ANTI-VILIFICATION LAWS AND PUBLIC RACISM IN AUSTRALIA: MAPPING THE GAPS BETWEEN THE HARMS OCCASIONED AND THE REMEDIES PROVIDED

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I INTRODUCTION

Despite a lively debate in Australia[1] and internationally[2] about the operation of anti-vilification laws, notably absent from these debates has been empirical evidence of the ways in which targeted communities experience racially and religiously motivated abuse. In this article we aim to contribute to addressing this significant gap. We report on interviews conducted with target community members to identify and map the gaps that exist between the *coverage* of

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1 See, eg, Luke McNamara, *Regulating Racism: Racial Vilification Laws in Australia* (Sydney Institute of Criminology, 2002); Katherine Gelber and Adrienne Stone (eds), *Hate Speech and Freedom of Speech in Australia* (Federation Press, 2007); Anna Chapman and Kathleen Kelly, 'Australian Anti-vilification Law: A Discussion of the Public/Private Divide and the Work Relations Context' (2005) 27 *Sydney Law Review* 203; Katharine Gelber, 'Implementing Racial Anti-vilification Laws in New South Wales, 1989–1998: A Study' (2000) 59(1) *Australian Journal of Public Administration* 13; Lawrence McNamara, 'The Things You Need: Racial Hatred, Pauline Hanson and the Limits of the Law' (1998) 2 *Southern Cross University Law Review* 92; Dan Meagher, 'So Far So Good?: A Critical Evaluation of Racial Vilification Laws in Australia' (2004) 32 *Federal Law Review* 225; Dilan Thampapillai, 'Inconsistent at Best?: An Analysis of Australia's Federal Racial Vilification Laws' (2010) 9 *Canberra Law Review* 106.

2 See, eg, Eric Heinze and Gavin Phillipson, *Debating Hate Speech* (Hart, 2015); Ishani Maitra and Mary Kate McGowan (eds), *Speech and Harm: Controversies Over Free Speech* (Oxford University Press, 2012); Michael Herz and Peter Molnar (eds), *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge University Press, 2012); Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press, 2012); Ivan Hare and James Weinstein (eds), *Extreme Speech and Democracy* (Oxford University Press, 2009); Marcel Maussen and Ralph Grillo, 'Regulation of Speech in Multicultural Societies: Introduction' (2014) 40 *Journal of Ethnic and Migration Studies* 174.

Australian laws and the *lived experience* of racially and religiously motivated abuse. These gaps emerge both from the structures of the laws themselves, and from the ways in which the law (necessarily) cannot cover all incidents of racially and religiously motivated abuse. Identifying these gaps is, in itself, an original contribution to the literature.

We also discuss the implications of these gaps. We do not argue that anti-vilification laws should be expanded to cover all experiences of racially and religiously motivated abuse – that would broaden the law too far, with attendant risks for freedom of speech and the law's symbolic and legal efficacy. Rather, we argue that the identification of these gaps has three benefits. First, it enables a more precise assessment of the limits of existing laws when it comes to combating public expressions of racially and religiously motivated abuse. Secondly, it reaffirms the symbolic importance of the law in contributing to (but not substituting for) broader anti-prejudice strategies in the community. Thirdly, it provides a framework within which to consider the allocation of resources to educative and campaign-based approaches to combat racially and religiously motivated abuse.

The article is organised as follows. The first Part outlines the scope of two models in Australia of the statutory civil wrong[3] of unlawful racial vilification.[4] The first model is what we call the 'NSW model' – established in New South Wales in 1989[5] and, with some variations, followed in Queensland,[6] Tasmania,[7]

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3 We focus on only the civil provisions in this article because the vast majority of cases are dealt with under the civil law. To our knowledge, three successful prosecutions have been undertaken under WA's criminal laws: Katharine Gelber and Luke McNamara, 'The Effects of Civil Hate Speech Laws: Lessons from Australia' (2015) 49 *Law and Society Review* 631, 635–6, and one successful prosecution in 2015 in Queensland: Australian Associated Press, 'Teen's Racist Brisbane Train Rant Disgusting: Magistrate', *Brisbane Times* (online), 14 September 2015 <http://www.brisbanetimes.com.au/queensland/teens-racist-brisbane-train-rant-disgusting-magistrate-20150914-gjm2e7.html>.

4 In this article we use the term 'vilification' to mean conduct defined in current statutory provisions in Australian jurisdictions in the terms used in that legislation and relevant judicial interpretation. We differentiate this from 'racially and religiously motivated abuse', which is a broader category inclusive of all speech-acts that are abusive on the ground of race, nationality, ethnicity and religion. We define 'speech-acts' as racially and religiously motivated abuse whether or not they would reach the threshold required to constitute unlawful conduct under federal, state or territory anti-vilification laws. We view 'racially and religiously motivated abuse' in the terms used in Parekh's broad definition of 'hate speech', namely a speech-act that is 'directed against a specified or easily identifiable individual or … a group of individuals based on an arbitrary and normatively irrelevant feature', which 'stigmatizes the target group by implicitly or explicitly ascribing to it qualities widely regarded as highly undesirable', and in which 'the target group is viewed as an undesirable presence and a legitimate object of hostility': Bhikhu Parekh, 'Is There a Case for Banning Hate Speech?' in Michael Herz and Peter Molnar (eds), *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge University Press, 2012) 37, 40–1.

5 *Anti-Discrimination (Racial Vilification) Amendment Act 1989* (NSW).

6 *Anti-Discrimination Act 1991* (Qld) s 124A.

7 *Anti-Discrimination Act 1998* (Tas) s 19. In 2013 the Tasmanian Parliament added a second provision to the Act which more closely resembles the Commonwealth model in that it prohibits any conduct (not limited to public conduct) that 'offends, humiliates, intimidates, insults or ridicules another person' because of any one of a broad range of attributes including race: *Anti-Discriminaiton Act 1998* (Tas) ss 16(a), 17, as amended by *Anti-Discrimination Amendment Act 2013* (Tas) s 9.

Victoria,[8] the Australian Capital Territory[9] and South Australia.[10] The second is the 'Commonwealth model' in section 18C of the federal *Racial Discrimination Act 1975* (Cth).[11] This Part outlines the commonalities and differences between these two models, and highlights some areas in which the legislation fails to provide coverage to acts of public vilification. In the second Part we report on qualitative data collected in interviews conducted with members of Indigenous and minority ethnic communities in Australia regarding their experiences of racially and religiously motivated abuse.[12] We highlight five aspects of these experiences that illuminate the gaps between the law's coverage of racial vilification and the experiences of racially and religiously motivated abuse that these community members face: (i) the frequency and routine nature of such abuse; (ii) the spontaneity of the abuse in settings that can make it difficult to identify a respondent; (iii) the cumulative effects of more moderate types of expression; (iv) the wide spectrum of harms; and (v) low levels of knowledge about the existence of anti-vilification laws, combined with strong support for their retention as a symbol of the government drawing a 'line in the sand' on acceptable public behaviour. Where the gaps that we have identified empirically in Australia map onto the claimed effects of public racism (or 'hate speech') in the relevant literature, we make that connection in our discussion. We conclude by drawing out the implications of these findings for legislative reform and public campaigning.

II THE SCOPE OF AUSTRALIAN ANTI-VILIFICATION LAWS

In order to assess the ways in which existing Australian racial vilification laws respond to the types of racially and religiously motivated abuse experienced by racial and ethnic minority communities in Australia, an appreciation of the scope of existing laws is essential. How is the category of unlawful speech defined?

There are two models of civil laws in Australia. The first is the NSW model, which, as noted above, was introduced by the NSW Parliament in 1989, and has been adopted in several other jurisdictions in the federation. The second is the Commonwealth model reflected in section 18C of the *Racial Discrimination Act 1975* (Cth), as amended by the *Racial Hatred Act 1995* (Cth). The two models adopt different thresholds, and different perspectives for determining whether conduct is sufficiently harmful to constitute unlawful speech.

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8 *Racial and Religious Tolerance Act 2001* (Vic).

9 *Discrimination Act 1991* (ACT) ss 65–7.

10 *Civil Liability Act 1936* (SA) s 73 (a tort of racial victimisation, created in 1998).

11 The NT has not enacted racial vilification laws, and WA has taken a unique regulatory approach, involving the creation of several criminal offences, but no civil provisions: see Gelber and McNamara, 'The Effects of Civil Hate Speech Laws', above n 3, 635.

12 Further details on the interview methodology are provided below n 76.

A The NSW Model

The *Anti-Discrimination (Racial Vilification) Amendment Act 1989* (NSW) added section 20C to the *Anti-Discrimination Act 1977* (NSW):[13]

> (1) It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group.
>
> (2) Nothing in this section renders unlawful:
>
> (a) a fair report of a public act referred to in subsection (1), or
>
> (b) a communication or the distribution or dissemination of any matter on an occasion that would be subject to a defence of absolute privilege … in proceedings for defamation, or
>
> (c) a public act, done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter.

The burden is on the complainant to prove on the 'balance of probabilities' that the respondent engaged in conduct that constituted unlawful vilification under section 20C(1).[14] Where a respondent seeks to assert that the impugned conduct falls within one of the exemption categories in section 20C(2), the respondent carries the burden of proof in relation to that claim.[15]

There are five distinctive features of the NSW model that are relevant to understanding the parameters of the category of unlawful conduct. First, only *public* behaviour may qualify as unlawful.[16] Even where the impugned conduct occurs in a public place, a private conversation does not constitute a 'public act'.[17] However, speech directed by one individual towards another can constitute a public act if it is reasonably foreseeable that a member of the public could have heard it.[18]

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13 Anti-vilification laws in NSW have since been extended to other grounds: transgender identity (*Anti-Discrimination Act 1977* (NSW) s 38S), homosexuality (s 49ZT), and HIV/AIDS status (s 49ZXB).

14 *Burns v Nine Network Australia Pty Ltd* [2011] NSWADTAP 25 (20 May 2011) [15]–[19] (O'Connor P, Member Furness and Ms Antonios).

15 *Corbett v Burns* [2014] NSWCATAP 42 (14 August 2014) [29] (Hennessy DP, Senior Member Wakefield and Member Field).

16 Under s 20B of the *Anti-Discrimination Act 1977* (NSW), a 'public act' is defined as:

> (a) any form of communication to the public, including speaking, writing, printing, displaying notices, broadcasting, telecasting, screening and playing of tapes or other recorded material, and
>
> (b) any conduct (not being a form of communication referred to in paragraph (a)) observable by the public, including actions and gestures and the wearing or display of clothing, signs, flags, emblems and insignia, and
>
> (c) the distribution or dissemination of any matter to the public with knowledge that the matter promotes or expresses hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group.

17 *Barry v Futter* [2011] NSWADT 205 (30 August 2011) [73] (Member Wright, Ms Lowe and Ms Newman).

18 For example in *Khalil v Sturgess* [2005] VCAT 2446 (17 October 2005) instances of abuse shouted at the front of a residential house and over the back fence from a neighbouring property were regarded as public acts. The Tribunal found that racial abusive comments 'were made loudly for the Khalils and any of their guests and any neighbours or member of the public in the vicinity to hear': at [51] (McKenzie DP).

Secondly, under the NSW model (and the Commonwealth model, discussed below) only a member of the targeted group at which the allegedly unlawful conduct is directed has standing to lodge a complaint and pursue civil litigation.[19] This means that the regulatory scheme is reliant upon 'citizen' initiation; the state has no role to play in initiating or carrying through complaints, or in bringing a matter to a tribunal or court.[20] So, for example, a non-Aboriginal person who encounters public conduct that she or he believes breaches anti-vilification legislation – for example, comments made in a column in a newspaper that vilify Aboriginal people, or racist abuse that takes place on the street – has no standing to take legal action in relation to the conduct in question. It has been held that this restriction precluded a 'white caucasian Australian' from pursuing a racial vilification complaint in relation to anti-Asian comments directed at him and his Indonesian wife and their children.[21] Representative complaints by an organisation are possible, but only if the organisation has a 'sufficient interest' in the complaint to give it standing.[22]

Thirdly, 'race' is defined broadly as including 'colour, nationality, descent and ethnic, ethno-religious or national origin',[23] and has been interpreted as including Jews and excluding Muslims.[24] (Religious religious vilification is expressly covered in only Victoria, Queensland and Tasmania.[25]) In *Ekermawi v Network Ten Pty Ltd*, the NSW Administrative Decisions Tribunal acknowledged that

> there does indeed seem to be a disparity in the way that courts have classified Jews as members of an ethno-religious group whereas Muslims, who come from diverse ethnic backgrounds, have not been characterised as a race. Nevertheless, the authorities are clear that Islam per se is not an ethno-religious origin under the provisions of the *Anti-Discrimination Act*.[26]

Fourthly, the words used to describe the harm threshold – hatred, serious contempt or severe ridicule – are based on the common law definition of defamation, with the threshold raised by the inclusion of the adjectives 'serious' and 'severe' to qualify contempt and ridicule respectively. The case law confirms that these words are to be given their ordinary meanings and that conduct need be

19 See, eg, *Anti-Discrimination Act 1977* (NSW) s 88.

20 See Katharine Gelber and Luke McNamara, 'Private Litigation to Address a Public Wrong: A Study of Australia's Regulatory Response to "Hate Speech"' (2014) 33 *Civil Justice Quarterly* 307.

21 *Alchin v Rail Corp (NSW)* (2012) 225 IR 171, 174 [4].

22 See, eg, *Anti-Discrimination Act 1977* (NSW) ss 87A(1)(c), 87C; *Racial and Religious Tolerance Act 2001* (Vic) s 20.

23 *Anti-Discrimination Act 1977* (NSW) s 4.

24 *Khan v Commissioner, Department of Corrective Services* [2002] NSWADT 131 (31 July 2002); *Ahmed v Macquarie Radio Network (Radio Station 2GB)* [2006] NSWADT 89 (27 March 2006); *Alchin v Rail Corp (NSW)* (2012) 225 IR 171. See also Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination Law* (Federation Press, 2nd ed, 2014) 194–6.

25 *Racial and Religious Tolerance Act 2001* (Vic) s 8; *Anti-Discrimination Act 1991* (Qld) s 124A; *Anti-Discrimination Act 1998* (Tas) s 19.

26 [2008] NSWADT 334 (18 November 2008) [7] (Hennessy DP).

capable of having only one of the three listed effects to constitute unlawful vilification.[27]

Fifthly, the definition does not consider the effect of the alleged vilification on the individual or community at which it is directed, or the intention of the speaker and/or actor. Rather, the relevant inquiry is an objective test[28] of whether the behaviour is capable of inciting reasonable members of the 'audience' of the public act to hate, have serious contempt for, or severely ridicule the targeted group. For the purposes of this assessment, the hypothetical reasonable audience member is 'an ordinary, reasonable person not immune from susceptibility to incitement, nor holding racially prejudiced views'.[29] The audience needs to be clearly identified in order to assess whether, on an objective test, the impugned conduct was capable of inciting ordinary members of *that* audience to hatred, serious contempt or severe ridicule of the target group.[30] For example, in *Jones v Trad*,[31] the NSW Court of Appeal ruled that it was not acceptable to assume that the listeners of a particular radio program would have the same comprehension and reaction as 'a hypothetical ordinary reasonable person drawn from the population at large'.[32] The Court held that the Tribunal was not in a position to pass judgment on Mr Jones' conduct – specifically, on whether the 'incitement' element of the definition of unlawful racial vilification could be satisfied – unless it had before it information about listeners to Mr Jones' radio program.[33] This approach has the potential to constrain the scope of NSW model vilification laws, because of the evidentiary challenges posed by a requirement that the complainant identify, with some precision, the 'audience' for a particular act of alleged vilification.[34]

27 *Western Aboriginal Legal Service Limited v Jones* [2000] NSWADT 102 (31 July 2000) [112] (Mr Luger, Member Rees, Mr Silva).

28 *Burns v Laws (EOD)* [2008] NSWADTAP 32 (16 May 2008) [32] (O'Connor P, Member Grotte and Ms Nemeth de Bikal).

29 *Burns v Dye* [2002] NSWADT 32 (12 March 2002), [22] (Member Britton, Mr Silva and Ms Toltz), quoting *Inquiry into Broadcasts by Ron Casey* (1989) 3 BR 351, 357.

30 See *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* (2006) 15 VR 207, 255 [160] (Neave JA); *Margan v Manias* [2014] NSWCATAP 16 (9 May 2014) [27] (Hennessy DP, Senior Member Wakefield and Ms Antonios).

31 (2013) 86 NSWLR 241.

32 Ibid 257 [71] (Ward JA) quoting *Jones and Harbour Radio Pty Ltd v Trad (EOD)* [2011] NSWADTAP 19 (27 April 2011) [60] (Madgwick DP, Member Perrignon and Ms Hayes).

33 *Jones v Trad* (2013) 86 NSWLR 241, 255 [61], 258 [77].

34 In December 2014, after a re-hearing in accordance with the NSW Court of Appeal's decision, Trad's complaint against Jones was again upheld: *Trad v Jones [No 7]* [2014] NSWCATAD 225 (19 December 2014).

A useful summary of the parameters of unlawful vilification in NSW was given in 2012 in the NSW Court of Appeal in *Sunol v Collier [No 2]*.[35] Chief Justice Bathurst stated:

> (a) Incite means to rouse, to stimulate, to urge, to spur on, to stir up or to animate and covers conduct involving commands, requests, proposals, actions or encouragement.
>
> (b) It is not necessary for a contravention that a person actually be incited.
>
> (c) It is not sufficient that the speech, conduct, or publication concerned conveys hatred towards, serious contempt for, or serious ridicule of … [the targeted group]; it must be capable of inciting such emotions in an ordinary member of the class to whom it is directed.
>
> (d) It is not necessary to establish an intention to incite.
>
> (e) For the public act to be reasonable within the meaning of … [the sub-section 2 exemption categories] it must bear a rational relationship to the protected activity and not be disproportionate to what is necessary to carry it out.
>
> (f) For the act in question to be done in good faith, it must be engaged in bona fide and for the protected purpose.[36]

Table 1 summarises some illustrative cases where a tribunal or court has determined that conduct constituted unlawful vilification under the model adopted in NSW – ie, where a complaint was upheld.[37] It is to be noted that nationally, only approximately 1.8 per cent of complaints are referred to a court or tribunal for adjudication, and in approximately half of these cases the complaint is upheld.[38] Adjudicated outcomes are therefore not representative of all matters in which unlawful racial vilification is found to have occurred. Approximately 200 vilification complaints are received (across all Australian jurisdictions) every year.[39]

35 (2012) 289 ALR 128. Note that although the case involved alleged homosexual vilification: *Anti-Discrimination Act 1977* (NSW) s 49ZT, the summary applies equally to the scope of unlawful racial vilification. This point has been subsequently confirmed by the NSW Court of Appeal in a racial vilification case: *Jones v Trad* (2013) 86 NSWLR 241, 253 [52] (Ward JA): 'There is no dispute between the parties that the above analysis [in *Sunol v Collier [No 2]*] is equally applicable to the racial vilification provisions here under consideration'.

36 *Sunol v Collier [No 2]* (2012) 289 ALR 128, 137–8 [41].

37 The example cases in Table 1 (and in Table 2, below) have been selected from cases in which a racial vilification was upheld – based on a review of successful and unsuccessful adjudicated complaints from the early 1990s to 2015. They illustrate the types of behaviour (typically crude, racist slurs) that constitute the majority of successful complaints, and also provide some insight into the particular racial or ethnic groups for whose protection vilification laws have been successfully engaged.

38 Gelber and McNamara, 'Private Litigation To Avoid a Public Wrong', above n 20, 314. This figure was calculated by comparing the number of court and tribunal decisions handed down over a 20 year period with the number of complaints lodged during the same period.

39 Gelber and McNamara, 'The Effects of Civil Hate Speech Laws', above n 3, 641–2.

TABLE 1: Examples of Complaints Upheld under the NSW Model

A local government politician made a public speech in which he referred to Aboriginal title claimants as 'half-caste radicals' and described the local Aboriginal community's elders as savages.[40]
In a documentary screened on national television a police officer called an Aboriginal teenager a 'coon' and humiliated him while inspecting his vehicle in a public street.[41]
During the course of a dispute between neighbours, the respondent directed various comments at the complainant (who was of French Mauritian national origin) in various locations in and around the apartment complex at which they both resided, including 'Fuck off, you black slut. Go back to where you belong', 'Are you still here? Don't you understand I have to get rid of you?' and 'Fuck off, you black bitch'.[42]
Outside the Russian Club, in Sydney, in front of a group of people, the respondent shouted loudly: 'When Jews get involved everything turns to shit, because Jews are shits!'[43]
The applicant, of Yugoslavian background, was vilified by the respondent on 'citizen band radio'; he called her an 'import', 'gypsy', 'dago' and 'wog'.[44]
The applicants and their children were racially abused by two neighbours on multiple occasions, including by calling them (and their children) 'ugly monkeys', 'import fish', 'Fucking Arabs' and 'sand niggers', telling them to 'get the fuck out or get back to where you came from'.[45]

In 2014/2015, the Anti-Discrimination Board of NSW received 28 complaints under section 20C of the *Anti-Discrimination Act 1977* (NSW),[46] and the Australian Human Rights Commission received 116 complaints under section 18C of the *Racial Discrimination Act 1975* (Cth).[47]

The preferred mechanism for resolving alleged breaches of Australia's civil racial vilification laws is confidential conciliation.[48] Indeed, in most jurisdictions, a complainant cannot seek court or tribunal adjudication until conciliation has been attempted, or assessed by the relevant human rights agency as inappropriate.[49] Conciliation does lead to 'successful' outcomes for complainants in some cases, including instances in which the respondent concedes that the conduct complained of was unlawful.[50] However, as we have noted elsewhere,

> [u]nless the respondent agrees, as part of the settlement agreement, to make a public apology (or retraction or correction of something that appeared in a newspaper, on the internet, or on a radio broadcast), conciliation produces no

40 *Wagga Wagga Aboriginal Action Group v Eldridge* (1995) EOC 92–701.
41 *Patten v New South Wales* [1995] NSWEOT (21 January 1997).
42 *Anderson v Thompson* [2001] NSWADT 11 (5 February 2001).
43 *Cohen v Hargous [No 2]* [2006] NSWADT 275 (22 September 2006).
44 *Casey v Blume* [2012] QCAT 627 (21 November 2012).
45 *Kahlil v Sturgess* [2005] VCAT 2446 (23 November 2005).
46 Anti-Discrimination Board of NSW, *Annual Report 2014–15* (2015) 14.
47 Australian Human Rights Commission, *Annual Report 2014–15* (2015) 142.
48 For a fuller discussion and critique of the process, see Gelber and McNamara, 'Private Litigation To Avoid a Public Wrong', above 20, 312–20.
49 Ibid.
50 See Luke McNamara, above n 1, 158–9.

> opportunity for public condemnation of the conduct in question, nor for wider education and deterrence.[51]

Relevant agencies sometimes publish anonymised case studies in their annual reports or on their websites,[52] but the net effect of this feature of Australia's enforcement process for civil racial vilification laws is that the proportion of 'wins' which make their way on to the public record is small.

B The Commonwealth Model

Australia's national racial vilification law was introduced by the *Racial Hatred Act 1995* (Cth). Section 18C of the *Racial Discrimination Act 1975* (Cth) now states:

> (1) It is unlawful for a person to do an act, otherwise than in private, if:
>
> (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
>
> (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.
>
> (2) For the purposes of subsection (1) an act is taken not to be done in private if it:
>
> (a) causes words, sounds, images or writing to be communicated to the public; or
>
> (b) is done in a public place; or
>
> (c) is done in the sight or hearing of people who are in a public place.
>
> (3) In this section: '*public place*' includes any place to which the public have access as of right or by invitation, whether express or implied, and whether or not a charge is made for admission to the place.

Section 18D of the *Racial Discrimination Act 1975* (Cth) provides for exemptions:

> Section 18C does not render unlawful anything said or done reasonably and in good faith:
>
> (a) in the performance, exhibition or distribution of an artistic work; or
>
> (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or
>
> (c) in making or publishing:
>
> (i) a fair and accurate report of any event or matter of public interest; or
>
> (ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

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51 Gelber and McNamara, 'Private Litigation To Avoid a Public Wrong', above n 20, 316.

52 See, eg, Anti-Discrimination Board of NSW, *Conciliations – Vilification* (29 September 2015) <http://www.antidiscrimination.justice.nsw.gov.au/Pages/adb1_resources/adb1_equaltimeconciliation/conciliations_vilification.aspx>; Victoria Equal Opportunity and Human Rights Commission, *Annual Report 2013–14* (2014) 27.

In relation to the exemptions, the burden of proof falls on the respondent,[53] and an assessment of 'good faith' has both subjective and objective components. While it is necessary to have 'regard to the subjective purpose of the publisher', the final assessment is an 'objective determination as to whether the act may be said to have been done in good faith having regard to the degree of harm likely to be caused and to the extent to which the act may be destructive of the object' of the legislation.[54]

In identifying key characteristics of the Commonwealth model relevant to our discussion, we focus here on identifying similarities and differences. The first two characteristics of the Commonwealth model are common to it and the NSW model. The first is that, although the limitation is expressed differently ('otherwise than in private'), the Commonwealth law only addresses public speech. Conduct may only fall within the category of unlawful speech where it is capable of being heard by members of the public.[55] Second, only a member of the targeted group may lodge a complaint with the Australian Human Rights Commission and subsequently take proceedings in the Federal Court or the Federal Circuit Court if the complaint cannot be conciliated or is terminated.[56]

The third characteristic is similar, but not identical, to that of the NSW model; namely, the definition of race. The Commonwealth law covers the ground of 'race, colour or national or ethnic origin'. Like in NSW, this category has been held to include Jews, as a group with an 'ethnic origin'.[57] However the term 'ethno-religious' is not expressly included in the statute and surprisingly, after almost 20 years of operation, there has been no authoritative ruling as to whether the definition in the Commonwealth law includes Muslims as a group.[58] The likely answer, based on the jurisprudence associated with the terms 'race' and 'ethno-religious' in other jurisdictions,[59] is that it does not cover conduct that vilifies Muslims unless the conducts also vilifies a person defined by 'race, colour or national or ethnic origin'.

The remaining characteristics exhibit clear differences between the two models.[60] The fourth characteristic is the conception of harm that the legislation

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53 *Eatock v Bolt* (2011) 197 FCR 261, 339 [339] (Bromberg J); *Clarke v Nationwide News Pty Ltd* (2012) 201 FCR 389, 413 [116] (Barker J).

54 *Clarke v Nationwide News Pty Ltd* (2012) 201 FCR 389, 415 [131] (Barker J); *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105, 132 [96] (French J); *Eatock v Bolt* (2011) 197 FCR 261, 341 [346]–[348] (Bromberg J).

55 *Campbell v Kirstenfeldt* [2008] FMCA 1356, [42] (Lucev FM); *McLeod v Power* (2003) 173 FLR 31, 47 [73] (Brown FM); *APS Group (Placements) Pty Ltd v O'Loughlin* (2011) 209 IR 351, 359 [17]–[18] (Lawler V-P and Commissioner Roberts).

56 *Australian Human Rights Commission Act 1986* (Cth) s 46P; *Executive Council of Australian Jewry v Scully* (1998) 79 FCR 537, 543.

57 *Miller v Wertheim* [2002] FCAFC 156 [14] (The Court); *Jones v Scully* (2002) 120 FCR 243, 272 [113] (Hely J); *Jones v Toben* (2002) 71 ALD 629, 645 [69] (Branson J).

58 See Australian Human Rights Commission, *Federal Discrimination Law 2011: Chapter 3 – The Racial Discrimination Act* (at 21 October 2011) 17.

59 *King-Ansell v Police* [1979] 2 NZLR 531; *Mandla v Dowell Lee* [1983] 2 AC 548. See also *Ekermawi v Network Ten Pty Ltd* [2008] NSWADT 334 (18 November 2008).

60 See also Rees, Rice and Allen, above n 24, 670–2.

seeks to address. The Commonwealth law adopts a different harm threshold than the NSW model. That threshold is the question of whether or not the unlawful conduct is likely to *offend, insult, humiliate or intimidate* members of the targeted group. This formulation, which is unique among racial vilification statutes in Australia, was modelled on the sexual harassment provisions contained in the *Sex Discrimination Act 1984* (Cth).[61] While the language may appear to set a relatively low harm threshold, the courts have held that the standard to be met is conduct that has 'profound and serious effects, not to be likened to mere slights'.[62] For example, in *Eatock v Bolt* the Federal Court found that:

> The definitions of 'insult' and 'humiliate' are closely connected to a loss of or lowering of dignity. The word 'intimidate' is apt to describe the silencing consequences of the dignity denying impact of racial prejudice as well as the use of threats of violence. The word 'offend' is potentially wider, but given the context, 'offend' should be interpreted conformably with the words chosen as its partners.[63]

The Court further held that '"offend, insult, humiliate or intimidate" were not intended to extend to personal hurt unaccompanied by some public consequence' or 'public mischief' which the legislation aims to deter.[64]

A fifth and final characteristic relevant to our discussion is that the definition of unlawful conduct under the Commonwealth law does not involve an incitement component. The inquiry is not concerned with the likely effect on the wider audience of the conduct, as it is in NSW. The focus is on the negative effects of the conduct on members of the targeted group. Therefore, the reasonable person employed for the purpose of the objective assessment in section 18C is not a generic reasonable member of the community as a whole, but a reasonable person from the racial, ethnic, and/or national origin group to whom the conduct relates (ie, the '"reasonable victim" perspective').[65] The courts have held that '[p]roof of actual offence for a particular person or group is neither required nor determinative, although evidence of subjective reaction is relevant to whether offence was reasonably likely'.[66]

Examples of some cases where the Federal Court, Federal Magistrates Court or Federal Circuit Court have determined that conduct constituted unlawful racial vilification under the *Racial Discrimination Act 1975* (Cth) are provided in Table 2.

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61 Luke McNamara and Tamsin Solomon, 'The Commonwealth *Racial Hatred Act 1995*: Achievement or Disappointment?' (1996) 18 *Adelaide Law Review* 259, 267. See *Sex Discrimination Act 1984* (Cth) s 28A(1).

62 *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, 356 [16] (Kiefel J).

63 (2011) 197 FCR 261, 324 [265] (Bromberg J).

64 Ibid 325 [267] (Bromberg J).

65 Ibid 327 [278] (Bromberg J); *Clarke v Nationwide News Pty Ltd* (2012) 201 FCR 389, 401–2 [50] (Barker J).

66 *Eatock v Bolt* (2011) 197 FCR 261, 318 [241] (Bromberg J).

TABLE 2: Examples of Complaints Upheld under the Commonwealth Model

The respondent published an online newspaper article and subsequent reader comments regarding a car accident in which four young Aboriginal boys were killed. Reader comments included that the boys were 'criminal trash' and that 'I would use these scum as land fill'.[67]
A newspaper columnist wrote a factually inaccurate article about a number of 'fair-skinned Aboriginal persons' which suggested they fabricated or exaggerated their Aboriginality for personal advantage.[68]
The respondent distributed anti-Semitic pamphlets by placing them in residential letterboxes and made some of the leaflets available at a stall she operated at a public market.[69]
The respondent produced a website that contained Holocaust denial assertions and other anti-Semitic content.[70]
The applicant, a man of Indian origin with a 'dark complexion', was called 'coconut' and 'nigger' in public by his girlfriend's brother.[71]
The applicant was a security officer at a law courts building. The respondent verbally abused him in the building foyer, calling him a 'Singaporean prick' and telling him to go back to Singapore.[72]
The respondent verbally abused his neighbour, an Aboriginal woman in a manner that could be heard in public – including outside their homes adjacent to a public footpath and public reserve. He called her and her family names, including 'niggers', 'coons', 'black mole', 'black bastards' and 'lying black mole cunt'.[73]
The applicant, of Chinese origin, worked as a cashier at a butcher's store. She was sexually and racially harassed by another employee including being told 'Fuck off ching chong go back home'.[74]

This outline has highlighted similarities and differences between the two models for anti-vilification laws adopted in Australia. For the purposes of our argument here, it is important to acknowledge that the laws themselves have two limitations in their ability to respond to established cases of vilification, namely the requirement that a complainant be from the targeted group and the exclusion of anti-Muslim vilification from coverage. Below, we consider the operation of anti-vilification laws further, against the evidence we obtained in interviews concerning individuals' and communities' experiences of racially and religiously motivated abuse. This will enable us to map empirically further gaps between the law's remit and those experiences.

67 *Clarke v Nationwide News Pty Ltd* (2012) 201 FCR 389.
68 *Eatock v Bolt* (2011) 197 FCR 261. We have examined the wider ramification of this decision in Katharine Gelber and Luke McNamara, 'Freedom of Speech and Racial Vilification in Australia: "The Bolt Case" in Public Discourse' (2013) 48 *Australian Journal of Political Science* 470.
69 *Jones v Scully* (2002) 120 FCR 243.
70 *Jones v Toben* (2002) 71 ALD 629.
71 *Sidhu v Raptis* [2012] FMCA 338.
72 *Kanapathy v In De Braekt* [No 4] [2013] FCCA 1368.
73 *Campbell v Kirstenfeldt* [2008] FMCA 1356.
74 *San v Dirluck Pty Ltd* (2005) 222 ALR 91.

III EXPERIENCES OF RACIALLY AND RELIGIOUSLY MOTIVATED ABUSE

How does the prohibition of racial vilification in Australian legislation compare with the public racially and religiously motivated abuse experienced by Indigenous Australians and members of minority racial or ethnic communities? To answer this question we have analysed qualitative data arising from interviews conducted with 101 community members and key informants[75] from a range of Indigenous, minority ethnic and religious communities[76] as part of a national study of the impact of vilification laws in Australia. Elsewhere we have discussed what the data reveal about the harms associated with these experiences.[77] Here, we draw attention to the defining characteristics of racially and religiously motivated abuse as it is experienced in Australia – a necessarily far wider category than that of vilification – so as to assess and map the gaps between legal means of redress and those experiences.

In summary, the data support identification of the following characteristics of racially and religiously motivated abuse in Australia:

1. experiences of racially and religiously motivated abuse are frequent, indeed routine, for many Indigenous and ethnic communities;
2. racially and religiously motivated abuse occurs in multiple public settings and involves both direct and indirect expressions;
3. racially and religiously motivated abuse is not limited to gross slurs or epithets, and the cumulative effects of moderate abuse can be harmful;
4. the harms of racially and religiously motivated abuse cover a wide spectrum, and include both constitutive and consequential harms; and
5. anti-vilification laws are 'invisible' and inaccessible, but nonetheless, symbolically important to targeted communities.

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75 Key informants were community members who were active on behalf of their community, whether in a formal or informal representative capacity. All interviews were conducted in confidence and interviewees are identified by anonymous numeric identifiers that refer to the interview schedule.

76 A total of 55 qualitative, semi-structured, in-depth, paired (46) and individual (9) interviews were conducted on the authors' behalf by the Cultural and Indigenous Research Centre Australia ('CIRCA'). Interviews were conducted in urban areas (41), regional areas (6) and remote areas (8). Where necessary, interviews were conducted in a language other than English by CIRCA staff with the requisite language skills. English-language transcripts were provided to the authors. Interviews were conducted with members of the following groups: Aboriginal and Torres Strait Islander, Afghani, Australian-born Arabic-speaking Muslim, Australian-born Arabic-speaking Christian, Chinese, Indian, Jewish, Lebanese-born Christian, Lebanese-born Muslim, Sudanese, Turkish Alevi, Turkish Muslim, and Vietnamese. We recognise that harm may be caused by the repetition in this article of some of the reported abuse, and emphasise that we have only repeated those expressions for the legitimate research purpose of giving voice to the experiences of targets of racial vilification.

77 See Katharine Gelber and Luke McNamara, 'Evidencing the Harms of Hate Speech' (2016) 22 *Social Identities* 324.

We will use these characteristics to map the limitations of the law's ability to provide redress for public racism, as it is experienced by Indigenous and ethnic minorities in Australia.

A Frequent and 'Routine'

The interviews revealed that exposure to racially and religiously motivated abuse in public is a frequent, indeed routine, experience for many members of target groups, consistent with previous research findings and surveys.[78] One Indigenous interviewee said, 'I think for me … every day I get vilified.'[79] Another interviewee, originally from Afghanistan, reported that when studying or working 'people start teasing us, "oh yeah, terrorists", unfortunately for us it's a routine exercise and experience'.[80] Muslim vilification ('Islamophobia') is common.[81] It is experienced by followers of the Islamic faith, and other individuals assumed to be Muslims because of their appearance, dress, language or accent.

These experiences stand in contrast to the complaint-based and civil litigation orientation of Australia's regulatory system, which implicitly, through its complaints mechanisms, treats incidents of public vilification as discrete and isolated.[82] Evidently they are not. Rather, they form part of the everyday lived experience of racism in this country. This is unable to be reflected in a complaints-based legal framework for remedy and redress, which relies on an individual person (or representative group) from the maligned community lodging a complaint against a perpetrator which, in the vast majority of cases in which vilification is found to have occurred, results in a mediated and entirely confidential conciliation between the individual complainant and the individual respondent. As noted above, numbers of complaints are not clearly reported in the annual reports of the agencies tasked with facilitating those complaints, and annual reports include only a selection of anonymised stories. This significantly reduces the potential of the law to communicate a visible message to victims of racially and religiously motivated abuse that remedy or redress may be available.

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78 See, eg, Andrew Markus, 'Mapping Social Cohesion: The Scanlon Foundation Surveys 2014' (Report, Scanlon Foundation, 2014); Victorian Equal Opportunity and Human Rights Commission, *Reporting Racism: What You Say Matters*, Report (2013) ch 4; Angeline Ferdinand, Yin Paradies and Margaret Kelaher, 'Mental Health Impacts of Racial Discrimination in Victorian Aboriginal Communities: The Localities Embracing and Accepting Diversity (LEAD) Experiences of Racism Survey' (Report, Lowitja Institute, January 2013); Jeremy Jones, 'Report on Antisemitism in Australia: 1 October 2010 – 30 September 2011' (Report, Executive Council on Australian Jewry, 11 November 2011); Desmond Cahill et al, 'Religion, Cultural Diversity and Safeguarding Australia' (Report, Department of Immigration and Multicultural and Indigenous Affairs and Australian Multicultural Foundation, 2004).

79 Interviewee 3.

80 Interviewee 28.

81 In 2014 the Islamophobia Register Australia was launched: *Islamophobia Register Australia* <http://www.islamophobia.com.au>. It aims to facilitate accurate recordkeeping about incidents of Islamophobia and anti-Muslim sentiment in Australia. See Mariam Veiszadeh, 'When Faith Attracts the Wrong Attention', *Sydney Morning Herald* (Sydney), 11 October 2014, 35.

82 See discussion above at text corresponding to nn 41–4; see also Gelber and McNamara, 'Private Litigation To Avoid a Public Wrong', above n 20, 313–14.

B Spontaneity, Diverse Settings and the Difficulty of Perpetrator Identification

Our interviewees experienced and observed both face-to-face encounters of racially and religiously motivated abuse and the putting into wide circulation of negative attributes or stereotypes about a particular target group. Both types of expression are potentially covered by vilification laws, as long as they occur in public. However, comments for which there is a public, or otherwise accessible and verifiable record (eg, a newspaper article, radio broadcast, website comment or some social media posts) are more likely to provide the basis for a successful invocation of anti-vilification laws because they provide evidence of the conduct that occurred and they can assist in identifying the person who engaged in the conduct.

In contrast to this, many of the incidents reported by interviewees were not recorded; they were spontaneous, ephemeral utterances that occurred in a range of settings including the street, supermarkets, outside places of worship, on public transport, during community events, in schools and in universities. Although potentially covered by the relevant legislation (in that they occurred in public), enforcement is difficult in these circumstances. Additionally, the growth of social media environments has created more opportunities for individuals to engage in racially and religiously motivated abuse under the cover of anonymity.[83] Our interviewees felt this keenly:

> Social media and internet forums are rife with anti Semitic comments because people can hide behind anonymity …[84]

> When a young Sudanese girl was attacked by a dog, some social media comments on the news reports were unsympathetic and racist: 'they were just like it's a dog that has attacked a dog'.[85]

A corollary of the spontaneous nature of, and diverse locations for, many incidents of racially and religiously motivated abuse (including 'cyber racism') is that in many such instances, the perpetrators cannot be identified. There is nothing surprising in this finding, but it has important implications in terms of mapping the limits of existing vilification laws. It is clear that the need to identify a respondent is a significant barrier to enforcing the law.[86] This is because even if a target of racial vilification is inclined to attempt to seek legal redress by lodging

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83 See, eg, Laura Leets, 'Responses to Internet Hate Sites: Is Speech Too Free in Cyberspace?' (2001) 6 *Communication Law and Policy* 287; Danielle Keats Citron, *Hate Crimes in Cyberspace* (Harvard University Press, 2014); Emma A Jane, 'Beyond Antifandom: Cheerleading, Textual Hate and New Media Ethics' (2014) 17 *International Journal of Cultural Studies* 175; Emma A Jane, '"Your a Ugly, Whorish, Slut" – Understanding E-bile' (2014) 14 *Feminist Media Studies* 531; Saul Levmore and Martha C Nussbaum (eds), *The Offensive Internet: Speech, Privacy, and Reputation* (Harvard University Press, 2010); Abraham H Foxman and Christopher Wolf, *Viral Hate: Containing Its Spread on the Internet* (Palgrave Macmillan, 2013).

84 Interviewee 48.

85 Interviewee 26b.

86 Gail Mason, 'Regulating Cyber-Racism' (Paper presented at RDA@40 Conference 2015 – 40 Years of the *Racial Discrimination Act 1975* (Cth), Australian Human Rights Commission, Sydney, 19–20 February 2015).

a complaint, the exercise will be futile if the complainant is unable to identify the perpetrator. Some of the more explicit and directly confrontational types of public racism take this form, and so it is troubling to recognise that such incidents rarely attract legal sanctions.

On the other hand, we note both that the smart phone has enabled citizen journalism that can bring, and has brought, some incidents of racially and religiously motivated abuse to public and police attention,[87] and that conduct that occurs in cyberspace *can* be addressed using existing vilification laws.[88]

C Not Just Gross Slurs and Epithets

Many of the adjudicated cases in which conduct has been found to breach state or Commonwealth vilification laws have involved vitriol and/or gross racist slurs and epithets. The category of unlawful vilification is not limited to such conduct, either by statutory language or judicial interpretation,[89] but it appears that a claim that the relevant harm threshold has been satisfied is easier to sustain in such cases.[90] Our interview data confirmed that explicit racially and religiously motivated slurs are directed at visible minorities in public (eg, 'camel driver', 'wog', 'Lebo', 'fuckin old Muslim lady', 'terrorist', 'fucking Indians', 'bloody Jews', 'Chinese are rubbish', 'letterbox'),[91] but the forms of abuse that occur and are believed by community members to cause them harm are much wider.

One interviewee gave an example of an incident in which the words used were moderate, but the message deeply hurtful. At his place of business he was told by a member of the public, 'go back to your country … you do not belong to us'.[92] Another interviewee, a female Muslim originally from Turkey, told of having been ignored while trying to receive service in a store and being told, 'I didn't see you, I only saw a sheet'.[93] Indeed, one of the concerns that has been expressed about the operational scope of Australia's anti-vilification laws is that while they are capable of catching gross expressions of racism, more subtle and sophisticated forms of racism may go under the radar.[94] Our interviewees supported this concern, saying about racially and religiously motivated abuse that:

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87 Amelia Johns, 'Racism in Public: Why the Majority Will Be Silent No Longer', *The Conversation* (online), 15 April 2013 <http://theconversation.com/racism-in-public-why-the-majority-will-be-silent-no-longer-13484>.

88 See, eg, *Jones v Toben* (2002) 71 ALD 629; *Clarke v Nationwide News Pty Ltd* (2012) 201 FCR 389.

89 See *Eatock v Bolt* (2011) 197 FCR 261, 310–11 [206]–[209] (Bromberg J).

90 This assertion is based on our analysis of successful and unsuccessful cases from the early 1990s to 2015. See also Katharine Gelber and Luke McNamara, 'Changes in the Expression of Prejudice in Public Discourse in Australia: Assessing the Impact of Hate Speech Laws on Letters to the Editor 1992–2010' (2014) 20 *Australian Journal of Human Rights* 99, 112; Luke McNamara, above n 1, 66, 164; Thampapillai, above n 1.

91 Interviewees 32, 39, 35, 23, 47, 36.

92 Interviewee 28.

93 Interviewee 43.

94 Margaret Thornton, *The Liberal Promise: Anti–Discrimination Legislation in Australia* (Oxford University Press, 1990); Michael Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant?* (Ashgate, 2000); Lawrence McNamara, above n 1.

> it's in behaviours, it's not always in language, which is harder. So sometimes you can deal with language and you can take a legal recourse, but if it's people's attitudes … the looks you get … you feel ostracised.[95]

Our interviewees' testimony supports the argument in the literature that moderate behaviours, especially cumulatively over time, are just as capable of causing harm to targets as gross epithets.[96]

Another form of conduct reported by interviewees was media reporting and commentary that perpetuate racist stereotypes, including the ways in which crimes and other incidents involving members of a particular racial or ethnic group are reported.[97] Many interviewees expressed the view that media reporting of events can be distorted, focusing on extreme cases, and thereby contributing to and reinforcing stereotypes of ethnically or racially identified communities:

> Look, any time I pick up a paper and there's a story in there about Aboriginal people, it's nearly always negative. That hasn't changed and I don't know whether it will.[98]

> We feel very disappointed about the media's interest in reporting the negative side of China while there is so much … good news worth telling.[99]

> It's just a negative picture that you see in [the media] which actually portrays just the bad things about India. It never portrays the good things …[100]

> The media … make the connection that all Muslims are terrorists … they are taking all Muslims to be terrorists and linking Muslims with terrorism.[101]

> When they're saying something about African people, it's usually something bad or something negative, like violence …[102]

We are not suggesting that all of the incidents that prompted such comments constituted unlawful racial vilification. On the contrary, our point is that there is a considerable distance between the manner in which public racially and religiously motivated abuse is experienced – which can be quite moderate in form but harmful to targets – and the necessary limits that construct how unlawful conduct has been legislatively and procedurally constructed. For example, while it is highly unlikely that a single incident of media perpetuation of stereotypes will be regarded as meeting either the NSW model or Commonwealth model threshold, the cumulative negative effects of such messages can be profound.

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95 Interviewee 2.

96 Anthony Lester and Geoffrey Bindman, *Race and Law* (Longman, 1972) 371, 374; Teun A van Dijk, 'Elite Discourse and the Reproduction of Racism' in Rita Kirk Whillock and David Slayden (eds), *Hate Speech* (Sage, 1995) 24; Anne Twomey, 'Laws against Incitement to Racial Hatred in the United Kingdom' (1994) 1 *Australian Journal of Human Rights* 235; Kristen P Jones et al, 'Not So Subtle: A Meta-analytic Investigation of the Correlates of Subtle and Overt Discrimination' (2013) *Journal of Management* <http://jom.sagepub.com/content/early/2013/10/11/0149206313506466>.

97 See Gail Phillips, 'Reporting Diversity: The Representation of Ethnic Minorities in Australia's Television Current Affairs Programs' (2011) 139 *Media International Australia* 23; Anti- Discrimination Board of New South Wales, *Race for the Headlines: Racism and Media Discourse* (2003).

98 Interviewee 6a.

99 Interviewee 15.

100 Interviewee 21.

101 Interviewee 28.

102 Interviewee 26b. See also interviewee 26a.

D Both Constitutive and Consequential Harms[103]

In the voluminous literature on the merits or otherwise of vilification laws, there is a tendency among some opponents of 'hate speech' laws to be sceptical about whether the harms associated with some racially and religiously motivated abuse are sufficiently serious to warrant curtailment of the right to freedom of expression.[104] It is sometimes suggested or implied that the constitutive harms – the damage that incidents, singularly and cumulatively, do to individuals and communities on the receiving end – are less serious and less deserving of legal sanction than consequential harms – the risk that others will be encouraged to hold negative views of the group in questions and act on them in ways that are discriminatory or violent. Our interview data suggest that this view represents a false dichotomy in understanding the harms that arise from racially and religiously motivated abuse.

Interviewees reported that incidents of public racism produce a range of negative short and long-term effects, including feeling offended, upset, hurt and angry,[105] experiencing fear, intimidation and paranoia,[106] suffering diminished self-esteem,[107] feeling paralysed and silenced, both personally[108] and collectively,[109] and feeling excluded from the wider community.[110] The link between constitutive and consequential harms was attested to by some interviewees, specifically the concern that others will be influenced to adopt the prejudicial views expressed during the racist incident in question, noting that this effect can occur incrementally over time.[111] Steps taken by some targets of racially and religiously motivated abuse in the wake of incidents included modification of public behaviour in order to avoid censure and stereotyping, thereby restricting one's ability to exercise religious freedom,[112] restrictions on social interactions in public places,[113] unwillingness to identify with one's ethnicity in the workplace,[114] and electing to speak only English in public.[115]

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103 For a more detailed examination of these aspects of our qualitative research with targets of public racism in Australia, see Gelber and McNamara, 'Evidencing the Harms of Hate Speech', above n 77.

104 See, eg, Nadine Strossen, 'Regulating Racist Speech on Campus: A Modest Proposal?' in Henry Louis Gates, Jr et al (eds), *Speaking of Race, Speaking of Sex: Hate Speech, Civil Rights, and Civil Liberties* (New York University Press, 1994); Peter Molnar, 'Interview with Nadine Strossen' in Michael Herz and Peter Molnar (eds), *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge University Press, 2012) 378; Eric Heinze, 'Hate Speech and the Normative Foundations of Regulation' (2013) 9 *International Journal of Law in Context* 590.

105 Interviewees 33, 45, 13, 15.

106 Interviewees 36, 44, 50.

107 Interviewee 29.

108 Interviewee 48.

109 Interviewee 46a.

110 Interviewee 38.

111 Interviewees 45, 50.

112 Interviewee 29.

113 Interviewee 36.

114 Interviewee 39.

115 Interviewee 43.

The interviews provide powerful verification of what has long been asserted in the pro-hate speech law literature: that racially and religiously motivated abuse can produce tangible and serious harms that warrant the state's legal intervention.[116] Incidents reported in the interviews produced harm to the dignity of individuals from targeted Indigenous and ethnic minority communities. They undermined the assurance to which Waldron argues every community member is entitled: that a person may go about their business as equals unaccosted by assaults on their social standing.[117]

Our interviewees' experiences, therefore, draw attention to a gap between the concept of harm used as the standard for vilification under some Australian laws and the concept of harm as experienced by targets. The NSW model uses serious consequential harms as the standard: the threshold for actionable conduct is expressed in terms of hatred, serious contempt or severe ridicule. Deciding whether the threshold has been met therefore requires deciding whether the conduct in question is likely to have the *consequence* of inciting other listeners to adopt or manifest hatred, serious contempt or severe ridicule. Any constitutive harms that may have been suffered by an individual targeted by racially or religiously motivated abuse are neither sufficient nor relevant to render the conduct 'unlawful'. This means that laws based on the NSW model do not respond to constitutive harms, only some consequential ones.

By contrast and in this context, one of the strengths of Australia's federal law – section 18C of the *Racial Discrimination Act 1975* (Cth) – is that it is in fact suited to the task of taking seriously, and facilitating a regulatory response to, the constitutive harms of some racially and religiously motivated abuse. This is the case because the standard required is conduct that can 'offend, insult, humiliate or intimidate' its targets – in other words whether a reasonable member of the targeted group (and not an allegedly neutral reasonable person) could have experienced these constitutive harms. To this extent, the Commonwealth model is constructed in a way that better acknowledges the harms of racially and religiously motivated abuse than the NSW model is able to do. This means the national law is sensitive to targets' perspectives in understanding such abuse, an approach that resonates with an argument in the scholarly literature that doing so is vital to understating and addressing racism.[118]

Notably, a key component of the now-withdrawn proposal by the Australian federal government to amend the federal vilification law in 2014[119] was to change

116 See generally Maitra and McGowan, above n 2; Mari J Matsuda et al (eds), *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Westview Press, 1993).

117 Waldron, above n 2, 5.

118 Barbara Applebaum, *Being White, Being Good: White Complicity, White Moral Responsibility, and Social Justice Pedagogy* (Lexington Books, 2010).

119 In 2014 the Australian Government announced – and later withdrew – a statutory reform proposal which would have dramatically narrowed the federal anti-vilification provision: Heath Aston, Lisa Cox and Lucy Cormack, 'Tony Abbott Dumps Controversial Changes to 18C Racial Discrimination Laws', *Sydney Morning Herald* (online), 5 August 2014 <http://www.smh.com.au/federal-politics/political-news/tony-abbott-dumps-controversial-changes-to-18c-racial-discrimination-laws-20140805-3d65l.html>.

this aspect of the law so that the threshold would be determined 'by the standards of an ordinary reasonable member of the Australian community, not by the standards of any particular group within the Australian community'.[120] Our interview data strongly support the maintenance of this aspect of the definition of unlawful racist speech under the *Racial Discrimination Act 1975* (Cth). As Rice has acknowledged, it is the targets of such abuse who are uniquely placed to attest to the lived harms of their experiences:

> No member of the Australian racial majority – politicians, policymakers, opinion writers – can understand what it is to have one's life defined by one's difference. … It is not for us to say that someone who actually – and, in their circumstances, reasonably – feels offence that they should not, or that it is to be borne with resignation. For almost 20 years, federal racial vilification law has been admirably respectful of the lived reality of racial difference.[121]

E Laws Are Not Well Known, but Symbolically Important

Although the experience of public racially and religiously motivated abuse was common for all interviewees, they reported low levels of familiarity with anti-vilification laws. For some interviewees, inaction was a consequence of the profound negative effects of the incidents on them: 'I usually can never … respond, I get totally paralysed'.[122] For others, a reluctance to seek legal redress reflected a lack of confidence that they would receive a sympathetic response:

> Some people do ignore things … they never report incidents related to racism. The problem is that they think they will not succeed even if they report them. They believe that cases related to them will not be taken seriously.[123]
>
> People can lodge complaints but 'they just don't do it, they don't use it [the law] 'cause they're scared'.[124]

Others doubted that they had sufficient skills or resources:

> In Australia, Vietnamese people rarely make complaints because of our limited English.[125]
>
> A little person in street … well what do you do? … How much money has a black fella got to get a solicitor?[126]
>
> The vilification laws in Australia are not useful because in order to protect the community that have been vilified you've got to have resources. The Human Rights Commission of Australia is a toothless tiger. It doesn't go around acting on behalf of these groups that have been vilified, start laying down standards … They don't stand up. They do not take on the Alan Jones' of the world. They do not take the Bolts on; they do not take the media on. They allow these racist mentalities, these racist structures to go on unimpeded and yet it's their role that the Commonwealth Government is established to monitor human rights in Australia.

120 Freedom of Speech (Repeal of s 18C) Bill 2014.

121 Simon Rice, 'Race Act Changes Are What You Get When You Champion Bigotry', *The Conversation* (online), 26 March 2014 <http://theconversation.com/race-act-changes-are-what-you-get-when-you-champion-bigotry-24782>.

122 Interviewee 48.

123 Interviewee 24b.

124 Interviewee 26a.

125 Interviewee 17.

126 Interviewee 9.

> What's the good of monitoring when these abuses are going on. They're doing nothing to stop them.[127]

The last comment expresses frustration with the 'neutral' role that Australian human rights agencies are required to play in relation to the enforcement of racial vilification laws. Rather than 'take sides' the role of bodies such as the Australian Human Rights Commission and the Anti-Discrimination Board of NSW is to facilitate resolution of the complaint, preferably by conciliation. This can leave targets of racial vilification feeling unsupported by the 'government' in their attempt to have perpetrators of racial vilification held to account.[128]

It might be assumed that if vilification laws are not particularly well known in most communities targeted by public racially and religiously motivated abuse, and are unlikely to be formally invoked via lodgement of a complaint, then the need for them might be seriously questioned. Our interviews stated the contrary – adamantly and frequently.[129] A powerful message to emerge from our interviews was that vilification laws are important and should not be weakened. Although most interviewees said they would never lodge a complaint or pursue litigation, they saw vilification laws as a precious symbol: they said that simply 'knowing there is something there to protect you' made them feel less vulnerable,[130] because the law 'curbs those urges',[131] 'protects the people',[132] and makes them feel 'safe and supported'.[133] The laws were seen as the government setting a 'standard',[134] making a statement about what is 'not right'[135] in public behaviour, acting 'as a deterrent',[136] and allowing 'us all to be treated with respect'.[137]

IV CONCLUSION

In this article we have identified a significant gap between the operational parameters of Australian anti-vilification laws and the variety of ways in which racially and religiously motivated abuse is experienced. We do not, on the basis of the evidence presented in this article, conclude that current laws do not

127 Interviewee 3.
128 See Gelber and McNamara, 'Private Litigation To Avoid a Public Wrong', above n 20, 332.
129 It was through participation in our project that many of the 101 interviewees first became aware of Australia's anti-vilification laws.
130 Interviewees 26a, 39.
131 Interviewee 24a.
132 Interviewee 15.
133 Interviewee 22.
134 Interviewee 46a.
135 Interviewee 45.
136 Interviewee 35.
137 Interviewee 20.

'work',[138] nor do we suggest that all the incidences of public racism we have discussed in this article ought to be covered by amending or extending current anti-vilification laws. Rather, our conclusions are more nuanced and, we hope, constructive.

The first contribution this article makes is to map with greater precision than has previously been possible, and based on a solid empirical foundation, the dimensions of the gap between racial vilification as it is *legally defined* and racial vilification as it is *experienced*. Two of the dimensions of the gap reside in the terms of the statutes themselves, and it is our view that these could be redressed through amendment to the relevant laws. The first is that, currently, a complainant must be a member of the target group. Current laws could be extended to allow any member of the community to initiate a complaint. The most likely objection to extending current laws in these ways is that it could greatly enlarge the number of complaints that agencies are required to deal with. We find this counter-argument unpersuasive. It is an argument that was raised against the introduction of anti-vilification laws at each time they have been introduced or extended in Australian law, yet experience over 25 years has shown comprehensively that the laws have not led to high levels of baseless complaints, nor have they yielded such a high number of complaints that authorities are unable to deal with them. To the contrary, the data show a tendency shortly after a new law is introduced to test out the parameters of that law, but remarkably few formal complaints being lodged over time.[139] We think the extension of current laws to cover any complainant, in a context where a complaint still needs to be substantiated before a remedy can be sought, would be an appropriate response to the identification of this gap between the incidences of vilification and the affected community's ability to seek a remedy. This change would also reduce the enforcement burden which currently falls heavily on the victims of racial vilification.[140] It is worth noting here that vilification complaints are rarely concerned with obtaining a personal remedy – such as damages. Typically, the complainant seeks – for the sake of the community of which she or he is a part – an authoritative ruling that the respondent has engaged in unlawful behaviour and a cessation of the behaviour in question. Elsewhere, we have described the individuals who initiate complaints as akin to a '"private prosecutor" – acting on behalf of the group that has been targeted'.[141] Not all

138 As part of our larger study we have examined a number of elements of the impact of current Australian anti-vilification laws: see Gelber and McNamara, 'The Effects of Civil Hate Speech Laws', above n 3; Gelber and McNamara, 'Private Litigation To Avoid a Public Wrong', above n 20; Gelber and McNamara, 'Evidencing the Harms of Hate Speech', above n 77; Gelber and McNamara, 'Freedom of Speech and Racial Vilification in Australia', above n 68; Katharine Gelber and Luke McNamara, 'The Impact of Section 18C and Other Civil Anti-vilification Laws in Australia' in Australian Human Rights Commission, *Perspectives on the Racial Discrimination Act: Papers From the 40 Years of the Racial Discrimination Act Conference. Sydney 19–20 February 2015* (2015) 156.

139 See Gelber and McNamara, 'The Effects of Civil Hate Speech Laws', above n 3, 641.

140 For a fuller critique of the current 'victim'-oriented standing rules, see Gelber and McNamara, 'Private Litigation To Avoid a Public Wrong', above n 20.

141 Ibid 316.

affected communities are equally well-placed to produce an individual who can 'step up' into this role. As a consequence, under current arrangements, the protection promised by anti-vilification laws is 'unevenly distributed among the communities who are likely to be targeted'.[142]

Another option is to extend the power to initiate and pursue complaints to human rights and anti-discrimination agencies themselves. That is, the relevant authority in each jurisdiction might be given the power to self-initiate complaints in relation to alleged vilification where it becomes aware of conduct that is likely to satisfy the definition of unlawful conduct, and no individual from the targeted group lodges a complaint.[143] We acknowledge that this proposal is controversial, including because it may give rise to conflicts of interest, and would require additional resourcing for agencies. A number of these issues have been canvassed in the context of discrimination complaints.[144] We emphasise that it is important to recognise the differences between *discrimination* and *vilification* when assessing the appropriateness and feasibility of agency self-initiation. A full examination of the vilification/discrimination distinction is beyond the scope of this article.[145] However, we have argued elsewhere that there are compelling grounds for conceiving of hate speech as a *public wrong*, and that this character should be reflected in both the legislative standards *and* enforcement mechanisms that the state puts in place to address the problem.[146]

The second gap we have demonstrated in the coverage of existing legislation is the exclusion of anti-Muslim 'racism' from the reach of most Australian anti-vilification laws. A fuller analysis of the challenges posed by anti-Muslim/Islamophobic speech and behaviour is beyond the scope of this article, but the experiences reported by many interviewees in our study, along with the other available evidence about the prevalence of vilification directed at Muslims (and persons assumed to be Muslims) is sufficiently stark to support a recommendation that current laws should be expanded.[147] The fact that some jurisdictions in Australia have already expressly included religion as a protected category in anti-vilification laws, again without suffering from an over-abundance of claims, is testament, we believe, to the possibility of the inclusion of anti-Muslim vilification in NSW and federal laws.

142 Ibid 333.

143 Ibid 334.

144 See, eg, Rees, Rice and Allen, above n 24, 733–4, 799–801; Beth Gaze and Rosemary Hunter, *Enforcing Human Rights: An Evaluation of the New Regime* (Themiss Press, 2010); Dominique Allen, 'Strategic Enforcement of Anti-Discrimination Law: A New Role for Australia's Equality Commissions' (2011) 36 *Monash University Law Review* 103; Jean R Sternlight, 'In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis' (2004) 78 *Tulane Law Review* 1401.

145 See Luke McNamara, above n 1, 163.

146 Gelber and McNamara, 'Private Litigation To Avoid a Public Wrong', above n 20, 309–12, 333–4.

147 See Kevin Dunn et al, 'The Resilience and Ordinariness of Australian Muslims: Attitudes and Experiences of Muslims Report' (Report, Western Sydney University and Islamic Sciences and Research Academy Australia, November 2015); Gelber and McNamara, 'The Effects of Civil Hate Speech Laws', above n 3, 645; *Islamophobia Register Australia*, above n 81.

The reported experiences of our interviewees enable us to map five further gaps. First, the complaints mechanism is necessarily based on individual complaints that treat cases as isolated, which means that the process by which targets are encouraged to seek a legal remedy is poorly adapted to responding to the cumulative effects of routine experiences of racially and religiously motivated abuse. Secondly, the spontaneity of much of this abuse, combined with the diversity of settings and the expansion of social media, can make it impossible for a respondent to be identified and therefore a complaint to be lodged successfully. Thirdly, moderate speech can, over time, have cumulatively harmful effects. These effects are perceived and felt by target communities as just as harmful as the effects of gross slurs and epithets, even though they are less likely to lead to successful complaints. Fourthly, the wide spectrum of both constitutive and consequential harms is not recognised in the NSW model's construction of the harm to which the law is addressed, although, notably, it is in the Commonwealth model. Finally, although the laws themselves are not well known or widely utilised in target communities, they remain highly important to those communities as symbols of the standards of tolerance and respect to which all people are entitled.

Importantly, our identification of these gaps between the lived experience of racially and religiously motivated abuse, and the ability of the law to provide redress, has emerged from the voices of the targets of vilification themselves. This in itself is important, since the voices of targets – the individuals and communities of which anti-vilification laws are intended to offer protection – are too often marginalised in this debate. We have provided evidence to support the argument that in spite of these gaps, current laws are believed to be vitally important by target communities as a message that they *are* protected and that the government has drawn a line in the sand distinguishing between acceptable and unacceptable public behaviour.

In addition, the results of this mapping provide a framework within which to consider the allocation of resources to educative and advocacy campaigns to combat racially and religiously motivated abuse.[148] This is because such campaigns are likely to be most effective if they are framed to respond to, and seek to remedy, the harms that anti-vilification laws are currently unable to address.

148 See, eg, Australian Human Rights Commission, *Racism. It Stops with Me* <https://itstopswithme.humanrights.gov.au>; Beyondblue, *Stop. Think. Respect.* (2016) <https://www.beyondblue.org.au/for-me/stop-think-respect-home>.