

PINNED LIKE A BUTTERFLY: WHITENESS AND RACIAL HATRED LAWS

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Abstract

This article explores ideas of whiteness and racial harm by focusing on an area of law in which these themes are pivotal: the regulation of racial hatred. Racial hatred provisions in anti-discrimination laws were established to provide a public space protected from offensive or intimidating racist behaviour. However, based as they are in equality doctrines, they also allow whites to bring claims of racial hatred against blacks. How does law respond, and how should it, when white applicants present themselves as victims of racial harm? This article argues for a legal response that makes embodiment central to the resolution of these cases.

An embodied approach to racial hatred cases can bring justice for black respondents, but also allows whiteness, which is generally obscured in law, to be rendered visible. Exposing whiteness to examination can lead to a more coherent racial identity for whites and a richer and fairer system of law.

Preface

Samantha Power, an Aboriginal woman, has travelled to visit the father of her four youngest children, an inmate at Yatala Labour Prison in Adelaide. It's a hot day, and she is travelling by bus with the children. They have taken two buses to get to the gaol, a trip of more than two hours. Three of her four children—a three year old, a two year old and a baby—are used to being pushed in a stroller. Ms Power is stressed and angry because

she has recently found out that her children may be taken from her into care, partly because of information given by the children's father to government workers. As well as being tired, hot and stressed, Ms Power is on a methadone dosage that makes her feel 'spaced out' and 'out of it'.

What happened when she finally makes it to the gaol, in time for the 2:45 visiting hour, is contested. Mr O'Leary, a white prison officer, was the visits booking officer that day. To enter the gaol Ms Power usually showed her Medicare card and pension card, but this time, in her rush, she had forgotten them and the other documents she offered were not considered valid ID. Despite having made 20 previous visits without incident she was refused entry. When she protested, Mr O'Leary's supervisor, Mr McLeod, backed up his decision and she was turned away from the gaol.

As she was escorted away by Mr McLeod and another officer, Ms Power, 'wild' and 'cursin'', as she put it, allegedly said to Mr McLeod: 'you white piece of shit', 'you fucking piece of white shit' and 'fuck you whites you're all fucking shit'.

Mr McLeod brought an action against her for racial hatred under the Racial Discrimination Act 1975 (Cth) (McLeod v Power 2003).

Introduction

Being white is an experience of privilege, and yet whites, Baldwin (1998: 321–2) has written, 'are impaled on their history like a butterfly on a pin':

This is the place in which it seems to me most white Americans find themselves. Impaled. They are dimly, or vividly, aware that the history they have fed themselves is mainly a lie, but they do not know how to release themselves from it, and they suffer enormously from the resulting personal incoherence.

Baldwin's assertion that whites suffer the internalised 'incoherence' of race denial is linked directly to a particular view of the past. In Australia, it is not only in an obscurant view of history that black/white relations have been contested and racial suffering compounded: law has been a historical and contemporary forum for race issues to be selectively acknowledged or obscured.¹ Law, after all, was instrumental in establishing the conditions of early colonisation, reinforcing the social disadvantage that Indigenous Australians have experienced, and, later, providing a means by which Indigenous people could argue for land rights and social equality (Karpin and O'Connell 2005: 173). Anti-discrimination schemata represent one avenue for Indigenous and other Australians to argue for the recognition of their rights and seek redress when those rights are transgressed. Racial hatred laws, introduced across Australian states and territories since 1989,² and federally in 1995,³ are one facet of these laws which attempts to tackle racial disadvantage directly.

Despite attempts such as these to provide legal remedies for racial harm, race continues to be subterranean,

barely visible in Australian laws. Yet race is fundamental to white legal institutions, 'elusive' but 'pervasive' (Ravenscroft 2004: 3). In this article I argue that the invisibility of race within law results in harm to white as well as Indigenous Australians, and suggest an approach that would begin to illuminate the white as well as the Indigenous experience of race in Australian law.

It is central to my argument in this article to assert that white people suffer because of their own racism. This suffering takes various forms and is expressed in different, sometimes conflicting ways, from the nostalgic and nationalistic⁴ to the postmodern,⁵ but has common ground in the idea that only aridity and constraint can arise from fantasies of racial neutrality or exclusivity. This claim of white suffering is difficult to assert when it is suffering accompanied by privilege: a suffering that appears trivial compared to the material suffering of Indigenous Australians. Yet the two are intertwined: a failure to acknowledge the negative consequences of racism on whites encourages further denial of white racial identity and maintains the pretence of invisibility that feeds into Indigenous disadvantage.

White Invisibility: Unseen by Whom?

One of the most distinctive qualities of 'whiteness' as it manifests in contemporary life is its ability to elude examination. When I have written previously about white/Indigenous identity, in the context of emerging genetic technologies, I found that however I approached it there seemed to be some kind of erasure taking place (O'Connell 2007). If I wrote about Indigenous people, I felt that I reinforced the privilege of white invisibility. If I focused on whiteness I found I was ignoring the much more serious potential

losses experienced by Indigenous people coming into contact with genetic technologies. Further, to write about race as a white person, I felt, was to expose exactly those vulnerabilities of the white consciousness that Baldwin identifies: incoherence and a subconscious desire for exoneration. This raised for me the general question of whether it is possible to write meaningfully about whiteness as a white person, whether, as Pease (2004: 119) puts it: '[it is] possible for whites to talk about whiteness in ways that are not racist'.

In the end I decided to simply acknowledge the struggles I was having, as a white person, in addressing race issues. I wrote about the sense of shame I shared about Australia's white history and the white desire to find an ethical position that erases this shame. However, I did this without interrogating my own racial status. Then I gave it to a colleague to read.⁶ She pointed out that I was taking a position myself, as 'white', that purified and erased any question over my own racial identity. She also commented that taking on responsibility for colonisation was potentially another form of hypervisibility.⁷ Her comments have inspired the more tentative position I take in this article: that racial identity is fluid, contextual and impure, but at the same time being perceived as 'white' gives one concrete privileges that cannot be ignored. 'Whiteness' like 'blackness', is at once socially constructed and accepted as biological 'fact'.

How then, to untangle this mix of social construction, embodiment, power and privilege? Both whiteness and blackness are, at different times, invisible in law. Williams (1997: 17) writes that: '[h]ow, or whether, blacks are seen depends upon a dynamic of display that ricochets between hypervisibility and oblivion'. Whiteness is invisible in a powerful sense,

the sense in which something cannot be seen simply because it is the standard of neutrality and so draws no attention to itself (Haraway 1997: 23–4). Whiteness escapes examination when, as a consequence of privilege, whites are seen as autonomous individuals rather than being reducible to a racial category (Chambers 1997: 192).

In this view, race lives only 'in black bodies' (Williams 1997: 7), unacknowledged as part of the experience of white embodiment. However, the invisibility of whiteness is highly subjective, since it is only whites who cannot see their own race: a self-willed blindness (Gaze 2005: 6; hooks 1997: 168). As Perkins (2004: 174) asks:

If 'whiteness as power is maintained by being unseen' ... the question remains: Unseen by whom? Those on whom such power impacts do not fail to see it and people of colour generally do not fail to see whiteness around them.⁸

Visibility shifts between whiteness and blackness, according to undercurrents of power and powerlessness. White and black visibility is also interconnected: white people's racial identities are purified and rendered invisible when 'race' is synonymous with 'non-white' (Morawski 2007: 216).

Despite this, social activism since the 1960s and critical race studies in the past decade have meant that there has been a partial reform of law and politics, and enough scholarship to irrevocably challenge the idea that whiteness can be monolithic or 'pure'. While white invisibility and white privilege endure, 'white identities have been displaced and refigured: they are now contradictory, as well as confused and anxiety-ridden' (Winant 2007: 4). The tension inherent in this state promises further political and academic action towards making whiteness visible.

In law, there are particular challenges in making white embodiment visible. At the heart of law are abstractions which represent the ideals to be constantly strived for: neutrality, equality, objectivity, justice. Inherent in this set of abstractions is the idea that if we are all equal before the law, and if law is neutral enough, objective enough, that this will translate into justice and social equality. And yet it is the very insistence upon abstraction that can make law unable to see the specific, embodied harm that exists before it. Thornton (1999: 756) puts this beautifully when she writes in relation to constitutional law:

While the representation of constitutional law as abstract, decorporealised and neutral accords with the idealised and universal norms of justice, such rhetoric serves to disguise the injustice at the root of the case—that is, the particularity of the harm that led to the search for a remedy. Constitutionalisation legitimises the recounting of narratives that are likely to be unrecognisable to the complainants. The sorrow of the Aboriginal 'Stolen Children' evaporates in the face of a legalistic excursus on the legislative scope of the Territories power (s 122 of the Constitution) (footnotes omitted).⁹

Racial hatred laws provide a unique means of interrogating whiteness and challenging this abstraction, because they deal directly with the emotional impact of racial harm.

Regulating Racial Hatred

Racial hatred or vilification laws exist in all states and territories of Australia, other than the Northern Territory, as part of a broader regulation of hate speech that Rice (2005) has described as a 'hotch-potch'.¹⁰ Some racial hatred provisions are criminal, some civil; almost all are inserted in anti-discrimination legislation.¹¹ Alongside state and territory

laws the *Racial Discrimination Act 1975 (Cth)* was amended in 1995 to include protections against racial hatred.¹²

Like all anti-discrimination legislation in Australia, the federal law is based on principles of equality. While it may seem self-evident that racial hatred and other anti-discrimination laws are intended to protect minority or subordinated groups from further harm, equality-based legislation is silent on underlying privilege or disadvantage; the Racial Discrimination Act protects whites as well as blacks from discrimination.¹³ This neutral expression of protection allows those who enjoy a privileged social status because of their race or other aspect of their identity to adopt relatively easily the language of victimhood.

Even before the Racial Discrimination Act was amended to make racial hatred unlawful at the federal level, there were concerns amongst some commentators about the potential use of the provisions to attack those they were intended to support. One commentator (Twomey 1994: 248), offering comparison with the experience of the United Kingdom, wrote:

If the aim of racial vilification legislation is to punish racists and racist organisations, we may also be disappointed. Experience in the United Kingdom has ... shown that many of the most notorious racists are capable of avoiding conviction under such legislation, and that it is often members of minority groups, who do not have the same access to legal advice, who are caught by the legislation.¹⁴

A stark example of this was provided when the first person charged under Western Australian racial vilification laws was a 15-year-old Aboriginal girl, who called another young woman a 'white cunt' (Taylor 2006).¹⁵ It is also, of course,

what happened to Samantha Power after swearing at a white prison guard. However, while whites do have equal access to racial hatred provision, the way that whiteness plays out in racial hatred cases is rarely straightforward.

Racial Hatred Cases and Whiteness

Cases brought under the racial hatred sections of the federal legislation have been, in general, more likely to succeed than other race discrimination cases (Gaze 2005). This probably demonstrates a more pervasive difficulty with proving racial discrimination, particularly in the most common area of complaint, discrimination in employment, where the seeming neutrality of the idea of 'merit' can mask racial bias, rather than the ease of bringing a successful action against acts of racial hatred (Hunyor 2003).

In cases that have involved white complainants, racial hatred claims have not succeeded.¹⁶ This is also the case with the claims against Ms Power. But the story of the day that she visits the prison to see her ex-partner, and ends up in court accused of racial vilification, starts with an earlier story: the case of *Gibbs v Wanganeen* (2001) ('*Gibbs*').

Gibbs v Wanganeen is also set in Yatala Labour Prison. We are told less about the details of this case, just that it involved an inmate of the prison, Mr Wanganeen, was required to submit to a urine test and strip search to check for drugs. Following this, he had a 'discussion' with a prison guard, Mr Gibbs. As part of the dispute, Mr Wanganeen called Mr Gibbs a 'fucking white cunt', a 'fucking dog' and 'white trash' (*Gibbs* [2]).

Although it is an interlocutory matter, confined to considering the meaning of the legislation when it states that a

vilifying act must be done 'otherwise than in private',¹⁷ Federal Magistrate Driver discussed whether he would have granted relief if the incident were covered by the legislation.¹⁸ Driver FM was clearly of the view that the matter did not warrant compensation, and gave as his reasons that '[t]he prison officer had control over the prisoner' and that '[t]here was [already] a procedure within the prison for dealing with racial abuse, or any other abuse, of a prison officer by a prisoner' (*Gibbs* [20]). There is not enough detail to determine whether the racial aspects of the case held any significance for the magistrate: race is essentially absent in this case, although it is fundamentally about race. We are not told the race of the abusive respondent and we only know that the object of abuse is white because of the respondent's insults.

Federal Magistrate Driver, however, does acknowledge, very briefly, the unique attributes of a prison and the prisoner/guard relationship. A prison, after all, is a site of immense power differentials, in which freedom of movement and choice is intensely regulated, and the people with the immediate power to exercise that regulation are the prison officers. However, while this power differential exists independently of race—white as well as black inmates are subjected to it—race also overlaps with and exacerbates the differential, given the over representation of Indigenous people in Australia's prisons (Australian Bureau of Statistics 2008),¹⁹ the history of Indigenous incarceration (Royal Commission into Aboriginal Deaths in Custody 1991) and the potential of prior experiences of racism to intensify an Indigenous person's experience of incarceration.

This, however, is not the end of the story. Following *Gibbs v Wanganeen*, the correctional officers' professional

association sent their members a pamphlet telling them that the *Gibbs* case had failed because it was in a private area of a gaol, promising to prosecute on behalf of any prison officer who was vilified in a visiting area or other public place.²⁰ Mr McLeod clearly relied on the pamphlet in taking action against Ms Power, who had abused him in an area of the prison that, following *Gibbs*, would be likely to be considered 'public'.

Federal Magistrate Brown refers to this incentive in his judgment, just as he acknowledges many of the practical or concrete factors that underpin *McLeod v Power* (2003) ('*McLeod*'). The case, in a way that is rich for law, sketches a picture of Power's day, demonstrating her state of mind, her emotions and her bodily state in the lead up to her verbal abuse of Mr McLeod. We know about her, can think about how she might have felt, and potentially empathise, because the magistrate does. He is the conduit for the reader of the case to imagine what it might feel like to be Ms Power, standing at the gatehouse in the heat, feeling angry, tired and sick.

The *McLeod* case also takes into consideration gender issues. It is rare in law—where stress factors are sometimes acknowledged and used as mitigating factors²¹—for domestic or caring pressures to be accepted as mitigating factors against potentially actionable behaviour. In *McLeod*, the magistrate acknowledges, as one of the stressors affecting Ms Power, the strain of caring for four small children in a stressful environment on a tiring trip, as well as her distress over whether she would lose the care of those children.

These points are not just background detail; they are treated as significant by the magistrate who, after outlining all of Ms Power's physical and emotional stresses, concludes:

In those circumstances, I can well understand that Ms Power would have become angry when she was refused admission to the prison, particularly when she had been admitted to it without incident in the past. I accept that she was frustrated and upset at the refusal by figures in authority in the form of the applicant and Mr O'Leary to allow her entry into the prison. I have no doubt that she reacted badly to this refusal. It was hot. She had come a long way. The purpose of her visit was frustrated. There was no other person to whom she could turn to seek a review of the decision. She reacted with vulgarity, rudeness and insult in the face of what she perceived to be heartless and inflexible bureaucracy (*McLeod* [23]).

Vulgarity and rudeness alone do not make a successful racial hatred case. The fact that Mr McLeod is white, and was abused using the term 'white', is not enough to make it a racial incident for the magistrate. 'White,' he says 'is of course a colour', and so seemingly falls within the protective scope of the legislation,²² but the term 'does not itself encompass a specific race or national or ethnic group. It is too wide a term for that' ([55]). White Australians, Brown FM states, are also not a homogenous group, since they have 'different languages, religious beliefs, countries of origin and cultural practices' (*McLeod* [59]). He concludes:

[B]eing 'white' per se is not in my view descriptive of any particular ethnic, national or racial group. Nor is it of itself a term of abuse. White people are the dominant people historically and culturally within Australia. They are not in any sense an oppressed group, whose political and civil rights are under threat (*McLeod* [59]).

The word 'white' itself, rather than adding an exacerbating racial element to the insults, is described by the magistrate as inoffensive, 'anodyne':

In my view [Mr McLeod] was shocked and offended by the strength and vehemence of the swearing that was directed against him. I do not believe that his shock and offence were necessarily transformed or intensified by the addition of the anodyne words 'white' or 'whites' into the melange of invective that had been directed against him (McLeod [28]).

In brief, Brown FM decided that Ms Power's insults were not racial vilification because they were made not because of Mr McLeod's race, but to express frustration at the power differential between them; because a 'reasonable correctional services officer with a pale skin' (McLeod [69]) would not have been offended by them; and because—despite the decision in *Gibbs*—the conversation between Ms Power and Mr McLeod was private in nature even though it occurred in a public place.

In reaching this conclusion Brown FM repeatedly refers to the power disparity between Mr McLeod and Ms Power. The benefit of the body and its material conditions being acknowledged in this case is that they help illuminate the power differential between the Aboriginal woman visitor and the white prison guard, who was 'to a large extent in control of the situation' (McLeod [75]); the kind of power differential that can so easily be obscured or obliterated by the abstractions of legal principle. *McLeod* is one of those exceptional cases in which embodiment is made visible, and in doing so justice has been done.

Wearing Racial Embodiment

Or has it? What is interesting in *McLeod* is that while we are told enough about Ms Power to imagine empathetically what it might be like to be experiencing her particular tensions in the moment of alleged vilification, Mr McLeod's bodily

state remains unexplored. We know almost nothing about his emotions, or the physical and mental context in which he operates. His racial identity, minimally explored, is also rendered insignificant. Brown FM effectively erases his whiteness, describing it in various contexts as non-homogenous ([59]), non-specific ([59]), insignificant ([66]) and 'anodyne' ([28]). The significance of whiteness is further undermined in other sections of the judgment by Brown FM pointing out the social dominance of whites in Australia, making white Australians a group that does not require legal definition since they are not in need of legal protection ([55], [59]).

For their social dominance, ill-defined boundaries and internal diversity as a group, Brown FM finds that whites should not be able to invoke the racial hatred provisions of the Racial Discrimination Act. It is not unusual for complaints of vilification against whites to fail: the actions in *Gibbs v Wanganeen*, *De la Mare v Special Broadcasting Service* (1998) and *Bryant v Queensland Newspaper Pty Ltd* (1997) were all unsuccessful (or in the case of *Gibbs* would likely have failed if it had proceeded) because of the decision maker's conclusion that the alleged vilification was not serious or offensive enough to warrant legal remedy. However, each of these cases was concluded with minimal discussion of racial embodiment. What *McLeod* demonstrates is that where racial embodiment is directly addressed, despite the possibilities for a just outcome to the case, there are further potential problems for the Indigenous legal actor.

In *McLeod*, Brown FM strives against legal neutrality and abstraction to acknowledge the material conditions of embodiment that will make the racial and other inequalities of the case legally visible. He draws an abject picture of Ms

Power that illustrates her vulnerabilities and establishes Mr McLeod's relative power and status. In doing so, he expresses and evokes compassion for Ms Power, and sets her up as a person to be pitied rather than prosecuted. However, in his focus on Ms Power's embodiment, Brown FM locates in her qualities that may as easily be reviled as pitied: her drug taking, the inadequacy of her parenting, her sexual history and poverty are all on display. Whether Mr McLeod shares any of these characteristics or has potentially abject qualities of his own is not discussed: since all we know about him are the bare facts of his gender, race and profession he remains simply an 'ordinary' white man, doing his job.

So, as well as allowing white privilege to remain undisturbed, this approach also highlights a danger for the Indigenous participant in discrimination cases: that he or she will remain vulnerable to the way that a given decision maker will describe, and then respond to, the very qualities that he or she must establish in order to attract protection. Should the decision maker adopt a different affective stance, such as contempt or disgust, in place of compassion, the outcome of the case may well be different.

Anti-discrimination laws are unique within the legal portfolio for their concern with embodiment in its various forms; from skin colour to physical ability, pregnancy or sex. However, while the body can be the focus of discrimination cases it is the physical and emotional state of the socially *disadvantaged* actor that is usually relevant:

It is the stigmatised body that is made to 'wear' embodiment: the normalised body remains clean of bodily flaws and vulnerabilities. While acknowledging embodiment means that discrimination law is grounded in the reality of daily life, the one-sidedness of the acknowledgement

reinscribes the relative privilege and disadvantage of the parties (O'Connell 2009).

These laws can sometimes have the unintended effect of making subordinated bodies hypervisible, making them wear the consequences of embodiment, so that black bodies are more situated, biased, affected by materiality, while white bodies remain neutral and unaffected by their embodiment. In other words, the white actor in anti-discrimination law is left with the power of his or her invisible whiteness intact, while the black actor's embodiment is on display.

Conclusion: Resisting Embodiment— What Remains Invisible?

Discrimination laws are useful and powerful in part because they acknowledge embodiment; yet they can also reinscribe powerlessness because they tend to see racial embodiment only in those who are already bearing the weight of a hypervisible racial identity. One response to this is to question the gaps in bodily representation in law: whose embodiment has eluded legal attention? What are the bodily 'remains' of a case; what remains invisible?

In considering which actors in this story have eluded embodiment, it is not only Mr McLeod and his colleagues who have escaped attention. In law, decision-makers are almost invariably disembodied, and the decision-makers in racial hatred cases are no exceptions. Their perceptions of race, their own race and their bodily states exist behind a seemingly impenetrable neutrality, albeit one that sometimes grows thin when the decision-maker is black or female or is otherwise visibly embodied. That, however, is another part of the story, told in other contexts by other theorists

(see Graycar 1998; 2008). Also invisible are you and I, the readers.

Telling all the parts of the embodiment story promises rewards for white as well as Indigenous Australians. Avoiding the reality of racial embodiment leads, as Baldwin suggests, to both 'personal incoherence' and to renunciatory versions of racial history that permeate social and legal institutions until they are finally and painfully acknowledged. It is through embracing the reality of embodiment that whites may gain a language, including a legal language, in which to speak about their own race. Attention to what whiteness may mean in any specific context—in Australia, in relation to Indigenous peoples, where there are allegations of racial hatred—promises whites some respite from the stifling neutrality of racial invisibility, an opportunity to consider how whiteness has shaped their identity and history, and the possibility of a more coherent self description.

When Baldwin wrote that whites were pinned like butterflies there was clearly a sense of oppressive constraint in that image. Yet a pinned butterfly is not only a negative symbol; as well as a metaphor of capture it is also a metaphor of taxonomy and display. There is something to be gained by putting whiteness under scrutiny and on show. This is not to suggest that attention to all forms of embodiment is a way of untangling the resilient and mutually constitutive relationship of racial privilege and disadvantage, embedded as it is in so many other powerful social structures (Levine-Rasky 2002: 341). But in discrimination law there is the possibility of remedying the one-sidedness of considerations of embodiment, to illuminate racial privilege as well as disadvantage, and to undermine the tendency of laws—even beneficial laws—to entrench the disadvantage they set out to redress.

Author Note

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Notes

¹ All racial terminology is fraught with shifting meanings and implied positions. Here I am using the terms 'black' and 'white' which are unsatisfactory because they suggest a homogenous individual and group racial identity that is exactly what I set out to challenge. However, I prefer the terms to other possibilities such as 'non-white others' that leave 'whiteness' intact, while underscoring the fragmented and contingent identity of the racial other. The lack of adequate racial descriptors is itself an eloquent critique of the irrationality of racial categorisations in contemporary Australia.

² In several states as well as the ACT, anti-discrimination legislation provides both civil and criminal offences. The *Anti-Discrimination Act 1977* (NSW) provides a civil remedy for racial vilification (s 20C) as well as making it a criminal offence in serious cases (s 20D). Racial vilification is prohibited under the *Racial and Religious Tolerance Act 2001* (Vic) s 7 (civil), s 24 (criminal). In Queensland, s 124A of the *Anti-Discrimination Act 1991* makes vilification unlawful; serious incidents may be a criminal offence under s 131A. The *Discrimination Act 1991* (ACT) s 66 makes racial vilification unlawful, and s 67 creates a criminal offence for serious incidents of racial vilification. In South Australia, criminal and civil offences for racial vilification are in two separate Acts: the *Racial Vilification Act 1996* s 4, (criminal) and the *Wrongs Act 1936* s 37 (civil). In Western Australia, racial vilification is

a criminal offence: *Criminal Code 1913* ss 76–80, and in Tasmania, a civil offence: *Anti-Discrimination Act 1998* s 19.

³ Sections 18B–18F *Racial Discrimination Act 1975* (Cth), as amended by the *Racial Hatred Act 1995* (Cth).

⁴ The 'New Abolitionists' of the American 'Race Traitor' movement claim that being white means not being fully 'American': (Ignatiev and Garvey 1996: 21).

⁵ See for example, the work of Haraway (1997), who champions the rich theoretical and material possibilities of acknowledging the ambiguous, contested meanings of race, in contrast to the trauma of a pretence to racial purity.

⁶ Professor Isabel Karpin, University of Technology Sydney, Faculty of Law.

⁷ See also Frankenberg (1997: 1).

⁸ See also Moreton-Robinson (2004: 81): 'In academia it is rarely considered that Indigenous people are extremely knowledgeable about whites and whiteness.'

⁹ Thornton is referring to the Stolen Generations case of *Kruger v Commonwealth* (1997) 190 CLR 1.

¹⁰ As well as the overlapping Commonwealth/state jurisdiction, there are also jurisdictional variations in the type of offence; civil or criminal, and differing grounds of hate speech (as well as race, some states protect against other kinds of vilification, such as religion or sexuality-based vilification).

¹¹ See n 1 above.

¹² See n 2 above.

¹³ See, for example, *Carr v Boree Aboriginal Corp & Ors* [2003] FMCA 408. Another older example of a case in which a white complainant argued discrimination in employment by an Indigenous respondent is *Bell v ATSIC & Gray & Brandy* [1993] HREOCA 25 (22 December 1993). This case was appealed to the High Court on the issue of the then Human Rights and Equal Opportunity Commission's 'judicial' powers, as *Brandy v HREOC and Ors* (1995) 127 ALR 1.

¹⁴ See also Poynder (1994: 57) who makes the same observation specifically about Aboriginal Australians.

¹⁵ The case was heard in Kalgoorlie Children's Court and the racist harassment charge was dismissed as the abuse was not serious, substantial or severe enough (*Criminal Code*

1913 (WA) s 76), to meet the legal requirement for prosecution.

¹⁶ In addition to the vilification cases of *Gibbs v Wanganeen* (2001) and *McLeod v Power* (2003), discussed here, see also *Bryant v Queensland Newspaper Pty Ltd* (1997) (an English man complained about the use of the term 'pom' in newspaper articles) and *De La Mare v Special Broadcasting Service* (1998) (a white person complained about the broadcast of a satirical 'mockumentary' called 'Darkest Austria' which he claimed vilified white people and Western countries).

¹⁷ Section 18C(1) of the *Racial Discrimination Act 1975* (Cth) states: '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 some or all of the people in the group.'

Sections 18C (2) and (3) give further detail on when an act will be considered not to be done in private.

¹⁸ The magistrate found that it was not an act done 'otherwise than in private' because there was no direct public right of access to this section of the gaol, unlike, he states, the gatehouse and visits centre: (*Gibbs v Wanganeen* [16]) Further, there were no members of the public present, nor any reason to find that the conversation was not intended to be private: ([17–18]).

¹⁹ Twenty four per cent of all Australian prisoners are Indigenous.

²⁰ The pamphlet stated that, following *Gibbs v Wanganeen*, 'it is clear that if an officer is racially vilified in a "public area" of the prison (such as the visits area) then the matter would be actionable' and invited its members to report any racial vilification that occurred in 'public' areas, promising legal support. Cited in *McLeod v Power* (2003) [5].

²¹ For example, in the law of provocation, triggers such as 'grossly insulting words or gestures' can reduce a sentence from murder to manslaughter under the various state criminal Acts, such as s 23 of the *Crimes Act 1900* (NSW).

²² Under s18C(1)(b) the act complained of must be done because of the complainant's 'race, colour or national or ethnic origin'.