

Regulating Racism — Racial Vilification Laws in Australia

**Luke McNamara , Sydney Institute of Criminology
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In terms of relevance, now is not a bad time to publish a book about racial vilification laws in Australia. Sadly, however, I wonder if there has ever been a time that wasn't a good time. Though we Australians like to see ourselves as a successful multicultural nation, most of us know of the thin veneer of racial civility that can be pierced without much provocation. As if the support that the infamous Pauline Hanson received for her anti-Asian/Aborigine views was not shocking enough, asylum seeker issues and the terrorist threat has resulted in anti-Arab/Islam vitriol that arguably has eclipsed all prior xenophobic fears that underlie the reasons for bigotry. What presented itself as rather right wing radicalism seems to have strangely become mainstream. Talkback radio, council meetings and indeed shops and street corners have become popular venues for hotbeds of racist speech.

The question of how to deal with the phenomena of racist speech has been problematic for many modern democracies where the concept of so-called 'free speech' is considered a keystone. Luke McNamara's book does not attempt to analyze the debate concerning the justifiability of racial vilification laws. Instead *Regulating Racism — Racial Vilification Law in Australia* acknowledges that Commonwealth, state and territorial parliaments in Australia, has already validly enacted racial vilification statutes. As well as providing a scholarly examination of the terms of these statutes this book also explores the impact of free speech debates on the shape and development of vilification law in Australia.

The book is arranged in six chapters. Chapter 1 provides a gripping discussion of the emergence of racial vilification laws in Australia. This chapter usefully sets out the parameters of the book, pointing out that though the book:

... begins with a conscious and decisive move beyond the conventional philosophical and jurisprudential threshold question of free speech compatibility, it does not ignore the relationship between free speech rights and principles on the one hand, and legal regulation of racial vilification on the other. In fact, a major concern of this book is to track the impact which 'free speech sensitivity' has had on the shape of racial vilification laws,

in terms of substantive and procedural form, both at the time of enactment, and as a result of practical operation and interpretation (p 4).

Accordingly one of the key questions of the book is: what factors have influenced the choice of particular forms of legislative regulation? The thesis of the book — usefully summarised in Chapter 6 — is that free speech sensitivity (with jurisdictional and temporal variations) has been a recurring theme in the enactment, operation and interpretation of racial vilification legislation in Australia.

In my view the analysis of this question sets this book apart from a mere text discussing the form and content of racial vilification laws in Australia. The analysis gives a context and underlying unity to the discussion in each of the following four chapters where an examination of the Commonwealth legislation (chapter 2), the legislation in NSW (chapter 3), Western Australia (chapter 4) and South Australia (chapter 5) take place.

Each of those chapters follows essentially the same format: a political and social history of the circumstances that preceded the relevant racial vilification legislation, followed by a discussion of the scope and enforcement of the legislation. This methodology provides a useful tool for comparison of context and content of the different legislation discussed in each chapter.

A description and brief discussion of the first substantive chapter will hopefully give intending readers a flavour of the structure and detail contained in the book the book.

Chapter 2, entitled 'Human Rights Complaint-Based Regulation: The Commonwealth Approach', provides an interesting discussion of the history and evolution of what was to become, in 1995, a new Pt IIA of the *Racial Discrimination Act 1975* (Cth) (RDA). The chapter then provides a short summary of the scope of the legislation identifying that conduct which is likely to 'offend, insult, humiliate' or 'intimidate because of' a person's race is rendered unlawful by s 18C. It is suggested that this wording, being unique among racial vilification statutes in Australia, adopts a relatively low threshold. However, the manner in which these words have been interpreted is left for a detailed discussion some 30 pages further into the chapter. At the risk of being picky it is suggested that a footnote indicating where in the chapter such discussion of the interpretation of the salient words is to take place would be useful and helpful in the next edition.

1 *Regulating Racism - Racial Vilification Laws in Australia*

Luke McNamara, Sydney Institute of Criminology Monograph Series No 16 2002 at p 4.

The chapter thereafter embarks upon a discussion of the processes available for the enforcing of the relevant provisions. Matters discussed are the exclusive reliance on victim initiated complaints, preference for resolution of the complaint by confidential conciliation undertaken by the Human Rights and Equal Opportunity Commission (HREOC) and the option of judicial adjudication where conciliation has not resolved the dispute. An analysis of data pertaining to complaints lodged under Pt IIA of the RDA between 1996 and 2001 is undertaken and a number of interesting observations are made including the fact that the high proportion of complaints which have been declined as falling outside the parameters of the legislation (annual average of 30 per cent) suggests that care should be taken not to overstate that s 18C provides a relatively low threshold for regulatory intervention.

All cases subject to a HREOC or Federal Court or Federal Magistrate Court determination between October 1995 and December 2001 are then summarized and citation or dates provided. The author notes that the early decisions have been particularly important in shaping the contours for the regulation of racial vilification under the Commonwealth legislation and discusses some important issues which have been considered — constitutional validity of the relevant provisions, standing to lodge a complaint, the effect of the notion 'otherwise than in private' upon the scope of a sustainable complaint, the harm threshold encompassed by 'offend, insult, humiliate or intimidate', the relevance of the motivation or intention of the person who did the act, an analysis of the notion 'because of', the breadth of Exemptions and the impact of free speech sensitivity on the interpretation of Pt IIA.

Regulating Racism — Racial Vilification Laws in Australia is a refreshingly lucid and accessible read. The book is well written being user friendly yet containing scholarly detail and analysis. In addition the contents of the whole book has been meticulously sourced and referenced. The footnotes alone provide a valuable resource for history and law students as well as legal practitioners and members of the community interested in Australia's racial vilification laws.

Those who are familiar with Australian anti-discrimination law will agree that this area of law is not well defined in terms of coherent doctrine. This book contains the necessary scholarly detail but does not bury the reader. It places the detail in an accessible context and the referencing allows opportunities for development of understanding of specialized issues. I enjoyed the book immensely and commend it as a text for the classroom and as worthy of a prominent position on ones bookshelves. ●

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