner Johnston, 21 June 1999).

[66] *Hobart Hebrew Congregation v Scully* (Unreported, HREOC, Commissioner Cavanough, 21 September 2000). The approach was affirmed in *Jones and the Executive Council of Australian Jewry v the Adelaide Institute* (Unreported, HREOC, Commissioner McEvoy, 5 October 2000) and applied by Commissioner Johnston in *Warner v Kucera* (Unreported, HREOC, 10 November 2000).

[67] Unreported, HREOC, Commissioner Nadar, 16 December 1999.

[68] Unreported, HREOC, Commissioner Nadar, 2 March 2000.

[69] Ibid.

[70] Unreported, HREOC, Commissioner Beech, 19 April 2000.

special treatment would be inadequate to overcome the inference of a connection between the conduct and the complainant's race.

E *The Exemptions: Section 18D*

It was argued by Poynder prior to the enactment of the laws that some of the exemptions in s 18D were 'so wide as to be meaningless'. He cited the Explanatory Memorandum to s 18D(c)(ii) in support. It states with respect to the exemption that:

> it is not the intention of the provisions 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.[71]

McNamara and Solomon argued that the inclusion of the genuine belief exemption 'seriously undermines the capacity of the Racial Hatred Act to achieve the key objective of extending protection to victims from the harm caused by racist speech and conduct'.[72] More generally, Jureidini argues that the width of s 18C opens up the provisions to trivial cases and the exemptions in s 18D are so wide as to minimise the effectiveness of the provisions to prevent the kinds of vilification that were sought to be overcome, particularly the stereotypes that persist in the media.[73] It will be seen from the analysis of the cases that the very fears expressed by Jureidini have been realised.

Commissioner Johnston, by way of obiter, in *Bryl and Kovacevic v Nowra and Melbourne Theatre Company*[74] investigated the exemption for artistic work in s 18D(a). Within the exemption it is the responsibility of the respondent to establish that the act is 'done *reasonably* and in *good faith* in the performance, exhibition or distribution of an artistic work'. The scope of the exemption, it was said, should be read broadly so that 'the presentation of even shocking artistic works which may be highly offensive to a group, provided they do not exceed the limits laid down', should be permitted. The conduct will *not* be done reasonably and in good faith where it:

> smacks of dishonesty or fraud ... something approaching a deliberate intent to mislead or, if it is reasonably foreseeable that a particular racial or national group will be humiliated or denigrated ..., at least a culpably reckless and callous indifference in that regard.[75]

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[71] Poynder, above n 4 and 5.
[72] McNamara and Solomon, above n 17, 270.
[73] Jureidini, above n 5.
[74] [1999] HREOCA 11 (Unreported, Commissioner Johnston, 21 June 1999).
[75] Ibid. See also *De La Mare v SBS* [1998] HREOCA 26 (Unreported, Commissioner McEvoy, 18 August 1998), where Commissioner McEvoy stated that had the broadcast been one that was reasonably likely to offend etc., the claim would have still failed because the broadcasting of the movie would have fallen within the exemption for artistic work in s 18D(a).

In *Walsh and others v Hanson*,[76] with respect to comments made about and in defence of the book, it was held that they were made in public debate for a genuine purpose on an issue of public interest. Claims that Aboriginal people were cannibals and did not deserve government financial assistance, it was said, were genuine political expression. Mr Ettridge, in defence of Ms Hanson, asserted that 'the book's claims were intended to correct misconceptions about Aboriginal history and were relevant to the present debate about welfare spending'.[77] Commissioner Nadar stated that:

> it is a concomitant of political freedom that political activists, especially those at the extreme ends of the political spectrum of ideas, will from time to time, even frequently, hurt and offend other members of society. It seems to me that we must be mature enough to accept that as a price that we must pay for the privilege of living in a society where political expression is to remain free and unfettered.[78]

In making this statement Commissioner Nadar has neglected to take into account the fact that the laws represent a legislative decision on the part of the Commonwealth Parliament to impinge on the freedom of political communication where the communication relates to the expression of racial hatred. A far more judicially sound approach was adopted by the Commissioners in the Holocaust 'revisionism' cases.[79] There the Commissioners assumed that the laws were constitutionally valid and accepted that the Parliament had restrained the freedom through the enactment of the laws. They did not, as Commissioner Nadar did, use freedom of speech as the basis to enlarge the exemptions in the Act.

As for the question as to whether the expression was genuine, Commissioner Nadar said that 'it would be dangerous to brand a political argument as not genuine political expression on the basis that those who happen to be in authority think that it is such bad argument as not to be tenable'.[80]

This case is an example of an exemption which has been framed too widely and has afforded protection to a respondent whose conduct should have been found unlawful. The assertion that the comments were made by the respondent within a broader political debate on Aboriginal welfare was tenuous and erroneous. Although the comments may have been made with the purpose of drawing out opposition to Aboriginal assistance, the comments that formed the basis of the complaint against Ms Hanson — that Aborigines were cannibals — could hardly be construed as 'political debate'. The issue was not contemporary or of significant importance to the community, nor was it an issue for legislative reform. It was a statement based

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[76] Unreported, HREOC, Commissioner Nadar, 2 March 2000.

[77] Little regard was paid to the fact that the debate was manufactured by Ms Hanson and her party and was largely based on misinformation and preyed on the fears of people in an attempt to gain political power.

[78] Unreported, HREOC, Commissioner Nadar, 2 March 2000.

[79] *Hobart Hebrew Congregation v Scully* (Unreported, HREOC, Commissioner Cavanough, 21 September 2000); *Jones and the Executive Council of Australian Jewry v the Adelaide Institute* (Unreported, HREOC, Commissioner McEvoy, 5 October 2000).

[80] *Walsh and others v Hanson* (Unreported, HREOC, Commissioner Nadar, 2 March 2000).

on weak historical evidence made with the desire to seek public attention. This is the very type of finding that was feared by McNamara and Solomon[81] and Poynder[82] (above) and it does diminish the capacity of the laws to fulfil their objectives. It allows people to express their views of hate by simply framing them within a broad political issue and not be challenged to prove the relationship between their words and the wider debate that they are using to shield themselves.

A preferable approach was adopted by Commissioner Beech in *Feghaly v Oldfield*.[83] He refused to exempt the offensive statement on the basis of genuine political comment despite it being made in a pre-election environment at a time when the issue of home-invasion was an important one. This refusal could have been attributed in some part to the comment made by the Commissioner that Mr Oldfield 'aims to produce statements which will attract publicity', a comment that could equally apply to Ms Hanson.

It has been asserted that Ms Hanson has been able to exploit the exemptions by framing her hate within the sphere of academic and political debate.[84] She set the bounds of the debate and used words such as equality, merit and neutrality (which she had given new meanings) and policies such as Aboriginal welfare and immigration as the basis for her claims. Consequently, despite the claims being offensive and insulting to the members of the Aboriginal and Asian communities she has been successful in avoiding sanctions by HREOC and her political discourse has been given legitimacy.

The obiter of Commissioner McEvoy in the *Adelaide Institute case*: that s 18D 'presents a very difficult range of hurdles to be overcome',[85] though not evidenced by outcomes in prior cases (such as those discussed above), does indicate a belief that the wide interpretation afforded to the exemptions should be wound back.

V CONCLUSION

The greatest impact of the laws created by the enactment of the *Racial Hatred Act 1995* (Cth) is that now all Australians have access to racial vilification laws.[86] The provisions have resulted in almost 550 complaints being made that may not have otherwise been made. It was intended, by the enactment of these laws, that racist speech be curtailed by sending a message to Australians that racial abuse is hurtful and unacceptable, while the right to freedom of speech not be unnecessarily eroded. The prevention of racial vilification, it was hoped, would build upon the societal changes initiated by the enactment in the 1980s of anti-discrimination laws. Although it is too soon to judge whether the laws have had the desired attitudinal

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[81] McNamara and Solomon, above n 17.
[82] Poynder, above n 4.
[83] Unreported, HREOC, Commissioner Beech, 19 April 2000. For an outline of the facts see above n 56.
[84] See, for example, Lawrence McNamara, 'The Things You Need: Racial Hatred, Pauline Hanson and the Limits of the Law' (1998) 2 *Southern Cross University Law Journal* 92.
[85] *Jones and the Executive Council of Australian Jewry v the Adelaide Institute* (Unreported, HREOC, Commissioner McEvoy, 5 October 2000).
[86] McNamara and Solomon, above n 17.

effect, there is no evidence that the diminished freedom of speech feared by opponents of the laws has been realised. The statistics in Part 3 showed that complaints concerning racial hatred are increasing relative to other areas under the RDA and determinations on the ground of racial hatred are similarly increasing. Although many complainants have settled or been able to negotiate adequate outcomes at conciliation, the secrecy of such resolutions has meant that the community has been kept unaware of and uninformed about the laws.

Nevertheless, once a complaint is referred for hearing, the chance of success of a complainant at a determination where HREOC has accepted and investigated the complaint is just 50%. The rate of success, however, is increasing. The low success rate can be explained through an analysis of the interpretation of the laws by the HREOC Commissioners, particularly those decisions handed down prior to 2000 — the fifth year of operation of the laws. By interpreting the substantive requirements narrowly and giving a wide reading to the exemptions the provisions have been interpreted in a way that limits the success of a complaint. The fears of some commentators that s 18C set a threshold of unlawfulness too low have not been born out.[87] The interpretation given in particular to the 'nexus' requirement (s 18C(1)(b)) has resulted in the threshold being set higher than would have been anticipated. The exemptions in s 18D have been given a wide meaning, which has led to them being exploited by right-wing opponents of Aboriginal assistance and immigration, and the media continues to offend members of minority groups and appears to be protected by the wide exemptions.

In light of the figures detailing complaints and their success at the determination stage and the restrictive interpretation given to the laws, the best assessment of the laws is that they have been disappointing. The symbolic message the laws have sent to the Australian people has been positive, but the implementation, operation and subsequent outcomes of the laws have failed to live up to the expectations of the legislation's proponents. It appears, however, in light of the findings of Commissioners McEvoy and Cavanough in respect of s 18C in uncontested hearings in the Holocaust 'revisionism' cases[88] that the laws have begun to be interpreted in a more consistent manner and one reflective of the intention of the lawmaker.

The future for the Commonwealth racial hatred laws remains unclear. After just five years of operation the laws are still developing and there is hope that they can succeed in meeting their aspired objectives. Recent procedural amendments to the RDA mean that all future determinations will be heard by the Federal Court or the Federal Magistrates Service. Such changes may make the pursuit of claims less attractive and the understanding of the laws by judges may differ markedly from that of the Commissioners. Early indications are that the shift to the Federal Magis-

[87] Reid and Smith, above n 53, suggest that the current requirement for unlawfulness in s 18C(1)(a) be replaced by the version used in the 1992 Bill, i.e. 'knowingly or recklessly doing a public act which was likely to stir up hatred, serious contempt or severe ridicule against a person or a group of persons on the ground of race, colour or national or ethnic origin'.

[88] *Hobart Hebrew Congregation v Scully* (Unreported, HREOC, Commissioner Cavanough, 21 September 2000); *Jones and the Executive Council of Australian Jewry v the Adelaide Institute* (Unreported, HREOC, Commissioner McEvoy, 5 October 2000).

trates Service will be positive. Disputes promise to be resolved more quickly at relatively low costs (when compared to other courts) and with an award of costs to the winner, which will encourage conciliation and deter complainants from persisting with frivolous claims. It is uncertain to what extent the federal judges and magistrates will follow the principles in the Commissioners' decisions discussed in this article, given the opportunity they have to establish some new directions in the interpretation of legislation so important for community harmony in Australia.