

# AUSTRALIAN RACIAL HATRED LAW: SOME COMMENTS ON REASONABLENESS AND ADJUDICATIVE METHOD IN COMPLAINTS BROUGHT BY INDIGENOUS PEOPLE

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*This article examines the adjudication of complaints of racial hatred brought by Indigenous applicants under the Racial Discrimination Act. The objective is to analyse how the legislative rules are interpreted and applied through the processes of adjudicative decision-making. The article focuses on ways in which the concept of reasonableness in the legislation is interpreted by adjudicators, in addition to some aspects of the broader processes and practices of adjudication. It is argued that the law in practice in these cases is problematic, in several interrelated respects.*

## I INTRODUCTION

Most Parliaments in Australia have enacted legislation that proscribes racial vilification, intimidation and expressions of racial hatred in public. The Commonwealth enactment, the *Racial Hatred Act 1995* (Cth) ('*Racial Hatred Act*'), inserted a new Part into the existing *Racial Discrimination Act 1975* (Cth) ('*Racial Discrimination Act*'). This new Part – Part IIA – proscribes offensive behaviour based on racial hatred.<sup>1</sup>

Part IIA of the *Racial Discrimination Act* uses broad, open-textured tests to delineate the behaviour it renders unlawful. In particular, the provisions utilise a concept of reasonableness at two key points in the legislative scheme. Section 18C(1)(a) renders unlawful conduct that is 'reasonably likely' to offend, insult or humiliate a person based on their race, whilst s 18D provides respondents with a broadly drawn defence in relation to conduct 'done reasonably and in good faith' for specified (broad) purposes including scientific or artistic purposes, or 'any other genuine purpose in the public interest'.<sup>2</sup> The second reading speech

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<sup>1</sup> Part IIA comprises s 18B to s 18F. For accounts of the background and enactment of the *Racial Hatred Act* see Luke McNamara, *Regulating Racism: Racial Vilification Laws In Australia* (2002) ch 1 and 2; Katharine Gelber, *Speaking Back: The Free Speech Versus Hate Speech Debate* (2002) ch 5; Luke McNamara and Tamsin Solomon, 'The Commonwealth Racial Hatred Act 1995: Achievement or Disappointment?' (1996) 18 *Adelaide Law Review* 259, 260-5, 271-87; Ray Jureidini, 'Origins and Initial Outcomes of the Racial Hatred Act 1995' (1997) 5 (1) *People and Place* 30.

<sup>2</sup> Provisions setting out a criminal offence of racial hatred did initially appear in the *Racial Hatred Bill* as introduced into Parliament but were removed during parliamentary debate in the Senate in order to ensure the passage of the Bill. See McNamara, above n 1, 35-7.

explains that the proposed s 18C 'requires an objective test to be applied ... so that community standards of behaviour rather than the subjective views of the complainant are taken into account'.<sup>3</sup>

The jurisdiction provides for a dispute resolution process that emphasises the resolution of complaints through confidential processes of conciliation. It is only in limited circumstances that a complaint will proceed to a public hearing. In practice, approximately only 14 per cent of complaints brought under Part IIA of the *Racial Discrimination Act* are referred to adjudication.<sup>4</sup>

In this article, I examine the adjudication of cases brought by Indigenous applicants under the Part IIA provisions. The article draws on an analysis of decisions handed down from the commencement of the jurisdiction in October 1995 to the end of May 2003.<sup>5</sup> My objective is to analyse how the legislative rules are interpreted and applied through the processes of adjudicative decision-making, to the extent that this is revealed in the case decisions. A main focus of the examination lies in how the concept of reasonableness as it appears in both s 18C and s 18D is constituted in the adjudications. The secondary literature reveals that this issue has not been the subject of thorough examination in relation to any body of complaints under the Part IIA provisions.<sup>6</sup> In addition, the article examines certain practices apparent in the broader processes of adjudication in these cases, such as the use of analogy with the Christian tradition and the way context is constituted in the cases. Both the meaning of reasonableness and the broader practices of adjudication are of central importance in understanding the

<sup>3</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 15 November 1994, 3336, 3341 (Michael Lavarch, Attorney-General).

<sup>4</sup> McNamara, above n 1, 66. Adjudications under the Part IIA provisions are conducted before the Federal Court or the Federal Magistrates Court. Prior to April 2000, adjudications of racial hatred claims were conducted by the Human Rights and Equal Opportunity Commission ('HREOC'). This is discussed below at n 17.

<sup>5</sup> These cases are: *Combined Housing Organisation Ltd, Ipswich Regional ATSIC for Legal Services, Thompson and Fisher v Hanson* [1997] HREOCA 58 (Unreported, Commissioner Wilson, 16 October 1997); *Corunna v West Australian Newspapers Ltd* (2001) EOC ¶93-146 ('Corunna') (on this case see Hannah McGlade, 'Racial Vilification Before the Human Rights and Equal Opportunity Commission' (2000) 5 *Indigenous Law Bulletin* 8); *Bropho v Human Rights and Equal Opportunity Commission* (2002) 72 ALD 321; *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352; *Creek v Cairns Post Pty Ltd* [2001] FCA 1150 (Unreported, Kiefel J, 20 August 2001); *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615 (Unreported, Drummond J, 10 November 2000) ('Hagan'); *Hagan v Trustees of the Toowoomba Sports Ground Trust* (2001) 105 FCR 56; *Hearne v Kelvin Dennis and South Pacific Tyres Pty Ltd* (Unreported, Human Rights and Equal Opportunity Commission, Commissioner Carter, 24 May 2000); *Jacobs v Fardig* [1999] HREOCA 9 (Unreported, Innes AM, 27 April 1999) (digest appears at (1999) EOC ¶93-016); *McGlade v Lightfoot* [1999] HREOCA 1 (Unreported, Commissioner Johnston, 21 January 1999) (digest at (1999) EOC ¶93-002); *McGlade v Lightfoot* (2000) 104 FCR 205; *McGlade v Lightfoot* [2002] FCA 752 (Unreported, Carr J, 13 June 2002); *McGlade v Lightfoot* (2002) 124 FCR 106; *McMahon v Bowman* [2000] FMCA 3 (Unreported, Raphael FM, 13 October 2000); *Walsh v Hanson* (Unreported, Human Rights and Equal Opportunity Commission, Commissioner Nader, 2 March 2000); *Wanjurri v Southern Cross Broadcasting (Aus) Ltd* (2001) EOC ¶93-147 ('Wanjurri') (on this case see Hannah McGlade, 'Racial Vilification Before the Human Rights and Equal Opportunity Commission' (2001) 5 *Indigenous Law Bulletin* 8, 9); *Warner v Kucera* (2001) EOC ¶93-137; *Williams v Tandanya Cultural Centre* (2001) 163 FLR 203.

<sup>6</sup> The only substantive examinations that I found on the issue of reasonableness are contained in McNamara, above n 1, 88-90 and Brad Jessup, 'Five Years On: A Critical Evaluation of the *Racial Hatred Act 1995*' (2001) 6 *Deakin Law Review* 91, 103-5.

reach and meaning of these *Racial Discrimination Act* provisions as they operate for Indigenous applicants. Notably, in the debate leading up to the enactment of the *Racial Hatred Act*, Indigenous people were identified as a major target of racist violence and harassment in Australia. A central motivation for the enactment of the federal provisions was to address this violence.<sup>7</sup>

I argue in this article that the 'law in action' in these cases is problematic in several interrelated respects.<sup>8</sup> This appears to be a consequence both of the wording and structure of Part IIA itself, as well as a product of particular practices and approaches adopted in some of the adjudications examined. The result is that the processes and outcomes of some of these cases further entrench dominant narratives about race relations in Australia. In this sense, the Anglo-Australian political and legal system is legitimated, and the subordinated status of Aboriginal people in law and society is maintained.<sup>9</sup>

The article first sets out the legislative provisions contained in Part IIA of the *Racial Discrimination Act* and then examines the main themes in the constitution of reasonableness in the adjudication of this group of complaints.

## II THE STATUTORY FRAMEWORK, PROCEDURE AND REMEDIES

Section 18C(1) contains the general statement of proscribed conduct:

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.<sup>10</sup> (emphasis added)

<sup>7</sup> Explanatory Memorandum, Racial Hatred Bill 1994 (Cth) 1 states that the Bill addresses concerns highlighted by the findings of HREOC's *National Inquiry into Racist Violence* (1991) (which found racist violence against Indigenous people was an 'endemic' problem in Australia: 387) and the Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991). The second reading speech refers to these inquiries, in addition to the Australian Law Reform Commission Report into *Multiculturalism and the Law* (1992): Commonwealth, *Parliamentary Debates*, above n 3, 3336-7. See further Nick Poynder, 'Racial Vilification Legislation' (1994) 71 *Aboriginal Law Bulletin* 4.

<sup>8</sup> The phrase 'law in action' is used to denote the implementation and enforcement of legal rules, as distinct from the 'law in books' (as the legal rules appear, here in statutory form). Richard Ingleby and Richard Johnstone, 'Invocation and Enforcement of Legal Rules', in Rosemary Hunter, Richard Ingleby and Richard Johnstone (eds), *Thinking About Law: Perspectives on the history, philosophy and sociology of Law* (1995) 157.

<sup>9</sup> A similar thesis is developed by Lawrence McNamara in relation to the operation of the *Racial Discrimination Act* in two different contexts, football and statements made by Pauline Hanson challenged as race discrimination in the case of *Combined Housing Organisation Ltd, Ipswich Regional ATSIIC for Legal Services, Thompson and Fisher v Hanson* [1997] HREOCA 58 (Unreported, Commissioner Wilson, 16 October 1997). See Lawrence McNamara, 'Long Stories, Big Pictures: Racial Slurs, Legal Solutions and Playing The Game' (1998) 10 *Australian Feminist Law Journal* 85; Lawrence McNamara, 'The Things You Need: Racial Hatred, Pauline Hanson and the Limits of the Law' (1998) 2 *Southern Cross University Law Review* 92.

<sup>10</sup> Note that the concepts of race, colour, national or ethnic origin are not defined in the *Racial Discrimination Act*.

Sections 18C(2) and (3) provide further articulation of the concept of 'otherwise than in private'.<sup>11</sup>

Section 18D provides an exemption where the respondent is able to establish that the conduct was 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.

The legislative scheme provides for an 'aggrieved person' to lodge an application alleging racial vilification with the Human Rights and Equal Opportunity Commission ('HREOC').<sup>12</sup> This has been interpreted to mean that ordinarily only a member of the vilified group has standing to lodge a complaint.<sup>13</sup> Limited provision is made for the lodging of representative complaints.<sup>14</sup> Once lodged, HREOC (or more specifically, the President of HREOC) is required to inquire into the application and attempt to resolve it through a process of conciliation.<sup>15</sup> This may lead to a range of (confidential) outcomes including an apology, a commitment by the respondent to engage in staff training, and/or the payment of monetary compensation to the applicant.<sup>16</sup> If HREOC declines to accept the complaint, for example on the ground that it is 'trivial, vexatious, [or]

<sup>11</sup> Section 18C(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.'

Section 18C(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.'

<sup>12</sup> *Human Rights and Equal Opportunity Commission Act 1986* (Cth) ('HREOC Act') s 46P. For a critique of complaint handling processes and adjudicative procedures see McNamara, above n 1, 54-62.

<sup>13</sup> *Cameron v Human Rights and Equal Opportunity Commission* (1993) 46 FCR 509, 519 (on standing to lodge a complaint of racial discrimination under the *Racial Discrimination Act*); Jureidini, above n 1, 40. See also *Executive Council of Australian Jewry v Scully* [1997] HREOCA 59 (Unreported, Commissioner Nettlefold, 21 October 1997) overturned on appeal in *Executive Council of Australian Jewry v Scully* (1998) 79 FCR 537. A similar requirement in the New South Wales scheme has been critiqued in Gelber, above n 1, 19-22.

<sup>14</sup> HREOC Act ss 46PB, 46PC.

<sup>15</sup> HREOC Act s 46PF. See also ss 46PH-46PN. Note that a relatively high proportion of complaints are declined by HREOC or not pursued by the complainant. See McNamara, above n 1, 64-5.

<sup>16</sup> There is no statutory prescription of acceptable outcomes in conciliation. Complaints against the media appear frequently to result in an apology alone. Employment complaints appear often to result in the payment of monetary compensation on its own, or with an apology. Some employment complaints are settled through an undertaking by the employer to engage in staff training, or to provide the employee with a written job reference. See generally the HREOC Conciliation Register, available at: <[http://www.humanrights.gov.au/complaints\\_information/register/index.html](http://www.humanrights.gov.au/complaints_information/register/index.html)> at March 8 2004.

misconceived',<sup>17</sup> or an application is terminated on the ground that conciliation has not settled the matter, the case will proceed to adjudication before the Federal Court or Federal Magistrates Court where the applicant lodges an application to this effect. If the matter proceeds to court, the onus is on the applicant to show that the elements of s 18C(1) are satisfied on the facts. Should a respondent seek to rely on s 18D, the respondent bears the onus of establishing its applicability.<sup>18</sup>

### III OBJECTIVITY AND PERSPECTIVE

It is said that the standard of reasonableness in both s 18C and s 18D imports an objective as opposed to subjective test of assessment. As noted above, this is the view expressed in the second reading speech on the Bill,<sup>19</sup> and it represents the way that adjudicators<sup>20</sup> articulate these aspects of s 18C and s 18D, both in cases brought by Indigenous applicants and in other cases.<sup>21</sup>

Specifically, adjudicators present their task under s 18C(1)(a) as being to assess the offensiveness or insulting nature of the respondent's conduct by reference to the perspective of the racial or ethnic group targeted in that conduct. It is to this perspective that adjudicators have explicitly or implicitly attached the concept of objectivity. That is, adjudicators seek to assess the respondent's conduct under s 18C(1)(a) by reference to the objective perspective of the racial or ethnic group targeted in the respondent's conduct. The decisions reveal that adjudicators ask whether the respondent's conduct was reasonably likely, in the circumstances, to

<sup>17</sup> HREOC Act ss 46PH, 46PO, and Part IIB Division 2 generally. Prior to April 2000, HREOC conducted inquiries and made determinations on racial hatred claims under Part IIA of the *Racial Discrimination Act*. The change from determination by HREOC to adjudication in the formal court system (the Federal Court and the Federal Magistrates Court) gave rise to concerns of growing legal costs for complainants (with the possibility of costs orders being made) and formalism. See Beth Gaze, 'The Costs of Equal Opportunity' (2000) 25 *Alternative Law Journal* 125.

<sup>18</sup> Explanatory Memorandum, Racial Hatred Bill 1994 (Cth), 11, adopted in *Bryl v Nowra* [1999] HREOCA 11 (Unreported, Commissioner Johnston, 21 June 1999) subheading 4.1; *Corunna* (2001) EOC ¶93-146, 75 465 (complainants' application for review dismissed: *Bropho v Human Rights and Equal Opportunity Commission* (2002) 72 ALD 321, 328-9); *Hobart Hebrew Congregation v Scully* (Unreported, Human Rights and Equal Opportunity Commission, Commissioner Cavanough, 21 September 2000) subheading 3.3; *Jones v Toben* (Unreported, Human Rights and Equal Opportunity Commission, Commissioner McEvoy, 5 October 2000) subheading 4.3 (digest at (2000) EOC ¶93-110) (on appeal *Toben v Jones* [2003] FCAFC 137 (27 June 2003)); *McGlade v Lightfoot* (2002) 124 FCR 106, 121.

<sup>19</sup> Commonwealth, *Parliamentary Debates*, above n 3.

<sup>20</sup> In this article the word 'adjudicator' is used to refer to judges, Federal Magistrates and Commissioners of HREOC who, prior to April 2000, conducted inquiries and made determinations under the *Racial Discrimination Act*. See also above n 17.

<sup>21</sup> On s 18C, see, eg, *Bryant v Queensland Newspaper Pty Ltd* [1997] HREOCA 23 (Unreported, President Wilson, 15 May 1997); *Corunna* (2001) EOC ¶93-146, 75 465-6 146 (complainants' application for review dismissed); *Bropho v Human Rights and Equal Opportunity Commission* (2002) 72 ALD 321; *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, 355; *De La Mare v Special Broadcasting Service* [1998] HREOCA 26 (Unreported, Commissioner McEvoy, 18 August 1998) subheading 5.2.2; *Hobart Hebrew Congregation v Scully* (unreported, Human Rights and Equal Opportunity Commission, Commissioner Cavanough, 21 September 2000) subheading 3.2. On s 18D, see, eg, *Bryl v Nowra* [1999] HREOCA 11 (Unreported, Commissioner Johnston, 21 June 1999) subheading 4.3; *Hobart Hebrew Congregation v Scully* (unreported, Human Rights and Equal Opportunity Commission, Commissioner Cavanough, 21 September 2000) subheading 3.3.

offend, insult, humiliate or intimidate the applicant<sup>22</sup> and/or a person or persons from the applicant's ethnic or racial group.<sup>23</sup> Or adjudicators ask whether the respondent's conduct was likely, in the circumstances, to offend a reasonable member of the applicant's ethnic or racial group.<sup>24</sup> The fact that the complainant was offended by the conduct in question is clearly not sufficient.<sup>25</sup> This type of approach has been identified by some as a 'reasonable victim' test.<sup>26</sup>

In contrast, with respect to the reasonableness requirement in s 18D, adjudicators present their task as being to take a broader perspective than a reasonable victim (racial outsider) test.<sup>27</sup> In two leading cases on s 18D, both adjudicators referred to the need to take account of 'community standards' in assessing the respondent's conduct, and in this they clearly were not seeking to limit their understanding to the values and standards of the vilified community.<sup>28</sup> Both adjudicators meant communities beyond the racial or ethnic communities vilified by the acts of racial

<sup>22</sup> See, eg, *Horman v Distribution Group* [2001] FMCA 52 (Unreported, Raphael FM, 27 July 2001) [60]; *Korczak v Commonwealth of Australia* (2000) EOC ¶93-056, 74 176; *McMahon v Bowman* [2000] FMCA 3 (Unreported, Raphael FM, 13 October 2000) [28].

<sup>23</sup> See, eg, *Hagan* [2000] FCA 1615 (Unreported, Drummond J, 10 November 2000) [31] (the test was articulated as 'an indigenous Australian or indigenous Australians generally', and was not discussed on appeal: *Hagan v Trustees of the Toowoomba Sports Ground Trust* (2000) 105 FCR 56); *Jones v Toben* (unreported, Human Rights and Equal Opportunity Commission, Commissioner McEvoy, 5 October 2000) subheading 4.2 (digest at (2000) EOC ¶93-110) (the group was identified as 'persons of Jewish origin in Australia (and indeed beyond)') (on appeal *Toben v Jones* [2003] FCAFC 137 (27 June 2003)); *Feghaly v Oldfield* (Unreported, Human Rights and Equal Opportunity Commission, Commissioner Beech, 19 April 2000) subheading 7 (digest at (2000) EOC ¶93-090) (the group was identified as 'members of the Lebanese and Iranian communities'); *Shron v Telstra Corporation Ltd* [1998] HREOCA 24 (Unreported, Commissioner Innes, 10 July 1998) subheading 5 (the test was articulated in terms of 'the complainant or some people of Jewish origin').

<sup>24</sup> See, eg, *Corunna* (2001) EOC ¶93-146, 75 465-8 (complainants' application for review dismissed: *Bropho v Human Rights and Equal Opportunity Commission* (2002) 72 ALD 321); *Wanjurri* (2001) EOC ¶93-147, 75 486; *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, 356.

<sup>25</sup> See, eg, *Corunna* (2001) EOC ¶93-146, 75 466 (complainants' application for review dismissed: *Bropho v Human Rights and Equal Opportunity Commission* (2002) 72 ALD 321); *Hagan* [2000] FCA 1615 (Unreported, Drummond J, 10 November 2000) [15]; *De La Mare v Special Broadcasting Service* [1998] HREOCA 26 (Unreported, Commissioner McEvoy, 18 August 1998) subheading 5.2.2; *Wanjurri* (2001) EOC ¶93-147, 75 486-7.

<sup>26</sup> See, eg, Saku Akmeemana and Melinda Jones, 'Fighting Racial Hatred', in Race Discrimination Commissioner, *The Racial Discrimination Act: A Review* (1995) 129, 168; *Wanjurri* (2001) EOC ¶93-147, 75 486; *Corunna* (2001) EOC ¶93-146, 75 468 (complainants' application for review dismissed: *Bropho v Human Rights and Equal Opportunity Commission* (2002) 72 ALD 321). Representations of women as victims has been critiqued in feminist legal scholarship as denying women's agency and resistance, and indeed as fastening women into a victim position. See generally, Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (2002) 322-6. For similar reasons, this article prefers to not use the terminology of the reasonable victim. Rather, references to the reasonable outsider, or the reasonable Indigenous person or Aboriginal or Torres Strait Islander perspective, are preferred.

<sup>27</sup> Section 18D also contains a requirement of 'good faith'. This has been interpreted by adjudicators as encompassing a subjective test. See, eg, *Bryl v Nowra* [1999] HREOCA 11 (Unreported, Commissioner Johnston, 21 June 1999) subheading 4.3; Contra *Hobart Hebrew Congregation v Scully* (Unreported, Human Rights and Equal Opportunity Commission, Commissioner Cavanough, 21 September 2000) subheading 3.3; *Jones v Toben* (Unreported, Human Rights and Equal Opportunity Commission, Commissioner McEvoy, 5 October 2000) para 4.3 (digest at (2000) EOC ¶93-110) (on appeal *Toben v Jones* [2003] FCAFC 137 (27 June 2003)). See further McNamara, above n 1, 97-102.

<sup>28</sup> As noted in the introduction, community standards were used in the second reading speech as a reference point. See Commonwealth, *Parliamentary Debates*, above n 3.

hatred. In effect, they used a reasonable person test, constituted as broader than a reasonable outsider test.<sup>29</sup>

A sense of these different constitutions of reasonableness under s 18C and s 18D – reasonable racial outsider versus reasonable person – can be gained from the decision of *Corunna v West Australian Newspapers Ltd.*<sup>30</sup> This application was brought by an Aboriginal elder on behalf of a number of Nyungar elders. The case concerned the publication of a cartoon in the West Australian newspaper demeaning Nyungar people, the ancestral warrior Yagan,<sup>31</sup> and the Dreamtime ancestor Waugyl. The cartoon identified particular Nyungar people and referred to their ancestry in a demeaning way. In addition it dealt with the issue of death in a manner that was offensive to Aboriginal people. The applicant argued that the conduct in question ought to be judged under s 18C(1)(a) according to whether it was reasonably likely to offend a person who is an Aboriginal person of the Nyungar group. It was the applicants' view that a reasonable non-Aboriginal person may not be offended by the cartoon.<sup>32</sup> The respondent argued against the adoption of a reasonable Aboriginal or Nyungar standard. It submitted that a 'reasonable ordinary reader' of the West Australian newspaper was the correct standard by which to judge the offensiveness etc of the conduct in question.<sup>33</sup> Indeed, the respondent argued that the evidence given by the complainant and two other Aboriginal elders was irrelevant to this reasonable person test and so ought to be excluded. The respondent argued that

[t]he submission [of the complainants] that the special cultural characteristics of a particular group are properly taken into account in assessing whether the relevant conduct is reasonably likely to offend etc must be rejected as to accept it would mean that liability would depend on the idiosyncratic sensitivities of a particular person or group of persons.<sup>34</sup>

In the result, the Commissioner determined that the appropriate question to ask under s 18C(1)(a) was whether a 'reasonable Nyungar or Aboriginal person' would, in all the circumstances, be offended etc by the cartoon.<sup>35</sup> He found that such a person would be.

Ultimately however the application was not successful due to the operation of s 18D. According to the Commissioner, for a comment to be reasonable under s 18D, 'it must be one which the ordinary, reasonable person would consider to

<sup>29</sup> *Hanna Bryl v Anna Kovacevic and Louis Nowra and Melbourne Theatre Company* [1999] HREOCA 11 (Unreported, Commissioner Johnston, 21 June 1999) subheading 4.3; *Walsh v Hanson* (Unreported, Human Rights and Equal Opportunity Commission, Commissioner Nader, 2 March 2000) subheading 4.

<sup>30</sup> (2001) EOC ¶93-146 (complainants' application for review dismissed: *Bropho v Human Rights and Equal Opportunity Commission* (2002) 72 ALD 321). On this case see McGlade, above n 5.

<sup>31</sup> On the return of the remains of Yagan from Britain, see Hannah McGlade, 'The Repatriation of Yagan: a Story of Manufacturing Dissent' (1998) 4 *Law/Text/Culture* 245.

<sup>32</sup> *Corunna* (2001) EOC ¶93-146, 75 456-7.

<sup>33</sup> *Ibid* 75 458.

<sup>34</sup> *Ibid*.

<sup>35</sup> *Ibid* 75 468. Commissioner Innes adopted his reasoning from this case in *Wanjurri* (2001) EOC ¶93-147, 75 486.

be reasonable in the circumstances of the case.<sup>36</sup> He was satisfied that the newspaper had acted reasonably in this sense and in good faith in publishing the cartoon.<sup>37</sup> He referred to an earlier HREOC decision discussing the meaning of s 18D and found that testing the cartoon 'against "moral and ethical consideration, expressive of community standards"', the newspaper did not act outside the 'margin of tolerance' allowed under s 18D.<sup>38</sup> The Commissioner concluded '[w]hile it may be argued that the cartoon could be characterised as "exaggerated" or "prejudiced", I do not consider that it was sufficiently exaggerated or prejudiced (having regard to the surrounding circumstances) to breach the standard of reasonableness.<sup>39</sup> Accordingly, in the result, no legal liability attached to the publication of this cartoon that was determined to be offensive to (reasonable) Nyungar or Aboriginal people.

The argument made in this article is that the legislative rules, as put into effect through the processes of adjudication, are in several interrelated respects problematic in relation to complaints brought by Indigenous people. This is apparent in the case of *Corunna* where the result of the case was a reification of dominant racial values to the effect that the publication of this cartoon was a legitimate comment on an issue of public interest. In the cases brought by Indigenous applicants, *Corunna* is not alone in prioritising non-indigenous racial narratives over Indigenous perspectives.

The themes and factors that I identify as problematic in complaints brought by Indigenous people are several and interrelated. They include the wording of the statutory rules in Part IIA, the constitution of the reasonableness tests in s 18C and s 18D through the processes of adjudication, essentialism, questions of epistemology, including the ability of adjudicators to hear the voices of racial outsiders,<sup>40</sup> the sources of information used by adjudicators, context, and the processes through which complainants' grievances are dismissed. The remainder of this article explores these ideas.

#### IV REASONABLE PEOPLE

A reasonable victim approach is seen by some commentators as providing a preferable method by which to assess the race specific phenomena of racial vilification. Saku Akmeemana and Melinda Jones, commenting on the test of

<sup>36</sup> *Corunna* (2001) EOC ¶93-146, 75 470, quoting *Western Aboriginal Legal Service v Jones* [2000] NSW ADT 102 (Unreported, Judicial Member Rees, Members Silva and Luger, 31 July 2000) [121].

<sup>37</sup> In coming to the conclusion that the newspaper acted in good faith, the Commissioner noted that the paper had published a series of articles (described as providing a 'balanced report') on the issue of the return of Yagan's remains, and that it was an issue of importance to Indigenous and non-Indigenous communities in Western Australia: *Corunna* (2001) EOC ¶93-146, 75 471.

<sup>38</sup> *Ibid* 75 470. The earlier decision referred to is *Bryl v Nowra* [1999] HREOCA 11 (Unreported, Commissioner Johnston, 21 June 1999).

<sup>39</sup> *Corunna* (2001) EOC ¶93-146, 75 470.

<sup>40</sup> The word 'outsider' is adopted from the work of Mari Matsuda who uses it in preference to 'minority' – a word that downplays the numerical significance of non-racially dominant groups. Mari Matsuda, 'Public Response to Racist Speech: Considering the Victim's Story' (1989) 87 *Michigan Law Review* 2320, 2323.

'reasonably likely' in s 18C(1)(a), have expressed the view that a reasonable person approach would merely perpetuate the values and understandings of dominant racial groups in Australia, and for that reason should be rejected. For these authors, a reasonable *victim* approach, on the other hand, 'can be interpreted as a means of eliminating a systemic barrier' in that in this approach complainants are not 'subject to the views of the dominant group concerning the types of comments that are offensive'.<sup>41</sup> In two cases in this study brought by Indigenous applicants under the racial hatred provisions in the *Racial Discrimination Act*, the adjudicator cited this work of Akmeemana and Jones and articulated similar reasons in support of the use of a reasonable Indigenous approach under s 18C(1)(a).<sup>42</sup>

Accepting for the moment that a reasonable Indigenous person standard is the preferable criterion to be applied in assessing the effect of racially vilifying behaviour, it is notable that the use of this approach under s 18C(1)(a) is largely overshadowed by the reasonable person test of s 18D. This is because the ultimate question in many, and potentially all, cases brought under Part IIA is whether the conduct was done reasonably and in good faith through the eyes of the reasonable person (under s 18D) who embodies the values and attitudes of the dominant racial group. This question is potentially relevant in all cases because, although the defence in s 18D that the act was 'said or done reasonably and in good faith' relates only to the circumstances delineated in (a), (b) and (c), these circumstances are so broadly drawn (see in particular (c)) that s 18D is potentially applicable to all complaints brought under Part IIA.<sup>43</sup> The sequence in which s 18C and s 18D are considered in the process of adjudication means that it is the values of the dominant racial group, constituted as the reasonable person, that are the final determinants of the border between lawful conduct, and unlawful racial hatred against Indigenous people.

### **A Concerns with a Reasonable Outsider Approach**

The appropriateness of a reasonable outsider standard, as distinct from a reasonable person test, has been subject to much debate amongst feminists in the context of legal remedies for gendered harms. This debate has produced useful insights informative for thinking about the reasonableness standard in both s 18C and s 18D.

A 'reasonable woman' standard has been posited as an appropriate legal standard to be used in assessing the conduct of perpetrators in relation to gendered harms such as sexual harassment, sexual assault and violence in the home. These harms

<sup>41</sup> Akmeemana and Jones, above n 26, 168.

<sup>42</sup> *Corunna* (2001) EOC ¶93-146, 75 467-8. Commissioner Innes adopted his reasoning from this case in *Wanjurri* (2001) EOC ¶93-147, 75 486.

<sup>43</sup> For similar views on the breadth of s 18D, see Akmeemana and Jones, above n 26, 172-3; Kate Eastman, 'Drafting Racial Vilification Laws: Legal and Policy Issues' (1995) 1 *Australian Journal of Human Rights* 285, 289. Eastman concludes that s 18D is potentially so wide that all public comments made by people who genuinely believe in the truth of what they are saying will be exempt. See also Poynder, above n 7, 5; Meredith Wilkie, 'Australia's Human Rights and Equal Opportunity Commission', in Martin MacEwen (ed), *Anti-Discrimination Law Enforcement: A Comparative Perspective* (1997) 84, 108.

are gender specific both in that they are overwhelmingly perpetrated by men against women, and secondly, each is a practice deeply embedded in the systemic gender hierarchy. For some commentators a reasonable woman standard provides a space in which the dominant gendered male reading of the incident can be displaced in favour of an interpretation from a context of women's experiences.<sup>44</sup> For other scholars, the adoption of a reasonable woman standard presents conceptual flaws and its use may mask and reify systems of privilege. For them the preferable course is rather to work towards transforming the reasonable person standard away from dominant gendered understandings to a position of inclusiveness of outsider perspectives.<sup>45</sup> In particular, for these scholars, the test of the reasonable woman implicates two issues at the core of feminist legal scholarship: essentialism and the sameness/difference dichotomy.

In terms of the reasonable woman test, feminists have been concerned that the use of this standard constitutes a unitary image of womanhood. The concern is that a reasonable woman standard may erase differences in experiences of women and conflate the multiplicity of women's lives into an essentialised universal definition of a reasonable woman. In this, the homogenised reasonable woman has been shown to be white, middle-class, heterosexual and able-bodied. In this conflation, systems of privilege are masked. Further, the idea of a reasonable woman standard presents women as different to men, permitting special or preferential treatment for women's difference. Not only does this invite negative stereotyping of women's difference, as difference is defined by a system of male privilege, the comparison invoked in the standard does not in any way address the system of privilege that defines male as the referent.<sup>46</sup>

<sup>44</sup> See, eg, Leslie M Kerns, 'A Feminist Perspective: Why Feminists Should Give the Reasonable Woman Standard Another Chance' (2001) 10 *Columbia Journal of Gender and Law* 195; Caroline A Forell and Donna M Matthews, *A Law of Her Own: The Reasonable Woman as a Measure of Man*, (2000); Caroline Forell, 'Essentialism, Empathy and The Reasonable Woman' (1994) *University of Illinois Law Review* 769; Jeffrey A Gettle, 'Sexual Harassment and the Reasonable Woman Standard: Is it a Viable Solution?' (1993) 31 *Duquesne Law Review* 841; Caroline Forell, 'Reasonable Woman Standard of Care' (1992) 11 *University of Tasmania Law Review* 1. Some adjudicators in Australia and the US have adopted a reasonable woman standard in assessing sexual harassment cases. In some cases this approach has furthered the objective of substantive sexual equality; in other cases it has led to further entrenching substantive inequality. See, eg, *Hall, Oliver and Reid v Sheiban* (1988) EOC ¶92-227 (overturned on appeal: *Hall v Sheiban Pty Ltd* (1989) EOC ¶92-250); *Rabidue v Osceola* 805 F 2d 611 (6th Cir 1986) 626 (Keith J dissenting); *Robinson v Jacksonville Shipyards, Inc* 760 F Supp 1486 (MD Fla 1991).

<sup>45</sup> See, eg, Stephanie M Wildman, 'Ending Male Privilege: Beyond the Reasonable Woman' (2000) 98 *Michigan Law Review* 1797 (a review essay on Forell and Matthews, above n 44); Kathryn Abrams, 'The New Jurisprudence of Sexual Harassment' (1998) 83 *Cornell Law Review* 1169; Kathryn Abrams, 'The Reasonable Woman: Sense and Sensibility in Sexual Harassment Law' (1995) *Dissent* 48; Sharon J Bittner, 'The Reasonable Woman Standard After *Harris v Forklift Systems, Inc*: The Debate Rages On' (1994) 16 *Women's Rights Law Reporter* 127; Naomi R Cahn, 'The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice' (1991-1992) 77 *Cornell Law Review* 1398; Lucinda Finley, 'A Break in the Silence: Including Women's Issues in a Torts Course' (1989) 1 *Yale Journal of Law and Feminism* 41.

<sup>46</sup> On these questions of essentialism and the sameness/difference debate of feminist theory in the context of the reasonable woman test, see Wildman, above n 45, 1809-13; Kerns, above n 44, 222-3; Abrams, 'The Reasonable Woman: Sense and Sensibility in Sexual Harassment Law', above n 45, 50-1; Cahn, above n 45, 1415-20. On essentialism and the *Racial Discrimination Act*, see Hilary Astor, 'A Question of Identity: The Intersection of Race and Other Grounds of Discrimination', in *Race Discrimination Commissioner*, above n 26, 261.

These concerns with the reasonable woman standard of US jurisprudence have resonance for the ways in which Indigenous perspectives are constructed by adjudicators under s 18C(1)(a) of the *Racial Discrimination Act*. In particular, we might usefully ask whether the racial or ethnic outsider perspective constituted by adjudicators under this section presents an essentialised view of Indigenous people. Is the legislation, and the processes of adjudication, reductivist of the ways in which interlocking systems of power – for example, sex, socio-economic class and heterosexuality – interact to shape Indigenous people's experiences of racial hatred?<sup>47</sup> Clearly the legislation, in identifying its ground as race and related cultural constructs, is reductive in this sense. Many case decisions were also reductive in focusing on race alone. In most cases examined, the adjudicators constituted the test under s 18C(1)(a) as being that of the reasonable Aboriginal or Indigenous person perspective, or the more specific reasonable Aboriginal person of the Nyungar group.<sup>48</sup> Notably though, and by contrast, in one case the adjudicator constructed the relevant Indigenous person perspective in a considerably narrower manner. In this case the Federal Court judge favoured the submission of the applicant's counsel that the question under s 18C(1)(a) ought to be phrased as whether the respondent's conduct was likely to offend a (reasonable) 'Aboriginal mother, or one who cares for children, and who resides in the township of Coen [a country town in Queensland]'.<sup>49</sup> The judge articulated the reason for adopting this narrower test as being that referring to race alone is too wide where, as here, Aboriginal peoples' views differ about the desirability of living a 'more traditional lifestyle' (as the judge described it). There was no discussion about the reference to being a mother, or a person with the care of children. Implicit in this formulation, however, is a view that both being a mother (or having primary responsibility for the care of a child) and the dichotomy of 'traditional lifestyle'/urban Aboriginal experience are relevant considerations in shaping how the respondent's conduct is perceived. The sensitivity shown in this decision to such identities goes some way in answering the concerns of essentialism. However, broader questions about whether this lapses into a subjective test, and secondly, how the judge then informed himself of the perspective of such a reasonable Aboriginal mother living in the town of Coen, remain. This second issue is examined below under the subheading 'Epistemology'. Notably, the sensitivity shown in this decision to interlocking identities underscores the finding that apart from this case, decisions were silent

<sup>47</sup> On intersecting systems of oppression experienced by Aboriginal women, see Hannah McGlade, 'Reviewing Racism: HREOC and the *Racial Discrimination Act 1975* (Cth)' (1997) 4 *Indigenous Law Bulletin* 12, 14. On reductivism under federal sex discrimination legislation, see Rosemary Hunter and Alice Leonard, 'The Outcomes of Conciliation in Sex Discrimination Cases' (Working Paper No 8, Centre for Employment and Labour Relations Law, University of Melbourne, 1995).

<sup>48</sup> On the construction of the broader category of Indigenous people, see, eg, *Hagan* [2000] FCA 1615 (Unreported, Drummond J, 10 November 2000) [31] (this reasoning was not discussed on appeal: *Hagan v Trustees of the Toowoomba Sports Ground Trust* (2000) 105 FCR 56). On the construction of the narrower category by reference to the Nyungar group, see, eg, *Corunna* (2001) EOC ¶93-146, 75 468; *Wanjurri* (2001) EOC ¶93-147, 75 486.

<sup>49</sup> *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, 356.

in relation to systems of power based on, for example, gender, geographic location and socio-economic class.<sup>50</sup>

Explorations of the sameness/difference framework in feminist scholarship on gender also have resonance in examining the cases brought by Indigenous people under Part IIA. In particular, does the juxtaposition of the (reasonable) Indigenous person perspective in s 18C against the perspective of the reasonable person in s 18D suggest that Aborigines and Torres Strait Islanders are not, and cannot, be reasonable people? The dichotomous positioning of these two concepts suggests that the answer to this question is yes, as the meaning of being a reasonable person is generated through difference to the reasonable Indigenous person, and vice versa. In other words, the concept of reasonable person in s 18D gains meaning in contrast to the reasonable Indigenous person perspective in s 18C.

It is clear that the use of a reasonable Indigenous person perspective in s 18C(1)(a) does not in any way challenge or usurp the content of the reasonable person test of s 18D. It leaves its non-indigenous content untouched, and indeed reifies it as the neutral, impartial standard against which the difference of Aboriginality is measured.

### **B Concerns with Reasonableness as a Legal Standard**

The discussion so far has examined the merits and concerns in using a reasonable Indigenous person perspective compared to a reasonable person test. A more fundamental criticism can however be made of the use of the concept of reasonableness itself in the Part IIA provisions, whether in the form of the s 18C reasonable Indigenous person perspective or the s 18D reasonable person test. This larger consideration has been convincingly articulated by Catharine MacKinnon in relation to gender.<sup>51</sup> It is that liberal legal concepts, including reasonableness and objectivity, are derived and interpreted by adjudicators from the perspectives of dominant values. In other words, law is not separate from other cultural processes and institutions including gender and racial hierarchies.<sup>52</sup> Nancy Ehrenreich asks how has the concept of reasonableness retained its legitimacy in light of its devastating fundamental weaknesses? She questions: 'Why, for example, in the context of antidiscrimination statutes designed to reform society, is a standard that is explicitly tied to the status quo thought to be a proper vehicle for identifying discriminatory behaviour?'<sup>53</sup> One might well ask the same question in relation to the use of reasonableness in the racial hatred

<sup>50</sup> Note however that a geographic dimension was also added in the case of *Warner v Kucera* (2001) EOC ¶93-137, 75 371 where Commissioner Johnston determined that the test to be applied was whether the conduct was reasonably likely to offend etc 'Aboriginal persons in Geraldton [a town in Western Australia] like Mr Warner' [the applicant].

<sup>51</sup> Catharine MacKinnon, 'Feminism, Marxism, Method and the State: Towards Feminist Jurisprudence' (1983) 8 *Signs: Journal of Women in Culture and Society* 635.

<sup>52</sup> MacKinnon unmasks law's neutrality, or point-of-viewlessness, to reveal a male standard. In her words, 'male dominance is perhaps the most pervasive and tenacious system of power in history, ... it is metaphysically nearly perfect. Its point of view is the standard for point-of-viewlessness, its particularity the meaning of universality': MacKinnon, above n 51, 638-9.

<sup>53</sup> Nancy S Ehrenreich, 'Pluralists Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law' [1990] 99 *Yale Law Journal* 1177, 1178.

provisions of the *Racial Discrimination Act*, both in the guise of the reasonable outsider perspective under s 18C and the reasonable person perspective in s 18D.

This critique of the use of reasonableness as a legal standard lies in the way that the concept can, and has been, deployed to maintain dominant cultural narratives, as illustrated in *Corunna*. Both the reasonable racial outsider test of s 18C and the reasonable person perspective of s 18D are deeply problematic. Ultimately, whatever standard is chosen, the real issue is how the interpreting of the standard is done.

## V EPISTEMOLOGY

Regina Graycar has suggested that in Australia we need to think much more closely about the process of judging in terms of what judges tell us about women and men. We ought to address the question of how judges form their knowledge of gender relations, and how the things they know construct the authorised version of reality presented in their judgements.<sup>54</sup> For Graycar, in one sense, judges, like all other people, 'are always talking about themselves'.<sup>55</sup> Graycar suggests the analogy of a window that judges try to look through to see out into the world to identify, for example, the reasonable person. But the window, unknown to the judge, has reflective glass in it, so instead of looking out a judge merely sees himself or (less likely) herself and the world he or she knows and mistakes that for the world.<sup>56</sup>

Graycar's thoughts on judging and gender have relevance in examining the adjudication of cases brought by Indigenous applicants under Part IIA of the *Racial Discrimination Act* in that it is important to ask how adjudicators form their knowledges about the views of Indigenous people under s 18C(1)(a), and the views of a reasonable person under s 18D. An illustration of this point in relation to s 18C is provided in *Hagan v Trustees of the Toowoomba Sports Ground Trust*.<sup>57</sup> This case was brought by an Aboriginal man in relation to the name of a spectators stand at his local football ground – the 'ES "Nigger" Brown Stand'. This name was displayed prominently on the stand and in addition was used in frequent announcements during football matches at the ground. The decision records that the stand had been named (in 1960) after a local football identity, ES Brown, who during his childhood in the early 1900s acquired the

<sup>54</sup> Regina Graycar, 'The Gender of Judgments: An Introduction', in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (1995) 262. See also Regina Graycar, 'The Gender of Judgments: Some Reflections on "Bias"' (1998) 32 *University of British Columbia Law Review* 1.

<sup>55</sup> Graycar, 'The Gender of Judgments: An Introduction', above n 54, 273.

<sup>56</sup> *Ibid* 278.

<sup>57</sup> *Hagan* [2000] FCA 1615 (Unreported, Drummond J, 10 November 2000). The views of Drummond J on s 18C(1)(a) were not overturned on appeal: *Hagan v Trustees of the Toowoomba Sports Ground Trust* (2000) 105 FCR 56. On the cultural construction of racism in Australian (AFL) football, see Lawrence McNamara, 'Tackling racial hatred: conciliation, reconciliation and football' (2000) 6(2) *Australian Journal of Human Rights* 5. In this article McNamara notes that racial slurs against Aboriginal players were considered, until recently, to be simply 'part of the game' engaged in by other players, officials and spectators: 5.

nickname 'Nigger'. The decision also records that ES Brown was of Anglo-Saxon descent. In the view of the applicant, the word 'nigger' always carries a culturally racist meaning and there are no contexts in which it has a neutral or non-derogatory meaning.<sup>58</sup> In this case, the respondent led evidence from other Aboriginal people to the effect that they were not offended by the name of the sports stand. The Federal Court judge hearing this case determined that the use of the word 'nigger' in this context did not have any racist connotation or message.<sup>59</sup> After articulating that s 18C called for an objective test, the judge determined that the use of 'nigger' here was not 'reasonably likely in all the circumstances to offend, insult, humiliate or intimidate an indigenous Australian or indigenous Australians generally.'<sup>60</sup> Graycar's work prompts us to ask how the judge formed this (objective) knowledge, particularly in the context of the conflicting opinions expressed by the complainant and Indigenous people called by the respondent.<sup>61</sup> By what processes and mechanisms did the adjudicator here come to this understanding of the (reasonable) Indigenous response to the use of the word 'nigger' in this context?

Adjudicators have looked to many different sources for the purposes of constituting the reasonableness perspectives of both s 18C and s 18D in cases brought by Indigenous people.

## VI THE KNOWLEDGE THAT ADJUDICATORS HAVE DRAWN ON

The evidence used by adjudicators in this group of complaints to constitute the reasonable person test of s 18D can be dealt with quickly. Apart from the views of the respondent, which are implicitly presented by the respondent as being those of the reasonable person, the decisions reveal a lack of explicit use of material by adjudicators for the purpose of constituting the reasonable person test of s 18D.<sup>62</sup>

<sup>58</sup> *Hagan* [2000] FCA 1615 (Unreported, Drummond J, 10 November 2000) [6].

<sup>59</sup> *Ibid* [9].

<sup>60</sup> *Ibid* [31].

<sup>61</sup> This issue of conflicting views is discussed further below. A related issue has to do with the formula of 'offend, insult, humiliate or intimidate' used in s 18C. This formula is identical to, and was taken from, the federal definition of sexual harassment in the *Sex Discrimination Act 1984* (Cth): Explanatory Memorandum, Racial Hatred Bill 1994 (Cth) 10. The use of this string of words has been criticised in the context of sexual harassment law as potentially failing to capture the experiences of women who have been sexually harassed, who may feel angry more than offended or insulted, (see Catharine A MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (1979) 47-55; Beth A Quinn, 'The Paradox of Complaining: Law, Humor and Harassment in the Everyday Work World' (2000) 25 *Law and Social Inquiry* 1151, 1177), and secondly because it contains moral overtures, suggesting that sexual harassment is a matter of offense (bad manners) rather than equality (see Jenny Morgan, 'Sexual Harassment and the Public/Private Dichotomy', 'Equality, Morality and Manners' in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (1995) 89, 92-3). See further Gail Mason and Anna Chapman, 'Defining Sexual Harassment: A History of the Commonwealth Legislation and its Critiques' (2003) 31 *Federal Law Review* 195; Margaret Thornton, 'Sexual Harassment Losing Sight of Sex Discrimination' (2002) 26 *Melbourne University Law Review* 422, 429-30, 436.

<sup>62</sup> See, eg, *Corunna* (2001) EOC ¶93-146, 75 470; *Wanjurri* (2001) EOC ¶93-147, 75 488-9.

In contrast, adjudicators have explicitly drawn upon a range of material in constituting their views on whether the conduct was reasonably likely to offend Indigenous people under s 18C(1)(a). Importantly, they have the applicants' views before them, but the processes through which such views come to be known to the adjudicator can be problematic. Scholars have queried whether it is possible for judges to understand and empathise with the voices and perspectives of the members of outsider groups. Rather, they suggest that judges may respond to such counternarratives with resistance.<sup>63</sup>

Reading the determinations under the racial hatred provisions in Part IIA of the *Racial Discrimination Act* provides a sense that some Indigenous applicants have transformed and contained their understanding of their experience into frameworks constructed through dominant narratives. In particular, one method adopted by Indigenous applicants, presumably in an attempt to make themselves more able to be understood by the adjudicator, was the use of analogy. This point is well illustrated in two applications brought by Aboriginal people in response to derogatory representations of Dreamtime ancestors and sacred sites.<sup>64</sup> In one case, the determination of the adjudicator records the evidence of several of the applicants as being that the respondent's portrayal of an ancestor (Waugyl) was analogous to making denigrating comments about the crucifixion of Jesus Christ.<sup>65</sup> Similarly, one of the applicants was recorded in the determination as stating the view that Waugyl was as important to him as Jesus Christ was to a Christian person.<sup>66</sup> The decision in this case records these views of the applicants in the adjudicator's own words. In contrast, the decision uses quotes to record that one applicant likened the conduct of the respondent to 'poking at and annoying his mother's body.'<sup>67</sup> These different methods used by the adjudicator to record the evidence – the adjudicator's own words compared to the use of quotes – suggest that the analogies with the Christian tradition were more easily understood by the adjudicator than was the applicant's evidence of 'poking at and annoying his mother's body.' Supporting this view is that whilst the findings of fact recorded later in the decision make reference to a comparative analysis with Christianity,<sup>68</sup> the evidence of 'poking at and annoying his mother's body' is not referred to again in the decision.

A second example of the use of analogy is provided in the case of *Corunna*. This case, discussed above, challenged a cartoon published in the West Australian newspaper that was derogatory of the Dreamtime ancestor Yagan. The determination, under the heading 'findings of fact,' reads as follows:

<sup>63</sup> Richard Delgado and Jean Stefancic, 'Norms and Narratives: Can Judges Avoid Serious Moral Error?' (1991) 69 *Texas Law Review* 1929, 1930; Matsuda, above n 40, 2326-7; Kim Lane Scheppele, 'Manners of Imagining the Real' (1994) 19 *Law and Social Inquiry* 995; Lisa Sarmas, 'Storytelling and the Law: A Case Study of *Louth v Diprose*' (1994) 19 *Melbourne University Law Review* 701, 725.

<sup>64</sup> *Wanjurri* (2001) EOC ¶93-147; *Corunna* (2001) EOC ¶93-146.

<sup>65</sup> *Wanjurri* (2001) EOC ¶93-147, 75 479-80.

<sup>66</sup> *Ibid* 75 480.

<sup>67</sup> *Ibid*.

<sup>68</sup> *Ibid* 75 485.

I particularly note the evidence of those of the complainants who were members of the delegation who traveled to England to bring back Yagan's head. I accept their evidence that this was a very spiritual experience for them, and that this cartoon would have been particularly distressing. A number of the witnesses, both in the delegation and not, compared the return of Yagan's head to the symbolic return to Australia of the body of the unknown soldier from Gallipoli, and I find this to be a *valid* analogy (emphasis added).<sup>69</sup>

The use in this passage of equivalence with the unknown soldier is interesting. What is notable is that not only did the adjudicator appear to find the analogy convincing, evidenced by its placement under the heading 'findings of fact', but he found it to be 'valid'. This provides support for the view that the processes through which this adjudicator was able to hear the applicants' counternarratives was by rendering them equivalent to a dominant narrative about the unknown Gallipoli soldier.

Although Indigenous applicants have found it strategically useful in some individual cases to analogise with dominant narratives, this practice may have longer-term negative consequences for Indigenous complaints. For example, it may mean that Indigenous perspectives are not heard on their own terms, but only to the extent that they can be, and are, contained within a broader dominant narrative. Specifically, can adjudication be cognisant of harms experienced by Indigenous applicants that have no dominant narrative analogy?

In addition to the evidence of the applicant, adjudicators have used a range of other mechanisms to form their views on the response of the reasonable Indigenous person under s 18C(1)(a). Some adjudicators have used dictionaries to assist them in their task of judging. For example, in *Hagan*<sup>70</sup> the written decision records that the adjudicator used a range of dictionaries on the meaning of the word 'nigger' – *The Australian National Dictionary*,<sup>71</sup> *The Macquarie Dictionary* (3rd ed, 1997), a *Dictionary of Afro-American Slang* (1970) (on the use of the word in the USA), and *The Oxford English Dictionary* (2nd ed, 1989) (on the use of the word in the UK).<sup>72</sup> It should be acknowledged that in this case the adjudicator did not appear to use these references as definitive of the meaning of the word 'nigger' but rather largely to shape his view that this word is not always, or necessarily, used in a derogatory sense. Nevertheless, it is appropriate to question whether these dictionaries are suitable sources of interpretation for use in the task of ascertaining whether the use of 'nigger' in the context of this complaint was reasonably likely to offend, insult, humiliate or intimidate Indigenous peoples in Australia (in the year of the complaint, 2000). Notably, the objective of dictionaries is to present a record of the current usage of words. In

<sup>69</sup> *Corunna* (2001) EOC ¶93-146, 75 461 (complainants' application for review dismissed: *Bropho v Human Rights and Equal Opportunity Commission* (2002) 72 ALD 321).

<sup>70</sup> [2000] FCA 1615 (Unreported, Drummond J, 10 November 2000).

<sup>71</sup> The decision does not record the full citation of this dictionary. It seems likely that the adjudicator was referring to WS Ramson (ed), *The Australian National Dictionary: A Dictionary of Australianisms on Historical Principles* (1988).

<sup>72</sup> *Hagan* [2000] FCA 1615 (Unreported, Drummond J, 10 November 2000) [7].

this way they record the use of the word in its mainstream or dominant sense at the time of publication. Such an interpretation is clearly of questionable relevance in an investigation such as that undertaken under s 18C(1)(a).

This discussion of the sources that adjudicators have drawn on in these cases is at least partly about context and the different ways this might be constituted.

## VII WHERE TO START THE STORY

Kim Lane Scheppelle explores the ways in which traditional legal methodology constitutes the legally relevant facts of a case in a narrow way. Stories, Scheppelle points out, including legal stories, have no natural or predetermined starting place. In contrast, conventional legal method assumes a particular starting point for its legal story. It is Scheppelle's argument that this beginning is inimical to the stories of outsiders.<sup>73</sup>

Section 18C requires that the assessment of the respondent's conduct take place 'in all the circumstances'. The question becomes how wide a view ought to be taken of those circumstances, or the context. In the cases examined in this article, the standard approach of legal method was to examine the specific incident the subject of the complaint of racial hatred, be it the publishing of the cartoon, the broadcasted radio program, or the shouted insult over the back fence. Applying Scheppelle's argument, this relatively narrow approach favours dominant racial narratives in that it denies or underplays the social context that gives the cartoon, the broadcast or the shouted words their culturally racial meaning. In other words, it assumes that the social context in which the particular incident took place is neutral.<sup>74</sup> Scheppelle argues in favour of judges adopting, what she describes as a 'wide-angle' version of the stories before them.<sup>75</sup> It is through such a contextualised approach that sense can be made of the interpretation of the incident by the outsider, in the form of the harm of the respondent's conduct. Outsiders, explains Scheppelle, often have a different history and interpretation than insiders, and unless context is provided for the outsider's story, it may make no sense in the eyes of the judge.<sup>76</sup>

<sup>73</sup> Kim Lane Scheppelle, 'Foreward: Telling Stories' [1989] 87 *Michigan Law Review* 2073, 2094-6. Other commentators have also explored how the processes of formal adjudication decontextualise instances of gender and racial harms. See, eg, Matsuda, above n 40, 2373-4; Mary Jane Mossman, 'Feminism and Legal Method: The Difference it Makes' (1986) 3 *Australian Journal of Law and Society* 30; Rosemary Hunter and Kathy Mack, 'Exclusion and Silence: Procedure and Evidence' in Ngaire Naffine and Rosemary Owens (eds), *Sexing the Subject of Law* (1997), especially 175-7.

<sup>74</sup> Lawrence McNamara, 'The Things You Need: Racial Hatred, Pauline Hanson and the Limits of the Law,' above n 9. McNamara explores, through a case argued substantially under s 9(1) of the *Racial Discrimination Act (Combined Housing Organisation Ltd, Ipswich Regional ATSIC for Legal Services v Hanson* [1997] HREOCA 58 (Unreported, Commissioner Wilson, 16 October 1997)), how the adjudicator's interpretation of Pauline Hanson's words divorced those words from their social, political, historical and cultural contexts. McNamara argues that through this process, the law legitimated the form of political discourse in which Hanson and the One Nation party engage.

<sup>75</sup> Scheppelle, above n 73, 2096-7.

<sup>76</sup> *Ibid.*

In some of the cases examined in this study, the adjudication did not appear to travel much beyond traditional legal methodology to take a 'wide-angle' approach examining the historical and social context of the conduct in question. A good illustration is provided in the HREOC decision of *McGlade v Lightfoot*.<sup>77</sup> This case involved a member of Parliament who made several derogatory statements regarding Aboriginal people to the effect that they 'were the most primitive people on earth and that many aspects of their culture, including sexual practices, were abhorrent'.<sup>78</sup> These statements were reported widely in the press and appeared on the front page of one newspaper. To the extent that these views were expressed during parliamentary proceedings, they were seen by HREOC as covered by parliamentary privilege and were not for this reason accepted as the basis of a complaint under the *Racial Discrimination Act* provisions. The applicant continued her complaint in relation to the statements made outside parliament. After an initial hearing, the HREOC Commissioner dismissed this aspect of the complaint as well on the basis that it was 'misconceived'.<sup>79</sup> There were several interconnected reasons for this finding. First, a 'crucial fact' as determined by HREOC was that the respondent had delivered an apology in parliament. Secondly, and related to the first, was the view of the Commissioner that, should the complainant be successful in a hearing, there would be no meaningful relief to grant given that the respondent had already apologised. In this the Commissioner was dismissive of the efficacy of the relief sought by the complainant – a declaration to the effect that the respondent had engaged in unlawful conduct under the Part IIA provisions<sup>80</sup> Thirdly, the Commissioner noted that the respondent had not repeated his views since the initial occasion the subject of the complaint, and fourthly, the respondent continued to be accountable for the views he expressed as a member of parliament.

The question of the apology warrants closer attention. Importantly, it came some three to four weeks after the initial statements were given publicity in the press, and in it the respondent apologised only for statements he had made that morning in Parliament. There was no apology in relation to the statements he had made

<sup>77</sup> [1999] HREOCA 1 (Unreported, Inquiry Commissioner Johnston, 21 January 1999).

<sup>78</sup> *Ibid*, as recorded in the decision, under subheading 1. The full statements were recorded in the decision as follows: 'Aboriginal people in their native state are the most primitive people on Earth. If you want to pick up some aspects of Aboriginal culture which are valid in the 21st Century, that aren't abhorrent, that don't have some of the terrible sexual and killing practices in them, I would be happy to listen to those.'

<sup>79</sup> The application was dismissed under s 25X of the *Racial Discrimination Act* which provides: 'Where, at any stage of an inquiry, the Commission is satisfied that a complaint is frivolous, vexatious, misconceived, lacking in substance or relates to an act that is not unlawful by reason of a provision of Part II or Part IIA, it may dismiss the complaint.' The Commissioner instigated by his own motion the question of whether the complaint should be dismissed under s 25X. By this stage the respondent had indicated to the HREOC that he would not take part in the hearing as he did not recognise the jurisdiction of the Commission. The Commissioner dismissed the complaint as being 'misconceived', even assuming that the complainant would be able to establish that the respondent had engaged in unlawful racial hatred under the Act.

<sup>80</sup> Initially the primary relief sought by the applicant was an apology: *McGlade v Lightfoot* (2000) 104 FCR 205, 212.

in the previous weeks.<sup>81</sup> The Commissioner noted this fact, but took the view that the main point was that the apology contained within it a repudiation of the views lying behind (all) the racially derogatory statements made by the respondent.<sup>82</sup> The fact that it related strictly only to the statements made earlier that morning was not, in the view of the Commissioner, fatal. The HREOC Commissioner summarised:

My decision to dismiss the complaint on that ground is founded on reasons which are specific and only relate to the case in question. Given that the respondent's remarks were made in a political context and were the subject of a later apology in the Commonwealth Parliament, representing a rejection of opinions of the kind that had given offence in this case, and balancing that in the situation where such matters are accessible to public debate and repudiation by right-thinking persons, it seems to me inappropriate and an exercise in futility to proceed to a determination of this complaint.<sup>83</sup>

Arguably the adjudicator's approach to this complaint was informed by a particular understanding of racism – that racism is not something perpetrated within parliament, government or law, or by parliamentarians. Such an approach underplays the context of colonialism and the genocide of Indigenous people in Australia carried out explicitly and consciously through parliamentary and legal process, and government policy. Further, the decision does not uphold the objectives of the Act to promote racial harmony and social cohesion.<sup>84</sup> A declaration that the respondent had engaged in unlawful conduct under the *Racial Discrimination Act* would have normative value both for Aboriginal and non-Aboriginal Australia, and would further the objectives of the Act, as the complainant argued:

I think for a lot of people, it still would be a very strong message for any finding, whether it's enforceable or not, particularly for Aboriginal people and

<sup>81</sup> The respondent's apology, as quoted in the HREOC determination, is as follows: 'I refer to a statement I made earlier today. I wish to unreservedly apologise to any Australians who may have been given offence by the remarks I made. I regard all Australians, irrespective of their race or ethnic background, as being completely equal and entitled to equality of treatment without discrimination of any kind. Any views to the contrary which I may have expressed in the past I no longer hold. I respect the Aboriginal people of Australia and strongly support practical measures to address their disadvantage. I wish to make it clear that I did not intentionally wish to give offence to anyone.' *McGlade v Lightfoot* [1999] HREOCA 1 (Unreported, Inquiry Commissioner Johnston, 21 January 1999) subheading 4.

<sup>82</sup> Notably though, as the Federal Court points out, there was evidence that the respondent maintained his view regarding Aboriginal people after the date of the apology. This was apparent from the content of letters written by the respondent to HREOC. See *McGlade v Lightfoot* (2000) 104 FCR 205, 215.

<sup>83</sup> *McGlade v Lightfoot* [1999] HREOCA 1 (Unreported, Inquiry Commissioner Johnston, 21 January 1999) subheading 5 ('Findings under s 25X'). The Commissioner went on to state '[t]his decision does not constitute a statement of principle that politicians are immune from the *Racial Discrimination Act* because they are subject to and accountable to the democratic process and parliamentary scrutiny. Nor does it represent a finding that simply because an apology is made it is totally dispositive of the matter.' It seems to me that the outcome of this decision does constitute such a statement of principle and finding.

<sup>84</sup> On the objectives of the legislation, see Commonwealth, *Parliamentary Debates*, above n 3; Explanatory Memorandum, Racial Hatred Bill 1994 (Cth) 1. These objectives were referred to (in discussing the appropriate remedy) in *McGlade v Lightfoot* (2002) 124 FCR 106, 124.

non-Aboriginal people to be aware that you can't racially vilify and for Aboriginal people to feel that there is some recourse against racial vilification.<sup>85</sup>

The point being made here is that had the HREOC adjudicator started the story of this complaint from an understanding of the exclusion of Aboriginal people carried out through parliamentary law-making and official government policy, and the central role played by Australia's political and legal systems in the continuing subordination of Indigenous peoples, a different outcome might have resulted. In such a context a complaint about racially derogatory statements made by a parliamentarian, who some weeks later gave a limited apology, may not have been dismissed as 'misconceived'.<sup>86</sup>

Ultimately the applicant in this case was successful before the Federal Court. The court overturned HREOC's dismissal of the application on the basis that the Commissioner had made an error in law by applying an incorrect test for dismissal under s 25X of the *Racial Discrimination Act*.<sup>87</sup> After four years of litigation, including four separate decisions, the court granted a declaration that the respondent had engaged in unlawful conduct under the Act and, in addition, awarded the complainant her costs.<sup>88</sup> Arguably these Federal Court decisions represent a correction of HREOC's lack of a 'wide-angle' approach, although notably the judgments are firmly situated in precedent and legal rules rather than an explicit acknowledgement of the need to take context into account.

## VIII ADJUDICATION AS A SECOND INJURY

Mari Matsuda, writing about the absence of racial hatred laws in the US, argues that when law fails to provide redress for an incident of racial hatred this constitutes a 'second injury' to the person vilified.<sup>89</sup> She describes this second harm as being 'the pain of knowing that the government provides no remedy, and offers no recognition of the dehumanizing experience that victims of hate

<sup>85</sup> *McGlade v Lightfoot* [1999] HREOCA 1 (Unreported, Inquiry Commissioner Johnston, 21 January 1999) subheading 4.

<sup>86</sup> An interesting and partial contrast to *McGlade v Lightfoot* is provided in *Jacobs v Fardig* [1999] HREOCA 9 (Unreported, Commissioner Innes, 27 April 1999) ('*Jacobs*'). In *Jacobs* the HREOC Commissioner expressed the view that the racially derogatory statements of a shire councillor were 'made worse by coming from the holder of an important public office' (under the subheading 6 ('Damages')). The Commissioner drew on evidence given by the applicant's psychologist to explain the adverse reaction experienced by the applicant when the respondent councillor suggested that a group of Aboriginal people in the shire should be shot. The psychologist linked the applicant's response to this remark to the trauma and anger caused to the applicant by government policies when he was a child. This use of context took place in assessing the applicant's damages. Interestingly, and in contrast to *McGlade v Lightfoot*, the councillor in *Jacobs* had apologised in relation to the remark (and apparently had completed 'cultural awareness training').

<sup>87</sup> *McGlade v Lightfoot* (2000) 104 FCR 205. A subsequent attempt by the respondent to have the application summarily dismissed under Federal Court rules on the ground that it disclosed no reasonable cause of action was dismissed in *McGlade v Lightfoot* [2002] FCA 752 (Unreported, Carr J, 13 June 2002).

<sup>88</sup> *McGlade v Lightfoot* (2002) 124 FCR 106.

<sup>89</sup> Matsuda, above n 40, 2379.

propaganda are subjected to.<sup>90</sup> For Matsuda this second injury may be more harmful to the racial outsider than the initial act of hatred because '[o]ne can dismiss the hate group as an organization of marginal people, but the state is the official embodiment of the society we live in.'<sup>91</sup> In experiencing this second injury Matsuda identifies that the racial outsider becomes a stateless person. He or she can either identify with a community that refuses to take racism against them seriously or 'they can admit that that community does not include them'.<sup>92</sup>

Matsuda's identification of a 'second injury,' following from racial hatred for which there is no legal remedy, is useful in thinking about the situation of Indigenous complainants whose cases were not successful under the Part IIA provisions. Of the 12 cases brought by Indigenous people that I identified as containing an examination or hearing into an alleged contravention of Part IIA of the *Racial Discrimination Act*, the complainant substantiated their allegation in five cases (41.6 per cent).<sup>93</sup> This success rate is similar to the overall success rate in relation to all adjudications under the federal racial hatred provisions.<sup>94</sup> Some of the cases brought by Indigenous people that failed appear likely to have imposed a 'second injury' on the applicants, in the sense of their experiencing the pain of knowing that the conduct they identify as racial hatred is not assessed by the state as being unlawful under the *Racial Discrimination Act*. A common theme in these cases is that the applicants have, in effect, been told that they must put up with the conduct in question for the sake of furthering the goals of free speech and political debate. An example is provided by a case in which a number of Indigenous complainants challenged the publication and distribution of the book, *Pauline Hanson The Truth*.<sup>95</sup> The passages that the applicants objected to in particular were the claims that Aboriginal people had engaged in acts of cannibalism in the past. The HREOC Commissioner dismissed the complaints in relation to the book on the basis that the applicants had not established as an evidential matter that either of the respondents – Pauline Hanson or Pauline Hanson's One Nation – were responsible or involved in the publication and distribution of the book. The applicants were not able to adduce sufficient evidence to establish such a link and the respondents denied it. Having made this finding the Commissioner nonetheless proceeded to express a view that statements made as part of a political debate about, as identified by the

<sup>90</sup> Ibid.

<sup>91</sup> Ibid.

<sup>92</sup> Ibid 2338.

<sup>93</sup> Complainants made out their complaints in the following cases: *Jacobs v Fardig* [1999] HREOCA 9 (Unreported, Commissioner Innes, 27 April 1999); *McGlade v Lightfoot* (2002) 124 FCR 106; *McMahon v Bowman* [2000] FMCA 3 (Unreported, Raphael FM, 13 October 2000); *Wanjurri* (2001) EOC ¶93-147; *Warner v Kucera* (2001) EOC ¶93-137.

<sup>94</sup> McNamara, above n 1, 73. In his study of the federal racial hatred provisions, McNamara found that the complainant success rate in adjudicated racial hatred cases under the *Racial Discrimination Act* has been 36 per cent. However if the study excludes adjudications conducted after the complaint had been dismissed or terminated by HREOC, then the complainant success rate rises to 50 per cent. If adjudications conducted after HREOC had dismissed or terminated the complaint are excluded from this group of complaints brought by Indigenous people, the success rate becomes 44.4 per cent.

<sup>95</sup> *Walsh and Ors v Hanson* (Unreported, Human Rights and Equal Opportunity Commission, Commissioner Nader, 2 March 2000).

Commissioner here, the Australian social welfare system and Indigenous people will not amount to racial vilification. The Commissioner stated:

If what is said in the book, and in the other statements arising from it, forms an integral part of a genuinely political argument, the mere fact that it is offensive to some persons is a price that has to be paid to preserve the freedom of political expression that *we* enjoy (emphasis added).<sup>96</sup>

The applicants must have wondered how much freedom of political expression they enjoyed, given the clear message here that the harm they experienced from the publication of the book is the price that has to be paid (by them) so that the freedom of vocal and powerful political movements to disseminate deeply divisive assertions is not curtailed. The applicants must have wondered, moreover, how claims of past cannibalism had any relevance to a discussion of social security programs and Indigenous people today. It is not difficult to imagine that this decision may well have imposed a 'second injury' on the complainants. This injury is the harm of knowing that the state, through the legal system, condones the publication of this type of material in the name of the free speech and the political debate that 'we' enjoy.

## IX CONCLUSIONS

This article has examined the adjudication of complaints brought by Indigenous people under the federal racial hatred provisions in Part IIA of the *Racial Discrimination Act*. The focus of analysis was how the tests of reasonableness in s 18C and s 18D have been constituted through the adjudication of these cases. In addition, several aspects of the processes of adjudication were problematised, including the translation of Indigenous applicants' experiences into narratives comprehensible to the adjudicator and the use made by adjudicators of sources of knowledge such as dictionaries. The importance of adjudication grounded in historical and social context was also discussed, as was the possible harm experienced by applicants from pursuing an unsuccessful complaint.

The argument developed in the article is that the ways in which reasonableness is constituted, and more broadly how the law is applied through the process of adjudication, constitute exercises of legitimation by the Anglo-Australian political and legal system. Non-indigenous narratives are prioritised over Indigenous perspectives at several key points in the legislation and adjudicative processes, and it is this privileging that reifies dominant racial values and images.

<sup>96</sup> Ibid subheading 4.