

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

Freedom of speech in Australia

SUBMISSION

- 1 This submission, made in the author's personal capacity, responds to the invitation for public comment alluded to in the Attorney-General's Media Release dated 8 November 2016 and formally extended on the Joint Committee's World Wide Web site.

Personal details

- 2 I was admitted to practise as a Barrister and Solicitor of the Supreme Court of Victoria on 4 April 1969. Prior to the scheme of national admission, I was admitted by the High Court of Australia (1969) and by the Supreme Courts of the ACT (1972), New South Wales (1998), and Tasmania (2001).
- 3 For most of the period between 1969-1971 and 1975-1994, I practised as a litigation solicitor in Melbourne. In the years 1972-1974, I lived and worked in Canberra. I have taught in a part-time capacity in the then Legal Studies Department at La Trobe University and in a part-time capacity (and later for two years in a full-time capacity) in the Faculty of Law at the University of Melbourne. Save for the years in Canberra, I have continuously held a current practising certificate and have been in active practice.
- 4 Since late 1994, I have practised as counsel as a member of the Victorian Bar. Details of my professional work, experience, appointments, and publications (scholarly and journalism) can be found on the web sites of the Victorian and Tasmanian Bars.
- 5 Throughout most of my working life as a lawyer, I have been involved in providing advice and appearing in litigation concerning aspects of freedom of expression – particularly in defamation cases, in disputes about literary, artistic and other publications, and in recent years in cases arising from national security decision-making.

Opinion

- 6 In my opinion, even if Part IIA of the Commonwealth *Racial Discrimination Act* 1995 (RDA) were to survive a challenge to its constitutionality, it should be repealed.¹
- 7 The defects of Part IIA can be summarised as follows:
- It is bad in principle. The right to “offend” is integral to the right to dissent in a free and open society. There should be no right not to be offended;
 - It is based on ideology and abstractions (such as “hate speech” which is no more than a convenient label for avoiding precision in the law). It is an affront to the equality requirement of the rule of law;²

- Its incurable vagueness offends the clarity requirement of the rule of law;
- It has produced incoherence in the law.

Structure of the submission

8 I have endeavoured to describe my position in a way that complies with the Joint Committee’s urging that submissions be concise. For that purpose, the submission is set out in two parts:

Part A is a summary of the elements of my opinion;

Part B is a compressed account of the reasoning underlying my opinion.

9 My expectation is that any member of the public should be able to read Part A alone and understand why I hold my opinion. For readers who are interested in more detail, Part B is an attempt to capture the more precise steps in the analysis.

10 As far as practicable, the contentions advanced in the submission have been informed by my reading of the Report of the Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*.

11 Free speech is often described as a “complex” issue. In my view, a more informative introductory description – as, on its face, the ALRC report demonstrates – involves asserting:

- first, that there are competing public policy choices to be made. The debate about s 18C has demonstrated that some Australians support the limitation embodied in s 18C simply because they are unable to comprehend or accept that fair-minded persons can hold and express starkly contrasting views about “*race, colour or national or ethnic origin of the other person or of some or all of the people in the group*”;

- secondly, that a basic understanding of the relevant legal concepts could not be articulated in four or five pages. Much of the case for s 18C occurs at a high level of abstraction which does not rely on the application of specific legal principles to specific factual situations;

- thirdly, nobody is arguing that free speech should, literally, be “absolute”. On the contrary, there is a large measure of public acceptance of the main categories of existing restrictions on freedom of expression;³

- fourthly, the debate about s 18C is one of those topics which is front and centre of political controversy. The policy question is whether debate about matters of “*race, colour or national or ethnic origin*” can be circumscribed by reason of some special attribute of that topic and/or the language in which debate can take place. Section 18C targets any public “act” which has a tendency to excite an adverse emotional reaction in some other person. All the so-called hate speech statutes share the defect that they treat one category of ideas as entitled to privileged protection;

- finally, that such an understanding requires a consideration of Anglo-Australian legal history. Restrictions on “offensive” speech/conduct have a long history of being used to suppress dissent and impose conformity of thinking.

- 12 The main focus of the submission is on the Joint Committee’s first term of reference.
- 13 The reference of the s 18C controversy is a manifestation of the fact that the broad question of human rights protection is inherently controversial. This is a healthy sign in a free and open society.
- 14 In paragraphs 68-70 below, there is a specific suggestion about the second term of reference. I have expressed criticism of the Australian Human Rights Commission (AHRC). In part, that criticism reflects my opinion, first, that the *Australian Human Rights Commission Act 1986* (Cth) pays far too little attention to the historic protection of human rights under domestic Australian law and, secondly, that the Act should be amended to transfer the complaints handling and decision-making function from the AHRC to an administrative decision-making tribunal which has no policy advice or advocacy functions.
- 15 The submission as a whole is offered as one suggested framework for the Committee’s consideration of Part IIA of the *Racial Discrimination Act 1975*.
- 16 For reasons which are set out below, I do not consider that I can offer any useful comment to the Joint Committee on how s 18C might be retained in some amended form.

PART A – BASIC POSITION

The contest of ideas in a free and open society – a suggested principled framework

- 17 Freedom of individual thought and expression should be acknowledged as being the fundamental freedom in Australia. It is the freedom on which all other individual freedoms depend in any society which claims to be free, democratic and open.
- 18 Insofar as there is any conceptual inconsistency between the protection of freedom of expression as a function of protecting the rights of the individual and protecting the rights of groups, the former long-standing preference of the domestic law should prevail.
- 19 A cursory consideration of the relevant legal history over the past 150 years shows that the individual right to freedom of expression has increased incrementally as democratic institutions have continued to evolve peacefully. Australia is a mature and self-confident democracy. Freedom of expression is not intended to promote conformity of thinking. It reflects the central role that diversity, division and dissent plays in a free and open society. As the majority decision of the High Court of Australia in *Australian Communist Parry v Commonwealth* ⁴ demonstrates, a society can even tolerate the peaceful expression of ideas which promote the overthrow of the existing social system.⁵

- 20 Over the past century, the restrictions on individual freedom of expression have gradually diminished. Two prominent examples are obscenity and blasphemy.⁶
- 21 From time to time, the utility of the right of individual freedom of expression has, necessarily, been called into question. In particular, each successive advancement in communications technology has led to controversies about whether or not a change of circumstances has provided a basis for ending an old form of restriction or imposing a new form of restriction.
- 22 The actual harm that can be done by unrestrained freedom is, alas, all too evident in the scourge of child pornography. The fundamental social obligation to protect children from rape, torture and other forms of violence and degradation, and to ensure, as far as practicable, that children grow up without being corrupted by the unspeakable cruelty and perversions of some adults has meant that legislatures have had to act to suppress the production, distribution, acquisition, use and possession of child pornography.
- 23 In the case of speech-related acts/conduct generally, the emphatic starting point should be on maximising the individual right. It should not be approached as being no more than the residue when every restriction is taken into account.
- 24 And those who contend for restricting the individual right should bear the onus of making out a compelling case for restriction.
- 25 Any such restriction needs to be formulated in a way that embodies clear, workable and fair specific standards. Such standards should be expressed in concrete rather than abstract terms in order to comply with the basic elements of the rule of law and to satisfy the suggested maximisation principle.
- 26 One model for the specification of distinct standards is the jurisprudence of the First Amendment⁷ of the Constitution of the United States of America. That jurisprudence protects a wide range of expressive acts and its specifications include the following:⁸
- The only basis on which speech can be “abridged” is the imminent threat of violence or other lawless conduct or other compelling public interest (sometimes encapsulated in the “clear and present danger” standard). Even abridging the right to urge the overthrow of the government has been held to be subjected to that test;
 - There are to be no prior legal restraints on speech;
 - Prohibitions on “offensive”, “insulting” and other speech labelled in similarly vague language are impermissible;
 - Under the First Amendment, there is no such thing as a false idea. Opinions will differ as to what ideas are “good” or “bad”. Public discussion and debate – which, by definition, promotes diversity – is far preferable to the heavy

hammer of state censorship. It is no less important to ensure that the State be retrained from encouraging self-censorship by individuals;

- The few exceptions to the content-neutrality principle – such as defamation, obscenity, and so-called “fighting words”, have been reduced to very narrow fields of operation;
- Where there is a clear case for content abridgment, as with protection of children from pornography, the law must be carefully drawn to avoid abridging any separate protected category or form of speech;
- The constitutional right can be abridged by reasonable time, place and manner restrictions;
- It is impermissible to compel speech to enforce respect for or loyalty to particular categories of ideas, including, if not especially, the idea of legally enforced equality.

- 27 The debate regarding s 18C has a constitutional dimension. Arguably, Part IIA of the RDA impermissibly interferes with the implied freedom of communication on government and political matters.
- 28 At a more specific contemporary level, freedom of expression is inextricably bound up with aspects of freedom of religion. That freedom is given a measure of express recognition in s116 of the Australian Constitution (which also provides a direct link with the text of the First Amendment).
- 29 Religion, as a category of ideas, beliefs and practices, requires particular scrutiny as a part of the contemporary debate about freedom of expression. Religious conviction/affiliation is an acquired characteristic. It should not be controversial to contend that every individual has the right to be a believer, to express beliefs, to renounce beliefs and to have no religious beliefs and to express the opinion that all such beliefs are manifestations of superstition.⁹
- 30 Notwithstanding a body of public opinion and scholarship which suggests that there is limited, if any, scope for challenging the contemporary orthodoxy concerning the nature and extent of human rights protection in Australia – that it is entirely anchored in international law – that question is, inherently, a matter of social, economic and political controversy.¹⁰
- 31 The international law of human rights is not without imperfections. In a free, open and democratic society, opinions will differ. Choices have to be made, as, for example,
- between an international law approach and a combination of domestic and international law approaches;
 - between an emphasis of legal rights and economic or social or other categories of rights; and,
 - between an emphasis on the individual and on groups.

- 32 If s 18C is beyond the legislative competence of the Parliament as infringing the implied constitutional freedom of communication, that alone will demonstrate its overreach. More specifically, insofar as s 18C makes truthful statements unlawful, it has the potential for inhibiting ordinary public debate.
- 33 The enactment of Part IIA of the RDA was contrary to that tradition and has produced incoherence in the broad context of the protection of dissenting speech.
- 34 The right to dissent is a fundamental characteristic of Australia's democratic tradition. Our history tends to show that it always has to be fought for.¹¹

PART B – SUMMARY OF REASONING

First term of reference

- 35 It is respectfully suggested that this reference provides the Joint Committee with an opportunity to emphasise the integral importance in a free and open society of the right of the individual to form, hold and express dissenting views by way of statements of fact or opinion.
- 36 There are several inter-related issues of principle which, when fully analysed, provide a firm foundation for contending that the enactment of Part IIA of the RDA was a step back from more than a century of ongoing relaxation of censorship.
- 37 **So-called hate speech: Ideology, stereotyping and abstractions.** Section 18C is justified on the basis that it targets “hate speech”. That term is no more than a label. It does not define itself. Hatred is an ordinary human emotion – that of intense dislike. Ideas, beliefs, practices and conduct are not immune from hatred. Moreover, the word “hatred” is at the heart of the law of defamation. A defensible defamatory publication is an expression of fact or opinion which, rightly, subjects a person to “hatred, contempt and ridicule”.¹²
- 38 **The stereotyping of minorities.** The pro-s 18C case is based on an assessment of entire groups of individuals, so-called “minorities”. They are, it is alleged, the “victims” of “hate speech” and they are susceptible to “harm” in ways that “majorities” are not. This view of the world that every individual is to be classed according to a majority or minority “identity” is, in truth, no more than a matter of opinion.
- 39 The starting point of domestic law and the law of defamation in particular, is that every individual is to be accorded equal treatment. There are neither privileged categories of fact or ideas or opinions,¹³ nor privileged groups.
- 40 **Treating some categories of ideas differently.** The ideology of “hate speech” censorship is anti-democratic. It reflects a public policy choice between undifferentiated protection of human rights¹⁴ and the drawing of distinctions between the rights and privileges of individuals based on group membership. One of the defects of the international law emphasis on human rights of groups is

the conspicuous absence in Article 18 of the *International Convention on Civil and Political Rights* (1967) of express mention of the individual's right to reject all religion and to say so out loud, and to be an apostate (collectively "freedom of religion").¹⁵

- 41 That conspicuous absence should not be a matter of surprise when regard is had to the presence of theocracies in the community of nations and the ongoing campaign to secure an international convention outlawing blasphemy.¹⁶
- 42 The claim that freedom of religion is protected by domestic Australian law should not be controversial. It was acknowledged by Chief Justice Latham in *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943)¹⁷ in the context of interpreting s 116 of the *Australian Constitution*.
- 43 **Multiculturalism – beyond debate?** The censorship of so called hate speech is said to be necessary to preserve and promote acceptance of Australian multiculturalism. A reading of the AHRC literature could be taken as suggesting that multiculturalism is beyond serious criticism. Common sense indicates that cross-cultural conflict is a fact of life.¹⁸ The inaugural Independent National Security Legislation Monitor provides one clear example of the gravity of risk to national security of one specific (politico-religious) form of contemporary cultural conflict:
"The presence of religion in terrorist motivations also adds in most cases the weight of monotheism, a shared attribute of Judaism, Christianity and Islam. Sharing that attribute has not historically linked the People of the Book in close friendship. Such tolerance as monotheism permits is toleration, after all, of others who are held to be wrong. None of this helps to prevent social distrust or hostility when different ethnic and cultural groups travel or migrate, including in settler societies such as Australia. The success of multiculturalism cannot conceal this problem."¹⁹
- 44 **Inherent contradictions.** One of the incurable shortcomings of so-called "hate speech" prohibitions is that there are irreconcilable conflicts between the privileged categories of ideas or "identities". For example, the three major monotheistic religions make irreconcilable claims regarding minorities in general, equality of men and women, and what is or is not permissible in terms of human sexual conduct.
- 45 At the forefront of this contradiction is the idea that that in Australia "respect" should be accorded to the content of religious ideas, as distinct from the right to hold and propagate (within the law) such ideas.
- 46 Part of the evidence for this is the nature and extent of the inconsistency displayed by the AHRC in its public responses to contrasting forms of public conduct.
- 47 At one end of the spectrum, there is the recent/ongoing controversy which followed the publication of the artist/cartoonist Bill Leak's cartoon in *The Australian* newspaper on 3 August 2016.

- 48 At the other end of the spectrum is the violent protest which occurred in the streets of central Sydney in September 2016. In the course of that episode, some demonstrators displayed signs exhorting those members of the public who witnessed the protest to murder a group of persons on the basis of their unacceptable religious beliefs (“the offensive sign(s)”).
- 49 So far as I have been able to ascertain from publicly available sources, chiefly the online record of the AHRC, the only public response of the AHRC to the September 2016 episode was the release of a short statement to the media. The AHRC confined itself to saying that the violence was a matter of “disappointment and concern”, and that it had to be understood in the context of anger prompted by behaviour which was disrespectful and offensive to the mob’s religious beliefs.²⁰ In my view, the most charitable assessment that can be offered regarding that statement is that many Australians would regard the AHRC’s response as completely inadequate. Two aggravating considerations make the AHRC’s response deserving of criticism.
- 50 The first was the depravity displayed in the use by some of the protesters of young children to hold aloft such signs. What restrained the AHRC, in the carrying of its statutory duties and functions from condemning, promptly and unequivocally, the abuse of the inculcation in vulnerable children of homicidal religious hatred.²¹
- 51 The second is the AHRC’s persistent conflation of race and religion in part manifested by its determination to ignore the fact (given voice by one member of the Victorian Court of Appeal in 2006) that:
 “[T]here are any number of persons who may despise each other’s faiths and yet bear each other no ill will. I dare say, for example, that there would be a large number of people who would despise Pastor Scot’s perception of Christianity and yet not dream of hating him or be inclined to any of the other stipulated emotions.”²²
- 52 **Section 18D.** A full consideration of s 18D should lead to the conclusions that:
- Although it provides for defences for an alleged contravention of s 18C and although it is on its face inspired largely by the language of the law of defamation, it is, in substance, designed to map out the much wider scope of s 18C than comparable elements of the law of defamation;
 - It is fundamentally different from the law of defamation at least to the extent that –
 - (a) it does not provide that substantial truth is a defence to a public act conveying an “offensive” etc imputation which is properly characterised as one of fact;²³
 - (b) The opaque concept of reasonableness test has no place in the corresponding defence of comment in the law of defamation. The contrary is the case. In 2007, then Chief Justice Gleeson, with his customary clarity and economy said of the important role that the defence of “fair”/honest comment plays in freedom of speech:

“In this context, "fair" does not mean objectively reasonable. The defence protects obstinate, or foolish, or offensive statements of opinion, or inference, or judgment, provided certain conditions are satisfied. The word "fair" refers to limits to what any honest person, however opinionated or prejudiced, would express upon the basis of the relevant facts.”²⁴

- 53 **Incoherence in the law.** Laws which target “offensive”²⁵ speech-related conduct are inherently anti-democratic. They target the tendency of speech to excite negative emotional reactions in the audience. We all have to put up with disagreeable speech. It is part of the price paid for living in a society which is free and open.
- 54 **Imputed/transient psychological harm.** Section 18C also represented a retrograde step in domestic human rights law by distorting the nature of harm which was recognized by the law. With some exceptions,²⁶ the negative emotional reactions embodied in the formulation “offend, insult, humiliate or intimidate” do not amount to “harm” of a kind recognized as compensable.
- 55 A recent judicial encapsulation of that contention can be seen in the following passage of Justice Hayne dissenting in *R v Monis & Droudis* (2013):²⁷
“None of the reactions described – significant anger, significant resentment, outrage, disgust or hatred – constitutes a form of legally cognisable harm. Anger, resentment, outrage, disgust and hatred, however intense, are transient emotional responses which may, and more often than not will, leave no mark upon the individual who experiences them. More than that, the emotional responses described are universal human responses which are among the ‘ordinary and inevitable incidents of life’. They can be provoked for any of a myriad of reasons, in well-nigh any circumstances. Experiencing responses of these kinds does not set the person concerned apart from any save the most sheltered or placid of human beings.”
- 56 **The incurably vague language of censorship.** The applicability of s 18C depends on identifying an audience. F C Hutley (later Mr Justice Hutley) made this point in 1941 regarding the word “insulting”:²⁸
“The statements ‘A is red’ and ‘A is not red’ are contradictories; they cannot both be true and they cannot both be false. But the statements ‘A is insulting’ and ‘A is not insulting’ need not be contradictories, for A may be insulting to B and not insulting to C. In other words the statement ‘A is insulting’ is not really intelligible in and by itself; it requires to be completed.”
- 57 What one person finds “offensive” other persons might find “insulting”, “humiliating” or “intimidating” and so on in varying combinations. Section 18C is incurably obscure. The use in other statutes of nouns such as “vilification” and the use of adverbs such as “seriously” suffer from the same major defect.
- 58 If the long history of judicial consideration of offensive etc speech prohibitions conveys any message, it is that each of the components of the rolled-up formulation “offensive, insulting, humiliating or intimidating” is meaningless as a clear marker of where the line is drawn between a speech act which is lawful

and one which is unlawful. Its meaninglessness is, however, of practical importance in affecting individuals who have no way in advance of knowing whether what they might say amounts to a contravention of s 18C or any comparable prohibition. Such a person may decide to refrain from speaking.

59 Section 18C purports to identify the audience whose sensibilities will be gauged and applied to determine, after the event, whether s 18C has been contravened as “*a person or a group of people*” in respect of whom the impugned act “*is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate*”.

60 In isolation, the “reasonable likelihood” test of tendency is incomplete. Where and how is the line to be drawn between probability and likelihood?

61 The situation is made worse by the elastic formulation “*in all the circumstances*”. What circumstances are they? How can a person ascertain the relevant circumstances prior to deciding whether or not to make a public speech act?

62 **The reality of the “tone” of public debate and discussion in Australia.** Voltaire’s creation, Dr Pangloss²⁹ has something to contribute to the contemporary debate about freedom of speech in Australia. If all was for the best in the best of all possible worlds, all would be respectful and dignified in the sphere of public debate. But in the real world, the terms in which public debate is conducted leaves much to be desired. If a person is looking for “hate speech”, the new social media is disgorging it in torrents day by day. Such speech is best ignored.

63 The law of defamation makes allowance for the use of vulgar abuse and satire. The scope of the law treats the community as an undifferentiated whole, not as the residue after a collection of “minorities” is set aside as requiring special protective privilege.

64 In *Monis & Droudis v R*,³⁰ Justice Hayne made this observation:
“History, not only recent history, teaches that abuse and invective are an inevitable part of political discourse. Abuse and invective are designed to drive a point home by inflicting the pain of humiliation and insult. . .

[I]f the quantity or even permitted nature of political discourse is identified by reference to what most, or most “right-thinking”, members of society would consider appropriate, the voice of the minority will soon be stilled. This is not and cannot be right. . .

65 **The constitutional dimension.** If the question is posed in terms of the standards which govern the operation of the implied freedom of communication, the questions to be asked where a law has the legal or practical effect of burdening political communication, are, first, whether the object of the impugned law is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government (or the procedure for submitting a proposed amendment to the Constitution to the informed decision of the

people),³¹ and, secondly, whether the impugned law achieves its legitimate object or end in a manner which is compatible with the maintenance of the system of representative and responsible government for which the Constitution provides.³²

- 66 The rationale for the implied constitutional freedom of communication on government and political matters is clear enough. So long as the High Court adheres to its jurisprudence, there will be a basis for contending that Part IIA of the *RDA* infringes that limitation on the Parliament's authority to circumscribe public debate on ideas relating to race, colour or national or ethnic origin (and equality).

Second term of reference

- 67 In my opinion, the *Australian Human Rights Commission Act* 1986 (Cth) has an inherent defect. This has become glaringly obvious in the context of developments in 2016 affecting Part IIA of the *RDA*.
- 68 The combination of disputes-handling and related decision-making functions with the AHRC's advocacy role inevitably creates an appearance of institutionalised bias when it sets about actively inciting the making of complaints under the Act as happened in the case of the notorious Bill Leak cartoon.³³
- 69 This is reinforced by the Aesopian nature of the legislative obligation of the AHRC to act in a "collegiate". At the least, the AHRC Act should be amended to transfer the power to receive and process complaints to an administrative tribunal whose sole purpose is that function within the constraints of the Australian Constitution.
- 70 I record my appreciation for the opportunity afforded by the Joint Committee to make this submission. I will be happy to respond to any questions or comments which the Joint Committee may care to communicate regarding the contents of this submission.

Laurence W Maher
Douglas Menzies Chambers
Melbourne, Vic
9 December 2016

Endnotes

¹ My contributions to the public debate on s 18C can be found in *Dissent* (Australia), *Online Opinion*, *Quadrant Online*, *Spectator Australia*, *Spiked*, and *The Australian Rationalist*, and in the letters to the editor column of *The Australian*.

² One prominent attempt to provide a scholarly foundation for the mischief/“harm” of so-called hate speech is Jeremy Waldron, *The Harm in Hate Speech* (2014).

³ Such as copyright (and other intellectual and proprietary rights), contempt of court, fraudulent and other injurious statements in trade and commerce, defence secrets, certain categories of information imparted in confidence.

⁴ (1951) 83 CLR 1; See “To Hell with Democracy! Australia’s Theocrats and the New Blasphemy”, *The Australian Rationalist*, No 102, Spring 2016.

⁵ There is one organization in Australia which, on politico-religious grounds, rejects Australia’s secular democratic form of government, *The Australian Rationalist*, No 102, Spring 2016.

⁶ *Pell v Council of Trustees of the National Gallery of Victoria v Pell* (1998) 2 VR 397. Twenty years ago, sedition was obsolescent. It was revived by the *Anti-Terrorism Act (No 2)* 2005 (No 144), Schedule 7.

⁷ “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

⁸ This is dealt with in “The Right to Offend”, *Dissent*, No 41, Autumn/Winter 2013, 43. The approach contended for in this submission draws on the scholarship of Zechariah Chafee, *Free Speech in the United States*, (OUP, 1941); Thomas I Emerson, *The System of Freedom of Expression* (Vintage Books, 1971); Ronald Dworkin. For a small sample of the application of the principles, see *Cantwell v Connecticut*, 310 US 296 (1940); *Chaplinsky v State of New Hampshire* 315 US 568; (1942); *Cohen v California* 403 US 15 (1971); *National Socialist Party of America v Village of Skokie*, 432 US 43 (1977); *RAV v City of St. Paul, Minnesota* 505 US 377 (1992); *Hurley v Irish-American Gay Group of Boston* 515 US 557 (1995); *Snyder v Phelps* 562 US 443 (2011).

⁹ In the context of the s 18C debate, some commentators have denied In September 2012, the then Australian Prime Minister in an address to the General Assembly of the United Nations stated that “*Denigration of religious beliefs is never acceptable*”. This claim is unambiguous. In reality, in a variety of contexts, it is rejected every day.

¹⁰ Part of the orthodoxy appears to be that Australia is somehow less of a democratic state because it lacks a Bill of Rights (of one form or another). This can only be a matter of opinion.

¹¹ Detailed consideration of the use of sedition prosecutions in Cold War Australia (1992) 14 *Sydney L Rev* 288; (1994) 16 *Adelaide L Rev* 1.

¹² Three instructive studies are Joel M Gora, David Goldberger, Gary M Stern and Morton H Halperin, *The Right to Protest: The Basic American Civil Liberties Union Guide to Free Expression* (Southern Illinois University Press, 1991); Samuel Walker, *Hate Speech: The History of an American Controversy* (University of Nebraska Press, 1994) and Philippa Strum, *When the Nazis Came to Skokie: Freedom for Speech We Hate* (University Press of Kansas, 1999). See also “Free Speech and its Postmodern Adversaries” (2001) 8 *Murdoch U Electronic Journal of Law* 12.

¹³ Although there may be privileged occasions or types of communications.

¹⁴ Reflected at an international level by the *Universal Declaration of Human Rights* (1948).

¹⁵ The AHRC contends that such a right is implied in Art 18.

¹⁶ See generally *The Cairo Declaration* (1990); UN General Assembly Resolution 62/154; Human Rights and Equal Opportunity Commission *Combating the Defamation of Religions* (2008).

¹⁷ (1943) 67 CLR 116.

¹⁸ This is dealt with in 2016.

¹⁹ Mr Bret Walker SC, Independent National Security Legislation Monitor, *First Annual Report* (2011).

²⁰ AHRC Media Release, “Violent Protest in Sydney”, 18 September 2012.

²¹ *Declaration of the Rights of the Child* proclaimed by the General Assembly of the United Nations on 20 November 1959; *Australian Human Rights Commission Act* 1986, ss 3, 8(1)(b), 10A, Part IIAA, Schedule 3.

²² *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* (2006) 15 VR 207 (Nettle JA)

²³ *Eatock v Bolt* (2011) 197 FCR 261 stands for the proposition that a truthful statement can contravene s 18C if, for example, the “tone” in which its expressed is impermissible. That is, with the utmost of respect to the learned trial judge, a vague and unworkable precept.

²⁴ *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245.

²⁵ There are shades of meaning, but for present purposes, no material distinction between the word “offensive” and the words “insulting”, humiliating, or intimidating” or other words used in offensive speech statutes such as “objectionable”, “threatening”, “indecent”, “obscene”, “annoying”, “menacing”, “harassing”, “blasphemous”.

²⁶ The fact that s 18C imposes civil liability only is a reminder that some speech-related “conduct” such as threats of or inciting violence is punishable because it involves the commission of a serious crime. In personal injury law, pain and suffering are compensable. In the law of defamation, notional injury to reputation and hurt feelings is compensable. Otherwise, there can be liability for negligent infliction of psychological injury, but it must be a recognized psychological disorder.

²⁷ [2013] HCA 4.

²⁸ “Insulting Words” (1941) 14 ALJ 384.

²⁹ *Candide* (1759).

³⁰ [2013] HCA 4.

³¹ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

³² *Coleman v Power* (2004) 220 CLR 1; *Wotton v Queensland* [2012] HCA 2.

³³ It seems to me that, in terms of the test for ostensible bias in decision-making, the ordinary reasonable person would detect the appearance of opportunism in the AHRC’s exercise of its statutory functions in that, acting collegiately through the Race Discrimination Commissioner’s Twitter account and Facebook page, it chose to publish (and continues to publish) the offending Bill Leak cartoon.