
The Case for Criminal and Civil Sanctions in Queensland's Racial Vilification Legislation

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Introduction

Queensland does not have effective racial vilification legislation. Its only provision related to hate speech, s126 of the *Anti-Discrimination Act* 1991 (Qld), is poorly drafted and places an onerous burden of proof on the complainant. It has been described as "effectively useless".¹ If Queensland is going to address the issue of racial vilification, then its hate speech provisions must be improved.

One crucial reform issue is the type of sanctions that should be used to fight hate speech. The major dispute is whether racial vilification legislation should create civil prohibitions or criminal offences or both. This dispute was illustrated when the Commonwealth Government attempted to pass its *Racial Hatred Bill* 1995 (Cth). The civil prohibitions were accepted but there was strong opposition to the creation of any criminal offences. As a result, the *Racial Hatred Act* 1995 (Cth) did not contain any criminal sanctions.

This paper argues that Queensland must enact both criminal and civil sanctions. It examines their different roles and asserts that both are needed to combat racial vilification effectively. It does this in four parts.

Part 1 sets the scene by briefly outlining the racial vilification legislation in Australia. It gives an overview of the legislation of the Commonwealth, Queensland, New South Wales, the Australian Capital Territory, South Australia and Western Australia.

Part 2 explains the rationale for using civil sanctions to combat racial vilification. It advocates that any civil redress should be through the discrimination law remedies available under the *Anti-Discrimination Act* 1991 (Qld). This part highlights

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1 John Briton (Queensland Anti-Discrimination Commissioner) *The Courier Mail* 2 October 1996, p8 and *The Courier Mail* 1 November 1996 p7.

the strengths of such remedies and focuses particularly on their victim orientation. It also addresses any weaknesses of the civil sanctions.

Part 3 justifies the criminalisation of racial vilification by examining the role that criminal sanctions would play in combating hate speech. It focuses on their strong public statement of condemnation as well as their protective function. It also considers some of the flaws that are perceived in criminalisation.

Finally, Part 4 examines how the partnership between these two very different sanctions would work. It explains why the discrimination law remedies should play the dominant role, with criminal sanctions being appropriate only in certain limited situations.

Part 1: Current Legislation²

1.1 The Commonwealth

The *Racial Hatred Act* 1995 (Cth) amended the *Racial Discrimination Act* 1975 (Cth) to prohibit racial vilification.³ The Commonwealth Government struggled to pass this legislation as it was opposed primarily on the ground that it would restrict the freedom of speech.⁴ The result was that the Act did not include criminal sanctions and created only discrimination law remedies.

Section 18C(1) of the *Racial Discrimination Act* 1975 (Cth) prohibits any racially motivated act, done otherwise than in private, that is "reasonably likely" to offend, insult, humiliate or intimidate. Section 18C(2) provides that any act will not be done in private if it is done in a public place, within the sight or hearing of people in a public place or causes communication to the public.⁵ Section 18B facilitates proof of racial vilification by providing that the motivation for "doing an act" does not have to be a dominant or even substantial reason so long as it is a reason.

Section 18D contains very broad exemptions⁶ for acts said or done reasonably and in good faith:

- for artistic purposes;
- in the course of a debate or discussion for academic, artistic or scientific purposes

2 The focus of this section is on whether the current Australian legislation has civil or criminal sanctions or both. It is not a general outline of what the legislation contains. Note also that draft legislation was tabled in the Victorian Parliament in 1992 but it lapsed with the election of a Liberal Government.

3 The Commonwealth relied on its external affairs power using the *International Convention on the Elimination of All Forms of Racial Discrimination*, Article 4 and the *International Covenant on Civil and Political Rights*, Article 20(2).

4 The original *Racial Discrimination Amendment Bill* 1992 (Cth) lapsed and the *Racial Hatred Bill* 1994 (Cth) was heavily amended by the Senate.

5 Section 18C(3) further defines "public place" as including "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."

6 These exemptions have been criticised as being too wide and also as being too focused on "neighbourhood racism" rather than public vilification. (John Briton, 2 October 1996, *supra* n 1).

or for any other genuine purpose in the public interest;

- to fairly and accurately report matters of public interest; or
- to make fair comment if the comment is genuinely believed.

Section 18F preserves the operation of State and Territory laws and shows that the Commonwealth does not intend to cover the field in relation to racial vilification. This means that Queensland's legislation can coexist provided that it is not directly inconsistent with the Commonwealth Act.⁷ This means that Queensland will be able to legally criminalise racial vilification even though the Commonwealth Act has not done so. Further, Queensland may validly introduce different, but not inconsistent, discrimination law remedies.

1.2 Queensland

Queensland, like the Commonwealth, only has discrimination law remedies and does not criminalise hate speech. However, racial vilification is not even specifically unlawful under Queensland law. All that s126 of the *Anti-Discrimination Act* 1991 (Qld) does is create a limited prohibition on inciting unlawful discrimination or another contravention of the Act through advocating racial or religious hatred. Although s126 focuses on preventing the Act being breached rather than stopping vilification, extreme cases of racial hatred may still fall within the section.

The major problem with s126 is that its drafting makes it "effectively useless" because it creates an incredibly high onus of proof.⁸ The complainant must prove not only that racial hatred was advocated but also that the hatred had a causal effect in inciting others to commit hate-inspired offences.⁹ Because of this extraordinary onus of proof, there has never been a successful s126 complaint since the section was introduced in 1992.¹⁰

This has meant that the Anti-Discrimination Commission has been unable to pursue any vilification complaints.¹¹ The Queensland Government has been called upon to strengthen its stance against racial vilification but as of yet has not taken any steps to do so.¹²

1.3 New South Wales and the Australian Capital Territory

The *Anti-Discrimination Act* 1977 (NSW)¹³ and the *Discrimination Act* 1991 (ACT) contain virtually identical racial vilification provisions.¹⁴ These Acts create both

⁷ *Constitution* 1900 (Cth), s109.

⁸ John Briton *supra* n 1.

⁹ *Ibid.*

¹⁰ John Briton, 2 October 1996, *supra* n 1.

¹¹ *Ibid.*

¹² John Briton, 1 November 1996, *supra* n 1.

¹³ As amended by the *Anti-Discrimination (Racial Vilification) Act* 1989 (NSW).

¹⁴ The focus of this section is on the *Anti-Discrimination Act* 1977 (NSW) with the corresponding provision of the *Discrimination Act* 1991 (ACT) being referred to in the footnotes.

civil and criminal sanctions. Because of this, they provide a useful model for the drafting of any proposed Queensland legislation.

Section 20C(1) of the *Anti-Discrimination Act* 1977 (NSW)¹⁵ creates discrimination law remedies and makes it unlawful for a person, by a public act, to “incite hatred towards, serious contempt for or severe ridicule of” another because of their race. Section 20C(2)¹⁶ creates exemptions similar to those in the *Racial Hatred Act* 1995 (Cth).

Section 20D¹⁷ creates criminal sanctions for more “serious racial vilification”.¹⁸ Threatening physical harm towards property or persons or inciting others to make such threats are examples of more serious vilification.

Both s20C and s20D require that the vilification be done by a public act. Section 20B¹⁹ defines “public act” broadly including communications to the public, any conduct observable by the public or any dissemination of any matter to the public knowing that matter expresses racial vilification.

1.4 South Australia

The most recent Australian hate speech legislation is the *Racial Vilification Act* 1996 (SA). It also creates both criminal and civil sanctions. Section 4 creates the criminal offence of racial vilification which is very similar to s20D of the *Anti-Discrimination Act* 1977 (NSW). Under s5, prosecution of this offence requires the consent of the Director of Public Prosecutions.

Section 6 is unique in Australia in that it makes specific provision for an award of damages up to \$40 000 in favour of any person vilified or in the case of a vilified group, an organisation formed to further the interests of that group.

Section 7 of the *Racial Vilification Act* 1996 (SA) also creates civil remedies by inserting s37 into the *Wrongs Act* 1936 (SA). These remedies are also unique in that they are available in tort law and not under discrimination law.²⁰

The actionable tort is an “act of racial victimisation that results in detriment”. An “act of racial victimisation” is defined in s37(1) in similar terms to the civil sanction created by s20C of the *Anti-Discrimination Act* 1977 (NSW). However, excluded from the definition of the tort is:²¹

- publication of a fair report of another person’s act;
- publication of material where that publication would be absolutely privileged in

¹⁵ *Discrimination Act* 1991 (ACT) s66(1).

¹⁶ *Ibid* s66(2).

¹⁷ *Ibid* s67.

¹⁸ Prosecution of these offences requires the Attorney-General’s consent. (s20D(2)) Any serious racial vilification that is complained of to the Anti-Discrimination Board must also be referred to the Attorney-General. (s89B).

¹⁹ *Discrimination Act* 1991 (ACT) s65.

²⁰ *Racial Vilification Act* 1996 (SA) s37(2).

²¹ *Ibid* s37(1).

- a defamation action; or
- a reasonable act, done in good faith, for academic, artistic, scientific or research purposes, or for other purposes in the public interest.

Section 37(1) also defines “detriment” which means “injury, damage or loss” or “distress in the nature of intimidation, harassment or humiliation”. As with the criminal sanctions, damages are available to the victims of racial victimisation up to a limit of \$40 000.²² To prevent “double dipping”, both s37(5) of the *Wrongs Act* (SA) and s6(4) of the *Racial Vilification Act* 1996 (SA) require that any award of damages made must take into account any damages previously awarded.

1.5 Western Australia

Western Australia’s response to the racial vilification issue is unusual as it has enacted only criminal sanctions. The most serious offences are contained in s77 and s78 of the *Criminal Code* 1913 (WA). Section 77 makes it an offence to possess threatening or abusive material intended to be published or displayed. The person must also intend to create or promote racial hatred by publishing that material. Section 78 creates an offence for the actual publication or display of that material with the same intention.

Sections 79 and 80 create less serious offences for possession and display of such material respectively. They apply when the person intends only to harass a racial group. Under s76, the definitions of terms such as “display” and “publish” make it clear that all of the vilification offences must be to the public or to a section of the public.

Part 2: Rationale for Creating Civil Sanctions for Racial Vilification in Queensland

2.1 Victim Orientation of Discrimination Law Remedies²³

The law is often criticised for failing to recognise the needs of people who seek its help. Reasons for this include the law’s technical language, its inflexibility and the lack of control over the final resolution of the dispute. However, discrimination law is a lot more flexible than other forms of legal redress. This enables it to provide the best solutions for victims of vilification.²⁴

²² *Ibid* ss37(3) and (4).

²³ Criminal sanctions, as opposed to civil remedies, are less victim oriented and this is often cited to support the use of discrimination law remedies. While this is true, this criticism falsely assumes that the two types of sanctions cannot be used together. (This criticism is explored further in Parts 3 and 4.) Despite that, this paper still does use the helpful comparison with criminal sanctions to highlight some of the strengths of discrimination law remedies.

²⁴ Not all aspects of discrimination law remedies have a victim orientation. For example, they may use a reasonable person test rather than considering the actual subjective reaction of the victim. (Explanatory Memorandum to *Racial Hatred Bill* 1994 (Cth)).

The first and most common form of discrimination law dispute resolution employed by the Queensland Anti-Discrimination Commission is conciliation.²⁵ This involves a member of the Commission discussing the complaint with the parties with the goal of reaching an agreement that would comply with Queensland's racial vilification legislation. Conciliation is victim oriented because it enables the victim to be involved in their own resolution process. It allows them to negotiate to protect what is important to them and it also facilitates ownership of the final agreement.²⁶ Conciliation is also victim orientated because the content of the conciliated agreement is not limited to traditional legal remedies.²⁷ The parties are free to decide whatever they want and to agree to any conditions they choose provided they comply with the *Anti-Discrimination Act* 1991 (Qld). Finally, conciliation does not place the burden of proving the rigid elements of a criminal offence or tort action on a victim.²⁸

If attempts to conciliate the complaint fail or the matter is inappropriate for conciliation, the next step under discrimination law is to be referred to the Anti-Discrimination Tribunal.²⁹ Again, victim orientation is a strength of this Tribunal because although it is more coercive than conciliation, it is still more flexible than other criminal or civil courts. For example, the Tribunal is not bound by the rules of evidence,³⁰ it can inform itself on any matter it considers appropriate³¹ and it must "act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms".³² This flexibility is also reflected in the remedies that the Tribunal can award.³³ Under s209 of the *Anti-Discrimination Act* 1991 (Qld), the Tribunal can prohibit future contravention of the Act, make an order for compensation or void an agreement made in connection with a contravention of the Act. It can also order that the respondent do specified things to redress loss or damage suffered by the complainant³⁴ such as make an apology³⁵ or implement a policy to eliminate vilification.³⁶

These two discrimination law remedies are also more responsive to victims because they make it easier for victims to "ask the law for help."³⁷ It is less onerous

25 Under s158 of the *Anti-Discrimination Act* 1991 (Qld), if the Commissioner believes that a complaint may be resolved by conciliation, then the parties **must** try to resolve it in that way.

26 L McNamara 'The Merits of Racial Hatred Laws: Beyond Free Speech' (1995) 4 *Griffith Law Review* 29 at 54; N Hennessy & P Smith 'Have We Got it Right? NSW Racial Vilification Laws Five Years On' (1994) 1 *AJHR* 249 at 259-60; Explanatory Memorandum to *Racial Hatred Bill* 1994 (Cth).

27 M Jones 'Empowering Victims of Racial Hatred by Outlawing Spirit Murder' (1994) 1 *AJHR* at 316-7.

28 McNamara 'The Merits of Racial Hatred Laws: Beyond Free Speech' *supra* n 23 at 54.

29 *Anti-Discrimination Act* 1991 (Qld) ss165-167.

30 *Ibid* s208(1).

31 *Ibid* s208(1)(a).

32 *Ibid* s208(1)(b).

33 Hennessy and Smith *supra* n 23 at 262.

34 *Anti-Discrimination Act* 1991 (Qld) s209(1)(c). See also s209(5).

35 As occurred in the recent HIV vilification decision in New South Wales. (*The Courier Mail* 20 September 1996, p9).

36 Hennessy and Smith *supra* n 23 at 262.

37 McNamara 'The Merits of Racial Hatred Laws: Beyond Free Speech' *supra* n 23 at 54.

to make a complaint to the Anti-Discrimination Commission than it is to instigate the litigation required for other civil actions. Discrimination law remedies are also less threatening as the focus is on agreement through conciliation rather than litigation and its adversarial nature. In addition, they are less expensive than traditional civil remedies and the conciliated agreements are confidential.³⁸

Further, discrimination law remedies are victim oriented because their flexibility makes them more likely to be able to deal with the diverse forms of racial vilification.³⁹ This strength is crudely evidenced by the 442 matters handled by the New South Wales Anti-Discrimination Board between October 1989 and 30 June 1994.

Finally, the role of a body such as the Anti-Discrimination Commission also produces benefits. One such benefit is that it can use its influence to achieve a positive outcome where the complainant may not have been able to do so by themselves.⁴⁰ Its specialised knowledge and the inevitable power of a government body can be a strong coercive force. A further benefit is that the Commission serves as a filter to prevent vexatious or frivolous claims.⁴¹

2.2 Problems

Discrimination law remedies are not without their flaws. One major problem is the confidential nature of conciliation as the *Anti-Discrimination Act* 1991 (Qld) requires that it must occur in private.⁴² This means that racial vilification becomes a private wrong relevant only to the parties.⁴³ The danger this presents is that it privatises justice and inhibits community education.⁴⁴ This is especially problematic as racial vilification legislation is primarily aimed at public acts.⁴⁵ However, this problem may be partly overcome by agreements between the parties to publish an apology⁴⁶ or by the Anti-Discrimination Commission anonymously publishing good news stories.⁴⁷ Despite that, this concern is a legitimate one.

Conciliation also presents difficulties with power imbalances between the parties.⁴⁸ Often one of the parties to the dispute may be more vulnerable than the other. This may arise due to their status as an employee negotiating with their employer or alternatively it may arise because they are unable to easily express themselves in English. These factors and others may impair their ability to effectively negotiate to protect their needs.

38 Hennessy and Smith *supra* n 23 at 260. Section 161 of the *Anti-Discrimination Act* 1991 (Qld) provides that conciliation must take place in private.

39 McNamara 'The Merits of Racial Hatred Laws: Beyond Free Speech' *supra* n 23 at 54-5.

40 Jones *supra* n 24 at 316-7.

41 *Anti-Discrimination Act* 1991 (Qld) s138.

42 *Ibid* s161.

43 This would be partly remedied by the public statement of condemnation made by criminal sanctions.

44 McNamara 'The Merits of Racial Hatred Laws: Beyond Free Speech' *supra* n 23 at 55.

45 *Ibid*.

46 As occurred in the recent HIV vilification decision in New South Wales *supra* n 35.

47 Hennessy and Smith *supra* n 23 at 260.

48 McNamara 'The Merits of Racial Hatred Laws: Beyond Free Speech' *supra* n 23 at 56-7.

Although the Anti-Discrimination Commission officers can limit that imbalance through effective facilitation, it will always remain. However, conciliation can include negotiations that are more than just personal meetings. Often conciliation takes place with the facilitator “shuttling” between the parties. Further, provided the Commissioner consents, s163 of the *Anti-Discrimination Act* 1991 (Qld) allows a complainant to be represented at conciliation by another person. In these cases where no personal meeting occurs, the possibility of a power imbalance is reduced. McNamara suggests that of those parties who do conciliate racial vilification disputes, less than half will actually meet.⁴⁹

Another criticism of discrimination law remedies is that their victim orientation places the burden of pursuing the claim on the victim.⁵⁰ They must initiate the complaint and be responsible for its carriage. However, that may be justifiable considering that it is the victim who benefits from the resolution of the dispute. A final problem is a respondent may be subject to multiple complaints from people who all want different outcomes. In Queensland, possible solutions for this include the potential to bring representative complaints⁵¹ or to conduct the hearing of two or more complaints together.⁵²

Part 3: Rationale for Creating Criminal Offences Outlawing Racial Vilification in Queensland

3.1 A Public Statement Condemning Racial Vilification

Some writers have argued that racial vilification is an attitudinal problem and as such, legislation is an inappropriate response.⁵³ However, it is clear that the law influences society’s moral standards.⁵⁴ If the law takes a public stance condemning racial vilification then it will gradually persuade society that it is morally wrong and reduce its social acceptability.⁵⁵

A public statement of condemnation also openly values the victim as an important member of society who deserves protection.⁵⁶ It would publicly recognise the

49 *Ibid* at 57. Note that this is based only on preliminary data gathered by McNamara in New South Wales. However, it is consistent with a study conducted by R Hunter and A Leonard. (R Hunter and A Leonard *The Outcomes of Conciliation in Sex Discrimination Cases*, Working Paper No 8, Melbourne, Centre for Employment and Labour Relations Law Faculty of Law, University of Melbourne, August 1995 at 14).

50 McNamara ‘The Merits of Racial Hatred Laws: Beyond Free Speech’ *supra* n 23 at 56.

51 *Anti-Discrimination Act* 1991 (Qld) ss146-152 and ss194-200.

52 Section 179 of the *Anti-Discrimination Act* 1991 (Qld) permits this provided the complaints arise out of substantially the same events.

53 For example, I Freckelton ‘Censorship and Vilification Legislation’ (1994) 1 *AJHR* 327.

54 T Solomon ‘Problems in Drafting Legislation Against Racist Activities’ (1994) 1 *AJHR* 265 at 284; K Mahoney ‘Hate Vilification Legislation and Freedom of Expression: Where is the Balance?’ (1994) 1 *AJHR* 353.

55 Solomon *supra* n 52 at 284; Jones *supra* n 24 at 313-5.

56 Jones *supra* n 24 at 315.

victim's hurt and provide justification for not having to tolerate vilification.⁵⁷

Criminalising racial vilification is necessary because civil remedies are less able to make this strong public statement of society's condemnation.⁵⁸ Civil offences deal only with private wrongs whereas imposing criminal sanctions means that it is society as a whole who has been wronged. Civil remedies, especially the discrimination law remedies advocated, have also become privatised so they are a less effective public statement.⁵⁹ Finally, criminal sanctions are appropriate because they are traditionally used when society takes a more severe stance.⁶⁰

3.2 Protection of Victims

Criminalisation of hate speech would also serve as a last line of defence to protect victims from serious racial vilification.⁶¹ In these severe cases, the discrimination law remedies are less likely to be effective as their emphasis is on conciliation which requires both parties' cooperation. Even if the matter did go before the Anti-Discrimination Tribunal, it too may not be appropriate as any civil sanctions it can order do not have the coercive force that criminal sanctions have.

This means that to gain protection from serious vilification, the strength of the criminal law is required. Even if these criminal sanctions do not change the attitudes of racists or even deter them,⁶² they are necessary to protect the victims of severe vilification by establishing minimum standards of conduct.⁶³

3.3 Problems

The use of criminal sanctions against racial vilification has been heavily criticised in Australia. This was illustrated by the difficulties that the Commonwealth Government faced in passing its *Racial Hatred Act* 1995 (Cth). However, some of these criticisms misconstrue the role of the criminal law. One reason for this is that they falsely assume that racial vilification legislation must be either criminal offences or civil sanctions and not both. However, when these criticisms are evaluated in the

57 *Ibid.*

58 *Ibid* at p313-5. To strengthen this public statement of condemnation, the criminal sanctions should be in the *Criminal Code* 1899 (Qld) rather than the *Anti-Discrimination Act* 1991 (Qld) as is the case in New South Wales. (Hennessy and Smith *supra* n 23 at 262).

59 Jones *supra* n 24 at 315. Under s161 of the *Anti-Discrimination Act* 1991 (Qld), all conciliation must take place in private.

60 Jones *supra* n 24 at 314.

61 *Ibid* at 314-5.

62 However, this point is not conceded, especially in the long term.

63 Jones *supra* n 24 at 314-5. As Martin Luther King said: "Judicial decrees may not change the heart but they restrain the heartless." (cited in C Rubenstein 'Legislating an End to Racism' *The Sydney Morning Herald* 23 May 1995, p13). See also *R v Keegstra* [1991] 2 WWR 1. This is a Canadian case that tested the constitutionality of s319(2) *Criminal Code* (Can). Dickson CJC of the majority conceded that the Canadian criminal provisions were not able to rid society of all its racism. (at 73) However, he did find that the use of criminal prohibitions was an appropriate and acceptable means for furthering the important objective of preventing racial vilification. (at 79).

context of the two purposes for criminalisation explored above and the availability of additional discrimination law remedies, their strength is weakened. Considered in this light, they do not significantly undermine the rationale for criminal sanctions.

The major criticism of criminal sanctions is their inability to provide victims with adequate remedies.⁶⁴ This criticism has some validity as the criminal law is relatively inflexible and pays little attention to any outcomes that the victim may want. Although tools such as victim statements may serve to improve that flexibility, they still do not entirely solve the problem. While this criticism is legitimate, it does fail to consider the true role of criminalisation⁶⁵ and the ability of coexisting discrimination law remedies to meet the victims' needs.⁶⁶

Other criticisms are that criminalising racial vilification may create martyrs or give racists a forum for their views.⁶⁷ Although these are problems, a public conviction is important to make the statement of societal condemnation and to show racists that their views are wrong. Critics have also argued that criminalisation does not stop racism.⁶⁸ Although this is probably true in the short term,⁶⁹ this argument does not undermine the need for a public statement or to protect victims in extreme cases. Further, prevention is not a prerequisite to the criminalisation of other harmful acts. For example, making assault a crime does not stop people being beaten. However, criminalising assault is valid because it may be used to protect the victim from future assaults as well as making a public statement condemning the act.

Freckelton attacks criminalisation on the basis that existing criminal sanctions for assault or damage to property are sufficient to deal with racially inspired crimes.⁷⁰ However, to treat a specifically motivated crime under general provisions would undermine the strength of a public stance supporting victims of racial vilification. This argument is similar to the one that opposes moves to make the offence of rape gender neutral. It argues that treating a specific crime generally obscures the true nature of the offence.

Freckelton also argues that Australia does not have a sufficiently serious racial vilification problem to justify criminalisation.⁷¹ He limits the problem to "pockets of unpleasant racism" and says that by world standards Australia is very

64 L McNamara 'Criminalising Racial Hatred: Learning from the Canadian Experience' (1994) 1 *AJHR* 198 at 207-9.

65 See Parts 3.1 and 3.2 above.

66 This victim orientation of the discrimination law remedies is discussed above in Part 2.1.

67 McNamara 'Criminalising Racial Hatred: Learning from the Canadian Experience' *supra* n.61 at 206-7; Freckelton *supra* n 51 at 343-5, 349. For example, in Canada, a convicted racist called Keegstra is still in the papers ten years after being charged.

68 F Brennan 'Law Won't Soften the Hearts of Racists' *The Australian* 12 August 1994, p13; Freckelton *supra* n 51 at 340-1; *R v Keegstra* [1991] 2 WWR 1 at 111 per McLachlin J of the minority.

69 It was argued in Part 3.1 that the law can change society. However, this clearly takes time and may occur over decades.

70 Freckelton *supra* n 51 at 333-4.

71 *Ibid* at 335-8.

harmonious.⁷² This view is contrary to the majority of other writers.⁷³ It is also contrary to the *National Inquiry into Racist Violence in Australia*, the *Royal Commission into Aboriginal Deaths in Custody* and the *Australian Law Reform Commission Reference on Multiculturalism and the Law* which all noted concerning levels of racism. In addition, recent developments such as the level of support for Pauline Hanson, have also highlighted the racism within Australia.

Further, Freckelton is concerned that criminalisation is more likely to restrict the freedom of speech than civil remedies.⁷⁴ While this is probably true, the freedom of speech has always been subject to reasonable restrictions. For example, obscenity, blackmail and defamation all limit the freedom of speech but have been judged by society to be reasonable.⁷⁵ In addition, the New South Wales experience over the past eight years has shown that criminalising racial vilification does not unduly limit the freedom of speech. Although there would have been some limitation,⁷⁶ Hennessy and Smith believe that it has not been significant.⁷⁷ There has been some criticism of the New South Wales Act but Hennessy and Smith argue that a lot of it has stemmed from ignorance or selectively cited evidence.⁷⁸

One legitimate concern of criminalisation of racial vilification is that it removes the hate speech from its context. Because only serious cases would be prosecuted, a public statement is subtly made that any vilification of a less serious nature is “normal” racism and therefore justified.⁷⁹ This presents a real concern as it undermines the educational aspect of criminalisation’s public statement.

Part 4: The Relationship Between Criminal and Civil Sanctions

Having highlighted the strengths and weaknesses of both criminal and civil sanctions, it is important to explain the proposed relationship between them. The first step in almost every case will be to use the discrimination law remedies. As outlined in Part 2, they provide the most flexible and victim oriented solutions and so are best suited to solving the real issues that victims face. Such an approach will be appropriate in the vast majority of cases.

However, in very severe cases, as explained in Part 3, the discrimination law

⁷² *Ibid* at 338.

⁷³ For example, Mahoney *supra* n 52 at 354-6; Solomon *supra* n 52 at 267-71; McNamara ‘The Merits of Racial Hatred Laws: Beyond Free Speech’ *supra* n 23 at 40-3.

⁷⁴ Freckelton *supra* n 51 at 338-9.

⁷⁵ The constitutionally implied freedom of political speech and its qualifications is another example of where reasonable restrictions have been placed on free speech. However, a full discussion of the implied freedom’s implications for racial vilification is beyond the scope of this paper.

⁷⁶ That is, after all, the aim of the legislation.

⁷⁷ Hennessy and Smith *supra* n 23 at 264.

⁷⁸ McNamara ‘The Merits of Racial Hatred Laws: Beyond Free Speech’ *supra* n 23 at 43.

⁷⁹ McNamara ‘Criminalising Racial Hatred: Learning from the Canadian Experience’ *supra* n 62 at 207-8.

remedies are likely to be ineffective. It is in these few cases that the criminal sanctions will be used. For example, the criminal law would be used to deal with a repeat offender who refuses to stop their hate speech or a racist who makes threats of physical harm on racial grounds. In these cases, criminal sanctions will provide the last line of protection for victims where other remedies would fail. Further, in these serious cases, the public statement of condemnation made by criminal sanctions is particularly appropriate.

This is similar to the approach taken in New South Wales with its combination of criminal and civil sanctions. Although the confidential nature of conciliated outcomes makes the New South Wales legislation difficult to assess, Hennessy and Smith suggest that it has been reasonably successful.⁸⁰ Between October 1989 and 30 June 1994, the New South Wales Anti-Discrimination Board handled 442 complaints using discrimination law remedies. A few cases were referred for criminal prosecution to the Director of Public Prosecutions but it was decided not to proceed. These statistics show how some of the concerns about creating criminal offences that were highlighted in Part 3 are overstated.

This can be contrasted with the situation in Canada where reliance is placed on the criminal law and little use is made of their discrimination law remedies. Canada has been unsuccessful in combating racial vilification using criminal sanctions with the laws being infrequently enforced and failing to satisfy the victim's needs.⁸¹ This supports the contention that Queensland's focus must remain on the discrimination law remedies with the criminal law playing a subsidiary and supporting role.

Conclusion

Queensland's current hate speech provision, s126 of the *Anti-Discrimination Act* 1991 (Qld), is inadequate so an improved legislative response is needed. An important part of that reform is enacting racial vilification legislation that contains both criminal and civil sanctions.

As each type of sanction has a different purpose, a comprehensive legislative response requires both. Civil sanctions based on discrimination law remedies provide victims with flexible solutions that meet their needs. It is these remedies that will be used in almost every case. However, the limited support of criminal sanctions is also necessary. They make a strong public statement condemning racial vilification and also protect victims from severe hate speech where discrimination law remedies would fail.

Queensland's racial vilification legislation must contain both criminal and civil sanctions. If it fails to do this, then we as a society are not providing the best protection that we can for the victims of hate speech.

⁸⁰ Hennessy and Smith *supra* n 23 at 263.

⁸¹ *Ibid.*