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# THE CASE FOR THE REPEAL OF SECTION 18C

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Public Affairs**  
THE VOICE FOR FREEDOM  
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# The case for the repeal of section 18C of the Racial Discrimination Act

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# Executive summary

Research conducted by the Institute of Public Affairs demonstrates that section 18C of the *Racial Discrimination Act 1975* must be repealed to protect freedom of speech in Australia.

Part A of this report comprehensively outlines the case for the full repeal of section 18C, and the reasons why alternative proposals for reform fail to stand up to scrutiny.

The key arguments of this report are that section 18C:

- Is a restriction on the human right to freedom of speech and an attack on human dignity;
- Undermines democracy;
- Is inconsistent with a peaceful and cohesive society;
- Punishes defendants through an unfair process;
- Is partially redundant;
- Undermines attempts to combat racism;
- Is unconstitutional.

The report rejects the following proposed compromises as inadequate:

- Removing 'offend' and 'insult' from section 18C;
- Replacing 'offend' and 'insult' with functionally similar language;
- Reforming the process for hearing section 18C or the Australian Human Rights Commission.

None of these reforms will address all of the problems created by section 18C.

We conclude that section 18C must be repealed in full, along with the associated provisions in Part IIA of the *Racial Discrimination Act 1975*.

Part B of this report outlines the history of section 18C and how it has been interpreted. This information forms the basis for the argumentation in Part A.

# Foreword

In 1943, in the midst of the Second World War — a war fought to defend human freedom, the Institute of Public Affairs was founded.

Enshrined in the Constitution of the Institute of Public Affairs is the objective to 'further the individual, social, political and economic freedom of the Australian people'.

Australia is a wonderful country. Since 1945 some 7 million people have chosen to live and work and bring up the families in Australia. They have chosen Australia because we are a free country. My parents came to Australia in search of a better life from a continent ravaged by war.

The origins of our successful, multicultural society were laid in the 1950s and 1960s when people from all backgrounds were welcomed as Australians, regardless of from where they came. At the time when Australia was welcoming unprecedented numbers of new arrivals to our shores it would have been inconceivable to suggest that the state should punish someone for uttering words that offended or insulted someone. The attempt to police and regulate and control speech was characteristic of governments from which people were seeking refuge.

Australia could only offer that welcome because we were a free country, steeped in the political practice and cultural traditions of democracy and liberalism and freedom. The most important of the freedoms that Australians have fought and died for is freedom of speech.

This issue is of great consequence to Australian democracy. My view is if we allow one of these pillars of freedom to become regulated by the state, why then should we not expect the same to occur for the other freedoms that we enjoy — they are all bound together.

Without freedom of speech there can be no freedom of religion, or freedom of association, or freedom of intellectual inquiry. Freedom of speech is not merely the human right to say something — it is the right to listen and hear what's said. Freedom of speech is also the right to disagree and argue back.

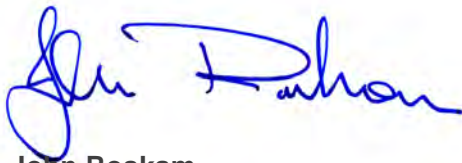
Without freedom we cannot confront the challenges of the future. Speech that can only be uttered, and thoughts that can only be contemplated when sanctioned by the state are reeds too weak on which to rest human flourishing.

Freedom is essential to human dignity. Dignity only comes from the ability to make choices. Without freedom of speech individuals are denied the opportunity to gain the dignity to which every human is entitled.

This is why in 2012 the Institute of Public Affairs was the first organisation to condemn efforts to impose government censorship of the press in Australia.

A quarter of century ago when laws such as section 18C were first mooted the Institute of Public Affairs stood firmly for freedom and for freedom of speech. Since then the Institute of Public Affairs has not shifted its position one inch.

The Institute of Public Affairs will always stand on the principle of the greatest idea in human history - freedom. Sadly, Australians tend to take their freedoms for granted, and are sanguine about the threats to threats to their freedoms. The Institute of Public Affairs is not. Too many people have made too great a sacrifice for us to disdain the legacy of freedom.



**John Roskam**

Executive Director, Institute of Public Affairs

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# Definitions

The following terms are referred to throughout the document...

“Racial Discrimination Act 1975”: An Act of the Commonwealth parliament that makes racial discrimination in specific contexts unlawful in Australia. It is administered by the Australian Human Rights Commission.

“Racial Hatred Act 1995”: An amendment passed by the Commonwealth parliament that added Part IIA to the *Racial Discrimination Act*.

“Part IIA”: Part IIA adds Sections 18B, 18C, 18D, 18E and 18F to the *Racial Discrimination Act*.

“Section 18C”: Section 18C makes it unlawful for a person to engage in an act that is reasonably likely in all circumstances to offend, insult, humiliate, or intimidate another person or a group of people where the act is done because of the race, colour, national, ethnic origin of that person or group of people. It is a civil prohibition, not a criminal offence. For more explanation on what section 18C is and how it has been interpreted, see chapter 5.1.

“Section 18D”: Section 18D provides exemptions to the prohibition in section 18C. The exemptions include anything said or done in the performance of an artistic work, statements as part of a genuine academic, artistic or scientific purpose, and the making or publishing of a fair comment or accurate report on any matter of public interest. Section 18D only applies to anything said or done reasonably and in good faith. For more explanation of the exceptions under section 18D and how it has been interpreted, see chapter 5.2.

“Australian Human Rights Commission”- The Australian Human Rights Commission was established in 1986, and was originally known as the Human Rights and Equal Opportunity Commission. The role of the commission is to resolve allegations of discrimination, breaches of human rights under federal laws, operate inquiries, provide legal advice, and undertake research into issues of human rights abuse and discrimination.

“Human Rights and Equal Opportunity Commission”- The Human Rights and Equal Opportunity Commission was the precursor to the Australian Human Rights Commission.

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Part A:

The case for repeal

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# Introduction

Section 18C must be repealed in full. It is bad policy and it is bad law. Only by removing the law from the statute books entirely can Parliament restore Australians' right to freedom of speech, improve our liberal democracy, and eliminate the sundry abuses that this law has caused.

The first part of this report makes a series of objections to section 18C that taken collectively amount to a dispositive case for its repeal. It then goes on to consider proposed amendments to the law and why they would be inadequate. It concludes by outlining the substantial and growing public and expert support for changing section 18C.

## Only full repeal will restore freedom of speech

Section 18C must be repealed because it violates the fundamental human right to freedom of speech. This right is deeply rooted in individual autonomy. For human freedom to mean anything, it must mean the ability to express one's thoughts and feelings. The exercise of this right is limited only to the extent that it conflicts with the rights of others. Section 18C does not protect any other natural right that might reasonably be said to countermand the right to freedom of speech. There is no right not to be offended. Nor does individual dignity demand this kind of restriction on free expression.

Even if this natural rights argument is not found persuasive, there is a powerful instrumental case for repealing section 18C. It is bad for democracy, limiting the range of ideas that can be expressed by free and equal citizens, ultimately impeding the marketplace of ideas and allowing prevailing ideas and influential people to escape the scrutiny they need to improve. Moreover, freedom of speech strengthens social cohesion by exposing bad ideas and malevolent actors, rather than allowing them to fester in silence.

The third limb of the case for repeal is that in practice the law has proved unworkable and unfair. The law does nothing to prevent the kinds of racism that people are most likely to encounter, overlaps with other laws to the point of redundancy, and is so poorly drafted that significant uncertainty about its key terms persists despite two decades of jurisprudence. Indeed, the law may well be an unconstitutional exercise of the external affairs power or an unconstitutional burden on Australians' implied right to freedom of political communication.

The inequities created by this uncertainty are compounded by the inadequacy of the statutory defence under section 18D, which has been too narrowly construed and is in any event an unfair reversal of the onus of proof. It implicitly claims for the state the moral right to restrict speech as it sees fit.

The problems of section 18D are indicative of the contempt with which this law treats citizens, a contempt that can be clearly seen in the unfairness of the process for hearing section 18C complaints.

Chapter 1 examines these objections in detail, making the case that to stop these abuses, and to restore respect for liberal democracy and individual rights, only the full repeal of section 18C will suffice.

## We cannot compromise on freedom of speech

As the debate about section 18C has evolved, a number of proposals for amending the law have been made. All are inadequate.

Removing the words ‘insult’ and ‘offend’ will either have little to no effect on the current jurisprudence of the section or will render the law redundant. Either the remaining words will retain the meaning currently given to the four words together, or ‘humiliate’ and ‘intimidate’ will be construed narrowly, in which case the law will merely duplicate state laws (extracted in Appendix 4).

Inserting new words, such as ‘vilify’ or ‘incitement to racial hatred’ would be nothing more than sleight of hand; it would be the mere appearance of change and would do little to change the law as it operates.

Procedural change in how complaints are handled is necessary but not sufficient. This should happen even if the law somehow stays intact but by itself would do nothing to address the law’s fundamental failings.

Chapter 2 expands on these points and shows why we must reject unprincipled, unnecessary compromise.

## The movement for change is building

There is growing support in Australia for changing section 18C. Public polling indicates that more people support change than retaining the status quo, and there is a huge number of experts from across the political spectrum also advocating change. Chapter 3 details the movement for change that is building across our country.

As well it should. Because it is time that Australia lived up to its principles. A number of other comparable countries have already taken significant steps to wind back misguided restrictions on freedom of speech. In this, Australia should follow their lead. The growing realisation around the world that restricting freedom of speech is counter to natural rights, the tradition of liberty, and democratic society is yet another reason to support the full repeal of section 18C.

Until 2013, it was illegal in Canada to ‘expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.’ This section was repealed when

the Conservative government supported a private member's bill to that effect.

Similarly, in 2012, the British government removed the word 'insulting' from the *Public Order Act* after it led to absurdities like the arrest and conviction of an elderly street preacher holding a sign critical of homosexuality. The man was attacked by a crowd numbering over 30 by being pushed to the ground and having soil thrown on him. The police intervened and arrested the preacher for provoking violence.<sup>1</sup>

In New Zealand, a prohibition on the use of 'insulting' words was repealed by the Labour government in 1989. Before its repeal, the effect of the law was to inundate the government's Race Relations Conciliator with racial disharmony complaints, accounting for 76.2% of total complaints between 1978 and 1985. Critics labelled it 'one of the most problematic, futile and time consuming provisions in New Zealand's race relations legislation'.<sup>2</sup>

Section 18C is also out of alignment with the international standard for laws restricting racist speech. The *International Convention on the Elimination of All Forms of Racial Discrimination* prohibits the 'dissemination of ideas based on racial superiority or hatred'. This is a far narrower standard than section 18C. Indeed, it has been noted that this disparity arguably renders section 18C unconstitutional (see Chapter 1.8).

The Australian Parliament must move immediately to defend freedom of speech just as legislators in these countries have done. The concerns that motivated these legislative changes around the world are shared by critics of section 18C. Part A of this report argues for the repeal of section 18C.

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1 *Hammond v Director of Public Prosecutions* [2004] EWHC 69.

2 Pheroze Jagose, 'The "Tigger" of New Zealand's Race Relations Legislation' (1984-1987) 5 *Auckland University Law Review* 494, 495.

# 1: Why section 18C is wrong and must be repealed

Section 18C is an unjustifiable limitation of Australians' right to freedom of speech. It is contrary to individual autonomy and the principles of liberal democracy. Moreover, it is ineffective in achieving its purpose, redundant in the context of Australian law, poorly drafted, and unfairly administered. There also remain serious questions about its constitutionality.

## 1.1 Section 18C violates the fundamental right to free speech

The right to freedom of speech is fundamental to individual liberty and democracy.

There is a direct connection between our nature as individuals and the rights that we can claim against one another. We are individuals capable of independent thought and action and therefore equally deserving of moral concern. And this implies that the rules by which we are bound should apply to us all in the same way.

Autonomy further implies that our ability to exercise our rights should only be limited to the extent that doing so conflicts with the rights of others. The most common formulation of permissible restrictions on liberty is derived from John Stuart Mill's famous maxim: 'the only purpose for which power can be rightfully exercised over any member of civilized community, against his will, is to prevent harm to others.'<sup>3</sup>

For social beings equipped with sophisticated language, this implies a broad right to express our thoughts and sentiments, and raises the question of in what sense such expression can be considered to harm others.

It is generally accepted that speech can justifiably be limited only when it conflicts with the rights of others. Archetypal examples include, but are not limited to, incitement to violence, fraud, and, more controversially, defamation. In each of these cases there is a definite material rights infraction directly caused by the speech: incitement leads either to physical harm or reasonably apprehended danger, fraud causes financial or material loss, and defamation compromises the ability of an affected individual to operate in society by tarnishing his reputation.

Identifying a harm of this nature in offensive speech is considerably more difficult.

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3 John Stuart Mill, *On Liberty* (Longman, Roberts, & Green Co, 1859) 9.

### 1.1.1 There is no right not to be offended

If individuals have the right not to be offended then this right may circumscribe the right to freedom of speech. But there is no such right. An injunction against offensive speech necessarily fails because this purported right is incoherent and therefore inapplicable.

Offence is inherently subjective and this poses a conceptual difficulty with formulating a principle of offence that can equitably limit the freedom of speech.

Sir William Blackstone said of offensive words that

Their meaning depends always on their connection with other words and things; they may signify differently even according to the tone of voice, with which they are delivered; and sometimes silence itself is more expressive than any discourse. As therefore there can be nothing more equivocal and ambiguous than words, it would indeed be unreasonable to make them amount to any high treason.<sup>4</sup>

For this reason, High Court Chief Justice Robert French has noted that ‘There is no generally accepted human right not to be offended’.<sup>5</sup>

Theoretically, an individual may genuinely be as offended about criticism of his hairstyle or diet as another is about commentary about his race or sex. If offence is to be a consistent basis for limiting the exercise of the right to free speech then all of these cases must be treated the same way.

As such, a truly universal, reciprocal injunction against offence will have the practical effect of potentially silencing any speech, no matter how seemingly benign it may seem to everyone other than the offended party because anyone can be offended by anything.

This is a compelling *reductio ad absurdum* of the supposed right to not be offended. It does not merely conflict with the right to freedom of speech, it obliterates it.

### 1.1.2 Dignity does not demand the loss of the freedom of speech

The assertion of a universal right not to be offended leads to an absurd conclusion. To avoid this conclusion, it is necessary to limit the injunction against offence to only certain kinds of offence which are deemed to be particularly harmful. That is, to distinguish between one offence and another, we must refer to something beyond the subjective experience of the offended party. Namely, the effect that the speech has on society, or a segment thereof.

It has been claimed that restrictions on freedom of speech are required to recognise members of persecuted or discriminated against groups as equals. This is a critique

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4 Sir William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1769, reprint 1983) vol IV, 81. Quoted by French ‘Giving and Taking Offence’ below n 5.

5 Chief Justice Robert French, ‘Giving and Taking Offence’ (Speech delivered at the Samuel Griffith Society’s 2016 Conference, Adelaide, 13 August 2016).

that goes beyond the instrumental value of free speech to its basis in individual autonomy. On this view, it is not just that such restrictions are necessary to enable individuals to participate in the public sphere but to enable them to live as equals with their fellow citizens - an ability Jeremy Waldron has called 'dignity'.<sup>6</sup> Absent such restrictions, discriminatory speech actively prevents members of persecuted groups from being able to exercise their freedom and realise their own autonomy. Addressing the effect of discrimination, Race Discrimination Commissioner Tim Soutphommasane has said

It is difficult to see how someone can reach their potential, or be truly self-determining individuals, if they constantly second-guess themselves or if they feel constantly without power and hope... Racism reduces the standing of another to that of second-class citizen.<sup>7</sup>

Injunctions against speech that discriminates against people based on their race, sex, religion etc (hate speech) are closest by analogy to defamation. The offended party is a member of a class which is held by the speaker to be of lesser worth, and therefore lower reputation, than other classes in society, with the effect of constraining the offended party and all members of that class from operating as equals in society.

This idea has already proved influential in section 18C jurisprudence. In *Eatock v Bolt*, Justice Bromberg wrote:

Where racially based disparagement is communicated publicly it has the capacity to hurt more than the private interests of those targeted. That capacity includes injury to the standing or social acceptance of the person or group of people being attacked. Social cohesion is dependent upon harmonious interactions between members of a society... [which] are fostered by respectful interpersonal relations in which citizens accord each other the assurance of dignity. Dignity serves as the key to participatory equality in the affairs of the community. Dignity and reputation are closely linked and, like reputation, dignity is a fundamental foundation upon which people interact...<sup>8</sup>

Note, however, that there is still a significant practical difference between defamation and hate speech. In the former case, there is an immediate harm caused to the complainant by the specific complained-about speech. In the latter case (keeping in mind that the offence to the complainant is not considered sufficient for the reasons outlined above) the harm is caused to a class of people and the complained-about speech is not considered to be the sole cause of that harm but rather a contribution to a phenomenon (eg racism or sexism) that is considered harmful because it restricts people's participation in society.

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6 Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press, 2012) 5.

7 Tim Soutphommasane, 'Two Freedoms: Freedom of Expression and Freedom from Racial Vilification' (Speech delivered at the Australian National University, Canberra, 3 March 2014).

8 *Eatock v Bolt* [[2011] FCA 1103 at [264]-[265].

The argument that racist speech affects the ability of others to participate in society as equals rests on the premise that a law (or rule, or principle) is wrong if it has disparate impacts on different individuals or groups of individuals. A law that applies to everyone the same way institutes formal equality. Proponents of laws like 18C believe that the law should instead have equal effects, or institute substantive equality. There is good reason to reject this assertion.

It is not clear how the particular harms and particular classes are to be selected for special legal attention. Any number of slights, insults, and inequities might be suffered by a person, all of which might affect one's ability to participate in society. Restricting freedom of speech based on loss of dignity is necessarily arbitrary, emphasising some sensibilities while failing to account for others.

So the attempt to limit freedom of speech in the name of equal participation in society fails for the same reason that the purported right to not be offended fails. Neither can give rise to a coherent universal principle that conflicts with the right to freedom of speech, and as such neither can justifiably circumscribe that right; it exists as either an arbitrary restriction, or a total prohibition.

We can take this argument one step further. Individual autonomy and dignity are inseparable; the latter can only be realised where the former is constrained only by universal, reciprocal, coherent rules. The argument that dignity requires that some people sacrifice their autonomy for the benefit of others satisfies none of these conditions; the loss of autonomy is itself a loss of dignity. That is, dignity is accorded to people when the rules that bind them are the same as those that bind everyone else. Dignity is *created by* formal equality before universal rules.

## 1.2 Section 18C is bad for democracy

Alternatively, freedom of speech can be understood as a right that emerges within the context of democracy and is limited by the requirements of that institution. This is to make a utilitarian argument that the cost to individuals of having their speech restricted is offset by goods thereby acquired for democracy.

Chris Berg and IPA Adjunct Fellow Sinclair Davidson argue in a new paper in the journal *Agenda* that individuals weigh the costs of restrictions on freedom of speech (including the loss of rights and the prevention of public debate) against the costs of unrestricted freedom of speech (including hate speech, libel, and sedition). They argue that people's understanding of those costs change in response to events that reveal their true extent. For instance, *Eatock v Bolt* led to renewed interest in the danger section 18C poses for freedom of speech in Australia because it shocked many out of the complacent belief that the law's jurisdiction was limited to only egregious cases, and began a conversation about the limits the state may place on this most fundamental of rights.<sup>9</sup>

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9 Chris Berg and Sinclair Davidson, 'Section 18C, Human Rights, and Media Reform: An Institutional Analysis of the 2011-13 Australian Free Speech Debate' (2016) 23(1) *Agenda* 5.

And in this context, there is also a powerful case for free speech. The costs of restriction outweigh the costs of liberty. The contribution free speech makes to democratic life outweighs any benefit its restriction might have.

Racism, sexism, sectarianism and other forms of discrimination impose costs on certain individuals when operating in the public sphere. For this reason, it is often claimed that the loss of some freedom of speech for some people is offset by other people thereby gaining the ability to more fully participate in democracy.<sup>10</sup> In order that these people are able to exercise their rights as full members of the polity, the speech of those who would discriminate against them needs to be silenced.<sup>11</sup>

Against this, it has been argued that freedom of speech is inherent in the concept of democracy itself. If democracy is a mechanism by which preferences are aggregated, it follows that individuals must have the ability to express their preferences, and to access the ideas of others so as to form their preferences. By this reasoning, political speech should be protected by any democratic state. That is, that the costs of restricting freedom of speech are very high because doing so harms the practice of democracy. This has been acknowledged by the High Court in its jurisprudence on the implied right to freedom of political communication.<sup>12</sup>

The danger that section 18C poses to democracy was made plain by the recent controversy surrounding a satirical political cartoon drawn by Bill Leak (see Chapter 7.1.9). Leak's cartoon, while confronting, dealt with a matter of grave public importance—the health and welfare of juvenile Aboriginal Australians. The idea that any offence taken to the cartoon could remove Leak's perspective from the democratic debate is, as the editor-in-chief of *The Australian* Paul Whittaker said, 'absurd'.<sup>13</sup>

Leak himself noted:

Freedom of speech is what created our civil and free society. It is all about the exchange of ideas, about letting people express their views in the marketplace of ideas.<sup>14</sup>

Delimiting which speech is political and which is not is a difficult question. But in a diverse society in which many different cultures and conceptions of the good compete for the loyalty of members, and in which the existence of these various communities of meaning have clear effects on the political debate, broad deference is owed to all speech which is upstream of day-to-day politics. Political opinions are not formed in a vacuum, they are the products of many influences. And therefore, a democratic citizenry is entitled to express and be exposed to all ideas which may shape political choices.

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10 Greg Dyett, 'Groups Call for Protecting Sections 18C and 18D of the Racial Discrimination Act', *SBS*, 11 November 2016

11 Tim Soutphommasane, 'Two Freedoms: Freedom of Expression and Freedom from Racial Vilification' (Speech delivered at the Australian National University, Canberra, 3 March 2014).

12 See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 557-562.

13 Gabrielle Chan, 'Bill Leak's Lawyers "Tried to Coax Me to Court", says 18C Cartoon Complainant', *The Guardian*, 14 November 2016.

14 Australian Broadcasting Corporation, 'Bill Leak, Cartoonist for The Australian Newspaper', *Lateline*, 20 October 2016 (Bill Leak).



So while it may make superficial sense to think that limiting the speech of some may increase the participation of others, in reality, restricting the terms of the debate comes at a cost to all who would participate in it.

This argument does not rest on ambivalence about the outcome of political debate. It is true that some political choices are better than others. But this is not a reason to limit individuals' exposure to certain ideas. Instead, it is an argument for more voices to be heard. John Stuart Mill considered the freedom of speech to be justified in large part by its instrumental value to democracy. Its utility derives from the role that debate plays in seeking the truth in the marketplace of ideas.

At an IPA forum on Section 18C at Parliament House, Andrew Hastie MP noted the centrality of freedom of speech to a free society:

This issue is of great consequence to Australian democracy. My view is if we allow one of these pillars of freedom to become regulated by the state, why then should we not expect the same to occur to the other freedoms we enjoy - they are all bound together.<sup>15</sup>

### 1.2.1 Freedom of speech strengthens social cohesion

A closely-related argument is that freedom of speech is actually better for human dignity and social cohesion than a restrictionist approach.

If human dignity depends on the ability to participate in society, this is all the more reason to support the right to freedom of speech. That is, there is a positive case to be made that freedom of speech actually leads to a more cohesive society. The widely-admired US Supreme Court Justice Louis Brandeis once famously said 'Sunlight is said to be the best of disinfectants'.<sup>16</sup> Allowing bad ideas to be exposed to the public is the best way to combat them. In the case of racist speech, this means letting people speak their minds and then convincing them they are wrong.

Waldron opens his 2012 book, *The Harm in Hate Speech*, with an anecdote about a sign he saw on a shopfront in New Jersey that said that the owner would not serve Muslims and nor should anyone else.<sup>17</sup> Leaving aside the more contentious question of the right to refuse service, we can say that there is a sense in which the sign itself conveyed a useful piece of information. For most people, a sign like that says, 'Do not shop here'. Potential customers will know that the giving the shop their custom will be an act in support of a racist. This information may not be available if the sign were illegal. By giving people the opportunity to demonstrate to the shop owner their disagreement, permitting a sign such as this one actually reinforces the norm of anti-racism.

Free speech also contributes to solidarity by limiting the frustration that people may feel if they are unable to express themselves. A person is likely to feel better if allowed to be wrong and then corrected by the words and example of others, than if

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15 Sarah Martin, 'Dump 18C for Sake of Democracy, Says Andrew Hastie', *The Australian*, 22 November 2016.

16 Louis D. Brandeis, 'What Publicity Can do', *Harpers Weekly*, 20 December 1913, 10.

17 Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press, 2012) 1-6.

silenced and left to stew in resentment. As IPA Adjunct Fellow Gideon Rozner wrote in the *Herald Sun* in December:

History shows that laws against bigoted speech end up emboldening the bigots themselves.

Suppression by the state gives publicity and credibility to racist lunatics who would otherwise receive, at most, ridicule. Banned ideologies move underground and fester, away from the scrutiny of the mainstream.<sup>18</sup>

Just as freedom of speech has an instrumental value to democracy, by ensuring citizens have the ability to debate all the ideas that inform their politics, it has an instrumental value to the underlying value of human dignity expressed as solidarity with society. As such, the restrictionist argument fails on both natural rights and utilitarian grounds.

For section 18C, this means that only full repeal can give expression to our fundamental right to freedom of speech, and thereby better realise our autonomy and the principles of liberal democracy.

## 1.3 Section 18C does not achieve its aims

Even if section 18C were a justifiable, principled restriction on the right to freedom of speech, the question would remain as to its effectiveness in achieving a reduction in racist speech or racism more broadly. There is good reason to believe that it does not do anything to stop the most common forms of racism.

Section 18C specifically targets public acts. Waleed Aly has written that supporters of section 18C 'are wrong if they insist that it provides anything like substantial protection against racism. I've copped my share of racial abuse both in public and in private, and section 18C wasn't ever going to do a damn thing about it'.<sup>19</sup> If the goal of the law is to reduce racism or race-based offence in society, it is inadequate to the task.

Instead, the law targets precisely those racist acts which are easiest for people to avoid: publications like newspaper articles, social media comments, cartoons; comments made on television or radio; acts done in the presence of many people. By doing so it leaves untouched the racism that is most likely to affect people personally.

Moreover, it treats different public acts in different ways. If the intention of the *Racial Hatred Bill 1994* was to prevent acts which could lead to racial hatred, then logically it should have made no difference whether an act was, for example, part of an artistic performance. This was noted in the Minority Report by the Senate Legal and Constitutional Legislation Committee when considering the Bill:

[T]he exclusion of artistic performances from the scope of the civil provision of the Bill makes it laughable. A comedian can, in the guise of an artistic performance, tell blatantly racist jokes on national television, and sell videotapes of the program for personal profit, but those same jokes told by an ordinary

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18 Gideon Rozner, 'It's Offensive When Labor Plays Politics with Racism', *Herald Sun*, 1 December 2016.

19 Waleed Aly, 'Brandis' Race Hate Laws are Whiter than White', *The Age*, 27 March 2014.

citizen in a public place such as a hotel or club, could render him/her subject to civil proceedings under the Bill.

If the Government is truly concerned to stamp out racism, then which is the greater evil: a racist joke told on national television or the same joke told in the confines of a hotel or club?<sup>20</sup>

Despite this, and despite the fact that the law has no direct effect on racist acts done in private, its defenders still make the argument that it has an indirect effect in reducing racism in society by sending a powerful signal to the culture at large that discrimination is wrong and unacceptable. And the repeal of these laws is argued to send the opposite signal. Repealing section 18C would 'licence racial hatred', in Tim Soutphommasane's words.<sup>21</sup>

This argument is misguided. Many of the goods and harms of restrictions on freedom of speech can be gained or avoided through custom, social sanction, and personal responsibility and so do not necessitate legal protection.

Encoding disapproval of racist speech in the law runs the risk of over-deterrence. Speech that would otherwise be useful may go unsaid for fear of running afoul of the law. This is known as the chilling effect.

The chilling effect hints at a deeper problem with this line of reasoning.

If there is no social stigma attached to racism, then the deterrent effect of having an anti-racist speech law comes from people's fear of (or respect for) the law generally, rather than from any concern about the intent of this particular law. Moreover, a deeply racist person is unlikely to be swayed from its convictions by the passage of a law. The inability of the state to regulate the sentiments of individuals has been recognised for centuries. The ancient Romans knew that, in the words of Themistius, it is "impossible... to be pious and god-loving out of fear of human laws".<sup>22</sup>

The same is true today. People may suffer a law they don't believe in, but its existence won't by itself lead them to adopt the norm that it encodes. Instead, any change in people's behaviour will come largely from social pressure.

Of section 18C, Chief Justice Robert French made a similar point:

Nor can the law alone prevent the social disharmony which some kinds of offensive expression can cause. It cannot protect the dignity of people if our culture does not respect them. In limiting the cases the law has intervened and does intervene. The identification of these limits depends upon societal and political attitudes to the proper province of the law. These can vary from place to place and from time to time.<sup>23</sup>

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20 Minority Report by the Senate Legal and Constitutional Legislation Committee, *Racial Hatred Bill 1994*, March 1995, p.2

21 Michelle Grattan, 'Human Rights Chiefs Divided on Racial Discrimination Act', *The Conversation*, 3 March 2014.

22 Chris Berg, *In Defence of Freedom of Speech*, (Institute of Public Affairs and Manakal Economic Education Foundation, 2012) 32.

23 Chief Justice Robert French, 'Giving and Taking Offence' (Speech delivered at the Samuel Griffith Society's 2016 Conference, Adelaide, 13 August 2016).

The law, then, is subsidiary to custom. It can only function where there is normative support for it within the common culture of the people it rules.

And yet, we might also note that if there is a very strong social stigma attached to being accused of racism, then the supposed work of the law is already done. And the anterior presence of this stigma will increase the chilling effect caused by any law encoding it, as the consequences of misspeaking will carry both social and legal penalties.

In Australia, there is, rightly, great stigma attached to being accused of racism. It is widely recognised in our society that discriminating against someone based on his or her race is shameful. The presence of this stigma actually argues against the law being justified by the need to send a signal to the public.

It is also hard to imagine that the repeal of section 18C will give license to racists. For this to be so, we would have to believe either that the norm of anti-racism only survives in society because of section 18C or that the norm does not operate in society, such that it is only the legal force of section 18C that is holding back a tide of racism. The first is patronising, positing that common decency is a legal product, and it is a misunderstanding of the relationship of law and custom. The second is almost certainly empirically wrong but also argues against the effectiveness of section 18C in building a norm of anti-racism.

Either way, the argument that section 18C is important because it expresses the value of anti-racism reveals that defenders of the law are interested in stifling a wide range of speech, and not just egregious cases of abuse or implied violence. The function of social stigma is to silence; it is to establish and enforce taboo. By associating the law with the establishment of taboo, its defenders reveal that its purpose goes beyond preventing specific harms from arising to reshaping thought and conversation about race and racial issues. It is entirely appropriate for individuals and groups to promote the establishment of taboos in society—such advocacy is itself an exercise in free speech—but encoding them in the law limits the autonomy of dissenters and precludes democratic debate. This line of argument implies that these are the intended consequences of the law.

Indeed, section 18C jurisprudence supports this interpretation. The decision in *Creek*<sup>24</sup> to read the requirement of ‘racial hatred’ out of the interpretation of the law indicates that the law exists not to give voice to the norm of anti-racism but for the much broader purpose of foreclosing discussion of controversies pertaining to race.

Lastly, there is good reason to believe that section 18C will not support or strengthen the norm of anti-racism in Australian society. Enshrining racial distinctions between citizens in laws passed by parliament rigidifies and perpetuates them. If the goal of a democratic society is to move beyond categories such as race and recognise the inherent and equal value of each individual, laws based on these distinctions are counterproductive because they imply that the categories they create are meaningful. But as Matt Ridley has written, they are not inherently meaningful at all:

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24 *Creek v Cairns Post Pty Ltd* [2001] 112 FCR 352.

It is just bad biology to focus on race, sex or sexual orientation as if they mattered most about people. We've known for decades—and Marxist biologists... used to insist on this point—that the genetic differences between two human beings of the same race are maybe ten times as great as the average genetic difference between two races. Race really is skin deep.<sup>25</sup>

It may be the case that some people in society do invest these categories with meaning. And it might be the case that this is sometimes harmful to others. But since the categories are malleable, it is difficult to see how this harm can be better remedied by the state imposing laws that essentially reassert the meaningfulness of these categories, rather than through bottom-up social change that challenges it.

In Australian society, racism is stigmatised and the norm of anti-racism is broadly supported. Section 18C did not cause this to be the case and its repeal will not jeopardise it. Laws can and do encode social norms but do not create them *de novo* and therefore the need to signal society's disapproval of racism is not sufficient reason for section 18C.

## 1.4 Section 18C is largely redundant

There are some harms that can be caused by speech, but they are already covered by Australian law. The unique importance of section 18C is in its penalising of insult and offence. If these terms are removed, as they should be for the reasons stated above, the section becomes redundant. (Chapter 2.1 below gives a fuller account of why removing 'offend' and 'insult' would by itself not be sufficient to remedy all of the problems of section 18C.)

Unlike insult and offence, humiliation and intimidation are arguably justifiable restrictions on freedom of expression. Fortunately, they are both more than adequately covered by an abundance of existing state and Commonwealth law.

Appendix 4 provides a non-comprehensive illustration of state and Commonwealth statutes which cover acts that could be described as humiliation and intimidation. It is important to note that this is an evolving area of law. State parliaments are revising their stalking and harassment laws in light of social and technological changes. This is entirely appropriate, and to the extent that existing law is insufficient to cover harassing, menacing and intimidatory acts, the IPA supports such changes at the state level. However, section 18C is the wrong vehicle to pursue such ends.

The redundancy of section 18C's restrictions on humiliation and intimidation is therefore further grounds for the section's repeal.

There are strong reasons to repeal redundant statutory provisions. The transmission of intent between parliament and judiciary is imperfect. There is a constant risk that the judiciary will prohibit or penalise more action than parliament intended. This is a particularly pressing issue when parliament is legislating to limit fundamental rights in the absence of constitutional constraints on rights. To ensure that the judiciary interprets statutes as parliament intended, parliament ought to limit the number of

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25 Matt Ridley, 'Why is the Left Reviving Apartheid?' *The Times*, 28 November 2016.

laws to only those which are necessary to their purpose. Redundancy in this context is particularly harmful. Furthermore, redundancy encourages forum shopping, where individuals who feel they have been wronged seek out the friendliest jurisdiction for their action. This creates uncertainty in the community about what acts are lawful and unlawful.

## 1.5 Section 18C is bad law

On 15 November 1994 in his Second Reading speech to the *Racial Hatred Bill 1994*, the then Attorney-General Michael Lavarch said:

The Racial Hatred Bill is about the protection of groups and individuals from threats of violence and the incitement of racial hatred, which leads inevitably to violence. It enables the Human Rights and Equal Opportunity Commission to conciliate complaints of racial abuse.<sup>26</sup>

And yet, despite this assertion, the law's operation is not limited to violence or the causes thereof. It now protects people against little more than hurt feelings. This scope creep has been enabled by the vagueness of the law, rooted in the ambiguity of its terms, the near unintelligibility of its central test, and its requirement that judges inquire into the subjective motivations of respondents.

Not only is section 18C wrong in principle, it is a bad law that has created uncertain, unworkable jurisprudence. The sections below give further weight to the case for repeal. It should be noted at the outset, though, that any attempt to replace section 18C with a similar law will still fall foul of the in-principle objections outlined above, regardless of how clearly it is written or administered.

### 1.5.1 The scope of the law is uncertain

The inclusion of the words 'offend' and 'insult' sets the harm required for a legitimate action under the law too low, giving the law an uncertain scope.

When the *Racial Hatred Bill* was first debated in 1994, the then Human Rights and Equal Opportunity Commission gave its support to the inclusion of a prohibition of incitement of racial hostility, but did not support 'protecting hurt feelings or injured sensibilities'.<sup>27</sup> The Victorian Council for Civil Liberties gave evidence to the Senate Legal and Constitutional Legislation Committee's inquiry into the Bill that:

... essentially the effect of that legislation will be to protect people from hurt feelings. The legislation is designed specifically and in terms to protect people from offence and insults. No other legislation or principle of law that we are aware of in this country has that effect... We say the Government has no role as the guardian of hurt feelings.<sup>28</sup>

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26 Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Racial Hatred Bill Report* (March 1995).

27 Lorraine Finlay, 'Section 18C Parliamentary Briefing Notes' (Remarks delivered to a parliamentary forum at Parliament House, Canberra, 21 November 2016).

28 Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Racial Hatred Bill 1994* (1995) 341.

Nonetheless, inherently subjective words ‘offend’ and ‘insult’ were inserted into the *Racial Discrimination Act*, and this has led to inconsistent jurisprudence and uncertain administration.

Different judges have read these terms differently. In the QUT case, Judge Jarrett found that the section requires ‘more than mere slights’. But other judges have construed it more broadly, as in the cases of *Jones v Tobin* and *Bropho*. Lorraine Finlay has correctly pointed out that this uncertainty has consequences for the rule of law because the outcome of a case seems to depend, in part, on which judge hears it.<sup>29</sup>

Section 18C is so poorly drafted that even members of the Human Rights Commission have failed to understand its scope. For example, Tim Soutphommasane has said that the law “does not concern itself with speech that might offend or insult anyone... the courts have regarded the words ‘offend, insult, humiliate or intimidate’ as a collective”.<sup>30</sup>

Similarly, former Attorney-General Mark Dreyfus QC has said:

Opponents of 18C also like to focus on two words contained in that section—‘insult’ and ‘offend’. They pretend cases are judged by four separate tests against each word—intimidate, humiliate, insult and offend. This demonstrates an ignorance of how the law works. It is a single test, not four separate tests. This sets the bar high for proved contraventions of section 18C.<sup>31</sup>

This is a misleading description of the law.

On the rules of statutory interpretation, the meaning of the individual words is construed in the context of the surrounding words. So it is true that the meaning of ‘offend’ and ‘insult’ is affected by the presence of ‘humiliate’ and ‘intimidate’. But Parliament included all four words and used the disjunction ‘or’, so the intent of the law is that all four words have individual meanings.

Reasonableness too must be tested against the four conditions separately. That is, the reasonable person part of the test is applied in the same way to the four conditions: the test can be fulfilled by any conduct that is reasonably apprehended by a member of the victim class to be offensive or insulting or humiliating or intimidating. Again, this is made obvious by the use of the disjunction ‘or’. But it can also be seen by contemplating the alternative interpretation, which would be that a complaint would need to satisfy all four parts of the “collective”—a position the courts have never taken.

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29 Lorraine Finlay, ‘Section 18C Parliamentary Briefing Notes’ (Remarks delivered to a parliamentary forum at Parliament House, Canberra, 21 November 2016).

30 Tim Soutphommasane, ‘Two Freedoms: Freedom of Expression and Freedom from Racial Vilification’ (Speech delivered at the Australian National University, Canberra, 3 March 2014).

31 Mark Dreyfus, ‘18C Inquiry an Insult to Free Speech and Ignores Reality’, *Australian Financial Review*, 11 November 2016.

The last point to note regarding the scope of section 18C is this absurdity: the law does not require that anyone actually be offended, insulted, humiliated, or intimidated. The test is satisfied if anyone is reasonably likely to be affected in those ways. The scope of the section therefore encompasses hypothetical as well as actual harm, compounding the uncertainty created by the low harm threshold and the inherently subjective nature of the matter being tested.

## 1.5.2 Reasonable person test is unclear

The reasonable person test included in section 18C(1)(a) is not a truly objective standard. Instead, it asks whether the act is reasonably likely to offend, insult, humiliate, or intimidate another person or group. This has been interpreted as asking whether a reasonable person in the position of the complainant or the group likely to be affected by the act would find the act to meet one or more of those conditions. Unlike an objective standard, this test requires that the judge first define the relevant class of people and then inquire into how a reasonable member of that class would respond to the act.

Anthony Morris QC, who represented two of the respondents in the QUT case, has written:

A law creating liability based on an objective assessment of the likely emotional response of an indeterminate person or group of persons — a hypothetical emotional response that is at the same time subjective yet reasonable — cannot be a good law. A person may easily fall foul of section 18C, not just in theory but also in practice, by making an utterance that neither the speaker nor a reasonable person in the speaker's position could ever have imagined could be found offensive.<sup>32</sup>

Situating the reasonableness of the complaint within a hypothetical societal subgroup renders it subjective, and diminishes the level of culpability required of the respondent.

Even assuming that the test as structured is intelligible, it introduces a level of subjectivity into the process because the judge must divine what is reasonable from a particular perspective. This is impractical, and necessarily arbitrary. Any determination by a judge of the factors likely to reasonably offend (for example) a member of a particular group is bound to be imprecise. And as noted above, this has serious consequences for the rule of law, since one judge might empathise differently from another.

It is also undesirable because the law adopting different perspectives such that an act might be unlawful as regards one citizen and lawful as regards another based on the racial difference between the two reinforces that difference. If the law is really expected to send a normative signal about the equality of citizens, this is a perverse outcome.

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<sup>32</sup> Anthony Morris, 'There will Never be Winners Under Section 18C as it Stands', *The Australian*, 24 August 2016.



### 1.5.3 Establishing that race was a motivating factor is difficult

Section 18C requires that the act of the respondent was done, at least in part, because of race (see Chapter 5.1.3). This is a much more difficult standard for a court to apply than intention or recklessness. It is easier to establish that an act was done intentionally, or that the actor ought to have known the effect of his act. Section 18C instead requires the court to inquire into the motivation(s) for the act.

The difficulty lies in the inherent subjectivity of motivation. For some actions, it will be obvious that race was a motivating factor. But this is not true for all actions, nor is it true for similar actions in different contexts. The same word might be used to different effect by different people in different contexts. And because section 18B defines an act as 'because of race' if any reason for doing that act is race or ethnic or national origin, it is not enough to establish that the act was motivated also or even mostly by other reasons.

So it is not clear how it is established that the complained-of act was done because of race, and whether the respondent has to know (or even ought to have known) that race was a factor in his action.

On this point it is also important to note the distinction between being motivated by race and being motivated by racial hatred. There is no requirement that the act be motivated by any negative feeling. The Human Rights and Equal Opportunity Commission originally held, consistent with the name of the *Racial Hatred Act* and the heading of Part IIA, that complainants had to demonstrate that the complained-of act evinced racial hatred. (See *Bryant* in Chapter 7.1.1 of this report.) The courts began to resile from this position, and from the ordinary principles of statutory interpretation, in *Creek v Cairns Post*. This confusion is another example of the inherent obscurity of this law as drafted.

It might be replied that the possibility of a good faith comment with racial connotations is covered by the defence available under section 18D. But this section is itself beset by serious problems.

## 1.6 Section 18D does not protect free speech and unfairly puts the onus of proof on respondents

As shown in *Eatoock v Bolt*, section 18D does not provide blanket protection for political speech. Bolt's writing was held to be too sarcastic to be reasonable or in good faith. While the idea that a mocking or derisory tone is inherently unreasonable is itself worthy of mocking and derision, the important point is that a sarcastic comment about race is not the same as racial hatred and yet is treated as such by the combined effect of sections 18C and 18D.

Section 18D has only ever been successfully used in court three times. In each of these cases, it was the limb permitting 'artistic works' that was accepted by the court. The other 18D exemptions have not been accepted by the courts. And because when the Human Rights Commission terminates a complaint, it does not give detailed reasons for doing so, it is unclear whether any cases have ever been terminated because of the likelihood of being able to establish a defence on those grounds, or how many others have been terminated on the ground of artistic licence.

Proponents of section 18C often point to the existence of section 18D as a safeguard against encroachment on freedom of speech. But it is impossible to say with any certainty how strong this safeguard is.

The main problem with the section, however, is that it is an affirmative defence that effectively sets hard limits on what speech is legal in Australia and forces all speakers to fit their speech into its confines. In all other cases of restriction on free speech, it is the state or the complainant that must justify the restriction. But in 18C complaints, the onus is always on the actor to prove that his act was legally acceptable.

The United Nations Human Rights Committee has explicitly warned states against reversing the onus in this way, stating that "the relation between the right and restriction and between norm and exception must not be reversed".<sup>33</sup> That is, free speech is the norm and the onus is on states to justify exceptions to it.

By contrast, the recent Bill Leak case illustrates that the premise underlying this law is that the state has absolute authority to determine whether speech is permitted or not. It is this fundamental assumption, that it is reasonable to require someone to justify talking about race at all, that is flawed.

A common charge against opponents of section 18C is that they never specify what it is that they want to say or do that is not permitted. The fact is that it is not that there is any specific act that is prohibited, but rather that it is not possible to know what may or may not be permitted. And the wording of section 18D only serves to promote this uncertainty. This is created by the state's presumption of plenary power to determine the legitimacy of race-related speech and the vagueness of the supposed safeguard provided to citizens.

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<sup>33</sup> Lorraine Finlay, 'Section 18C Parliamentary Briefing Notes' (Remarks delivered to a parliamentary forum at Parliament House, Canberra, 21 November 2016). (p. 4)

The uncertainty that sections 18C and 18D combine to give Australians contributes to their chilling effect on democratic debate. It is unfair in and of itself, and made doubly unfair by the inequities of the complaints process.

## 1.7 The process is a punishment

Under section 18C, the process is a punishment. The complaints process for section 18C (see Chapter 6 for description) is inherently unfair. It subjects respondents to heavy costs, it is opaque and secretive, and even supporters of the law have acknowledged that it needs to change.

### 1.7.1 The cost to respondents

The QUT case demonstrates that even unsuccessful complaints come at a cost to respondents. After a 30-month process (the first half conducted without the students' knowledge) the Federal Circuit Court found on 4 November 2016 that the student respondents had no case to answer. Reaching that outcome cost the three students involved time, money, and reputational damage. A further three students made financial payments to the complainant soon after the complaint was lodged in the courts early in the conciliation process after realising how costly it would be to mount a defence.

Those alleged to have breached section 18C must expend time, energy, and money defending themselves, even before a complaint ever reaches court. There is no way of knowing how many people have paid complainants to go away, simply to avoid having to carry these costs.

### 1.7.2 Lack of transparency and the 'chilling effect'

In the end, the QUT case was terminated when the Federal Circuit Court determined that the action had no reasonable chance of success.

But the transparency of this judgement is unusual for 18C cases.

Most complaints do not go to court: up to 97 percent of complaints brought to the Australian Human Rights Commission are resolved in secret through the conciliation process.<sup>34</sup> And as explained in chapter 7, of the 2,018 complaints that have been lodged with the Australian Human Rights Commission under section 18C, less than 5 per cent have been taken to court.

When complaints are terminated by the commission, the parties are not provided with detailed reasons for the termination, providing little opportunity for decisions, and the consistency of the process, to be scrutinised. In practice, the only oversight of the complaints process that the public has is the commission's annual report, Commissioners' appearances before Senate estimates, and the fraction of cases that go to trial.

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34 Simon Breheny, 'Racial Discrimination Act: Turnbull should revisit 18C repeal case', *The Australian*, 29 April 2016.

The secrecy of the complaints process argues against the idea that the law is needed to send a signal about the importance of the norm of anti-racism in society. An open, transparent complaints process would have significantly more educational value for the public.

Put another way, the secrecy of the process contributes to the chilling effect of the law. That is, the uncertainty it creates deters not only the acts within its scope, but any acts that potential actors fear will come under its purview. This was understood when the law was first passed. In 1995, the Australian Press Council noted in its submission to the Senate Legal and Constitutional Legislation Committee inquiry into the *Racial Hatred Bill 1994*:<sup>35</sup>

Under the threat of a determination by the Human Rights and Equal Opportunity Commission, these proceedings could impose a ‘chilling effect’ which is not subject to the public scrutiny attached to court proceedings. As the Chairman of the Press Council wrote:

Conciliation [conferences] usually will be confidential - we have no way of knowing what ‘chilling effect’ they may have on freedom of information. Of course, they probably will have zero effect on racist criminals, on taunts and abuse in the streets from strangers, and on outrageous graffiti...

It is true conciliation provisions have worked well in NSW probably because the present and previous presidents of the Anti-Discrimination Board are reasonable and sensible persons. But should a public servant enjoy quasi-judicial power? What if the wrong person is appointed?

This lack of transparency has the perverse effect of deterring ordinary citizens from acts which may or may not be within the intended scope of the law while simultaneously obscuring the signal that the law is supposed to send to society.

### 1.7.3 Low threshold for acceptance of complaints

The uncertainty of the law is compounded by the AHRC’s applying a very low standard for accepting complaints. Accepting cases which have no real possibility of conciliation or success in court does nothing more than heighten the chilling effect by fostering public fear and misapprehension of the scope of the law.

The AHRC’s motivations for having such a low threshold are dubious. According to AHRC president Gillian Triggs, the AHRC accepts complaints for conciliation based on a much lower threshold than whether those complaints might be upheld by a court. This is a “form of social justice” that costs complainants and respondents “nothing, unless they choose to go to the lawyers”.

Oddly, despite this defence, President Triggs has also said that the commission has proposed to the government that the law be amended to raise the threshold for complaints the AHRC is obliged to accept for conciliation.<sup>36</sup>

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35 Australian Press Council, Submission No 20 to Senate Legal and Constitutional Legislation Affairs Committee, *Racial Hatred Bill 1994*, 24 February 1995, 14.

36 Michael Gordon, ‘Gillian Triggs Hits Back at “Deeply Misleading” Malcolm Turnbull over 18C Claims’, *The Sydney Morning Herald*, 7 November 2016.

In any event, all of this is incorrect. As Mark Leibler has pointed out, the AHRC president clearly has the power, under section 46PH of the *Australian Human Rights Commission Act 1986*, to terminate complaints that are vexatious or lacking in substance.<sup>37</sup> The AHRC could raise the threshold if it so chose.

And as the QUT case demonstrates, the costs of being drawn into the complaints process go beyond the financial cost of hiring lawyers. There is no justice, social or otherwise, in that.

It has also been argued that the low threshold encourages people to make complaints that have only a low chance of success, incurring the costs of legal advice and even exacerbating the hurt that they feel.

Even if the AHRC acted more expeditiously in terminating vexatious and insubstantial complaints, the fundamental unfairness of the process would remain. Complaints would still be investigated without the knowledge of the respondent, the public would still have no knowledge of the reasons for the termination of complaints, and the respondent would still be obliged to affirmatively defend himself by rebutting the presumption that the state is entitled to regulate his speech.

Contrary to President Triggs and Leibler, the unfairness of the process goes beyond the maladministration of the AHRC. Just as Section 18C undermines individual autonomy and citizens' equality before the law, the process established for complaints under the section are contrary to traditional principles of procedural fairness, imposing costs on respondents before wrongdoing is established and operating in secret, away from democratic scrutiny.

## 1.8 Section 18C is unconstitutional

Joshua Forrester, Lorraine Finlay, and Augusto Zimmerman have argued that section 18C is unconstitutional on two grounds: it was not a lawful exercise of Commonwealth power; and it is in contravention of the implied constitutional right to freedom of political communication.<sup>38</sup>

### 1.8.1 Not a valid exercise of the external affairs power

Section 18C was enacted under section 51(xxix) of the Constitution, the external affairs power. This power enables the Commonwealth Parliament to create legislation necessary to implement the provisions of international treaties to which Australia is a signatory. Such laws must conform to the provisions of the treaty.

The treaty in question is the *International Convention on the Elimination of All Forms of Racial Discrimination* which requires signatories to punish 'all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well

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<sup>37</sup> Mark Leibler, 'Prompt Action Could Have Avoided Threat to Australian Race Law', *The Australian*, 14 November 2016.

<sup>38</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmerman, *No Offence Intended: Why 18C Is Wrong* (Connor Court Publishing, 2016).

as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin’.

By its inclusion of offence and insult as grounds for complaint, section 18C goes beyond what the convention requires and is therefore unconstitutional. Moreover, Part IIA has been read in a way that takes it further from conformity from the convention. As described in Chapter 5.6, the Federal Court has held that for section 18C complaints to be established, there is no requirement that the complainant show racial hatred on the part of the respondent. This jurisprudence effectively concedes the non-conformity section 18C with the convention.

## 1.8.2 Contravenes the implied right to freedom of political communication

While Australia does not have an express constitutional guarantee of freedom of speech, the High Court has found in the constitution an implied right to freedom of political communication based on the liberal democracy established by that document.

High Court jurisprudence on the implied right to freedom of political communication was settled in a series of cases in the 1990s. In *Lange*, the court devised a test that has been modified by subsequent decisions. As formulated in *McCoy*, the test has three parts: whether the law in question effectively burdens the freedom of political communication; whether the law’s purpose and means of achieving that purpose are legitimate, in the sense that they are compatible with Australia’s system of representative government; and whether the law is appropriate and adapted to that legitimate purpose.<sup>39</sup>

Section 18C fails this test. It is clear that the law restricts political discussion: for example, however one feels about his methods, Andrew Bolt was clearly making a political point in his articles about fair-skinned Aboriginal Australians.

It is also clear that the law adopts a means of reducing racial hatred that is incompatible with a representative democracy in which disputes about the significance or otherwise of racial identification may take place. There is no reason that this goal could not be attained through education rather than censorship.

But even if censorship is a legitimate means of achieving greater racial harmony, this law is maladapted to that purpose. By setting the low threshold of offence or insult, the law purports to govern many acts which could not be said to contribute to the broader social problem of racial disharmony, from family disputes to one-off insults. The chilling effect of the law should also be considered when assessing the overall burden the law places on the implied right.

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39 Joshua Forrester, Lorraine Finlay and Augusto Zimmerman, *No Offence Intended: Why 18C Is Wrong* (Connor Court Publishing, 2016) 117-18.

Forrester, Finlay, and Zimmermann summarise this burden as follows:

It is not only the setting of a dangerously low harm threshold through inclusion of the words 'offend' and 'insult' that is problematic. The burden that [section] 18C imposes on the implied freedom of political communication is compounded by requiring only that an act is reasonably likely to offend or insult; by the conduct in question being judged not by reference to community standards but rather by the standards of the alleged victim group; by the failure to include truth as a defence; and by the overriding requirement that any acts must have been 'said or done reasonably and in good faith' if the s 18D exemption is to be applied. Being able to discuss controversial political issues freely and robustly is essential to the health of our democracy. Section 18C restricts this in a disproportionate way that violates the implied constitutional freedom of political communication.<sup>40</sup>

Although section 18C has been on the statute books for two decades, its constitutionality should not be assumed, having never been tested in the High Court. The question can be avoided more justly by Parliament repealing the section.

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40 Joshua Forrester, Lorraine Finlay and Augusto Zimmermann 'Indeed, Mr Abbott, Section 18C is "clearly a bad law"', *Online Opinion* 6 May 2016

## 2: An analysis of alternative proposals to amend section 18C

### 2.1 Removing the words ‘offend’ and ‘insult’

In September 2014, Family First Senator Bob Day (South Australia) introduced into the Senate the *Racial Discrimination Amendment Bill 2014*, a private member’s bill to remove the words “offend” and “insult” from the *Racial Discrimination Act 1975*. Senator Day’s bill lapsed in May 2016, as the 44th Commonwealth Parliament was dissolved ahead of the June general election. Following the election, Senator Cory Bernardi (Liberal, South Australia) in August 2016 introduced into the Senate an identical bill, the *Racial Discrimination Amendment Bill 2016*.

There are two considerable problems with this proposal.

The first is that the worst excesses of section 18C would not necessarily be remedied by removing ‘offend’ and ‘insult’. For instance, the complaints against Andrew Bolt were accepted on the grounds that the conduct was not only offensive and insulting, but also that the complainant would also be reasonably likely to be:

humiliated and intimidated by her perception of the capacity of the Newspaper Articles to generate negative or confronting attitudes to her from others... She will have a heightened fear of experiencing unpleasantness of the kind experienced by Mr McMillan [another complainant] when he perceived that he was being asked to justify or confirm his identity by his University...<sup>41</sup>

In the event that the courts reinterpreted ‘humiliate’ and ‘intimidate’ to require a higher standard of conduct, this would leave the provision redundant. As noted in Chapter 1.4 above, prohibiting intimidatory conduct is a worthwhile policy objective, but the *Racial Discrimination Act* is an inappropriate vehicle for this. As listed in Appendix 4, a wide array of state laws prohibit intimidation, humiliation, threats, menacing behaviour and incitement to crimes.

The second is that a complainant no longer able to complain of offence or insult would not be restrained from complaining of humiliation or intimidation. Deleting ‘offend’ and ‘insult’ from section 18C would still enable the current protracted and opaque process (outlined in chapter 5). For example, in *Prior v QUT* the complainant alleged that a series of Facebook comments she had read were all offensive, insulting, humiliating and intimidating.

Removing ‘offend’ and ‘insult’ would not necessarily foreclose the possibility of further cases like the Bolt case, meaning that it would not address the law’s rights violations and incompatibility with democracy. Nor would this reform eliminate the procedural abuses characteristics of section 18C complaints. It is not a viable alternative to full repeal.

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<sup>41</sup> *Eatock v Bolt* [2011] FCA 1103 at [295].



## 2.2 Changing the words of section 18C

### 2.2.1 Inserting the word 'vilify'

Professor Gillian Triggs, the president of the Australian Human Rights Commission, has thrown her support behind a proposal to insert the word 'vilify' in place of 'offend' and 'insult' in section 18C.<sup>42</sup>

The word 'vilify' is in practical terms no different from the words 'offend' or 'insult'. Court judgments routinely refer to section 18C as an anti-vilification provision.<sup>43</sup> The Macquarie Dictionary defines 'vilify' as 'to speak evil of; defame; traduce'.<sup>44</sup> The Cambridge Dictionary defines 'vilify' as 'to say or write unpleasant things about someone or something, in order to cause other people to have a bad opinion of them'.<sup>45</sup> The Macquarie Thesaurus specifies 'insult' as a synonym of 'vilify'.<sup>46</sup>

This would not raise the threshold for conduct to be in breach of section 18C. In fact, it would arguably lower the threshold. President Triggs told ABC Radio in November that the proposal would be a 'strengthening' of the laws and a 'very useful thing to do'.<sup>47</sup>

It is not clear what effect the word 'vilify' would have in section 18C, but it is clear that replacing 'offend' and 'insult' with the word 'vilify' would not remedy how section 18C undermines freedom of speech. At best it would be a cosmetic change; at worst, it would exacerbate the law's fundamental unfairness.

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42 Jane Norman, '18C: Malcolm Turnbull announces inquiry into Racial Discrimination Act', *ABC*, 8 November 2016.

43 See for instance, *Eatock v Bolt* [2011] FCA 1103 at [225]-[226]; *Noble v Baldwin & Anor* [2011] FMCA 283 at [143]; *Bropho v Human Rights & Equal Opportunity Commission* [2004] FCAFC 16 at [32], [95]

44 Macquarie Dictionary Online (2003) viewed online, [https://www-macquariedictionary-com-au.ezp.lib.unimelb.edu.au/features/word/search/?word=vilify&search\\_word\\_type=Dictionary](https://www-macquariedictionary-com-au.ezp.lib.unimelb.edu.au/features/word/search/?word=vilify&search_word_type=Dictionary).

45 Cambridge Dictionary Online (Cambridge University Press, 2016) viewed online, <http://dictionary.cambridge.org/dictionary/english/vilify>.

46 Oxford Dictionary Online (Oxford University Press) <viewed online 9 November 2016, <https://en.oxforddictionaries.com/thesaurus/vilify>.

47 Katherine Murphy, 'Gillian Triggs says replacing 'insult' and 'offend' could strengthen 18C', *The Guardian*, 8 November 2016.

## 2.2.2 Inserting the phrase ‘incitement to racial hatred’

The proposal to prohibit ‘incitement to racial hatred’ is longstanding. The original draft of the *Racial Discrimination Act 1975* included a prohibition on incitement to hatred. The Human Rights Commission, the part-time predecessor to the Australian Human Rights Commission from 1981-1986, penned a report in November 1983 recommending the Racial Discrimination Act be amended to prohibit incitement of racial hatred.<sup>48</sup> More recently, Professor Ramesh Thakur wrote in *The Australian* that section 18C should be deleted entirely, and in its place a ‘law that bans incitement to racial hatred and violence but leaves the thought police to the repressive regimes of the world’.<sup>49</sup>

This quote, though, highlights the chief problem with this approach. Separating ‘racial hatred’ from ‘offence’ on one hand and ‘violence’ on the other is difficult, if not impossible.

Incitement to violence is rightly illegal. Putting someone in fear for his or her safety meets the common law definition of assault, and in certain situations the expression of racist hatred can give rise to this genuine apprehension. For example, being trapped in a confined area with someone agitating for violence against a particular racial group could make any member of that group present legitimately fear for his or her safety.

But in other situations, incitements to racial hatred would not give rise to a sufficiently imminent fear of harm to be considered violent. A Nazi parade or rally in an open space likely falls into this category.

The development of social media has enabled people of ill-will to remotely harass others. And with so much personal available online, people may feel that they are more vulnerable than they were in the past. This is a genuine concern and the law will have to adapt to these new circumstances. It does not necessarily follow, however, that that response should come from the legislature, nor does it follow that the *Racial Discrimination Act* is the appropriate instrument for that response. The law needs to develop by analogy with existing law, with a focus on the threat of violence, rather than on subjective motivations and cultural norms.

A law against incitement to racial hatred invites uncertain jurisprudence. It blurs the distinction between offence and violence, or attempts to sit somewhere in the spectrum between the two, disconnected from the complex understanding of fundamental rights that underpins existing restrictions on the freedom of speech.

At the state level, where this has been tried, confusion has been the result.

The words ‘incitement to racial hatred’ would mirror laws present in every Australian state that make it unlawful *to incite hatred*, or serious contempt for, or serious ridicule of, a person or group of people on the ground of the race of the person or members

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48 Human Rights Commission, *Proposal for Amendments to the Racial Discrimination Act to cover incitement to racial hatred and defamation*, Report No 7 (1983).

49 Ramesh Thakur, ‘Trump is not here to destroy democracy but to refresh it’, *The Australian*, 18 November 2016.

of a prescribed group.<sup>50</sup> In practice, the state provisions have enabled protracted legal disputes based on complaints of dubious merit.

In 1998, a complaint lodged under section 20C of the *Anti-Discrimination Act 1977* in New South Wales against the publishers of the *Australian Financial Review* for publishing an article by Tom Switzer that accused Palestine of undermining the Middle East peace process. It was upheld by the NSW Administrative Decisions Tribunal, which ruled that the 'article as a whole [painted] an extremely negative picture of the Palestinian people'.<sup>51</sup> In Victoria, the Islamic Council of Victoria in November 2002 alleged that statements and publications by Catch the Fire Ministries between late 2001 and early 2002 breached section 8 of the *Racial and Religious Tolerance Act 2001*. The Victorian Civil and Administrative Tribunal accepted the complaint, and on 17 December 2004 ordered the defendants to take out newspaper advertisements which summarised the findings of the case. An appeal was lodged with the Victorian Court of Appeal, which was heard in August 2006. The Court's decision was handed down on 14 December 2006 allowed the appeal, ordering the matter be heard by VCAT again by a different judge.<sup>52</sup>

Not only is 'incitement to racial hatred' a difficult standard to enforce, it can be deleterious for social cohesion. With reference to legislation in the United Kingdom, Professor Anne Twomey of the University of Sydney wrote:

There are several elements of the legislation which have caused problems in its practical application. These include the difficulty in defining words such as 'hatred', 'insulting' and 'abusive', the difficulty in proving that words or actions were 'likely to stir up racial hatred'... There is also the further problem that acquittals of some groups, while others are convicted, can lead to even greater racial disharmony than was caused by the impugned acts.<sup>53</sup>

In Australian states and overseas jurisdictions, incitement to hatred provisions have been found to be ambiguous, difficult to interpret and unpredictable in application. This proposal would not remedy the concerns this report has detailed that exist under section 18C.

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50 *Anti-Discrimination Act 1977* (NSW) s 20D; *Racial and Religious Tolerance Act 2001* (Vic) s 7; *Anti-Discrimination Act* (Qld) s 124A; *Criminal Code Compilation Act 1913* (WA) ss 76-80; *Racial Vilification Act 1996* (SA); *Anti-Discrimination Act 1998* (Tas) s 19; *Discrimination Act 1991* (ACT) ss 66 and 67.

51 *Kazak v John Fairfax Publications Limited* [2000] NSWADT 77 at [78].

52 *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* [2006] VSCA 284.

53 Anne Twomey, 'Laws Against Incitement to Racial Hatred in the United Kingdom' (1994) 1(1) *Australian Journal of Human Rights* 235

## 2.3 Reforming the Australian Human Rights Commission process

Calls to reform the processes of the Australian Human Rights Commission are not without merit. What happened to the university students in *Prior v QUT* (see case summary in Chapter 7.1.7) is something that should not be permitted in the Australian legal system.

However, changing the process would not advance freedom of speech. At its core, the QUT case concerned a complaint lodged with a government agency relating to a series of innocuous Facebook comments. The stage at which the commission is entitled to terminate the complaint is meaningless.

Arguments based on process also risk being perceived as insincere. It is known that (as explained in Chapter 3) the president of the commission has the power under section 46PH(1)(c) to terminate complaints where ‘the President is satisfied that the complaint was trivial, vexatious, misconceived or lacking in substance.’ It is also known that Professor Triggs, the president of the commission, felt that the complaint against the QUT students was one that had merit, saying to ABC’s 7:30 programme the complaint ‘was one that had a level of substance’.<sup>54</sup>

The Australian Human Rights Commission may well be a poor administrator, but it is administering a bad law. The best way to fix the process is to remove the process altogether, by repealing section 18C, and removing the possibility that another QUT case will ever happen again.

## 2.4 Introducing a judicial function in the Australian Human Rights Commission

In a speech to the Chinese Australian Services Society in Sydney in November, Julian Leeser MP argued that a part-time judicial member of the Australian Human Rights Commission could be appointed to consider complaints and quickly terminate those with little prospect of success.<sup>55</sup>

As noted above, giving an agent of the commission an enlarged power to throw out complaints does not resolve the core problem of section 18C. It is unclear how a ‘judicial officer’ can be trusted to make more reliable decisions than the current official in charge of terminating complaints.

Giving an agent of the commission any judicial power would also call into doubt the constitutionality of his decisions and positions. Amendments in 1992 to effectively make rulings of the Human Rights and Equal Opportunity Commission legally enforceable was struck down by the High Court in 1995, as it violated

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<sup>54</sup> Australian Broadcasting Corporation, ‘Triggs on the Debate over Section 18C’, 7:30, 7 November 2016 (Gillian Triggs).

<sup>55</sup> Gareth Hutchins, ‘Push to weaken Racial Discrimination Act opposed by ethnic and religious groups’, *The Guardian*, 10 November 2016.

the constitutional separation of powers by giving the commission, an arm of the executive, powers reserved for the judicial branch of the federal government.<sup>56</sup>

Changing the complaints process would only be window dressing. While the abuses that respondents have suffered under the current regime are real and serious, even the fairest of processes would not address the broader concerns about the content of the law.

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<sup>56</sup> *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

### 3: Public support for change

Freedom of speech concerns all Australians. And the available evidence suggests that there exists broad community support for reform of section 18C.

Three separate opinion polls conducted in late 2016 reveal that there is broad community support for changing section 18C. A Galaxy Research poll conducted between 3 November and 6 November 2016 of 1,000 Australians aged 18 years and older asked the following question:

*Do you approve or disapprove of the proposal to change the Racial Discrimination Act so that it is no longer unlawful to 'offend' or 'insult' someone because of their race or ethnicity? It will still be unlawful to 'humiliate' or 'intimidate' someone because of their race or ethnicity.*

The results were 45% approved, 38% disapproved, and 18% said 'Don't know'.<sup>57</sup>

The Galaxy Research poll is consistent with two separate polls conducted by Essential Research in September and November, both of which asked the same question. The results from the Essential Research poll conducted between 9 September and 12 September of 1,019 Australians were 45% approved, 35% disapproved, and 21% said 'Don't know'.<sup>58</sup> The results from the Essential Research poll conducted between 11 November and 14 November 2016 of 1,014 Australians were 44% approved, 33% disapproved, and 23% said 'Don't know'.<sup>59</sup>

Many prominent public figures have also spoken in favour of reforming section 18C so that at least 'offend' and 'insult' are removed. In a May 2015 appearance on the *Bolt Report* before he became Prime Minister, Malcolm Turnbull summed up moderate reform of section 18C:<sup>60</sup>

MALCOLM TURNBULL: There was a very general consensus that - well a broad consensus, among lots of interested groups and stakeholders, that the words "insult" and "offend" could be removed, leaving the words "humiliate" and "intimidate".

ANDREW BOLT: Did you support that?

TURNBULL: I think that was broadly supported across the board.

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57 Joe Kelly, 'Most Support Free-Speech Overhaul, says Poll', *The Australian*, 10 November 2016.

58 Essential Research, 'Racial Discrimination Act' (13 September 2016) *Essential Report*, 9 <[http://www.essentialvision.com.au/wp-content/uploads/2016/09/Essential-Report\\_160913.pdf](http://www.essentialvision.com.au/wp-content/uploads/2016/09/Essential-Report_160913.pdf)>.

59 Essential Research, 'Racial Discrimination Act' (15 November 2016) *Essential Report*, 6 <[http://www.essentialvision.com.au/wp-content/uploads/2016/11/Essential-Report\\_161115.pdf](http://www.essentialvision.com.au/wp-content/uploads/2016/11/Essential-Report_161115.pdf)>.

60 Channel 10, 'Interview of the Communications Minister', *The Bolt Report*, 17 May 2015 (Malcolm Turnbull MP & Andrew Bolt).

BOLT: By you too?

TURNBULL: I was very comfortable about that. I didn't think that would have any sort of negative impact.

Many in the legal community have publicly criticised section 18C as it currently stands, including Mark Leibler AC, senior partner at law firm Arnold Bloch Leibler, Melbourne barrister Geoff Bloch, and the former Solicitor-General of New South Wales, Michael Sexton. Barrister and prominent human rights advocate Julian Burnside QC said in March 2014 that section 18C 'reached a bit far' and the 'mere fact that you insult or offend someone probably should not, of itself, give rise to legal liability.'<sup>61</sup>

In the media, *Guardian* journalist Gay Alcorn, the ABC's Jonathan Holmes, and the *Australian Financial Review's* Lenore Taylor have recognised problems with section 18C. Journalist and progressive commentator David Marr noted in *The Saturday Paper* in April 2014, 'The present act has to be changed - a little. Hurt feelings should never attract the law as they do under section 18C. Offence and insults are the everyday reality of free discourse.'<sup>62</sup> Former Chief Justice of New South Wales and former Chairman of the ABC James Spigelman AC QC noted in 2012 how inconsistent Australian law is with the rest of the Western world:

The freedom to offend is an integral component of freedom of speech. There is no right not to be offended.

I am not aware of any international human rights instrument, or national anti-discrimination statute in another liberal democracy, that extends to conduct which is merely offensive... [w]e would be pretty much on our own in declaring conduct which does no more than offend, to be unlawful. In a context where human rights protection draws on a global jurisprudence, this should give us pause when we re-enact [section] 18C and before we extend such protection to other contexts.<sup>63</sup>

From academia, Garrick Professor of Law at the University of Queensland James Allan, Castan Centre for Human Rights Law director Sarah Joseph, and Professor of Law and Research Co-ordinator in the Thomas More Academy of Law Spencer Zifcak have also spoken critically of section 18C.

This diverse range of people listed here is only a selection of public comment on section 18C (see Appendix 2 for a more complete list). But they represent a real cross-section of our country, politically and culturally diverse. They all recognise that section 18C is a bad law, and must be changed.

It is important to reiterate, however, that mere change is not sufficient. For the reasons outlined in the preceding chapters, everyone who supports change should support repeal.

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61 AAP, 'Human Rights Lawyer says 18C went too far' *SBS*, 29 March 2016.

62 David Marr, 'David Marr on race, votes and free speech', *The Saturday Paper*, 5 April 2014.

63 James Spigelman, 'Where Do We Draw the Line between Hate Speech and Free Speech', (Human Rights Day Oration delivered to the Australian Human Rights Commission's 25th Human Rights Award Ceremony, Sydney, 10 December 2012).

# Conclusion

The case for repeal consists of three arguments that individually and collectively lead only to the conclusion that section 18C must be repealed:

- The law violates the fundamental right to freedom of speech. There is no competing right rooted in offence or dignity that limits the right to freedom of speech, which is necessary to individual autonomy.
- Freedom of speech is vital to a healthy, functioning liberal democracy. The freedom to speak one's mind is essential to the pursuit of truth, to collective action, and to the expression of the self as situated in society.
- Section 18C is a bad law. Even if it were not in violation of the principles of liberty and liberal democracy, it would still be a font of confused jurisprudence, uncertain social effect, and procedural unfairness. It also may well be unconstitutional.

Each of these arguments taken by themselves is reason enough to repeal section 18C. Taken together they are overwhelming.

The case for repeal is stronger still when you consider the proposed alternatives:

- Removing or replacing the words 'offend' and 'insult', which, at best, only half addresses the principled concerns about the law, which leaves the unfair process untouched, and which is likely to be no more than a cosmetic change as the remaining or new words come to be interpreted as the old ones; or
- Reforming the process, and thereby wilfully ignoring the problems at the heart of the law.

The deficiencies of the law are becoming more and more apparent, and the public and the political class is coming to realise that the law must be changed.

We must go further than that. We must repeal section 18C.



# Part B: Background

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## 4: The origins of section 18C

Section 18C of the Racial Discrimination Act has a history extending well beyond the introduction into parliament of the *Racial Hatred Bill* in 1994.

Hate speech laws along the lines of what eventually became section 18C were being debated as far back as the early 1970s.

The first attempt to legislate a federal racial vilification provision in Australia was in 1975 with the introduction into parliament of the *Racial Discrimination Bill 1974*. The original text of the bill included clause 28, which read:

A person shall not, with intent to promote hostility or ill-will against, or to bring into contempt or ridicule, persons included in a group of persons in Australia by reason of race, colour or national or ethnic origin of the persons included in that group –

- (a) Publish or distribute written matters;
- (b) Broadcast words by means of radio or television; or
- (c) Utter words in any public place, or within the hearing of persons in any public place, or at any meeting to which the public are invited or have access,

Being written matter that promotes, or words that promote, ideas based on –

- (d) The alleged superiority of persons of a particular race, colour or national or ethnic origin over persons of a different race, colour or national or ethnic origin; or
- (e) Hatred of persons of a particular race, colour or national or ethnic origin.  
Penalty: \$5,000<sup>64</sup>

The Liberal Party-Country Party Coalition opposed clause 28 primarily on the grounds that it would place a restriction on the human right to freedom of speech. Several third reading speeches were used to criticise this aspect of the bill. The then federal member for Bennelong, John Howard, outlined the Coalition's opposition to clause 28:

...to attempt to proscribe dissemination of ideas, however base many people in this chamber might find those ideas, is to get into an area which in the view of the Opposition is so dangerous and could infringe on such a basic right that the Opposition very strongly opposes the inclusion in the Bill of this clause.<sup>65</sup>

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64 Parliament of Australia, Hansard (House of Representatives), 9 April 1975, page 1408

65 Parliament of Australia, Hansard (House of Representatives), 9 April 1975, page 1408-9

The Victorian Senator Ivor Greenwood also expressed concern:

...the basic objection which the Opposition has is that this clause is an infringement of freedom of expression which ought not to be seen in a Bill of this character which is directed towards improving human relations. I cannot believe that one improves human relations by preventing some people from saying what they want to say.<sup>66</sup>

Attorney-General Keppel Enderby QC, who had introduced the bill, attempted to fend off this criticism by making a civil education argument, stating 'the criminal law does not only provide a penalty; it expresses a sense of community outrage at certain types of behaviour.'<sup>67</sup>

In attempting to reach a compromise on the bill, the Labor government proposed an amendment, which would have replaced clause 28 with a general prohibition on racial vilification with an 'intent to provoke a breach of the peace.'<sup>68</sup> This amendment was rejected by the Coalition, and in order to get the legislation passed through the senate clause 28 was deleted from the *Racial Discrimination Bill*.

The prospect of national racial vilification laws was put to rest for a number of years until, in 1983, a report of the Human Rights Commission recommended the introduction of new laws that would:

Make it unlawful for a person to publicly utter or publish words which, having regard to all the circumstances, are likely to result in hatred, intolerance or violence against a person or persons, or a group of persons, distinguished by race, colour or national or ethnic origin [and] ... make it unlawful to publicly insult or abuse an individual or group, or hold that individual or group up to contempt or slander, by reason of their race, colour or national or ethnic origin.<sup>69</sup>

In 1989 Liberal New South Wales Premier Nick Greiner passed Australia's first racial vilification laws in Australia.<sup>70</sup> The legislation was not considered to restrict free speech because of its emphasis on physical harm to 'property or persons'.<sup>71</sup>

In the period leading up to the introduction of the Racial Hatred Bill 1995, three reports raised the issue of federal racial vilification laws.

The Human Rights and Equal Opportunities Commission published the 'National Inquiry into Racist Violence' which contended that racism is a problem in society rather than isolated acts of individuals. The report recommended amending legislation, including the *Racial Discrimination Act*, to outlaw 'racial harassment and

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66 Parliament of Australia, Hansard (House of Representatives), 29 May 1975, page 2036

67 Parliament of Australia, Hansard (House of Representatives), 9 April 1975, page 1409

68 Parliament of Australia, Hansard (House of Representatives), 29 May 1975, page 2036 (Senator James McClelland).

69 Human Rights Commission 1983, page 2

70 "Racial Vilification Law In Australia | Australian Human Rights Commission". 2016.

71 Parliament of Australia, Hansard (House of Representatives), "Parlinfo - Leader Of The National Party Rejects The Government's Proposed Racial Hatred Legislation; Will Support A Draft Bill Directed At The Protection Of Persons And Property From Racially Motivated Attacks". 2016.

incitements to racial hostility'.<sup>72</sup>

On 10 August 1987, then Prime Minister Bob Hawke announced a Royal Commission into 'Aboriginal Deaths in Custody' over serious concerns about the rate of Aboriginal deaths while in the custody of the police, prisons, and juvenile detention centres. The final report of the royal commission released on 15 April 1991 recommended the introduction of laws against racial vilification.<sup>73</sup>

The third report of that period was published by the Australian Law Reform Commission, which released 'Multiculturalism and the Law' on 9 April 1992. The commission recommended in this report the implementation of legislation creating sanctions against threats and acts of racial violence, but only as a civil mechanism, with the majority of the commission opposing the criminalisation of such actions on the grounds that this would restrict free speech.<sup>74</sup>

Ostensibly following the recommendations made in these three reports, the then Keating government introduced the *Racial Discrimination Amendment Bill 1992* into parliament. The bill proposed a new criminal provision for public acts that 'incite hatred towards, serious contempt for, or severe ridicule of, a person or group of person on the ground of the race of the person or members of the group'.<sup>75</sup>

However, as the then Human Rights Commissioner, Tim Wilson, argued in a speech in 2014:

Each of these inquiries clearly raises concerns about racism in Australia. But none come even remotely close to arguing for the wording of 'offend', 'insult' or 'humiliate' which later appeared in section 18C of the Racial Discrimination Act. Rather, they raised the need to deal with 'vilification', 'hostility', 'harassment' and 'violence'. Any fair analysis would conclude that the recommendations of these three inquiries did not recommend the current law.<sup>76</sup>

Due to the federal election of 13 March 1993, the *Racial Discrimination Amendment Bill 1992* lapsed before a vote could be taken on the bill.<sup>77</sup>

After the 1992 bill failed to pass parliament, the government called for public submissions on the bill. 85 per cent of the 646 submissions it received opposed the provisions in the 1992 legislation, but they were strongly supported by a number of ethnic minority groups including the Jewish and Chinese lobbies, and the Federation of Ethnic Communities Councils of Australia. This support would help lead the government to introduce a new bill in 1994 – the *Racial Hatred Bill 1994*.<sup>78</sup>

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72 Human Rights and Equal Opportunity Commission, *Racist Violence: Report Of The National Inquiry Into Racist Violence In Australia* (1991).

73 Royal Commission into Aboriginal Deaths in Custody, Final Report 'Towards Social Justice? An Issues Paper' (2016).

74 Australian Law Reform Commission, 1992, ALRC Report 57.

75 Parliamentary Research Service, *Racial Discrimination Amendment Bill 1992* (Cth) s20D , 27 January 1993, 2.

76 Tim Wilson, 'The Forgotten Freedoms' (Speech to the Sydney Institute, 2014).

77 *Racial Hatred Bill 1994* (Cth)

78 Michael Baume, 'Relic should be repealed', *The Australian Financial Review*, 17 October 2011, 54.

The bill proposed a number of amendments to the *Racial Discrimination Act 1975*, including criminal sanctions for acts 'reasonably likely to incite racial hatred'. A key provision in the bill was section 18C, which proposed prohibiting acts which are likely to 'offend, insult, humiliate or intimidate another person or a group of people' on the basis of race.

In remarkably similar fashion to the debate over the earlier attempts to introduce racial vilification provisions, the Coalition again opposed the bill.

The *Racial Hatred Bill 1994* passed following revisions from the Senate. The West Australian Greens and the Coalition remove criminal provisions from the legislation. The Coalition also supported the removal of civil provisions, but these (including 18C) were supported by the WA Greens and Democrats and thus remained in the legislation.

## 5: The content of Part IIA

The *Racial Hatred Act 1995* inserted into the *Racial Discrimination Act* the new Part IIA, titled 'Prohibition of offensive behaviour based on racial hatred'. Part IIA comprises sections 18B, 18C, 18D, 18E and 18F. Here we outline the significance and effect of each provision in Part IIA, starting with section 18C, and will then outline how it is modified by the other sections.

### 5.1 Section 18C: The prohibition

**SECTION 18C: Offensive behaviour because of race, colour or national or ethnic origin**

- (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.

Note: Subsection (1) makes certain acts unlawful. Section 46P of the *Australian Human Rights Commission Act 1986* allows people to make complaints to the Australian Human Rights Commission about unlawful acts. However, an unlawful act is not necessarily a criminal offence. Section 26 says that this Act does not make it an offence to do an act that is unlawful because of this Part, unless Part IV expressly says that the act is an offence.

- (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 18C is the civil prohibition on conduct done otherwise than in private that offends, insults, humiliates or intimidates another person because of their race, colour, national or ethnic origin.

The key elements of section 18C can be summarised as follows:

- It must be an act done otherwise than in private;
- The act must be reasonably likely in all the circumstances to offend, insult,

humiliate or intimidate another person or group of people; and

- The Act must be 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.

### 5.1.1 ‘Otherwise than in private’

Section 18C(2) explains that an act is taken not to be done in private if it causes words, sounds, images or writing to be communicated to the public, or is done in a public place, or is done in the sight or hearing of people who are in a public place.

Therefore, the act need not necessarily be done in a public place to satisfy this element. The following examples of conduct have been deemed ‘otherwise than in private’:

- Words shouted across a laneway between one house and another;<sup>79</sup>
- Words called over a neighbourhood fence;<sup>80</sup>
- An “on the record” interview between a politician and a journalist;<sup>81</sup>
- Material posted on the internet.<sup>82</sup>

In contrast, certain parts of a prison<sup>83</sup> and workplaces<sup>84</sup> have been held to be not “otherwise than in public”.

### 5.1.2 ‘Reasonably likely in all the circumstances to offend, insult, humiliate another person or group of people’

The courts have construed the phrase ‘reasonably likely’ as being ‘a chance of an event occurring or not occurring which is real – not fanciful or remote’.<sup>85</sup> The phrase ‘in all the circumstances’ requires that the social, cultural, historical and other circumstances attending the person or the people in the relevant group be considered when assessing whether the relevant act was reasonably likely to have the alleged effect.<sup>86</sup>

‘Offend, insult, humiliate and intimidate’ refers to conduct that must have ‘profound and serious effects, not to be likened to mere slights’.<sup>87</sup> Conduct is not required to be offensive, insulting, humiliating and intimidating. The use of the word ‘or’ rather than ‘and’ means the words form a disjunctive list. In *Project Blue Sky v Australian*

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79 *McMahon v Bowman* [2000] FMCA 3.

80 *Campbell v Kirstenfeldt* [2008] FMCA 1356.

81 *McGlade v Lightfoot* (2002) 124 FCR 106.

82 *Jones v Toben* [2002] FCA 1150.

83 *Gibbs v Wanganeen* (2001) 162 FLR 333.

84 *Noble v Baldwin & Anor* [2011] FMCA 283; *Ilijevski v Commonwealth of Australia (as represented by the Commissioner of the Australian Taxation Office)* [2016] FCCA 2787.

85 *Eatock v Bolt* [2011] FCA 1103 at [260].

86 *Eatock v Bolt* [2011] FCA 1103 at [257].

87 *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, 362.



*Broadcasting Commission*, the High Court stated ‘a court construing a statutory provision must strive to give meaning to every word of the provision’.<sup>88</sup> Justice Bromberg in *Eatock v Bolt* defined the words in the following terms:

The definitions of “insult” and “humiliate” are closely connected to a loss of or lowering of dignity. The word “intimidate” is apt to describe the silencing consequences of the dignity denying impact of racial prejudice as well as the use of threats of violence. The word “offend” is potentially wider, but given the context, “offend” should be interpreted conformably with the words chosen as its partners.<sup>89</sup>

This element is an assessment of the reasonable likelihood of a particular reaction of the person or people within a certain group of people. The ‘proof of actual offence for a particular person or group is neither required nor determinative, although evidence of subjective reaction is relevant to whether offence was reasonably likely’.<sup>90</sup> The courts have established an objective test to determine whether an act complained of has the necessary offensive, insulting, humiliating or intimidating quality for it to fall within section 18C.

The likelihood of people within a group being offended by an act directed at them in a general sense, is assessed by reference to a representative member of the group. An ‘ordinary’ or ‘reasonable’ member of the relevant group is to be isolated<sup>91</sup> and it is the values, standards and other circumstances of the person or group of people to whom section 18C refers that will bear upon the likely reaction of those person to the act in question. It is the reaction from their perspective which is to be assessed.<sup>92</sup>

### 5.1.3 ‘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 within the group’

Section 18C(b) requires that the offending behaviour is done “because of” the race, colour or national or ethnic origin of the other person. This implies there must be a causal relationship between the offending behaviour and the race or colour of the person targetted by the behaviour. The Full Court of the Federal Court in *Hagan v Trustees of the Toowoomba Sports Ground Trust* determined that this element requires consideration of the reason or reasons for which the relevant act was done.<sup>93</sup> A relevant inquiry identified by Justice Kiefel in *Creek v Cairns Post* is whether ‘anything suggests race as a factor’ in the decision to undertake the relevant conduct.<sup>94</sup>

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88 *Project Blue Sky v Australian Broadcasting Commission* (1998) 194 CLR 355, 382.

89 *Eatock v Bolt* [2011] FCA 1103 at [265].

90 *Eatock v Bolt* [2011] FCA 1103 at [241].

91 *Prior v Queensland University of Technology & Ors (No 2)* [2016] FCCA 2852 at [30].

92 *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352 at [16]; *Jones v Scully* [2002] FCA 1080 at [108], *Eatock v Bolt* [2011] FCA 1103 at [253].

93 *Hagan v Trustees of the Toowoomba Sports Ground Trust* (2001) 105 FCR 56, 60.

94 *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, 359.

In *Eatock v Bolt*, Justice Bromberg held that if a publisher of an article is aware that the author's motivation for writing the article includes the race, colour, national or ethnic origin of a person the article deals with, then the publisher's act will also be deemed to be motivated by the same reasons as the authors. This is so whether or not the author of an article is an employee of the publisher.<sup>95</sup>

## 5.2 Section 18D: The exemptions

### **SECTION 18D: Exemptions**

Section 18C does not render unlawful anything said or done reasonably and in good faith:

- (a) In the performance, exhibition or distribution of an artistic work; or
- (b) In the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or
- (c) In making or publishing:
  - (i) A fair and accurate report of any event or matter of public interest; or
  - (ii) A fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

Section 18D provides for the exemptions to the civil prohibition under section 18C. Namely, the exemptions provide that an act is not unlawful if it is done reasonably and in good faith, and that it also is done in a number of circumstances including:

- in the performance, exhibition or distribution of an artistic work, or
- if it was done for 'any genuine academic, artistic or scientific purpose' or 'any other genuine purpose in the public interest'; or
- if it was a fair and accurate report of any event or matter of public interest; or
- if it was a fair comment that was an expression of genuine belief.

### 5.2.1 Onus of proof lies on the respondent

The respondent to a section 18C complaint bears the onus of proving that, on the balance of probabilities, an act meets the exemption provided in section 18D.<sup>96</sup>

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<sup>95</sup> *Eatock v Bolt* [2011] FCA at [332].

<sup>96</sup> See discussion of this point at *Eatock v Bolt* [2011] FCA 1103 at [336]-[339] where Bromberg J applied the Full Court of the Federal Court's reasoning in *Toben v Jones* (2003) 129 FCR 515.

## 5.2.2 Broad or narrow interpretation?

Judicial opinion is divided on whether the section 18D exemptions should be construed narrowly or broadly. In *Bropho v Human Rights and Equal Opportunity Commission*, the Full Court of the Federal Court considered the application of the artistic work exemption under section 18D(a) to the publication of a cartoon published in the West Australian newspaper that was allegedly offensive to Aboriginal Australians. Justice French stated that the provision should be interpreted broadly, as 18D was an ‘exception upon exception’ to the common law principle that people should enjoy freedom of speech and expression.<sup>97</sup>

In contrast, Federal Magistrate Brown in *Kelly-Country v Beers* held that as Part IIA was remedial legislation, the exemption should be narrowly construed. His Honour said:

Those who would incite racial hatred or intolerance within Australia should not be given protection to express their abhorrent views through a wide or liberal interpretation of the exceptions... A broad reading... could potentially undermine the protection afforded by the vilification provisions contained in section 18C...<sup>98</sup>

## 5.2.3 ‘Reasonably and in good faith’

Whether an act is done ‘reasonably’ will be answered by reference to the objective circumstances of the respondent.

In *Bropho*, Justice French stated that ‘reasonably’ under section 18D ‘imports an objective judgment’<sup>99</sup> and explained the element as follows:

An act will be done reasonably in the performance, exhibition or distribution of an artistic work if it is done for the purpose and in a manner calculated to advance the purpose of the artistic expression in question. An act is done reasonably in relation to statements, publications, discussions or debates for genuine academic, artistic or scientific purposes, if it bears a rational relationship to those purposes. The publication of a genuine scientific paper on the topic of genetic differences between particular human populations might, for one reason or another, be insulting or offensive to a group of people. Its discussion at a scientific conference would no doubt be reasonable. Its presentation to a meeting convened by a racist organisation and its use to support a view that a particular group of persons is morally or otherwise “inferior” to another by reason of their race or ethnicity, may not be a thing reasonably done in relation to par (b) of s 18D.<sup>100</sup>

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<sup>97</sup> *Bropho v Human Rights and Equal Opportunity Commissioner* [2004] FCAFC 16 at [72].

<sup>98</sup> *Kelly-Country v Beers* (2004) 207 ALR 421, 447.

<sup>99</sup> *Bropho v Human Rights and Equal Opportunity Commissioner* [2004] FCAFC 16 at [79].

<sup>100</sup> *Bropho* at [80].

Good faith, on the other hand, may be tested both objectively and subjectively. Justice French in *Bropho* stated:

But good faith requires more than subjective honesty and legitimate purposes. It requires, under the aegis of fidelity and loyalty to the relevant principles in the Act, a conscientious approach to the task of honouring the values asserted by the Act. This may be assessed objectively.

... Generally speaking the absence of subjective good faith, eg dishonesty or the knowing pursuit of an improper purpose, should be sufficient to establish want of good faith for most purposes. But it may not be necessary where objective good faith, in the sense of a conscientious approach to the relevant obligation is required... having regard to the public mischief to which [section] 18C is directed, both subjective and objective good faith is required by [section] 18D in the doing of the free speech and expression activities protected by that section.

A person... will act in good faith if he or she is subjectively honest, and objectively viewed, has taken a conscientious approach to advancing the exercising of that freedom [of speech or expression] in a way that is designed to minimise the offence or insult, humiliation or intimidation suffered by people affected by it... On the other hand, a person who exercises the freedom carelessly disregarding or wilfully blind to its effect upon people who will be hurt by it or in such a way as to enhance that hurt may be found not to have been acting in good faith.<sup>101</sup>

In *Eatoock v Bolt*, Justice Bromberg held that the respondent was not able to rely on the exemption under section 18D as 'Mr Bolt's conduct involved a lack of good faith'. His Honour summarised a number of different ways that a person can objectively fail to act in good faith as required by this provision:<sup>102</sup>

- '[Bolt] did not evince a conscientious approach to advancing freedom of expression in a way designed to honour the values asserted by the RDA';
- 'Insufficient care and diligence was taken to minimise the offence, insult, humiliation and intimidation suffered by the people likely to be affected by the conduct';
- 'insufficient care and diligence was applied to guard against the offensive conduct reinforcing, encouraging or emboldening racial prejudice';
- 'untruthful facts and the distortion of the truth'; and
- 'derisive tone, the provocative and inflammatory language and the inclusion of gratuitous asides.'

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101 *Bropho* at [96]-[102].

102 *Eatoock v Bolt* [2011] FCA 1103 at [425].

## 5.2.4 Artistic works

Justice French in *Bropho* stated that it ‘must be accepted that artistic works cover an infinite variety of expressions of human creativity’<sup>103</sup> and stated:

The term does seem to be used broadly in [section] 18D. The collocation ‘performance, exhibition or distribution’ used in conjunction with it seems to contemplate works in both the visual and performing arts. If it does extend that far it seems unlikely, having regard to the evident policy of the exemption, that literary works are excluded.<sup>104</sup>

Notably the only three cases which have successfully claimed the 18D exemption were based on the ‘artistic works’ limb. They are:

- *Bropho v HREOC* [2002] FCA 1510, which involved a complaint that a cartoon published in the West Australian newspaper was in breach of the section 18C;
- *Kelly-Country v Beers* (2004) 207 ALR 421, which involved a complaint that a comedic performance was in breach of section 18C
- *Bropho v HREOC* (2004) 135 FCR 105, which was an appeal from the Federal Court decision in 2002, which was dismissed.

## 5.2.5 ‘Statement, publication, debate or discussion or made or held for any genuine academic, artistic, scientific purpose or other genuine purpose in the public interest’

In *Jeremy Jones v The Bible Believers’ Church*, Justice Conti considered a claim under section 18D that material published denying the existence of the Holocaust was part of an academic or public interest discussion:

I should record for completeness that [the respondent] sought to contend... that ‘[t]he matters about which the complaints in this matter have been made do not relate to every “Jew”, but are part of an academic or public interest discussion in relation to “Zionist” policies and practices’. I have not been able to identify, much less rationalise however, the existence of any such discussion in the context of the present proceedings and of the conduct complained of by the applicant which has led thereto.<sup>105</sup>

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<sup>103</sup>*Bropho* at [106]

<sup>104</sup>*Bropho* at [104]

<sup>105</sup>*Jeremy Jones, and on behalf of the Executive Council of Australian Jewry v The Bible Believers Church* [2007] FCA 55 at [63].

## 5.2.6 ‘Fair and accurate reports in the public interest and fair comment on matter of public interest where comment is a genuinely held belief’

The courts have considered the law of defamation to be a useful guide in determining what a ‘fair and accurate report’ is for the purposes of section 18D. Justice Kiefel in *Creek v Cairns Post* noted:

[Section 18D] is said to balance the right to free speech and the protection of individuals. The section has borrowed words found in defamation law. I do not think the notion of whether something is in the public interest is to be regarded as in any way different and here it is made out. For a comment to be ‘fair’ in defamation law it would need to be based upon true facts and I take that to be the meaning subscribed to in the section. What is saved from a requirement of accuracy is the comment, which is tested according to whether a fair-minded person could hold that view and that it is genuinely held. Subpar (c)(i), upon which the respondent would rely, incorporates both the concepts of fairness and accuracy.<sup>106</sup>

In that case, the complaint lodged against the publishers of the Cairns Post was dismissed for failing to satisfy the elements in section 18C. However, Justice Kiefel reasoned that in the event section 18C was satisfied, the respondent newspaper would not have been able to rely on section 18D, as the photograph it published inaccurately portrayed the complainant as living in a ‘primitive’ condition.

The maker of the comment must also be acting honestly. Justice Bromberg stated in *Eatoock v Bolt*:

Honesty requires that the maker of the comment genuinely believes the comment that was made. If the maker the comment was untrue, or was recklessly indifferent to the truth or falsity of the comment, the maker would be acting dishonestly... Section 18D(c)(ii) deals with that aspect expressly by requiring that the comment “an expression of a genuine belief held” by the maker of the comment.<sup>107</sup>

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<sup>106</sup> *Creek v Cairns Post Pty Ltd* at 360 [32]

<sup>107</sup> *Eatoock v Bolt* [2011] FCA 1103 at [357].

## 5.3 Section 18B: Reason for doing an act

If:

- (a) an act is done for 2 or more reasons; and
- (b) one of the reasons is the race, colour or national or ethnic origin of a person (whether or not it is the dominant reason or a substantial reason for doing an act);

then, for the purposes of this Part, the act is taken to be done because of the person's race, colour or national or ethnic origin.

Section 18B is an interpretative provision dealing with the reasons for doing a prohibited act under Part IIA. It provides that if an act is done for two or more reasons and one of the reasons is because of the race, colour or national or ethnic origin of a person (regardless of whether or not it is a dominant or substantial reason for doing that act), then for the purposes of Part IIA of the Racial Discrimination Act it is taken to be done because of the person's race, colour or national or ethnic origin.

Here the complainant needs only to prove that race, colour or national or ethnic origin was a reason for doing the prohibited act.

## 5.4 Section 18E: vicarious liability

Vicarious liability

- (1) Subject to subsection (2), if:
  - (a) An employee or agent of a person does an act in connection with his or her duties as an employee or agent; and
  - (b) The act would be unlawful under this Part if it were done by the person;

This act applies in relation to the person as if the person had also done the act.

- (2) Subsection (1) does not apply to an act done by an employee or agent of a person if it is established that the person took all reasonable steps to prevent the employee or agent from doing the act.

Section 18E is a vicarious liability provision. It provides that an employer may be liable for the conduct of a person which breaches section 18C by doing an act in connection with their duties as an employee or agent of the employer. It is a defence for the employer under this provision if they establish they took all reasonable steps to prevent the employee or agent from doing the act.

In *Gama v Qantas Airways Ltd*,<sup>108</sup> Qantas was held to be vicariously liable for action of its employees in discriminating against another employee on the basis of his race and disability, on the basis that the remarks which breached section 18C were made by, or in the presence of, a supervisor of Mr Gama and therefore condoned.

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<sup>108</sup> *Gama v Qantas Airways Ltd (No 2)* [2006] FMCA 1767.

## 5.5 Section 18F: State and territory application

State and Territory laws not affected

This Part is not intended to exclude or limit the concurrent operation of any law of a State or Territory.

Section 18F provides that the operation of State and Territory laws are not limited or excluded by the introduction of Part IIA. Both Federal and State laws are intended to operate concurrently.

## 5.6 The heading of Part IIA

The heading of Part IIA reads: 'Prohibition of offensive behaviour based on racial hatred'.

However, the courts have held that the prohibition in section 18C 'does not refer to racial hatred or hate'.<sup>109</sup> Earlier decisions of the Human Rights and Equal Opportunity Commission had considered 'hatred' a relevant factor in determining whether a breach to section 18C had occurred. But in 2001, Justice Kiefel in the Federal Court held that the 'intensity of feeling of the person whose act it is, is not necessary to be considered'.<sup>110</sup> The mental state of the aggressor is not relevant to the operation of section 18C. As Justice Allsop identified in *Toben v Jones*, under section 18C 'no intent or recklessness was required... [the] words of Part IIA, especially section 18C, did not require there to be an expression of racial hatred or intended "vilification"'.<sup>111</sup>

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<sup>109</sup> *Bolt v Eatock* [2011] FCA 1103 at [206].

<sup>110</sup> *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352 at [18].

<sup>111</sup> *Toben v Jones* (2003) 129 FCR 515 at [128].



## 6: The process of resolving section 18C disputes

Part IIB of the *Australian Human Rights Commission Act 1986* (Cth) provides the process for redress for unlawful discrimination under Commonwealth anti-discrimination laws, including section 18C of the *Racial Discrimination Act*.

### 6.1 Who can make a complaint?

A person alleging unlawful discrimination may lodge a written complaint with the Australian Human Rights Commission (section 46P). For the purposes of section 18C, the complaint may be lodged by a person directly aggrieved by the offensive conduct, by two or more people aggrieved by the offensive conduct, or it may be a representative complaint, which is 'a complaint lodged on behalf of at least one person who is not a complainant'.

A representative complaint must describe or otherwise identify the 'class members' who would be aggrieved by the alleged unlawful conduct, as long as:

- the class members have complaints against the same person;
- all the complaints are in respect of, or arise out of, the same, similar or related circumstances; and
- all the complaints give rise to a substantial common issue of law or fact.

A representative complaint to the Australian Human Rights Commission does not require all class members to be named, the number of class members to be specified, or the consent of those class members to be obtained (section 46PB).

### 6.2 What happens to the complaint?

Section 46PD requires the commission to refer a complaint lodged under section 46P to the president of the commission. The president of the commission is then required to inquire into the complaint and attempt to conciliate the complaint (section 46PF(1)).

An investigation of a complaint will generally involve communicating with the complainant and with the party alleged to have unlawfully discriminated. The commission may then conduct a 'conciliation conference', which is an informal dispute resolution forum to 'assist the parties to consider different options to resolve the complaint and provide information about possible terms of settlement.'<sup>112</sup>

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<sup>112</sup> Australian Human Rights Commission webpage, 'Conciliation - how it works' <<https://www.humanrights.gov.au/complaints/complaint-guides/conciliation-how-it-works>>.

The president of the commission also possesses coercive powers to collect information and documents from parties the president believes are capable of providing information or producing documents relevant to an inquiry by the commission (section 46PI). If a document is provided to the president in accordance with a written notice to provide that information, the president may take possession of the document, make copies of the document, and retain possession of the document for as long as is necessary for the purposes of the inquiry.

The president may also conduct a “compulsory conference”, compelling complainants, respondents, and any parties able to provide information relevant to the commission’s inquiry to attend. A failure to attend a compulsory conference is a strict liability offence under section 46PL, punishable by 10 penalty units (currently equal to \$1,800).<sup>113</sup>

A compulsory conference is a private hearing, and a person attending is not entitled to be represented by another person without the consent of the presiding officer.

## 6.3 Can complaints be terminated?

If the complaint is not withdrawn by the complainant or otherwise resolved by conciliation, the president can terminate the complaint on one of the grounds listed in section 46PH:

- The president is satisfied that the conduct is not unlawful discrimination;
- The complaint was lodged more than 12 months after the alleged unlawful discrimination took place;
- The president is satisfied that the complaint was trivial, vexatious, misconceived or lacking in substance;
- The president is satisfied the subject matter of the complaint has been adequately dealt with by some other remedy sought, or has been dealt with by some other statutory authority;
- The president is satisfied that the subject matter of the complaint is of such public importance that it should be considered by the federal courts; or
- The president is satisfied that there is no reasonable prospect of the matter being settled by conciliation.

Once a notice of termination has been issued by the president, an ‘affected person in relation to the complaint’ may make an application to the Federal Court of Australia or the Federal Circuit Court of Australia for adjudication of the complaint (section 46PO). The complainant may do this regardless of the reason the complaint was terminated by the commission.

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113 A Commonwealth “penalty unit” means the amount of \$180: Section 4AA of the *Crimes Act 1914* (Cth).

## 7: Twenty years of section 18C in operation

Since the *Racial Hatred Act* was introduced in 1995, 2,018<sup>114</sup> complaints have been lodged to the Australian Human Rights Commission and its precursor the Human Rights and Equal Opportunity Commission of Australia (the HREOC).<sup>115</sup>

Before 2001, a complaint that was not able to be resolved by the Race Discrimination Commissioner could have the complaint referred to the HREOC for hearing and determination. However, the decisions from the commission were not legally enforceable: laws passed in 1992 to have HREOC decisions registered with the federal courts, giving them the same force as a court order, were struck down by the High Court of Australia in *Brandy v HREOC* (1995).<sup>116</sup> After the *Brandy* decision, the HREOC was limited to making unenforceable determinations, which a complainant could subsequently take to the Federal Court to hear the complaint and make enforceable orders. Between 1995 and 2001, 22 section 18C complaints were formally heard by the HREOC for determination.

The situation post-*Brandy* meant that parties might be required to undergo litigation twice if the complainant was seeking an enforceable remedy. In response, the federal government passed the *Human Rights Legislation Amendment Act (No 1)* in 1999, which amended the functions and procedures of the HREOC. In particular, the HREOC's ability to hear complaints and make determinations was abolished. Further provision was made for complainants to commence proceedings in the Federal Court or the then-Federal Magistrates Court if the complaint was not informally conciliated by the HREOC.

Since 2000-01, 63% of complaints lodged to the commission under the Racial Discrimination Act have been finalised (meaning either conciliated, withdrawn or terminated) within 6 months, while 37% have taken over 6 months to finalise.

The Federal Court, the Federal Magistrates Court and its successor the Federal Circuit Court, have heard 72 cases adjudicating a section 18C complaint. In 35 of those hearings, the section 18C complaint was upheld by the court.

On three occasions 'special leave' has been sought for cases to be heard in the High Court. As of November 2016, such leave has never been granted, and the constitutionality of section 18C has never been tested in the High Court (see Chapter 1.8 for discussion of constitutionality).

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114 From Australian Human Rights Commission annual reports from 1995-96 to 2015-16.

115 On 5 August 2009, the Human Rights and Equal Opportunity Commission of Australia was renamed the Australian Human Rights Commission, following the commencement of Schedule 3 of the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth).

116 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 145.

## 7.1 Significant cases

The following list outlines some key cases that have attempted to adjudicate section 18C complaints.

### 7.1.1 *Bryant v Queensland Newspaper Pty Ltd* [1997] HREOCA 23

This was the first reported case to be heard by the Human Rights and Equal Opportunity Commission for determination. The complaint cited numerous occasions when the Sunday Mail newspaper published articles or letters which referred to English people as “Poms” or “Pommies”. The complainant was an Englishman, who alleged that the use of these terms were offensive and insulting to English people.

HREOC President Sir Ronald Wilson dismissed the complaint, stating that ‘it would be an extreme case where the use of the words ‘Pom’ and ‘Pommy’ as such would attract such a degree of seriousness as to be unlawful within the meaning of the Act.’ Sir Ronald noted that due to the title *Racial Hatred Act* and the heading to Part IIA (‘Prohibition of Offensive Behaviour based on Racial Hatred’) that the notion of ‘hatred’ is a factor in interpreting Part IIA of the RDA. The relevance of the word ‘hatred’ was later disregarded by the Federal Court in *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352.

### 7.1.2 *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615 (the ‘Nigger Brown’ case)

A complaint was lodged by an Aboriginal Australian against the Trustees of the Toowoomba Sports Ground Trust, following their decision not to remove the word ‘Nigger’ from the ‘ES Nigger Brown Stand’ at an athletic oval. The stand was named after a prominent local rugby player, who was not an Aboriginal Australian.

The complaint was dismissed in the Federal Court of Australia. Justice Drummond held that, with regard to the context in which the word was used and to evidence of community perceptions of the sign, the Trustees decision not to remove the sign did not breach the objective test in section 18C(1)(a). His Honour also rejected that argument that the sign was put up because of the race of the complainant.

An appeal of this judgment was dismissed in 2001,<sup>117</sup> and an attempt to seek special leave to appear before the High Court was denied in 2002.<sup>118</sup>

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<sup>117</sup> *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2001] FCA 123.

<sup>118</sup> *Hagan v Trustees of the Toowoomba Sports Ground Trust* B17/2001 [2002] HCATrans 132.

### 7.1.3 *Eatock v Bolt* [2011] FCA 1103

A complaint was lodged against columnist Andrew Bolt and the Herald & Weekly Times, alleging discrimination against light-skinned Aboriginal people in two newspaper articles which were published in the *Herald Sun* and also available online. The complainant, an Aboriginal woman with fair skin, alleged that the articles implied fair-skinned Aboriginal people were not genuine Aboriginal Australians, and were instead pretending to be Aboriginal in order to access benefits that are only available to Aboriginal people.

The Federal Court of Australia upheld the complaint. Justice Bromberg found that fairer skinned Aboriginal persons of mixed descent do constitute a distinct racial group for the purposes of section 18C.<sup>119</sup> In recognising this particular group of Aboriginal persons, His Honour found that a 'reasonable member' of this group would be reasonably likely, in all the circumstances, to have been offended, insulted, humiliated or intimidated by the imputations conveyed by the articles.<sup>120</sup>

Justice Bromberg rejected the argument that the section 18D exemptions should have applied, concluding Bolt's 'conduct involved a lack of good faith':

What Mr Bolt did and what he failed to do, did not evince a conscientious approach to advancing freedom of expression in a way designed to honour the values asserted by the RDA. Insufficient care and diligence was taken to minimise the offence, insult, humiliation and intimidation suffered by the people likely to be affected by the conduct and insufficient care and diligence was applied to guard against the offensive conduct reinforcing, encouraging or emboldening racial prejudice. The lack of care and diligence is demonstrated by the inclusion in the Newspaper Articles of the untruthful facts and the distortion of the truth which I have identified, together with the derisive tone, the provocative and inflammatory language and the inclusion of gratuitous asides.<sup>121</sup>

The court ordered that a corrective notice be published online and in the *Herald Sun* adjacent to the original articles, and that further publication or distribution of the content in question be restrained.<sup>122</sup>

### 7.1.4 *Kanapathy on behalf of Rajandran Kanapathy v in de Braekt* (No. 4) [2013] FCCA 1368

A complaint was lodged under section 18C in relation to an incident in 2009, where a lawyer called a security official at the Perth Central Law Court a 'Singaporean prick', a 'short prick', and that he ought to go back to Singapore. The Federal Circuit Court, upheld the complaint, ordering that the respondent apologise and pay damages of \$12,500.

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<sup>119</sup> *Eatock v Bolt* [2011] FCA 1103 at [86]

<sup>120</sup> *Eatock v Bolt* [2011] FCA 1103 at [452]

<sup>121</sup> *Eatock v Bolt* [2011] FCA 1103 at [425]

<sup>122</sup> *Eatock v Bolt* (No. 2) [2011] FCA 1180 at [6]

### 7.1.5 *Taylor v Yamanda Aboriginal Association Inc & Anor* [2016] FCCA 1298

On 23 May 2010 Simpson was granted 'confirmation of aboriginality' certificates for himself and members of his family. Two years later, following personal disagreements between Mr Simpson's family and the local indigenous community, these certificates were rescinded. Ms Taylor (Simpson's daughter), alleged that this was racially discriminatory conduct under section 18C. The case was dismissed, as insufficient factual evidence for the alleged discrimination was provided.<sup>123</sup>

### 7.1.6 Senator David Leyonhjelm's complaint against Mark Kenny (terminated)

On 15 August 2016, Senator David Leyonhjelm lodged a complaint with the Australian Human Rights Commission against Fairfax journalist Mark Kenny, in relation to an article Kenny had authored which appeared in *The Sydney Morning Herald* on 8 August 2016. The article described Senator Leyonhjelm as having 'angry white-male-certitude'.<sup>124</sup>

The Australian Human Rights Commission accepted the complaint on 13 September 2016, and terminated the complaint on 30 November 2016. The commission described the complainant as not 'truly aggrieved' by the comments, and that the words 'white' and 'male' are not considered 'terms of denigration'. Senator Leyonhjelm said that there is a high likelihood that he will appeal the commission's decision to terminate the complaint in the federal courts.<sup>125</sup>

### 7.1.7 *Prior v Queensland University of Technology (QUT) & Ors (No 2)* [2016] FCCA 2853 ('the QUT case')

On 28 May 2013, three students at the Gardens Point campus of the Queensland University of Technology were asked to leave university facilities reserved for Aboriginal and Torres Strait Islander students. One of the evicted students later posted on an unofficial QUT student Facebook page, 'Just got kicked out of the unsigned Indigenous computer room. QUT stopping segregation with segregation..?' Several other students posted remarks critical of the facilities.

The staff member who originally evicted the students (Prior) became aware of the Facebook comments, and among other things, requested disciplinary action be taken against the students who posted comments. On 27 May 2014, Prior lodged a complaint with the Australian Human Rights Commission against QUT, two QUT staff members and seven QUT students. The students were not informed for 14 months that a complaint had been made against them, and when they were informed, it was

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123 *Taylor v Yamanda Aboriginal Association Inc & Anor* [2016] FCCA 1298 at [91]

124 Jared Owens and Andrew Burrell, 'Senator David Leyonhjelm's 18C Case on White Abuse', *The Australian*, 15 August 2016.

125 Michael Koziol, 'Human Rights Commission Rejects David Leyonhjelm "Angry White Male" Discrimination Claim', *The Sydney Morning Herald*, 30 November 2016.

only six days before a conciliation conference was scheduled to occur.

At the conciliation conference on 4 August 2015, only two students were in attendance. On the basis of that one session, the commission was satisfied that there was 'no reasonable prospect of the matter being settled by conciliation', and the complaint was terminated. On 20 October 2015, Prior filed the complaint in the Federal Circuit Court, seeking \$250,000 for past and future economic loss. On 4 November 2016, Justice Jarrett dismissed the case against three of the students,<sup>126</sup> as the complainant did not enjoy 'reasonable prospects of successfully prosecuting her proceedings against' the students.

### *7.1.8 Ilijevski v Commonwealth of Australia (as represented by the Commissioner of the Australian Taxation Office)* [2016] FCCA 2787

Ms Ilijevski, who was born in Australia to Croatian parents, alleged racist comments and conduct under 18C by her supervisor (Jones) at the Australian Taxation Office (ATO). The alleged conduct included: negative body language with 'crossed arms and an angry manner', 'shutting down' the applicant's suggestions for improvements to the workplace; saying 'who included you in this conversation' and setting conditions for overtime and meeting attendances.

The Federal Circuit Court found that Ilijevski's case was deficient in that she had not specified the attribute she relied on within the meaning of section 18B (race, colour, national or ethnic origin), the causal connection between the conduct and her attribute (unspecified as it was) was not clear, and no evidence that the objective test was satisfied. The requirement that the conduct be done 'otherwise than in private' was not satisfied, as there was 'not a scintilla of a suggestion that the public has access (as of right or invitation) to the Australian Taxation Office workplace'.<sup>127</sup>

The decision is now being appealed to the Federal Court, with Ilijevski claiming damages of \$1,250,000 in damages from economic loss, pain and suffering and legal costs. Inserted into the claim for the appeal, but not appearing in the original case, Ilijevski alleges that her supervisor asked her 'Do you live in a wog double-storey house with arches and lions?' and said that all 'wogs' and 'Europeans' think about is 'money, money, money'.<sup>128</sup>

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<sup>126</sup>Three other students reportedly settled the complaint out of court by paying \$5,000 to Prior, and proceedings were discontinued against them in November, December and January respectively. Another student listed on the complaint was never found.

<sup>127</sup>*Ilijevski v Commonwealth of Australia (as represented by the Commissioner of the Australian Taxation Office)* [2016] FCCA 2787.

<sup>128</sup>Noel Towell, 'Six Years of Racism: Public Servants \$1 Million Compo Claim', *The Canberra Times*, 25 November 2016.

## 7.1.9 Bill Leak Complaint

An illustration by cartoonist and satirist Bill Leak was published in *The Australian* on 4 August 2016, depicting an interaction between three Aboriginal Australians: a father, his child and a policeman. The policeman is shown telling the father ‘you need to teach your son some personal responsibility’. The father responded ‘Righto, what’s his name then?’.

On the day the cartoon was published, Race Discrimination Commissioner Tim Soutphommasane publicly called for people who were offended by the cartoon to lodge complaints to the Australian Human Rights Commission.<sup>129</sup> Melissa Dennison lodged a complaint against Leak saying that ‘It didn’t seem fair to me that somebody with that much power and that much sway over public opinion could publish such derogatory and hurtful things like this’.<sup>130</sup> In the remote town of Fitzroy Cross in Western Australia’s far northern Kimberley region, Bruce Till and Kevin Gunn signed a complaint about the cartoon presented to them by representatives of the state Aboriginal Legal Service (WA).<sup>131</sup>

On November 11 2016, the commission formally wrote to Leak’s employer, *The Australian*, to inform them the case would not go ahead.<sup>132</sup>

## 7.2 Summary

The cases summarised above are not exhaustive, but are merely used to illustrate the application of section 18C over the past two decades. Part 7 of this report will go into further detail, with reference to these cases, about how section 18C is such a problematic law.

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130 Lindy Kerin, ‘Bill Leak was “Uncooperative”, says Woman who Lodged Racial Discrimination Complaint’, *Australian Broadcasting Corporation*, 14 November 2016.

131 Paige Taylor, ‘Cash-strapped Legal Service Defends Case Against Cartoon’, *The Australian*, 5 November 2016.

132 Adam Gartrell, ‘Racial Discrimination Complaint against Cartoonist Bill Leak Dropped’, *Sydney Morning Herald*, 12 November 2016.



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# Appendix 1: Selected works by IPA staff & associates defending freedom of speech

Section 18C is not the only threat to freedom of speech in Australia. Nor is it the only restriction on freedom of speech that should be amended or repealed.

IPA staff and associates have previously criticised the countless limitations on freedom of speech across state and federal laws. The following is a brief list of some of restrictions on freedom of speech that we have opposed. There follows a select bibliography of IPA works addressing these issues.

Numerous laws constraining political debate on controversial issues of public importance, including: visa restrictions on controversial speakers, election advertising restrictions, campaign finance laws, the Gillard Government's previous proposed 2012 changes to federal anti-discrimination laws, restrictions on reporting cases before anti-corruption bodies and sensitive trials, legal treatment of Wikileaks, internet filter proposals, restrictions on union political participation, local government restrictions on political signs on private property, bans on door-knocking in public estates and bans on street preaching.

Many of other laws excessively regulate freedom of speech in the arts and media. These include, the Australian film and literature classification system, media ownership restrictions, the Finkelstein Independent Inquiry into Media and Media Regulation, the powers of the Australian Communications and Media Authority and the Australian Press Council and anti-piracy laws.

Other laws restrain freedom of speech in a way that places impediments on commerce by constraining the actions of private organisations: secondary boycott laws, the Australian Securities and Investment Commission's use of telecommunications legislation to shut down websites, legal actions by the International Telecommunications Union, bans on gambling advertising and junk food advertising and restrictions on billboard advertising.

There are yet further restrictions, both legal and institutional, on the exercise of freedom of speech in day-to-day life. Of these, the IPA has written about: obscenity and defamation laws, anti-swearing laws, a 2008 inquiry into swearing on television, speech restrictions in schools and universities, a proposed tort of privacy, blasphemy laws, the 'right to be forgotten', local government restrictions on obscenities on camper vans cyberbullying controls on social media and internet trolls, restrictions on violent video games, internet data retention regimes, and even laws against offensive plant names. In one extreme example, a teenager was even arrested solely for tweeting the lyrics of a song.

The IPA has stridently spoken out in defence of freedom and against all of these limitations on the right to freedom of speech. Below is a non-comprehensive list of the IPA's work on freedom of speech, including 178 publications.

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# Appendix 2: Frequently asked questions about Section 18C of the Racial Discrimination Act 1975

Prepared by the Institute of Public Affairs for a forum held at Parliament House in Canberra, 21 November 2016

## What was Section 18C intended to do?

On 15 November 1994 in his Second Reading speech to the Racial Hatred Bill 1994 (which introduced Section 18C) the then Attorney-General, Mr Lavarch said:

"The Racial Hatred Bill is about the protection of groups and individuals from threats of violence and the incitement of racial hatred, which leads inevitably to violence. It enables the Human Rights and Equal Opportunity Commission to conciliate complaints of racial abuse. This bill is controversial. It has generated much comment and raises difficult issues for the parliament to consider. It calls for a careful decision on principle." [emphasis added]

(Hansard, House of Representatives, 15 November 1994, p3336.)

## What does Section 18C do?

It makes it unlawful for a person to do an act, other than in private, if:

- the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or group of people; and
- 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 [emphasis added]

A breach of Section 18C is not a criminal offence - it is a 'civil offence', which in this context means an individual can seek a legal remedy against the person alleged to have breached s18C. Under the Australian Human Rights Commission Act 1986 remedies include payment of monetary damages, the provision of an apology, an undertaking not to repeat the act complained of, or a combination of these.

## Given that Section 18C came into operation more than 20 years ago on 13 October 1995, why has it only now become controversial?

In fact, Section 18C has always been controversial (as the then Attorney-General recognised in 1994).

At the time of its introduction the Racial Hatred Bill 1994 provoked extensive public and media comment.

Public opposition to the Racial Hatred Bill 1994 at the time included Peter Costello ("Debate, Not Laws, Should Fight Racism," *The Age*, 1 November 1994); P.P. McGuinness ("Racial Hatred Bill is a Legislative Lie," *The Age*, 12 November 1994); Ron Merkel ("Does Australia Need a Racial Vilification Law?," *Quadrant* 38, no. 11 (1994)); and Robert Manne ("Race Bill an Offence against Free Speech," *The Age*, 16 November 1994).

Prior to its introduction opposition to the type of legislative measures proposed in the Racial Hatred Bill 1994 was widespread, for example Terry Lane ("The case against racial defamation laws," *IPA Review*, Vol. 45, No.2, 1992)

The Racial Hatred Bill 1994 passed the parliament with the support of the Australian Labor Party, the Australian Democrats, and the Australian Greens, and was opposed by the Liberal Party and the National Party.

The Bill was the subject of an inquiry by the Senate Legal and Constitutional Legislation Committee in February 1995.

Some of the concerns about Section 18C expressed to the 1995 inquiry included:

- (1) the broad scope of the section, in particular the words 'insult' and 'offend'.

The Victorian Council for Civil Liberties gave evidence that:

'...essentially the effect of that legislation will be to protect people from hurt feelings. The legislation is designed specifically and in terms to protect people from offence and insults. No other legislation or principle of law that we are aware of in this country has that effect... We say the Government has no role as the guardian of hurt feelings.'

(Hansard, Michael Pearce - Victorian Council for Civil Liberties, Evidence to Senate Legal and Constitutional Legislation Committee, 24 February, 1995, p 341.)

- (2) its impact on freedom of speech and freedom of the media.

The Australian Press Council gave evidence that:

'If the Parliament decides to proceed with the Bill, it must do so in the knowledge that the civil law provisions have the potential to create serious difficulties for the press. Publishers and broadcasters, particularly those with little capital, such as country newspapers and public radio stations, may so fear the dangers of legal action that the legislation may have a 'chilling effect' on the free flow of information and on public debate.'

(Australian Press Council Submission to the Senate Standing Committee on Legal and Constitutional Affairs on the Racial Hatred Bill 1994, 24 February 1995, p 4)

'The Committee also received submissions which argued that the Bill, if enacted, would have a chilling effect on freedom of speech, with publishers and the media suppressing certain points of view for fear of attracting complaints under the legislation, even if these complaints are unfounded and eventually dismissed.

It was argued that the fact that a person cannot claim costs in relation to proceedings before the Commission means that the risk of a complaint is sufficient inducement to avoid all discussion of racial issues, even when hatred or offence are not intended.' [emphasis added]

(Report by the Senate Legal and Constitutional Legislation Committee, Racial Hatred Bill 1994, March 1995, p 8.)

(3) the lack of scrutiny applied to the dispute-resolution process

The Australian Press Council gave evidence that:

'Under the threat of a determination by the Human Rights and Equality Opportunity Commission [the precursor to the current Australian Human Rights Commission], these proceedings could impose a 'chilling effect' which is not subject to the public scrutiny attached to court proceedings.

As the Chairman of the Press Council wrote in The Sydney Morning Herald, 17 November 1994:

"Conciliation [conferences] usually will be confidential - we have no way of knowing what 'chilling effect' they may have on freedom of information. Of course, they probably will have zero effect on racist criminals, on taunts and abuse in the streets from strangers, and on outrageous graffiti...

It is true conciliation provisions have worked well in NSW probably because the present and previous presidents of the Anti-Discrimination Board are reasonable and sensible persons. But should a public servant enjoy quasi-judicial power? What if the wrong person is appointed?"

(Australian Press Council Submission to the Senate Standing Committee on Legal and Constitutional Affairs on the Racial Hatred Bill 1994, 24 February 1995, p.4)

(4) its inconsistent treatment of unlawful acts

The Racial Hatred Bill 1994 provided a defence to breaches of Section 18C, namely Section 18D which provided that an act was not unlawful if it was done reasonably and in good faith and in a number of circumstances including:

- (a) in the performance, exhibition or distribution of an artistic work, or
- (b) if it was done for 'any genuine academic, artistic or scientific purpose' or 'any other genuine purpose in the public interest', or
- (c) if it was a fair and accurate report of any event or matter of public interest, or
- (d) if it was a fair comment that was an expression of genuine belief.

Members of the Senate Committee identified that if the intention of the Racial

Hatred Bill 1994 was to prevent acts which could lead to racist violence than logically it should make no difference whether an act was undertaken as part of an artistic work or not.

'Further, the exclusion of a artistic performances from the scope of the civil provision of the Bill make it laughable. A comedian can, in the guise of an artistic performance, tell blatantly racist jokes on national television, and sell videotapes of the program for personal profit, but those same jokes told by an ordinary citizen in a public place such as a hotel or club, could render him/her subject to civil proceedings under the Bill.

If the Government is truly concerned to stamp out racism, then which is the greater evil: a racist joke told on national television or, the same joke told in the relative confines of a hotel or club?'

(Minority Report by the Senate Legal and Constitutional Legislation Committee, Racial Hatred Bill 1994, March 1995, p2.)

## How has Section 18C operated?

2,109 complaints under Section 18C have been made to the Australian Human Rights Commission and its precursor bodies since 1995.

Of these complaints, 96 have resulted in litigation before the courts. Most of these cases relate to comments in the workplace or in an education setting, or comments made or reported in the media. The majority of S18C cases brought to court are dismissed. Successful actions under Section 18C usually result in the payment of monetary damages.

## If less than 5% of Section 18C cases end up in court what's the problem?

The number of court cases resulting from a law doesn't determine whether the law is good or bad. The number of court cases as a result of Section 18C reveals nothing about the consequences of the law and its 'chilling effect'.

Under Section 18C the process is the punishment. Those alleged to have breached Section 18C must expend time, energy, and money defending themselves, even before a complaint reaches court. In this way people can be punished for their speech without the case coming to court.

As occurred in the 'QUT case', defendants made financial payments to resolve a Section 18C complaint that was later deemed by a judge in the Federal Circuit Court of Australia to be without merit. Such payments are not represented in the statistics of the number of Section 18C cases that come before the courts.



The shadow Attorney-General, Mark Dreyfus QC has said:

'Opponents of 18C also like to focus on two words contained in that section - 'insult' and 'offend'. They pretend cases are judged by four separate tests against each word - intimidate, humiliate, insult and offend. This demonstrates an ignorance of how the law works. It is a single test, not four separate tests. This sets the bar high for proved contraventions of section 18C.' (The Australian Financial Review, 11 November 2016)

Is he correct?

No. Simply offending someone is sufficient to breach Section 18C.

The section says 'offend, insult, humiliate or intimidate' [emphasis added]. The words are disjunctive. Parliament did not use the word 'and' it used the word 'or'. In *Project Blue Sky v Australian Broadcasting Commission* (1998) 194 CLR 355, the High Court stated 'a court construing a statutory provision must strive to give meaning to every word of the provision.'

Doesn't the defence in Section 18D protect freedom of speech?

No.

How Section 18D operates is unclear. In the 'QUT' case, Judge Jarrett of the Federal Circuit Court of Australia said there was a 'significant' conflict between the authorities in the interpretation of Section 18D (*Prior v Queensland University of Technology & Ors* 2016 FCCA 2853).

In the 'Bolt case', Justice Bromberg of the Federal Court decided that the use of humour by Andrew Bolt was one of the reasons why Section 18D could not be relied upon as a defence (*Eatock v Bolt* [2011] FCA 1103).

A person alleged to have breached Section 18C who relies on Section 18D as a defence bears the onus of establishing the defence. That is, a defendant seeking to rely on Section 18D must establish that what they did was done reasonably and in good faith, as opposed to the complainant being required to establish that it was not done reasonably and in good faith (*McGlade v Lightfoot* (2002) 124 FCR 106).

The President of the Human Rights Commission, Professor Gillian Triggs has supported the suggestion that the words 'offend' and 'insult' be removed from Section 18C and replaced with the word 'vilify' (The Sydney Morning Herald, 8 November 2016).

### Would this fix the problem with Section 18C?

No.

'Vilify' is not different in practical terms from 'offend' or 'insult'. The Macquarie Dictionary defines 'vilify' as 'to speak evil of; defame; traduce'. The Macquarie Thesaurus specifies 'insult' as a synonym of 'vilify'.

Replacing 'offend' and 'insult' with 'vilify' would lower the threshold under Section 18C. Professor Triggs said 'removing offend and insult and inserting 'vilify' would be a strengthening of the laws' (The Sydney Morning Herald, 8 November 2016).

### Would replacing the words 'offend, insult, humiliate or intimidate' in Section 18C with a new offence of 'incitement to racial hatred' fix the problem with Section 18C?

No.

In Australian states and overseas jurisdictions where 'incitement to racial hatred' is an offence the words have been found to be ambiguous and vague, and extremely difficult to apply in practice.

### Would changing the complaints-handling process of the Australian Human Rights Commission fix the problem with Section 18C?

No.

Under Section 46PH(1)(c) of the Human Rights Commission Act 1986, the President of the Commission already has the power to terminate a complaint where 'the President is satisfied that the complaint was trivial, vexatious, misconceived or lacking in substance.'

In the 'QUT case', the President of Commission, Professor Triggs could have terminated the complaint on these grounds but chose not to, because she believed the complaint 'was one that had a level of substance' (ABC 7.30 program, 7 November 2016).

## Who supports reforming Section 18C?

Two different public opinion polls reveal that there is broad community support for reform of Section 18C.

A Galaxy Research poll conducted between 3 November and 6 November 2016 of 1,000 Australians aged 18 years and older asked the following question:

'Do you approve or disapprove of the proposal to change the Racial Discrimination Act so that it is no longer unlawful to "offend" or "insult" someone because of their race or ethnicity? It will still be unlawful to "humiliate" or "intimidate" someone because of their race or ethnicity.'

The results were 45% approved, 38% disapproved, and 18% said 'Don't know'.

The Galaxy Research poll is consistent with a poll conducted by Essential Research in November 2016 which asked the same question. The results in the Essential Research poll were 44% approved, 33% disapproved, and 23% said 'Don't know'.

A diverse range of individuals have stated their support for some reform of Section 18C including Julian Burnside, Mark Leibler, Robert Magid, David Marr, Kerry Pholi, Justin Quill, Margaret Simons, Jim Spigelman, Lenore Taylor, and Spencer Zifcak.

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# Appendix 3: A selection of those who support reforming section 18C

## **The Hon. Tony Abbott**

‘Section 18C... is clearly a bad law. Our debates should be polite but they should never be guaranteed not to offend... with hindsight, I should have persisted with a simpler amendment along the lines of senator Bob Day’s later private member’s bill.’

## **Senator the Hon. Eric Abetz**

‘Section 18C...is something that divides, promotes sectionalism and is corrosive to that societal foundation of free speech. In particular, the provisions that make it an offence to offend and insult are an anathema to the kind of free and open society that we should be promoting.’

*Federal Young Liberal Policy Journal* (October 2015)

## **Wesley Aird**

‘Throwing his support behind the push to scrap section 18C of the Racial Discrimination Act, Mr Aird said yesterday the amendments proposed by Attorney-General George Brandis were needed to bring the act into alignment with the “expectations of mainstream Australian society”.’

*The Australian* (29 March 2014)

## **Don Aitkin**

‘18C is a big stick, since a complainant has only to say that he or she feels “offended” or “insulted”, and the game is on... In my view 18C has led to a self-imposed restriction of useful comment in many areas of our public life, and that has led to an impoverishment of democratic discussion – at least in print.’

*Don Aitkin Blog* (13 October 2014)

## **Piers Akerman**

‘The sort of people who want political correctness and self-censorship resort in line with the current section 18C... which is patently a block on free speech.’

*Daily Telegraph* (6 June 2014)

## **Janet Albrechtsen**

‘These laws must be abolished.’

*The Australian* (26 October 2011)

## **Gay Alcorn**

‘Some people (including me) who disagree with Bolt’s views on most things nonetheless believe that section 18C... is too broad in a democracy where robust debate means that even the most unpalatable opinions should be contested, not outlawed.’

*The Sydney Morning Herald* (3 May 2014)

**Professor James Allan**

'All of s 18C of the Racial Discrimination Act needs to go.'

*The Spectator* (15 September 2012)

**Australian Christian Lobby**

'Attempting to prevent offense or insult can only quash free speech. The force of the law should not be used to stop people being offensive or insulting.'

*Australian Christian Lobby Press Release* (30 April 2014)

**Senator Dr Chris Back**

'[The current form of 18C is] a grotesque limitation on political discourse.'

*The Sydney Morning Herald* (15 October 2015)

**Senator Cory Bernardi**

'I'm absolutely committed to freedom of speech in this country and if Bob Day wants my support [for the private member's bill to remove "offend" and "insult"] he's got it.'

*The Sydney Morning Herald* (13 August 2014)

**Geoffrey Bloch**

'... passing laws regulating how we speak to each other? Surely that is a matter best left to us. Do we really need to be infantilised by our Government and warned against offending and insulting each other under threat of being taken to court?'

*J-Wire* (8 September 2016)

**Andrew Bolt**

'...the argument is not between those who want more free speech and those who want less racism. It is between those who trust Australians and those who don't. Those who think we are basically decent and can be trusted with free speech and those who think we're too racist for such freedom.'

*The Herald Sun* (3 April 2014)

**Alan Borovoy, QC**

'... Borovoy warns that the same ambiguities arise from our legislation that uses words like "offend, insult, humiliate or intimidate".

Drawing on Canada's experience, Borovoy says: "You wind up losing a lot more than you're trying to nail. That's the guts of it."

*The Australian* (April 9 2014)

**Michael Brull**

'The case being tried against Andrew Bolt, in my opinion, is wrong. Not because I think what he said was right, decent, or defensible. It is because he should be allowed the right to express his opinions, however odious they may seem to others.'

*ABC* (30 March 2011)

**Former Senator Joe Bullock**

‘To be tolerant of your views I do not need to pretend that you are just as right as I am but rather to accept that you have a perfect right to hold a view I believe to be wrong, even if I find your view offensive.’

*The West Australian* (27 August 2014)

**Julian Burnside AO, QC**

‘The mere fact that you insult or offend someone probably should not, of itself, give rise to legal liability.’

SBS (29 March 2014)

**Senator Brian Burston**

‘...so called offended/insulted people are using the Act as a money making vehicle as well as a vehicle to stifle free speech. Such action can take years to resolve and in this meantime the “accused” lives have been ruined. It must be repealed.’

*The Australian* (November 18 2016)

**Senator David Bushby**

‘[18C is] a fundamental injustice...We don’t need a law and threat of criminal prosecution to ensure Australians exercise common sense’

*The Examiner* (30 April 2016)

**The Hon. Senator Matt Canavan**

‘Senator McGrath’s Queensland Nationals colleague in the Senate, Matt Canavan, confirmed to Fairfax Media on Monday that he would be crossing the floor in favour of the Day amendment, in the unlikely event it would come to a vote.’

*The Sydney Morning Herald* (12 October 2015)

**Nick Cater**

‘[Critics of efforts to reform section 18C] underestimate the chilling effect the act’s provisions have on those who hold the freedom of expression as a non-negotiable element of a liberal society.’

*The Australian* (18 March 2014)

**George Christensen, MP**

‘I’m on the record saying 18C needs to be amended as this QUT case and others is appalling’

*The Australian* (November 18 2016)

**Louise Clegg**

‘... the idea that in a free society we should tolerate laws that outlaw merely offending others – in effect that parliaments should legislate for politeness – is a dangerous one. It is at odds with the assumptions made by our founding fathers about the freedoms that underpin our democracy. That’s why the demise of the current 18C, one way or another, cannot come quick enough.’

*The Australian Financial Review* (20 September 2016)

**Dr Hal GP Colebatch**

'Free societies don't make "insult" and "giving offence" a crime.'

*The Spectator* (31 October 2015)

**Peter Corney**

'The way the current law is framed makes critique and open discussion very vulnerable to legal challenge and so limits freedom of speech.'

*Ethos* (1 July 2014)

**Courier Mail Editorial**

'The reality is that if one person is not free to speak freely then none of us are.'

*The Courier Mail* (March 22 2014)

**Narelle Davis**

'Not forgetting the widows and mothers who lost their sons and husbands and carried on through depressions and hard times with very few comforts.

What a betrayal of their sacrifice and suffering for our nation's freedom not to amend 18C.'

*The Border Mail* (12 August 2014)

**William Dawes**

'From its first issue, Mon Droit has valued the plurality which comes from freedom of expression. Any legislation which threatens this is anathema to our values. S 18C needs to go.'

*Mon Droit* (28 July 2014)

**Former Senator Bob Day**

'I am indeed sympathetic to the Government's proposal to wind back Section 18C of the Act as I am not persuaded by the arguments of those who believe that offensive or insulting speech should be outlawed. I strongly believe that freedom of speech, freedom of religion and freedom of association are the foundations of democracy.'

*Personal Letter from Senator Bob Day to Mr. Mark Dreyfus QC, MP (Shadow Attorney General)* (14 May 2014)

**Alan Dershowitz**

'By turning those who express racist ideas into criminals, we give their bigoted voice a megaphone. Racists want the government to censor them so they can claim the mantle of free expression. The racist expression escalates from a one-day story to a multi-day story, with the censorship receiving far more attention than the statement itself.'

*The Australian* (2 April 2014)



### **Dr Anthony Dillon**

‘Political correctness, with regard to people who identify as Aboriginal Australians, has reached the ridiculous stage where one can be accused of being racist simply by questioning the motives of some people who identify as being Aboriginal.

Or there is the obvious elephant in the room. Why is it that someone with multiple ancestries chooses to build their identity around being Aboriginal, when having only one of your 16 great-great-grandparents being Aboriginal qualifies you to claim being Aboriginal? People are free to identify how they wish, but they should not be surprised when they are questioned about it.’

*The Australian* (March 27 2014)

### **Dr Andrew Dodd**

‘[The Bolt decision] is a slap in the face for free expression. It limits the kinds of things we can discuss in public and it suggests there are lots of taboo areas where only the meekest forms of reporting would be legally acceptable.’

*ABC* (28 September 2011)

### **Dr Meredith Doig**

‘Former Federal Court judge Ronald Sackville. ... proposes two amendments that would achieve a more defensible balance between the legitimate protection of vulnerable groups from serious hate speech and the values of free speech.

The first would replace the words “offend, insult, humiliate or intimidate” with the more demanding standard of “degrade, intimidate or incite hatred or contempt”. The second would assist courts in interpreting the legislation, replacing subjective criteria with objective tests...of how “a reasonable member of the community at large” would respond to the behaviour in question.’

Sensible suggestions from a rationalist’s point of view.’

*The New Matilda* (23 August 2016)

### **Senator Jonathon Duniam**

‘Firebrand conservative senator Cory Bernardi on Tuesday introduced a private member’s bill that called for the words “offend” and “humiliate” to be removed.

The change was signed by all but one of the Coalition’s backbench senators, including Tasmanian senators Eric Abetz, David Bushby, and newly elected Jonathon Duniam... Senator Duniam described the words “humiliate” and “offend” as highly subjective.’

*The Advocate* 30 August 2016

### **Former Senator Sean Edwards**

‘We can’t escape the fact Section 18C of the Racial Discrimination Act continues to unreasonably suppress completely reasonable speech.’

*The Advertiser* 21 January 2015

### **Senator David Fawcett**

‘... my position is well known – the legislation, process and culture (within the HRC) all need reform.’

*The Australian* (18 November 2016)

**Alex Fitton**

'2014 Australia is finally ready for a previously idealised solution: remove Section 18(C). It only takes common sense to realise that it won't be long before the racists and racist institutions end their charade of equality and tolerance, thus exposing their ugly heads and even uglier closed-mindedness.'

*The Australian* (18 November 2016)

**Professor Ross Fitzgerald, AM**

'Moreover, even though advocates of anti-racial discrimination and other similar legislation are almost always well intentioned, as far as freedom of speech and free expression are concerned, the consequences of such legislative prohibitions are disastrous to liberal democracy. That is why I oppose such legislation.'

*The Australian* (19 July 2014)

**Professor David Flint, AM**

'There can be no doubt that, absent approval of the current very modest private senators' bill to amend 18C, an antipodean *Charlie Hebdo* would be doomed.'

*The Spectator* (24 January 2015)

**Nicolle Flint, MP**

'The ordeal the QUT students were subjected to shows the Human Rights Commission and section 18C processes are broken. The more recent complaint against Mr Bill Leak reiterates this. A society that threatens its students, cartoonists and artists with censorship is a society in a very dangerous place.'

*The Australian* (18 November 2016)

**The Hon. Josh Frydenberg, MP**

'I don't think the balance has been struck, I think that the threshold with offend and insult is too low'.

*AAP* (6 November 2016)

**Professor John Furedy**

'There has been what I call a velvet totalitarianism creeping in. I call it that because the punishments are less severe but people still try to censor themselves and each other... The only protection against stupid speech is better speech.'

*The Australian* (2 April 2014)

**Michael Gawenda**

'Section 18C ought to be repealed. Feeling insulted or offended or humiliated or even intimidated should not be a basis on which a court should be able to silence anyone.'

*The Australian* (March 5 2014)

**Dr Andrew Glover**

‘We may think Section 18C is a shield to protect the vulnerable against vile and damaging forms of hate speech. But, in the hands of some, a shield is also a weapon. By not allowing legitimate, and—yes, arguably “racist”— critiques of entrenched white privilege to be voiced, 18C actually gives the powerful yet another means of reprisal. Or worse still – it means that we might never hear the truths of an ongoing racist co-existence that we need to hear.’

*Online Opinion* (23 July 2014)

**Ian Goodenough, MP**

‘By fine tuning existing laws we can allow free speech to bridge cultural differences to achieve compromise. Mature debate is preferable to harbouring unresolved cultural conflicts’.

*The West Australian* (17 November 2016)

**Dr Sue Gordon, AM**

‘I think sometimes there is too much emotion in this topic and people need to just look at it calmly... We are not a communist country, we have free speech and if we start picking things off to suppress individuals, well it gets worse it goes more underground’.

*The Australian* (27 March 2014)

**Samuel Gordon-Stewart**

‘Tony Abbott’s decision last year to abandon proposed changes to the *Racial Discrimination Act* ... was a disgrace in my view, and an absolute betrayal of the mainly conservative voters who trusted him to ensure that freedom of speech, a cornerstone of any free society, was protected.’

*Samuel Gordon’s Blog* (15 January 2015)

**Alex Hawke, MP**

‘Recent cases brought under 18C of the Racial Discrimination Act do reveal substantial flaws in the process and operation of the law as currently constructed, to the detriment of free speech in Australia.’

*The Australian* (18 November 2016)

**Herald Sun Editorial**

‘Gagging people from fairly and legitimately held opinions is censorship. It is a basic denial of freedom of speech...’

The underlying problem with the ill-considered effects of Section 18C is that if someone says they have been offended or humiliated, who is to challenge them? That is not what freedom of speech and the right to fairly voice your opinions is about.’

*Herald Sun* (12 March 2014)

**Senator Pauline Hanson**

'18C of the Racial Discrimination Act and it does, if you find anything that's offensive or - and the other components of it... The thing is that we live in a democratic society... We are entitled to freedom of speech and freedom of expression... As long as it's not out to insight [sic] hatred or violence, so by having this, it is stifling people's right to have an opinion.'

*The Coffs Coast Advocate* (July 4 2016)

**Andrew Hastie, MP**

'We can't afford to fail a second time [on 18C reform]. It's all very well to virtue-signal to our base but we have to get this over the line.'

*The Australian*, (2 November 2016)

**Senator Derryn Hinch**

'I've long said I oppose 18C and would abolish it.'

*The Australian* (18 November 2016)

**Jonathan Holmes**

'Justice Bromberg's interpretation of the Racial Discrimination Act, and his application of it to Bolt's columns, strikes me as profoundly disturbing.'

*The Drum* (30 September 2011)

**Des Houghton**

'The Turnbull government must abolish 18.'

*The Courier Mail* (9 September 2016)

**The Hon. John Howard OM, AC**

'Mr Howard will argue the changes [to s 18C] are in line with the classical liberal tradition... Australia is not a racist nation but rather one that respects and cherishes an open and tolerant society, which should therefore uphold freedom of speech, he will say.'

*The Australian* (3 April 2014)

**Paul Howes**

'[An] Orwellian law that, probably, should not be there...I am concerned that people in some of the circles I mix, on my side of politics, increasingly seem to think that they should write, or invoke, or resurrect, laws that will shut Andrew Bolt up... A democracy is at the very least a free marketplace of ideas, and a free marketplace of arguments against those ideas. But it is never, never, a stifling or a suffocation of ideas.'

*The Herald Sun* (30 September 2011)

**Senator Jane Hume**

'Removing the words "offend" and "insult" is a measured response.'

*ABC* (7 September 2016)

**Reginald Hunter**

‘These laws are tantamount to being so nebulous as to being able to bring anybody up on charges and to take their job and their livelihood just because your interpretation of offence [is different to someone else’s]. The power of these laws is in its vagueness and its nebulousness, and that’s the point of it... A lot of things have been presented as for our good, but the truth of the matter is that if you just leave people alone, they pretty much work things out themselves.’

*ABC* (13 May 2014)

**Rabbi Chaim Ingram**

‘If rabbis are prevented from speaking on certain moral issues because of the Act, then it would be good to change that Act.’

*Australian Jewish News* (10 April 2014)

**John Izzard**

‘Senator Brandis, the pressure on you must be intense, and some of it, according to press reports, is coming from members of your own party. Rather than hear the voices of those who regard free speech with disdain, I urge you to look instead to Canada, where a similar and similarly unjust law has been recently overturned.’

*Quadrant* (17 June 2014)

**The Hon. Gary Johns**

‘Was Australia a darker place before the insertion of 18c in 1995? I do not think so.’

*The Australian* (12 March 2014)

**Christopher Johnson**

‘If changes are to be made to Section 18 of the Racial Discrimination Act I recommend that Section 18C (1)(a) should only be amended to at most only remove “offend” and “insult”.’

*Christopher Johnson’s Personal Blog* (29 April 2014)

**Dr Sarah Joseph**

‘The prohibitions on speech which offends and insults, even on the basis of race, go too far. Feelings of offence and insult are not serious enough to justify restrictions on the human right to freedom of speech: there are no counter-vailing human rights to freedom from offence or freedom from insult. Feelings of offence and insult are not enough to equate with a right to be free from racial discrimination.’

*Castan Centre for Human Rights Law* (30 April 2014)

**Bernard Keane**

‘...inconsistency and inequity points to a crucial reason why the amendment of 18C should be supported: free speech in Australia is in a bad way.’

*Crikey* (21 March 2014)

**Craig Kelly, MP**

'I have called from reform to 18c long before the QUT case. The QUT case makes a mockery of 18c. And demonstrates the HRC is out of control.'

*The Australian* (November 18 2016)

**Paul Kelly**

'You might think this law is designed to prevent race hate and is restricted to this goal. But that's wrong. It makes behaviour unlawful in a racial context where it is likely to "offend, insult, humiliate or intimidate". This is an extraordinarily low threshold and subjective test.'

*The Australian* (8 August 2012)

**Dr David Kemp**

'...when a Human Rights Commissioner tells us that without section 18C of the Racial Discrimination Act the darker side of human nature will be unleashed, he obviously has no concept of the capacity of a free society to develop a moral order. Liberal thought, with the wisdom of our democratic history behind us, tells us that a good society is created not by pursuing the illiberal with tribunals, punishments and bans, but by the morality that grows out of the desire of people to be validated by the good opinions of others. It is this, not law that has made Australia one of the least racist societies in the world.'

*FreedomWatch* (17 June 2014)

**Chris Kenny**

'The 18C amendments are necessary to ensure we see no more columns banned.'

*The Australian* (29 March 2014)

**Michael Kroger**

'I'm a very strong supporter of [the Abbott government's] changes.'

*FreedomWatch* (7 April 2014)

**Bill Leak**

'I think 18C is an abomination. Look, I can only assume that a lot of people genuinely believe that freedom of speech means the legal right to hurl abuse. In fact, nothing could be further from the truth'

*ABC* (20 October 2016)

**Mark Leibler, AC**

'It is a question of getting the balance right ... this is not black and white. It is not all right on the one side, and all wrong on the other side. My own view is that if all the government wants to remove the word "offend", I think at the end of the day everyone could live with that.'

*The Australian* (15 April 2014)

**Senator David Leyonhjelm**

'My preference would be that 18C be completely repealed and not amended but [the proposal put forward by the Abbott government in 2014] is a significant improvement on the existing situation.'

*The Australian* (27 March 2014)

**Antony Loewenstein**

‘As an atheist Jew, I find it distinctly uncomfortable to defend the free speech rights of Holocaust deniers. I utterly oppose the inaccuracy, hatred and intolerance that goes with refuting the reality of Nazi crimes against Jews, gay people, Gypsies and many others.

But a truly free society is one that tolerates and encourages strong exchanges of ideas. This includes the most abominable of them, such as those expressed by German born, Australian-citizen, Holocaust denying Frederick Tobin, a regular bogeyman wheeled out to justify laws against offensive thoughts.’

*The Guardian* (2 April 2014)

**Senator the Hon. Ian Macdonald**

‘[I support amending] section 18C ...to remove the words ‘offend’ and ‘insult’..... when Australians have to legislate against offence and insult.... it is a sad day.’

*Hansard* (31 August 2016)

**Senator the Hon. James McGrath**

‘No [Section 18 C is not working well]. I’ve seen chook yards in the wet season with higher standards. The poor QUT students were treated appallingly with the HRC becoming a bad joke masquerading as a national embarrassment covered by a fig leaf of incompetence. If Triggs had any remaining semblance of professionalism, she would resign.’

*The Australian* (18 November 2016)

**Laurence W Maher**

‘The chief vice exemplified by such censorship is that its promoters insist that public debate and disagreement about specific categories of ideas and opinions, in the case of 18c, race, (skin) colour, nationality or ethnic origin, must be burdened by a special restrictive privilege to protect the alleged tender feelings of specific groups of the citizenry. The rationale is a concocted ideology whose adherents patronisingly assert that entire “oppressed/ vulnerable minorities” lack the ordinary fortitude, self-respect and dignity of all human beings who live in a free society in which everyone’s cherished ideas and opinions are open to challenge.’

‘Repeal should be insisted upon.’

*The Spectator* (7 September 2016)

**David Marr**

‘The present act has to be changed – a little. Hurt feelings should never attract the law as they do now under section 18C. Offence and insults are the everyday reality of free discourse.’

*The Saturday Paper* (5 April 2014)

**Nick McCallum**

‘Agree with Nick Cater. Better to rely on natural community decency rather than regulate it. Govt should amend 18C.’

*Twitter*

**Chris Merritt**

'If there ever was a statute that has brought the law into disrepute, this is it... There is no place in Australian law for such a one-sided procedure. Nor is there any place for a provision that imposes penalties on journalists for what they do not write. It belongs in North Korea.'

*The Australian* (7 March 2014)

**Ben Morton, MP**

'On the matter of 18C...complainants and the Human Rights Commission have taken action that divides us, action that creates resentment and division...We are a democracy and we can debate issues intelligently. On this basis, I welcome this inquiry.'

*Hansard* (9 November 2016)

**Bill Muehlenberg**

'The federal Racial Discrimination Act, like the Victorian Racial and Religious Vilification Act, may have been set up with the best of intentions. But both seem to increasingly be little more than clubs with which to clobber those who do not hold to acceptable views on controversial issues.'

*Quadrant* (29 September 2011)

**Warren Mundine**

'The way things are going at the moment, we are seeing people who have been stifled in regards to their conversations, that is the concern I have,' [Mr Mundine] told *The Australian*. "I do believe it needs changes — not to wipe it completely, but to pull it back a bit.'

*The Australian* (31 August 2016)

**Brendan O'Neill**

'Race Discrimination Commissioner Tim Soutphommasane says we have to keep 18C because racist speech can "damage our cohesion as a multicultural society". He defends the 2011 court ruling against journalist Andrew Bolt for using "inflammatory and provocative language" in his columns about fair-skinned Aborigines.'

This is a classic argument for censorship. The paternalistic notion that certain ideas must be hidden from view because they have the power to rattle society... Arguing prejudiced speech must be quashed to preserve social harmony may sound PC, but it's the bastard ideological offspring of the thirst for social control and fear of the unpredictable public that have motivated every censor.'

*The Australian* (3 May 2014)

**Senator Barry O'Sullivan**

'[The issue has been] hanging around like an old bag of veggie scraps for the past 18 months and it was time to test its support in the Senate.'

*ABC* (30 August 2016)



**Sev Ozdowski**

'I am for free speech, even if sometimes it hurts.'

*Dr Sev Ozdowski's Personal Blog* (3 December 2013)

**Senator James Paterson**

'Freedom of speech and freedom of thought are inseparable. For as long as I am in this place, I will stand up for free speech.'

*Hansard, The Senate* (16 March 2016)

**Dr Rita Panahi, OAM**

'[O]ne of the more absurd laws ever passed by Parliament... A free and sophisticated society must allow citizens to offend and to be offended without contravening any law. If someone is not inciting violence or defaming... then why should their right to free speech be [curtailed].'

'... [I]t has no place in an open society that values freedom of thought and expression.'

*Herald Sun* (13 January 2015)

**Senator the Hon. Stephen Parry, President of the Senate**

Fellow Liberal Stephen Parry said that as Senate president it would have been inappropriate for him to sign it but he will support it if it comes to a vote.

'If that piece of legislation comes before the Senate I will be voting to remove the words "offend" and "insult" out of 18C.'

*ABC* (31 August 2016)

**Charlie Pearson**

'Apparently, free speech is not a cornerstone of liberal democracy, but a tool used by wrong-thinking citizens to poison the minds of others... This attitude ignores the fact that free speech means the freedom to argue and point out the ample flaws in bigoted or racist worldviews.'

*Spiked* (1 April 2014)

**David Penberthy**

'The changes should be supported by people who believe in the importance of freedom of expression. I am less interested in how that freedom extends to journalists or broadcasters who are in the powerful position of having a way to make their voices heard, than how it affects the ability of you to make a point in a letter to the editor, a comment on a website, a call to talkback radio. Or for that matter in a group conversation at work with a bunch of colleagues.'

*The Advertiser* (29 March 2014)

**Dr Peter Phelps, MLC**

'What defenders of section 18C ignore is that social sanctions already exist to enforce culturally accepted standards of behaviour. A truly civil society has ways of self-regulating and condemning racist speech without resorting to the lawyers and the apparatchiks of the Human Rights Commission.'

*Hansard, Legislative Council of New South Wales* (7 May 2014)

**Kerryn Pholi**

'I hereby demand freedom from protection from this thing we call 'racial vilification'. I do not wish to be protected from the opinions of others. I demand the right to hear the views that other people may wish to express about me. I want this because I do not see how forcing others to shield their true opinion is of any benefit to me. Rather, it infantilises me by suggesting that I cannot handle the ugliness of life. Silencing or concealing the ugliness also exposes me to unnecessary risk, since if all others were free to express their views openly, I could at least make more informed choices about whom to associate with and whom to avoid. I also believe that ugliness and nastiness should be freely expressed, because it is good for us.'

*The Spectator* (26 April 2014)

**Justin Quill**

'Those named in Andrew's article and their supporters would no doubt have been publicly critical of the article. They would have fought Andrew's free speech with a powerful weapon — their own free speech. And in my view, that would be the best result of all.'

*The Australian* (28 March 2014)

**Clyde Rathbone**

'People are different, and pointing to these differences doesn't make one racist, it makes one observant. Differences we're too afraid to acknowledge can never be celebrated. And cultures we're too afraid to criticise continue to cause much harm. Relaxing the laws that bound our speech will invariably lead to offence, which in turn will lead to debate. Open conversation, rather than legal intervention, is our best hope for a lasting solution to racial discrimination.'

*The Sydney Morning Herald* (28 March 2014)

**Senator Linda Reynolds, CSC**

'I believe the Australian community must rediscover a way to accept hearing things we do not personally believe in. I don't believe insulting or offending someone should give rise to legal liability and it is my personal view that these laws have overreached and require amendment.'

*The Sydney Morning Herald* (13 February 2015)

**The Hon. Stuart Robert, MP**

'I'm on the record saying 18c needs to be amended as this QUT case and others is appalling'

*The Australian* (18 November 2016)

**Senator Malcolm Roberts**

'It is very important to the country because at the moment a lot of people are afraid to speak up,' he told Insiders... Mr Roberts had told reporters on Friday that Section 18C "needs to be addressed because [it is] curbing free speech".'

*ABC* (7 August 2016)

**Senator the Hon. Scott Ryan**

'I said at the start that I was a First Amendment type of person and I view the proposal put up by this the government and Senator Brandis in the exposure draft as a compromise because I accept that my views are not typical of all those in this place or indeed all those in this country in supporting a very strong and almost unlimited commitment to freedom of speech.'

*Hansard* (26 March 2014)

**Sukrit Sabhlok**

'Voltaire is (incorrectly) credited with saying "I disapprove of what you say, but I will defend to the death your right to say it". Free speech is fundamental in liberal democracies because it allows for vigorous debate and discussion on matters of importance that may be politically incorrect and repealing section 18C would contribute to that.'

*Sukrit Sabhlok Weekly* (8 April 2014)

**Dr Frank Salter**

'Yet the Government's proposed amendments, announced on 25th March, though a significant improvement, represent a climb down from full repeal.'

*Quadrant* (28 March 2014)

**Dr Jeremy Sammut**

'The race-based scare campaign that is being waged against the repeal of Section 18C should not weigh heavily on the mind of the Abbott government. If the RDA withers, the 'fair go' culture that makes Australia a multiracial success will persist.'

*The Spectator* (15 March 2014)

**Gabriel Sassoon**

'The measure of a society's commitment to free speech is the extent to which it protects offensive, unpopular speech. Free speech is hard: it has any meaning only if it protects the most virulent and obnoxious of views.'

Disturbingly, it has become more and more clear that many Australians wish to protect only speech that we find innocuous... Free speech is a meaningless concept if it protects only inoffensive, popular views.'

*The Australian* (29 March 2014)

**Senator Zed Seselja**

'But we should not have the kind of discussion that has been stifled in the Bolt case being banned. It should not be. Yes, our feelings get hurt from time to time. We do not like it when it happens; I do not like it when it happens. But we cannot have a law to protect against every piece of offensive behaviour in our community.'

*Hansard* (25 March 2014)

**Michael Sexton SC**

'There is room for argument as to whether the prohibition on intimidation should be retained, although this could normally be dealt with by the ordinary provisions of the criminal law.

The notions of offence, insult and humiliation, however, involve hurt to feelings. This is always unattractive for the subject of the verbal attack but these shock tactics have always been legitimate tools of debate on questions of politics and public interest.'

*The Australian* (3 March 2014)

**Paul Sheehan**

'... section 18C of the Racial Discrimination Act, which extends the law against racial vilification to language which "offends". This is an absurdly broad term to insert in any law.'

*The Sydney Morning Herald* (7 October 2015)

**Tory Shepherd**

'The law should be changed...'

*The Advertiser* (13 January 2015)

**Margaret Simons**

'Civil libertarians have for a long while argued that the Racial Discrimination Act is too broadly worded. I agree.'

*Crikey* (29 September 2011)

**Senator Dean Smith**

'I'm sure I speak for many, many, many West Australians who believe that racism is not tolerated in our country - that racism should be combatted - but many will argue that part of our democratic evolution is for government and laws to step back so that communities can step up to the challenge.'

*Hansard* (26 March 2014)

**The Hon. James Spigelman AC, QC**

'The freedom to offend is an integral component of freedom of speech. There is no right not to be offended. I am not aware of any international human rights instrument, or national anti-discrimination statute in another liberal democracy, that extends to conduct which is merely offensive. I have not conducted a detailed review of the international position in this respect. However, so far as I have been able to determine, we would be pretty much on our own in declaring conduct which does no more than offend, to be unlawful.'

*Human Rights Day Oration* (10 December 2012)

**Michael Sukkar, MP**

'There is "public outrage" that free speech is being "muzzled" by s 18C.

"It is no great shock" that Australians believed the court case, brought under section 18C of the Racial Discrimination Act, was "absolutely outrageous". The QUT complaint was "vexatious".

*The Australian* (26 October 2016)

**Lenore Taylor**

'I personally think that section 18C might be drawn slightly too broadly but there has to be some kind of recourse to racial vilification. I don't want to live in a society where racial vilification is OK.'

*The Guardian* (16 February 2016)

**The Age Editorial**

Title: "Free Speech has to include freedom to offend: Tony Abbott is right, racial vilification laws are too broad."

'Race vilification laws were never meant to impinge on robust debate or ban obnoxious and ill-informed voices from the conversation. The line is fine, the judgments difficult, but our democracy can meet the challenge. The danger in the present framework is that in trying to protect tolerance and freedom, the legislation diminishes both.'

*The Age* (8 August 2012)

**The Australian Editorial**

'Australia has no reason to be complacent about freedom of speech. Hundreds of prohibitions govern the things we are not allowed to know. And we rank 28th out of 180 on the World Press Freedom Index. The further erosion of freedom of speech is too high a price to pay for legislation erroneously intended to stifle the rougher edges of our robust debate. Trying to legislate for good manners or to prevent hurt invariably backfires. The government is right to abolish Section 18C of the RDA.'

*The Australian* (29 March 2014)

**The Saturday Age Editorial**

'This newspaper has long argued that the Racial Discrimination Act should be amended to rebalance it more towards free speech. Specifically, we believe Section 18C should be abolished.'

*The Saturday Age* (21 December 2013)

**The Hon. Malcolm Turnbull, MP**

Malcolm Turnbull: '... There was a very general consensus that – well, a broad consensus, among lots of interested groups and stakeholders, that the words "insult" and "offend" could be removed, leaving the words "humiliate" and "intimidate".'

Andrew Dolt: 'Did you support that?'

Malcolm Turnbull: '... I was very comfortable about that. I didn't think that would have any sort of negative impact.'

*The Bolt Report* (17 May 2015)

**Chris Uhlmann**

'It's an insidious, creeping assault on free speech. Unfortunately, the people doing the job of advocating the rollback are doing such a shocking job, it's unlikely to happen.'

*The Sydney Morning Herald* (21 June 2014)

**Daniel Ward**

'For if there is one political party whose members should welcome the freer debate that will come from repeal of section 18C, it is the Australian Greens...the debate needs to be unshackled from the politically correct strictures of the Racial Discrimination Act. That is what Attorney-General George Brandis proposes to do.'

*The Australian* (13 November 2013)

**Tim Wilson, MP**

'I want full repeal.'

*ABC* (17 February 2014)

**Keith Windschuttle**

'The repeal of Section 18C would be a small but helpful gesture in turning back this tide of intolerance and restoring some of the principles of free expression that Australian society once regarded as its cultural bedrock.'

*Quadrant* (2 June 2014)

**Paul Whittaker**

'Freedom of expression is absolutely essential to a robust and fair-minded liberal democracy. Bill's cartoons are often confronting and prompt readers to think about unpalatable truths'

'In this case, it is an indisputable fact that the serious child welfare issues present in remote indigenous communities are often the result of absent or neglectful parents.'

He said the newspaper was proud of Leak's work and would mount a vigorous defence. He called on the Turnbull government to revisit previous Liberal Party promises to repeal or amend section 18C.

*The Australian* (October 15 2016)

**John Zerilli**

'It may be that Section 18C goes too far. There are certainly problems with the formulation of Section 18D (of a largely technical kind).'

*The Conversation* (26 February 2014)

**Professor Spencer Zifcak**

'What Bolt wrote was absolutely disgraceful and offensive,' said Liberty Victoria president Spencer Zifcak. 'But I think we ought to be sufficiently concerned to advance freedom of expression to allow for that kind of speech to occur.'

*The Age* (2 October 2011)

# Appendix 4: State and Commonwealth provisions that cover the incitement of crimes, intimidation, menacing, threatening, humiliating and harassing conduct.

## Commonwealth

### Criminal Code Act 1995 (Cth)

#### Section 11.2: Complicity and Common Purpose

- (1) A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.**
- (2) For the person to be guilty:
  - (a) The person's conduct must have in fact aided, abetted, counselled or procured the commission of the offence by the other person: and
  - (b) The offence must have been committed by the other person.
- (3) For the person to be guilty, the person must have intended that:
  - (a) his or her conduct would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed; or
  - (b) his or her conduct would aid, abet, counsel or procure the commission of an offence and have been reckless about the commission of the offence (including its fault elements) that the other person in fact committed.
- (3A) Subsection (3) has effect subject to subsection (6).
- (4) A person cannot be found guilty of aiding, abetting, counselling or procuring the commission of an offence if, before the offence was committed, the person:
  - (a) terminated his or her involvement; and
  - (b) took all reasonable steps to prevent the commission of the offence.
- (5) A person may be found guilty of aiding, abetting, counselling or procuring the commission of an offence even if the other person has not been prosecuted or has not been found guilty.
- (6) Any special liability provisions that apply to an offence apply also for the purposes of determining whether a person is guilty of that offence because of the operation of subsection (1).
- (7) If the trier of fact is satisfied beyond reasonable doubt that a person either:

- (a) is guilty of a particular offence otherwise than because of the operation of subsection (1); or
- (b) is guilty of that offence because of the operation of subsection (1);

but is not able to determine which, the trier of fact may nonetheless find the person guilty of that offence.

## Section 11.4: Incitement

**(1) A person who urges the commission of an offence commits the offence of incitement.**

(2) For the person to be guilty, the person must intend that the offence incited be committed.

(2A) Subsection (2) has effect subject to subsection (4A).

(3) A person may be found guilty even if committing the offence incited is impossible.

(4) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of incitement in respect of that offence.

Any special liability provisions that apply to an offence apply also to the offence of incitement in respect of that offence.

(5) It is not an offence to incite the commission of an offence against section 11.1 (attempt), this section or section 11.5 (conspiracy).

Penalty:

- (a) if the offence incited is punishable by life imprisonment--imprisonment for 10 years; or
- (b) if the offence incited is punishable by imprisonment for 14 years or more, but is not punishable by life imprisonment--imprisonment for 7 years; or
- (c) if the offence incited is punishable by imprisonment for 10 years or more, but is not punishable by imprisonment for 14 years or more--imprisonment for 5 years; or
- (d) if the offence is otherwise punishable by imprisonment--imprisonment for 3 years or for the maximum term of imprisonment for the offence incited, whichever is the lesser; or
- (e) if the offence incited is not punishable by imprisonment--the number of penalty units equal to the maximum number of penalty units applicable to the offence incited.

Note: Under [section 4D](#) of the [Crimes Act 1914](#), these penalties are only maximum penalties. Subsection 4B(2) of that Act allows a court to impose an appropriate fine instead of, or in addition to, a term of imprisonment. If a body corporate is convicted of the offence, subsection 4B(3) of that Act allows a court to impose a fine of an amount not greater than 5 times the maximum fine that the court could impose on an individual convicted of the same offence. Penalty units are defined in section 4AA of that Act.



## Section 11.5: Conspiracy

- (1) A person who conspires with another person to commit an offence punishable by imprisonment for more than 12 months, or by a fine of 200 penalty units or more, commits the offence of conspiracy to commit that offence and is punishable as if the offence to which the conspiracy relates had been committed.

Note: Penalty units are defined in [section 4AA](#) of the [Crimes Act 1914](#).

- (2) For the person to be guilty:
- (a) the person must have entered into an agreement with one or more other persons; and
  - (b) the person and at least one other party to the agreement must have intended that an offence would be committed pursuant to the agreement; and
  - (c) the person or at least one other party to the agreement must have committed an overt act pursuant to the agreement.
- (2A) Subsection (2) has effect subject to subsection (7A).
- (3) A person may be found guilty of conspiracy to commit an offence even if:
- (a) committing the offence is impossible; or
  - (b) the only other party to the agreement is a body corporate; or
  - (c) each other party to the agreement is at least one of the following:
    - (i) a person who is not criminally responsible;
    - (ii) a person for whose benefit or protection the offence exists; or
  - (d) subject to paragraph (4)(a), all other parties to the agreement have been acquitted of the conspiracy.
- (4) A person cannot be found guilty of conspiracy to commit an offence if:
- (a) all other parties to the agreement have been acquitted of the conspiracy and a finding of guilt would be inconsistent with their acquittal; or
  - (b) he or she is a person for whose benefit or protection the offence exists.
- (5) A person cannot be found guilty of conspiracy to commit an offence if, before the commission of an overt act pursuant to the agreement, the person:
- (a) withdrew from the agreement; and
  - (b) took all reasonable steps to prevent the commission of the offence.
- (6) A court may dismiss a charge of conspiracy if it thinks that the interests of justice require it to do so.
- (7) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of conspiracy to commit that offence.
- (7A) Any special liability provisions that apply to an offence apply also to the offence of conspiracy to commit that offence.
- (8) Proceedings for an offence of conspiracy must not be commenced without the consent of the Director of Public Prosecutions. However, a person may be arrested for, charged with, or remanded in custody or on bail in connection with, an offence of conspiracy before the necessary consent has been given.

## Section 80.2A: Urging violence against groups

### Offences

(1) A person (the **first person**) commits an offence if:

- (a) the first person intentionally urges another person, or a group, to use force or violence against a group (the **targeted group**); and
- (b) the first person does so intending that force or violence will occur; and
- (c) the targeted group is distinguished by race, religion, nationality, national or ethnic origin or political opinion; and
- (d) the use of the force or violence would threaten the peace, order and good government of the Commonwealth.

Penalty: Imprisonment for 7 years.

Note: For intention, see section 5.2.

(2) A person (the **first person**) commits an offence if:

- (a) the first person intentionally urges another person, or a group, to use force or violence against a group (the **targeted group**); and
- (b) the first person does so intending that force or violence will occur; and
- (c) the targeted group is distinguished by race, religion, nationality, national or ethnic origin or political opinion.

Penalty: Imprisonment for 5 years.

Note: For intention, see section 5.2.

(3) The fault element for paragraphs (1)(c) and (2)(c) is recklessness.

Note: For recklessness, see section 5.4.

### Alternative verdict

(4) Subsection (5) applies if, in a prosecution for an offence (the **prosecuted offence**) against subsection (1), the trier of fact:

- (a) is not satisfied that the defendant is guilty of the offence; but
- (b) is satisfied beyond reasonable doubt that the defendant is guilty of an offence (the **alternative offence**) against subsection (2).

(5) The trier of fact may find the defendant not guilty of the prosecuted offence but guilty of the alternative offence, so long as the defendant has been accorded procedural fairness in relation to that finding of guilt.

Note: There is a defence in section 80.3 for acts done in good faith.

## Section 80.2B: Urging violence against members of a group

### Offences

(1) A person (the **first person**) commits an offence if:

- (a) the first person intentionally urges another person, or a group, to use force or violence against a person (the **targeted person**); and
- (b) the first person does so intending that force or violence will occur; and

- (c) the first person does so because of his or her belief that the targeted person is a member of a group (the **targeted group**); and
- (d) the targeted group is distinguished by race, religion, nationality, national or ethnic origin or political opinion; and
- (e) the use of the force or violence would threaten the peace, order and good government of the Commonwealth.

Penalty: Imprisonment for 7 years.

Note: For intention, see section 5.2.

(2) A person (the **first person**) commits an offence if:

- (a) the first person intentionally urges another person, or a group, to use force or violence against a person (the **targeted person**); and
- (b) the first person does so intending that force or violence will occur; and
- (c) the first person does so because of his or her belief that the targeted person is a member of a group (the **targeted group**); and
- (d) the targeted group is distinguished by race, religion, nationality, national or ethnic origin or political opinion.

Penalty: Imprisonment for 5 years.

Note: For intention, see section 5.2.

(3) For the purposes of paragraphs (1)(c) and (2)(c), it is immaterial whether the targeted person actually is a member of the targeted group.

(4) The fault element for paragraphs (1)(d) and (2)(d) is recklessness.

Note: For recklessness, see section 5.4.

Alternative verdict

(5) Subsection (6) applies if, in a prosecution for an offence (the **prosecuted offence**) against subsection (1), the trier of fact:

- (a) is not satisfied that the defendant is guilty of the offence; but
- (b) is satisfied beyond reasonable doubt that the defendant is guilty of an offence (the **alternative offence**) against subsection (2).

(6) The trier of fact may find the defendant not guilty of the prosecuted offence but guilty of the alternative offence, so long as the defendant has been accorded procedural fairness in relation to that finding of guilt.

Note: There is a defence in section 80.3 for acts done in good faith.

## Section 138.2: Menaces

- (1) For the purposes of this Part, **menaces** includes:
- (a) a threat (whether express or implied) of conduct that is detrimental or unpleasant to another person; or
  - (b) a general threat of detrimental or unpleasant conduct that is implied because of the status, office or position of the maker of the threat.

Threat against an individual

- (2) For the purposes of this Part, a threat against an individual is taken not to be **menaces** unless:
- (a) both:
    - (i) the threat would be likely to cause the individual to act unwillingly; and
    - (ii) the maker of the threat is aware of the vulnerability of the individual to the threat; or
  - (b) the threat would be likely to cause a person of normal stability and courage to act unwillingly.

Threat against a person who is not an individual

- (3) For the purposes of this Part, a threat against a person who is not an individual is taken not to be **menaces** unless:
- (a) the threat would ordinarily cause an unwilling response; or
  - (b) the threat would be likely to cause an unwilling response because of a particular vulnerability of which the maker of the threat is aware.

## Section 471.12: Using a postal or similar service to menace, harass or cause offence

A person commits an offence if:

- (a) the person uses a postal or similar service; and
- (b) the person does so in a way (whether by the method of use or the content of a communication, or both) that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive.

Penalty: Imprisonment for 2 years.

## Section 474.15: Using a carriage service to make a threat to kill or cause serious harm

Threat to kill

- (1) A person (the **first person**) commits an offence if:
- (a) the first person uses a carriage service to make to another person (the **second person**) a threat to kill the second person or a third person; and
  - (b) the first person intends the second person to fear that the threat will be carried out.

Penalty: Imprisonment for 10 years.

Threat to cause serious harm

- (2) A person (the **first person**) commits an offence if:
- (a) the first person uses a carriage service to make to another person (the **second person**) a threat to cause serious harm to the second person or a third person; and
  - (b) the first person intends the second person to fear that the threat will be carried out.

Penalty: Imprisonment for 7 years.

Actual fear not necessary

- (3) In a prosecution for an offence against this section, it is not necessary to prove that the person receiving the threat actually feared that the threat would be carried out.

#### Definitions

- (4) In this section:

**“fear”** includes apprehension.

**“threat to cause serious harm to a person”** includes a threat to substantially contribute to serious harm to the person.

## New South Wales

### Crimes Act 1900 (NSW)

#### Section 60E: Assaults etc at schools

- (1) A person who assaults, stalks, harasses or intimidates any school student or member of staff of a school while the student or member of staff is attending a school, although no actual bodily harm is occasioned, is liable to imprisonment for 5 years.
- (2) A person who assaults a school student or member of staff of a school while the student or member of staff is attending a school and by the assault occasions actual bodily harm, is liable to imprisonment for 7 years.
- (3) A person who by any means:
- (a) wounds or causes grievous bodily harm to a school student or member of staff of a school while the student or member of staff is attending a school, and
  - (b) is reckless as to causing actual bodily harm to that student or member of staff or any other person,
- is liable to imprisonment for 12 years.

- (4) A person who enters school premises with intent to commit an offence under another provision of this section is liable to imprisonment for 5 years.
- (5) Nothing in subsection (1) applies to any reasonable disciplinary action taken by a member of staff of a school against a school student.

### Section 249F: Aiding, abetting etc

- (1) A person who aids, abets, counsels, procures, solicits or incites the commission of an offence under this Part is guilty of an offence and is liable to imprisonment for 7 years.
- (2) A person who, in New South Wales, aids, abets, counsels or procures the commission of an offence in any place outside New South Wales, being an offence punishable under the provisions of a law in force in that place which corresponds to a provision of this Part, is guilty of an offence and is liable to imprisonment for 7 years.

### Section 545B: Intimidation or annoyance by violence or otherwise

- (1) Whosoever:

- (a) with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, or
- (b) in consequence of such other person having done any act which he had a legal right to do, or of his having abstained from doing any act which he had a legal right to abstain from doing,

wrongfully and without legal authority:

- (i) uses violence or intimidation to or toward such other person or his wife, child, or dependant, or does any injury to him or to his wife, child, or dependant, or
- (ii) follows such other person about from place to place, or
- (iii) hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof, or
- (iv) (Repealed)
- (v) follows such other person with two or more other persons in a disorderly manner in or through any street, road, or public place,

is liable, on conviction before the Local Court, to imprisonment for 2 years, or to a fine of 50 penalty units, or both.

- (2) In this section:

**Intimidation** means the causing of a reasonable apprehension of injury to a person or to any member of his family or to any of his dependants, or of violence or damage to any person or property, and **intimidate** has a corresponding meaning.

**Injury** includes any injury to a person in respect of his property, business,

occupation, employment, or other source of income, and also includes any actionable wrong of any nature.

## Section 545E: Abetting or procuring

Whosoever, where any offence is by this Act punishable on summary conviction, aids, abets, counsels, or procures the commission of such offence, shall, on conviction by the Local Court, be guilty in the same degree, and liable to the same forfeiture, and punishment, as the principal offender.

# Victoria

## Summary Offences Act 1966 (Victoria)

### Section 17: Obscene, indecent, threatening language and behaviour etc in public

- (1) Any person who in or near a public place or within the view or hearing of any person being or passing therein or thereon—
  - (a) sings an obscene song or ballad;
  - (b) writes or draws exhibits or displays an indecent or obscene word figure or representation;
  - (c) uses profane indecent or obscene language or threatening abusive or insulting words; or
  - (d) behaves in a riotous indecent offensive or insulting manner—

shall be guilty of an offence.

Penalty: 10 penalty units or imprisonment for two months;

For a second offence—15 penalty units or imprisonment for three months;

For a third or subsequent offence—25 penalty units or imprisonment for six months.

- (2) Where in the opinion of the chairman presiding at a public meeting any person in or near the hall room or building in which the meeting is being held—
  - (a) behaves in a riotous indecent offensive threatening or insulting manner; or
  - (b) uses threatening abusive obscene indecent or insulting words—

the chairman may verbally direct any police officer who is present to remove such person from the hall room or building or the neighbourhood thereof and the police officer shall remove such person accordingly.

- (3) Where at a general meeting of a corporation a person wilfully fails to obey a ruling or direction given in good faith by the chairman presiding at the meeting for the preservation of order at the meeting, such person shall be liable to be removed from the meeting if the meeting so resolves or where because the meeting has

been so disrupted that it is not practicable to put such a resolution to the meeting the Chairman so directs.

- (4) Where a person is liable to be removed from a meeting under subsection (3) the Chairman may verbally direct any police officer who is present to remove such person from the hall, room or building in which the meeting is being held or the neighbourhood thereof and the police officer shall remove such person accordingly.

## Crimes Act 1958 (Vic)

### Section 321G: Incitement

- (1) Subject to this Act, where a person in Victoria or elsewhere incites any other person to pursue a course of conduct which will involve the commission of an offence by—

- (a) the person incited;
- (b) the inciter; or
- (c) both the inciter and the person incited—

if the inciting is acted on in accordance with the inciter's intention, the inciter is guilty of the indictable offence of incitement.

- (2) For a person to be guilty under subsection (1) of incitement the person—

- (a) must intend that the offence the subject of the incitement be committed; and
- (b) must intend or believe that any fact or circumstance the existence of which is an element of the offence in question will exist at the time when the conduct constituting the offence is to take place.

- (3) A person may be guilty under subsection (1) of incitement notwithstanding the existence of facts of which the person is unaware which make commission of the offence in question by the course of conduct incited impossible.

## Queensland

### Criminal Code Act 1899 (Queensland)

#### Section 75: Threatening violence

- (1) Any person who—

- (a) (a) with intent to intimidate or annoy any person, by words or conduct threatens to enter or damage a dwelling or other premises; or
- (b) (b) with intent to alarm any person, discharges loaded firearms or does any other act that is likely to cause any person in the vicinity to fear bodily harm to any person or damage to property;



commits a crime.

Maximum penalty—2 years imprisonment.

- (2) If the offence is committed in the night the offender is guilty of a crime, and is liable to imprisonment for 5 years.

## Summary Offences Act 2005 (Queensland)

### Section 6: Public nuisance

- (1) A person must not commit a public nuisance offence.

Maximum penalty—

- (a) if the person commits a public nuisance offence within licensed premises, or in the vicinity of licensed premises—25 penalty units or 6 months imprisonment; or  
(b) otherwise—10 penalty units or 6 months imprisonment.

- (2) (2) A person commits a public nuisance offence if—

(a) the person behaves in—

- (i) a disorderly way; or  
(ii) an offensive way; or  
(iii) a threatening way; or  
(iv) a violent way; and

(b) the person's behaviour interferes, or is likely to interfere, with the peaceful passage through, or enjoyment of, a public place by a member of the public.

- (3) Without limiting subsection (2)—

- (a) a person behaves in an offensive way if the person uses offensive, obscene, indecent or abusive language; and  
(b) a person behaves in a threatening way if the person uses threatening language.

- (4) It is not necessary for a person to make a complaint about the behaviour of another person before a police officer may start a proceeding against the person for a public nuisance offence.

- (5) Also, in a proceeding for a public nuisance offence, more than 1 matter mentioned in subsection (2)(a) may be relied on to prove a single public nuisance offence.

# Western Australia

## Criminal Code Compilation Act 1913 (WA)

### Section 10D: Charge of offence, alternative convictions of attempt etc.

If a person is charged with committing an offence (the **principal offence**), the person, instead of being convicted as charged, may be convicted of —

- (a) attempting to commit; or
- (b) inciting another person to commit; or
- (c) Becoming an accessory after the fact to,

the principal offence or any alternative offence of which a person might be convicted instead of the principal offence.

### Section 10F: Charge of conspiracy, alternative convictions on

If a person is charged with conspiring to commit an offence (the **principal offence**), the person, instead of being convicted as charged, may be convicted of —

- (a) committing the principal offence; or
- (b) attempting to commit the principal offence; or
- (c) inciting another person to commit the principal offence,

but the person shall not be liable to a punishment greater than the greatest punishment to which the person would have been liable if convicted of conspiring to commit the principal offence.

### 74A. Disorderly behaviour in public

(1) In this section —

**behave in a disorderly manner** includes —

- (a) to use insulting, offensive or threatening language; and
- (b) to behave in an insulting, offensive or threatening manner.

(2) A person who behaves in a disorderly manner —

- (a) in a public place or in the sight or hearing of any person who is in a public place; or
- (b) in a police station or lock-up,

is guilty of an offence and is liable to a fine of \$6 000.

(3) A person who has the control or management of a place where food or refreshments are sold to or consumed by the public and who permits a person to behave in a disorderly manner in that place is guilty of an offence and is liable to a fine of \$4 000.

## Section 77: Conduct intended to incite racial animosity or racist harassment

Any person who engages in any conduct, otherwise than in private, by which the person intends to create, promote or increase animosity towards, or harassment of, a racial group, or a person as a member of a racial group, is guilty of a crime and is liable to imprisonment for 14 years.

## Section 78: Conduct likely to incite racial animosity or racist harassment

Any person who engages in any conduct, otherwise than in private, that is likely to create, promote or increase animosity towards, or harassment of, a racial group, or a person as a member of a racial group, is guilty of a crime and is liable to imprisonment for 5 years.

Summary conviction penalty: imprisonment for 2 years and a fine of \$24 000.

## Section 79: Possession of material for dissemination with intent to incite racial animosity or racist harassment

Any person who —

- (a) possesses written or pictorial material that is threatening or abusive intending the material to be published, distributed or displayed whether by that person or another person; and
- (b) intends the publication, distribution or display of the material to create, promote or increase animosity towards, or harassment of, a racial group, or a person as a member of a racial group,

is guilty of a crime and is liable to imprisonment for 14 years.

## Section 80: Possession of material for dissemination that is likely to incite racial animosity or racist harassment

If —

- (a) any person possesses written or pictorial material that is threatening or abusive intending the material to be published, distributed or displayed whether by that person or another person; and
- (b) the publication, distribution or display of the material would be likely to create, promote or increase animosity towards, or harassment of, a racial group, or a person as a member of a racial group,

the person possessing the material is guilty of a crime and is liable to imprisonment for 5 years.

Summary conviction penalty: imprisonment for 2 years and a fine of \$24 000.

## Section 80A: Conduct intended to racially harass

Any person who engages in any conduct, otherwise than in private, by which the person intends to harass a racial group, or a person as a member of a racial group, is guilty of a crime and is liable to imprisonment for 5 years.

Summary conviction penalty: imprisonment for 2 years and a fine of \$24 000.

## Section 80B: Conduct likely to racially harass

Any person who engages in any conduct, otherwise than in private, that is likely to harass a racial group, or a person as a member of a racial group, is guilty of a crime and is liable to imprisonment for 3 years.

Summary conviction penalty: imprisonment for 12 months and a fine of \$12 000.

## Section 80C: Possession of material for display with intent to racially harass

Any person who —

- (a) possesses written or pictorial material that is threatening or abusive intending the material to be displayed whether by that person or another person; and
- (b) intends the display of the material to harass a racial group, or a person as a member of a racial group,

is guilty of a crime and is liable to imprisonment for 5 years.

Alternative offence: s. 80 or 80D.

Summary conviction penalty: imprisonment for 2 years and a fine of \$24 000.

*[Section 80C inserted by No. 80 of 2004 s. 6; amended by No. 70 of 2004 s. 38(1) and (3).]*

## Section 80D: Possession of material for display that is likely to racially harass

If —

- (a) any person possesses written or pictorial material that is threatening or abusive intending the material to be displayed whether by that person or another person; and
- (b) the display of the material would be likely to harass a racial group, or a person as a member of a racial group,

the person possessing the material is guilty of a crime and is liable to imprisonment for 3 years.

Summary conviction penalty: imprisonment for 12 months and a fine of \$12 000.

## Section 338B: Threats

Any person who makes a threat to unlawfully do anything mentioned in section 338(a), (b), (c) or (d) is guilty of a crime and is liable —

- (a) where the threat is to kill a person, to imprisonment for 7 years or, if the offence is committed in circumstances of racial aggravation, to imprisonment for 14 years;
- (b) in the case of any other threat, to imprisonment for 3 years or, if the offence is committed in circumstances of racial aggravation, to imprisonment for 6 years.

Summary conviction penalty in a case to which paragraph (b) applies: imprisonment for 18 months and a fine of \$18 000.

## Section 74: Threat toward dwelling

Any person who —

- (1) With intent to intimidate or annoy any person, threatens to enter or damage a dwelling; or
- (2) With intent to alarm any person in a dwelling, discharges loaded firearms or commits any other breach of the peace;

is guilty of a crime, and is liable to imprisonment for 3 years.

Summary conviction penalty: imprisonment for 12 months and a fine of \$12 000.

## Section 74A: Disorderly behaviour in public

- (1) In this section —

***behave in a disorderly manner*** includes —

- (a) to use insulting, offensive or threatening language; and
- (b) to behave in an insulting, offensive or threatening manner.
- (2) A person who behaves in a disorderly manner —
  - (a) in a public place or in the sight or hearing of any person who is in a public place; or
  - (b) in a police station or lock-up,

is guilty of an offence and is liable to a fine of \$6 000.

- (3) A person who has the control or management of a place where food or refreshments are sold to or consumed by the public and who permits a person to behave in a disorderly manner in that place is guilty of an offence and is liable to a fine of \$4 000.

## Section 204A: Showing offensive material to child under 16

...

**offensive material** means material that —

...

(d) promotes, incites, or instructs in matters of crime or violence,

...

- (1) A person who, with intent to commit a crime, shows offensive material to a child under the age of 16 years is guilty of a crime and is liable to imprisonment for 5 years.
- (2) Upon an indictment charging a person with an offence under subsection (2), a certificate issued under an Act referred to in the definition of **offensive material** in subsection (1) as to the status of any material under that Act is, in the absence of evidence to the contrary, proof of the matters in the certificate.
- (3) It is a defence to a charge under subsection (2) to prove the accused person —
  - (a) believed on reasonable grounds that the child was of or over the age of 16 years; and
  - (b) was not more than 3 years older than the child.

## Section 553: Incitement to commit indictable offence

- (1) Any person who, intending that an indictable offence (the **principal offence**) be committed, incites another person to commit the principal offence, is guilty of a crime.
- (2) A person guilty of a crime under subsection (1) is liable —
  - (a) if the principal offence is punishable on indictment with imprisonment for life — to imprisonment for 14 years;
  - (b) in any other case — to half of the penalty with which the principal offence is punishable on indictment.

Summary conviction penalty: for an offence where the principal offence may be dealt with summarily, the lesser of —

- (a) the penalty with which the principal offence is punishable on summary conviction; or
  - (b) the penalty that is half of the penalty with which the principal offence is punishable on indictment.
- (3) The summary conviction penalty in subsection (2) does not apply to an offence to which section 426 applies.

## Section 555: Attempt and incitement to commit simple offence under this Code

- (1) Any person who attempts to commit a simple offence under this Code is guilty of a simple offence and is liable to the punishment to which a person convicted of the first-mentioned offence is liable.

- (2) Any person who, intending that a simple offence under this Code be committed, incites another person to commit the offence, is guilty of a simple offence and is liable to the punishment to which a person convicted of the first-mentioned offence is liable.
- (3) A prosecution for an offence under subsection (1) or (2) may be commenced at any time if the offence alleged to have been attempted or incited is one for which prosecutions may be commenced at any time.

## South Australia

### Criminal Law Consolidation Act 1935 (SA)

#### Section 19: Unlawful threats

- (1) A person who—
  - (a) threatens, without lawful excuse, to kill or endanger the life of another; and
  - (b) intends to arouse a fear that the threat will be, or is likely to be, carried out, or is recklessly indifferent as to whether such a fear is aroused,is guilty of an offence.  
Maximum penalty:
  - (a) for a basic offence—imprisonment for 10 years;
  - (b) for an aggravated offence—imprisonment for 12 years.
- (2) A person who—
  - (a) threatens, without lawful excuse, to cause harm to another; and
  - (b) intends to arouse a fear that the threat will be, or is likely to be, carried out, or is recklessly indifferent as to whether such a fear is aroused,is guilty of an offence.  
Maximum penalty:
  - (a) for a basic offence—imprisonment for 5 years;
  - (b) for an aggravated offence—imprisonment for 7 years.
- (3) This section applies to a threat directly or indirectly communicated by words (written or spoken) or by conduct, or partially by words and partially by conduct.

# Summary Offences Act 1953 (SA)

## Section 6A: Violent disorder

- (1) If 3 or more persons who are present together use or threaten unlawful violence and the conduct of them (taken together) is such as would cause a person of reasonable firmness present at the scene to fear for his or her personal safety, each of the persons using or threatening unlawful violence is guilty of an offence.

Maximum penalty: \$10 000 or imprisonment for 2 years.

- (2) It is immaterial whether or not the 3 or more persons use or threaten unlawful violence simultaneously.
- (3) No person of reasonable firmness need actually be, or be likely to be, present at the scene.
- (4) An offence under subsection (1) may be committed in private as well as in public places.
- (5) A person is guilty of an offence under subsection (1) only if he or she intends to use or threaten violence or is aware that his or her conduct may be violent or threaten violence.
- (6) Subsection (5) does not affect the determination for the purposes of subsection (1) of the number of persons who use or threaten violence.
- (7) In this section—  
“violence” means any violent conduct, so that—
  - (a) it includes violent conduct towards property as well as violent conduct towards persons; and
  - (b) it is not restricted to conduct causing or intended to cause injury or damage but includes any other violent conduct.

Example—

Throwing at, or towards, a person a missile of a kind capable of causing injury which does not hit, or falls short of, the person.

## Section 7: Disorderly or offensive conduct or language

- (1) A person who, in a public place or a police station—
  - (a) behaves in a disorderly or offensive manner; or
  - (b) fights with another person; or
  - (c) Uses offensive language,

is guilty of an offence.

Maximum penalty: \$1 250 or imprisonment for 3 months.

- (2) A person who disturbs the public peace is guilty of an offence.

Maximum penalty: \$1 250 or imprisonment for 3 months.

- (3) In this section—



“disorderly” includes riotous;

“offensive” includes threatening, abusive or insulting;

“public place” includes, in addition to the places mentioned in section 4 —

- (a) a ship or vessel (not being a naval ship or vessel) in a harbor, port, dock or river;
- (b) premises or a part of premises in respect of which a licence is in force under the *Liquor Licensing Act 1997*.

## Tasmania

### Criminal Code Act 1924 (Tas)

#### Section 192: Stalking

- (1) A person who, with intent to cause another person physical or mental harm or to be apprehensive or fearful, pursues a course of conduct made up of one or more of the following actions:
  - (a) following the other person or a third person;
  - (b) keeping the other person or a third person under surveillance;
  - (c) loitering outside the residence or workplace of the other person or a third person;
  - (d) loitering outside a place that the other person or a third person frequents;
  - (e) entering or interfering with the property of the other person or a third person;
  - (f) sending offensive material to the other person or a third person or leaving offensive material where it is likely to be found by, given to or brought to the attention of the other person or a third person;
  - (g) publishing or transmitting offensive material by electronic or any other means in such a way that the offensive material is likely to be found by, or brought to the attention of, the other person or a third person;
  - (h) using the internet or any other form of electronic communication in a way that could reasonably be expected to cause the other person to be apprehensive or fearful;
  - (i) contacting the other person or a third person by postal, telephonic, electronic or any other means of communication;
  - (j) acting in another way that could reasonably be expected to cause the other person to be apprehensive or fearful –

## Section 196: Criminal defamation

- (1) A person who, without lawful excuse, publishes matter defamatory of another living person (the “victim”) –
  - (a) knowing the matter to be false or without having regard to whether the matter is true or false; and
  - (b) intending to cause serious harm to the victim or any other person or without having regard to whether such harm is caused –is guilty of a crime.

Charge: Defamation.

- (2) In proceedings for an offence under this section, the accused has a lawful excuse for the publication of defamatory matter about the victim if, and only if, subsection (3) applies.
- (3) This subsection applies if the accused would, having regard only to the circumstances happening before or at the time of the publication, have had a defence for the publication if the victim had brought civil proceedings for defamation against the accused.
- (4) The prosecutor bears the onus of negating the existence of a lawful excuse if, and only if, evidence directed to establishing the excuse is first adduced by or on behalf of the accused.
- (5) On a trial before a jury for an offence under this section –
  - (a) the question of whether the matter complained of is capable of bearing a defamatory meaning is a question for determination by the judge; and
  - (b) the question of whether the matter complained of does bear a defamatory meaning is a question for the jury; and
  - (c) the jury may give a general verdict of guilty or not guilty on the issues as a whole.
- (6) A prosecution under this section must not be commenced without the consent of the Director of Public Prosecutions.
- (7) In this section –

publish and “defamatory” have the meanings that those terms have in the law of tort (as modified by the Defamation Act 2005) relating to defamation.

## Section 298: Inciting to commit crimes

Any person who incites another to commit a crime is guilty of a crime.

Charge: Inciting to commit [specify particular crime].

## Police Offences Act 1935 (Tas)

### Section 12: Prohibited language and behaviour

- (1) A person shall not, in any public place, or within the hearing of any person in that place –
- (a) curse or swear;
  - (b) sing any profane or obscene song;
  - (c) use any profane, indecent, obscene, offensive, or blasphemous language;  
or
  - (d) use any threatening, abusive, or insulting words or behaviour calculated to provoke a breach of the peace or whereby a breach of the peace may be occasioned.
- (1A) A person who contravenes a provision of subsection (1) is guilty of an offence and is liable on summary conviction to a penalty not exceeding 3 penalty units or to imprisonment for a term not exceeding 3 months.
- (2) A person convicted in respect of an offence under this section committed within 6 months after he has been convicted of that or any other offence thereunder is liable to double the penalty prescribed in subsection (1) in respect of the offence in respect of which he is so convicted.

### Section 13: Public annoyance

- (1) A person shall not, in a public place –
- (a) behave in a violent, riotous, offensive, or indecent manner;
  - (b) disturb the public peace;
  - (c) engage in disorderly conduct;
  - (d) jostle, insult, or annoy any person;
  - (e) commit any nuisance; or
  - (f) throw, let off, or set fire to any firework.
- (2) A person shall not recklessly throw or discharge a missile to the danger or damage of another person or to the danger or damage of the property of another person.
- (2A) A person shall not, in a public place, supply liquor to a person under the age of 18 years.
- (2B) A person under the age of 18 years shall not consume liquor in a public place.
- (2C) A person under the age of 18 years shall not have possession or control of liquor in a public place.
- (3) A person shall not wilfully disquiet or disturb any meeting, assembly, or congregation of persons assembled for religious worship.
- (3AAA) If a police officer has reasonable grounds to believe that a person is contravening or has contravened subsection (1)(f) or subsection (2), the police officer may, without warrant and using such force, means and assistance as is reasonably necessary –

- (a) detain and search that person; and
- (b) seize –
  - (i) in relation to a contravention under subsection (1)(f), any firework found on that person; and
  - (ii) in relation to a contravention of subsection (2), any missile found on that person.

(3AAB) On conviction of a person of an offence against subsection (1)(f) or subsection (2) any firework or missile seized under subsection (3AAA)(b) is forfeited to the Crown.

(3AA) A person who contravenes a provision of subsection (1), (2), (2A), (2B), (2C) or

(3) is guilty of an offence and is liable on summary conviction to –

- (a) a penalty not exceeding 3 penalty units or to imprisonment for a term not exceeding 3 months, in the case of an offence under subsection (1) or (3);  
or
- (b) a penalty not exceeding 5 penalty units or to imprisonment for a term not exceeding 6 months, in the case of an offence under subsection (2); or
- (c) a penalty not exceeding 10 penalty units or imprisonment for a term not exceeding 6 months, in the case of an offence under subsection (2A), (2B) or (2C).

(3A) A person convicted in respect of an offence under this section committed within 6 months after he has been convicted of that or any other offence thereunder is liable to double the penalty prescribed in respect of the offence in respect of which he is so convicted.

(3B) A police officer may seize liquor in the possession of a person the police officer reasonably believes is committing an offence under subsection (1), (2), (2A), (2B), (2C) or (3).

(3C) If a police officer has seized liquor in accordance with subsection (3B) and the person who has possession of the liquor is subsequently convicted of an offence under subsection (1), (2), (2A), (2B), (2C) or (3), the court that convicted the person may order that the liquor and its container be forfeited to the Crown.

(3D) If –

- (a) a police officer has seized liquor in accordance with subsection (3B); and
- (b) subsequent to the seizure –
  - (i) no proceedings are instituted within a reasonable time for an offence under subsection (1), (2), (2A), (2B), (2C) or (3); or
  - (ii) proceedings are instituted for an offence under one of those subsections but no order for the forfeiture of the liquor is made –

a magistrate may order that the liquor be given to a person the magistrate is satisfied has a right to its possession but if no such order is made or sought within a reasonable time the Commissioner may dispose of the liquor in such manner as the Commissioner considers most appropriate, and shall pay any proceeds into the Consolidated Fund.

(4) A person shall not wilfully leave open any gate or slip-panel or make a gap in any fence for the purpose of permitting or causing any animal, or otherwise wilfully cause or procure any animal, to trespass.

(4A) A person who contravenes a provision of subsection (4) is guilty of an offence and is liable on summary conviction to a penalty not exceeding 3 penalty units.

(5)

(6) A person, being the owner or usual keeper of a stallion, bull, boar, or ram, shall not permit the animal to be in any public place unless it is under the immediate custody or control of some competent person.

(6A) A person who contravenes subsection (6) is guilty of an offence and is liable on summary conviction to a penalty not exceeding 5 penalty units.

(7) A person, being the owner or usual keeper of a horse, mule, hinny, ass, ox, pig, sheep, or goat, other than those mentioned in subsection (6), shall not permit the animal to graze or stray in any public place.

(7A) A person who contravenes subsection (7) is guilty of an offence and is liable on summary conviction to a penalty not exceeding 1 penalty unit or to a penalty not exceeding 3 penalty units for any fifth or subsequent offence within a period of 5 years.

(8) The provisions of subsection (7) do not apply in respect of a milch cow grazing in pursuance of an authority lawfully issued by the body controlling the public place where the cow is grazing; nor to an animal grazing on an unfenced road not within 2.5 kilometres of a city or town.

(9) The owner or usual keeper of any animal mentioned in subsection (7) which is found straying in a public place is liable to the penalty imposed by that subsection, unless he satisfies the court that the presence of the animal therein was not due to the negligence or default of himself, his servant, or agent.

## Section 20: Misbehaviour at public meetings

(1) A person in or near any hall, room, or building in which a public meeting is being held shall not –

(a) behave in a riotous, disorderly, indecent, offensive, threatening, or insulting manner; or

(b) use any threatening, abusive, or insulting words.

(1A) A person who contravenes a provision of subsection (1) is guilty of an offence and is liable on summary conviction to a penalty not exceeding 3 penalty units or to imprisonment for a term not exceeding 3 months.

(2) Where in the opinion of the chairman presiding at any public meeting any person in or near the hall, room, or building in which such meeting is being held commits an offence against this section, such chairman may verbally direct any police officer who is present to remove such person from the said hall, room, or building, or the neighbourhood thereof; and such police officer shall remove such person accordingly.

