

IT'S NOT WHAT YOU SAY BUT THE WAY THAT YOU SAY IT: AUSTRALIAN HATE SPEECH LAWS AND THE EXEMPTION OF "REASONABLE" EXPRESSION

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I. INTRODUCTION.....	23
II. DELICATE FLORA: FREE SPEECH IN AUSTRALIA	26
III. AN OVERVIEW OF AUSTRALIAN RACIAL VILIFICATION LAWS	27
IV. EXEMPTION OF "REASONABLE" ACTS DONE IN "GOOD FAITH"	32
V. "REASONABLE" HATE SPEECH?	38
VI. CONCLUSION	39

I. INTRODUCTION

At a Local Shire Council meeting in Western Australia, a Councillor said "we shoot them" in response to a discussion about a group of homeless Aboriginal people.¹ The Councillor was ordered to pay \$1,000 compensation by the Human Rights and Equal Opportunity Commission, and he also apologized and completed cultural awareness training.² In an interview with a Western Australian newspaper journalist, a senior officer of the "One Nation" political party said "[h]ome invasions are ethnically based, Lebanese or Iranian, not Australian."³ He was ordered to pay \$1,000 compensation and publish a retraction.⁴ A resident of a Sydney apartment block yelled racist comments at another resident and was ordered to pay \$5,000 compensation.⁵ A diner owner whose premises had been vandalized put up signs, such as "Not open due to destructive Aborigines," and the noticeboard then attracted racist graffiti that was not removed by the owner.⁶ The diner owner was ordered to apologize to a respected Aboriginal community leader who had complained.⁷

Australia has a network of state and federal laws that proscribe hate speech of this kind.⁸ The amounts of compensation ordered in these cases are relatively small, but in many cases, it is the orders to

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1. *Jacobs v. Fardig* (1999) E.O.C. ¶ 93-016, (1999) HREOCA 9, ¶ 3.1 (find at <http://austlii.edu.au>).

2. *Id.*, (1999) HREOCA ¶ 6.

3. *Feghaly v. Oldfield* (2000) E.O.C. ¶ 93-090.

4. *Id.*

5. *Anderson v. Thompson* (2001) N.S.W.A.D.T. 11, ¶ 37 (find at <http://austlii.edu.au>).

6. *Warner v. Kucera* (2001) E.O.C. ¶ 93-137.

7. *Id.*

8. *See, e.g.*, Racial Discrimination Act, 1975 (Austl.); Discrimination Act, 1991 (Austl. Cap. Terr.); Anti-Discrimination Act, 1977 (N.S.W.); Anti-Discrimination Act, 1991 (Queensl.); Racial Vilification Act, 1996 (S. Austl.); Civil Liability Act, 1936, § 73 (S. Austl.); Anti-Discrimination Act, 1998 (Tas.); Racial and Religious Tolerance Act, 2001 (Vict.); Criminal Code, §§ 76-80F (W. Austl.).

apologize,⁹ to retract, or to cease distribution that have the greatest impact upon those found culpable and upon broader public debate. The prospect of being embroiled in proceedings before a commission, tribunal, or court can have a chilling effect on free speech. In cases in which the complaints have been dismissed,¹⁰ the speakers and publishers were nevertheless drawn into conciliation or court proceedings; this can have a chilling effect on future speech. Many of the cases involving hate speech attract little attention outside of the law reports, but there have been some high-profile cases that have come before the courts and have been reported in the media.¹¹ These cases include a claim of vilification of Islam brought against a Christian preacher¹² and complaints about Holocaust denial and anti-Semitic literature.¹³

Referred to as “racial vilification” in Australia,¹⁴ these hate speech laws at state and federal levels have an impact on public debate by

9. Apologies are sometimes ordered, but some magistrates and judges have expressed doubts about the utility of such orders. “An apology should come from the heart and not be the subject of a court order.” *San v. Dirluck Pty Ltd.* (2005) 222 A.L.R. 91, ¶ 49, (2005) F.M.C.A. 750, ¶ 49 (find at <http://austlii.edu.au>).

10. Several complaints were not sustained as vilification. *See, e.g.*, *Miller v. Wertheim* (2002) E.O.C. ¶ 93-182, (2002) E.O.C. ¶ 93-223, (2002) F.C.A. 156, ¶ 1 (find at <http://austlii.edu.au>) (involving criticism of the Orthodox Jewish community in a speech at a Jewish Board of Deputies meeting); *Bryl v. Kovacevic* (1999) E.O.C. ¶ 93-022, (1999) HREOCA 11, ¶¶ 1, 7 (find at <http://austlii.edu.au>) (involving a theatrical play about the turmoil in Bosnia-Herzegovina); *Francis v. YWCA Austl.* (2006) V.C.A.T. 2456, ¶ 3 (find at <http://austlii.edu.au>) (involving a t-shirt with the words “get your rosaries off my ovaries”); *Fletcher v. Salvation Army Austl.* (2005) V.C.A.T. 1523, ¶ 1 (find at <http://austlii.edu.au>) (involving a claim that Christian teaching vilified witchcraft); *Judeh v. Jewish Nat’l Fund of Austl. Inc.* (2003) V.C.A.T. 1254, ¶¶ 9, 10 (find at <http://austlii.edu.au>) (involving an advertisement in a newspaper with the outline of a map of Israel that incorporated Palestinian semiautonomous areas).

11. *See, e.g.*, Amir Butler, Opinion, *Muzzling the Haters Doesn’t Mean That Hate Has Vanished*, AGE (Melbourne), Jan. 4, 2005, at 11; Ian Gerard, Opinion, *‘Racist’ Website Material Banned*, AUSTRALIAN, Sept. 18, 2002, at 5; Moira Rayner, *Why Not Just Let the Truth Speak for Itself?*, AGE (Melbourne), Jan. 6, 2005, at 11; Brett Stubbs, *Campaigner to Defy Race Law Ruling*, MERCURY (Hobart), Sept. 27, 2000, at 9; Barney Zwartz, *Pastors Will Keep ‘Telling Truth’ on Muslims*, AGE (Melbourne), Dec. 15, 2006, at 5; Barney Zwartz, *Pastors Vow to Go to Jail on Hate Case*, AGE (Melbourne), June 23, 2005, at 3.

12. *Catch the Fire Ministries, Inc. v. Islamic Council of Vict. Inc.* (2006) 15 V.R. 207, (2006) V.S.C.A. 284 (find at <http://austlii.edu.au>). The matter was remitted to the tribunal by the Court of Appeal and then settled by the parties. Press Release, Vict. Civil and Admin. Tribunal, Joint Statement of the Islamic Council of Victoria Inc., *Catch the Fire Ministries Inc., Daniel Nalliah and Daniel Scot* (June 22, 2007), available at <http://www.vcat.vic.gov.au>.

13. *E.g.*, *Jones v. Bible Believers’ Church* (2007) F.C.A. 55, ¶ 2 (find at <http://austlii.edu.au>) (material published on the Internet); *Toben v. Jones* (2003) 129 F.C.R. 515, 517, (2003) F.C.A. 137, ¶ 2 (find at <http://austlii.edu.au>) (material published on the Internet); *Jones v. Scully* (2002) 120 F.C.R. 243, 246, (2002) F.C.A. 1080, ¶ 1 (find at <http://austlii.edu.au>) (material published in pamphlets).

14. *See, e.g.*, Discrimination Act, 1991, §§ 66-67 (Austl. Cap. Terr.); Anti-Discrimination Act, 1977, § 20C-20D (N.S.W.); Anti-Discrimination Act, 1991, §§ 124A, 131A (Queensl.); Racial Vilification Act, 1996 (S. Austl.); Racial and Religious Tolerance Act, 2001, § 7 (Vict.).

proscribing some, but not all, kinds of vilifying speech. The extent of that impact, and whether the legislation can be justified on public policy grounds, has been a topic of concern for many years.¹⁵ When these laws were passed, there was significant debate in the media and parliaments about the potential impact upon free speech.¹⁶ A good deal of attention in that early debate was focused on criminal sanctions that have never been deployed. Concerns about the impact of the civil complaint procedures were allayed by exemptions designed to protect public debate, the media, academic inquiry, and artistic expression. The impact of these exemptions is the central theme in this Article.

With limited constitutional protection for free speech and a complex network of legislation, Australia offers an interesting case study for the impact of hate speech laws in practice.¹⁷ In this Article, I argue that, in many cases, the Australian racial vilification laws favor certain voices over others. Privileged speakers, who conform to judicial interpretations of reasonableness, are exempted; those who use inflammatory or intemperate language are silenced. These laws restrict the form of expression rather than the racist message itself. Thus, it is not so much what you say, but how you say it.

Public debate can be impoverished by this exclusion of marginal voices that do not conform to legal standards of reasonableness and so are subject to hate speech laws. At the same time, racist material communicated by speakers who know and are comfortable with the rules of the game can undermine the objectives of the legislation. Court findings that expressions of racial hatred are “reasonable,” even though such expressions are hateful, are troubling. Exemptions of this kind of speech may be treated as authoritative and therefore reinforce the racist messages that the legislation was intended to proscribe.

15. See, e.g., sources cited *infra* notes 24-25 (citing popular and scholarly debate on impact and justification of racial vilification laws).

16. Luke McNamara & Tamsin Solomon, *The Commonwealth Racial Hatred Act 1995: Achievement or Disappointment?*, 18 ADEL. L. REV. 259, 271-77 (1996) (Austl).

17. As early as 1995, Luke McNamara called for the adoption of empirical perspectives and “an assessment of the relative merits of different models of legal intervention.” Luke McNamara, *The Merits of Racial Hatred Laws: Beyond Free Speech*, 4 GRIFFITH L. REV. 29, 30 (1995). Katharine Gelber and Adrienne Stone have argued that because hate speech laws exist in Australia, an “intellectual space” is raised for questions such as: who are the hate speakers and what types of hate speech are targeted by these laws? Katharine Gelber & Adrienne Stone, *Introduction*, in HATE SPEECH AND FREEDOM OF SPEECH IN AUSTRALIA xiii, xiv (Katharine Gelber & Adrienne Stone eds., 2007).

II. DELICATE FLORA: FREE SPEECH IN AUSTRALIA

Free speech in Australia has been described as “a delicate plant.”¹⁸ Australia does not have an entrenched protection for free speech, but there is some limited protection for political expression implied from our system of representative government established by the Australian Constitution.¹⁹ This implied freedom is limited to communications relating to political or governmental matters. Legislation that burdens political communications may still be valid if it is reasonably appropriate and adapted to serve a legitimate end that is compatible with the maintenance of a system of representative and responsible government. The Federal Court²⁰ and Victorian Court of Appeal²¹ have held that the vilification statutes are reasonably and appropriately adapted to serve the legitimate end of preventing vilification.²²

While the Australian Constitution was no barrier to passing Australia’s hate speech laws, concerns for the protection of free speech were raised when the laws were introduced, and free speech sensitivities have shaped judicial interpretation of the laws.²³ There were free speech debates in the press²⁴ and amongst academics²⁵ when the

18. MICHAEL CHESTERMAN, FREEDOM OF SPEECH IN AUSTRALIAN LAW: A DELICATE PLANT 1 (2000).

19. This implied freedom of political expression has been developed in a series of High Court decisions dating back to 1992. *See, e.g.*, *Coleman v. Power* (2004) 220 C.L.R. 1, (2004) H.C.A. 39 (find at <http://austlii.edu.au>); *Lange v. Austl. Broad. Corp.* (1997) 189 C.L.R. 520, (1997) H.C.A. 25 (find at <http://austlii.edu.au>); *Australian Capital Television v. Commonwealth* (1992) 177 C.L.R. 106, (1992) H.C.A. 45 (find at <http://austlii.edu.au>).

20. *Toben v. Jones* (2003) 129 F.C.R. 515, 551-52, (2003) F.C.A. 137, ¶¶ 141-48 (find at <http://austlii.edu.au>); *Jones v. Scully* (2002) 120 F.C.R. 243, 304-06, (2002) F.C.A. 1080, ¶¶ 234-42 (find at <http://austlii.edu.au>).

21. *Catch the Fire Ministries, Inc. v. Islamic Council of Vict. Inc.* (2006) 15 V.R. 207, ¶¶ 113, 210, (2006) V.S.C.A. 284, ¶¶ 113, 210 (find at <http://austlii.edu.au>).

22. *See, e.g.*, Nicholas Aroney, *The Constitutional (In)validity of Religious Vilification Laws: Implications for Their Interpretation*, 34 FED. L. REV. 287 (2006) (Austl.) (discussing the religious vilification laws as they relate to the High Court’s decisions, which imply a freedom of political communication).

23. Luke McNamara, *Does a Bill of Rights Matter?: Comparing Australia and New Zealand*, in HATE SPEECH AND FREEDOM OF SPEECH IN AUSTRALIA, *supra* note 17, at 194, 212-13; LUKE MCNAMARA, REGULATING RACISM: RACIAL VILIFICATION LAWS IN AUSTRALIA 102-07 (2002).

24. *See, e.g.*, Robert Manne, Opinion, *Race Bill an Offence Against Free Speech*, AGE (Melbourne), Nov. 16, 1994, at 19 (arguing against the Bill on the grounds of free speech); *Racial Bill Problems*, SYDNEY MORNING HERALD, Nov. 2, 1994, at 16 (stating that the case for vilification legislation is not proved); Colin Rubenstein & Michael Kapel, *Sending out the Right Signals*, AGE (Melbourne), Nov. 21, 1994, at 9 (arguing for the Bill).

25. *See, e.g.*, Nancy Hennessy & Paula Smith, *Have We Got It Right? NSW Racial Vilification Laws Five Years On*, 1(1) AUSTL. J. HUM. RTS. 249 (1994); Jeremy Jones, *Holocaust Denial: “Clear and Present” Racial Vilification*, 1(1) AUSTL. J. HUM. RTS. 169 (1994); Melinda Jones, *Empowering Victims of Racial Hatred by Outlawing Spirit-Murder*, 1(1) AUSTL. J. HUM. RTS. 299 (1994) [hereinafter Jones, *Empowering Victims*]; Kathleen Mahoney, *Hate Vilification Legislation and Freedom of Expression: Where Is the Balance?*, 1(1) AUSTL. J. HUM. RTS. 353 (1994); Tamsin Solomon, *Problems in Drafting Legislation Against Racist Activities*, 1(1) AUSTL. J. HUM. RTS. 265 (1994).

Federal Racial Hatred Bill was introduced in 1994.²⁶ Free speech was raised both as grounds for opposing and supporting the legislation. Legislative restrictions on speech were decried by some commentators, but other commentators argued that hate speech, if unopposed, has a chilling effect because it excludes some minority participants from public debate and belittles their voices if raised.²⁷ The Explanatory Memorandum to the Federal Bill declared that the legislation maintained a “balance between the right to free speech and the protection of individuals and groups from harassment and fear because of their race, colour or national or ethnic origin.”²⁸ In his Second Reading Speech on the Racial Hatred Bill, the Federal Attorney General, Mr. Lavarch, stated:

The bill places no new limits on genuine public debate. Australians must be free to speak their minds, to criticise actions and policies of others and to share a joke. The bill does not prohibit people from expressing ideas or having beliefs, no matter how unpopular the views may be to many other people. The law has no application to private conversations. Nothing which is said or done reasonably and in good faith in the course of any statement, publication, discussion or debate made or held for an academic, artistic or scientific purpose or any other purpose in the public interest will be prohibited by the law.²⁹

The Attorney General’s argument was that the legislation had built-in protection for free speech in the form of exemptions for certain kinds of “genuine” speech that is judged to be reasonable and in good faith.³⁰

III. AN OVERVIEW OF AUSTRALIAN RACIAL VILIFICATION LAWS

The Australian racial vilification laws vary between state and federal jurisdictions, but they include criminal offenses,³¹ civil complaints-based processes in tribunals and commissions,³² and tort

26. Nick Poynder, *Racial Vilification Legislation*, ABORIGINAL L. BULL., Dec. 1994, at 4 (discussing Racial Hatred Bill 1994), available at <http://austlii.law.uts.edu.au/journals/AboriginalLB/1994/57.html>; see also Racial Hatred Act, 1995 (Austl.) (subsequently enacted variant of the 1994 Bill).

27. Jones, *Empowering Victims*, *supra* note 25, at 310-11.

28. H.R., RACIAL HATRED BILL, EXPLANATORY MEMORANDUM 1 (1994) (Austl.).

29. Parliamentary Deb., H. Hansard 3337 (Nov. 15, 1994) (statement of Att’y Gen. Lavarch).

30. *Id.*

31. Discrimination Act, 1991, § 67 (Austl. Cap. Terr.); Anti-Discrimination Act, 1977, § 20D (N.S.W.); Anti-Discrimination Act, 1991, § 131A (Queensl.); Racial Vilification Act, 1996, § 4 (S. Austl.); Racial and Religious Tolerance Act, 2001, § 24 (Vict.); Criminal Code, §§ 77-80D (W. Austl.).

32. Racial Discrimination Act, 1975, § 18C (Austl.); Discrimination Act, 1991, § 66 (Austl. Cap. Terr.); Anti-Discrimination Act, 1977, § 20C (N.S.W.); Anti-Discrimination Act, 1991, § 124A (Queensl.); Anti-Discrimination Act, 1998, § 19 (Tas.); Racial and Religious Tolerance Act, 2001, § 7 (Vict.).

law.³³ The state regulatory schemes operate concurrently with the federal laws, and the Federal Act makes it clear that there is no inconsistency intended by these overlapping regimes.³⁴ The first of the laws was passed in the State of New South Wales in 1989, and other states and territories followed throughout the 1990s. The federal provisions commenced in 1995, and the last states to pass legislation in this field were Queensland and Victoria in 2001.³⁵ In some states, the grounds of vilification extend to sexuality, homosexuality, transgender and transsexuality,³⁶ HIV or AIDS status,³⁷ and disability.³⁸ In this Article, I will concentrate on racial vilification that is covered by all of the state and federal acts. I will also focus on the civil complaints-based schemes since those are the provisions that have been enforced.³⁹

To truly understand the impact of the state and federal legislation on free speech, it is necessary to investigate the way that the legislation has been used by complainants. Who, or at least what areas, attract complaints of racial hatred? The civil complaints are commenced before administrative commissions and tribunals.⁴⁰ At the federal level, conciliation by the Human Rights and Equal Opportunity Commission is the first step in the process; if conciliation fails, the matter may proceed to civil action in the courts. In the Federal Human Rights and Equal Opportunity Commission's annual report, the statistics for lodgment of complaints provide a useful overview of the range of disputes that come into the system.⁴¹ Many complaints

33. See, e.g., Civil Liability Act, 1936, § 73 (S. Austl.).

34. Racial Discrimination Act, 1975, §§ 6A, 18F (Austl.).

35. Anti-Discrimination Amendment Act, 2001 (Queensl.); Racial and Religious Tolerance Act, 2001 (Vict.). The Northern Territory is the only jurisdiction without any local hate speech laws, but, as with the other Australian states and territories, the Northern Territory is covered by the Federal Act.

36. Discrimination Act, 1991, §§ 66(1)(b)-(c), 67(1)(d)(ii)-(iii) (Austl. Cap. Terr.); Anti-Discrimination Act, 1977, §§ 38R-38T, 49ZS-49ZTA (N.S.W.); Anti-Discrimination Act, 1991, § 124A (Queensl.); Anti-Discrimination Act, 1998, § 19(c) (Tas.).

37. Discrimination Act, 1991, §§ 66(1)(d), 67(1)(d)(iv) (Austl. Cap. Terr.); Anti-Discrimination Act, 1977, §§ 49ZXA-49ZXC (N.S.W.).

38. Anti-Discrimination Act, 1998, § 19(b) (Tas.).

39. There are no federal criminal sanctions. Most of the states have criminal offenses, but Dan Meagher has reported that only one person has been convicted of a racial vilification crime in Australia since the first law was passed in 1989. Dan Meagher, *So Far No Good: The Regulatory Failure of Criminal Racial Vilification Laws in Australia*, 17 PUB. L. REV. 209, 210 (2006).

40. Katharine Gelber, *Hate Speech and the Australian Legal and Political Landscape*, in HATE SPEECH AND FREEDOM OF SPEECH IN AUSTRALIA, *supra* note 17, at 2, 9 (describing "more mundane manifestations of hate speech").

41. See, e.g., HUMAN RIGHTS AND EQUAL OPPORTUNITY COMM'N, ANNUAL REPORT 2006-2007, at 74 (2007), available at http://www.humanrights.gov.au/about/publications/annual_reports/2006_2007/pdf/hreoc_ar2006-07.pdf [hereinafter ANNUAL REPORT 2006-2007]; see also Australian Human Rights Commission, Annual Reports, http://www.humanrights.gov.au/about/publications/annual_reports/index.html (collection of annual reports from 1996 to present) (last visited Nov. 12, 2008).

are dismissed, withdrawn, or resolved, and thus only a few proceed to the courts.⁴² The annual reports show a general decline in the number of racial hatred complaints made under the Federal Act over the last few years. The number of these complaints fell from a high of 186 complaints in 1996-1997 to 44 complaints in 2006-2007.⁴³ The figures also disclose that disputes between individuals in neighborhoods and in the workplace make up a large proportion of the complaints received.⁴⁴ Indeed, when the categories of “public debate,” “media,” and “Internet” are combined, they only make up between twenty and forty-five percent of complaints in any year.⁴⁵ Some of the high-profile and problematic cases discussed below that reach the courts involve the media and other participants in public discourse. However, it is worth noting the significant number of complaints that focus on personal, neighborhood, or workplace disputes. This might be interpreted as the regime fulfilling an educative role that was intended by Parliament when the Act was passed, but the conciliation proceedings are confidential, and so the cases that do not go beyond the first stage have limited impact beyond those directly involved.⁴⁶ Equally, the number of personal, neighborhood, and workplace disputes can be interpreted as a disproportionate burden being imposed upon individuals and employers while a racist discourse continues relatively unchecked in privileged domains such as politics and the commercial media.⁴⁷

42. See, e.g., ANNUAL REPORT 2006–2007, *supra* note 41, at 74 (reporting figures reported for 2006-2007 for conciliation and termination of all complaints of racial discrimination (racial hatred figures not separately recorded)). When complaints are terminated by the Human Rights and Equal Opportunity Commission, the complainant may apply to have the allegations heard and determined by the Federal Court or the Federal Magistrates Court. Human Rights and Equal Opportunity Commission Act, 1986, § 46PO (Austl.), available at http://www.austlii.edu.au/au/legis/cth/consol_act/hraeocpaaa19861054.

43. ANNUAL REPORT 2006–2007, *supra* note 41, at 74; HUMAN RIGHTS AND EQUAL OPPORTUNITY COMM’N, ANNUAL REPORT 1996 - 1997, at 18 (1997), available at http://www.humanrights.gov.au/pdf/annual_reports/ar97.pdf.

44. See, e.g., ANNUAL REPORT 2006–2007, *supra* note 41, at 74.

45. Australian Human Rights Commission, *supra* note 41. Statistics for racial hatred areas of complaints were not reported in 2004-2005 and 2005-2006 annual reports.

46. Although equivocal about conciliation, Margaret Thornton has argued that it can create a space where small victories might be achieved for minorities. MARGARET THORNTON, *THE LIBERAL PROMISE: ANTI-DISCRIMINATION LEGISLATION IN AUSTRALIA* 170 (1990).

47. Katharine Gelber has investigated examples of the Australian Government as a hate speaker in immigration controversies. Katharine Gelber, *Hate Speech and the Australian Legal and Political Landscape*, in *HATE SPEECH AND FREEDOM OF SPEECH IN AUSTRALIA*, *supra* note 17, at 2, 14.

The harm threshold for civil complaints⁴⁸ varies between the state and federal schemes. In the states, the threshold is higher: “to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of . . . race.”⁴⁹ The focus of the harm threshold in the states is the impact on the audience and whether others are likely to be incited. In all jurisdictions, an essential element of the unlawful conduct is that the act must be done in public.⁵⁰

When considering the concept of “incitement” in the state acts, there is no need to prove intention to incite.⁵¹ Rather, the focus is on the effects of the public act. It is not sufficient to show that a statement was incorrect or might be inflammatory; there must be incitement of hatred.⁵² The provisions do not turn on proof of actual incitement of a specific person, but rather the likely effect. However, the evidence of actual effect may be relevant to the assessment of remedies.⁵³ The incitement is the effect of the words on an “ordinary reasonable” person, which is someone who is not “malevolently inclined [n]or free from susceptibility to prejudice.”⁵⁴ In a New South Wales case involving a newspaper article about Palestinians, counsel for *The Australian Financial Review* submitted that an ordinary, reasonable reader would anticipate that the paper would print balancing material, such as follow-up letters, in response to the article and other opinion pieces.⁵⁵ The tribunal did not accept that argument.⁵⁶ This hypothetical person who could envisage a diverse ongoing debate was “not the ordinary, reasonable person, but rather a person who is virtually free from susceptibility to prejudice.”⁵⁷ Nor

48. The harm threshold for the criminal provisions in most of the states is threats of, or incitement to threaten, physical harm. Discrimination Act, 1991, § 67 (Austl. Cap. Terr.); Anti-Discrimination Act, 1977, § 20D (N.S.W.); Anti-Discrimination Act, 1991, § 131A (Queensl.); Racial Vilification Act, 1996, § 4 (S. Austl.); Racial and Religious Tolerance Act, 2001, § 24 (Vict.). In Western Australia, the offense involves incitement of racial animosity or racist harassment. Criminal Code, §§ 77-80D (W. Austl.).

49. Discrimination Act, 1991, § 66 (Austl. Cap. Terr.); Anti-Discrimination Act, 1977, § 20C (N.S.W.); Anti-Discrimination Act, 1991, § 124A (Queensl.); *see also* Civil Liability Act, 1936, § 73 (S. Austl.); Anti-Discrimination Act, 1998, § 19 (Tas.); Racial and Religious Tolerance Act, 2001, § 7 (Vict.).

50. The Federal and Victorian versions require that the act not be done in private. Racial Discrimination Act, 1975, § 18C (Austl.); Racial and Religious Tolerance Act, 2001, § 12 (Vict.).

51. *Kazak v. John Fairfax Publ'ns Ltd.* (2000) N.S.W.A.D.T. 77, ¶ 26 (find at <http://austlii.edu.au>); *W. Aboriginal Legal Serv. Ltd. v. Jones* (2000) N.S.W.A.D.T. 102, ¶ 93 (find at <http://austlii.edu.au>).

52. *Agean Macedonian Ass'n of Austl. v. Karagiannakis* (2000) E.O.C. ¶ 93-070, (1999) N.S.W.A.D.T. 130, ¶ 22 (find at <http://austlii.edu.au>).

53. *W. Aboriginal Legal Serv. Ltd.*, (2000) N.S.W.A.D.T. ¶ 93.

54. *Kazak*, (2000) N.S.W.A.D.T. ¶ 38.

55. *Id.* ¶ 39.

56. *Id.*

57. *Id.*

was it relevant that a reader understands that people hold divergent views. “The ordinary reader may well be aware for example, that people have extreme views on white supremacy. That does not make statements about white supremacy any less likely to incite hatred.”⁵⁸

At the federal level, the harm threshold is lower:

It is unlawful for a person to do an act, otherwise than in private, if . . . that the act is reasonably likely . . . to offend, insult, humiliate or intimidate another person or a group of people . . . because of the race, colour or national or ethnic origin of the other person or . . . group.⁵⁹

A mere slight is insufficient.⁶⁰ The focus here is on the victims of the vilifying speech and whether they are “reasonably likely” to be offended, insulted, humiliated, or intimidated. Dan Meagher has criticized the lack of any detailed analysis or reasoning in many cases in which this harm threshold was applied and has argued that it is often exercised as a “‘personal discretion to do justice,’”⁶¹ leaving the impression of arbitrary decisionmaking in some cases.

The “reasonably likely” phrase incorporates an objective standard⁶² and has been interpreted as a “reasonable victim” of the relevant race or ethnic background informed by community standards. The historical or socioeconomic situation of the group is relevant.⁶³ The provisions are not limited to the protection of minority groups, but decisionmakers have held that reasonable members of majority groups are less likely to be offended. Referring to English people as “[p]oms”⁶⁴ and yelling abusive comments at white prison officers⁶⁵ have been held not to meet the requisite harm threshold. In a case involving white prison officers, a woman was refused permission to visit a prisoner, and she yelled abusive comments at the prison officer who was at the gatehouse.⁶⁶ The Magistrate was clearly reluctant to hold against the woman and decided that, while much of the language she used was offensive, the racial element, using the epithet “white,” was something that a reasonable officer would not have

58. *Id.* ¶ 60.

59. Racial Discrimination Act, 1975, § 18C (Austl.).

60. *Creek v. Cairns Post Pty Ltd.* (2001) 112 F.C.R. 352, 356, (2001) F.C.A. 1007, ¶ 16 (find at <http://austlii.edu.au>); *Kelly-Country v. Beers* (2004) 207 A.L.R. 421, ¶ 87, (2004) F.M.C.A. 336, ¶ 87 (find at <http://austlii.edu.au>).

61. Dan Meagher, *So Far So Good?: A Critical Evaluation of Racial Vilification Laws in Australia*, 32 FED. L. REV. 225, 235-36 (2004) (quoting Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176 (1989)).

62. *Kelly-Country*, (2004) F.M.C.A. ¶ 84.

63. *Id.* ¶ 88.

64. *Bryant v. Queensland Newspapers Pty Ltd.* (1997) H.R.E.O.C.A. 23 (find at <http://austlii.edu.au>).

65. *McLeod v. Power* (2003) 173 F.L.R. 31, 46-47, (2003) F.M.C.A. 2, ¶¶ 67-69 (find at <http://austlii.edu.au>).

66. *See id.* at 32, (2003) F.M.C.A. ¶ 2.

found offensive.⁶⁷ The Magistrate interpreted the impact of the allegedly racially offensive words in the context of a power imbalance between the white prison officer and the Aboriginal woman abusing him. In that case, the Aboriginal woman was railing against a decision of the prison officials to refuse her entry that she could do nothing to change.⁶⁸ Interpreting “reasonable” victims in this way can avoid the potential problem, raised by some commentators, that members of victimized groups may be punished for hate speech directed against dominant groups.⁶⁹ Similarly, the Human Rights and Equal Opportunity Commission held that a spoof documentary, which reversed the roles of ethnographers with Africans studying Austrian communities, was not reasonably likely to offend Austrians.⁷⁰ When enacting the racial hatred provisions, the Legislature clearly did not have in mind that these kinds of cases would be brought by white complainants.

IV. EXEMPTION OF “REASONABLE” ACTS DONE IN “GOOD FAITH”

To properly understand the outcomes of racial hatred complaints, it is necessary to also carefully consider the exemptions. There are exemptions in the state and federal statutes that protect acts done reasonably and in good faith for academic, artistic, scientific, or research purposes, or acts done in the public interest, including both discussion and debate.⁷¹ When the exemptions were included in the federal bill, they were criticized in submissions made to a Senate inquiry as being a “bonanza for lawyers” because of the imprecision of the words “fair” and “reasonable.”⁷² The Senate inquiry also raised concerns about who might or might not benefit from the exemptions:

67. *Id.* at 46-47, (2003) F.M.C.A. ¶¶ 67-69.

68. *Id.* at 38, (2003) F.M.C.A. ¶ 33. The Magistrate also held that the exchange did not occur in public. *Id.* at 48, (2003) F.M.C.A. ¶ 73; *see also* Gibbs v. Wanganeen (2001), 162 F.L.R. 333, 335-37, (2001) F.M.C.A. 14, ¶¶ 3, 6, 9, 114 (find at <http://austlii.edu.au>).

69. *See* Henry Louis Gates, Jr., *War of Words: Critical Race Theory and the First Amendment*, in *SPEAKING OF RACE, SPEAKING OF SEX: HATE SPEECH, CIVIL RIGHTS, AND CIVIL LIBERTIES* 17, 43 (Henry Louis Gates, Jr. et al. eds., 1994); Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 *CARDOZO L. REV.* 1523, 1525, 1566 (2003). Nadine Strossen has made a similar argument in relation to censorship of hate speech and women’s rights: “If you belong to a group that has traditionally suffered discrimination, including women, restrictions on hate speech are especially likely to be wielded against your speech.” Nadine Strossen, *Hate Speech and Pornography: Do We Have to Choose Between Freedom of Speech and Equality?*, 46 *CASE W. RES. L. REV.* 449, 470 (1996).

70. *De La Mare v. Special Broad. Serv.* (1998) H.R.E.O.C.A. 26, ¶ 6 (find at <http://austlii.edu.au>).

71. Racial Discrimination Act, 1975, § 18D (Austl.); Discrimination Act, 1991, § 66(2)(c) (Austl. Cap. Terr.); Anti-Discrimination Act, 1977, § 20C(2)(c) (N.S.W.); Anti-Discrimination Act, 1991, § 124A(2)(c) (Queensl.); Civil Liability Act, § 73(1)(c) (S. Austl.); Racial and Religious Tolerance Act, § 11 (Vict.).

72. S. LEGAL AND CONSTITUTIONAL LEGIS. COMM., REPORT ON RACIAL HATRED BILL 1994, ¶ 1.64 (1995) (Austl.).

“The effect of that provision could well be simply to discriminate between the sophisticated and the unsophisticated racist: to give the likes of David Irving a free run, and yet to make unlawful a relatively harmless schoolyard taunt.”⁷³

A spokesperson for the Australian Arabic Council was also critical of the proposed exemption during the Senate inquiry: “[T]he effects of the actions exempted are no less serious than the racist actions, and the grounds for exemptions do not mitigate the effect that the bill is ostensibly trying to address.”⁷⁴ The Senate Committee concluded that the exemptions might allow acts that lead to offense, insult, intimidation, or humiliation, but that it was necessary to support constitutional validity⁷⁵ by accommodating freedom of expression in this way.

The Minority Committee Report in the Senate inquiry expressed similar concerns about the exemptions in relation to artistic performances:

[T]he exclusion of artistic performances from the scope of the civil provision of the Bill makes it laughable. A comedian can, in the guise of an artistic performance, tell blatantly racist jokes on national television, and sell videotapes of the program for personal profit, but those some [sic] jokes told by an ordinary citizen in a public place such as a hotel or club, could render him/her subject to civil proceedings

If the Government is truly concerned to stamp out racism, then which is the greater evil: a racist joke told on national television, or, the same joke told in the relative confines of a hotel or club?⁷⁶

These concerns have been vindicated by some cases brought by Aboriginal complainants. For example, in a case involving a stand-up comedian going by the stage name “King Billy Cokebottle,” the comedian, who was not Aboriginal, dressed up as if he were Aboriginal by using black face paint.⁷⁷ The Complainant found the character’s name offensive and argued that use of “Kriol” English with mispronunciations held Aboriginal people up to ridicule, mockery, and contempt.⁷⁸ The Magistrate agreed that the act was a “grotesque caricature”⁷⁹ and said, “Aboriginal people have been the subject of racial

73. *Id.* (citation omitted). The Senate Committee responded that the requirement of reasonableness and good faith would keep “sophisticated” racists from exploiting the exemptions. *Id.* ¶ 1.65.

74. *Id.* ¶ 1.68 (citation omitted).

75. *Id.* ¶ 1.69.

76. S. LEGAL AND CONSTITUTIONAL LEGIS. COMM., REPORT ON RACIAL HATRED BILL 1994, MINORITY REPORT, at 6 (1995) (Austl).

77. *Kelly-Country v. Beers* (2004) 207 A.L.R. 421, ¶¶ 2, 30, (2004) F.M.C.A. 336, ¶¶ 2, 30 (find at <http://austlii.edu.au>).

78. *Id.* ¶ 31.

79. *Id.* ¶ 127.

discrimination and prejudice throughout the European settlement of Australia. As a result, they are likely to be more sensitive about jokes directed towards them, as they are members of a minority group, which is significantly socially disadvantaged.”⁸⁰ The Magistrate accepted that the act was vulgar and in poor taste but also recognized that it was comedic in intention; he concluded that “the character has more licence than a politician or social commentator to express views. In the context of a stand-up comedy performance, the offence implicit in much of [the] material does not appear to me to be out of proportion.”⁸¹

When it comes to comedy and artistic work, the courts allow a margin of tolerance that is not necessarily extended to speakers in other contexts. In a case concerning a cartoon in a Western Australian newspaper, the Human Rights and Equal Opportunity Commission held that a “reasonable” Aboriginal person would be offended by the work,⁸² but that the newspaper publisher was protected by the exemption. The Commission concluded that, “[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.”⁸³

Given the objectives of the Act, the idea that a “reasonable” person may be prejudiced is troubling. The cartoon in the case entitled “Alas poor Yagan” was published during a public controversy about the return of the skull of an Aboriginal man that had been sent to England and displayed in a museum in Liverpool in the nineteenth century.⁸⁴ The return of Aboriginal remains from museums is a matter of public interest, and in this case, there were disputes within indigenous communities about who had the right to negotiate and arrange the return.⁸⁵ There was also a wider public debate about government grants given to representatives to travel to London where the representatives negotiated the return of the remains.⁸⁶ The cartoon lampooned these events.⁸⁷ The paper that published the cartoon could have discussed the government funding of the trip and the disputes within the Aboriginal communities without publishing the demeaning cartoon.

80. *Id.* ¶ 98.

81. *Id.* ¶ 127.

82. *Corunna v. W. Austl. Newspapers Ltd.* (2001) E.O.C. ¶ 93-146, § 8.7.3.

83. *Id.*

84. *Bropho v. Human Rights and Equal Opportunity Comm’n* (2004) 135 F.C.R. 105, 110, (2004) F.C.A. 16, ¶ 14 (find at <http://austlii.edu.au>).

85. *Corunna*, (2001) E.O.C. § 6.2.2.

86. *Id.*

87. *Id.*

The Commission's decision that the cartoon was published "reasonably and in good faith" as an artistic work or as part of a debate in the public interest was upheld when reviewed by a single judge of the Federal Court and on appeal by the majority in the full Federal Court.⁸⁸ In a dissenting judgment, Justice Lee argued that the cartoon was humiliating and demeaning and that the reasonableness of the newspaper's decision to publish the cartoon should be judged against the harm it may cause:

Such harm . . . would be the extent to which that part of the community which consisted of persons who held racially-based views destructive of social cohesion, or persons susceptible to the formation of such opinions, may be reinforced, encouraged or emboldened in such attitudes by the publication, on the ground of race, of a cartoon which, irrespective of the intent of the artist and of the purpose of the publisher, was capable of being seen by such persons as providing support or justification from an authoritative source for views grounded on racial antipathy.⁸⁹

In relation to the requirement of good faith, Justice Lee argued that the publisher should have exercised prudence, caution, and diligence, and endeavored to avoid or minimize the harmful consequences.⁹⁰

The majority judges upheld the Commission's decision that the cartoon was published reasonably and in good faith. Justice French suggested in dicta that the use of derogatory racist "slang" would probably not be "reasonable,"⁹¹ and yet the cartoon was held to be reasonable in that case. Humor and political satire is clearly accepted as part of mainstream discourse in Australia, while marginal voices—speakers who do not conform and who use inflammatory words or slang—are more likely to be excluded.

In the case involving a Western Australian diner owner who put up notices about "destructive Aborigines" after her premises were vandalized, her "short staccato expressions" were held not to be reasonable by the Human Rights and Equal Opportunity Commission.⁹² However, the Commission suggested that it might have been reasonable "if the respondent had published a clear account of what had transpired and what she thought could have been done by way of remedying the endemic problems of anti-social behaviour by Aboriginal juveniles."⁹³

88. *Bropho v. Human Rights and Equal Opportunity Comm'n* 72 A.L.D. 321, ¶ 46, (2002) F.C.A. 1510, ¶ 46 (find at <http://austlii.edu.au>); see also *Bropho*, (2004) 135 F.C.R. at 138, (2004) F.C.A. ¶¶ 118-21.

89. *Bropho*, (2004) 135 F.C.R. at 141, (2004) F.C.A. ¶ 136 (Lee, J., dissenting).

90. *Id.* at 143, (2004) F.C.A. ¶ 144.

91. *Id.* at 129, (2004) F.C.A. ¶ 81 (French, J.).

92. *Warner v. Kucera* (2001) E.O.C. ¶ 93-137, § 9.

93. *Id.*

In a case brought against a Perth radio station, talkback callers contributing to a segment called "Taxi talk" vilified members of the Aboriginal community who were protesting about the redevelopment of an old brewery site on land considered sacred by the Nyungah people.⁹⁴ The talkback callers claimed that the Nyungah people lie about sacred sites and that they were really protesting because alcohol was no longer being brewed on the site.⁹⁵ Redevelopment of the site and the Aboriginal protests were matters of public interest and had been reported in the newspapers, but the comments were not protected by the exemption.⁹⁶ The Human Rights and Equal Opportunity Commission held that "it is the way in which the issues were discussed, rather than the issues themselves," which breached the Act.⁹⁷ The Commission held that the radio broadcaster did not act reasonably when it allowed the talkback callers' comments to go to air.⁹⁸ Clearly, comments that are exaggerated, obstinate, or prejudiced are unlikely to be held to be reasonable.

In a case before the New South Wales Administrative Decisions Tribunal, an opinion piece with extreme negative generalizations about Palestinians that was published by the well-regarded *The Australian Financial Review* newspaper was held to be unlawful.⁹⁹ The newspaper publisher failed to make out its argument that it had acted reasonably because it subsequently published letters and articles that balanced the views expressed in the opinion piece.¹⁰⁰ "Reasonableness must be assessed at the time of publication, not at some unstated future time, depending on what else appears in the paper."¹⁰¹ Decisions such as these seriously limit the ability of the media to act as an open forum for public debate. Editors and radio talk show hosts are required to act as gatekeepers and exclude participants who do not behave "reasonably."¹⁰²

Australia has had some Holocaust denial and anti-Semitic literature cases; in those cases, the speakers were not protected by the exemption for acts done reasonably and in good faith. In one case, a Tasmanian woman distributed pamphlets and sold books that included claims that the Holocaust was a myth perpetuated by Jews for their own political purposes and that Jews are liars, fraudulent,

94. *Wanjurri v. S. Cross Broad. (Aus) Ltd.* (2001) E.O.C. ¶ 93-147, § 12.

95. *Id.*

96. *See id.* § 10.7.3.

97. *Id.* § 10.7.3.

98. *Id.* §§ 10.7.3, 12.

99. *See Kazak v. John Fairfax Publ'ns Ltd.* (2000) N.S.W.A.D.T. 77, ¶¶ 91-92 (find at <http://austlii.edu.au>).

100. *See id.* ¶ 90.

101. *Id.*

102. *See id.*; *see also Wanjurri*, (2001) E.O.C. §§ 10.7.3, 12.

immoral, and engaged in conspiracy.¹⁰³ The complaint against the woman, Mrs. Scully, was substantiated, and she was restrained from distributing the publications or others to the same effect.¹⁰⁴ Mrs. Scully tried to use the proceedings to argue the “truth” of her claims and attempted to tender more material described by the judge as polemical in character.¹⁰⁵ The material tendered, however, was not relevant to the proceedings.¹⁰⁶ Justice Hely emphasized that the concern in a racial hatred proceeding is not the truth or falsity of what was claimed; that is a task best left to historians.¹⁰⁷ Rather, the court was concerned with whether the material was reasonably likely to offend.¹⁰⁸ Justice Hely stated that one might cast doubt on the accepted version of the Holocaust without contravening the Australian Act, but in that case, the literature went beyond that discussion and vilified Jews.¹⁰⁹ Mrs. Scully attempted to rely upon the exemption for genuine academic purpose, but failed.¹¹⁰ Jews and their beliefs are open to criticism and scrutiny, but “[t]here is a line between legitimate criticism, and prejudicial vilification of the Jewish race and people.”¹¹¹ Judge Hely held that, in that case, the respondent did not act reasonably or in good faith.

In a similar case before the Federal Court, an Internet publisher uploaded material to his website that talked of the “Holocaust racket.”¹¹² Again, the Respondent’s actions were held not to be reasonable or in good faith and were thus not covered by the exemption.¹¹³ The court held that a degree of restraint was required: “[A] reasonable person acting in good faith would have made every effort to express the challenge and his views with as much restraint as was consistent with the communication of those views.”¹¹⁴ Justice Kiefel stated that, in other cases, “it may be that, in pursuing an historical or other discourse, offence cannot be avoided.”¹¹⁵ But in that case, the tenor of the publications and the use of deliberately provocative and inflammatory language was not reasonable or in good faith.¹¹⁶ The same

103. *Jones v. Scully* (2002) F.C.A. 1080, ¶¶ 1, 6 (find at <http://austlii.edu.au>).

104. *Id.* ¶ 247.

105. *Id.* ¶¶ 41, 71, 85.

106. *See id.* ¶ 41.

107. *Id.* ¶ 176.

108. *Id.* ¶¶ 232, 245.

109. *Id.* ¶ 182.

110. *Id.* ¶¶ 183, 186.

111. *Id.* ¶ 185.

112. *Toben v. Jones* (2003) 129 F.C.R. 515, 522, (2003) F.C.A. 137, ¶ 12 (find at <http://austlii.edu.au>).

113. *Id.* at 528, (2003) F.C.A. ¶¶ 43, 46.

114. *Id.*, (2003) F.C.A. ¶ 44.

115. *Id.* at 532, (2003) F.C.A. ¶ 70.

116. *Id.* at 528, (2003) F.C.A. ¶ 45.

message, equally offensive, could have been published if it had been couched in more temperate language.

While the judges in these cases emphasized that Holocaust denial was not unlawful, the court orders in the Internet case restrained Toben from publishing any material that conveyed the imputation that there is serious doubt that the Holocaust occurred.¹¹⁷ The trial judge conceded that the practical effect of the injunction could be undermined by other publishers, but she believed that the orders had an important symbolic and educative value.¹¹⁸ However, the education may be little more than how to reformat the message; this material reappeared in Toben's "reporting" of the case.¹¹⁹

V. "REASONABLE" HATE SPEECH?

The interpretation of "reasonableness" in these Australian cases excuses some forms of discourse and silences others. Anna Chapman has criticized the way that the courts have used the reasonableness concept in the racial hatred litigation because it "has been, deployed to maintain dominant cultural narratives."¹²⁰ She is concerned that, from the perspective of indigenous complainants, the "reasonableness" test is tied to the status quo and legitimizes the Anglo-Australian political and legal system.¹²¹ Chapman looked at reasonableness from the "outsider" complainant perspective, but the argument can be made the opposite way. Protection of the dominant narrative can also be criticized from the perspective of the "outsider" accused of hate speech, such as the Internet and pamphlet publishers and talkback callers. Speaking of the exemption for academic, artistic, research, and acts done in the public interest in the New South Wales legislation, Margaret Thornton argued, "The exception is a clear manifestation of the social reality that racist acts of social elites are privileged, even though the harm occasioned by such acts may be more pervasive than that arising from a crude tract."¹²²

The exemptions included in the Australian Acts may have placated free speech advocates when the laws were passed, but public

117. Jones v. Toben (2002) F.C.A. 1150, ¶ 113 (find at <http://austlii.edu.au>).

118. *Id.* ¶¶ 110-11.

119. Katharine Gelber, *Hate Speech and the Australian Legal and Political Landscape*, in HATE SPEECH AND FREEDOM OF SPEECH IN AUSTRALIA, *supra* note 17, at 2, 12. Toben has also been found guilty of a criminal offense under German law. See Yulia A. Timofeeva, *Hate Speech Online: Restricted or Protected? Comparison of Regulations in the United States and Germany*, 12 FLA. ST. J. TRANSNAT'L L. & POL'Y 253, 263 (2003); Christopher D. Van Blarcum, *Internet Hate Speech: The European Framework and the Emerging American Haven*, 62 WASH. & LEE L. REV. 781, 803-04 (2005).

120. Anna Chapman, *Australian Racial Hatred Law: Some Comments on Reasonableness and Adjudicative Method in Complaints Brought by Indigenous People*, 30 MONASH U. L. REV. 27, 39 (2004).

121. *Id.* at 38, 48.

122. THORNTON, *supra* note 46, at 49.

discourse has been distorted in the process. These provisions are not neutral and have reinforced a particular kind of restrained discourse that may, nevertheless, have racist overtones.¹²³ Some commentators in the United States have questioned the effectiveness of hate speech laws for this reason. Henry Louis Gates, Jr., for example, has contrasted the “vocabulary of indirection” with gutter epithets and argued that the former is far more painful.¹²⁴ “A rule of thumb: in American society today, the real power commanded by the racist is likely to vary inversely with the vulgarity with which it is expressed.”¹²⁵

I do not argue that all hate speech should be unrestrained or that all the Australian legislation should be repealed. A minimum¹²⁶ of threatening harm or inciting violence should continue to be proscribed along with severe cases of incitement of hatred. But when the threshold is as low as the Australian Federal Act so that the giving of offense is caught within the provisions and free speech must be protected with wide ranging exemptions, then the threshold needs to be reviewed to avoid a bifurcation of public discourse with hateful speech being either refined or repressed.

VI. CONCLUSION

Public debate is impoverished by the exclusion of marginal voices, even if intemperate, and their exclusion creates an unequal public discourse that may undermine the objectives of the hate speech laws. Exempting newspaper cartoons and comedy acts might seem quite reasonable on one level, but why single out for rebuke an angry outburst of a diner owner when such material is accepted as the backdrop for our national discussion of race? When hateful material is freely communicated by speakers who know and are comfortable with the rules of the game, it may be treated as authoritative and so reinforce entrenched racist messages the legislation was intended to proscribe. Australia has had a few high-profile cases involving Holocaust denial, vilification of Islam and Aborigines, but there has also been an accumulation of small matters, conciliated in confidence or decided in tribunals that have attracted little public attention. It is important that the outcomes in these commission and tribunal cases

123. Gail Mason has referred to arguments that some white supremacist organizations and Internet users have learned to comply with hate speech laws by using “correct or polite” language while continuing to communicate the same messages. Gail Mason, *The Reconstruction of Hate Language*, in HATE SPEECH AND FREEDOM OF SPEECH IN AUSTRALIA, *supra* note 17, at 34, 43.

124. Gates, *supra* note 69, at 47.

125. *Id.*; see also Henry Louis Gates, Jr., *Let Them Talk*, NEW REPUBLIC, Sept. 20 & 27, 1993, at 37, 45.

126. See John C. Knechtle, *When to Regulate Hate Speech*, 110 PENN ST. L. REV. 539, 543 (2006).

are also monitored because they can have an incremental impact on free speech, and the inconsistencies in treatment of some speakers can be resented.

Australia offers an interesting case study for the impact of hate speech laws in practice. It should be a cautionary tale for advocates of law reform in other jurisdictions. The Federal law in Australia has a particularly low harm threshold of offending, and when this is combined with a broad exemption for certain kinds of speech, there is a real risk that we have created a schism within society between an elite free to engage in restrained, but nevertheless hateful, speech and an “outsider” group whose intemperate language can be silenced. When balancing the right to human dignity against the right to free expression, this is not the best way to arrange the weights.