PEOPLE AND PLACE

# ORIGINS AND INITIAL OUTCOMES OF THE RACIAL HATRED ACT 1995[1]

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*In 1992 the former Labor Government proposed a Bill to apply criminal and civil sanctions against perpetrators of racial vilification. In 1995, after prolonged Parliamentary and community debate, the Bill was passed as an amendment to the 1975 Racial Discrimination Act, but with civil sanctions only. Preliminary data on its first months of operation show that approximately 112 complaints have been made and that eight of these have been resolved.*

It is ironic that approximately one year following the passing of the Racial Hatred Bill in the Federal Parliament, MHR Pauline Hanson's maiden speech should spark one of the most enduring debates on ethnicity and race in Australia in recent times. Yet in the recent flurry of media attention to race, ethnicity and immigration very little reference has been made to the anti-discrimination laws, and in particular to the 1995 amendment to the Racial Discrimination Act 1975 (Cwlth) (RDA) on incitement to racial hatred.

In the first section of this article I revisit some of the arguments in the debates leading up to the enactment of the Racial Hatred Bill in 1995, with particular emphasis on the arguments for and against criminal sanctions, which were eventually eliminated from the original bill. Throughout the debates, there were many groups and individuals who made submissions and publicised their views. The Australian Arabic Council (AAC) was perhaps the only so-called 'ethnically-based' organisation to publicly criticise the proposed racial hatred legislation. In this discussion, therefore, the AAC's position on a number of the issues will be highlighted. The second section offers a discussion of the most recent information on cases brought before the Human Rights and Equal Opportunity Commission (HREOC) under the racial hatred provisions of the RDA.

## BACKGROUND

In July 1992, Michael Duffy, the Federal Attorney General in the Labor Government, announced to the Parliament his intention to draft legislation on racial vilification which would amend the Crimes Act 1914 and the Racial Discrimination Act 1975. The proposed legislation was a response to three inquiries, the Royal Commission into Aboriginal Deaths in Custody (RCIADC), the National Inquiry into Racist Violence (NIRV) by the Human Rights and Equal Opportunity Commission, and the recommendations of the Australian Law Reform Commission's report on Multiculturalism and the Law (ALRC).[2] These inquiries indicated sufficiently widespread racial violence and vilification in Australia to warrant extensions to existing legislation. The NIRV report proposed criminal sanctions under the Crimes Act 1914 against expressions of racist violence and intimidation, while the RCIADC

recommended that only civil remedies be pursued against racial vilification. The ALRC was split, with a majority report suggesting civil laws against racial hatred and a minority view favouring criminal provisions. In addition, since 1975 the Australian Government had been a signatory to the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), but it was yet to meet the requirements of Article 4(a) which required signatories to:

> ...declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities.[3]

At the time of signing, the Australian Government felt that Article 4(a) would undermine freedom of speech and that existing criminal law against behaviour such as 'the maintenance of public order, public mischief, assault, riot, criminal libel, conspiracy and attempts' would cover most of the CERD requirements.[4]

**The proposed legislation**

The Racial Discrimination Amendment Bill 1992 was introduced into the House of Representatives on 16 December 1992, but was suspended when the Parliament closed for the March 1993 election. This Bill proposed legislation against racial incitement as an amendment to the Crimes Act 1914 with criminal penalties (12 months imprisonment) against those who deliberately stir up hatred against others on the ground of race, colour or national or ethnic origin. It also proposed that any intention to create 'fear that violence may be used' against others on the basis of their race, colour or national or ethnic origin would be a criminal act with a penalty of two years imprisonment.

The Bill also proposed an amendment to the Racial Discrimination Act 1975 against racial vilification. Both racial incitement and racial vilification were viewed comprehensively as public acts:

> (a) ... by which words, sounds, images or writings are communicated to the public, including the display or distribution of documents or the broadcasting, telecasting, screening or playing of any kinds of material; or (b) any conduct that is seen by the public, including gestures or the wearing or displaying of clothing, signs, flags, emblems or insignia.

Explicitly, there was no intention to supercede any State or Territory laws against racial violence, discrimination or vilification.[5]

Public discussions were conducted by the government during 1993 and 646 public submissions on the issue were received by the Attorney-General's Department. A large majority of these submissions were against the legislation.[6] Following substantial rewriting, a new document, the Racial Hatred Bill 1994 was passed by the House of Representatives on 16 November 1994. After its introduction into the Senate, the Bill was referred to the Senate Standing Committee on Legal and Constitutional Affairs on 2 February 1995.

The Senate Legal and Constitutional Legislation Committee conducted three public hearings on the new bill in February 1995. Following the hearings the Labor and Democrat majority in the Committee recommended introduction of the Bill into the Parliament as it stood. The Minority Report by the Coalition members of the Committee argued that the criminal sanctions of the Bill were inappropriate because: (a) jail sentences would only make martyrs of extremists who can propagate their racist messages during public trials; and (b) proof is difficult and experiences in other countries have shown that successful prosecutions are rare. Against the civil sanctions, it was argued that: (a) terms such as 'offend' and 'insult' were too broad and subjective; and (b) the ability of HREOC to enforce civil sanctions was doubtful.

**The legislation passed — the Racial Hatred Act 1995**

Debate in the Senate resumed in August 1995 and the Bill was amended, reflecting opposition from the Coalition and the WA Greens,[7] by deleting the proposed criminal sanctions, leaving only the civil remedies. The Senate finally passed the Racial Hatred Act 1995 on 24 August 1995 as an amendment to the Racial Discrimination Act 1975, without criminal provisions. That is, civil remedies were to be administered by the HREOC where the amendment rendered unlawful acts 'otherwise than in private' that are 'reasonably likely in all circumstances' to 'offend, insult, humiliate or intimidate' others because of 'race, colour or national or ethnic origin'. Such behaviour is deemed to be unlawful, but not necessarily a criminal offence.

Section 18C (2) states that 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'. This covers such media as pictorial or electronic communications to the general public such as the dissemination of publications, fliers and posters; television and radio broadcasts; the creation of Web sites on the Internet; or making speeches at a rally. A 'public place' includes a road, footpath, alley way, shop, park, hotel, restaurant, theatre, public transport, and workplaces. Although the act may be 'done in the sight or hearing of people who are in a public place', there is no requirement that a third party be witness to an act of racial hatred.

A number of exemptions were applied under Section 18D of the Racial Discrimination Act. Individuals, whose actions, sayings or writings may offend or insult, can claim that they are genuinely acting in the public interest or that they are engaged in genuine academic debate. Section 18D states that it is not unlawful to say or do anything 'reasonably and in good

faith', when it is:

> (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 an event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

**Ethnic community groups in the debate**

The Ethnic Coalition of Australia (ECA) and the Australian Arabic Council (AAC) were perhaps the most outspoken of ethnically-based groups in the debates.[8] The Ethnic Coalition of Australia, supporting the legislation with criminal provisions, was a 'loose coalition of leading members and representatives of the Italian, Greek, Chinese, Vietnamese and Jewish communities' formed as a lobby group to secure the passage of racial hatred legislation.[9] Its spokesperson was Mark Liebler, former chairman of the Zionist Federation of Australia. There was no formal affiliation between the ECA and the Federation of Ethnic Communities Council of Australia (FECCA), yet the ECA was far more prominent than FECCA in its political activity and media limelight in the debate. While FECCA publicly supported the Bill, a number of FECCA members opposed or criticised it privately.[10]

The AAC was formed in April 1993 as a non-partisan association committed to initiating and co-ordinating projects relating to community-relations issues affecting the Australian Arabic community. The organisation was born out of the Gulf War experience of 1990-1991, when the Australian Arabic community experienced widespread racist attacks. In 1991, evidence to the Human Rights and Equal Opportunity Commission showed the Arabic community to be one of the four most vilified groups in Australia, along with Aboriginal, Asian and Jewish communities.[11]

In its submission to the Senate Hearing Committee in February 1995, the AAC focussed upon the need for anti-racist education, rather than laws with criminal sanctions. The AAC's concern about freedom of expression, however, was not universalistic in the sense argued by civil libertarians. Rather, its concern lay with the inability of individuals and groups to seek redress from possible racial hatred expressed by journalists, academics and others in the public arena which would be deemed exempt under Section 18D of the Bill (see above). Thus, while concerned with freedom of speech principles, the AAC concentrated on the issue

of the powerlessness of relatively unorganised victim groups compared with perpetrator groups. The following discussion highlights the major reservations which the AAC had about the legislation.[12]

## THE DEBATE ON PROVISIONS OF THE RACIAL HATRED BILL

The Racial Hatred provision would have made it explicit that racist threats were a criminal offence. Further, the proposed legislation covered threats 'where there is no single person threatened, but a group of people identifiable by their race'.[13]

The original bill provided for three new criminal offences:

1. Prohibition of threats to cause physical harm because of race, colour or national or ethnic origin *penalty: imprisonment for two years* (section 58);

2. Prohibition of threats to property because of race, colour or national or ethnic origin *penalty: imprisonment for one year* (section 59);

3. Prohibition of incitement to racial hatred because of race, colour or national or ethnic origin *penalty: imprisonment for one year* (section 60).

### Arguments for

The following points summarise the arguments put in favour of criminal and civil sanctions.

1.The legislation implements Australian obligations contained in the CERD.

2. Firm measures are required to deal with racist violence and harassment.

3. The free dissemination of racist views encourages violence against minority groups.

4. Legislation will have an educative impact by setting unambiguous guidelines for what is acceptable and unacceptable behaviour.

5. Vilification laws provide a formal recourse and reassurance for victims who would not normally take any action.

6. Laws against property damage (eg. with posters and graffitti) do not adequately identify the damage caused by the racist message portrayed. That is, people may be charged and convicted of damaging property, but not of racism or incitement to racial hatred.[14]

The lack of criminal sanctions may have contributed to the widespread racial abuse as reported in the media[15] following Pauline Hanson's speech in September 1996. The assaults and abuse which followed her speech could have been subject to criminal prosecution under existing laws, but this would not have specified the racist motivation nor had additional penalties imposed for the racist motivation.[16] The AAC was keen to point out that racist

statements can trigger defensive and sometimes aggressive counter responses from victims themselves. Such responses can then be interpreted as racism from the victim group or individual who can then be prosecuted.[17] One example might be the case of the two Aboriginal children who spat at Pauline Hanson in her electoral office and who were apprehended, charged and placed into custody. It is unclear whether their actions were considered by the authorities to have been racially based.

While it is true that violence and threats of violence (against persons and property) are covered by criminal laws, it has been argued that such actions would not formally be *named* as racially motivated acts and as threats of violence.[18] It is this naming element which is seen as a crucial factor. Without identifying racially motivated criminal acts, we cannot assess the real degree of racial violence and its growth. Currently, such criminal prosecutions go unrecorded or unreported as racially motivated.[19]

From another perspective, criminal provisions would have given greater responsibility to the federal police for prosecution, compared with the current civil provisions under the HREOC which has limited administrative resources. This is particularly salient with organised groups who operate across state borders and with the importation of hate literature. A great deal of concern within the Australian debates has been with neo-nazi and extreme right-wing groups in Australia such as National Action.[20]

**Arguments against: Universalistic**

The major arguments put against both criminal and civil provisions were as follows:

1. There is insufficient evidence to link racist statements with racist violence. In the absence of a causative relationship, freedom of speech is a more important consideration in the pursuit of civil rights.

2. Laws covering similar behaviour already exist.

3. Racist violence is relatively insignificant and isolated in Australia.

4. Racial vilification laws will subvert open debate on racial and ethnic issues, debate which is in the public interest.

5. The law will not change racist views, nor increase social cohesion. Only open debate and education will.

6. The suppression of open debate will drive racism 'underground', making it more dangerous.

7. Criminal courts will be used as platforms for racists who will be made martyrs for their cause thus increasing social divisions.

8. Legislation may worsen inter-ethnic conflict.[21]

*Freedom of Speech*

Perhaps the major objection to the proposed legislation (both criminal and civil provisions) was the belief that it would undermine freedom of speech. This view was supported by most of the English language press.[22] This was not surprising. The NSW experience had shown that the print media were primary targets of vilification complaints (see below, footnote 40). The Victorian Council of Civil Liberties[23] and the Australian Arabic Council[24] were also concerned about the free speech issue. Counter to this, however, it was repeatedly argued that free speech is in fact limited by long accepted laws which relate, for example, to defamation, sedition, sub judice and privacy.[25] The criminal sanctions, however, did not seem at first glance to challenge freedom of speech, because they specifically targetted racist violence and incitement to racial hatred. It was the latter element, however, which was the most problematic because of its ambiguity.

*Ambiguity*

The criminal sanctions against incitement to racial hatred were criticised by Phillip Ruddock, who argued that the provisions of the proposed section 60 of the Crimes Act did not place the 'onus upon the law' to establish intention to incite racial hatred. Section 60 stated: 'a person must not, with the intention of inciting racial hatred against another person or a group of people, do an act, otherwise than in private, if the act: (a) is reasonably likely, in all the circumstances, to incite racial hatred against the other person or group of people...' According to Ruddock, the section thus qualified intention to the extent that it became a 'subjective test of some other person's view of what is reasonably likely, in all the circumstances, to incite.'[26]

Under the civil provisions of the Racial Hatred Act 1995, racially motivated behaviour that offends, insults, humiliates or intimidates is now unlawful. These terms were thought by some to be too vague and subjective for the Commission's interpretation. After all, if a person asserts that he or she is offended, either directly or indirectly by something someone has said, how can it be challenged? By contrast the State Anti-Discrimination Act 1977 (NSW) more specifically referred to 'hatred, serious contempt or severe ridicule.'[27] Lavarch argued that the terms used under the Racial Hatred Bill were based upon the Sex Discrimination Act 1984 and it was assumed that the HREOC had sufficient experience to ensure that only serious incidents would be followed up.[28] Ultimately, the Commission (and, if appealed, the Federal Court or High Court) must determine whether it is 'reasonably likely, in all circumstances' to 'offend, insult, humiliate or intimidate', with regard for the social context, location, style of language, lead up to the incident, relationship between the complainant and respondent, and so on, in order to establish some objective standard which is independent of the complainant's claims and respondent's intentions.

**Arguments against: the AAC**

*Education*

Much emphasis was given to education in the debates over the Racial Hatred legislation. Some argued that, while an education program was needed, legal sanctions were the only form of deterrent.[29] The Australian Arabic Council argued that ignorance was the basis of racism and only education would strike at its causes. If legislation were to be implemented it should go hand in hand with an education campaign that would be as wide-reaching as the 'clean up Australia' campaign and the 'anti-drink-driving' advertisements. Legislation was not adequate in itself. There were arguments in favour of education without legislation, but all proponents of the legislation also acknowledged the need for a concomitant education programs.[30] It was also suggested that legislation in itself would serve an educative function.[31]

In August 1996 HREOC did mount a national community education and public information campaign using audio-visual materials, booklets and fact sheets, specifically targetting Indigenous people and people from non-English-speaking backgrounds. Journalists have also been addressed with a series of briefings and seminars around the country.[32]

*Disadvantaged Minorities*

It may be suggested that racial hatred and racial vilification laws were primarily designed to protect racial and ethnic minorities in Australia. There were fears, however, that legislation might be used against those who were in fact victimised, such as if a white policeman were to lay charges against an Aborigine, or that it may serve to fuel longstanding inter-ethnic conflicts, such as between Serbs and Croats.[33]

One of the major concerns of the AAC, for example, was that victims of racism are often powerless to make formal complaints or bring charges against perpetrators. Responding to those ethnic groups such as the ECA which supported the legislation with criminal sanctions, the AAC noted:

> The best organised ethnic groups favour legislation, because they are well resourced, enjoy extensive networks, and senior positions that allow them to take advantage of criminal legislation and legal-judicial processes. However, the majority of groups who fall prey to racism and vilification are not so well organised. They do not have the necessary economic resources, relevant connections, and assertiveness to benefit from such resources. Laws are not readily accessible to many of these communities because of their experience of authority (both within Australia and in other countries) and their lack of faith in the legal processes...
>
> Even under existing laws related to discrimination, victims face enormous and well documented barriers in using these systems as a recourse for justice: English proficiency, fear of repercussions from the perpetrator, fear of backlash against

family members, faith in the justice system, fear of being labelled oversensitive or paranoid, fear of ridicule for not being able to 'cop' robust Aussie humour, lack of economic resources, fear that the police may trivialise the case, lack of positive precedents, and strength of proof.[34]

*Exemptions*

Another of the concerns which the AAC expressed was that trivial cases would be caught in the civil provisions of the legislation, while those excluded under 18D related precisely to the kinds of vilification and stereotyping of Arabs experienced in the mass media, particularly in Hollywood films such as *True Lies, Executive Decision or Delta Force*. In such films and cartoons, Arabs are portrayed as 'fundamentalist', 'violent terrorists', 'barbaric', 'ignorant', 'stupid', 'irrational', 'lawless', and so on. These are images which seep insidiously and uncritically into the psyche of children in particular and the population more generally. It is interesting to note that complaints against the media form the largest single group of complaints so far under the Act (see Table 1).

*Religion*

McNamara and Solomon (1997) suggest that a major limitation of the Racial Hatred Act is contained in the list of characteristics of a victim (race, colour or national or ethnic origin). They argue that even though it is 'a major source of "ethnic" conflict, religion is not included.'[35] Twomey shows that this is also true of racial hatred laws in England where some religious groups are not covered: 'It appears that Jews and Sikhs have succeeded in achieving recognition as belonging to a certain "ethnic origin", whereas Christians, Muslims and Rastafarians do not receive the same protection of the law.'[36]

The NSW Anti-Discrimination (Racial Vilification) Act 1989 was amended in 1994 to define race to include 'colour, nationality, descent and ethnic, ethno-religious or national origin.'[37] Yet it remained unclear whether Muslims constitute an ethnic or ethno-religious group. To explicitly cover religious vilification, Hennessy and Smith proposed 'to extend vilification to cover religion in accordance with the ICCPR [International Covenant on Civil and Political Rights] which prohibits advocating national or religious hatred that constitutes incitement to discrimination, hostility or violence.'[38]

However, the Explanatory Memorandum to the Commonwealth Racial Hatred Bill did explain that the terms 'ethnic origin' and 'race' were to be interpreted 'broadly' and to include religion.[39]

## OUTCOMES OF THE RACIAL HATRED ACT 1995

### HREOC's First Year of Complaints

**Table 1: Broad breakdown of area of complaint brought under the Racial Hatred Act: 13 October 1995 — 31 October 1996**

| | No. | % |
|---|---|---|
| Media | 25 | 22.3 |
| Neighbourhood Dispute | 23 | 20.5 |
| Employment | 17 | 15.2 |
| Personal Conflict | 14 | 12.5 |
| Racist Propaganda | 10 | 8.9 |
| Provision of Goods and Services | 9 | 8.0 |
| Public Debate | 6 | 5.4 |
| Advertisement | 3 | 2.7 |
| Entertainment | 3 | 2.7 |
| Accommodation | 1 | 0.9 |
| Other | 1 | 0.9 |
| Total Complaints | 112 | 100.0 |

The following figures on formal complaints lodged with HREOC under the Racial Hatred Act are based on unpublished HREOC internal working figures and are not as yet confirmed as final and 'official'. Thus some caution must be taken with respect to their precision and reliability, although it is unlikely that the final official figures will vary significantly. Nor can the data be seen as representative indicators of acts of racial hatred and vilification within Australia. The Commission also receives many complaint telephone calls which are not formally lodged in writing. When available, details of such calls and enquiries will give a more complete picture of the Commission's activities under the Racial Hatred Act. The current figures do, however, provide some measure of how the legislation is operating, although it is not clear which of the cases provided in Tables 1-4 below have been upheld, conciliated, rejected or are still in process. This section provides some explanation of the types of formal complaints which have been received by the Commission, followed by a discussion of the strengths and limitations of the Act.

*Types of Complaints*

Table 1 indicates that approximately 112 complaints were made to HREOC under the Racial Hatred Act in the 12 months since its enactment in October 1995. (This is similar to the annual average number of racial vilification complaints to the NSW Anti-Discrimination

Board between 1989-1994.)

The largest number of complaints (25) were brought against some form of the mass media (22.3 per cent) including, print, television and radio, but it was mainly newspapers that were named as respondents.[40] Twenty three complaints were classified as 'neighbourhood disputes' (20.5 per cent). These complaints might, for example, involve neighbours arguing over the front fence (ie. in a 'public place') when one neighbour yells racist abuse at another. It is not clear, however, whether such complaints will be upheld as justified under the Act. While some incidents may be judged as trivial and not to be pursued by the Commission, others may be seen as arising from long histories of serious racial abuse.

The third major area of complaint 'employment' (15.2 per cent) is centred around the workplace which is covered by the provision of Vicarious Liability. Under Section 18E, the Act states that an employer is liable for acts of racial hatred by employees in the course of their duties unless 'reasonable steps' have been taken by the employer 'to prevent the employee or agent from doing the act.' An employee who racially taunts a colleague will be liable themselves, in addition to the employer. This type of complaint is also covered by the provisions dealing with racial discrimination in employment under the Racial Discrimination Act 1975 where the test is much broader and requires the complainant to show discrimination and disadvantage. Under the Racial Hatred amendment, the complainant must only establish that the act by an employee in the workplace is 'reasonably likely in all the circumstances to offend, insult, humiliate or intimidate'. The workplace is generally considered to be a public area and is therefore covered by the 'otherwise than in private' provision.

Complaints characterised as 'personal conflict' (12.5 per cent) include abusive comments and behaviour on the streets. Such harassment in public places is sometimes perpetrated by strangers who are not always identified, located or apprehended.

'Racist propaganda' cases (8.9 per cent) are complaints against written material not published in the mass media. They include pamphlets and newsletters disseminated mainly by right-wing organisations agitating against Aboriginal welfare or non-white immigration or promoting anti-Asian sentiments.

Racial hatred complaints concerning the 'provision of goods and services' (8 per cent) occur when a person is subjected to an act of racial hatred in the course of receiving goods and services. It may therefore also breach the racial discrimination provisions because the services have been supplied on a less than favourable basis. If, for example, a customer complains about the service they are receiving and the proprietor (or waiter, or barperson) replies with racist slurs, the racial hatred amendment to the RDA may be invoked.

In 'public debate' (5.4 per cent) which may be conducted through the media, a complaint may not be against the newspaper, radio or television station, but against the person who made the racist statements or who is quoted. Advertisements (2.7 per cent) and entertainers (2.7 per cent), such as in comedy productions, where racial and ethnic stereotyping occurs

have also been the subject of a few formal complaints.

*Period of Complaints*

**Table 2: Racial Hatred complaints received per month October 1995 — October 1996**

| | No. | % |
|---|---|---|
| Oct | 6 | 5.4 |
| Nov | 4 | 3.6 |
| Dec | 7 | 6.3 |
| Jan | 6 | 5.4 |
| Feb | 12 | 10.7 |
| Mar | 6 | 5.4 |
| Apr | 4 | 3.6 |
| May | 4 | 3.6 |
| June | 10 | 8.9 |
| July | 7 | 6.3 |
| Aug | 10 | 8.9 |
| Sep | 23 | 20.5 |
| Oct | 13 | 11.6 |
| Total | 112 | 100.0 |

**Table 3: Ethnicity of complainant, October 1995 — October 1996**

| | No. | % |
|---|---|---|
| Aboriginal and Torres Strait Islander | 16 | 14.3 |
| Australian ESB | 9 | 8.0 |
| British | 9 | 8.0 |
| Jewish | 6 | 5.4 |

| | | |
|---|---|---|
| Chinese | 5 | 4.5 |
| French | 5 | 4.5 |
| German | 5 | 4.5 |
| Bosnian | 3 | 2.7 |
| Irish | 3 | 2.7 |
| Indian | 3 | 2.7 |
| Lebanese | 3 | 2.7 |
| Italian | 2 | 1.8 |
| Pakistani | 2 | 1.8 |
| Egyptian | 1 | 0.9 |
| Fijian | 1 | 0.9 |
| Canadian | 1 | 0.9 |
| Mauritian | 1 | 0.9 |
| African-American | 1 | 0.9 |
| Maori | 1 | 0.9 |
| Malaysian | 1 | 0.9 |
| Austrian | 1 | 0.9 |
| Serbian | 1 | 0.9 |
| NewZealander | 1 | 0.9 |
| Other Australian NESB | 16 | 14.3 |
| Unknown | 15 | 13.4 |
| Total | 112 | 100.0 |

Note: ESB = English-speaking-background and NESB = non-English-speaking-background.

Table 2 shows the number of complaints received by HREOC on a month by month basis between October 1995 and October 1996. Clearly, the largest number of complaints received occurred in September following Pauline Hanson's maiden speech in the Federal Parliament. Indeed, the number of complaints received in September and October constituted almost one third (32.1 per cent) of all complaints over the 13 month period since the Racial Hatred legislation was passed.

*Ethnicity of Complainants*

Table 3 provides a breakdown of complainants according to ethnic origin. The most significant of these is the number of complaints from Aboriginal and Torres Strait Islanders. This is the largest group (14 per cent). These are followed by Australians from English-speaking backgrounds (8 per cent) and British (8 per cent). The category 'Other Australian NESB' (14 per cent) refers to complaints where the complainant has not indicated his or her specific ethnic background, but the nature of the complaint indicates that the complainant is of non-English-speaking background. In all, 24 groups according to ethnicity (or nationality) are represented. The fifteen 'unknown' cases indicate that the complainant has not volunteered any information on ethnicity to date, and that the nature of the complaint does not disclose the information. The combination of Australian ESB and British complainants constitutes approximately 19 per cent of all complainants where ethnicity is identified.

*Location and Administrative Status*

**Table 4: Current status of complaints, October 1995 — October 1996**

| | No. | % |
|---|---|---|
| Conciliated | 8 | 7.1 |
| Declined | 27 | 24.1 |
| In Process | 77 | 68.8 |
| Total | 112 | 100.0 |

Table 4 indicates that, up to October 1996, eight cases (7.1 per cent) under the Racial Hatred amendment before the Commission had been conciliated, while 27 (almost one quarter of cases) were declined.[41] Conciliation has occurred when the parties have come to some agreement regarding remedies, which may include an apology and/or financial payment. The Race Discrimination Commissioner has pointed out that the vast majority of complainants under the Racial Discrimination Act, including the Racial Hatred amendment, prefer to conciliate and settle with some form of apology. They rarely want to profit financially and, if money is sought, they are usually content to merely have their legal expenses met (personal

communication).

Complaints which were deemed inadmissible were judged as: a) exempt under Section 18D, for example, radio current affairs or talk-back programs which have been judged to be in the 'public interest'; b) not 'reasonably likely in all the circumstances to offend, insult, humiliate or intimidate'; c) not done 'because of race, colour or national or ethnic origin'; and d) evidence simply lacking substance.

It may be noted that radio current affairs or talk-back programs are not to be automatically 'judged to be in the public interest'.[42] What has to be determined is whether the relevant statements were broadcast 'reasonably and in good faith' in the course of a debate in the public interest or as part of a fair report or fair comment. Also, an individual or group is unable under the Act to bring action against someone if they do not belong to the aggrieved ethnic group. For example, if an individual of Anglo-Australian background wished to lodge a complaint against someone who had made racist remarks against Aborigines, the complaint would be declined. The complainant does not have to be a direct victim, but usually has to be a member of the group being vilified. In this sense, a complaint must be lodged by a 'person aggrieved', meaning someone with a real and material interest in the subject matter of the complaint, and not just a bystander who has a mere intellectual or emotional concern in the matter.[43]

**Discussion**

*Civil Provisions and Confidentiality*

The above data provided by HREOC on cases brought before it under the Racial Hatred Act 1995 are quite limited. Details of cases which have been conciliated or are under conciliation, or those which have been rejected, remain confidential (as with all anti-discrimination and other legislation which utilise conciliation). There have been no public hearings to date, although a number of cases will be referred to public hearings over the next twelve months. The confidentiality of civil cases under conciliation has a rather insidious aspect to it in that it does not serve a public knowledge and educative function. Thornton goes so far as to say that, despite the benefits of conciliation[44] for the parties concerned:

> the confidentiality of conciliation indubitably thwarts the aim of deterrence. Those most likely to feel empowered by knowledge of the resolution of complaints analogous with their own are denied access to this knowledge.[45]

*Subjectivity of Claims*

It is difficult to objectively determine whether an individual or group 'feels' offended, humiliated, insulted or intimidated. What 'evidence' must be brought to bear by the claimant? It is also unclear whether the Commission might accept that some people are more

'sensitive' than others and thus more susceptible. It has been argued, for example that racist name-calling and general taunts are in fact part of the Australian cultural life and humour. If people cannot 'take it' they may be labelled 'un-Australian'. This attitude, unfortunately serves to force people into silence when they genuinely feel insulted, humiliated and intimidated.[46] In reality, some people are offended by ethnic jokes and name-calling, others are not. Some people are prepared to take action and others are not.

One reason for complaints being rejected may be that in many cases the verbal abuse is not the primary basis of the dispute, but arises tangentially, in the heat of the moment such as in neighbourhood disputes. However, Section 18b states that:

> If: (a) an act is done for two or more reasons; and (b) one of the reasons is the race, colour or national or ethnic origin of a person (whether or not it is the dominant reason or a substantial reason for doing the act); then, for the purposes of this Part, the act is taken to be done because of the person's race, colour or national or ethnic origin.

Thus, according to the law, it does not matter whether calling someone a 'wog' or a 'pom' is not the primary basis of the altercation. While many cases have arisen from such name-calling, the fact that it has been said during the course of another argument the legislation accepts that vilification occured. This may make it difficult for the Commission to reject relatively trivial cases. Thus there is considerable confusion as to what type of complaint is acceptable and what is not, particularly where exemptions under the Act may be invoked.

Finally, HREOC's power to force the parties in a case to a resolution is limited. The Brandy case in the High Court in 1995 made it clear that the Commission is an administrative body without judicial powers.[47] For example, HREOC cannot force an accused to comply with its determination. If an accused refuses to comply with a HREOC determination, the complainant must go to the Federal Court which can be costly. There is currently a bill before the Parliament which provides that complaints which cannot be conciliated by the Commission will go directly to the Federal Court for public hearing.

**CONCLUSION**

Following Pauline Hanson's speech in September 1996 much of the ensuing race debate was conducted under parliamentary privilege but it also took place in public broadcasting through the electronic and print media. The 'fair report' exemptions allow the media to report about an event or matter of public interest. Thus the provisions of the Racial Hatred Act clearly have not stifled freedom of speech on race, ethnic and immigration issues. Despite the wide public discussion over the Bill and its passage to legislaton, it is difficult to establish the extent to which the Racial Hatred Act has made any impact.

Perhaps the absence of criminal provisions in its final form weakened its ability to bring

about significant behavioural change.

Has the Racial Hatred Act served to facilitate multiculturalism with the kind of racial, ethnic and religious tolerance that was originally envisaged? Clearly, the spate of attacks and abuse since September 1996 indicates that, when provided with a loose form of legitimacy, racial hatred can show its presence in Australia, for there is a 'latent racism that resides just beneath the social surface ever ready to erupt, particularly when the economy declines and competition for jobs is sharpened.'[48] On the other hand, the Canadian experience suggests that there is no evidence that criminal racial hatred legislation 'contributes to the enhancement and preservation of multiculturalism in Canada.'[49] Whether the relative level of tolerance or suppression of hatred in Australia has been a function of legislation, 'political correctness' or core values is difficult to determine.

In summary, after almost 18 months following the enactment of the Racial Hatred Act 1995, it may be that the absence of criminal sanctions against racial hatred has become a major impediment to acheiving the goals of racial tolerance and multiculturalism in Australia. Further, the breadth of the exemptions in section 18D may also be an impediment to the Act's effectiveness. There is no real evidence of a positive or negative educational role of the legislation. While at least 112 individuals and groups were prepared to make formal complaints in the first year since the law was passed, the number of cases does not seem particularly high. The informal evidence of abuse, fear and trepidation, forced particularly on the Indigenous Australian population and Australians of Asian descent since September 1996 perhaps bears out the AAC's suggestion that victims are not always in a position to take action against acts of racial violence, expressed hatred and vilification. It may be concluded that there needs to be a far more concerted public education campaign than the $5 million program now in process.[50] The dilemmas of privacy in civil conciliation and the relative absence of public hearings of complaints may suggest a need for criminal provisions. These could more readily stimulate and promote education. Until there is a detailed analysis of the HREOC cases it is impossible to know the real effect of the ambiguities, exemptions, trivialities and interpretations of the Act. On the other hand, it is only a matter of time before complaints will be heard at a public hearing and it is too soon to expect any results from the Commission's community education and public information campaign (although it is not clear how changes can be directly attributed to the Commission's activities).

Future moves to place all discrimination and vilification laws (eg. sex, race, disability, age, marital status, etc.) under one Federal human rights legislative umbrella may be administratively sensible (although it would not affect state legislation which would continue to operate separately). Such moves would overcome the complexities of piecemeal Federal laws by more standardised universalistic principles. The task, of course, is to make both civil and criminal provisions coherent and workable.

**References** 1 I am grateful to the Race Discrimination Commissioner, Zita Antonios, for her assistance in making information available for this paper, and for explanatory comments on a number of points in an earlier draft. Thanks also to Katharine Betts for her editorial

comments and suggestions.

2 Australian Law Reform Commission (1992) *Multiculturalism and the Law* (No. 57), The Commission, Canberra; E. Johnson, *National Report of the Royal Commission into Aboriginal Deaths in Custody* (RCIADC), Australian Government Publishing Service (AGPS), Canberra, 1992; Human Rights And Equal Opportunity Commission (1991) *Report of the National Inquiry into Racial Violence* , AGPS, Canberra

3 Cited in S. Keeley, *Racial Vilification: A Case Study in Changing the Law*, VCTA Publishing, Melbourne, 1995, p. 12; see also S. Akmeemana and M. Jones, 'Fighting racial hatred' in Race Discrimination Commissioner, *The Racial Discrimination Act: A Review*, AGPS, Canberra, 1995, pp. 129-182.

4 Keeley, op. cit.

5 State legislation on racial vilification included: *Anti-Discrimination Act* 1977 (NSW) ss20B-22; *Discrimination Act* 1991 (ACT) ss65-67; *Criminal Code* (WA) ss76-80; and *Anti-Discrimination Act* 1992 (Qld) s126. See Akmeemana and Jones, op. cit., p. 131, fn 4

6 See J. Short, *Hansard*, Senate, 23 August, 1995, p. 218; also G. Campbell, *Hansard*, House of Representatives, 15 November 1994, p. 3387.

7 Senator Charmarette put the curious case that the proposed legislation itself was racist because it assumed an 'intolerance of people expressing racial sentiments.' See L. McNamara and T. Solomon, 'The Commonwealth Racial Hatred Act 1995: Achievement or Disappointment?', forthcoming, *Adelaide Law Review,* 1997

8 The Bill was also supported by the Executive Council of Australian Jewry, the Federation of Ethnic Communities Council, the Ethnic Affairs Council and the Macedonian Community Council of Melbourne and Victoria. Other opposition to all or parts of the Bill included the Hellenic Council of NSW, the Australian Arab Association, the Australian Lebanese Association and the Islamic Association of Victoria.

9 M. Liebler, *Hansard*, Legal and Constitutional Legislation Committee, Senate, 24 February 1995, p. 368

10 See J. Short, op. cit., p. 218

11 HREOC, *Report of the National Inquiry into Racial Violence* , AGPS, Canberra, 1991, pp. 69-180

12 Interestingly, each of the major political parties in both the House of Representatives and the Senate made reference to the AAC's public position on the legislation with quotes and counter quotes — eg. see Ruddock (Liberal), Tanner (Labor), Cleary (Independent) in *Hansard*, House of Representatives, 15 November 1994 and Senators Spindler (Democrats), Bolkus (Labor), Abetz (Liberal) and Short (Liberal) in *Hansard*,

Senate, 23- 24 August 1995. In this sense, the AAC's arguments were used as a barometer of some ethnic sentiments. While not opposed to legislation per se, the Council was strongly critical of the proposed legislation.

13 M. Lavarch, *Hansard*, House of Representatives, 1994, p. 3339

14 Taken from Keeley, op. cit., pp. 31, 78; and Committee to advise the Attorney General on Racial Vilification, *Racial Vilification in Victoria*, East Melbourne, July 1990, p. 7; see also A. Goldberg, *Racial Vilification*, Australian Studies Discussion Paper No 2, Victorian Council of Civil Liberties, July 1994.

15 See K. Middleton, 'Debate blamed for rise in racism', *The Age*, 27 February 1997, p. A3.

16 Thus statistics on racially motivated crime are currently not collected in Australia, in contrast to the United States and England.

17 'Vilification may incite vilification, as the most organised groups may make mileage from such a law and embark on a vindictive, expensive and opportunistic venture of scrutinising each other's activities in order to score points. Hence it may provide a legitimate outlet for racial hatred.' Australian Arabic Council, *AAC Position Paper on Proposed Federal Racial Vilification Legislation*, February 1994.

18 See Akmeemana and Jones, op. cit.

19 A large number of cases of racist abuse are reported, but cannot be acted upon because they are more often anonymous attacks and abuse on the streets where perpetrators cannot be apprehended; or people sending untraceable hate mail.

20 See 'Politics of hate at home in our city', *Herald Sun,* 2 April, 1994.

21 See footnote 14.

22 See, for example, Editorials in *The Age* 14/4/94; 31/5/94; 2/11/94; *The Sydney Morning Herald* 2/11/94.

23 The NSW Council for Civil Liberties supported the Bill.

24 See Commonwealth of Australia, *The Racial Hatred Bill 1994: Report by the Senate Legal and Constitutional Legislation Committee*, March 1995.

25 See, for example, Isi Leibler, *Herald Sun* 31/5/94; Bernard Rechter *The Age* 3/6/94. For a comprehensive analysis of the free speech aspect of the debate, see McNamara and Solomon, op. cit.

26 P. Ruddock, *Hansard*, House of Representatives, 15 November, 1994, p. 3343

27 ibid., p. 5

28 M. Lavarch, *Hansard*, House of Representatives, 15 November, 1994, p. 3341

29 See M. Leibler, op. cit., p. 393

30 See N. Hennessy and P. Smith, 'Have we got it right? NSW racial vilification laws five years on', *Australian Journal of Human Rights*, vol. 1, no. 1, December 1994, pp. 249-264: 263; and E. Stefanou-Haag, 'Antiracism: from legislation to education' in *Australian Journal of Human Rights*, vol. 1, no. 1, December 1994, pp. 185-197.

31 See S. Keeley, *Racial Vilification: A Case Study in Changing the Law*, VCTA Publishing, Melbourne, 1995, p. 34.

32 See Human Rights and Equal Opportunity Commission, *The Racial Hatred Act: A Guide for People Working in the Australian Media*, Racial Discrimination Unit, HREOC, Sydney, 1996.

33 See Senator Peter Walsh, 'Perils of racial vilification legislation', *Australian Financial Review*, 11 August, 1992. The member for Kalgoorlie, Graeme Campbell suggested that the stongest advocacy for the legislation with criminal sanctions came from Mark Liebler and 'the Zionist lobby'. Campbell, *Hansard*, House of Representatives, 15 November, 1994, p. 3386; see also the exchange between Jackson and Liebler in *Hansard*, Senate Legal and Constitutional Legislation Committee, 24 February 1995, pp. 381-384.

34 AAC, *Submission to the Senate Legal and Constitutional Legislation Committee,* 15 February, 1995

35 op. cit., p. 8

36 A. Twomey, 'Laws Against Incitement to Racial Hatred in the United Kingdom' in *Australian Journal of Human Rights*, vol. 1, no. 1, December 1994, pp. 235-248: 244

37 Hennessy and Smith, op.cit., p. 255

38 ibid., p. 256

39 The Parliament of the Commonwealth of Australia, *Racial Hatred Bill 1994: Explanatory Memorandum,* House of Representatives, Canberra, pp. 2-3

40 In NSW nearly half of all racial vilification complaints were against the media between 1989 and 1994, with most against the print media, followed by television and radio. As with the Federal experience, neighbours were the next most frequent respondents. See Hennessy and Smith, op. cit., p. 259

41 By comparison, in the financial year 1993-94 the New South Wales Anti-

Discrimination Board recieved 94 racial vilification complaints. Of these, '14 were outside the Board's jurisdiction, 17 were declined, 48 were not proceeded with, 14 were conciliated and 1 was referred to the EOT (Equal Opportunity Tribunal) for hearing.' ibid.

42 Race Discrimination Commissioner, personal communication

43 ibid.

44 The main benefit is to allow open discussion for resolution — see Twomey, op. cit., p. 260.

45 M. Thornton, 'Revisiting Race' in Race Discrimination Commissioner, *Racial Discrimination Act 1975: A Review*, AGPS, Canberra, 1995, p. 85

46 See J. Wakim, 'Time for a lead on diversity', Letter to the Editor, *The Age,* 9 October, 1996.

47 Thornton, op. cit., p. 89

48 ibid., p. 83

49 Justice McLachlin, cited in L. McNamara op.cit., p. 209

50 It may be noted that the anti-racism education program introduced by the Education Department of South Australia did not seem to quell the attitudes of the Mayor and citizens of Port Lincoln in 1996 or those who desecrated Jewish graves in Adelaide in 1995. See E. Stefanou-Haag, op.cit.; Thornton, op. cit., p. 83.

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