Frequently asked questions about Section 18C of the *Racial Discrimination Act* 1975

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If you have any questions pleased don't hesitate to contact

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Question:
What was Section 18C intended to do?

Answer:
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.)

Question:
What does Section 18C do?

Answer:
It makes 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.

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

Answer:
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:

i) 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.)

ii) 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, <u>even if these complaints are unfounded and eventually dismissed.</u>
> 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, p8.)

iii) 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)

iv) 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:

- 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 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.

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 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.)

Question:
How has Section 18C operated?

Answer:
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.

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

Answer:
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 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 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.

Question
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?

Answer:
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.'

Question:

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

Answer:
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).

Question:
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?

Answer:
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).

Question:
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?

Answer:
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.

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

Answer:
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).

Question:
Who supports reforming Section 18C?

Answer:
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 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.