

Australian Anti-Vilification Law: A Discussion of the Public/Private Divide and the Work Relations Context

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Anti-vilification legislation exists in most Australian jurisdictions.¹ Broadly, this legislation prohibits public acts of vilification, verbal abuse and hatred, on a range of grounds including race and religion. Some statutes contain civil proscriptions and processes alone,² whilst other Acts additionally establish criminal offences.³ The criminal proscriptions usually require an additional element — that the perpetrator has threatened, or has incited others to threaten physical harm to a person or their property.

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1 In this article anti-vilification legislation refers to the following statutory provisions: *Racial Discrimination Act* 1975 (Cth) Part IIA (racial hatred) (hereafter *RDA*); *Anti-Discrimination Act* 1977 (NSW) Part 2 Division 3A (racial vilification), Part 3A Division 5 (transgender vilification), Part 4C Division 4 (homosexuality vilification), Part 4F (HIV/AIDS vilification) (hereafter *ADA* (NSW)); *Racial and Religious Tolerance Act* 2001 (Vic) (racial and religious vilification) (hereafter *R&RT Act*); *Anti-Discrimination Act* 1991 (Qld) s124A (racial and religious vilification); *Anti-Discrimination Act* 1998 (Tas) s19 (inciting hatred on the grounds of race, disability, sexual orientation, lawful sexual activity, religious belief or activity); *Discrimination Act* 1991 (ACT) Part 6 (racial vilification); *Racial Vilification Act* 1996 (SA) s4 (racial vilification).

2 See, for example, *RDA*; *Anti-Discrimination Act* 1998 (Tas). The Western Australian jurisdiction covers racial harassment in employment, education and accommodation: *Equal Opportunity Act* 1984 (WA), Part 3, Division 3A.

3 See, for example, *ADA* (NSW) s20D (serious racial vilification), s38T (serious transgender vilification), s49ZTA (serious homosexual vilification), s49ZXC (serious HIV/AIDS vilification); *R&RT Act* Part 4 (serious racial or religious vilification); *Anti-Discrimination Act* 1991 (Qld) s131A (serious racial or religious vilification). Note that Western Australian legislation creates criminal offences for intending or likely to racially harass or incite racial hatred, and possessing material for dissemination or display for such purposes: *Criminal Code Amendment (Racial Vilification) Act* 2004 (WA). These provisions are under review: Equal Opportunity Commission and Office of Multicultural Interests (WA), *Racial and Religious Vilification Consultation Paper* (2004).

All Australian statutes are based on a separation of public and private. In drafting each Act the relevant parliament has constituted a line, or several different lines at various points, between a public sphere (regulated by the legislation) and a private realm of life (not touched by the legislation). A central way in which the various statutes map a public/private divide is by requiring that the vilifying act have the character of being public behaviour.⁴ The technical approaches adopted in the statutes to achieve this separation between public and private vary. All State legislation, apart from the Victorian Act, requires that in order to be unlawful, the vilifying conduct must be a 'public act'.⁵ The Commonwealth legislation requires that in order to be unlawful, the vilifying act must take place 'otherwise than in private'.⁶

The latest addition to the raft of anti-vilification statutes in Australia — the *Racial and Religious Tolerance Act 2001 (Vic) (R&RT Act)* — contains a novel approach to constituting a public/private line of vilifying behaviour. The statute defines the prohibited conduct negatively by reference to the parties' desire for the conduct to be seen or heard only by themselves, and their reasonable expectation of this. In effect, vilifying conduct will not contravene the statute's proscription where the perpetrator subjectively intends it to be seen or heard only by the immediate parties, unless an objective reading of the circumstances implies that a reasonable person would have known that the conduct would, or may, be overheard or seen by others.⁷ On its face this new Victorian articulation presents quite a different public/private divide to that appearing in anti-vilification legislation elsewhere in Australia. Most obviously, it uses neither the word public, nor the word private, in its articulation of its scope. Rather, it is about objective intention and reasonableness.

These different statutory constructions delineating a public/private line have not been the subject of close analysis. This article conducts such an examination of the New South Wales and Commonwealth jurisdictions, and the new Victorian jurisdiction. The focus of the investigation is on the adjudications in the different jurisdictions.⁸ The New South Wales and Commonwealth jurisdictions have received the most adjudicative scrutiny and for this reason they have been chosen for analysis here. The new *R&RT Act*, with its unique approach to separating a private sphere of conduct beyond the reach of the legislative prohibition, provides an interesting contrast to the more developed jurisdictions of New South Wales and the Commonwealth.

4 Another way in which a public/private line is drawn in the legislation is through the exemption of publication in the public interest. See, for example, *RDA* s18D(b), (c); *ADA* (NSW) s20C(2)(c), s38S(2)(c), s49ZT(2)(c), s49ZXB(2)(c); *R&RT Act* (Vic) s11.

5 See, for example, *ADA* (NSW) and the definitions of public act in s20B, s38R, s49ZS, s49ZXA; *Anti-Discrimination Act 1991* (Qld) and the definition of public act in s4A; *Anti-Discrimination Act 1998* (Tas) and the definition of public act in s3; *Discrimination Act 1991* (ACT) and the definition of public act in s65; *Racial Vilification Act 1996* (SA) and the definition of public act in s3.

6 *RDA* s18C.

7 *R&RT Act* s12.

The focus of the examination in this article is on the context of workplaces and work relations.⁹ Anti-vilification legislation has not conventionally been seen as being an important source of employment legal obligation. Indeed, longer standing anti-discrimination legislation such as the *Racial Discrimination Act 1975* (Cth) (*RDA*) and the *Sex Discrimination Act 1984* (Cth) have only relatively recently come to be seen as part of labour or workplace law.¹⁰ There are, however, reasons to think that anti-vilification legislation may grow as a significant source of employment obligation. With concepts like hostile work environment, racial harassment, bullying and victimisation increasingly entering everyday understandings of workplace obligations, employees may be more prepared to identify and name workplace wrongs against them. In addition, it appears that racial and religious tension in Australia has increased over recent years,¹¹ and it might be expected that such conflict will be played out across society broadly, including workplaces. Interestingly, there are interconnections between the applicability of anti-vilification legislation to the workplace context and the growing interest in worker privacy, which has become an issue of policy concern.¹² Although the debate about privacy in the workplace usually refers to

8 The focus of our examination on adjudications is necessarily limited as most complaints are dealt with through a process of confidential conciliation and do not proceed to an adjudication. In all jurisdictions complaints are usually initially dealt with through a confidential process of conciliation. It is only where conciliation has not resolved the complaint, or in other certain limited circumstances, that the case proceeds to adjudication. On average, 14 per cent of complaints each year lodged under the *RDA* racial hatred provisions have been referred to adjudication: Luke McNamara, *Regulating Racism: Racial Vilification Laws in Australia* (2002) at 66. Around nine per cent of racial vilification complaints lodged under the *ADA* (NSW) are referred to adjudication: at 161.

9 The percentage of complaints lodged under the federal racial hatred provisions that relate to employment contexts have varied over the years. In 1999–2000 it was 10 per cent, whilst in 2000–2001 it was 19 per cent. The two main areas of complaint under the *RDA* have consistently been the media, and disputes between residential neighbours. See McNamara, above n8 at 63 (Figure 3); Brad Jessup, ‘Five Years On: A Critical Evaluation of the Racial Hatred Act 1995’ (2001) 6 *Deakin LR* 91 at 97 (Table 3); Ray Jureidini, ‘Origins and Initial Outcomes of the Racial Hatred Act 1995’ (1997) 5 *People and Place* 30 at 37 (Table 1). The information available regarding the *ADA* (NSW) racial vilification provisions suggests that complaints in the employment context are negligible. See McNamara, above n8 at 153–154. We were not able to locate this type of information in relation to other areas of vilification under the *ADA* (NSW).

10 Rosemary Hunter, ‘Representing Gender in Legal Analysis: A Case/Book Study in Labour Law’ (1991) 18 *MULR* 305 at 321–325. Notably, discrimination provisions have been used by complainants to challenge derogatory racial comments and behaviour in the workplace context. See, for example, *Rugema v J Gadsten Pty Ltd v/a Southcorp Packaging* [1997] HREOCA 34 (Webster C, 26 June 1997) (hereafter *Rugema*); *Fernandez v State of New South Wales* (1999) EOC 92–989 (hereafter *Fernandez*).

11 See, for example, Human Rights and Equal Opportunity Commission, *I Want Respect and Equality: A Summary of Consultations with Civil Society on Racism in Australia* (2001); Anti-Discrimination Board of NSW, *Annual Report 2001–2002: President’s Report* (2002).

12 At the time of writing, the Victorian Law Reform Commission has a reference on workplace privacy: see Victorian Law Reform Commission, *Workplace Privacy: Issues Paper* (2002); Kate Foord, *Defining Privacy* (Occasional Paper, Victorian Law Reform Commission, 2002). In addition, in 2000 the Commonwealth announced a review of the privacy protections that attach to information contained in employee records: Attorney-General’s Department and Department of Employment and Workplace Relations, *Employee Records Privacy: A Discussion Paper on Information Privacy and Employee Records* (2004).

what is seen as invasive employer practices such as surveillance and monitoring of employees' communications and actions, the applicability of anti-vilification legislation to employee conduct does raise related questions concerning an employee's expectation of privacy at work, and perhaps more directly, the degree to which employers are entitled to monitor employee conduct in order to avoid vicarious liability under anti-vilification legislation.¹³

We conclude in the final section of this article that the line between public and private in workplaces and work relations is left largely unarticulated, both in the different statutes themselves, and in the case decisions interpreting them. Moreover, we argue that the new approach in the Victorian civil provisions has some advantages over the older approaches of New South Wales and the Commonwealth. Although at first glance the new Victorian provisions appear more ambiguous than the more familiar formulations of the public/private line found elsewhere in Australia, upon investigation the Victorian provisions probably offer more certainty generally on where the line between public and private will be drawn, and specifically more certainty for both employees and employers regarding their legal obligations in this area.

The public/private divides in the New South Wales and Commonwealth jurisdictions are examined first. The analysis explores and draws out questions relevant to the workplace context. Following this, the article turns to focus on the new Victorian *R&RT Act*. The final part of the article draws out some issues that arise in comparing these different jurisdictions.

1. The New South Wales and Commonwealth Legislative Frameworks

A. The Legislative Frameworks Regarding Prohibited Conduct

New South Wales was the first jurisdiction in Australia to enact anti-vilification statutory provisions. In 1989 the *Anti-Discrimination Act 1977* (NSW) was amended to insert racial vilification provisions.¹⁴ Since then, the Act has been amended on successive occasions to insert vilification provisions relating to homosexuality (1993), HIV/AIDS status (1994) and transgender status (1996).¹⁵ The civil prohibition is expressed as follows:

13 In this article we look simply at whether anti-vilification legislation as it currently stands applies in the work relations context, and the strengths and weaknesses of different legislative formulae in that context. We leave for a later day the normative question of whether anti-vilification legislation ought to apply broadly across all conduct in the paid labour market. Our initial view is that it ought, in the same way that sexual harassment and discrimination proscriptions apply across workplaces.

14 Racial vilification was added in 1989 by the *Anti-Discrimination (Racial Vilification) Amendment Act 1989* (NSW). On the history of this enactment, see McNamara, above n8 at 121–130. In 1994 the *ADA* (NSW) definition of 'race' (in s4) was amended to include ethno-religious origin or descent: *Anti-Discrimination (Amendment) Act 1994* (Cth). The objective of this amendment was to clarify coverage of ethno-religious groups such as Jewish people, Muslims and Sikhs: John Hannaford, Attorney-General, New South Wales, Legislative Council, *Parliamentary Debates (Hansard)*, 4 May 1994 at 1827–1828.

(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 [homosexuality, HIV/AIDS status, transgender status] of the person or members of the group.¹⁶

The key phrase is ‘public act’. This is explained further as including:

- (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 [homosexuality, HIV/AIDS status, transgender status] of the person or members of the group.¹⁷

The *ADA* (NSW) contains a number of exemptions to these civil prohibitions on vilification. Conduct that is exempted includes fair reporting of a public act of vilification, communications which attract absolute privilege, and acts done reasonably and in good faith for academic, artistic, scientific or research purposes, or any other purpose in the public interest, including discussion about any matter or act.¹⁸ In addition to this civil wrong, the *ADA* (NSW) prescribes offences of

15 Homosexual vilification was added in 1993 by the *Anti-Discrimination (Homosexual Vilification) Amendment Act 1993* (NSW); HIV/AIDS vilification was added in 1994 by the *Anti-Discrimination (Amendment) Act 1994* (NSW); transgender vilification was added in 1996 by the *Transgender (Anti-Discrimination and Other Acts Amendment) Act 1996* (NSW). The 1993, 1994 and 1996 anti-vilification provisions were all modeled on the original racial vilification legislative rules.

16 *ADA* (NSW) s20C (racial vilification). In relation to vilification on other grounds, see s38S (transgender vilification); s49ZT (homosexuality vilification); s49ZXB (HIV/AIDS vilification).

17 *ADA* (NSW) s20B (racial vilification). In relation to vilification on other grounds, see s38R (transgender vilification); s49ZS (homosexuality vilification); s49ZXA (HIV/AIDS vilification). The second reading speech contains little explanation of this concept of ‘public act’, other than that it ‘does not include private communications or other conduct in private’: Attorney-General John Dowd, New South Wales, Legislative Assembly, *Parliamentary Debates (Hansard)*, 4 May 1989 at 7489.

18 *ADA* (NSW) s20C(2) (racial vilification), s49ZT(2) (homosexuality vilification), s49ZXB(2) (HIV/AIDS vilification), s38S(2) (transgender vilification). On the exemptions in s20C(2), see McNamara, above n8 at 187–194.

serious vilification on the different grounds.¹⁹ The requirement of “public act” applies in relation to these criminal offences.²⁰

In October 1995 the *RDA* was amended by the *Racial Hatred Act 1995* (Cth). This statute inserted a new part into the *RDA* – Part IIA. The central substantive provision in Part IIA is s18C:

- (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.

The public/private divide in s18C(1) is drawn by the necessity that the act be ‘otherwise than in private’. Section 18C(2) and (3) provide further specification in relation to this concept:

- (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 contains an exemption to this prohibition on racial hatred in relation to conduct done reasonably and in good faith as part of an artistic work, in the course of any genuine academic, artistic or scientific discussion, or any other genuine purpose in the public interest. The exemption extends to cover a fair comment on any event or matter of public interest. This provision is potentially very broad, and for this reason has been heavily criticised by commentators.²¹

19 *ADA* (NSW) s20D (offence of serious racial vilification), s49ZTA (offence of serious homosexual vilification), s49ZXC (offence of serious HIV/AIDS vilification), s38T (offence of serious transgender vilification). There have to date been no prosecutions of these criminal offences.

20 The New South Wales Law Reform Commission has recommended that the offence of serious vilification be removed from the *ADA* (NSW) and relocated to the criminal law: New South Wales Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (NSW), Report No 92 (1999) at 536–537.

21 Indeed, one commentator has concluded that s18D is potentially so wide that all public comments made by people who genuinely believe in the truth of what they have said will be exempt: Kate Eastman, ‘Drafting Racial Vilification Laws: Legal and Policy Issues’ (1994) 1 *AJHR* 285 at 289. See also Saku Akmeemana & Melinda Jones, ‘Fighting Racial Hatred’ in Race Discrimination Commissioner (ed), *The Racial Discrimination Act 1975: A Review* (1995) 129 at 172–173; Nick Poynder, ‘Racial Vilification Legislation’ (1994) 3 *Aboriginal Law Bulletin* 4 at 5; McNamara, above n8 at 53–54 and 94–102.

Notably, the *RDA* does not contain a criminal offence relating to racial hatred. Although provisions establishing a criminal offence initially appeared in the original Bill, they were removed during parliamentary debate in the Senate in order to ensure the passage of the Bill.²²

Both the *ADA* (NSW) test of ‘public act’ and the Commonwealth concept of ‘otherwise than in private’ are tied to a concept of ‘the public’. Put simply, the *ADA* (NSW) covers conduct that is a communication to ‘the public’, is observable by ‘the public’, or is the distribution of material to ‘the public’ with knowledge that the material is vilifying. The *RDA* covers conduct that causes material to be communicated to ‘the public’, or is done in a ‘public place’, or is done within sight or hearing of people who are in a ‘public place’. ‘[P]ublic place’ is defined in terms of a place to which ‘the public’ have access, as of right or by invitation. The concept of ‘the public’ then is of central importance in understanding the scope of both statutes’ proscription of racial hatred and vilification. Notably, ‘public’ is not defined in either Act. It is an ambiguous concept, and, as will be explored below, it fails to draw a clear line in the workplace and work relations context between public acts caught under the two statutes, and non-remediable private acts.

B. The Legislative Framework Regarding Employer Civil Liability

There are a number of different ways in which businesses face potential civil liability in relation to contraventions of these racial hatred and vilification provisions in the *ADA* (NSW) and the *RDA* by their employees and contractors.²³ These provisions are similar to the mechanisms in anti-discrimination legislation that render employers liable in relation to conduct such as sexual harassment, or sex or disability discrimination in their workplaces.

Employers and principals face potential vicarious liability. Notably the *ADA* (NSW) vicarious liability provision was inserted into the Act relatively recently, in 1994.²⁴ Under the *ADA* (NSW) vicarious liability is linked to the issue of whether the employer or principal authorised the conduct in question. Section 53(1) of the Act provides that:

An act done by a person as the agent or employee of the person’s principal or employer which if done by the principal or employer would be a contravention of this Act is taken to have been done by the principal or employer also unless the principal or employer did not, either before or after the doing of the act, authorise the agent or employee, either expressly or by implication, to do the act.

22 McNamara, above n8 at 35–37; Akmeemana & Jones, above n21 at 138–139; Luke McNamara & Tamsin Solomon, ‘The Commonwealth *Racial Hatred Act* 1995: Achievement or Disappointment?’ (1996) 18 *Adelaide LR* 259 at 263–264. The original Bill was the Racial Discrimination Amendment Bill 1992 (Cth).

23 Employers and principals are potentially liable under the *ADA* (NSW) criminal offences of serious vilification as person who themselves committed the criminal offence. Vicarious liability does not arise in relation to these criminal offences, although employers and principals may be liable by reason of their complicity in a contravention of the criminal law by an employee (or other person).

24 *Anti-Discrimination (Amendment) Act* 1994 (NSW).

The section provides that liability is joint and several.²⁵ There is an exemption for the principal or employer where this person ‘took all reasonable steps to prevent the agent or employee from contravening the Act.’²⁶ These vicarious liability provisions apply in relation to employees engaged under contracts of employment, independent contractors engaged under contracts for service, employees working under agency arrangements and agents remunerated by commission.²⁷

The *RDA* provision on vicarious liability is relatively straightforward. It provides that ‘if an employee or agent of a person does an act in connection with his or her duties as an employee or agent, and the act would be unlawful under this Part if it were done by the person, [then] this Act applies in relation to the person [employer or principal] as if the person had also done the act.’²⁸ There is an exemption where it is established that the employing entity ‘took all reasonable steps to prevent the employee or agent from doing the act.’²⁹ Notably, the word ‘employee’ is defined to include a person working under a contract for services, that is, an independent contractor.³⁰

In addition to vicarious liability, under the New South Wales statute an employer or principal might be liable as an accessory for aiding and abetting a contravention of the statute.³¹ There is no equivalent provision in the *RDA* in relation to racial hatred. Finally, an employer may itself, himself or herself, be directly liable as the person who engaged in the unlawful racial hatred or vilification.

2. Adjudications Under the New South Wales and Commonwealth Jurisdictions

This section of the article draws out some main themes in the decisions under the legislative provisions of importance in thinking about the workplace and work relations context. The question of whether the legislative formulae are definitive of the conduct covered under the two statutes is examined first. This is followed by an examination of how adjudicators approach cases involving workplace contexts, with some broad principles extracted from the case decisions. These include the necessity of having a third party present, and the meaning of ‘the public’.

A. Legislative Definitions and Definitiveness

It is clear from the face of the legislation that the definition of ‘public act’ in the ADA (NSW) is non-exhaustive.³² Turning to the federal legislation, it is also clear from the face of the *RDA* that the definition of ‘public place’ in s18C(3) is similarly

25 *ADA* (NSW) s53(2).

26 *ADA* (NSW) s53(3).

27 *ADA* (NSW) s4 definitions of ‘principal’, ‘commission agent’, ‘contract worker’, ‘employment’.

28 *RDA* s18E(1).

29 *RDA* s18E(2).

30 *RDA* s3(1). Note that ‘agent’ is not defined in s3(1).

31 *ADA* (NSW) s52: ‘It is unlawful for a person to cause, instruct, induce, aid or permit another person to do an act that is unlawful by reason of a provision of this Act.’

non-exhaustive. But is s18C(2) (with (3)) definitive of the meaning of ‘otherwise than in private’ in s18C(1)? Several decisions indicate, either explicitly or implicitly, that s18C(2) (with (3)) is not an exhaustive statement of what constitutes conduct done ‘otherwise than in private’ for the purpose of s18C(1).³³ Not only is it not an exhaustive statement, but it appears that the circumstances referred to in each of subsections (a), (b) and (c) of s18C(2) may not necessarily satisfy the test of ‘otherwise than in private’ in s18C(1).³⁴

In *Korczak v Commonwealth* the HREOC Hearing Commissioner stated that:

Section 18C(2) indicates circumstances where certain conduct may be taken to occur ‘otherwise than in private’. However, the section is not exhaustive, it simply indicates some examples of cases which may fall within the definition and it does not exclude other circumstances which a person may argue fall within the meaning of ‘otherwise than in private’.³⁵

The Commissioner drew support for this reading of s18C(2) from two main sources. First, he expressed the view that the racial hatred provisions must be construed in the context of the rest of the *RDA*, and especially the s9 broad prohibition on racial discrimination in ‘public life’.³⁶ Since the *RDA* must be read as a whole, ‘otherwise than in private’ in s18C(1) must be reconciled with the broad concept of ‘public life’ in s9, and this suggests that the concept of ‘otherwise than in private’ will be broader than the specified circumstances of s18C(2) (and (3)). Secondly, the Commissioner construed ‘otherwise than in private’ in light of the broad coverage of public activities and matters in art 4 of the *International Convention on the Elimination of all Forms of Racial Discrimination*³⁷ (CERD), which the Commissioner noted provided the basis for the enactment of the federal racial hatred provisions.³⁸

32 ‘Public act’ is defined to ‘include’ certain behaviour only. See *ADA* (NSW) ss20B, 38R, 49ZS, 49ZXA.

33 *Korczak v Commonwealth* (Human Rights and Equal Opportunity Commission, Commissioner Innes, 16 December 1999) (digest at (2000) EOC 93–056) (hereafter *Korczak*); *McLeod v Power* (2003) 173 FLR 31 (hereafter *McLeod*). The reasoning of the adjudicator in *Jacobs v Fardig* effectively also adopts this approach: *Jacobs v Fardig* [1999] HREOCA 9 (Commissioner Innes, 27 April 1999) (digest at (1999) EOC 93–016) (hereafter *Fardig*).

34 See in particular *McLeod*, above n33.

35 See *Korczak*, above n33 at subheading 8.3.

36 Section 9(1) refers to any act that impairs the recognition on an equal footing of any human right or fundamental freedom ‘in the political, economic, social, cultural or any other field of public life.’ The Commissioner also drew on Article 5 of the *International Convention on the Elimination of All Forms of Racial Discrimination* (hereafter *CERD*); *Korczak*, above n33 at subheading 8.3. Note that it is reported that the adjudicator in *Fardig*, above n33 stated that ‘if the meeting [the act] occurred in the sphere of public life, the meeting [the act] occurred “otherwise than in private”’ under s18C(1): Human Rights and Equal Opportunity Commission *Annual Report 1998–1999* (1999) at 54.

37 *CERD* opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969).

38 *Korczak*, above n33 under subheading 8.3. Australia ratified *CERD* in September 1975, with a reservation to art 4(a). Article 4(a) imposes an obligation on state parties to criminalise racial hatred: *Akmeemana & Jones*, above n21 at 131.

McLeod v Power is an important case on this question of the definitiveness of s18C(2).³⁹ The Federal Magistrate expressed agreement with the view in the passage from *Korczak* quoted above and said that ‘the various matters set out in sub section (2) are examples that may fall within the definition but are not in themselves definitive’ of the meaning of ‘otherwise than in private’.⁴⁰ Although in this case the respondent’s behaviour clearly occurred in a ‘public place’ under s18C(2)(b), the Federal Magistrate held that the conduct did not take place ‘otherwise than in private’ under s18C(1). Ultimately for this adjudicator, it was ‘the circumstances and the quality of the act concerned’ that determined whether the act was done ‘otherwise than in private’ under s18C(1).⁴¹ The adjudicator explained that the ‘quality of the statement’ refers to whether the conversation ‘was intended to be a private conversation or heard by a more general audience or was one likely to be heard by a larger audience.’⁴² The conversation in question here was a racial comment made by the respondent to a prison officer as she walked away from the prison, having been refused entry as a visitor. The officer had followed the respondent to ensure she left the prison grounds. The Magistrate concluded that the interaction in this case was intended by the visitor to be a ‘private exchange’ between herself and the officer. In other words, ‘[her] invective was directed to the ... [officer] alone.’⁴³ She wasn’t in any sense ‘playing to the grandstand’, as the adjudicator described it.⁴⁴ The adjudicator said:

A private conversation does not become a public one merely because it takes place in a public street or in a place to which members of the public have a right to admission or access. Again, whether or not an act occurs “otherwise than in private” depends on the context of the situation and must be interpreted from the overall intention of the legislature in enacting Part IIA of the [*RDA*]. That purpose was to prohibit and provide a civil remedy for behaviour based on racial hatred and to prevent persons being threatened because of their particular racial, colour, national or ethnic origins.⁴⁵

The decision records clearly the adjudicator’s view of Parliamentary intention — ‘the legislation intends to protect private conversations from the reach of the [*RDA*].’⁴⁶ The message in this decision, and in *Korczak*, is that s18C(2)(a), (b) and (c) do not provide a definitive test of what is done ‘otherwise than in private’ for the purposes of s18C(1). Moreover, *McLeod* suggests that there is a field of genuinely private conversation that is beyond the reach of the *RDA* racial hatred provisions, even where it occurs in a public place.⁴⁷ The second reading speech

39 (2003) 173 FLR 31.

40 *McLeod*, above n33.

41 *Id* at 47.

42 *Id* at 47–48.

43 *Id* at 39.

44 *Id* at 47.

45 *Id* at 42.

46 *Id* at 47.

47 This view is supported by the case of *Gibbs v Wanganeen* (2001) 162 FLR 333 at 337–338 (Driver FM) (hereafter *Gibbs*). In contrast to *McLeod*, above n33 though, this view does not appear to have shaped the finding in *Gibbs*.

and explanatory memorandum for the Bill provides some support for this view. Notably, the second reading speech states that '[t]he law has no application to private conversations.' The text around this statement unfortunately does not elucidate this point.⁴⁸ The Explanatory Memorandum states that '[t]he Bill does not apply to statements made during a private conversation or within the confines of a private home.'⁴⁹

Support for the interpretation of s18C(2) as non-definitive of the s18C(1) 'otherwise than in private' test is provided by two further cases. In these cases, acts that initially appear to have taken place in private have been characterised by adjudicators as being done 'otherwise than in private' under the *RDA* s18C(1) where the initial private act triggers conduct that takes place in the public realm. For example, it has been determined that giving an interview to a newspaper reporter, quotes from which were later published in two daily newspapers, was an act done 'otherwise than in private' by the interviewee (a parliamentarian). Even though the interview took place in the parliamentarian's office, it was held that the interviewee 'deliberately and intentionally engaged in conduct, the natural consequence of which was the publication of his words' in a newspaper.⁵⁰ Similarly, the act of writing a play that was subsequently performed by the Melbourne Theatre Company was an act 'done otherwise than in private' by the writer, because the act of writing the play, although it occurred in private, was 'inseparable' from the (public) act of performance.⁵¹ These cases illustrate an approach to interpreting 'otherwise than in private' in s18C(1) that either travels outside s18C(2) (notably (a)), or that takes a non-technical and broad approach to interpreting s18C(2).

48 Attorney-General Michael Lavarch, Commonwealth, House of Representatives, *Parliamentary Debates (Hansard)*, House of Representatives, 15 November 1994 at 3337.

49 Explanatory Memorandum accompanying the Racial Hatred Bill 1994 (Cth) at 1.

50 *McGlade v Lightfoot* (2002) 124 FCR 106 at 116 (Carr J). Making statements (which were subsequently published in a newspaper) during an interview with a reporter in a cafe was held to have been done otherwise than in private: *Feghaly v Oldfield* (Human Rights and Equal Opportunity Commission, Inquiry Commissioner Beech, 19 April 2000) (digest at (2000) EOC 93-090). See also *Walsh v Hanson* (Human Rights and Equal Opportunity Commission, Nader QC, 2 March 2000). Although in *Walsh v Hanson* the requirement of 'otherwise than in private' was not specifically discussed, it seems that the parties assumed this criteria was satisfied. A New South Wales case also suggests that an act done in a setting that may appear at first glance to be private can be caught under the legislation as having a sufficiently public character to be a 'public act'. In *Patten v New South Wales* [1997] EOTrib(NSW) 90-91 of 1995 (Judicial Member Biddulph, Members Alt & McDonald, 21 January 1997) (hereafter *Patten*), a police officer used a racially derogatory word to another officer as they traveled in a patrol car. The comment was determined to be a 'public act' under the *ADA* (NSW), as a three person ABC television crew sat in the back of the patrol car, filming the officers as part of a documentary. The police officers were aware that they were being filmed at the time of the comment.

51 *Bryl v Nowra* [1999] HREOCA 11 (Inquiry Commissioner Johnston, 21 June 1999) (digest at (1999) EOC 93-022).

B. The General Approach of Adjudicators to Work Contexts

The case decisions dealing with racial hatred and vilification in workplaces and work contexts can be categorised into two broad groupings. The first set comprises more straightforward, and perhaps typical, workplace conflicts where one employee vilifies another employee in a common workplace such as an office environment, a workshop or factory. The second set of cases deals with less usual work environments, such as prisons and the police force, where the issue might be alleged vilification involving prison officers, prisoners, police officers, suspects or members of the public. These two types of cases are examined in turn.

(i) Employee-Employee Conduct

There are no reported decisions under the *ADA* (NSW) vilification provisions dealing with more straightforward workplace contexts where one employee vilifies another employee in the workplace of both of them.⁵² There are however many cases argued as direct discrimination that include behaviour that appears from the decision to involve conduct potentially amounting to vilification.⁵³ This choice by complainants to pursue redress on the basis of discrimination rather than vilification, seems likely to reflect a number of matters, including the ‘public act’ requirement of the vilification provisions and the lower threshold under the direct discrimination provisions as being less favourable treatment compared to the vilification requirement of inciting hatred, serious contempt, or severe ridicule. The choice to pursue these issues as discrimination might also reflect the Anti-Discrimination Board’s interpretation that the legislation requires the complainant to establish that a person other than the complainant overheard or saw the vilifying conduct.⁵⁴ At this point it can be noted that it may be very difficult for a complainant to establish the presence of another person in the work relations context. Co-workers may understandably be reluctant to come forward to support the complainant’s case of vicarious liability against their employer, and it may be difficult to identify other people, such as clients or members of the general public who saw or heard the conduct.

In contrast, there have been a number of cases of employee to employee vilification brought under the *RDA* provisions, and these provide some indication of the scope of the federal legislation regarding work issues. In some of these cases adjudicators have stated explicitly that vilification that takes place in a workplace setting will ordinarily qualify as an act done ‘otherwise than in private’ under

52 Unfortunately, as the annual reports of the Anti-Discrimination Board of NSW do not reveal the area of vilification complaints, it is not possible to ascertain whether vilification complaints in employment are lodged (or settled). See Anti-Discrimination Board of NSW, *Annual Report 2003–2004* at 12; Anti-Discrimination Board of NSW, *Annual Report 2002–2003: Handling Complaints* at 4.

53 See, for example, *Riley v Western College of Adult Education* (2003) EOC 93–253; *Borg v Commissioner, Department of Corrective Services* (2002) EOC 93–198; *Dutt v Central Coast Area Health Service* (2002) EOC 93–228; *Karekar v TAFE Commission of NSW* (2002) EOC 93–199; *Fernandez*, above n10.

54 New South Wales Law Reform Commission, above n20 at 536. This issue is discussed below. See n72 and accompanying text.

s18C(1).⁵⁵ In other cases adjudicators appear to have assumed that the workplace act occurred ‘otherwise than in private’.⁵⁶ These views of adjudicators clearly overlap with the point discussed above, that adjudicators have not construed s18C(2) (and (3)) as definitive of the meaning of ‘otherwise than in private’ in s18C(1). Notably, the view that work contexts are generally covered by the racial hatred provisions under the *RDA* accords broadly with the anticipated scenarios on which the vicarious liability provisions in Part IIA have been enacted – first that racial hatred will occur between workers in a workplace, and secondly that employers will be liable in certain circumstances.

The clearest explicit statement that conduct that takes place in workplaces is done ‘otherwise than in private’ is contained in *Korzak*.⁵⁷ The workplace in question in this case comprised an open plan office space, with people at workstations with chest height partitions. The complainant alleged that he had been harassed and verbally abused by his co-workers. The conduct here was determined to be acts done ‘otherwise than in private’.⁵⁸ The broad approach of the adjudicator to the meaning of ‘otherwise than in private’ in s18C(1) has been discussed above. In effect, the adjudicator drew on the breadth of ‘public life’ in s9 of the *RDA* and the scope of article 4 of the CERD to conclude that ‘the context of the *RDA* utilises a broad concept of what constitutes a field of “public life”’. Public life includes employment situations. In these circumstances, comments made in the workplace fall within the sphere of “public life” and so constitute conduct done ‘otherwise than in private’ under s18C(1).⁵⁹ The adjudicator in *Jacobs v Fardig* took a similar approach in indicating that the context of employment constituted ‘public life’ under s9 and this was sufficient to bring behaviour in the workplace context within the scope of ‘otherwise than in private’.⁶⁰

55 *Korzak*, above n33; *Fardig*, above n33.

56 *Hearne v Kelvin Dennis and South Pacific Tyres Pty Ltd* (Human Rights and Equal Opportunity Commission, Carter QC, 24 May 2000) (hereafter *Hearne*); *Rugema*, above n10; *Charan v Commonwealth Insurance Ltd* [2002] FMCA 50 (Driver FM, 8 May 2002) (digested at (2002) EOC 93–220) (hereafter *Charan*).

57 *Korzak*, above n33.

58 The complaint was however dismissed as HREOC was not satisfied that the conduct that was alleged to be vilifying was ‘done because of the race’ or national origin of the complainant, as required under s18C(1)(b) of the *RDA*. In other words, the complainant did not establish the necessary causal link between the acts of vilification, and his race or national origin.

59 *Korzak*, above n33 at subheading 8.3.

60 See also *Fardig*, above n33. This case involved a statement made by one shire councillor during a council Strategy and Planning Workshop attended by councillors and members of the Council’s senior management. In a preliminary finding, the HREOC Inquiry Commissioner held that even though the workshop had features that suggested it was not a public gathering — it was held at 5.30pm in the Council chambers and there were no members of the public present — making this comment was found to be an act which occurred ‘otherwise than in private’ under the *RDA*. This view of the Commissioner was largely formed by reading the application of s18C(1) as congruent with the application of the s9 discrimination provision. In examining the concept of ‘public life’ in s9, the Commissioner ‘stated that public life included employment situations as well as participation in government on any level’: Human Rights and Equal Opportunity Commission, above n36 at 54.

An example of a decision in which the adjudicator assumed that the workplace conduct in question took place ‘otherwise than in private’ under s18C(1) is provided in *Hearne v Kelvin Dennis and South Pacific Tyres Pty Ltd*.⁶¹ In this case, the complainant tyre fitter alleged that he had been subjected to a series of racial comments directed at him by the Assistant Manager of the workshop. In the HREOC decision it appears that it was assumed that had this conduct taken place, it would have satisfied the test of ‘otherwise than in private’ for the purposes of s18C(1).⁶² In another case a trainee insurance clerk alleged that she had been vilified by a co-worker. From the decision it appears that the Federal Magistrate assumed that had the conduct occurred, such behaviour would constitute acts done ‘otherwise than in private’ under s18C(1).⁶³ In *Rugema* the HREOC Commissioner determined that Rugema had been subjected to racial abuse by his supervisor (another employee of the company), and that the respondent was vicariously liable for these actions of the supervisor.⁶⁴ Rugema worked in the respondent’s factory. Initially he was a machine operator. It appears that the Commissioner assumed that the actions in this workplace occurred ‘otherwise than in private’. Unfortunately the reasoning leading to this conclusion does not appear in the decision. It is an interesting case because it seems likely that the conduct in the workplace here would not satisfy the criteria in s18C(2). A factory would be unlikely to be a ‘public place’, as members of the public are generally discouraged or forbidden to enter premises such as factories due to health and safety concerns such as noise and dangerous machinery. Given the noise levels that often exist in factories, it also seems unlikely that the racial abuse was heard, or could be heard, by members of the public outside the factory, under either s18C(2)(a) or (c).

In *Horman v Distribution Group Ltd* the adjudicator provided a broad conclusion as to how the work context of the case satisfied the ‘otherwise than in private’ test of s18C(1). Horman was an employee of the respondent in its automotive spare parts business.⁶⁵ Horman’s work involved processing telephone orders for spare parts from clients. It appears from the decision that the business comprised a warehouse with a showroom (or retail outlet) attached. In her complaint Horman alleged several wrongs including sexual harassment and discrimination on a range of grounds. In addition, she alleged incidents of racial hatred directed at her by other employees of her employer. In relation to the complaint of racial hatred, the Federal Magistrate concluded that ‘the respondent used offensive and derogatory terms directed to the applicant and others in the

61 *Hearne*, above n56.

62 *Ibid.* The complaint was dismissed, on the ground that the complainant failed to establish as an evidential matter that the alleged acts of racial hatred took place.

63 *Charan*, above n56. In this case the adjudicator was not satisfied that the acts that allegedly amounted to racial hatred took place.

64 *Reguma*, above n10. Rugema also successfully claimed racial discrimination in employment under s15 of the *RDA*.

65 *Horman v Distribution Group Ltd* [2001] FMCA 52 (Raphael FM, 27 July 2001) (hereafter *Horman*). See also [2002] FCA 219 (Emmett J, 22 February 2002) where an application to appeal was refused. The decision records that the complainant worked as a ‘spare parts interpreter’.

presence of the applicant in a public place or in the sight or hearing of people in a public place in breach of section 18C.⁶⁶ Unfortunately the decision does not provide any further explanation of this finding. Presumably the retail outlet would be a ‘public place’ under s18C(2)(b) and (c). Possibly though the entire premises constituted a ‘public place’, as it appears from the evidence recorded in the decision that clients came into the area where Horman’s desk was located. This analysis assumes that clients constitute ‘the public’, an issue discussed further below.

(ii) *Unusual Work Settings*

In cases involving more unusual work settings and circumstances — such as prisons and the police force — adjudicators under both the *RDA* and the *ADA* (NSW) have not adopted the approach that conduct that takes place in the context of paid work will generally be caught under the legislation as being sufficiently public. Indeed, in one case under the *RDA* the adjudicator explicitly disavowed any view that the fact that an act took place in a work setting (in that case a prison) meant that it took place ‘otherwise than in private’ under s18C(1). The example that the adjudicator gave was the work setting of a personal care attendant carrying out his or her duties in the client’s home. According to the adjudicator, ordinarily conduct in such a setting would not be covered by s18C(1) of the federal Act.⁶⁷

The adjudicators in less usual work cases generally engage in a closer analysis of the applicability of s18C(2)(a), (b) and (c), and (3) of the *RDA*, and s20B(a), (b) and (c) etc in the *ADA* (NSW).⁶⁸ This frequently comes down to an investigation of the presence, or absence, of ‘the public’ in the vicinity of the incident. An example of this closer investigation of the legislation is provided in the case of *Gibbs*, which concerned an allegedly vilifying statement made by a prisoner to a prison officer.⁶⁹ The case was brought under the *RDA* racial hatred provisions. The incident took place in F Division, which was a part of the prison to which members of the public did not have access. Another prison officer, but no members of the public, heard the conversation. Implicitly this was seen as insufficient to come within s18C(2)(a). Driver FM concluded that the prison gatehouse was a ‘public place’ under s18C(2)(b) (because the public had a direct right of access to it), as was the visits centre (because the public was invited there, if they passed a security clearance). However, F Division was not such a ‘public place’ ‘because there is no express or implied invitation for the public to enter it unescorted’.⁷⁰ As discussed above, the adjudicator took the view that to come within s18C(2)(c), it would need

66 *Horman*, id at 60.

67 *Gibbs*, above n47 at 337 (Driver FM).

68 See, for example, *Gibbs*, above n47; *Patten*, above n50; *Russell v Commissioner of Police, New South Wales Police Service* [2001] NSWADT 32 (Judicial Member Ireland, Members Farmer & Taksa, 26 February 2001) (hereinafter *Russell*). The latter case was appealed, but the ‘public act’ conclusion was not affected: *Commissioner of Police, New South Wales Police Service v Estate of Russell* [2001] NSWSC 745 (Sully J, 31 August 2001) (hereafter *Estate of Russell* [2001]); *Commissioner of Police, New South Wales Police Service v Estate of Russell* (2002) 55 NSWLR 232 (hereafter *Estate of Russell* (2002)). The exception is *McLeod*, above n33.

69 *Gibbs*, above n47.

70 Id at 337.

to be shown that there was a third party in a public place who was within ‘earshot’ of the statement.⁷¹ Here, any third parties in the visits centre and the gatehouse were not within earshot of the conduct that took place in F Division (as these are in separate buildings). In addition, the incident took place at a time when any visitors to the prison were likely to have already left the prison. On this basis the statement made by the prisoner did not occur ‘otherwise than in private’ under s18C(1).

C. *The Presence of Third Parties*

In its report on the *ADA* (NSW), the New South Wales Law Reform Commission drew attention to an important difference between the New South Wales provisions and the *RDA*. This difference is potentially of considerable importance to the workplace and work relations context. Although noting that it is unclear whether the words ‘observable by the public’ in the definition of ‘public act’ require that the conduct was actually observable by members of the public who were present, or only that the conduct was capable of being observed by members of the public had they been present, the report nonetheless concludes that the *ADA* (NSW) does not cover situations where only the target and vilifier are present.⁷² The Anti-Discrimination Board (NSW)⁷³ is reported to take the view that at least one member of the public must be present for the conduct to be ‘observable by the public’.⁷⁴ This view is in keeping with the concept of vilification as being about inciting third parties to hate the target’s group. As incitement requires the presence of an audience, at least one person, of a different racial group to the complainant, must have seen or heard the vilifying act.⁷⁵

In contrast, the Law Reform Commission report notes that the *RDA* does not require that someone other than the vilifier and target be present.⁷⁶ This renders

71 *Ibid.*

72 New South Wales Law Reform Commission, above n20 at 536. This conclusion appears to be borne out in the cases, where third parties were present. See, *Patten*, above n50; *Russell*, above n68; *Anderson v Thompson* [2001] NSWADT 11 (Judicial Member Ireland, Members Clayton & Lau, 5 February 2001) (hereafter *Anderson*). Note that in *R v Marinkovic* (1996) EOC 92–841, it appears that the adjudicator assumed, quite reasonably, that the incidents were overheard or seen by third parties. See also Sharyn Ch’ang, ‘Legislating Against Racism: Racial Vilification Laws in New South Wales’ in Sandra Coliver (ed), Kevin Boyle & Frances D’Souza (contributing eds), *Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination* (1992) 87 at 93–95.

73 The Anti-Discrimination Board is the State body with the task of receiving complaints under the *ADA* (NSW) and attempting to resolve them by a process of conciliation.

74 New South Wales Law Reform Commission, above n20 at 536. In its submission to the Commission’s inquiry the Board identified this aspect of the provisions as problematic and suggested an alternative approach of focussing on the offence caused to the victim as well as the potential for incitement.

75 The concept of vilification as incitement is clearly articulated in the substantive prohibition on inciting hatred in *ADA* (NSW) s20C(1) (racial vilification); s38S(1) (transgender vilification); s49ZT(1) (homosexuality vilification); s49ZXB(1) (HIV/AIDS vilification). On whether incitement must be actual or potential, see Simon Rice, ‘Racial Vilification: The Missing Words’ (1995) 20 *Alt LJ* 304.

76 New South Wales Law Reform Commission, above n20 at 539.

the scope of the *RDA* legislative provisions significantly broader than the *ADA* (NSW) vilification provisions on this issue. The concept of vilification underlying the racial hatred provisions in the *RDA* is less about inciting third parties to hatred, and more about causing insult or offence to a reasonable member of the vilified group.⁷⁷ Even so, the *RDA* does contain a public/private line by requiring that the conduct take place ‘otherwise than in private’.⁷⁸ Although the first part of the statutory articulation of the public/private line relates to matters ‘communicated to the public’ (s18C(2)(a)), clearly the test of whether the conduct was ‘done in a public place’ (s18C(2)(b)) does not require that a third person actually hear or see the act, or even be within sight or hearing of the act. Indeed the presence (or absence) of a third party is irrelevant as the concept of ‘public place’ is defined by reference to whether the public have access to it, not whether they are present in it. Case decisions indicate that the third articulation of the test, whether the act was ‘done in the sight or hearing of people who are in a public place’ (s18C(2)(c)) requires not that a third person who was in a public place actually see or hear the conduct, only that their physical proximity was such that a third party could see it or hear it, had they been paying attention to what was going on around them.⁷⁹ In the case of *Gibbs* the adjudicator referred to the need only for a third party to be within ‘earshot’ to satisfy s18C(2)(c).⁸⁰ In *McMahon v Bowman*, the Federal Magistrate determined that the test in s18C(2)(c) would be satisfied where, as here, the allegedly vilifying words were ‘spoken in such a way that they were capable of being heard by some person in the street [a “public place”] if that person was attending to what was taking place.’⁸¹ In this case, although there were three people on the street at the time of the incident, there was no evidence that any of them actually heard what was said.

This discussion of whether the legislation requires the presence of a third party must be supplemented by recalling the decision in *McLeod*, discussed above.⁸²

77 See *RDA* s18C (1)(a). Anna Chapman, ‘Australian Racial Hatred Law: Some Comments on Reasonableness and Adjudicative Method in Complaints Brought by Indigenous People’ (2004) 30 *Mon LR* 27; Eastman, above n21 at 290.

78 Given that the *RDA* does not require an element of incitement in its prohibited conduct, there is no logical reason to require that the conduct take place in public. Private conduct that causes offence or insult to the (reasonable) member of the vilified group should logically be caught under the *RDAs* prohibition on racial hatred. This tension has been noted by several commentators; see Akmeemana and Jones, above n21 169; McNamara, above n8 at 51.

79 This seems the preferable interpretation. Had federal Parliament intended to require that a third party in a public place actually see or hear the conduct, it would be expected that the legislation would have been more clearly worded, such as ‘(c) is seen or heard by people who are in a public place’.

80 *Gibbs*, above n47 at 337.

81 *McMahon v Bowman* [2000] FMCA 3 (Raphael FM, 13 October 2000) at 26. In coming to this view, the Federal Magistrate drew on a line of English and New Zealand authorities regarding offensive behaviour to the effect that a requirement that something is done within sight of a person does not require that the person did see it, only that they could see it; *v James Webb* (1848) 2 C&K 933; *Purves v Inglis* (1915) 34 NZLR 1051. The reasoning in *McMahon v Bowman* was discussed in *Chambers v Darley* [2002] FMCA 3 (Baumann FM, 20 December 2001). In this case the adjudicator confirmed that a backyard is not a ‘public place’.

82 *McLeod*, above n33.

This case is of importance as the tenor of the reasoning revealed in the determination suggests that the *RDA* provisions require that the respondent's behaviour contain the element of incitement. Notably though such a view is not supported by other decisions under the federal provisions.

D. Meaning of 'the public'

A key concept in both the *ADA* (NSW) test of 'public act' and the *RDA* concepts in s18C(2) and (3), is 'the public'.⁸³ The New South Wales Law Reform Commission has discussed the problematic character of this test of 'the public', as it appears in the *ADA* (NSW).⁸⁴ In the opinion of the Commission, this wording fails to provide a clear dividing line between the 'public acts' that are covered by the legislation, and unremediable private acts. The example the Commission gives of a situation which is neither clearly public nor private is 'where vilifying statements are made at a private function in the presence of a large number of people'.⁸⁵ Unfortunately the Commission does not articulate what it means by a 'private function', that is, the characteristics of the function that make it 'private'. Presumably, a 'private function' would be one at which attendance was by invitation only, whether or not it takes place in a private space such as a home, or a more public space such as a conference centre or function rooms at a reception centre.

The meaning of the statutory concepts of 'the public' in the *ADA* (NSW) and *RDA* may be an important issue in complaints relating to work contexts. This question appears of particular relevance in unusual work circumstances under the *ADA* (NSW) and the *RDA*, as in these situations adjudicators have not adopted a general approach that workplaces and work contexts are usually covered by the legislation. Clearly members of the general public (the world at large), who happen upon the incident as passers by will constitute 'the public'.⁸⁶ But what of a more

83 The *RDA* also explicitly relies on a concept of 'private' in the test of 'otherwise than in private'. The meaning of the concept of privacy in Australia is notoriously difficult to pin down. See generally Foord, above n12.

84 New South Wales Law Reform Commission, above n20 at 535–543.

85 Id at 536.

86 Two cases brought under the racial vilification provisions in the *ADA* (NSW) involved conduct and comments by police officers during the course of questioning and arresting potential suspects on Sydney streets. This behaviour was overheard and seen by people passing by, and in both cases it was found that the officers' conduct constituted 'public act[s]' within the meaning of the legislation. *Patten*, above n50; *Russell*, above n68. The latter case was appealed, but the 'public act' conclusion was not affected: *Estate of Russell* [2001], above n68; *Estate of Russell* (2002), above n68. Another case brought under the *ADA* (NSW) provisions involved a local councillor in relation to comments he made at two council events. On the first occasion the councillor spoke out loudly during a public event held at the council chambers, at which many members of the local community were present. The second incident occurred during a council meeting when there were approximately 30 people watching the proceedings from the public gallery. It was found that both sets of comments constituted 'public acts' by the councillor: *Wagga Wagga Aboriginal Action Group v Eldridge* (1995) EOC 92–701. In these three cases the presence of members of the general community who witnessed the conduct rendered each incident of allegedly vilifying behaviour a 'public act', as a 'communication to the public' under s20B(a) of the *ADA* (NSW).

limited audience? Are other workers of the same employer ‘the public’ within the meaning of these legislative provisions? In several cases (under the *RDA*) adjudicators appear to have assumed that they are.⁸⁷ Can visitors to the employer’s premises, such as courier drivers and delivery dispatchers, constitute ‘the public’? Are clients ‘the public’? The case decisions under the *ADA* (NSW) and *RDA* provide some guidance, but not definitive answers to these questions.

The case of *Gibbs* is useful in understanding who may count as ‘the public’.⁸⁸ In this decision, about the alleged vilification of a prison guard by a prisoner, the adjudicator assumed that members of the general public who were visitors to the prison were ‘the public’. The adjudicator expressed a clear view that other correctional services staff and prisoners were not ‘the public’ for the purposes of the test of communication to the public in *RDA* s18C(2)(a).⁸⁹ This case is potentially very important in the workplace context as suggesting that Co-workers and perhaps clients will not constitute ‘the public’.

In non-work cases, relatively select or defined groups of people have been found to constitute ‘the public’.⁹⁰ In three New South Wales cases that dealt with conflicts between neighbours in blocks of flats, ‘the public’ under the *ADA* (NSW) was constituted in a narrower manner — as residents and their guests in each block of flats.⁹¹

In addition, in a New South Wales case it appears to have been assumed that the publication of a newspaper article in a language other than English was still a ‘public act’ under the *ADA* (NSW), even though the article had a relatively closed readership — people who read Greek.⁹² Another relatively closed group of people

87 *Korczak*, above n33 (digest at (2000) EOC 93–056); *Fardig*, above n33; *Rugema*, above n10; *Hearne*, above n56; *Charan*, above n56.

88 *Gibbs*, above n47.

89 *Id* at 337.

90 *Beling v Stapels* provides some interesting preliminary analysis of this issue under the *RDA*. It was alleged in this complaint that the respondent vilified the complainant, whilst both were in the complainant’s home, and that this was overheard by a tradesperson who happened to be working in the complainant’s home at that time. In hearing an application for an extension of time the Federal Magistrate formed the view that these circumstances may fall within s18C(2)(a) as being a communication to the public. He noted that the *RDA* does not define how many people are needed in order to constitute ‘the public’ for these purposes. In his view, this situation presented an arguable case, and one that ought to be explored at a hearing of the complaint. Unfortunately this case did not proceed to a hearing. *Beling v Stapels* [2001] FMCA 135 (McInnis FM, 10 December 2001).

91 *Anderson*, above n72; *R v Marinkovic*, above n72; *Burns v Dye* [2002] NSWADT 32 (Judicial Member Britton, Members Silva & Toltz, 12 March 2003).

92 *Malco v Massaris* [1998] EOTrib(NSW) 226–229 of 1996 (Judicial Member Raphael, Members Greenhill & McDonald, 12 February 1998). See also *Aegean Macedonian Association of Australia v Karagiannakis* [1999] NSWADT 130 (Judicial Member Bartley, Members Farmer & Clayton, 10 December 1999) (digest at (2000) EOC 93) (the language of the article is unclear from the decision). Note, however, that in an earlier case (*Hellenic Council of New South Wales v Apoleski* [1997] EOTrib(NSW) 9 & 11 of 1995 (Judicial Member Biddulph, Members Alt & Mooney, 25 September 1997)) the Tribunal seemed to rely on the fact that the *Macedonian Weekly Herald* occasionally published articles in English, in order to find that the publication was a ‘public act’.

satisfied the requirement of ‘the public’ in *Miller v Wertheim*, a decision under the *RDA* racial hatred provisions.⁹³ This case involved a speech that was made during the Annual General Meeting of the New South Wales Jewish Board of Deputies.⁹⁴ The speech was given by the retiring president of the Board, and the complainant took the view that it vilified the Orthodox Jewish community, of which she was a member. The Full Federal Court assumed that the giving of this speech was an act done ‘otherwise than in private’ under s18C(1) by the outgoing president.⁹⁵ Presumably the only attendees at the Annual General Meeting were members of the NSW Jewish Board of Deputies. This decision of the Full Federal Court lends support to an argument that clients, visitors to the workplace, and even co-workers can constitute “the public” for the purposes of both the *RDA* and the *ADA* (NSW) anti-vilification provisions.

The model of ‘the public’ is of course not unique to the *ADA* (NSW) and *RDA* statutory schemes. It is a concept that is found in other areas of Australian law, notably corporations law⁹⁶ and copyright law.⁹⁷ One particular case worth discussing here involves copyright law. The applicant claimed that the respondent had breached its copyright in a musical work by performing the work ‘in public’, without its consent.⁹⁸ The respondent bank had played a video to 11 of its

93 *Miller v Wertheim* [2002] FCAFC 156 (Heerey, Lindgren & Merkel JJ, 27 May 2002) (digest at (2002) EOC 93–223). The High Court refused leave to appeal from this decision: Transcript of Proceedings, *Miller v Wertheim* (High Court of Australia, Gleeson CJ & Heydon J, 20 June 2003).

94 A primary function of the Board is to act as a representative body of the Jewish community in New South Wales.

95 Although the speech was later reported in a newspaper — the *Australian Jewish News* — this was not seen as relevant to the question of whether the retiring president had contravened the racial hatred provisions. In the result the case failed. The Full Court took the view that the causal nexus between the allegedly vilifying behaviour, and race or ethnic origin, was not established. In short, it could not be established that the objectionable parts of the speech were acts done ‘because of the race or ethnic origin’ of the members of the Orthodox community criticized by the outgoing president: *Miller v Wertheim* [2002], above n93 at [13].

96 The main way in which the concept appears in the corporations law is the question of whether an issue of securities was a prohibited offer or invitation to the public, or any section of the public, whether selected as clients or not. See, for example, *Corporations Act* 2001 (Cth) s82. It is clear that relatively defined groups of offerees can constitute the public or a section of the public under this legal rule. Specifically, the offerees do not necessarily need to be strangers, either to the offeror, or to each other, to constitute the public or a section of it. Where there is some antecedent relationship between the offeror and the group of offerees, or some connection between the offerees as a group and the offer made to them, the issue of whether the group of offerees satisfies the test of a section of the public will be determined by consideration of a number of indicia, including the number of offerees (although there is no set minimum number), the type of relationship that exists between the offeror and the group of offerees and the type of characteristic that connects the offerees themselves. See *Corporate Affairs Commission (SA) v Australian Central Credit Union* (1985) 157 CLR 201 at 208–9 (Mason ACJ, Wilson, Deane & Dawson JJ) (on the Companies Code (South Australia) s169, s5(4)).

97 Copyright law gives the copyright owner the exclusive right to perform the work ‘in public’. See *Copyright Act* 1968 (Cth) s31(1)(a)(iii).

98 *Australasian Performing Rights Association Limited v Commonwealth Bank of Australia* (1992) 40 FCR 59.

employees as part of a training session. The applicant's music had been incorporated as part of the sound track for the video. Although the video was played at one of the bank's branches, the television monitor was not visible or audible to anyone other than these 11 employees. The applicant copyright owner was successful in the Federal Court in seeking declaratory relief against the bank. After an extensive analysis of law and policy in several jurisdictions, Gummow J concluded that a 'performance will be "in public" if it is not "in private"'.⁹⁹ To distinguish between these two antithetical states, it is important to investigate the nature of the audience for the performance. Was the audience 'bound together by a domestic or private tie or by an aspect of their public life? Their "public life" would include their presence at their place of employment for the supply of a performance to assist the commercial purposes of their employer.'¹⁰⁰ This case indicates that a communication to a relatively small group of employees can be a communication 'in public', at least under copyright law. Obviously the reasoning in this case is not directly applicable to an examination of the meaning of a communication to 'the public' in the *ADA* (NSW) and *RDA* anti-vilification provisions. How the word 'public' is used in different statutory schemes is clearly crucial. As Gummow J noted, the claim before him was specifically whether the musical work had been performed 'in public', not whether it had been performed before 'members of the public', or 'the general public'.¹⁰¹ Nonetheless, and bearing these limitations in mind, the reasoning in the case does provide some support for an argument that a communication to employees and co-workers may be a communication to 'the public' under anti-vilification law.

E. Conclusions (New South Wales and the Commonwealth)

It is clear that the case decisions in the New South Wales and Commonwealth jurisdictions have, to date, only partially mapped out each statute's public/private line. Much remains to be explored regarding how these provisions apply in the workplace and work relations context.

The cases tell us that the various legislative formulae in the *ADA* (NSW) and the *RDA* are not definitive of the conduct covered by the civil prohibitions. Adjudicators retain much discretion in determining the meaning of 'public act' and 'otherwise than in private'. An example of this discretion is provided in *McLeod* where the adjudicator suggested that truly private conversations, even where they occur in a public place, may not be caught by the *RDA*'s proscription.¹⁰² We know in addition that in employee-employee vilification claims under the *RDA*, a general principle has developed in the decisions to the effect that work behaviour will generally be covered by the Act. In other types of work contexts, under both the *RDA* and the *ADA* (NSW), an approach of paying close attention to the wording of the relevant legislation has emerged.

⁹⁹ *Id* at 74.

¹⁰⁰ *Ibid*.

¹⁰¹ *Ibid*.

¹⁰² *McLeod*, above n33.

Under the *ADA* (NSW) there may be a need for the complainant to show that a third party (a person potentially incited) was present, whereas under the *RDA* there is clearly no such need. This New South Wales requirement may impose a difficult evidential burden for complainants alleging vilification in a work context. An issue of considerable uncertainty is the meaning of ‘the public’, and specifically who might constitute ‘the public’ in a workplace context. The questions raised above regarding the potential of co-workers, contractors and clients to constitute the public remain open. They are of particular importance in the New South Wales jurisdiction where there has been no parallel development in case decisions of the general view emerging under the *RDA* that work relations (at least in an employee-employee sense) are usually covered by the statutory civil prohibitions.

3. *The Victorian Jurisdiction*

This article turns to examine the new Victorian jurisdiction regarding racial vilification and religious vilification. The legislative provisions setting out the prohibited behaviour, and potential employer liability, are examined first. Next, the article turns to analyse parliamentary material in an attempt to better understand the Victorian provisions. This material leaves a large number of questions unanswered. Some implications for the workplace and work relations context are explored in the final section under this subheading.

To date, there have been only two decisions handed down under the *R&RT Act*.¹⁰³ Although neither of them discusses the public/private line drawn in the Victorian Act, the first decision is worth briefly noting as it provides a sense of how the legislation might be interpreted by adjudicators.¹⁰⁴ In this case the adjudicator made substantial use of the objects and purpose clauses, preamble, second reading speech and explanatory memorandum for the *R&RT Act*. The content and scope of this material is discussed below. Also of interest was the caution sounded by the tribunal that Victorian adjudicators should not be too ready to use cases from other Australian anti-vilification jurisdictions. The tribunal reminds us that ‘[t]he legislation in these other jurisdictions is significantly and, sometimes, entirely different from the R[&]RT Act.’¹⁰⁵

103 The two cases are: *Judeh v Jewish National Fund of Australia Inc* [2003] VCAT 1254 (Deputy President McKenzie, 13 March 2003) (hereafter *Judeh*) (concerning an advertisement placed in *The Australian Jewish News* newspaper) and *Islamic Council of Victoria Inc v Catch the Fire Ministries Inc* [2003] VCAT 1753 (Vice President Higgins, 21 October 2003) and the subsequent decision in *Islamic Council of Victoria v Catch the Fire Ministries Inc (Final)* [2004] VCAT 2510 (Vice President Higgins, 22 December 2004) (concerning statements made during a seminar, in a newsletter and in an article published on the Internet). An earlier complaint, alleging that a website (which was not password protected) vilified Muslims, was settled. See Adam Morton, ‘Oldfield Website Vilifies Muslims’ *The Weekend Australian* 17 August 2003. The website was hosted by an ISP located in New South Wales, thereby raising the extra-territorial character of the *R&RT Act* provisions. See Mark Tamhane, ‘David Oldfield Sued Over Terrorism Website’ (16 August, 2003) ABC Online: <www.abc.net.au/am/content/2003/s925911.htm> (13 May 2004).

104 *Judeh*, above n103. This case was a successful application to dismiss the complaint under s75 of the *Victorian Civil and Administrative Tribunal Act* 1998 (Cth) as being frivolous, vexatious, misconceived, lacking in substance or an abuse of process.

105 *Judeh*, above n103 at 36.

A. *The Legislative Framework Regarding Prohibited Conduct*

Legislation to deal with racial vilification had been on and off the political agenda in Victoria for more than 10 years before the current *R&RT Act* was enacted.¹⁰⁶ The Act was preceded by considerable public consultation, and its passage through parliament was marked by heated discussion and media coverage. The contentious character of this enactment appears to be reflected in many aspects of the Act, including its title, lengthy preamble of four paragraphs, objects clause and clause setting out the Act's purposes.¹⁰⁷

The preamble positions racial and religious vilification as antipathetic to the values of a democratic society. These values include not only 'freedom of expression', but '[t]he right of all citizens to participate equally in society'.¹⁰⁸ Vilification is undemocratic, according to the preamble, because it undermines people's ability to 'contribute to, or fully participate in, all social, political, economic and cultural aspects of society as equals.'¹⁰⁹ The first matter listed in the Act's objects clause is 'to promote the full and equal participation of every person' in Victoria.¹¹⁰ This emphasis on the value of full and equal participation in society will be an important principle for use in interpreting the legislative provisions.¹¹¹ An interpretation of the legislation that furthers the objects of the Act — the full and equal participation in market work of all people, regardless of their race or religion — should be preferred over an interpretation that does not.

The central civil provision in the Victorian *R&RT Act* that delineates the prohibited conduct provides that:

A person must not, on the ground of the race [or religious belief or activity] of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.¹¹²

The *R&RT Act* contains a note to the effect that 'engage in conduct' includes the use of the Internet or email to publish or transmit messages.¹¹³ The Act provides explicitly that the respondent's motive or intention is irrelevant to the question of

106 The *R&RT Act* commenced on 1 January 2002. For an overview of the *R&RT Act*, see Anna Chapman, 'New Vilification Laws and Victorian and Queensland Work Relationships' (2002) 15 *AJLL* 277.

107 *R&RT Act* s1 (Purposes of the Act), s4 (Objects of the Act).

108 *R&RT Act*, Preamble, paragraph 1.

109 *R&RT Act*, Preamble, paragraph 3.

110 *R&RT Act* s4(1)(a).

111 Section 35(a) of the *Interpretation of Legislation Act* 1984 (Vic) requires that adjudicators prefer an interpretation of Victorian legislation that promotes the purpose or object underlying the Act. The purposes and objects of the *R&RT Act* were discussed in *Judeh*, above n103 at 28–33.

112 *R&RT Act* s7(1) (racial vilification). In relation to religious vilification, see s8. Note that 'race' and 'religious belief or activity' are defined in s3 of the *R&RT Act*. Race is defined to include all races, ethnicities, descents and national origins. Religious belief or activity means holding (or not holding) a lawful religious belief, or engaging (or not engaging) in lawful religious activity.

113 *R&RT Act* ss7, 8.

whether the conduct contravened the Act.¹¹⁴ In addition, a single act may constitute a contravention of the statute, and the act may occur inside or outside Victoria.¹¹⁵

Like other Australian anti-vilification statutes, the *R&RT Act* articulates a public/private understanding of its scope of legal regulation. It does this primarily by way of an exemption in s12 that a respondent may establish to exonerate it from liability. Section 12 of the *RRTA* is headed '[e]xceptions — private conduct' and provides that:

(1) A person does not contravene section 7 or 8 if the person establishes that the person engaged in the conduct in circumstances that may reasonably be taken to indicate that the parties to the conduct desire it to be heard or seen only by themselves.

(2) Sub-section (1) does not apply in relation to conduct in any circumstances in which the parties to the conduct ought reasonably to expect that it may be heard or seen by someone else.

As discussed in the introduction, this drafting of the public/private divide is quite unlike the wording used in other Australian anti-vilification statutes, and specifically the *ADA* (NSW) and the *RDA*. In contrast to these two jurisdictions, the line between the public and the private in the *R&RT Act* is not about the idea of 'the public', or a 'public place', as such. Rather, s12 is about whether the circumstances (or factual matrix) indicate that the parties to the conduct intended that it be heard or seen only by themselves, and whether they ought to have realised that it might be overheard or seen by someone else.¹¹⁶

It is useful at this stage to note two points about the wording of s12. First, the concept of reasonableness defines both strands of the test in s12. The second reading speech and the Explanatory Memorandum confirm that this imports an objective test.¹¹⁷ Secondly, the s12 provision is worded as an exemption, which means that the onus will be on the respondent to establish its application. Accordingly, conduct that contravenes s7 or s8 of the Act will be within the scope of the Act's civil prohibition, unless the respondent is able to establish that the s12 exemption applies. Under other Australian anti-vilification legislation the onus is generally on the complainant to establish that the conduct took place in the public realm of the Act's application.

114 *R&RT Act* s9(1).

115 *R&RT Act* s7(2). The extraterritorial character of this provision was apparent in the application brought against Mr David Oldfield, MLC, discussed above n103.

116 Some ambiguity attaches to the phrase 'parties to the conduct' in s12(1). Does this concept mean the perpetrator or perpetrators of the conduct, or does it include the person or persons being vilified? It would seem that the first interpretation makes more sense. Not only are there problems in conflating the desire of the perpetrator with the desire of the victim in this respect, but it may be that during an act of vilification the victim is in no mental state to form a desire about wanting to be seen or overheard by others. Presumably they just want the incident to stop.

117 Premier Stephen Bracks, Victoria, Legislative Assembly, *Parliamentary Debates (Hansard)*, 17 May 2001 at 1286; Explanatory Memorandum accompanying the Racial and Religious Tolerance Bill 2001 (Vic) Part 2 Divi 1.

In a similar manner to the *ADA* (NSW) and *RDA* vilification provisions, the *R&RT Act* contains a provision that operates by way of exemption where the respondent is able to establish that the conduct was engaged in ‘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, or any other conduct engaged in, for-
 - (i) any genuine academic, artistic, religious or scientific purpose; or
 - (ii) any purpose that is in the public interest; or
- (c) In making or publishing a fair and accurate report of any event or matter of public interest.¹¹⁸

Like the *ADA* (NSW), the *R&RT Act* prescribes criminal offences of serious racial vilification and serious religious vilification.¹¹⁹ These offences relate broadly to the intentional incitement of physical harm to a person or their property.¹²⁰ Notably, the s12 exception for private conduct is not applicable in relation to these offences.¹²¹ This means in effect that these criminal provisions apply in relation to all interactions across the whole of Victoria, including all workplaces and work relations situations.

B. The Legislative Framework Regarding Employer Civil Liability

Employers face potential liability in relation to the civil proscriptions in several different ways.¹²² This liability mirrors an employer’s liability for acts of unlawful discrimination, and sexual harassment under the *Equal Opportunity Act 1995* (Vic).

Employers and principals are potentially vicariously liable for the civil wrongs of racial vilification and religious vilification committed by their workers in the course of their engagement. Section 17 of the *R&RT Act* provides that if a worker in the course of their employment or while acting as an agent contravenes the civil provisions in the *R&RT Act*, both the worker and the employer are liable, and a complaint may be lodged against either or both of them. Section 18 provides that an employer is not vicariously liable if the employer can establish, on the balance of probabilities, that it took reasonable precautions to prevent the worker contravening the vilification provisions. The words ‘employee’ and ‘employer’ under the *R&RT Act* are defined to have the same meaning as under the *Equal Opportunity Act 1995* (Vic).¹²³ The *Equal Opportunity Act 1995* (Vic) defines

118 *R&RT Act* s11 (‘Exceptions – public conduct’).

119 *R&RT Act* s24 (serious racial vilification), s25 (serious religious vilification).

120 See further, Chapman, above n106 at 284–285.

121 Nor is the s11 exception applicable.

122 Employers and principals are potentially liable under the criminal offences of serious racial vilification and serious religious vilification as person who themselves committed the criminal offence. Company directors, executive officers, managers and others may additionally be liable as ‘officers’ of a body corporate that is guilty of an offence: *R&RT Act* s27. Vicarious liability does not arise in relation to these criminal offences, although employers and principals may be liable by reason of their complicity in a contravention of the criminal law by an employee or other person.

123 *R&RT Act* s3.

‘employee’ to include employees under a contract of service (a contract of employment), a person engaged under the *Public Sector Management and Employment Act 1998* (Vic), an independent contractor (engaged under a contract for services), but not an unpaid worker or volunteer.¹²⁴ The definition of ‘employer’ is defined in an equivalent manner.¹²⁵

In addition to vicarious liability, a business may face accessory liability where the employing entity has requested, instructed, induced, encouraged or assisted another person to contravene the Act. The *R&RT Act* provides joint and several liability on this basis.¹²⁶ Notably, the exemption of reasonable precautions in s18 applies in relation to accessory liability. Finally, an employer may itself, himself or herself, be directly liable as the person who engaged in the racial vilification or religious vilification.

C. *Parliamentary Material*

The wording of s12 of the *R&RT Act* can be traced to a discussion paper and model bill released by the Victorian Office of Multicultural Affairs in December 2000.¹²⁷ The discussion paper canvassed three different possible approaches to drawing a public/private line in the Bill’s civil operation. The first was to identify the scope of the Act’s application by reference to ‘public places’.¹²⁸ This concept was not however explained further, beyond the provision of a few examples including ‘assaulting a person in the street because of the victim’s race, applying abusive graffiti on property or making intimidating phone calls’.¹²⁹ These last two examples, and especially the last scenario, are odd as they do not have an obvious public character about them. The second approach canvassed in the discussion paper was to not draw a distinction between public and private, by in effect covering all situations. The third option, identified as ‘vilification where there is possible observation by a third party’, discussed delineating the Act’s application by reference to situations where ‘the parties ought reasonably to have expected that the communication would be seen or heard by someone else.’¹³⁰ Notably, this last approach is most closely aligned to the enacted s12(2). The discussion paper contains the following explanation:

This option is not intended to capture private conversation or acts of vilification performed in private, if it is unlikely the conversation or act would be heard or observed by a third party. As a result, vilification occurring on private property

124 *Equal Opportunity Act 1995* (Vic) s4(1) definitions.

125 *Ibid.*

126 *R&RT Act* ss15, 16.

127 Victorian Office of Multicultural Affairs, *Racial and Religious Tolerance Legislation: A Discussion Paper and a Model Bill* (2000).

128 *Id* at 13.

129 *Ibid.* Examples of offensive comments on the radio and distributing hate propaganda were also given.

130 *Ibid.*

could be unlawful, if it could reasonably be expected the act would be heard or observed by a third party.¹³¹

The example the discussion paper gives of this option is where ‘a person places a sign containing offensive comments or symbols in the front garden of their private residence and the sign is visible from the street, a complaint may be lodged against that person by a neighbour or passer-by who witnessed the communication.’¹³² Apart from providing this fairly obvious example, the discussion paper provided no further analysis of the meaning of this third approach.

The model bill attached to the discussion paper provided a clause that had substantially identical wording to the enacted s12 of the *R&RT Act*. The only substantive alteration was to add words, before the Bill was introduced into Parliament, clarifying that the onus of proof lay on the respondent to establish the exemption of private conduct.¹³³

The Bill was introduced into the Legislative Assembly on 16 May 2001 and second read by the Premier a day later. In his second reading speech the Premier discussed the public/private understanding underlying the Act’s civil provisions as follows:

An exception also exists for private conversations or behaviour, which occurs in circumstances that indicate, objectively, that the parties did not intend to be seen or heard by anyone else.

For example, a private conversation in a private home will be taken not to have been intended to be heard by anyone else and will escape liability. The erection of an offensive sign in the front yard of a private home, which can clearly be viewed by any person passing by, however, is a different matter.¹³⁴

The Explanatory Memorandum accompanying the Bill explains the effect of clause 12 in very similar language as that used in the second reading speech. The Explanatory Memorandum provides that:

Clause 12 provides an exception for private conduct. Conduct or a conversation occurring in circumstances in which the parties can be taken to have intended it to be seen or heard only by themselves, and no-one else, will escape liability. The intention of the parties is determined objectively, taking into consideration of all [sic] the circumstances in which the conduct or conversation took place.¹³⁵

131 Ibid.

132 Id at 14. Note that this example was given by Premier Bracks in the second reading speech on the Bill. Premier Stephen Bracks, above n117 at 1286.

133 The four words added were ‘the person establishes that’. The clause in the Model Bill was Clause 9.

134 Premier Stephen Bracks, above n117. As noted above, this second example was cited in the earlier discussion paper. The subsequent second reading speech in the Legislative Council was in identical terms. See Monica Gould, Victoria, Legislative Council, *Parliamentary Debates (Hansard)*, 7 June 2001 at 1216.

The parliamentary debate on clause 12 of the Bill was characterised by much uncertainty over the meaning of the provisions.¹³⁶ In particular, an issue that received considerable attention was whether speech or conduct that takes place in a home would be caught by the Bill's civil provisions.¹³⁷ The scenario of a private residence was discussed more than any other. The applicability of clause 12 to work relations and workplaces was not discussed at all.¹³⁸ Some parliamentarians were justifiably critical of the example given in the Premier's second reading speech of a 'private conversation in a private home' as being outside the scope of the *R&RT Act* civil proscription.¹³⁹ Depending on what the Premier meant by the phrase 'private conversation', this example would seem to present an oversimplification. For example, if the conversation was shouted in such a way as to be clearly audible to neighbours, and people passing by on the street, this would be likely to attract s12(2), and so render the conduct outside the s12 exception. Whether the windows and doors in the house were open or closed would also presumably be relevant to an inquiry under s12(2). So too would the type of housing arrangement in question — is it dense inner city housing or a free standing house on a large block of land? Suffice to say, the Premier's brief example in his second reading speech is an oversimplification of the complex factual and legal inquiry required under s12.

There is a further piece of information on the genesis of the s12 provision that is absent from the discussion paper and model bill, parliamentary debate and the Explanatory Memorandum. It is the similarity between s12 of the *R&RT Act* and concepts articulated in the *Surveillance Devices Act* 1999 (Vic).¹⁴⁰ That Act regulates the installation and use of listening and optical surveillance devices, and

135 Explanatory Memorandum accompanying the Racial and Religious Tolerance Bill 2001 (Vic). Note that this was the 'circulation print': <http://www.dms.dpc.vic.gov.au/archive/Autumn_2001/bills/>. A second explanatory memorandum appeared when the Bill went to the Legislative Council, but the explanation of clause 12 was identical to that in the original EM. This explanation of clause 12 was repeated, virtually word for word, and including the grammatical error, in the Scrutiny of Acts and Regulations Committee report on the Bill. Scrutiny of Acts and Regulations Committee, *Alert Digest No 6 of 2001* (2001) Victorian Parliament: <<http://www.parliament.vic.gov.au/sarc/2001alerts/01alt6.htm>> (20 November 2003).

136 See, for example, Peter Ryan, Victoria, Legislative Assembly, *Parliamentary Debates (Hansard)*, 5 June 2001 at 1609; Antony Plowman, Victoria, Legislative Assembly, *Parliamentary Debates (Hansard)*, 5 June 2001 at 1665; Carlo Furletti, Victoria, Legislative Council, *Parliamentary Debates (Hansard)*, 13 June 2001 at 1406; Elizabeth Powell, Victoria, Legislative Council, *Parliamentary Debates (Hansard)*, 13 June 2001 at 1420–1421; Ronald Bowden, Victoria Legislative Council, *Parliamentary Debates (Hansard)*, 14 June 2001 at 1499; Ken Smith, Victoria, Legislative Council, *Parliamentary Debates (Hansard)*, 14 June 2001 at 1512.

137 See, for example, Furletti, id at 1406; Nicholas Kotsiras, Victoria, Legislative Assembly, *Parliamentary Debates (Hansard)*, 5 June 2001 at 1630; Powell, id at 1420–1421; Bowden, id at 1499; Kaye Darveniza, Victoria, Legislative Council, *Parliamentary Debates (Hansard)*, 13 June 2001 at 1413.

138 There was more discussion of the well-established concept of an employer's vicarious liability, than the whole discussion on clause 12.

139 See, for example, Kotsiras, above n137 at 1630.

140 And prior to that the *Listening Devices Act* 1969 (Vic).

tracking devices. It contains a public/private line in prohibiting surveillance of 'private conversations' and 'private activity' without consent.¹⁴¹ 'Private conversation' is defined to mean:

a conversation carried on in circumstances that may reasonably be taken to indicate that the parties to it desire it to be heard only by themselves, but does not include a conversation made in any circumstances in which the parties to it ought reasonably to expect that it may be overheard by someone else.¹⁴²

'Private activity' is defined similarly.¹⁴³ The Explanatory Memorandum for the 1999 Bill is informative regarding the potential scope of these surveillance provisions in the workplace context. It states:

Circumstances in which the parties to an activity ought reasonably expect that they might be observed by someone else include:

- activities in places accessible to the public;
- activities in those parts of workplaces accessible to other employees or invitees of that workplace; and
- activities of persons illegally present on premises.

Circumstances in which the parties to an activity may reasonably expect that they may not be observed by someone else include:

- activities in toilet cubicles and shower areas;
- activities in change rooms; and
- activities in those parts of workplaces where the parties to the activity may exclude others from observing the activity, such as in an office with covered windows.¹⁴⁴

Although the meaning of 'private conversation' and 'private activity' has not been explored by adjudicators, this articulation of different workplace circumstances in the Explanatory Memorandum may prove useful in interpreting s12 of the *R&RT Act*.

D. Workplaces and Work Relations

It is clear that the parliament, and the Equal Opportunity Commission Victoria, believe that the *R&RT Act* applies generally in the workplace context. The discussion paper released in 2000 records the government's intention to outlaw vilification in the workplace.¹⁴⁵ The publication of Employer Guidelines on the

141 *Surveillance Devices Act 1999* (Vic) s6, s7.

142 *Id* at s3 definition of 'private conversation'.

143 *Id* at s3 definition of 'private activity'. Note however that the definition of private activity is defined as to not include conduct that takes place outside a building.

144 Explanatory Memorandum accompanying the *Surveillance Devices Bill 1999* (Vic) at 1–2. Julian Sempill points out that employees in relatively low-status positions have less privacy from surveillance than do employees in high status positions with their own office: Julian Sempill, 'Under the Lens: Electronic Workplace Surveillance' (2001) 19 *AJLL* 111 at 141.

145 Victorian Office of Multicultural Affairs, above n127 at 14.

Act evidences the Commission's view on this matter. Moreover, the vicarious liability provisions in relation to the civil prohibition on vilification also indicate a clear parliamentary intention that the civil provisions apply to work relations. Finally, the emphasis in the preamble and objects clause on free and equal participation in all aspects of society, including in the economy, supports the view that the legislation applies in Victorian workplaces.¹⁴⁶

The Commission's Employer Guidelines provide some examples of behaviour that the guidelines state 'may' be covered by the civil provisions in the *R&RT Act*. The list includes:

- writing racist graffiti in public places or in a work place;
- ...
- displaying racist posters or stickers in a public place or in a work place;
- racist or religious vilifying abuse in a public place or in a work place;
- offensive racist comments in a publication including Internet, email and workplace intranet and email.¹⁴⁷

This extract does provide a useful list of potentially unlawful conduct in the work relations context. Before turning to examine each of these examples, two points should be made about the Commission's Guidelines. First, the use in this list of the concept of 'public place' in distinction to a workplace is both unnecessary and unfortunate. The *R&RT Act* itself does not contain a concept of a 'public place', and it is hard to see that its use in this publication brings clarity in understanding the scope of the Act's prohibitions. Secondly, although the Guidelines contain a brief mention of the principles in s12, nowhere in the eight page document is there a discussion of the meaning of this provision, and how it might apply in a workplace context. Perhaps such a discussion was considered to be too technical for inclusion in a document of this type, which is essentially about encouraging and assisting employers to meet their broad obligations regarding vicarious liability.¹⁴⁸ Nonetheless, some explanation of s12 is surely justified in a publication such as this.

To turn then to examine each of the listed examples. It seems unlikely that the first two examples — racist graffiti and racist posters and stickers in a workplace — would fall within the exception in s12 of the Act. This is because a person writing the graffiti or affixing a sticker or poster on premises should reasonably expect that the graffiti etc might be seen by other people, such as co-workers and visitors to the workplace (s12(2)). Indeed, attracting the attention of other people would seem to be a primary reason for using graffiti, stickers and posters. This

146 Section 4(2) records that it is the intention of parliament that the provisions of the *R&RT Act* are interpreted so as to further the objects of the Act.

147 *Employer Guidelines: Racial and Religious Tolerance Act*, Equal Opportunity Commission: <<http://www.standuptoracism.com.au/pdf/RRTAEmployer.pdf>> (13 May 2004) at 3.

148 Notably there is a relatively lengthy, and no doubt useful, discussion of the vicarious liability provisions in the Act, and how employers might go about satisfying their legal obligations in this respect.

analysis of the applicability of s12 would hold regardless of where the graffiti, sticker or poster was placed — on a filing cabinet in an open plan office space, on the wall in an office, or even inside an employee's locker.

In contrast, and depending on all the circumstances of the conduct, the last two examples may fall within the s12 exemption. If the 'vilifying abuse' occurred, for example, in hushed tones behind a closed office door, or on an internal telephone call between co-workers, then the effect of s12 might well be to exclude the vilifying behaviour from a finding of unlawfulness. The circumstances of a closed office door and quiet voice may reasonably be taken to indicate that the speaker and listener desire the conversation to be heard only by themselves (s12(1)), and it might be that it cannot be said under s12(2) that they ought reasonably to have expected that they may be overheard. This interpretation is broadly consistent with the explanation regarding the similar wording of the *Surveillance Devices Act 1999* (Vic) contained in the Explanatory Memorandum.

Turning to the last example, a publication of 'offensive racist comments' on the World Wide Web would seem clearly to be outside the exception in s12. Whether such comments over an email system or a workplace intranet system would fall within s12 would depend on the specific circumstances in question. Is the content of messages through email and intranet systems in that workplace monitored on a regular basis, and do the employees know this? If the employer does carry out regular monitoring, and the employees have been informed of this practice, then the conduct will not be exonerated under s12, because under s12(2) the parties ought reasonably to expect that their messages may be seen by someone else — a member of the employer's information technology staff.

4. Comparing the New South Wales, Commonwealth and Victorian Jurisdictions

It is clear that examining the applicability of the Victorian *R&RT Act* to workplace conduct requires quite a different approach to an investigation of potential workplace vilification under the *ADA* (NSW) and *RDA* provisions. An analysis under the *R&RT Act* poses a different set of questions to those that must be addressed in investigating the applicability of the *ADA* (NSW) and the *RDA*. Importantly, the jurisdictions utilise different legal ideas. The key concepts in s12 of the *R&RT Act* are objective intention and reasonableness. By contrast, central terms in the *ADA* (NSW) and *RDA* are public and private. These latter concepts of public and private remain largely undeveloped in anti-vilification law. Although they appear in other areas of Australian law, these other fields have not produced a body of jurisprudence on public and private that can be easily adapted to inform anti-vilification law.

Reasonableness and objectivity, like public and private, are open textured legal concepts, and they can be interpreted in ways that are deeply problematic. Many scholars have convincingly shown how the liberal legal values of reasonableness and objectivity have been applied by adjudicators across many areas of law —

including for example sexual harassment law and criminal law — in ways that maintain dominant gendered hierarchies.¹⁴⁹ A recent article on Australian anti-discrimination law unpacks the ways in which the concept of reasonableness in the definition of indirect discrimination has been applied by some adjudicators in ways that undermine the effectiveness of the legal scheme to bring about change in social power relations.¹⁵⁰ Whilst not wanting to disregard these concerns, the role of reasonableness and objectivity in s12 is relatively limited. These concepts are used to ascertain the parties' objective intention to keep their conduct to themselves, and in relation to whether the parties ought to have known that their conduct might be overheard or seen by someone else. In this sense reasonableness and objectivity are used in a relatively contained manner. Notably, they are not used (at least in s12) to assess the seriousness of the respondent's conduct, in terms of whether it constitutes racial hatred, or is merely disrespectful.¹⁵¹ This limited use of reasonableness and objectivity render their use in s12 less problematic than their use in other areas of Australian law, such as sexual harassment law, and in the concept of indirect discrimination.¹⁵² For these reasons reasonableness and objectivity in s12 seem to offer advantages over the concepts of public and private in the *ADA* (NSW) and the *RDA*.

A further notable difference between the Victorian *R&RT Act* and the *ADA* (NSW) and *RDA* provisions lies in the issue of onus of proof. Under the Victorian Act, respondents bear the onus of establishing that their actions lay outside the scope of the legislation as being private, whereas under the NSW statute and the *RDA*, complainants bear the onus of proof that the conduct fell within the scope of the legislation, because it was sufficiently public. In this sense, the *R&RT Act* starts from a position that vilifying conduct is covered by the legislation, and leaves it to the respondent to displace this assumption on the basis of evidence. This may in practice tend to favour a finding that the respondent's conduct is covered by the legislation, and in this way contribute to the breadth of the Victorian prohibitions, relative to the NSW and federal schemes.

A further possible advantage of the *R&RT Act* approach over the tests adopted in the *ADA* (NSW) and the *RDA*, is that the line between prohibited public conduct

149 See, for example, Catharine MacKinnon, 'Feminism, Marxism, Method and the State: Towards Feminist Jurisprudence' (1983) 8 *Signs* 635; Kathryn Abrams, 'The Reasonable Woman: Sense and Sensibility in Sexual Harassment Law' [1995] *Dissent* 48; Nancy Ehrenreich, 'Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law' (1990) 99 *Yale LJ* 1177.

150 Beth Gaze, 'Context and Interpretation in Anti-Discrimination Law' (2002) 26 *MULR* 325.

151 Reasonableness is used elsewhere in the *RDA* to assess the seriousness of the respondent's conduct. See, for example, *RDA* s18C. On the use of reasonableness in s18C, see Chapman, above n77.

152 In sexual harassment law, reasonableness is used in the inquiry of whether a reasonable person would have anticipated that the complainant would be offended, humiliated or intimidated by the respondent's sexual conduct. See, for example, *Sex Discrimination Act* 1984 (Cth) s28A(1). In indirect discrimination, reasonableness is used to assess whether the allegedly discriminatory requirement or practice imposed by the respondent was not reasonable. See, for example, *Equal Opportunity Act* 1995 (Vic) s9(1)(a).

and unremediable private conduct in the Victorian Act is more malleable than is the line under the *ADA* (NSW) and *RDA*. This is an advantage in the workplace context as it permits employers to bring more certainty to the question of potential liability. Under s12(2) an employer could displace any objective expectation of privacy in, for example, the use by employees of telephones, email and Internet systems. An employer could do this simply by informing employees of a new management practice of regularly monitoring phone calls, emails etc. Similarly, an employer could formulate an open door policy where employees were asked to refrain from closing their office doors. This would mean that employees ought reasonably to know that any conduct on their part might be heard or seen by someone else (s12(2)). Such employer initiatives might widen the potential liability of employees, and so increase the potential vicarious liability of employers, although vicarious liability may be offset by the employer being able to argue that through these initiatives it took reasonable precautions to prevent the vilifying behaviour from occurring.¹⁵³

The obverse also applies. Theoretically employers could create a (reasonable) expectation of privacy under s12(2) by informing employees that phone calls, emails etc are strictly private and will not be monitored. There are of course good reasons why an employer may not wish to do this. It seems that many employers do monitor email and Internet use and give a range of reasons to justify this practice — protection of their property, to monitor work performance, and to further compliance with the employer's vicarious liability to take reasonable steps to ensure that the workplace is free of discriminatory and vilifying conduct.¹⁵⁴ Given these reasons, it seems most likely that employers will decrease the reasonable expectation of privacy under s12(2), rather than increase the reasonable expectation of privacy under s12(2).

For these reasons reasonableness and objectivity under the *R&RT Act* may provide a better basis for anti-vilification legislation than is provided by the concepts of public and private used in the *ADA* (NSW) and *RDA*. We are not alone in coming to this view. As has been discussed, the New South Wales Law Reform Commission viewed the concept of 'the public' used in the *ADA* (NSW) anti-vilification provisions as ambiguous.¹⁵⁵ The Commission recommended that the references to 'the public' in the New South Wales Act be deleted, and replaced with a test that asks whether the communication 'is intended or likely to be received by someone other than a member of the group being vilified.'¹⁵⁶ Interestingly, an enactment along these lines would position the public/private line in the *ADA* (NSW) closer to the Victorian *R&RT Act* approach. Were a New South Wales Bill drafted to introduce this change, it seems likely that it would contain an explicit reference to reasonableness, in the sense of whether the communication was reasonably intended and/or reasonably likely to be received by a third party.

153 *R&RT Act* s18.

154 Victorian Law Reform Commission, above n12.

155 New South Wales Law Reform Commission, above n20 at 540.

156 *Id* at 540–541. This recommendation would retain the focus in the *ADA* (NSW) on vilification as being about incitement, which in the opinion of the Commission was appropriate.

5. *Conclusions*

This article has examined the separation of public and private in the anti-vilification provisions in the *Anti-Discrimination Act* 1977 (NSW), the federal *Racial Discrimination Act* 1975 (Cth) and the new *Racial and Religious Tolerance Act* 2001 (Vic). It was seen that key aspects of the separation are left largely unarticulated, both in the legislative provisions, and in the case decisions decided under them. The NSW Act and the Racial Discrimination Act rely on concepts of 'public act', 'otherwise than in private', 'public place' and 'the public'. The legislative definitions of these terms, where provided, have been interpreted to be inclusive only, and, much discretion lies with adjudicators to determine whether the conduct in question was covered by the legislation. The cases have not provided clear guidelines on what these concepts of public and private mean, either generally or in relation to the workplace context. In particular, it is uncertain whether co-workers, clients and other visitors to a workplace will constitute 'the public' for these purposes.

Rather than using ideas of public and private, the new and unique *R&RT Act* relies on concepts of objectivity and reasonableness. Although these concepts can be fraught, in this context their use appears to be less so. The Victorian formulation appears to have a number of advantages over the older and more familiar concepts articulated in the *ADA* (NSW) and *RDA*. Notably, the Victorian approach brings the potential for more certainty in the scope of legal obligations faced by both employees and employers as the expectation of privacy is malleable. Moreover, objectivity and reasonableness are themselves more certain concepts in Australian jurisprudence than are the ideas of public and private. Most immediately they have a strong history in anti-discrimination law. For these reasons, the new and unique Victorian provisions appear to be an improvement on the older public/private formulations of anti-vilification law, seen in the NSW statute and the federal Act.



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