

SPEECH ACTS: IS RACIAL VILIFICATION A FORM OF RACIAL DISCRIMINATION?

ABSTRACT

This article examines three issues concerning the relationship between racially offensive speech and laws prohibiting racial discrimination. First, it examines whether there is an overlap between the provisions of pt II of the *Racial Discrimination Act 1975* (Cth) (*RDA*) (which prohibits various forms of racial discrimination), and pt IIA (which prohibits racial vilification). It examines two decisions of the Federal Court of Australia, in which the Court held that racially offensive speech may, in certain circumstances, infringe pt II of the *RDA*. Second, it examines whether prohibitions on racial vilification are underpinned by the same values as laws prohibiting racial discrimination. The article determines that respect for individual autonomy and dignity underpins both sets of laws, and that racial vilification laws can be regarded as an aspect of the prohibition on racial discrimination. Third, the article argues that the distinction between conduct and speech is not tenable, and that racial vilification can simply be regarded as a form of harmful conduct. Therefore, courts should focus on the effects of such conduct, particularly on its targets, rather than the motives of respondents or the importance of disseminating ‘ideas’.

I INTRODUCTION

This article examines the relationship between pt IIA of the *Racial Discrimination Act 1975* (Cth) (*RDA*), which prohibits racial vilification, and pt II, which prohibits various forms of racial discrimination.¹ Specifically, it considers whether racial vilification can be considered a particular form of racial discrimination, and the implications of such a conclusion. The ongoing debate concerning

* Lecturer, College of Law and Justice, Victoria University; PhD candidate, Monash University. Email: Bill.Swannie@vu.edu.au; ORCID iD: 0000-0002-5540-8105. The author thanks Associate Professor Patrick Emerton and Dr Colin Campbell, and the reviewers and editors, for their assistance with this article.

¹ Racial discrimination and vilification are also prohibited by various state and territory legislation. However, the *RDA* is the only national law on these topics. In addition, the *RDA* contains the broadest prohibition on racial discrimination: *Racial Discrimination Act 1975* (Cth) s 9 (*RDA*).

pt IIA (and in particular s 18C)² generally frames these provisions as concerning *speech*, rather than discrimination. Further, these provisions are commonly regarded as limiting rights, rather than enhancing them.

This article seeks to challenge these assumptions in several ways. Part II of this article briefly outlines the key provisions of pt IIA, namely s 18C (which defines and prohibits racial vilification), and s 18D (which provides exemptions from liability). It also outlines the significance of the enactment of the *RDA*, and how pt II prohibits discrimination. It then examines two decisions of the Federal Court of Australia, in which the Court held that racially offensive speech may, in certain circumstances, infringe pt II.³ This means that such speech may result in liability under the *RDA*, completely apart from pt IIA. Further, the exemptions in s 18D are not relevant when liability is based on pt II. This part considers some implications of this overlap between pts II and IIA.

Part III of this article argues that pts II and IIA of the *RDA* are both underpinned by the values of protecting human dignity and individual autonomy. In Australia, a liberal democracy based on multiculturalism, these values are fundamental. Therefore, protection from racial vilification should be regarded as being as important as protection from racial discrimination. As a rights-protecting provision, s 18C therefore should be interpreted broadly and beneficially, rather than restrictively.⁴

Part IV of this article examines the distinction between conduct and speech, which underpins the assumption that vilification is different to discrimination. This distinction has been challenged on conceptual grounds, and it is implicitly rejected by the Federal Court in the decisions examined in this article. Viewing speech as a form of conduct moves the focus from the *ideas* it expresses to its *effects*, particularly its harmful effects on members of target groups.⁵ Scholars such as Katharine Gelber argue that racial vilification is discrimination in discursive form, as it seeks to subordinate members of minority racial and ethnic groups.⁶ Gelber also provides guidance on assessing the impacts of particular speech acts.

This article highlights two main implications of considering racial vilification within a discrimination law framework, rather than a free speech framework. First, this means that the provisions of s 18C should be interpreted broadly and beneficially,

² See Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Freedom of Speech in Australia: Inquiry into the Operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and Related Procedures under the Australian Human Rights Commission Act 1986 (Cth)* (Report, 28 February 2017).

³ *Qantas Airways Ltd v Gama* (2008) 167 FCR 537 ('*Gama*'); *Vata-Meyer v Commonwealth* [2015] FCAFC 139 ('*Vata-Meyer*').

⁴ See, eg, *Gama* (n 3) 576 [134] (Branson J).

⁵ In the words of Catharine MacKinnon, the focus is on what the conduct *does*, not merely what it *says*: Catharine A MacKinnon, *Only Words* (Harvard University Press, 1993) 31.

⁶ See below Part IV(A). Part IV examines the concept of 'speech acts'.

consistently with their purpose of eliminating discrimination and upholding human dignity. Part IV of this article examines how courts have interpreted the requirement in s 18C that the respondent's conduct be done 'because of' the race of the target group. It argues that courts should focus on the objective nature of the relevant conduct, rather than (as some judges have done) focusing on the respondent's motive, intention and moral culpability.

Second, this article seeks to challenge the free speech paradigm in which racial vilification laws, such as pt IIA of the *RDA*, are commonly understood. This paradigm tends to frame these laws as primarily *limiting* rights (rather than enhancing them), and it understates the harms of vilification. This article argues for a discrimination law framework for understanding racial vilification laws, and particularly for understanding the types of harms these laws seek to target. This contributes to a richer debate concerning the legitimacy and importance of such laws in a multicultural liberal democracy such as Australia.

II DOES PT IIA OVERLAP WITH PT II OF THE *RDA*?

Part IIA was inserted in the *RDA* in 1995, following the recommendations of three government reports.⁷ Part IIA has two main provisions. First, s 18C makes it unlawful to 'do an act' that is 'reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people', if the act is done 'because of the race' of the person or group of persons.⁸ Second, s 18D establishes several exemptions from liability under s 18C. These exemptions provide defences for respondents, provided that they have acted 'reasonably and in good faith'. In broad terms, pt IIA proscribes 'racially offensive speech', or racial vilification.⁹

This part of the article examines whether racially offensive speech may also contravene pt II of the *RDA*.¹⁰ To determine whether there is overlap between the provisions of pts II and IIA, the provisions will be examined in detail. However, some background to the enactment of the *RDA* will be provided first.

⁷ *Royal Commission into Aboriginal Deaths in Custody* (Final Report, 15 April 1991); Human Rights and Equal Opportunity Commission, Commonwealth of Australia, *Report of the National Inquiry into Racist Violence in Australia* (Report, 1991); Australian Law Reform Commission, *Multiculturalism and the Law* (Report No 57, 14 April 1992). See Luke McNamara, *Regulating Racism: Racial Vilification Laws in Australia* (Institute of Criminology, University of Sydney Law School, 2002) for the background to the enactment of the *Racial Hatred Act 1995* (Cth).

⁸ Part IIA applies only to conduct having 'profound and serious effects': see *Eatoock v Bolt* (2011) 197 FCR 261, 330 [297] (Bromberg J) ('*Eatoock*').

⁹ *Toben v Jones* (2003) 129 FCR 515 ('*Toben*').

¹⁰ When pt IIA was enacted, it was unclear whether racial vilification was prohibited by the provisions of pt II: see Human Rights and Equal Opportunity Commission (Cth), *Racist Violence: Report of the National Inquiry into Racist Violence in Australia* (Report, 27 March 1991) 298.

A The International and Constitutional Significance of the RDA

Two significant features of the *RDA* highlight its unique place in Australian law. First, its provisions are based on international human rights treaties to which Australia is a party. Second, the *RDA* has quasi-constitutional status. In relation to the first feature, key provisions of the *RDA*¹¹ are based on international human rights treaties, in particular the provisions of the *International Convention on the Elimination of All Forms of Racial Discrimination* ('*ICERD*'),¹² to which Australia is a party. Australia is therefore obliged, under international law, to provide legislative protection from racial discrimination. Because key provisions in the *RDA* are based directly on the wording of the *ICERD*, this links the purposes of the treaty, particularly the aim of 'eliminating racial discrimination in all its forms and manifestations',¹³ with the purposes and the interpretation of the *RDA*.¹⁴ Therefore, the *RDA* should be interpreted consistently with the *ICERD*.¹⁵ Also, the constitutional validity of the *RDA* is based on Australia's ratification of the *ICERD*.¹⁶

Australia is also party to the *International Covenant on Civil and Political Rights* ('*ICCPR*'),¹⁷ which prohibits discrimination based on a person's 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.¹⁸ Further, the *ICCPR* provides that '[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law'.¹⁹ Freedom from racial discrimination is a central principle of international human rights law,²⁰ and eliminating racial discrimination is a central obligation of states

¹¹ See especially *RDA* (n 1) ss 8–10.

¹² Opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) ('*ICERD*').

¹³ *Ibid* Preamble.

¹⁴ *Wotton v Queensland [No 5]* (2016) 352 ALR 146, 280 [517], 282 [528] (Mortimer J) ('*Wotton*').

¹⁵ *Ibid* 281 [526].

¹⁶ *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 ('*Koowarta*'). In that case, Murphy J noted that the elimination of racial discrimination is also a matter of international concern: at 241–2. Therefore, it is within the external affairs power of Commonwealth Parliament, even in the absence of a treaty obligation. Similarly, the constitutional validity of s 18C was upheld by the Full Court of the Federal Court in *Toben* (n 9).

¹⁷ Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

¹⁸ *Ibid* art 2.

¹⁹ *Ibid* art 26. In *Mabo v Queensland [No 2]* (1992) 175 CLR 1, the High Court recognised Aboriginal native title in Australia and rejected the principle of terra nullius. One ground provided for this decision was the prohibition on racial discrimination contained in the *ICCPR*, which is binding on Australia: at 42 (Brennan J).

²⁰ Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2016) 10–15. See also Sandra Fredman, *Discrimination and Human Rights: The Case of Racism* (Oxford University Press, 2001).

parties to these treaties.²¹ Pursuant to the *RDA*, certain forms of racial discrimination are unlawful, and victims may make a complaint and potentially obtain legal remedies for such conduct.²² Other liberal democracies, such as the United Kingdom and the United States of America ('US'), have also enacted laws prohibiting various forms of racial discrimination.²³

Second, and relatedly, protection from racial discrimination has a quasi-constitutional status in Australia, as s 10 of the *RDA* prohibits the federal government, as well as state and territory governments, from enacting racially discriminatory laws.²⁴ Therefore, the value and importance of eliminating racial discrimination is widely accepted in Australian society.²⁵ Also, the enactment of the *RDA* in 1975 closely coincided with Australia adopting a formal policy of multiculturalism.²⁶

B *The RDA Prohibits Racial Discrimination in Two Ways*

Part II of the *RDA* prohibits racial discrimination in two distinct ways. First, it prohibits particular types of discrimination in certain areas, such as employment, education and the provision of goods and services. These prohibitions are examined in the following section, with a particular focus on employment. Second, s 9 of the *RDA* contains a general prohibition on racial discrimination. This provision will be examined in Part II(B)(2), particularly in relation to its application to racially offensive remarks. In summary, this part concludes that racially offensive speech is unlikely to breach the activity-based prohibitions in the *RDA*, but it may breach the general prohibition in s 9.

1 *Activity-Based Prohibitions on Racial Discrimination in the RDA*

As mentioned above, ss 11–16 of the *RDA* contain several activity-based prohibitions on racial discrimination. The areas of activity in which racial discrimination is

²¹ Gaze and Smith (n 20). See also Fredman (n 20) 35–6.

²² Notably, these provisions apply to private actors, and also to conduct by the state: see, eg, *Koowarta* (n 16), which concerned racially discriminatory conduct by the State of Queensland.

²³ *Race Relations Act 1965* (UK); *Civil Rights Act 1964*, Pub L No 88–352, 78 Stat 241.

²⁴ This is not to say that racially discriminatory laws are not enacted in Australia, even by the federal Parliament: see, eg, *Northern Territory National Emergency Response Act 2007* (Cth), which was repealed and replaced by the *Stronger Futures in the Northern Territory Act 2012* (Cth).

²⁵ Tim Soutphommasane argues that the values established by the *RDA* are so well entrenched in the Australian legal and political system that repeal of the *RDA* is unlikely and suspension is usually highly controversial: Tim Soutphommasane, *I'm Not Racist But...: 40 Years of the Racial Discrimination Act* (NewSouth, 2015) ch 2. See also Parliamentary Joint Committee on Human Rights (n 2).

²⁶ The connection between eliminating racial discrimination and promoting multiculturalism is examined in Part III(B) of this article.

prohibited are the provision of goods and services,²⁷ employment,²⁸ access to land, housing and other accommodation,²⁹ and access to public places and facilities.³⁰ However, only certain conduct *within* these areas is prohibited. For example, s 15(1) makes unlawful certain conduct in the context of employment:

15 Employment

- (1) It is unlawful for an employer or a person acting or purporting to act on behalf of an employer:
 - (a) to refuse or fail to employ a second person on work of any description which is available and for which that second person is qualified;
 - (b) to refuse or fail to offer or afford a second person the same terms of employment, conditions of work and opportunities for training and promotion as are made available for other persons having the same qualifications and employed in the same circumstances on work of the same description; or
 - (c) to dismiss a second person from his or her employment;

by reason of the race, colour or national or ethnic origin of that second person or of any relative or associate of that second person.

Sections 11–16 are broad in that they cover both direct and indirect discrimination. *Direct* discrimination occurs when the discriminator treats the complainant ‘less favourably’, on the basis of the complainant’s race, than they would have treated someone who was otherwise in the same circumstances as the complainant but who was of a different race.³¹ Prohibiting such treatment, based on a person’s race, supports notions of *formal* equality — the concept that people who are similarly situated should be treated alike³² — as it requires consistent treatment of people, regardless of race.³³ *Indirect* racial discrimination, on the other hand, involves the

²⁷ RDA (n 1) s 13.

²⁸ Ibid s 15.

²⁹ Ibid s 12.

³⁰ Ibid s 11.

³¹ See *ibid* ss 11(a)–(b), 12(b)–(c), 13(b), 15(2). But see *ibid* ss 11(c), 12(1)(a), (d)–(e), (2)–(3), 13(a), 14, 15(1), (3)–(5), which are all absolute prohibitions. Alternatively, direct discrimination may require ‘unfavourable’ treatment, rather than ‘less favourable treatment’: see *Equal Opportunity Act 2010* (Vic).

³² Gaze and Smith (n 20) 16.

³³ Fredman (n 20) 16. According to this approach, a person’s race is considered normatively *irrelevant* to how they should be treated: see Gaze and Smith (n 20). Treating race as irrelevant adopts a ‘colour-blind’ approach to race, under which race is supposed to be ignored: Neil Gotanda, ‘A Critique of “Our Constitution is Color-Blind”’ (1991) 44(1) *Stanford Law Review* 1.

imposition of a term, condition or requirement which, although neutral on its face, disadvantages members of certain racial groups.³⁴ In particular, ss 11–16 recognise that a practice which appears neutral may in fact be discriminatory. Indeed, these provisions recognise that certain practices may discriminate against large groups of people simultaneously, including members of a particular racial group.³⁵ Whereas direct discrimination is based largely on notions of formal equality, indirect discrimination encompasses notions of substantive equality.³⁶ Substantive equality emphasises the actual circumstances of members of particular social groups, and particularly the disadvantaged and vulnerable circumstances of certain groups.³⁷ In particular, substantive equality acknowledges that discriminatory practices can cause or contribute to various forms of disadvantage.³⁸

Racially offensive speech is unlikely to breach the activity-based prohibitions in ss 11–16 of the *RDA*.³⁹ This is because such conduct is not likely to result in the specific forms of detriment required by these provisions, such as a person not being employed by reason of their race.⁴⁰ In this respect, Luke McNamara is correct in noting that the nature of the harms caused by racial vilification is different to those of racial discrimination.⁴¹ However, racially offensive speech may breach s 9 of the *RDA*, which applies to a broader range of conduct, and is examined in the next section of this article.

2 *The Scope and Nature of s 9 of the RDA*

Section 9 operates very differently from the activity-based provisions in ss 11–16. The section provides:

³⁴ See *RDA* (n 1) s 9(1A).

³⁵ In the United States, the terms ‘differential treatment’ and ‘differential impact’ are used in place of direct and indirect discrimination: see Gaze and Smith (n 20) 34.

³⁶ *Ibid* 20.

³⁷ *Ibid* 18–19.

³⁸ *Ibid* 18. See also Fredman (n 20) 24. This issue is examined further in Part III(B) of this article.

³⁹ McNamara (n 7) 56.

⁴⁰ *RDA* (n 1) s 15(1)(a). No reported Australian decisions could be located regarding racially offensive speech brought under ss 11–16 of the *RDA*.

⁴¹ McNamara (n 7) 269. McNamara does not, however, seem to acknowledge that acts of racial vilification may occur together with acts of discrimination, so that the difference in the nature of the harms becomes practically irrelevant. Indeed, he seems to assume that acts of *discrimination* commonly occur in the context of a pre-existing and ongoing relationship, such as employment, whereas *vilification* commonly occurs when the parties are ‘total strangers’: at 56–7. The former assumption may be correct; the latter assumption is not supported by the cases of *Gama* (n 3) and *Vata-Meyer* (n 3) which both involved racially offensive speech in the context of an employment relationship. These cases are examined in Part II(B)(4) of this article.

- (1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

In *Wotton*,⁴² Mortimer J comprehensively examined the requirements of s 9. In particular, her Honour emphasised the section's origins in international law, and the implications of this for the proper interpretation of the section. Justice Mortimer described s 9 as having two 'limbs' — one 'conduct-based' and one 'outcome-based' — that must be satisfied for a claim to succeed.⁴³ The conduct-based limb requires 'an act involving a distinction, exclusion, restriction or preference that is based on race'.⁴⁴ Although the word 'discrimination' is not used in s 9, Mortimer J held that differential treatment of at least one person is required by the words 'distinction, exclusion, restriction or preference'.⁴⁵ In other words, this limb requires comparing the way one person or group is treated, with that of another person or group.⁴⁶

The outcome-based limb of s 9 focuses on the 'purpose or effect' of the relevant act on the human rights of the relevant person or group. In *Wotton*, Mortimer J emphasised that s 9 focuses on the 'actual outcome', or the practical consequences, of the act, rather than the motive or intent of the respondent.⁴⁷ In relation to the word 'effect', her Honour stated that a 'qualitative assessment of the impact of conduct' is required.⁴⁸ This necessarily involves examining the circumstances surrounding the relevant act, including its consequences for the complainant.⁴⁹ Her Honour emphasised that s 9 is concerned with achieving substantive, rather than merely formal, equality.⁵⁰

⁴² *Wotton* (n 14). This case did not itself involve racially offensive speech. However, it is examined in detail as it is the leading decision on the interpretation of s 9.

⁴³ *Ibid* 283 [530]–[531].

⁴⁴ This section will examine the 'distinction, exclusion, restriction or preference' aspect. The 'based on race' aspect, although related, is examined in Part IV(C)(2) of this article.

⁴⁵ *Wotton* (n 14) 283–4 [534]–[538].

⁴⁶ *Ibid* 285 [540].

⁴⁷ *Ibid* 283 [530]–[531]. Her Honour appeared to equate 'purpose' in s 9 with intent, which suggests that proving intent to discriminate may satisfy this requirement. However, her Honour's focus in this decision was on the alternative requirement of 'effect'.

⁴⁸ *Ibid* 283 [532].

⁴⁹ *Ibid* 289–91 [555]–[560].

⁵⁰ *Ibid* 283 [532]. Provisions in anti-discrimination law that focus on the *effect* of certain conduct, which is common in prohibitions on *indirect* discrimination, are more focused on achieving substantive equality, or equality in fact, rather than merely formal equality, or same treatment.

Justice Mortimer noted that the text of s 9 is drawn directly from art 1 of the *ICERD*.⁵¹ Section 9 should therefore be construed consistently with the *ICERD*, and it is ‘appropriate ... [and] necessary to have regard to international and comparative decisions concerning the content of those rights’.⁵² Her Honour noted that the provisions of the *RDA* must be interpreted consistently with their purpose.⁵³ As mentioned earlier, the purpose of the *RDA*, and of the *ICERD*, is ‘eliminating racial discrimination ... in all its forms and manifestations’.⁵⁴ This purpose, in turn, is underpinned by the principle of respect for human dignity.⁵⁵

In *Wotton*, Mortimer J did not merely cite the principle that s 9 must be interpreted purposively and in a way that contributes to the elimination of racial discrimination. Her Honour actually applied this principle to the circumstances of the case. First, her Honour focused on the consequences of the relevant act on the complainant, rather than the respondent’s motive or intent. Her Honour thus adopted a perspective that was sympathetic to the victim, which is more conducive to eliminating racial discrimination than a perpetrator-centred perspective.⁵⁶ Second, in determining whether the impugned act involved a ‘distinction, exclusion, restriction or preference’, Mortimer J examined the surrounding circumstances, and in particular, the impact of the respondent’s conduct on the complainant. Thus, her Honour determined the actual consequence of the act on the complainant, rather than taking a merely formal approach to whether the section had been breached.

Gaze and Smith have noted that s 9 is extremely broad in scope, particularly in comparison to the provisions of ss 11–16. First, s 9 does not impose a duty only on certain classes of persons.⁵⁷ Section 15, by contrast, applies only to actions by an ‘employer’, or a ‘person acting or purporting to act on behalf of an employer’. As illustrated by the decisions that will be examined below,⁵⁸ s 9 can apply to the conduct

⁵¹ Her Honour noted that ss 8 and 10 of the *RDA* are also based on the terms of the *ICERD*: *ibid* 282 [527].

⁵² *Ibid* 281 [526].

⁵³ *Ibid* 291 [561]. Gaze also emphasises the importance of interpreting anti-discrimination laws consistently with their purpose; she notes, however, that this is not done consistently by Australian judges: Beth Gaze, ‘Context and Interpretation in Anti-Discrimination Law’ (2002) 26(2) *Melbourne University Law Review* 325.

⁵⁴ *Wotton* (n 14) 282 [528], quoting *Maloney v R* (2013) 252 CLR 168, 271 [281] (Gageler J). This purpose is manifest in the *Charter of the United Nations*, the *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948), and the *United Nations Declaration on the Elimination of All Forms of Racial Discrimination*, GA Res 1904 (XVIII), UN GAOR, UN Doc A/RES/18/1904 (20 November 193).

⁵⁵ *Wotton* (n 14) 282 [528], 285–6 [544].

⁵⁶ See Alan D Freeman, ‘Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine’ (1978) 62(6) *Minnesota Law Review* 1049.

⁵⁷ Gaze and Smith (n 20) 109.

⁵⁸ See below Part II(B)(4).

of a wider range of people, including the complainant's co-workers, rather than only their employer. Second, s 9 is not limited to discrimination that occurs in particular spheres of activity.⁵⁹ As mentioned earlier, ss 11–16 are limited to particular types of discrimination that occur in certain areas of life, such as the provision of education, goods and services, or employment. Section 9, by contrast, focuses on the effect of the relevant conduct on human rights and fundamental freedoms.⁶⁰ The relevant rights 'include any right[s] of a kind referred to in Article 5 of the ... [ICERD]'.⁶¹ This list is non-exhaustive, and it includes the rights listed in the *ICCPR* and the *International Covenant on Economic, Social and Cultural Rights*.⁶²

Also, s 9 is not qualified by a test of reasonableness.⁶³ Provisions in anti-discrimination legislation that focus on the *effect* of certain conduct are often subject to a reasonableness defence.⁶⁴ Typically, these are prohibitions on indirect discrimination. Section 9, however, applies to both direct and indirect discrimination.⁶⁵

3 'Based on Race' in s 9

As mentioned above, liability under s 9 depends on whether the relevant act was done 'based on race'.⁶⁶ As will be outlined below, courts have adopted a purposive approach to interpreting this requirement. In particular, courts have focused on the 'essential nature' of the respondent's conduct, rather than the motive or intention of the respondent,⁶⁷ as this approach assists in eliminating racial discrimination in all its forms and manifestations.⁶⁸ This is quite different to how courts have interpreted

⁵⁹ Gaze and Smith (n 20) 109.

⁶⁰ Ibid.

⁶¹ *RDA* (n 1) s 9(2).

⁶² Opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976). See *Wotton* (n 14) 316 [672]. See also Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 260–1. In *Iliafi v The Church of Jesus Christ of Latter-Day Saints Australia* (2014) 221 FCR 86 ('*Iliafi*'), the Court found that the right to worship publicly in native (Samoan) language is not a human right or fundamental freedom within the meaning of art 5 of the *ICERD*.

⁶³ Gaze and Smith (n 20) 121.

⁶⁴ See *RDA* (n 1) s 9(1A).

⁶⁵ Section 9(1A) was inserted by s 49 of the *Law and Justice Legislation Amendment Act 1990* (Cth). The purpose of the amendment was to clarify that s 9 applies to acts of indirect discrimination: see Explanatory Memorandum, *Law and Justice Legislation Amendment Bill 1990* (Cth) 48. This amendment appears to be for the avoidance of doubt, and s 9(1A) has been little used.

⁶⁶ This is different to the requirement in s 18C that the relevant act is done 'because of the race ... of the other person'.

⁶⁷ *Wotton* (n 14) 288–9 [551]–[553], quoting *Macedonian Teachers' Association of Victoria Inc v Human Rights and Equal Opportunity Commission* (1998) 91 FCR 8, 33–4 (Weinberg J) ('*Macedonian Teachers' Association*').

⁶⁸ *Wotton* (n 14) 282 [528].

the wording ‘because of race’ in s 18C.⁶⁹ Courts have, on occasion, interpreted that requirement as focusing on the respondent’s motives or intention. Using s 9, rather than s 18C, may therefore be preferable for those seeking a remedy for racially offensive speech.⁷⁰

In *Macedonian Teachers’ Association*,⁷¹ Weinberg J distinguished the words ‘based on race’ (used in s 9) from ‘because of race’ (used in ss 11–16). His Honour held that the former (in contrast to the latter) does not imply any causal requirement but connotes that the act be done, or undertaken, by reference to race.⁷² In *Wotton*, Mortimer J adopted this reasoning, interpreting ‘based on race’ as focusing on the ‘essential nature’ of the relevant act.⁷³ Her Honour held that the character of the act must be determined by examining all the surrounding circumstances, including the consequences of the act.⁷⁴

Justice Mortimer referred to two examples of conduct that was ‘essentially discriminatory in nature’ provided in earlier decisions.⁷⁵ The first example was the internment by the US government, following the bombing of Pearl Harbour, of all American citizens of Japanese ancestry living on the west coast of the US.⁷⁶ At the time, the government said this action was necessary on the grounds of national security.⁷⁷ However, as this action singled out a single ethnic group for disadvantageous treatment, it was essentially discriminatory.⁷⁸ The second example relates to racially offensive speech, and it highlights the close connection between establishing a ‘distinction, exclusion, restriction or preference’, on the one hand, and establishing that this was done ‘based on race’, on the other. The example also highlights that the reference to race need not be explicit for s 9 to be infringed:

The making of a remark is an act. It may be that the remark involves a distinction because it is made to a particular person and not to others. The remark may convey no express or implicit reference to the person’s race, colour, descent or national or ethnic origin. Nevertheless, a linkage may be drawn between the distinction effected by the remark and the person’s race or other relevant characteristic by reason of the circumstances in which the remark was made or the fact

⁶⁹ See below Part IV(C)(2).

⁷⁰ However, if (as I argue in Part III of this article) racially offensive speech is considered a form of discrimination, then the respondent’s motive or intention is less relevant.

⁷¹ *Macedonian Teachers’ Association* (n 67).

⁷² *Ibid* 29–30.

⁷³ *Wotton* (n 14) 288–9 [551]–[553].

⁷⁴ *Ibid* 289–91 [555]–[560].

⁷⁵ *Ibid* 288 [551], quoting *Macedonian Teachers’ Association* (n 67) 33–4 (Weinberg J); *Wotton* (n 14) 290 [559], quoting *Gama* (n 3) 564 [76] (French and Jacobson JJ).

⁷⁶ This action was upheld by the United States Supreme Court in *Korematsu v United States*, 323 US 214 (1944) (*Korematsu*).

⁷⁷ *Wotton* (n 14) 288 [551], quoting *Macedonian Teachers’ Association* (n 67) 33–4 (Weinberg J).

⁷⁸ *Wotton* (n 14) 288 [551].

that it was part of a pattern of remarks directed to that person and not to others of a different race or relevant characteristic. Where the remark, critical of one person in a group but not others, expressly or by implication links the criticism or denigration to that person's race then that linkage establishes both the distinction and its basis upon race.⁷⁹

As mentioned above, Mortimer J adopted an approach that focuses on the *essential nature* of the relevant act, rather than the respondent's motive or intention. In particular, her Honour noted that 'the basis of the impugned conduct must not be conflated with intention or subjective purpose [of the alleged discriminator]'.⁸⁰ This approach is consistent with the principle that a respondent's motive or intent is generally irrelevant to a claim based on direct discrimination.⁸¹ In anti-discrimination law, motive is the reason (or purpose) for which an act is done.⁸² Typically, as in *Korematsu v United States*,⁸³ the respondent will argue that there is a non-discriminatory reason for the conduct. However, it is well established in Australian anti-discrimination law that having a good motive is no defence to an otherwise established claim of direct discrimination.⁸⁴ To allow a good motive to prevent a claim of discrimination would severely undermine the effectiveness of anti-discrimination legislation, and would allow alleged discriminators easily to avoid their obligations under such laws.⁸⁵

Wotton involved a claim of racial discrimination made against members of the Queensland Police Service ('QPS') regarding their treatment of Aboriginal people during a period of heightened tension between the Aboriginal community and police in a remote community. Affirming the principles outlined above, Mortimer J stated that the existence of 'laudable motives, appreciable difficulties or understandable dilemmas [on the part of the QPS] will not prevent or preclude a contravention of s 9 where it can nevertheless be said that the impugned conduct ... was based on race'.⁸⁶

⁷⁹ Ibid 290 [559], quoting *Gama* (n 3) 564 [76] (French and Jacobson JJ).

⁸⁰ *Wotton* (n 14) 288 [551].

⁸¹ *Australian Iron and Steel Pty Ltd v Banovic* (1989) 168 CLR 165, 176 (Deane and Gaudron JJ) ('*Australian Iron*'). See also *Waters v Public Transport Corporation* (1991) 173 CLR 349, 359 (Mason CJ and Gaudron J); *Wotton* (n 14) 156–7 [551]–[553]; *Gaze and Smith* (n 20) 115. A respondent's motive may be relevant to a claim of indirect discrimination.

⁸² *Australian Iron* (n 81) 176–7 (Deane and Gaudron JJ).

⁸³ *Korematsu* (n 76).

⁸⁴ *Australian Iron* (n 81) 176–7 (Deane and Gaudron JJ).

⁸⁵ Ibid.

⁸⁶ *Wotton* (n 14) 289 [553]. Similarly, in *Macedonian Teachers Association* (n 67), the impugned conduct was a directive issued by the Victorian Premier that Ministers refer to the Macedonian language as 'Slav-Macedonian'. Justice Weinberg, without commenting on the merits of the instant matter, remarked that this conduct was 'essentially discriminatory', as it singled out all people of Macedonian ethnicity for differential treatment: at 34, 39–40. Also, it was irrelevant that the respondent stated that its motive was to promote peace and social harmony between two ethnic groups: at 39.

Similarly, a respondent's *intent* is generally considered irrelevant in anti-discrimination law.⁸⁷ Specifically, proof that the respondent had a desire to discriminate, for example, based on overt racial prejudice, is not required.⁸⁸ Among other reasons, proving an intention to discriminate would usually be extremely difficult for a complainant.

In summary, determining whether certain conduct is 'based on race' requires focusing on the essential nature of the relevant conduct, rather than on the alleged discriminator's stated intention or motive. This is consistent with a purposive approach to interpreting s 9, and an approach that assists in eliminating racial discrimination and protecting the inherent dignity and equal standing of each member of the Australian community.⁸⁹

4 *Racially Offensive Speech May Contravene s 9*

The preceding sections have examined the requirements for a successful claim under s 9. This section examines whether racially offensive speech may infringe s 9. Specifically, it examines two Australian Federal Court decisions, in which the Court determined that racially offensive remarks may contravene s 9. Notably, the Court neither relied on nor referred to pt IIA of the *RDA*, which specifically prohibits racial vilification.⁹⁰ These decisions are examined in detail to determine in what circumstances a claim involving racially offensive speech will be likely to succeed under s 9.

Gama involved racially discriminatory remarks made to an employee by his supervisor.⁹¹ The remarks, including that the complainant (who was Portuguese, and who experienced difficulty walking due to a workplace injury) walked 'like a monkey', and looked like a 'Bombay taxi driver',⁹² were made in the presence of his co-workers. The supervisor also stated to the complainant's co-workers that workers compensation

⁸⁷ As mentioned above, in *Wotton*, Mortimer J seemed to equate 'purpose' in s 9 with intent. Her Honour did not, however, elaborate further on this point.

⁸⁸ *Wotton* (n 14) 288–9 [551]–[553]. See also Gaze and Smith (n 20) 115.

⁸⁹ In *Wotton*, Mortimer J took an approach that was sympathetic to the effect of the relevant conduct on the victim. This is consistent with the view that s 9 seeks to achieve substantive, and not merely formal, equality. This approach is also consistent with a 'victim' perspective, rather than a 'perpetrator' perspective: see Freeman (n 56). Freeman argues that fault (or moral blameworthiness) is regarded by courts and legislators as an essential aspect of discrimination law: at 1054–6. See also Charles R Lawrence, 'The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism' (1987) 39(2) *Stanford Law Review* 317. Freeman and Lawrence focus on the harmful *effects* of discrimination on the victim.

⁹⁰ A number of Federal Court proceedings that were decided under s 18C also relied on s 9: see *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352 ('*Creek*'); *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615 ('*Hagan*'). In these cases, the Court did not determine whether s 9 was infringed.

⁹¹ *Gama* (n 3).

⁹² *Ibid* 563 [74] (French and Jacobson JJ).

claims made by the complainant were not legitimate.⁹³ The Full Court of the Federal Court upheld the trial judge's decision that the supervisor's conduct infringed s 9 of the *RDA*, and that the employer was vicariously liable.⁹⁴ The Court stated that racially derogatory remarks made in a workplace could contravene s 9, and that the complainant did not need to bring his complaint under s 15.⁹⁵ The Court rejected an argument that 'systemic racial bullying or harassment' was necessary to prove infringement of s 9 in these circumstances.⁹⁶ Similarly, the Court held that proof that the supervisor's statements 'created any disadvantage in the workplace' was also unnecessary.⁹⁷

Significantly, the Court held that remarks made in the workplace could constitute an 'act' for the purposes of s 9.⁹⁸ In other words, the Court did not distinguish between discrimination by words (usually considered the province of pt IIA of the *RDA*) and discrimination by conduct (usually considered the province of pt II).

Justices French and Jacobson emphasised that derogatory racial remarks are capable of meeting the requirements for liability under s 9, and that these requirements will often overlap in cases involving remarks made in the workplace.⁹⁹ In relation to the impairment of the complainant's rights, their Honours stated that

remarks which are calculated to humiliate or demean an employee by reference to race ... are capable of having a very damaging impact on that person's perception of how he or she is regarded by fellow employees and his or her superiors. They may even affect their sense of self worth and thereby appreciably disadvantage them in their conditions of work.¹⁰⁰

The Court thus found that each of the requirements for liability under s 9 had been met, and that the employer was vicariously liable for the supervisor's conduct.

More recently, in *Vata-Meyer*,¹⁰¹ an Aboriginal woman was repeatedly invited to eat 'black babies' and 'Coon cheese' by a male co-worker. The Full Court of the Federal Court affirmed the decision in *Gama* that racially offensive remarks made in the workplace could contravene s 9. In particular, the Court accepted that 'depending on the facts, racially-based remarks may affect a person's sense of self-worth and thereby

⁹³ Ibid 567 [91] (French and Jacobson JJ).

⁹⁴ *RDA* (n 1) s 18A.

⁹⁵ As outlined above, s 15 prohibits certain types of discrimination in relation to employment.

⁹⁶ *Gama* (n 3) 563–4 [73]–[76].

⁹⁷ Ibid.

⁹⁸ Ibid 564 [76] (French and Jacobson JJ, Branson J agreeing at 573 [122]).

⁹⁹ Ibid, quoted in *Wotton* (n 14) 290 [559] (Mortimer J).

¹⁰⁰ *Gama* (n 3) 564 [78].

¹⁰¹ *Vata-Meyer* (n 3).

appreciably disadvantage them in their conditions of work'.¹⁰² The Court also held that 'an unintentional racially offensive remark may impair a person's enjoyment of her right to work and to just and favourable conditions of work'.¹⁰³

In relation to the 'purpose' of the respondent's conduct, the Full Court rejected the respondent's 'innocent explanation' for the relevant remarks, and the trial judge's assessment of the respondent as simply 'obtuse' and 'unsophisticated'.¹⁰⁴ Thus, the Court determined that the remarks were made for the required purpose, as the respondent was aware (or should have been aware) of the offence caused by his conduct.¹⁰⁵

These two decisions confirm that racially offensive (or derogatory) remarks, particularly when made in the workplace by a co-worker or supervisor to an employee, may infringe s 9 of the *RDA*. This is not to say that all instances of racially offensive remarks in the workplace will infringe the section. As the cases emphasise, the nature of the conduct and the surrounding circumstances must be closely examined. However, the decisions in *Gama* and *Vata-Meyer* emphasise that subjecting a person to racially offensive or derogatory remarks in the workplace can often be humiliating and demeaning.¹⁰⁶ This conduct is likely to interfere with the right to work, and to just and favourable conditions of work, which is prohibited by s 9 of the *RDA*.¹⁰⁷

It is difficult to determine why the complainants in *Gama* and *Vata-Meyer* did not bring their complaints under s 18C, rather than s 9.¹⁰⁸ However, it is notable that the Court's judgment in *Vata-Meyer* determined that the respondent's conduct was 'likely to offend an Aboriginal person'.¹⁰⁹ This is similar to the language of s 18C, under which the respondent's conduct must be 'reasonably likely ... to offend, insult, humiliate or intimidate' a member of the relevant group. Also, both judgments emphasised that conduct that 'humiliate[d] [the complainant] ... by reference to

¹⁰² Ibid [93] (North, Collier and Katzmann JJ).

¹⁰³ Ibid.

¹⁰⁴ Ibid [72], [85]–[88].

¹⁰⁵ Ibid [85]–[88]. To support this conclusion, the Court referred to the fact that the complainant had 'dark skin', and that the respondent had recently undertaken training in Aboriginal cultural awareness: at [82]–[84]. Contrary to the trial judge, the Court found that the complainant's version of events was 'more probable than not': at [85].

¹⁰⁶ *Gama* (n 3) 564 [76]–[78], quoted in *Vata-Meyer* (n 3) [29].

¹⁰⁷ As mentioned above, s 9(4) provides that, to infringe s 9, the respondent's conduct must limit or restrict a human right or fundamental freedom within the meaning of art 5 of the *ICERD*.

¹⁰⁸ One possible reason may be that the complainant anticipated difficulty in satisfying the 'because of race' requirement under s 18C: see below Part IV(C).

¹⁰⁹ *Vata-Meyer* (n 3) [93]. More accurately, the respondent's repeated request for the complainant to eat 'black babies' was likely to offend an Aboriginal woman.

race' could incur liability under s 9.¹¹⁰ Therefore, it is possible that the respondent's conduct in these cases may also have infringed s 18C.¹¹¹

5 Implications of These Decisions

The decisions in *Gama* and *Vata-Meyer*, that racially offensive speech may infringe s 9 of the *RDA*, have significant implications for the operation of the *RDA*. The decisions mean that complaints relating to racially offensive speech may be made under s 9, rather than under pt IIA. Further, there are several reasons why proceeding under s 9 may be preferable for a complainant. First, unlike s 18C, there is no requirement in s 9 that the relevant act be done 'otherwise than in private'.¹¹² Therefore, it is possible that a complaint could be made under s 9 regarding racially offensive speech by one person to another in a private home, for example.

Second, unlike s 18C, there are no defences to a complaint made under s 9.¹¹³ In particular, reasonableness is not a defence under s 9. Therefore, the exemptions in pt IIA are not relevant to complaints made under s 9. These exemptions, and particularly the aspect of reasonableness, have sometimes resulted in complainants being denied a remedy.¹¹⁴ Therefore, a remedy may be available under s 9 in circumstances where no remedy would be available under pt IIA. Conversely, a person may be liable for racially offensive speech under s 9 even though the requirements of pt IIA would not be met, and an exemption under pt IIA may otherwise be available. Third, under s 9, the relevant conduct must be done 'based on race', which focuses on the essential nature of the conduct. However, under s 18C, the conduct must be done 'because of the race ... of the other person'. Courts have interpreted this requirement as focusing on the respondent's motives or intention, which has made it difficult for complainants to prove their claim.¹¹⁵

¹¹⁰ *Gama* (n 3) 564 [78], cited in *Vata-Meyer* (n 3) [29].

¹¹¹ The complainants may have elected not to use s 18C due to doubt that the relevant conduct took place 'otherwise than in private'.

¹¹² See, eg, *McLeod v Power* (2003) 173 FLR 31 ('*McLeod*'), in which it was determined that this requirement is not met where a racist remark is directed at a particular person, and where no other people are present. However, the decisions in *Gama* (n 3) and *Vata-Meyer* (n 3) strongly suggest that the presence of others (such as co-workers) is relevant to whether the conduct was likely to humiliate the complainant, and therefore whether it was likely to restrict or limit their human rights as required by s 9(4).

¹¹³ *Macedonian Teachers' Association* (n 67). The only defence to a complaint under s 9 is s 8, which concerns special measures for the 'advancement of certain racial or ethnic groups': see *ICERD* (n 12) art 1(4). This is unlikely to apply to racially offensive speech.

¹¹⁴ See, eg, *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105 ('*Bropho*'). This case involved a cartoon published in a major newspaper that was found to contravene s 18C. However, it was exempt as an 'artistic work' under s 18D.

¹¹⁵ See below Part IV(C).

The fact that some racially offensive speech may infringe pt II may suggest that separate laws prohibiting racial vilification are not necessary, or are undesirable. For example, retaining separate provisions relating to racial vilification may be regarded as undesirable because the same conduct could give rise to liability on two separate grounds, based on different criteria, with different defences being available. However, there are three reasons for maintaining laws specifically prohibiting racial vilification.

First, it is not unusual for an act to provide grounds for legal action on two or more bases. For example, a statement may be actionable both as defamation and as racial vilification.¹¹⁶ Additionally, one act may be both a breach of contract and also involve the commission of a tort. Therefore, the possibility of an overlap (or plurality) of legal claims, or the fact that a claim may succeed on one legal basis but fail on another, is not in itself grounds for arguing that one cause of action should be abolished. On the contrary, this would deprive complainants of their ability to choose the grounds upon which to proceed.¹¹⁷

Second, the overlap between ss 18C and 9 is far from complete. There are many circumstances where proceedings under one section or the other will not be available. For example, s 18C can be relied on only where the relevant conduct was done ‘otherwise than in private’.¹¹⁸ Also, there are several broad exemptions to liability under s 18C, which are contained in s 18D. These defences have been successfully relied on to exclude liability in several prominent cases.¹¹⁹ On the other hand, s 9 will not be available in relation to all racially derogatory remarks. As highlighted by *Gama* and *Vata-Meyer*, much will depend on the effect of the relevant conduct on the victim. Racially derogatory remarks are most likely to contravene s 9 when (as in those cases) they occur in the workplace and they otherwise deny or impair the enjoyment of a relevant human right. Thus, ss 18C and 9 should be seen as separate

¹¹⁶ For example, the respondents in *Eatock* (n 8) argued that the complainant should have sued for defamation, rather than racial vilification: see Adrienne Stone, ‘The Ironic Aftermath of *Eatock v Bolt*’ (2015) 38(3) *Melbourne University Law Review* 926. As the statements named specific individuals, they were most likely actionable as defamation.

¹¹⁷ For valid tactical reasons, complainants commonly allege both sexual harassment and sexual discrimination when both claims are available: see Rees, Rice and Allen (n 62) 651.

¹¹⁸ This requirement is not met, for example, where a racist remark is directed at a particular person, and where no other people are present: see *McLeod* (n 112). On the other hand, s 9 requires that the respondent’s conduct interferes with a ‘fundamental right or freedom’, which will not be the case in every complaint: see *Iliafi* (n 62).

¹¹⁹ See, eg, *Bropho* (n 114). The absence of similar exemptions in s 9 may be regarded as an argument *against* allowing vilification claims under s 9; that is, s 9 allows a complainant to effectively ‘circumvent’ such defences. However, as mentioned above, it is not unusual to have more than one cause of action available in respect of particular conduct, and for different defences to be available in respect of different causes of action.

and complementary provisions that work together to prohibit different types of racially discriminatory conduct.

Finally, maintaining separate and specific racial vilification laws is important in the message this conveys to the public. Specifically, these laws emphasise the unacceptability of this type of conduct. Racial vilification laws play an important symbolic role, particularly regarding public attitudes. As was highlighted in submissions to a recent inquiry into pt IIA, the existence of these laws sends a clear message to the general public regarding acceptable standards of public behaviour.¹²⁰ By way of analogy, some forms of sexual harassment may also be actionable under sex discrimination laws.¹²¹ However, the existence of some degree of overlap does not provide grounds to repeal laws specifically targeting sexual harassment. Rather, repealing such laws would likely be regarded by the public as the government condoning such conduct.

III IS PROTECTION FROM RACIAL VILIFICATION PART OF RACIAL DISCRIMINATION LAW?

Part II of this article examined issues concerning the overlap between racially offensive speech (generally considered the province of pt IIA of the *RDA*) and prohibitions on racial discrimination (the province of pt II). This part considers the relationship between racial vilification and racial discrimination on a deeper conceptual level. Specifically, it argues that laws prohibiting racial vilification should be understood as not merely *overlapping* with prohibitions on racial discrimination in a technical or fortuitous way, but conceptually as being *part* of the body of law and jurisprudence prohibiting racial discrimination.

As mentioned above, conceiving prohibitions on racial vilification in this way is significant for several reasons. Currently, pt IIA is understood by many commentators and judges as constituting a limitation on free speech, which is considered a fundamental right.¹²² Therefore, the provisions of pt IIA are sometimes interpreted restrictively, in a way that makes it difficult for complainants to vindicate their rights. Relatedly, the legitimacy of pt IIA is questioned, particularly in terms of its consistency with values of deliberative democracy and individual liberties. However, if pt IIA is understood as prohibiting a form of racial discrimination, it can be seen as *protecting* the rights of victims, and not merely limiting free speech.¹²³ Therefore, a broad and beneficial approach to interpreting pt IIA is required. This is because freedom from racial discrimination is a fundamental right, and an essential safeguard in a liberal democracy based on multiculturalism.

¹²⁰ Parliamentary Joint Committee on Human Rights (n 2) [2.64], [2.78].

¹²¹ See *O'Callaghan v Loder* [1983] 3 NSWLR 89. See also *Hall v A & A Sheiban Pty Ltd* (1989) 20 FCR 217, in which French J described sexual harassment as a 'species of sex discrimination': at 274–5.

¹²² See below Part IV(B).

¹²³ See, eg, *Gama* (n 3) 575–6 [134] (Branson J).

Several contextual factors support this contention. First, the prohibitions in pts II and IIA of the *RDA* were both enacted pursuant to Australia's international obligations to prohibit various forms of racial discrimination.¹²⁴ Second, pts II and IIA are contained in the *RDA*, the purpose of which is to eliminate racial discrimination in all its forms. However, a more powerful argument, presented below, is that judges and scholars have emphasised that providing protection from racial vilification is necessary to maintain individual dignity and autonomy, and these same values also underpin prohibitions on racial discrimination.¹²⁵

*A Laws Prohibiting Racial Discrimination and Vilification
Are Based on Similar Values*

Two main accounts are given by scholars regarding the values underpinning anti-discrimination laws and laws prohibiting racial discrimination in particular.¹²⁶ Liberty-based accounts of such laws focus on the harmful effect of discriminatory acts on the autonomy of victims.¹²⁷ These accounts emphasise the moral wrong of interfering with a person's chosen plan of life based on 'morally irrelevant' grounds, such as the person's race.¹²⁸ Liberty-based accounts have a strong individualistic focus, as they emphasise the interests of the victim as an individual (rather than, for example, as a member of a particular group).¹²⁹ These accounts regard the underlying purpose of prohibitions on racial discrimination as facilitating rectification, or enabling a victim to obtain a legal remedy for the wrong done to them.¹³⁰

Equality-based accounts, by contrast, focus on the relative status of groups, and the connection between discrimination and group disadvantage.¹³¹ These accounts emphasise that members of certain groups are more likely to experience serious and entrenched forms of disadvantage than members of other groups.¹³² For example, Owen Fiss argues that African Americans are a 'specially disadvantaged group',¹³³ because their numerical minority, lack of political power, and typically low socio-economic status place them in a subordinate role in society.¹³⁴ Fiss also argues that the effects of any further acts of discrimination against members of disadvantaged

¹²⁴ See above Part II(A).

¹²⁵ See below Part III(B).

¹²⁶ Owen M Fiss, 'Groups and the Equal Protection Clause' (1976) 5(2) *Philosophy and Public Affairs* 107; Colm O'Conneide, 'Justifying Discrimination Law' (2016) 36(4) *Oxford Journal of Legal Studies* 909.

¹²⁷ Sophia Moreau, 'What is Discrimination?' (2010) 38(2) *Philosophy and Public Affairs* 143.

¹²⁸ *Ibid.*

¹²⁹ See Gotanda (n 33).

¹³⁰ Moreau (n 127) 146–7.

¹³¹ Fiss (n 126) 155.

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ *Ibid* 150–5.

groups are likely to be more severe and long-lasting.¹³⁵ In a similar way, Aboriginal Australians and other minority racial groups currently have a subordinate status in Australian society.¹³⁶ Equality-based accounts regard the underlying purpose of laws prohibiting racial discrimination as facilitating a more equitable redistribution of goods in society.¹³⁷

Although liberty- and equality-based conceptions of racial discrimination laws are usually regarded as being in competition with each other and mutually exclusive, this article does not prefer one over the other.¹³⁸ Rather, this section argues that laws prohibiting racial vilification are underpinned by very similar values to those outlined above. Some scholars argue that racial vilification laws uphold the dignity and autonomy of members of minority racial groups.¹³⁹ This aligns with liberty-based conceptions of racial discrimination laws. On the other hand, some scholars argue that racial vilification laws seek to prevent vulnerable racial groups from being further marginalised and disadvantaged.¹⁴⁰ This aligns with equality-based conceptions of racial discrimination laws. Therefore, laws prohibiting racial vilification are underpinned by the same values as prohibitions on racial discrimination, and can be regarded as an aspect of that protection. Relatedly, Sophia Moreau notes that acts of discrimination paint the victim as ‘less worthy’ than others.¹⁴¹ Discriminatory conduct therefore has an ‘expressive dimension’ in that it stigmatises victims as ‘second class citizens’ who are ‘not worthy of consideration’.¹⁴² Although Moreau considers this to be merely a ‘side effect’ of discrimination,¹⁴³ this demonstrates that the practical effects of racial discrimination and vilification, from a victim’s perspective, are very similar.¹⁴⁴

Further, Australia’s commitment to multiculturalism supports the values underpinning racial vilification laws and laws prohibiting racial discrimination, as will be argued in the next section.

¹³⁵ Ibid.

¹³⁶ Wojciech Sadurski, ‘Gerhardy v Brown v the Concept of Discrimination: Reflections on the Landmark Case That Wasn’t’ (1986) 11(1) *Sydney Law Review* 5, 6.

¹³⁷ Moreau (n 127) 146–7.

¹³⁸ It is beyond the scope of this article to examine different conceptions of justice in relation to racial vilification laws.

¹³⁹ Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press, 2012).

¹⁴⁰ See, eg, Richard Delgado and Jean Stefancic, *Understanding Words That Wound* (Westview Press, 2004).

¹⁴¹ Moreau (n 127) 163.

¹⁴² Ibid 177–8. See *Brown v Board of Education of Topeka*, 347 US 483 (1954), in which the United States Supreme Court held that racially segregated schools stigmatised African American children as inferior. See also Sadurski (n 136) 28. Sadurski emphasises that discrimination stigmatises the particular groups targeted.

¹⁴³ Moreau (n 127) 163.

¹⁴⁴ Moreau describes the expressive effect of discrimination as treating someone with contempt: *ibid* 177.

B *Australian Multiculturalism and Substantive Equality*

As mentioned above, the enactment of the *RDA* in 1975 closely coincided with Australia adopting a formal policy of multiculturalism.¹⁴⁵ This section argues that Australia's commitment to multiculturalism aligns with, and supports, laws prohibiting both racial discrimination and vilification. In particular, commitment to multiculturalism highlights the significance of group identity, and the importance of legal protections for members of minority racial and ethnic groups. Minority groups should be protected from discriminatory conduct by members of dominant social groups. This argument is based largely on the work of Will Kymlicka,¹⁴⁶ and it builds on, and completes, the discussion of racial discrimination above.

Kymlicka argues that providing certain legal protections for members of minority racial and ethnic groups is necessary to place members of such groups on an equal footing with members of dominant social groups, and also to respect the autonomy of individual members of such groups.¹⁴⁷ Such protections, therefore, are entirely consistent with liberal values. Notably, Kymlicka specifically argues that protecting members of minority groups from racial hate speech is necessary to ensure that they enjoy full multicultural citizenship, or full membership of society, on equal terms with others.¹⁴⁸

In terms of its drafting, the *RDA* applies equally to members of all racial and ethnic groups, regardless of whether they are dominant or minority groups. Therefore, such laws could be regarded as conferring universal rights,¹⁴⁹ rather than the group-differentiated rights argued for by Kymlicka. However, the rights provided for in the *RDA* are more often invoked by members of minority groups than by members of dominant racial groups.¹⁵⁰ Further, it has been argued that s 18C, in particular,

¹⁴⁵ Albert J Grassby, *A Multi-Cultural Society for the Future* (Australian Government Publishing Service, 1973).

¹⁴⁶ Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford University Press, 1995) 2, 36. In relation to minority groups, Kymlicka distinguishes between the status, and the claims for inclusion, of indigenous groups on the one hand, and migrant groups on the other. He recognises, however, that not all minority groups fall into these two categories. Significantly, these categories overlook refugees and other forced migrants (such as African Americans), who may be even more disadvantaged and marginalised than the two categories on which Kymlicka focuses.

¹⁴⁷ *Ibid* 36–7.

¹⁴⁸ *Ibid* 43–4. Although Kymlicka does not present detailed arguments for racial vilification laws, support for such laws can be drawn from his discussion of multicultural citizenship.

¹⁴⁹ Universal rights are consistent with notions of formal equality, that all people should be treated the same, regardless of race.

¹⁵⁰ Australian Human Rights Commission, *2018–19 Complaint Statistics* (Report, 2019). This report demonstrates that protection from racial vilification is needed more by members of racial and ethnic minorities.

is inconsistent with notions of equality before the law.¹⁵¹ This is because liability under that section depends on the response of a reasonable member of the target group to the relevant conduct.¹⁵² Specifically, it has been argued that liability under the section depends on race.¹⁵³ It is correct that s 18C recognises the existence and reality of race, and racial groups, as does the *RDA* generally. Without doing so, it would be impossible to achieve the *RDA*'s purpose of eliminating racial discrimination. It is also correct that the *RDA* recognises the existence of racially-defined groups. For example, provisions concerning indirect discrimination (such as s 9(1A)) are premised on determining whether members of particular racially-defined groups are disadvantaged by particular practices, in comparison to other racially-defined groups.¹⁵⁴

However, this article rejects the argument that s 18C is inconsistent with principles of racial equality. Rather, the section actually promotes *substantive* equality, particularly for members of minority racial and ethnic groups. This is because, as will be outlined in the following paragraphs, s 18C protects members of racial and ethnic minorities from actions by others that undermine their dignity and autonomy. Providing substantive equality to members of such groups is particularly important in countries such as Australia that are committed to multiculturalism. These arguments are supported by the work of Kymlicka, which will now be examined.

Kymlicka presents two main arguments in favour of group-differentiated rights, or particular legal protections for minority groups. First, he argues that such protections are necessary to protect the autonomy of members of minority groups.¹⁵⁵ Kymlicka argues that autonomy is intimately linked with culture.¹⁵⁶ 'Cultures are valuable because [by] having access to a ... culture ... people have access to a range of meaningful options' in relation to their life choices.¹⁵⁷ He argues that access to culture is 'crucial to people's well-being', and that 'a liberal society does not compel people to revise their [cultural] commitments'.¹⁵⁸ He argues that the cultural practices of dominant social groups are invariably protected by, and indeed embedded in, the legal and political system in a given society.¹⁵⁹ Minority cultures, by contrast, are

¹⁵¹ See Dan Meagher, 'So Far So Good?: A Critical Evaluation of Racial Vilification Laws in Australia' (2004) 32(2) *Federal Law Review* 225.

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ See above Part II(B)(1).

¹⁵⁵ Kymlicka (n 146) 35–8.

¹⁵⁶ *Ibid.* 75.

¹⁵⁷ *Ibid.* 83.

¹⁵⁸ *Ibid.* 89–91.

¹⁵⁹ *Ibid.* 57. For example, the major public holidays in Australia (including Christmas and Easter) are based on specifically Christian celebrations, rather than those of any other culture or religion.

vulnerable to marginalisation and exclusion by the mainstream legal and political system.¹⁶⁰

Second, Kymlicka argues that group-differentiated rights promote fairness between minority and majority groups.¹⁶¹ He argues that members of minority cultural groups experience systemic economic disadvantage and political marginalisation.¹⁶² For example, members of such groups commonly face discrimination and exclusion in relation to education, housing and employment.¹⁶³ Kymlicka argues that ‘true social equality’ requires acknowledgement of the vulnerability, disadvantage and marginalisation frequently experienced by members of racial minorities.¹⁶⁴ Protection of minority groups is based on acknowledging the vulnerable situation of members of these groups, and their need for protection, specifically in relation to certain conduct by members of dominant cultural groups.¹⁶⁵

Acts of racial vilification undermine the autonomy of members of targeted groups by preventing them from participating in valuable opportunities such as education, employment and political activity.¹⁶⁶ Members of targeted groups are effectively barred from full inclusion in society in two separate but related ways: first, acts of racial vilification cause targeted groups to withdraw from contact with mainstream society, and from valuable opportunities generally,¹⁶⁷ and second, they cause listeners (who are *not* members of the target group) to shun and avoid members of targeted groups.¹⁶⁸ Racial vilification prevents members of targeted groups from accessing valuable opportunities on equal terms with others.

Similar to Kymlicka’s emphasis on autonomy and inclusion, Jeremy Waldron argues that racial vilification laws protect the dignity of members of disadvantaged groups.¹⁶⁹ He emphasises the importance of ensuring respect for a person’s

¹⁶⁰ Ibid 36–7. Gotanda also emphasises the need for laws to protect aspects of minority cultures: see Gotanda (n 33).

¹⁶¹ Kymlicka (n 146) 36–7.

¹⁶² Ibid 109, 126.

¹⁶³ Ibid 109–11.

¹⁶⁴ Ibid 126. This is also true for racial minorities in Australia: see, eg, Australian Human Rights Commission (n 150).

¹⁶⁵ Kymlicka (n 146) 126. Kymlicka’s emphasis on autonomy and fairness are similar to the purpose of prohibitions on racial discrimination — liberty and equality — discussed in Part III(A) of this article.

¹⁶⁶ See Waldron (n 139) regarding the harms of racial vilification.

¹⁶⁷ Because they are intimidated or humiliated, for example: see *RDA* (n 1) s 18C.

¹⁶⁸ The shunning and avoidance of members of targeted groups is examined by Waldron (n 139).

¹⁶⁹ Waldron (n 139). Waldron does not base his arguments, as Kymlicka does, on multi-cultural citizenship. Rather, Waldron bases his arguments on John Rawls’ notion of a ‘well-ordered society’. However, the values identified by Waldron as supporting freedom from racial vilification are very similar to those identified by Kymlicka. See also Gaze and Smith (n 20) 19.

‘elementary dignity’, or their status as a full member of society in good standing.¹⁷⁰ He argues that a person’s dignity is intimately linked with their ‘basic standing’ in society,¹⁷¹ and with ensuring basic respect for a person as a human being.¹⁷² Human dignity, and the principle that every person has inherent and equal moral worth, is a powerful underlying justification for human rights.¹⁷³ Respecting human dignity means that every person has a duty to act consistently with the equal moral value of every other person.

In summary, multicultural citizenship requires that vulnerable racial groups are protected from conduct that effectively excludes them from full participation in society. Acts of racial vilification undermine the full and equal citizenship of members of targeted groups in a multicultural society. Such acts are inconsistent with respecting a person’s dignity or their equal moral worth, which are core liberal democratic values. As mentioned above, respect for individual autonomy and for notions of fair and equal treatment underpins Australia’s laws prohibiting racial discrimination.

On this basis, protection from racial vilification can be seen as an aspect of legal prohibitions on racial discrimination. This is because such protection seeks to promote the autonomy and dignity of members of vulnerable racial and ethnic groups. Also, acts of racial discrimination stigmatise victims as inferior. Therefore, the harmful effects of racial vilification are very similar to those of racial discrimination. These conclusions indicate that a broad and beneficial approach should be taken when interpreting racial vilification laws, rather than the restrictive approach commonly taken by courts.¹⁷⁴

IV CAN A DISTINCTION BE MAINTAINED BETWEEN ACTS AND WORDS?

This part of the article examines the distinction between acts and words. This distinction underpins the concept of free speech,¹⁷⁵ which is said to be restricted or threatened by racial vilification laws.¹⁷⁶ However, as the following section will demonstrate, the distinction between speech on the one hand, and conduct on the other, cannot be maintained in many circumstances. Also, this distinction was implicitly rejected by

¹⁷⁰ Waldron (n 139) 46–7, 60.

¹⁷¹ Ibid 57.

¹⁷² Ibid 87–92.

¹⁷³ Ibid 60.

¹⁷⁴ Interpretive issues are examined in more detail in Part IV(C) of this article.

¹⁷⁵ Katharine Gelber, *Speaking Back: The Free Speech Versus Hate Speech Debate* (John Benjamins Publishing Company, 2002) 53–5. See also John L Austin, *How to Do Things with Words* (Harvard University Press, 2nd ed, 1975); MacKinnon (n 5).

¹⁷⁶ See Waldron (n 139).

the Federal Court in the decisions examined earlier in this article.¹⁷⁷ These decisions simply treated the relevant conduct *as conduct*, and therefore as subject to racial discrimination laws.

Regarding racially discriminatory conduct as conduct (rather than as speech) focuses attention on the *effects* of the conduct, particularly on its harmful effects on members of target groups. This contrasts strongly with a free speech perspective, which emphasises the importance of the ‘ideas’ the conduct is said to express or convey.¹⁷⁸ Also, focusing on the harmful *effects* of certain conduct (regardless of motive or intention) is consistent with an objective approach to interpreting and applying pt IIA of the *RDA*, and also with principles of interpretation in anti-discrimination law. This part of the article examines the work of Katharine Gelber, who argues that racial vilification is discrimination in discursive form, as it seeks to subordinate members of minority racial and ethnic groups. Gelber’s work also provides guidance on assessing the impacts of particular speech acts, and it emphasises the importance of examining the surrounding circumstances. This principle is particularly relevant to the interpretation of the requirement in s 18C that the respondent’s conduct be done ‘because of’ the race of the target group.¹⁷⁹

A *The Speech–Conduct Distinction Is Not Tenable*

The concept of ‘free speech’ relies on a distinction being made between speech on the one hand, and conduct on the other.¹⁸⁰ This distinction is often implicit, and indeed it is embedded in the structure of language.¹⁸¹ Many scholars argue, however, that this distinction is untenable. This section examines the work of Gelber, who argues that ‘hate speech’ should be understood and treated by the law as ‘harmful conduct’.¹⁸² Further, Gelber argues that racial vilification is a form of discrimination, in that it presents the target as inferior, and it seeks to normalise and legitimise unequal treatment of members of certain racial groups.¹⁸³ These arguments are inter-related and will be examined in turn.

¹⁷⁷ *Gama* (n 3); *Vata-Meyer* (n 3).

¹⁷⁸ MacKinnon (n 5) 8.

¹⁷⁹ This issue is examined in Part IV(C) of this article.

¹⁸⁰ Gelber (n 175) 53–5. See also Austin (n 175); MacKinnon (n 5). Judith Butler describes the speech–conduct distinction as ‘metaphysical’: Judith Butler, *Excitable Speech: A Politics of the Performative* (Routledge, 1997) 10–11.

¹⁸¹ Gelber (n 175) 53–5. For example, in ordinary language, we say that a person *does* an act, but they *say* a word.

¹⁸² Gelber (n 175) chs 3–5. Gelber uses the term ‘hate speech’, though her work focuses on racial vilification.

¹⁸³ *Ibid* 71, 81.

Gelber argues that certain words or speech do not merely state facts or opinions.¹⁸⁴ Rather, certain words *do something* in the saying of them.¹⁸⁵ Further, the significance of these utterances is recognised by the law and society. For example, when a bride and groom say ‘I do’, in the circumstance of a wedding ceremony, this has practical, social and legal effects on both people involved.¹⁸⁶ Also, when a firing squad sergeant yells ‘fire!’, this also has practical effects.¹⁸⁷ In both these examples, the speaker’s words have immediate, practical effects, for which the speaker is responsible.

Gelber argues that many types of speech are treated as ‘doing something’, or as ‘performative’.¹⁸⁸ That is, the practical effects of these ‘speech acts’ are treated as indistinguishable from the speech act itself.¹⁸⁹ Famously, John Austin described three types of speech acts: locutionary, illocutionary and perlocutionary. Locutionary speech acts are simply propositional statements that convey certain ideas or opinions.¹⁹⁰ Illocutionary speech acts create a certain result or effect in the saying of the words.¹⁹¹ Perlocutionary speech acts cause a certain result or effect as a consequence of saying the words.¹⁹² The distinction between illocutionary and perlocutionary speech acts therefore depends on the directness or immediacy of the result or consequence.

Significantly, Gelber argues that the meaning and effect of a particular speech act, and therefore the category into which it falls, depends on its particular nature, and the circumstances in which it is performed.¹⁹³ In other words, Gelber advocates a *contextual* approach to determining the meaning and effect of particular speech acts.¹⁹⁴ This can be contrasted to a *formal* approach, which looks merely at the expressive form of the relevant speech act (for example, whether it is expressed as words or as conduct).¹⁹⁵

¹⁸⁴ Ibid 55–6. That is, words do not merely state a proposition, or an idea.

¹⁸⁵ Ibid.

¹⁸⁶ Ibid 51.

¹⁸⁷ Butler also provides the example of a judge giving a sentence in court — this statement has legal effects: Butler (n 180) 49. Butler emphasises, however, that the speech acts of private individuals, and not merely those exercising public power (such as a judge), have practical effects: at 24. This is relevant to racial vilification, which may be conducted by private individuals.

¹⁸⁸ Gelber (n 175) 55–6.

¹⁸⁹ Austin in fact argued that all speech is conduct: *ibid* 58, 62–3. Establishing this broader claim is not necessary for the purposes of this article.

¹⁹⁰ Ibid 56.

¹⁹¹ Ibid 55.

¹⁹² Ibid 56.

¹⁹³ Ibid 56–7.

¹⁹⁴ Ibid 56–7, 63.

¹⁹⁵ It is notable that a contextual approach to interpreting conduct is required by the wording of s 18C, which requires that ‘all the circumstances’ be taken into account, in determining whether the relevant conduct has the required effect.

Gelber also draws on the work of Jürgen Habermas, and in particular on Habermas' concept of 'validity claims'.¹⁹⁶ This concept is used by Habermas to determine the meaning and effect of particular speech acts.¹⁹⁷ Significantly, Habermas highlights the complexity and difficulty in determining the meaning and effect of particular speech acts, as such acts are used to communicate ideas and propositions, but are also used 'strategically' for many other purposes.¹⁹⁸ Gelber uses Habermas' concept of validity claims in her definition of racial vilification (which is examined below).

Gelber argues that the meaning and effect of a particular speech act is determined by examining three aspects of the speech act. The first aspect is the factual claims made in the speech act.¹⁹⁹ This is the propositional content, or the ideas conveyed, which is the aspect of communication commonly emphasised by free speech proponents.²⁰⁰ The second aspect is the norms or values advanced in the speech act.²⁰¹ This focuses on the moral aspects, rather than the purely factual claims made.²⁰² This aspect has the potential to foster solidarity between a speaker and a listener who sympathises with the values expressed, but also to alienate the target of negative moral claims.²⁰³ Third, it is necessary to determine the 'speaker's subjectivities', such as their sincerity, motivation and intention.²⁰⁴ Gelber argues that this can be the most difficult, and perhaps the least important aspect of determining the meaning and effect of a speech act.²⁰⁵

As mentioned above, Gelber argues that racial vilification²⁰⁶ constitutes an act of racial discrimination. She bases this argument on her analysis of the theories of Austin and Habermas. Gelber specifically argues that racial vilification *constitutes* discrimination, rather than merely *causing* it.²⁰⁷ Thus, she distinguishes her approach from those who argue that vilification merely contributes to an environment in which acts of discrimination are more likely to occur (for example, by those who are influenced

¹⁹⁶ Gelber (n 175) 60–5. See Jürgen Habermas, *The Theory of Communicative Action, Volume 1: Reason and the Rationalization of Society* (Heinemann, 1984).

¹⁹⁷ Gelber (n 175) 63–4.

¹⁹⁸ *Ibid* 62–3.

¹⁹⁹ *Ibid* 64–5.

²⁰⁰ *Ibid* 54.

²⁰¹ *Ibid* 65.

²⁰² *Ibid*.

²⁰³ *Ibid*.

²⁰⁴ *Ibid*.

²⁰⁵ *Ibid* 74.

²⁰⁶ As noted above, Gelber uses the term 'hate speech', although her analysis focuses on racial vilification.

²⁰⁷ Gelber (n 175) 75.

to discriminate by the speech acts of others).²⁰⁸ Rather, Gelber argues that acts of racial vilification are *themselves* ‘discursive acts of racial discrimination’.²⁰⁹

Gelber uses Habermas’ concept of validity claims in her definition of racial vilification. Significantly, she does not accept the definition of racial vilification contained in Australian (or other) legislation.²¹⁰ Rather, she proposes a definition based on her understanding of the harms of such conduct, and also based on notions of racial discrimination. This section will first examine the relevance of the concept of validity claims to defining racial vilification. Then it will examine the relevance of racial discrimination to Gelber’s definition of racial vilification.

Gelber argues that racial vilification has three key features. First, it presents members of the target group as inherently inferior, based on race.²¹¹ This relates to the first aspect of Habermas’ validity claims — the factual content of the message. Second, racial vilification seeks to legitimise and normalise unequal treatment of people, based on their race.²¹² This relates to the second aspect of Habermas’s validity claims — the normative aspects. In other words, Gelber defines certain speech as racial vilification if it supports notions of racial inequality, inferiority, subordination or exclusion.²¹³ On the other hand, a speech act will not be vilification if, although it presents racial inequality as a fact, it seeks to criticise or challenge such inequality.²¹⁴ Third, racial vilification depends on an assessment of the intention, motive and sincerity of the speaker.²¹⁵ Gelber notes that these subjective factors are often difficult to assess,²¹⁶ and are ‘much less important ... than the empirically examinable’ evidence, such as the words used and the surrounding context.²¹⁷

Gelber’s approach to defining racial vilification is significantly different to the definitions currently found in Australian legislation. In particular, Gelber’s approach focuses on the *effects* of a particular speech act, especially on members of the target group. Her approach is based on preventing, minimising and ameliorating harm to individuals.²¹⁸

²⁰⁸ Thus, in Austin’s terms, Gelber argues that racial vilification is an illocutionary, rather than a perlocutionary, speech act.

²⁰⁹ Gelber (n 175) 95.

²¹⁰ *Ibid* ch 4.

²¹¹ *Ibid* 71.

²¹² *Ibid* 81.

²¹³ *Ibid* 82.

²¹⁴ *Ibid*.

²¹⁵ *Ibid* 65, 74.

²¹⁶ *Ibid* 65, 74, 78.

²¹⁷ *Ibid* 74. This approach is similar to the approach taken by Bromberg J in *Eatock* (n 8). See below Part IV(C)(2).

²¹⁸ Gelber argues that ‘silencing of victims’ is the specific harm of racial vilification: Gelber (n 175) 69, 86. This article does not accept (as Gelber seems to claim) that this is the *only* harm of racial vilification. However, this article accepts that the main purpose of racial vilification laws is to prevent, minimise and ameliorate harm to members of target groups.

As noted above, Gelber argues for a contextual approach to assessing these harms. Indeed, such an approach is necessary to capture ‘[s]ophisticated, or sanitised’ vilification,²¹⁹ which is presented as being part of political discussion or debate.²²⁰ Definitions that focus only on the words used will not capture such speech.²²¹ Indeed, Gelber argues that her approach does not require legislative exemptions, and it is therefore easier to apply.²²²

Further, Gelber regards racial vilification as a form of racial discrimination. This seems to be for two reasons. First, the distinction between speech acts and conduct is not maintainable in many contexts and a range of factors should be taken into account in determining whether particular speech acts should be regulated. Whereas focusing on speech acts as speech emphasises the importance of their propositional content, this approach ignores the harmful effects of certain speech acts. Gelber argues for a contextual approach that takes these harms into account. Second, she highlights the significant similarities between the purposes of racial vilification laws, and prohibitions on racial discrimination.

Gelber argues that racial vilification presents members of target groups as inherently inferior, and it seeks to normalise unequal or discriminatory treatment of certain racial groups. Such acts, therefore, reinforce relationships of dominance and subordination based on race. Gelber also emphasises that vilification can exclude members of target groups from full inclusion in society.²²³ Racial vilification can promote fear or hatred of particular racial groups, for example by presenting the group as a threat (either physically, or as an existential threat to accepted values).²²⁴ As mentioned above, Gelber advocates a contextual approach to determining the meaning and effect of particular speech acts. Of particular relevance is the identity of the speaker and the target group,²²⁵ and also the historical relationship between the racial groups involved.²²⁶ Gelber argues that racial vilification is used by ‘powerful racially defined groups [to] circumscribe less powerful racially defined groups to limit the way they are able to participate in society’.²²⁷ She focuses on the relative power of particular groups, arguing that racial vilification often occurs — and is most harmful — when there is a ‘systemic power asymmetry between the speaker and the hearer, and in favour of the speaker’.²²⁸ As Gelber emphasises, the harms of racial vilification are very similar to those of racial discrimination, particularly in relation to the effects of racial vilification on members of target groups. These effects, although they may not

²¹⁹ Ibid 80.

²²⁰ Ibid 78–80.

²²¹ Ibid.

²²² Ibid 127.

²²³ Ibid 82, 85.

²²⁴ Ibid 76–7.

²²⁵ Ibid 84.

²²⁶ Ibid 81–2.

²²⁷ Ibid 73.

²²⁸ Ibid 87.

be as visible as the tangible harms required by discrimination laws, are nonetheless very real for members of vulnerable and marginalised racial groups.

Judith Butler highlights another aspect of speech that is relevant to racial vilification. She notes that the most harmful speech acts are repeated or ritualised ones, such as racial insults, epithets and slurs.²²⁹ The meaning and effect of these speech acts derive from history, and each use of these words ‘recalls prior acts’.²³⁰ Butler argues that racist speech ‘works through the invocation of conventions’.²³¹ In other words, racial vilification circulates certain ideas (such as racial inferiority) and it keeps them alive. Butler notes that all ‘injurious names have a history’,²³² highlighting that historical context must be taken into account in determining the meaning and effects of such words. Certain speech acts, such as cross burning by the Ku Klux Klan, are strongly associated, particularly in the minds of African Americans, with the threat of actual violence.²³³ Like Gelber, Butler argues that racial vilification can constitute discrimination by placing members of the target group in a subordinate position.²³⁴

Butler makes the important observation that scholars who seek to collapse the speech–conduct distinction do so specifically to strengthen the case for legal regulation of certain speech acts.²³⁵ She notes that scholars do this for ‘political purposes’, rather than for merely theoretical purposes.²³⁶ Further, Butler argues that increasing (or legitimising) legal regulation of certain speech acts may be the ‘greatest threat’ to the free speech of minority groups.²³⁷ Clearly, Butler is correct in arguing that scholars who seek to collapse the speech–conduct distinction do so in order to legitimise legal regulation of certain speech acts.²³⁸ However, this article does not accept Butler’s conclusion that increased regulation necessarily harms the interests of the groups that the regulation is intended to benefit. Rather, an approach to defining racial vilification that is sensitive to context, and the existence of appropriate exemptions to liability, minimises the risk that legal regulation may have the unintended consequences highlighted by Butler.

²²⁹ Butler (n 180) 3.

²³⁰ Ibid 20.

²³¹ Ibid 34.

²³² Ibid 36.

²³³ Ibid 55, 57.

²³⁴ Ibid 18.

²³⁵ Ibid 20, 23.

²³⁶ Ibid 22.

²³⁷ Ibid 23. Butler, like Gelber, favours a ‘more speech’ approach to racial vilification, rather than supporting legal regulation.

²³⁸ The distinction between speech and conduct is crucial in the United States context, as courts may invalidate legislation that is characterised as restricting ‘speech’. In Australia, communication also needs to be characterised as ‘political’ in order to be protected on constitutional grounds.

B *Implications of Gelber's Approach to Racial Vilification*

Although this article has examined Gelber's approach to racial vilification in detail, it does not argue that her definition of racial vilification should be adopted in place of the current definition in s 18C. However, her emphasis on the *effects* of racial vilification represents a significant development in the debate surrounding its regulation. Indeed, Gelber's approach presents a new paradigm for understanding and interpreting such laws, as will be outlined below. Also, Gelber's emphasis on the importance of social, historical and political context in determining the effect of particular speech acts is reflected in the language of s 18C and in the way that it has been interpreted by courts.²³⁹

Currently, racial vilification laws (including pt IIA of the *RDA*) are understood and interpreted predominantly within a free speech paradigm. This is reflected in certain judicial decisions,²⁴⁰ certain academic commentary,²⁴¹ and in a recent government report.²⁴² The understanding of s 18C as primarily *limiting* rights has implications for how it is interpreted by courts (and how it is understood more generally). For example, in *Bropho*, French J stated that s 18D should be interpreted 'broadly rather than narrowly'.²⁴³ This is because his Honour understood s 18D as representing a fundamental right.²⁴⁴ In other words, French J understood s 18C as *limiting* a fundamental right, and this informed his Honour's approach to interpreting the relevant provisions.

However, Gelber presents a very different framework for understanding racial vilification laws, and particularly for understanding the types of harm they seek to target. First, she challenges the free speech paradigm, by highlighting that a strict distinction between words and conduct can no longer be maintained. In this light, racial vilification laws can be seen as regulating a particular type of conduct (rather than speech). Indeed, it is notable that s 18C does not refer to 'speech' at all — it applies to 'any act' that meets the requirements of the section. Second, Gelber argues that a more appropriate paradigm for understanding racial vilification is the prohibition on racial discrimination. Indeed, there is a large overlap between these two areas of

²³⁹ In particular, s 18C requires that 'all the circumstances' be taken into account in determining whether the relevant conduct has the prohibited effects.

²⁴⁰ For example, in *Bropho*, French J described s 18C as a 'proscription' and 'an encroachment on freedom of speech and expression': *Bropho* (n 114) 123 [65], 125 [72]. On the other hand, his Honour described s 18D as protecting 'freedom': at 131 [94].

²⁴¹ For example, Meagher emphasises the 'limitations' that s 18C places on free speech and on political communication: Meagher (n 151).

²⁴² Parliamentary Joint Committee on Human Rights (n 2).

²⁴³ *Bropho* (n 114) 126 [73]. Justice French also suggested that the burden of proof in relation to s 18D may fall on complainants, rather than respondents, due to s 18D representing a fundamental right: at 126–7 [74]–[75].

²⁴⁴ *Ibid* 125–6 [72].

law.²⁴⁵ Notably, in the two Federal Court decisions examined in this article, *Gama* and *Vata-Meyer*, the Court stated that, in certain circumstances, ‘[t]he making of a remark is an act’.²⁴⁶ In both decisions, the Court did not elaborate further on this issue. It seems that it was self-evident to the Court that, in certain circumstances, what is usually considered as speech can constitute unlawful racial discrimination. Gelber argues that laws prohibiting vilification and discrimination both seek to protect members of target groups from particular harms. This is consistent with the analysis of the purposes of racial discrimination laws above.²⁴⁷

An important practical implication of these arguments concerns the interpretation of racial vilification laws, and in particular, s 18C. If these laws are regarded as protecting, rather than limiting rights, then they should be interpreted broadly and beneficially. This article will now apply this principle to the interpretation of one of the most contentious and difficult aspects of s 18C — the requirement that the relevant act be done ‘because of the race ... of the other person’.

C *The Proper Interpretation of ‘Because of Race’*

Under s 18C, the relevant act must be done ‘because of the race ... of the other person’. Courts and commentators have described this as the ‘causal’ requirement or connection.²⁴⁸ In interpreting and applying this requirement, courts have often focused to a large degree on the respondent’s motive, and other exculpatory reasons, and even on the reasons given by the respondent for their own conduct. As a result, courts have found that certain conduct was not done ‘because of race’, even when there is a clear connection to race. In other decisions, courts have focused on the surrounding circumstances, and on whether race is one of the reasons for the respondent’s conduct. This section argues that the latter approach is more consistent with the purpose of the *RDA*, which is to eliminate discrimination in all its forms. It is also consistent with the approach to racial discrimination laws, which focuses on the effects of the relevant act, rather than the motive or intention of the respondent.

1 *Court Decisions That Inappropriately Emphasise Motive*

This section examines two Federal Court decisions in which the Court emphasised the motive of the respondent.²⁴⁹ In both cases, the Court found that the relevant conduct was not done ‘because of race’. The circumstances surrounding each complaint will be examined in some detail, as this is necessary in taking context into account.

²⁴⁵ Notably, in two leading Australian decisions regarding the interpretation of s 18C, the complainant also alleged racial discrimination under s 9 of the *RDA*: see *Hagan* (n 90); *Creek* (n 90). In both these decisions, the Court determined liability based on s 18C, rather than s 9.

²⁴⁶ *Gama* (n 3) 564 [76] (French and Jacobson JJ), quoted in *Vata-Meyer* (n 3) [29].

²⁴⁷ See above Part III(A).

²⁴⁸ Meagher (n 151).

²⁴⁹ These decisions are examined as they demonstrate a restrictive approach to interpreting s 18C.

Hagan involved a complaint by a man of Aboriginal descent regarding a public sign in a Toowoomba sporting stadium that featured the name ‘ES “Nigger” Brown’.²⁵⁰ Justice Drummond noted that ‘the use of the word ... is ... well capable of being an extremely offensive racist act’, and that s 18C ‘would almost certainly’ be breached ‘[i]f someone were ... to call a person of indigenous descent’ by that name.²⁵¹ However, his Honour stated that it is ‘always ... necessary to take into account the context’, and that this involves considering the circumstances of the particular use of the word.²⁵² As an example, Drummond J stated that if the word was used ‘in a joking way’, or ironically, by one Aboriginal person to another, then there would be no breach of s 18C.²⁵³

Ultimately, Drummond J found that the respondent’s failure to remove the offending word from public display was not done ‘because of race’.²⁵⁴ To the contrary, Drummond J held that the respondent was ‘careful to avoid giving offence to [local Aboriginal people] who might be offended’.²⁵⁵ His Honour noted that the views of local Aboriginal people had been sought, and that they did not object to the sign.²⁵⁶ Justice Drummond also stated that the word ‘was not ... intended ... to convey ... a racist element’.²⁵⁷ Rather, the word was a ‘customary identifier’ of a non-Aboriginal man who was well-known in the area for his sporting achievements.²⁵⁸ Finally, Drummond J noted that the word had been part of the stand since 1960 and that it had ‘long ceased to have any racial connotation, even if it once did have that’.²⁵⁹ On appeal, the Full Court of the Federal Court upheld Drummond J’s decision, agreeing that the relevant conduct was not done ‘because of race’ as the respondent acted for other, non-discriminatory reasons.²⁶⁰

²⁵⁰ *Hagan* (n 90). The complaint in *Hagan* was made under ss 9 and 18C of the *RDA*.

²⁵¹ *Ibid* [7].

²⁵² *Ibid* [7]–[8].

²⁵³ *Ibid*. Justice Drummond did not appear to consider the issue of who determines whether particular words are used ‘jokingly’ or ‘ironically’.

²⁵⁴ *Ibid* [36].

²⁵⁵ *Ibid*.

²⁵⁶ *Ibid* [19].

²⁵⁷ *Ibid* [13]. Justice Drummond also held that the use of the word was not ‘racially motivated or ... a deliberate racist gesture’: at [27].

²⁵⁸ *Ibid* [13].

²⁵⁹ *Ibid* [27]. Justice Drummond’s decision could be criticised on the grounds that his Honour focused unduly on the history of the sign itself, rather than on the specific word that was the gravamen of the complaint.

²⁶⁰ *Hagan v Trustees of the Toowoomba Sports Ground Trust* (2001) 105 FCR 56; Committee on the Elimination of Racial Discrimination, *Opinion: Communication No 26/2002*, 62nd session, UN Doc CERD/C/62/D/26/2002 (14 April 2003) (*Hagan v Australia*). The UN Committee on the Elimination of Racial Discrimination upheld Mr Hagan’s complaint regarding the use of the word on a public sports stand. The Committee stated that the use of the word must be seen in the circumstances of contemporary society, and particularly in the light of ‘increased sensitivities in respect of ... [racial slurs] appertaining today’: at [7.3]. The Committee determined the sign to be racially offensive and recommended its removal: at [8].

Similarly, in *Creek*, the complaint related to a newspaper report regarding a dispute over the custody of an Aboriginal child.²⁶¹ The report featured photographs of the complainant (an Aboriginal woman) in a remote, bush setting, and the non-Aboriginal couple who were contesting custody in their suburban lounge room. The newspaper report referred to the recently released Human Rights and Equal Opportunity Commission report, *Bringing Them Home*, concerning the Aboriginal Stolen Generations.²⁶² Justice Kiefel held that a member of the relevant audience would be offended by the use of the image, as it portrayed the complainant ‘as living in rough bush conditions in the context of a report which is about a child’s welfare’.²⁶³ The image ‘inaccurately ... portrayed the complainant’s usual living circumstances’,²⁶⁴ and invited an unfavourable comparison between her and the non-Aboriginal couple.²⁶⁵

Justice Kiefel held that the requirement in s 18C that the conduct be done ‘because of the race ... of the other person’ requires a causal connection between the conduct and race.²⁶⁶ As stated by Drummond J in *Hagan*, one reason for the respondent doing the act must have been the race of the target person or group.²⁶⁷ Justice Kiefel distinguished the requirement under s 9 that the conduct be ‘based on race’, which does not require a causal relationship.²⁶⁸ Under s 9, race need only be a ‘material factor’ in the respondent doing the relevant act.²⁶⁹ In determining whether that relationship exists, all the circumstances must be taken into account, including the words used, and the nature of the conduct.²⁷⁰ Justice Kiefel noted that ‘discrimination legislation operates with respect to unconscious acts’,²⁷¹ and that it is unnecessary to prove a motive or intention to discriminate.²⁷²

Despite emphasising the importance of context²⁷³ and the irrelevance of the respondent’s motives, Kiefel J ultimately held that the relevant conduct was not done

²⁶¹ *Creek* (n 90).

²⁶² Human Rights and Equal Opportunity Commission, *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (Report, 1997).

²⁶³ *Creek* (n 90) 356 [13].

²⁶⁴ *Ibid* 355 [6].

²⁶⁵ *Ibid* 356 [13].

²⁶⁶ *Ibid* 359–60 [27]–[29].

²⁶⁷ *Ibid* 355 [12], citing *Hagan* (n 90) [15].

²⁶⁸ See *Hagan* (n 90) [39].

²⁶⁹ *Creek* (n 90) 359 [25]. It is unclear if there is any practical difference between race being a ‘reason’ for the making of the decision, and race being a ‘material factor’ in the making of the decision.

²⁷⁰ *Ibid* 358–9 [22]–[23].

²⁷¹ *Ibid* 358 [23].

²⁷² *Ibid* 359–60 [26].

²⁷³ Justice Kiefel stated that ‘[t]he context of the article is of course race’: *ibid* 359 [28].

‘because of race’.²⁷⁴ Rather, her Honour characterised the respondent’s conduct as thoughtless, rather than unlawful.²⁷⁵ This decision is difficult to reconcile with her Honour’s emphasis on context, and the irrelevance of motive. The decision seems to be based on an extremely narrow view of the impugned conduct. Justice Kiefel focused on the respondent’s decision regarding the choice of photographs used in the report, rather than on the effect of the news report as a whole. Her Honour held that *this particular decision* was not shown to be motivated by considerations of race.²⁷⁶ Considering that the newspaper report referred to the *Bringing Them Home* report,²⁷⁷ and the context clearly pertained to issues of the welfare of Aboriginal children, this decision seems hard to justify. Determined objectively, issues of race seem to have actuated the respondent’s conduct in constructing and publishing the report in the way that it did.²⁷⁸ As Kiefel J highlighted, proof of racial hatred (or even malice) is not required for an infringement of s 18C.²⁷⁹

These decisions highlight that judges sometimes appear to make a ‘qualitative assessment of the motivation behind the respondent’s conduct’.²⁸⁰ This requires the complainant to prove ‘something equivalent to malevolence’, which seems inconsistent with objectively assessing the effect of the conduct in question.²⁸¹ In addition, this interpretation ‘has the potential to significantly limit the scope of [s 18C]’.²⁸²

2 *How Should ‘Because of Race’ Be Interpreted?*

The proper interpretation of the wording ‘because of race’ in s 18C is complicated by s 18B, which provides that ‘the race, colour or national or ethnic origin’ of the person or group need only be *one* of the reasons for the respondent’s conduct.²⁸³ This section appears to be intended to assist complainants, by clarifying that race need not be the *only* reason, or the dominant reason, for the conduct.²⁸⁴ However, the use of the term ‘reason’ appears to draw attention to the respondent’s reasons, or motive, for acting as they did.²⁸⁵

²⁷⁴ Ibid 359 [29].

²⁷⁵ Ibid. Justice Kiefel stated that ‘[a] finding of contravention would have meant that the respondent had acted for racist reasons’: at 360–1 [35].

²⁷⁶ Ibid 359–60 [28]–[29].

²⁷⁷ Human Rights and Equal Opportunity Commission (n 262).

²⁷⁸ McNamara (n 7) 94.

²⁷⁹ *Creek* (n 90) 357 [18].

²⁸⁰ McNamara (n 7) 93.

²⁸¹ Ibid. The objective nature of the assessment was emphasised in *Hagan* (n 90) [15] (Drummond J), and in *Creek* (n 90) 355 [12] (Kiefel J).

²⁸² McNamara (n 7) 94.

²⁸³ See also *RDA* (n 1) s 18A, which applies to pt II of the *RDA*.

²⁸⁴ Rees, Rice and Allen (n 62) 707.

²⁸⁵ McNamara (n 7) 92.

This is how s 18B was interpreted by Kiefel J in *Toben v Jones* ('*Toben*').²⁸⁶ In this decision, her Honour emphasised her approach in *Creek*, stating that courts must determine 'what ... the *reason* for the conduct in question [was]',²⁸⁷ and that a racially based motive is required.²⁸⁸ In this case, Kiefel J was not willing to impute such a motive to the respondent, based on the highly offensive nature of the statements he made asserting that Jewish people exaggerate the extent of the Nazi Holocaust for political advantage.²⁸⁹ Rather, her Honour suggested that the defendant may have been 'pursuing an historical ... discourse ... [in which] offence cannot be avoided'.²⁹⁰ Her Honour also stated that proving a racially-based motive is different to proving 'a lack of sensitivity or even thought towards others'.²⁹¹ Finally, her Honour stated that pt IIA of the *RDA* 'does not render unlawful insensitive statements or those made in poor taste'.²⁹²

With respect, Kiefel J's holding that the phrase 'because of race' requires proof of a 'racially based motive' is clearly incorrect. First, this requirement replaces the words 'because of race' with a different test. Second, s 18B is intended to clarify the relevance of race — that race must be one of the reasons, rather than other, non-discriminatory, reasons.²⁹³ Third, scholars such as Beth Gaze have noted that judges tend to focus on notions of individual fault and blame when interpreting and applying the *RDA*.²⁹⁴ This seems to be exemplified in Kiefel J's approach to 'because of race'.²⁹⁵

In *Eatock*, Bromberg J took an alternative, and preferable, approach to interpreting 'because of race'. His Honour noted that 'the inquiry ... is not to be limited to the explanation given by the person whose conduct is at issue or that person's genuine understanding as to his or her motivation'.²⁹⁶ This is because "'their insight might be

²⁸⁶ *Toben* (n 9).

²⁸⁷ *Ibid* 531 [61] (emphasis in original).

²⁸⁸ *Ibid* 531 [62].

²⁸⁹ Justice Kiefel held that determining whether a statement or other conduct is likely to offend or insult a group (the issue under s 18C (1)(a)) is 'a separate question' from the inquiry as to the respondent's motive (s 18C(1)(b)): *ibid* 531 [64].

²⁹⁰ *Ibid* 532 [70].

²⁹¹ *Ibid* 532 [69].

²⁹² *Ibid*. Justice Kiefel's approach to interpreting 'because of race' in *Toben* has not been followed by subsequent decisions. It represents an extreme judicial emphasis on the need to prove a racially-based motive on the part of the defendant.

²⁹³ Rees, Rice and Allen (n 62) 707. The key word in s 18B is therefore 'race', not 'reason'. Indeed, the word 'reason' seems to be copied by the draftsman from pt II.

²⁹⁴ Gaze (n 53).

²⁹⁵ *Ibid*. Gaze notes that judges' emphasis on motive, in interpreting the *RDA*, seems to be underpinned by the assumption that the purpose of the *RDA* is to address abhorrent individual conduct, rather than eliminate racial discrimination. It is also underpinned by assumptions regarding the stigma attached to defining certain conduct as 'racist'.

²⁹⁶ *Eatock* (n 8) 336 [325] (Bromberg J), citing *Toben* (n 9) 531 [63] (Kiefel J).

limited” and they “might not always be a reliable witness as to their own actions”²⁹⁷ This emphasises the objective nature of the assessment made by a court in determining the ‘true reason’ for the act.²⁹⁸ As Bromberg J noted, focusing on the impugned conduct itself (‘[w]hat the person actually said or did’) ‘may be a more reliable basis for discerning that person’s true motivation’, rather than relying on explanations provided at a later stage.²⁹⁹

Justice Bromberg’s approach is consistent with Gelber’s analysis of the dynamics of racial vilification. Gelber notes that it is difficult for a judge (or anyone else) to determine with any certainty the motive or intention of another person. Indeed, she highlights that racial vilification has the effect of discrediting members of the target group, who are typically less powerful than the hate speaker.³⁰⁰ As mentioned above, Gelber argues that the focus should be on ‘empirically examinable’ evidence, such as the actual words used by the defendant, and the surrounding circumstances, including the effect on members of the target group, rather than seeking to determine a defendant’s motive or intention.

In summary, Bromberg J’s approach to interpreting ‘because of race’ is preferable to that of Kiefel J (in *Creek* and in *Toben*). First, Bromberg J’s approach is consistent with the objective nature of the inquiry, which has been emphasised by many judges (including Kiefel J). Requiring (as Kiefel J does) proof of a ‘racially based motive’ is not consistent with an objective approach to interpreting and applying s 18C. Second, requiring proof of a ‘racially based motive’ is not consistent with the language of s 18C (‘because of race’). This is particularly so given s 18C pertains to civil (rather than criminal) liability, not otherwise containing a fault element.³⁰¹ Third, it is almost impossible for a complainant to prove that the defendant had a ‘racially based motive’, and this interpretation, therefore, does not support the legislative purpose of eliminating racial discrimination in all its forms. Finally, as was argued above, racial vilification laws should be regarded as rights-protecting legislation. Therefore, such laws should be interpreted in a broad and beneficial manner. A beneficial interpretation of ‘because of race’ is broadly along the lines of Bromberg J’s approach in *Eatock*. This approach seeks to determine the ‘reasons’ for the relevant act by focusing on objective criteria, such as the nature of the defendant’s conduct, and the surrounding circumstances (including the historical relationship between the speaker and members of the target group).

²⁹⁷ *Eatock* (n 8) 336 [325], quoting *Toben* (n 9) 531 [63] (Kiefel J). These words seem to cover cases of unconscious bias, where a person is in fact motivated by prejudiced views but is unaware of these views: see *Freeman* (n 56).

²⁹⁸ *Eatock* (n 8) 336 [325]. In this context, ‘objective’ means that judges independently and critically review the ‘reason’ for the act, based on the words used and the surrounding circumstances.

²⁹⁹ *Ibid.* Justice Bromberg stated that ‘[r]ace, colour and ethnicity were vital elements of the message [made by the respondents] and therefore a motivating reason for conveying the message’: at 337 [327].

³⁰⁰ Gelber (n 175) 86–7.

³⁰¹ See, eg, *Criminal Code Act 1995* (Cth) sch 1 ch 2 pt 2.2 div 5.

V CONCLUSION

This article has argued that racial vilification should be considered a form of racial discrimination for two main reasons. First, two Federal Court decisions have determined that racially offensive speech may infringe the prohibition on racial discrimination contained in the *RDA*. Specifically, such speech will contravene s 9 if it limits a person's equal enjoyment of human rights in any field of public life. Second, prohibitions on racial discrimination and vilification both seek to protect the autonomy and dignity of individuals. In particular, these laws seek to protect members of racial and ethnic minorities from conduct that has the effect of excluding them from full participation in the community. Racial vilification laws therefore seek to promote equal access to civic life, which (as Kymlicka highlights) is fundamental in a liberal democracy based on multiculturalism.

Relatedly, this article examined whether the distinction between conduct and speech, on which free speech is based, can be maintained. It examined Gelber's arguments regarding speech act theory, which emphasise that many forms of speech (or speech acts) do more than merely describe something or advance a proposition. Many speech acts are recognised (legally and socially) as having direct and immediate practical effects. Gelber argues that racial vilification has direct effects on members of target groups, who are presented as inherently inferior and naturally subordinate. The effects of racial vilification are very similar to those of racial discrimination, particularly as both commonly involve subordination or exclusion of members of vulnerable racially-defined groups.

Understanding racial vilification as a type of discrimination, rather than as an exercise of free speech, has two main implications. First, it highlights the harms of such conduct, particularly regarding its impact on the dignity and autonomy of its victims. Protection from such conduct, just like protection from racial discrimination, can be considered a fundamental right. Therefore, s 18C can be regarded as rights-protecting, rather than merely rights-limiting. This means that such provisions should be interpreted in a broad and beneficial manner, rather than restrictively, consistent with the legislative purpose of eliminating racial discrimination.

Second, framing racial vilification as a discrimination issue challenges the free speech paradigm in which racial vilification laws such as pt IIA of the *RDA* are commonly understood. It challenges the distinction between words and conduct on which concepts of free speech are based. In a free speech paradigm, speech is associated with ideas, rather than effects. However, focusing on speech as conduct highlights its effects on particular people, and particularly on members of marginalised groups. Scholars such as Gelber argue that racial vilification is a form of racial subordination, achieved by means of legitimising notions of the racial superiority of certain groups, and the inferiority of others. Framing racial vilification laws in this way invokes a long history of struggle for racial equality, demonstrated, for example, in international treaties to which Australia is a party, such as the *ICCPR* and *ICERD*. This understanding of racial vilification laws can contribute to a richer debate concerning the legitimacy and importance of such laws in a liberal democracy, and particularly one based on multiculturalism, such as Australia.