

## Submission to the Parliamentary Joint Committee on Human Rights on Freedom of Speech in Australia

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What follows is our submission to the Parliamentary Joint Committee on Human Rights regarding Freedom of Speech in Australia, specifically with respect to:

- Whether the operation of Part IIA of the *Racial Discrimination Act 1975* (Cth) ('RDA') (including sections 18C and 18D) imposes unreasonable restrictions on freedom of speech; and
- Whether the complaints-handling procedures of the Australian Human Rights Commission ('AHRC') should be reformed.

Before going further, we should note that two of us (Dr Augusto Zimmermann and Lorraine Finlay) lecture in constitutional law at Murdoch University. Further, we are all co-authors of recent academic works that examine the constitutional validity of s 18C of the RDA<sup>1</sup> and of certain State hate speech laws. These works are:

- Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) (referred to below as '*No Offence Intended*'); and

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<sup>1</sup> Subsequent mentions of s 18C of the RDA will be to just 'section 18C' or 's 18C' as the case requires.

- Joshua Forrester, Augusto Zimmermann and Lorraine Finlay, ‘An Opportunity Missed? A Constitutional Analysis of Proposed Reforms to Tasmania’s ‘Hate Speech’ Laws’ (2016) 7 *The Western Australian Jurist* 275 (referred to below as ‘*An Opportunity Missed?*’).

Those wanting to consider our arguments in more detail should read these works. This submission summarises certain key arguments of ours. In addition, our submission assesses the AHRC’s role in administering s 18C.

## **1. Executive summary**

1. Section 18C is unconstitutional. This is because:
  - a. It is not supported by s 51(xxix) of the *Commonwealth Constitution*, known (and referred to below) as the ‘external affairs power’. Section 18C cannot be reasonably be considered appropriate and adapted to implementing relevant Articles of the following treaties:
    - i. *Convention on the Elimination of All Forms of Racial Discrimination* (‘Convention’).
    - ii. *International Covenant on Civil and Political Rights* (‘ICCPR’).
  - b. It impermissibly infringes the freedom to communicate about government and political matters implied from the *Commonwealth Constitution* (referred to below as ‘the implied freedom of political communication’).
2. Simply put, s 18C is too broad and too vague to be constitutional. It targets acts that, in many cases, have little if anything to do with racial hatred. The terms it uses also create

significant uncertainties about “where the line is drawn” between lawful and unlawful conduct.

3. Section 18C’s constitutional invalidity cannot be remedied by merely removing ‘offend’ and ‘insult’. This is because constitutional issues remain with ‘humiliate’ and ‘intimidate’.
4. Section 18D of the RDA,<sup>2</sup> which provides exemptions to acts that s 18C makes unlawful, is itself constitutionally invalid. This is because it is not reasonably capable of being considered appropriate and adapted to implementing the Convention.
5. Consequently, ss 18C and 18D must be removed entirely. They should be replaced with a more narrowly focused law that makes intent to incite racial enmity a crime. Enmity is defined as hatred or contempt creating an imminent danger of physical harm to persons or property.
6. The AHRC’s processes and structure must change. In particular:
  - a. It should be statutorily obliged to directly notify a respondent of a complaint made under the RDA and other human rights statutes immediately following a complaint being lodged; and
  - b. In place of the existing AHRC, there needs to be two new entities that are statutorily and physically separate. One entity is dedicated to processing complaints (including rejecting claims that have no reasonable prospect of success before a court) and conciliation. The other entity educates and advocates on issues concerning human rights. Splitting these functions, along with officers

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<sup>2</sup> Subsequent mentions of s 18D of the RDA will be to just ‘section 18D’ or ‘s 18D’ as the case requires.

of these separate entities abiding by their roles, should address issues concerning procedural fairness.

## **2. The importance of the question of constitutional validity**

Somewhat remarkably, an often-overlooked issue in contemporary debates over s 18C is whether it is in fact constitutionally valid. Section 18C's constitutional validity has never been challenged in the High Court of Australia. However, s 18C's constitutional validity cannot be taken for granted for two reasons.

First, for reasons given below, the leading case holding that s 18C's is constitutionally valid, *Toben v Jones*,<sup>3</sup> is in error. In any event, the Full Court of the Federal Court in *Toben* only considered whether s 18C was constitutionally valid under the external affairs power. It did not consider whether s 18C impermissibly infringed implied freedom of political communication.

Second, the law concerning the implied freedom of political communication has undergone significant development since s 18C was inserted into the RDA. Section 18C may not (and does not) pass the test for constitutional validity stated in the most recent High Court case concerning the implied freedom of political communication, *McCloy v New South Wales*.<sup>4</sup>

As a final point, if s 18C is to be reformed or repealed, the Commonwealth Parliament must be mindful of the limits imposed by the external affairs power and the implied freedom of political communication. Put another way, the Commonwealth Parliament must be aware of what a racial vilification law can and cannot do.

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<sup>3</sup> [2003] FCAFC 137; (2003) 129 FCR 505 (*Toben*).

<sup>4</sup> [2015] HCA 34 (*McCloy*)

Before exploring the constitutional issues with s 18C, it is worth noting some background relevant to its enactment.

### 3. Relevant background to s 18C

The RDA was enacted in 1975. Originally, the Bill introducing the RDA contained a provision, clause 28,<sup>5</sup> that made incitement to racial hatred a crime. Clause 28 was more confined in scope than s 18C. However, during the course of Parliamentary debate, clause 28 was removed owing to concerns about its effect on freedom of expression.

Prior to s 18C's insertion in 1995, several reports recommended a Commonwealth law prohibiting expression of racial hatred. These reports were:

- The Royal Commission into Aboriginal Deaths in Custody in 1991 ('Royal Commission');<sup>6</sup>
- The Human Rights and Equal Opportunity Commission's *National Inquiry into Racist Violence* in 1991 ('Inquiry');<sup>7</sup> and
- The Australian Law Reform Commission's ('ALRC's') report, *Multiculturalism and the Law* ('ALRC Report').<sup>8</sup>

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<sup>5</sup> Clause 28 provided:

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 the race, colour or national or ethnic origin of the persons included in the 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>6</sup> Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991).

<sup>7</sup> Human Rights and Equal Opportunity Commission, *National Enquiry into Racist Violence* (Australian Government Publishing Service, 1991).

However, *none* of these reports recommended that speech that offended, insulted or even humiliated be made unlawful.<sup>9</sup> Indeed, the Inquiry noted:

The threshold for prohibited conduct needs to be higher than expressions of mere ill will to prevent the situation in New Zealand, where legislation produced a host of trivial complaints. The Inquiry is of the opinion that the term “incitement to racial hostility” conveys the level and degree of conduct with which the legislation would be concerned.<sup>10</sup>

In 1995, the RDA was amended to include s 18C. However, in the *Bills Digest* accompanying the Bill inserting s 18C, the Parliamentary Research Service thought that s 18C could be vulnerable to constitutional challenge, noting:

There is no requirement in proposed s. 18C that the act include ideas based on racial superiority or hatred, or incite racial discrimination or violence, nor is there a requirement that it involve the advocacy or racial hatred or incite hostility. There appears to be quite a wide chasm between racial hatred and ‘offending’ a person by an act, where one of the reasons for the act was the race of a person.<sup>11</sup>

Recently, the ALRC noted that s 18C may be vulnerable to constitutional challenge<sup>12</sup> because the external affairs power does not support s 18C’s use of ‘offence’ and ‘insult’,<sup>13</sup> or that

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<sup>8</sup> Australian Law Reform Commission, *Multiculturalism and the Law*, Report No 57 (1992).

<sup>9</sup> The Royal Commission supported legislation modelled on NSW’s racial vilification, albeit with some modifications (including only having a civil and not a criminal provision): Royal Commission [28.3.48]-[28.4.49]. NSW’s civil racial vilification provision makes unlawful public acts that incite hatred towards, serious contempt for, or severe ridicule of a person or group of people on the grounds of race: see *ibid* [28.3.38]. The Inquiry recommended enacting criminal provisions against racist violence and intimidation, and also incitement to racist violence and racial hatred. It further recommended civil provisions against abusive, threatening and intimidatory conduct constituting harassment, and also incitement to racial hostility: Inquiry 297-300. The ALRC Report recommended a civil provision making unlawful incitement to racist hatred and hostility: ALRC Report [7.47]. For further discussion see Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 96-9.

<sup>10</sup> Inquiry 300.

<sup>11</sup> Parliamentary Research Service (Department of the Parliamentary Library), *Bills Digest: Racial Hatred Bill 1994*, 14 November 1994, 12.

<sup>12</sup> Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Report No 129 (2015) [4.202].

<sup>13</sup> *Ibid* [4.203].

these words are constitutionally invalid given the implied freedom of political communication.<sup>14</sup>

We will now examine s 18C's constitutional invalidity with respect to the external affairs power and the implied freedom of political communication. We start with the external affairs power.

#### **4. The external affairs power**

For the Commonwealth Parliament to pass a valid law, the law's subject matter must fall within a power conferred onto the Commonwealth Parliament by ss 51<sup>15</sup> or 52 of the *Commonwealth Constitution*. In s 51, the head of power that is most relevant to s 18C is the external affairs power.

In s 18C's case, the Commonwealth Parliament purported to implement Articles of the Convention and ICCPR relevant to prohibiting racial hatred. Hence, the Commonwealth Parliament was implementing a treaty. However, the High Court has held that, in order to validly implement a treaty, the law must pass a four-stage test:

1. The treaty is a bona fide treaty.
2. The subject of the treaty is a matter of international concern.
3. The treaty specifically obliges the Commonwealth of Australia to take legislative action (known as the 'specificity requirement').
4. The law conforms to the relevant treaty (known as the 'conformity requirement').

There is no issue that both the Convention and the ICCPR are bona fide treaties addressing matters of international concern. However, there are issues concerning whether 18C meets

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<sup>14</sup> Ibid [4.204].

<sup>15</sup> Subsequent mentions of s 51 of the *Commonwealth Constitution* will be to just 'section 51' or 's 51' as the case requires.

the specificity and conformity requirements for implementing relevant Articles of the Convention and the ICCPR. We will provide an overview of these issues with respect to Articles 2,<sup>16</sup> 4,<sup>17</sup> and 7<sup>18</sup> of the Convention, and then Article 20(2)<sup>19</sup> of the ICCPR. Given that Article 4 of the Convention is the Article most relevant to s 18C, we cover it first.

#### 4.1 Article 4

Section 18C fails to meet the conformity requirement to implement Article 4. The test for the conformity requirement is **whether the law is reasonably capable of being considered appropriate and adapted to implementing the treaty.**<sup>20</sup>

The part of Article 4 most relevant to s 18C is Article 4(a), which provides:

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, *inter alia*:

1. Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

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<sup>16</sup> Subsequent mentions of Article 2 of the Convention will be to just 'Article 2'.

<sup>17</sup> Subsequent mentions of Article 4 of the Convention will be to just 'Article 4'.

<sup>18</sup> Subsequent mentions of Article 7 of the Convention will be to just 'Article 7'.

<sup>19</sup> Subsequent mentions of Article 20(2) of the ICCPR will be to just 'Article 20(2)'.

<sup>20</sup> *Victoria v Commonwealth of Australia* [1996] HCA 56; (1996) 187 CLR 416, 487 (Brennan CJ, Toohey, Gaudron, McHugh & Gummow JJ).



Particularly relevant to s 18C's compliance with the conformity requirement are the following types of conduct that States Parties should prohibit under Article 4(a):

- The dissemination of ideas based on racial superiority or hatred; and
- The incitement to racial discrimination or violence.

#### 4.1.1 *Dissemination of ideas based on racial superiority or hatred*

We note the following passage from *No Offence Intended*:

...Article 4 directs States Parties to do a Herculean task: to enact laws prohibiting expression based on an *emotion*, namely hatred. We say "Herculean" because while the task is not impossible, it is difficult. Laws rarely prohibit conduct embodying or creating emotions, for good reason. Laws can and do concern themselves with states of consciousness, with *mens rea* (or "the guilty mind") and intent being the classic examples. However, these states of mind pertain to *knowledge* or *volition* and not *feelings*.

It is one thing to attach legal liability on a state of mind that the accused has consciously created, like knowledge or volition. It is another to attach legal liability to an emotion: a state of mind whose origins may not be conscious but visceral. Of course, individuals are responsible for controlling their own emotions. Hence, a law could (but not necessarily *should*) impose liability for expression *manifesting* an emotion. However, it is legitimate to ask whether the law should impose liability on expression that *creates* an emotional response in *other* people. Given that an emotional response is visceral, another's emotional response to an individual's expression may vary widely.

Despite these conceptual difficulties, laws can and do attach legal liability to manifesting or creating an emotion. However, such laws may encounter further difficulties defining the emotion, and hence the actual scope of the law. There may also be difficulties proving that certain conduct manifested or created the prohibited emotion. Confining the prohibited emotion

to that against certain groups creates additional problems with defining who is or is not a member of the group.<sup>21</sup>

In targeting the dissemination of certain ideas, Article 4(a) uses a strong word: hate. Not dislike, not disdain. Hate.<sup>22</sup>

Hate itself is a strong and distinct emotion. In targeting hatred, Article 4 specifies laws prohibiting expression that *is motivated by*, that *manifests*, or that *creates* hatred towards another race, colour or ethnicity.<sup>23</sup> However, in purporting to combat racial hatred, s 18C targets **the wrong feelings, in the wrong people**. This is because:

- Despite s 18C being within Part IIA of the RDA, which is titled “Prohibition of Offensive Behaviour Based on Racial Hatred”,<sup>24</sup> s 18C itself does not target hatred. Instead, it targets emotions that, in many cases, have little if anything to do with hatred. Offence, insult and humiliation are themselves emotions distinct from hatred. An act that creates offence, insult or humiliation will, in many cases, *not* create hatred. Further, creating offence, insult or humiliation will, in many cases, *not* feed a climate that eventually results in hatred.<sup>25</sup>
- Section 18C focuses on the feelings of the person or group of people who are the subject of the act. That is, whether that person or group of people are reasonably

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<sup>21</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 38-9 (citations omitted, emphasis in original).

<sup>22</sup> Lorraine Finlay, Augusto Zimmermann and Joshua Forrester, ‘Section 18C is too broad and too vague, and should be repealed’, *The Conversation* (online), 31 August 2016 < <https://theconversation.com/section-18c-is-too-broad-and-too-vague-and-should-be-repealed-64482>>.

<sup>23</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 45-6.

<sup>24</sup> RDA Part IIA.

<sup>25</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 46-8

likely<sup>26</sup> to be offended, insulted or humiliated. It does not focus, as it should, on the feelings of people *toward* that person or group. That is, whether the act is motivated by, manifests or creates hatred *towards* the person or group of people who are the subject of the act.<sup>27</sup>

As we said in *No Offence Intended*:

Section 18C therefore appears to greatly overreach the boundaries that Article 4 sets for prohibited expression. Indeed, it is no exaggeration to say that s 18C's approach to implementing Article 4 is not just legislative overreach, but legislative overkill. However, even if it were only a case of legislative overreach, then this is sufficient to say that s 18C is not reasonably capable of being a suitable or fitting way of implementing Article 4. Hence, s 18C fails the conformity requirement.<sup>28</sup>

We then noted the following about s 18D:

Section 18C's overreach is not remedied by s 18D. This is because s 18D provides that acts are not unlawful so long as they are (amongst other things) made 'reasonably and in good faith'. However, speech that offends, insults and even humiliates will fall short of the harm threshold Article 4 requires even if that speech is made *unreasonably* and in *bad faith*. Speech that offends, insults or humiliates is often unfair, tendentious, gratuitous, hyperbolic or disingenuous. "Cheap shots" and "hits below the belt" abound. This is especially so when it comes to discussing contentious political or social issues. However, many (if not most)

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<sup>26</sup> We should note that the test requires only the act be 'reasonably likely' to offend, insult or humiliate. It does not require actual offence, insult or humiliation. In the context of a law affecting freedom of expression, this scope is unacceptably wide: someone may be held liable for an act that may not actually have offended anyone.

<sup>27</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 48-9.

<sup>28</sup> *Ibid* 50 (citation omitted, emphasis in original).

instances of such speech will also *not* be based on racial hatred, or amount to threats or incitement to racial hatred.<sup>29</sup>

When considering ss 18C and 18D it is also essential not to forget the importance of the underlying freedom, and that **the relationship between the right and the restriction is not reversed**. Whilst freedom of speech is not absolute,<sup>30</sup> any limitations on that right must be carefully drafted to conform with the requirements of necessity and proportionality.<sup>31</sup> Indeed, the United Nations Human Rights Committee has repeatedly emphasised that:<sup>32</sup>

... [W]hen a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. The Committee recalls that the relation between right and restriction and between norm and exception must not be reversed.

However, to continue the “overkill” metaphor, s 18C is the equivalent of bombing an entire suburb in order to destroy the house whose occupant might intend to punch someone.

Ultimately, if the Commonwealth Parliament wants a law targeting racial hatred, **then it should draft a law targeting racial hatred**. It should not draft laws targeting emotions that in many cases have little, if anything, to do with hatred. We propose an alternative law against expression of racial hatred below.

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<sup>29</sup> Ibid 50-1 (citations omitted).

<sup>30</sup> Although, as we noted in *No Offence Intended*, ‘It is disturbing how often the following formulation is heard: “Of course, rights/freedoms are not absolute, so [insert sweeping intrusion into the relevant right/freedom here]”: see Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 130 fn 475.

<sup>31</sup> See, for example, United Nations Human Rights Committee, *General comment No. 34* (CCPR/C/GC/34), 12 September 2011, [22].

<sup>32</sup> Ibid [21].

#### 4.1.2 *Incitement to racial discrimination or violence*

Article 4(a) also prohibits incitement to racial discrimination, and incitement to violence against ‘any race or group of persons of another colour or ethnic origin’. The *Macquarie Dictionary* defines ‘incite’ as:

‘[T]o urge on; stimulate or prompt to action.’<sup>33</sup>

Incitement appears to involve a purposive element. That is, the conscious urging of racial discrimination or violence against people of a different race, colour or ethnicity. This suggests that laws should contain an element of incitement. That is, the law should target a person’s subjective intent to urge racial discrimination or violence, which then manifests in acts that urge these things. Alternatively, laws may determine objectively whether a person crossed a legal threshold for inciting racial discrimination or racial violence, although great care must be taken when formulating an objective test.<sup>34</sup>

In this regard, Section 18C goes well beyond the type of law envisaged by Article 4(a). It has no element of intent. Further, and once again, it takes an overkill approach. Acts that offend, insult or even humiliate in many cases simply do not lead to racial discrimination or violence.

#### 4.1.3 *Article 5*

So far, we have only focused on Article 4(a) itself. However, the analysis cannot stop there. This is because laws prohibiting the conduct described in Article 4 must pay ‘due regard to the principles embodied in the Universal Declaration of Human Rights and the rights

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<sup>33</sup> Susan Butler (ed), *Macquarie Concise Dictionary* (Macquarie Dictionary Publishers, 6<sup>th</sup> ed, 2013) 750 (‘*Macquarie Dictionary*’).

<sup>34</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 41.

expressly set forth in article 5 of this Convention’.<sup>35</sup> Among the rights expressly set forth in Article 5 is freedom of opinion and expression,<sup>36</sup> and equality before the law.<sup>37</sup> Article 5 states that these rights are to be *guaranteed* ‘without distinction as to race, colour, or national or ethnic origin’.<sup>38</sup>

The reason why Article 4 was inserted, and why Article 4 expressly refers to Article 5, relates back to the initial negotiations over the Convention’s provisions. Specifically, that the ‘objective of Article 4, designed to safeguard certain human rights and fundamental freedoms, *should not be achieved at the expense of other equally fundamental human rights*.’<sup>39</sup> Hence, ‘[t]he phrase beginning with ‘with due regard’ was introduced... in order to meet objections of those who maintained that Article 4 would violate the principles of freedom of speech and freedom of association.’<sup>40</sup>

When applied to the test for the conformity requirement, the question becomes this: is s 18C reasonably capable of being considered appropriate and adapted to implementing Article 4, *while paying due regard to the right to freedom of opinion and expression guaranteed in Article 5*? The answer is no. Indeed, s 18C’s “overkill” approach appears even more stark.

However, s 18C’s issues with Article 5 do not stop there. As noted above, Article 5 also guarantees the right to equality before the law. Section 18C fails the conformity test in this regard. As presently drafted, s 18C determines offence, insult or humiliation ‘in all the

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<sup>35</sup> Article 4. Subsequent mentions of Article 5 of the Convention will be to just ‘Article 5’.

<sup>36</sup> Article 5(d)(vii).

<sup>37</sup> Article 5.

<sup>38</sup> Ibid. As to the guarantee of rights, the relevant part of Article 5 reads: ‘...States Parties undertake... to *guarantee* the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: [which include the right to freedom of opinion and expression]’ (emphasis ours).

<sup>39</sup> Egon Schwelb, ‘The International Convention on the Elimination of All Forms of Racial Discrimination’ (1966) 15 *International and Comparative Law Quarterly* 996, 1024 (emphasis ours).

<sup>40</sup> Natan Lerner, *The UN Convention on the Elimination of all Forms of Racial Discrimination* (Sijthoff & Noordhoff, 2<sup>nd</sup> ed, 1980) 48 (citations omitted).

circumstances’.<sup>41</sup> In cases interpreting s 18C, a ‘reasonable representative’ test has been used. That is, whether a ‘reasonable representative’ of the group or sub-group subject to the act would be offended, insulted or humiliated. In determining this, the values and standards of the group or sub-group are taken into account, as well as its social, cultural, historical or other circumstances.<sup>42</sup> Given the scope of the phrase ‘in all the circumstances’, the race, culture, ethnicity and nationality of the speaker should also be taken into account.

This means that, when determining a breach of s 18C – and the legal liability that follows – the following factors are relevant:

- The race, colour, ethnicity and/or nationality of the audience; and
- The race, colour, ethnicity and/or nationality of the speaker.

This gives rise to the real risk of inequality before the law. For example, something that an Aboriginal says to an Aboriginal audience may not breach s 18C; whereas a non-Aboriginal saying the same thing to an Aboriginal audience may breach s 18C. To illustrate, in the recent controversy over Bill Leak’s cartoon in *The Australian* (which we cover in more detail below), would there have been similar moves to investigate Bill Leak under s 18C had he been Aboriginal? If this s 18C complaint had proceeded to investigation, or even later to court proceedings, would the outcome be different had Bill Leak been Aboriginal?

Our point is this: the ‘reasonable representative test’ appears to arise from s 18C’s wording that a breach be determined ‘in all the circumstances’. However, making someone’s legal liability dependent on their own and their audience’s race, colour, ethnicity or nationality fails the conformity requirement. That is, s 18C is not reasonably capable of being considered

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<sup>41</sup> RDA s 18C(1)(a).

<sup>42</sup> *Eatock v Bolt* [2011] FCA 1103; (2011) 197 FCR 261, 321 [253], 322 [257] (Bromberg J). See also Adrienne Stone, ‘The Ironic Aftermath of *Eatock v Bolt*’ (2015) 38 *Melbourne University Law Review* 926, 931.

appropriate and adapted to implementing Article 4, *while paying due regard to the right to equality before the law in guaranteed in Article 5.*

Indeed, **s 18C’s discriminatory operation breaches Articles 2(1)(a) and 2(1)(c) of the Convention.** Article 2(1)(a) provides:

Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;

Article 2(1)(c) provides:

Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

Articles 1(4) and 2(2) of Convention do allow “affirmative action” measures. However, these Articles do not apply to s 18C. This is because they only allow temporary affirmative action measures that are carefully targeted. As the Committee on the Elimination of Racial Discrimination noted:

Special measures should be appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, *and be temporary.* The measures should be designed and implemented on the basis of need, grounded in a realistic appraisal of the current situation of the individuals and communities concerned.

Appraisals of the need for special measures should be carried out on the basis of accurate data, disaggregated by race, colour, descent and ethnic or national origin and incorporating a gender



perspective, on the socio-economic and cultural status and conditions of the various groups in the population and their participation in the social and economic development of the country.<sup>43</sup>

By contrast, s 18C is a permanent law. Indeed, the operation of the ‘reasonable representative’ test will mean that racial discrimination will become *more* entrenched as a body of precedent is built.<sup>44</sup>

One further point needs to be made concerning s 18D and Article 5’s guarantee of equality before the law. Presently, s 18D appears provides exemptions that more readily apply to certain vocations or ‘classes’ than others. Specifically, s 18D(b) provides an exemption for ‘any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose’. Hence, vocations or ‘classes’ routinely engaged in academic, artistic or scientific work are benefitted over other vocations, and indeed over ordinary members of the Australian community, who must rely on the ‘genuine public interest’ exemption in s 18D(b).

This type of exemption cannot reasonably considered to be appropriate and adapted to implementing Article 4 while paying due regard to the rights to equality before the law and freedom of opinion and expression guaranteed in Article 5. This is because, first, democratic participation in government involves freely discussing controversial issues involving race, colour, ethnicity and nationality (for more detail see section 5.1.1 below). The right to equality before the law, combined with the right to freedom of opinion and expression, means that all should have equal scope to express their own perspective on such issues regardless of vocation.

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<sup>43</sup> Committee on the Elimination of Racial Discrimination, *General recommendation No. 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination* (24 September 2009) [16]-[17] (citation omitted, emphasis ours).

<sup>44</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 58 fn 185.

Second, history suggests that academics, artists and scientists have been among the worst offenders when it comes to espousing racist doctrines. Indeed, such vocations have provided an intellectual or artistic veneer to rancid ideas. *Birth of a Nation*<sup>45</sup> and *Triumph of the Will* were artistic works despite their vile messages. As to academic and scientific works, Natan Lerner noted ‘It should not be forgotten... that in the past many books and papers aimed at disseminating racial hatred adopted the form of ‘scientific’ books or studies. The Nazi regime was specially prolific in the production of such studies’.<sup>46</sup>

Further, it should not be thought that such days are behind us. Presently, concepts such as ‘intersectionality’ and ‘privilege’ have gained influence in certain academic circles. At heart, these concepts depend upon prejudiced assumptions being made about individuals or groups based on attributes like race, colour, culture, religion or ethnicity.<sup>47</sup> These concepts attempt to excuse such prejudice by using formulations like “racism equals prejudice *plus power*”. However, such formulations simply cannot withstand critical scrutiny. Prejudice poisons the spirit of any person. Real or perceived powerlessness does not render someone immune to this poison, and it is a dangerous conceit to believe otherwise.

Given the foregoing, if s 18C’s purpose is to promote racial harmony or reduce racial hatred, then it would actually make more sense for s 18C to *prohibit* academic, artistic or scientific works that offended, insulted or humiliated on the grounds of race, colour ethnicity or nationality.

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<sup>45</sup> To avoid doubt, the 1915 film, not the 2016 film.

<sup>46</sup> Natan Lerner, *The UN Convention on the Elimination of all Forms of Racial Discrimination* (Sijthoff & Noordhoff, 2<sup>nd</sup> ed, 1980) 49. See also: John Cornwell, *Hitler’s Scientists: War, Science and the Devil’s Pact* (Penguin, 2004). See also: Augusto Zimmermann, *Western Legal Theory: History, Concepts and Perspectives* (LexisNexis, 2013) 142-8.

<sup>47</sup> See our discussion of these concepts in Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 227-239.

Of course, we are not in favour of any such law. Rather, we favour a law combatting racial hatred that applies to all equally, including the application of defences. This principle reflects that of defamation law, where the principle is: ‘Who is entitled to comment? The answer to that is “everyone”. A newspaper reporter or a newspaper editor has exactly the same rights, neither more or less, than every other citizen’.<sup>48</sup> Such laws of equal application would work in addition to the freedom of all individuals to challenge prejudiced academic, artistic and scientific works in open discussion.

#### 4.2 *Article 2*

There are, of course, broader obligations contained in other parts of the Convention. For example, Article 2 provides a general condemnation of racial discrimination and outlines a number of specific undertakings designed to eliminate racial discrimination. Most relevantly in relation to s 18C this includes the requirement under Article 2(1)(d) that ‘[e]ach State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization’.

In our view, **s 18C fails the conformity requirement to implement even the broader obligations under Article 2.** There are three important points to note in relation to Article 2. First, Article 2 was never intended to impose specific obligations concerning laws prohibiting expression of racial hatred. As an examination of both the history and structure of the Convention make clear, the broad language employed by Article 2 cannot be read in isolation. The general obligations imposed under Article 2 must be read in light of the specific obligations contained in Article 4 and the express guarantee that Article 5 provides for freedom of opinion and expression.

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<sup>48</sup> *Silkin v Beaverbrook Newspapers* [1958] 1 WLR 743, 746 (Diplock J).

In particular, Article 4 is the Article of the Convention that was expressly designed to address the problem of speech inciting racial hatred, and its specific wording was the subject of considerable debate due to concerns about the impact that the obligation would necessarily have on freedom of speech.<sup>49</sup> In other words, it is the specific obligation under Article 4 that should inform the development and reach of domestic laws prohibiting expression of racial hatred, not the more general obligations under Article 2.

Second, Article 5 directly refers to Article 2. This emphasizes that the general obligations outlined by Article 2 must be read in light of Article 5 and its recognition that the prohibition and elimination of racial discrimination must be done in a way that simultaneously guarantees to everyone the enjoyment of other fundamental rights, including the right to freedom of opinion and expression.

Third, the definition of “racial discrimination” with the Convention must be considered. An important, but generally overlooked, limitation on the reach of the general obligations contained within the Convention (including Article 2) is the definition of ‘racial discrimination’ that is found in Article 1. It states that for the purposes of the Convention ‘racial discrimination’ means:

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

This is substantially the same definition that is adopted in section 9(1) of the RDA. As was noted by Frédéric Mégret this definition of ‘racial discrimination’ in Article 2 means that ‘[r]acial discrimination occurs not simply when differences are made between certain racial

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<sup>49</sup> Natan Lerner, *The UN Convention on the Elimination of all Forms of Racial Discrimination* (Sijthoff & Noordhoff, 2<sup>nd</sup> ed, 1980), 11-2, 37-8, 43, 47.

groups, but when this differentiation adversely affects the enjoyment of rights otherwise protected by international human rights treaties by members of one group'.<sup>50</sup> This requirement was also confirmed by the Committee on the Elimination of Racial Discrimination, with specific reference to the obligations under Article 2.<sup>51</sup> The central rights referred to are expressly outlined in Article 5 of the Convention, and include 'the right to freedom of opinion and expression'.<sup>52</sup>

This limitation is central in understanding the balance to be struck between prohibiting expression of racial hatred and the protection of freedom of speech. When, for example, racist speech reaches a level that constitutes an incitement to violence it adversely affects the targeted individual or groups enjoyment of 'the right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution'.<sup>53</sup>

At international law there is, however, **no human right that protects against simply being offended or insulted**.<sup>54</sup> Behaviour that solely offends or insults (without more) does not itself adversely affect the enjoyment of other specific human rights and is not, therefore, a form of racial discrimination that comes within the technical terms of the Convention. The broad language and low harm threshold adopted by s 18C through the inclusion of acts that

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<sup>50</sup> Frédéric Mégret, *The Relevance of international instruments on racial discrimination to racial discrimination policy in Ontario* (Ontario Human Rights Commission, December 2004) (emphasis ours).

<sup>51</sup> Committee on the Elimination of Racial Discrimination, *General Recommendation 14* (2003). See also Human Rights Committee, *General Comment 18, Non-discrimination* (1994).

<sup>52</sup> Convention Article 5(viii).

<sup>53</sup> Convention Article 5(b).

<sup>54</sup> See James Spigelman, 'Free Speech Tripped up by Offensive Line', *The Australian*, 11 December 2002, 12, quoting Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press, 2012) 106. Further, freedom from offence cannot be found within other rights. For example, the right to dignity does not imply the right to be free from offence for a number of reasons. To name two: first, dignity itself is a vague term, and was deliberately kept vague in the *Universal Declaration of Human Rights*. This because the drafters knew that there would be sharp disagreement about what human dignity entailed. During the course of such disagreements, one could easily be offended, insulted or humiliated. Second, the right to dignity does not mean one's ideas, actions or even appearance should be immune from even withering criticism. The express rights to freedom of conscience and freedom of expression flatly contradict such a contention. See Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 62-71, 136-45.

are reasonably likely to offend or insult therefore extends beyond the scope of the Convention, including the general obligations contained in Article 2 which refers specifically to measures designed to directly prohibit or end racial discrimination. Given this, s 18C is not reasonably capable of being considered appropriate and adapted to implementing the obligations contained under Article 2 of the Convention, and fails the conformity test.

#### 4.3 Article 7

Article 7 is also unable to provide constitutional support for s 18C as it **fails the specificity requirement**. The test for specificity requires that a law relying on the external affairs power ‘must prescribe a regime that the treaty has itself defined *with sufficient specificity to direct the general course to be taken by the signatory states*’.<sup>55</sup> That is, a treaty that is primarily couched in aspirational language will not be sufficiently specific to enliven the external affairs power.

Article 7 provides that:

States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.

The aspirational language and open-ended commitments imposed under Article 7 mean that it fails to meet the specificity requirement. While the Article does oblige States Parties to ‘adopt immediate and effective measures’, it provides no direction as to what those measures

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<sup>55</sup> *Victoria v Commonwealth* [1996] HCA 56; (1996) 187 CLR 416 (Brennan CJ, Toohey, Gaudron, McHugh & Gummow JJ) (emphasis ours).

might be or the tangible steps that States Parties will be expected to take in fulfilment of their treaty obligations. As we noted in *No Offence Intended*:

Article 7 provides no guidance concerning the measures that might be considered effective in combating prejudices and promoting understanding, tolerance and friendship amongst nations. It would certainly be open to States Parties to take significantly divergent views about these measures. For example, laws prohibiting hate speech may be seen by some States Parties as a measure combating racial prejudice. However, other States Parties may see such a measure as doing the opposite by preventing the types of public discussions that ultimately help eliminate racial discrimination in the longer-term.<sup>56</sup>

#### 4.4 Article 20(2) of the ICCPR

Finally, some comment should be made regarding Article 20(2), which provides that ‘[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law’. While some have argued that Article 20(2) provides constitutional support for s 18C, in our view the conformity requirement is not met and, as a result, the external affairs power is not enlivened.

The key consideration here is the high harm threshold set by the use of the words ‘advocacy’, ‘hatred’ and ‘incitement’. The wording of Article 20(2):

[A]ppears directed to prohibiting speech that urges, recommends or espouses intense dislike or detestation against others on the basis of nationality, race or religion such that it stimulates or prompts others to engage in discrimination, hostility or violence.<sup>57</sup>

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<sup>56</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 33.

<sup>57</sup> Ibid 93.

Section 18C extends its reach well beyond the terms of Article 20(2). For example, speech may be reasonably likely to offend or insult on the basis of race, colour or national or ethnic origin without going so far as to advocate hatred or incite discrimination, hostility or violence. As with Article 4, s 18C far overreaches Article 20(2)'s limits and thus fails the conformity test.

It is also important to note that the overreach of s 18C is not remedied by s 18D. As was noted in *No Offence Intended*, 'as with Article 4, acts that offend, insult or humiliate in many cases will not fall into a category that Article 20(2) of the ICCPR prohibits even if those acts are made *unreasonably* and in *bad faith*.'<sup>58</sup>

#### 4.5 A note on *Toben v Jones*

*Toben* is the leading case concerning the constitutional validity of s 18C. It is a decision of the Full Court of the Federal Court. However, two things must be noted about *Toben*. First, it did not consider the implied freedom of political communication. Second, its reasoning concerning the external affairs power contains grave errors. We explored these errors in detail in *No Offence Intended*.<sup>59</sup> However, to summarise certain key errors, the reasoning in *Toben*:

- Failed to consider High Court authority concerning the interpretation of treaties.<sup>60</sup> In particular, a treaty's text, object and purpose of a treaty is important to its

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<sup>58</sup> Ibid (emphasis in original).

<sup>59</sup> Ibid 99-115.

<sup>60</sup> *A v Minister for Immigration and Ethnic Affairs* [1997] HCA 4; (1997) 190 CLR 225, 231 (Brennan CJ). See also ibid 251-6 (McHugh J), 240 (Dawson J) and 294 (Kirby J). In short, these approaches embody how Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* are applied to interpreting treaties enacted into Australian law. See also *Povey v Qantas Airways Ltd* [2005] HCA 33; (2005) 216 ALR 427, 433 (Gleeson CJ, Gummow, Hayne and Heydon JJ).



interpretation, along with the form the treaty takes, the history of its negotiation, the subject to which it relates, and the mischief it addresses.<sup>61</sup>

- Failed to correctly account for the history and purpose of Article 4.
- Failed to correctly account for the history and purpose of Article 2.
- Failed to correctly account for the history and purpose of Article 7.
- Entirely failed to account for history and purpose Article 5.
- Consequently, failed to correctly apply the test for the conformity requirement for articles 2, 4 and 7.
- Consequently, failed to correctly apply the test for the specificity requirement for Article 7.
- Failed to correctly account for the history and purpose of Article 20(2).
- Consequently, failed to correctly apply the test for the conformity requirement for Article 20(2).

In light of the foregoing, our view is that *Toben* is highly likely to be overturned if challenged in the High Court.

We now turn to considering the implied freedom of political communication.

## **5. The implied freedom of political communication**

Section 18C impermissibly infringes the implied freedom of political communication. The test for determining whether a law impermissibly infringes the implied freedom of political communication was most recently stated in *McCloy*.<sup>62</sup> This test is as follows:

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<sup>61</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 26.

<sup>62</sup> [2015] HCA 34.

1. Does the law effectively burden the implied freedom of political communication in its terms, operation or effect?
2. If “yes” to question 1, are the purpose of the law and the means adopted to achieve that purpose legitimate, in the sense that they are compatible with the maintenance of the constitutionally prescribed system of representative government?
3. If “yes” to question 2, is the law reasonably appropriate and adapted to advance that legitimate object? If not, then the measure will exceed the implied limitation on legislative power.<sup>63</sup>

Section 18C fails every stage of this test. We will now examine each stage in turn.

### *5.1 Does s 18C burden the implied freedom of political communication?*

Section 18C’s indeed burdens the implied freedom of political communication. However, it is important to understand the nature of s 18C’s burden,<sup>64</sup> which is ***direct, heavy and sweeping***.

#### *5.1.1 A direct burden*

Section 18C directly burdens the implied freedom of political communication. This is because the Commonwealth Parliament may enact laws under various heads of power that involve race, colour, ethnicity or nationality. Such heads of power are:<sup>65</sup>

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<sup>63</sup> Ibid [2] (French CJ, Kiefel, Bell and Keane JJ).

<sup>64</sup> The nature of the burden is ultimately relevant to ‘proportionality testing’ in the third stage. The majority in *McCloy* noted that such a determination required comparing ‘the positive effect of realising the law’s proper purpose with the negative effect of the limits on constitutional rights or freedoms’, and that ‘[l]ogically, the greater the restriction on the freedom, the more important the public interest purpose of the legislation must be for the law to be proportionate...’: *ibid* [87] (French CJ, Kiefel, Bell and Keane JJ) (citations omitted). Gageler J stated that judicial scrutiny of the relevant law should be ‘calibrated to the degree of risk to the system of representative and responsible government established by the Constitution that arises from the nature and extent of the restriction on political communication that is identified at the first step in the analysis’: *ibid* [150] (Gageler J). Nettle J observed that ‘a direct or severe burden on the implied freedom requires a strong justification’: *ibid* [255] (Nettle J). Gordon J stated that whether a law impermissibly infringes the implied freedom of political communication ‘is a question of judgment about the nature and extent of the effect of the impugned law on the maintenance of the constitutionally prescribed system of representative and responsible government’: *ibid* [336] (Gordon J).

- ‘the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth’;<sup>66</sup>
- ‘quarantine’;<sup>67</sup>
- ‘naturalisation and aliens’;<sup>68</sup>
- ‘the people of any race, ~~other than the aboriginal race in any State~~, for whom it is necessary to make special laws’;<sup>69</sup>
- ‘immigration and emigration’;<sup>70</sup>
- ‘external affairs’;<sup>71</sup>
- ‘the relations of the Commonwealth with the islands of the Pacific’;<sup>72</sup> and
- ‘the influx of criminals’.<sup>73</sup>

Other heads of power that may involve race, colour, ethnicity or nationality include:

- ‘trade and commerce with other countries, and among the States’;<sup>74</sup>
- ‘fisheries in Australian waters beyond territorial limits’;<sup>75</sup>
- ‘census and statistics’;<sup>76</sup> and
- ‘foreign corporations...’.<sup>77</sup>

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<sup>65</sup> The following lists are taken from Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 119-20.

<sup>66</sup> *Commonwealth Constitution* s 51(vi).

<sup>67</sup> *Ibid* s 51(ix). This is not a fanciful inclusion. During the Ebola outbreak in Africa in 2014, commentators noted racial aspects to restricting travel to and from countries in which the Ebola outbreaks were located, and the treatment of those afflicted with Ebola: see, for example, Hannah Kozłowska, ‘Has Ebola Exposed a Strain of Racism?’, *New York Times* (online), 21 October 2014 <[optalk.blogs.nytimes.com/2014/10/21/has-ebola-exposed-a-strain-of-racism/?\\_r=1](http://optalk.blogs.nytimes.com/2014/10/21/has-ebola-exposed-a-strain-of-racism/?_r=1)>.

<sup>68</sup> *Ibid* s 51(xix).

<sup>69</sup> *Ibid* s 51 (xxvi) (the strike-through appears in official versions of the *Commonwealth Constitution*).

<sup>70</sup> *Ibid* s 51(xxvii).

<sup>71</sup> *Ibid* s 51(xxix).

<sup>72</sup> *Ibid* s 51(xxx).

<sup>73</sup> *Ibid* s 51(xxviii).

<sup>74</sup> *Ibid* s 51(i).

<sup>75</sup> *Ibid* s 51(x).

<sup>76</sup> *Ibid* s 51(xi).

<sup>77</sup> *Ibid* s 51(xx).

Laws or policies made under the heads of power noted above often involve discussing controversial issues. For example, border protection, refugee intake and immigration raise controversial issues concerning the level of refugee and immigrant intake, the racial, ethnic or national composition of such intake and the level of integration expected of immigrants.<sup>78</sup>

In addition to laws passed by the Commonwealth Parliament, the Commonwealth's executive government is responsible for implementing laws as well as other executive functions.<sup>79</sup> The way that the Commonwealth's executive government goes about this in matters involving race, colour, ethnicity or nationality may also raise controversial issues. For example, the way that Australia's executive government conducts border protection and runs refugee and immigration programs often involves controversial issues. To conclude with perhaps the most serious (but not uncommon) example, Australia's prosecution of wars creates controversies about the nature of the conflict and the enemy.<sup>80</sup>

Putting aside Commonwealth matters, those local to a State, such as law and order, health, welfare or education, may raise controversial issues involving race, colour, ethnicity or nationality.<sup>81</sup>

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<sup>78</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 120. See also Joshua Forrester, Augusto Zimmermann and Lorraine Finlay, 'An Opportunity Missed? A Constitutional Analysis of Proposed Reforms to Tasmania's 'Hate Speech' Laws' (2016) 7 *The Western Australian Jurist* 275, 284-5.

<sup>79</sup> *Commonwealth Constitution* s 61.

<sup>80</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 121; Joshua Forrester, Augusto Zimmermann and Lorraine Finlay, 'An Opportunity Missed? A Constitutional Analysis of Proposed Reforms to Tasmania's 'Hate Speech' Laws' (2016) 7 *The Western Australian Jurist* 275, 285.

<sup>81</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 121; Joshua Forrester, Augusto Zimmermann and Lorraine Finlay, 'An Opportunity Missed? A Constitutional Analysis of Proposed Reforms to Tasmania's 'Hate Speech' Laws' (2016) 7 *The Western Australian Jurist* 275, 285.

### 5.1.2 *A heavy burden*

Assessing the heaviness of s 18C's burden requires considering popular sovereignty; the general nature of laws and discussions about them; the uncertainty of the terms used in s18C; and s 18C's operation. We will examine each in turn.

#### (a) *Popular sovereignty*

Unfortunately, the following are often overlooked in discussions about freedom of expression and the implied freedom of political communication:

- The sovereignty of the Australian people under the *Commonwealth Constitution*; and
- The plenary powers of Commonwealth, State and Territory Parliaments.

As we noted in *An Opportunity Missed?*:<sup>82</sup>

The *Commonwealth Constitution* provides for popular sovereignty. That is, under the *Commonwealth Constitution*, the Australian people are sovereign.<sup>83</sup> It is Australian electors who elect representatives to make laws on their behalf.<sup>84</sup> It is Australian electors to whom these representatives are ultimately answerable.<sup>85</sup> And it is Australian electors who have the power to amend the *Commonwealth Constitution*.<sup>86</sup>

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<sup>82</sup> Joshua Forrester, Augusto Zimmermann and Lorraine Finlay, 'An Opportunity Missed? A Constitutional Analysis of Proposed Reforms to Tasmania's 'Hate Speech' Laws' (2016) 7 *The Western Australian Jurist* 275, 286-9 (emphasis in original). Please note that the footnotes in the quoted passage adopt the numbering used in this submission and not that used in the original article.

<sup>83</sup> *Unions NSW v New South Wales* [2013] HCA 58; (2013) 252 CLR 530, 548 [17] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). See also *McCloy* [2015] HCA 23 [45] (French CJ, Kiefel, Bell and Keane JJ), [215] (Nettle J), [318] (Gordon J).

<sup>84</sup> *Australian Capital Television Pty Ltd v The Commonwealth* [1992] HCA 45; (1992) 177 CLR 106, 137-8 (Mason CJ).

<sup>85</sup> *Nationwide News Pty Ltd v Wills* [1992] HCA 46; (1992) 177 CLR 1, 47 (Brennan J). See also Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 122.

<sup>86</sup> *Commonwealth Constitution* s 128.

The *Commonwealth Constitution* also provides for a Commonwealth Parliament that, along with State and Territory Parliaments, has what is known as the plenary power to make laws.<sup>87</sup> These plenary powers are extremely broad.<sup>88</sup> The Commonwealth Parliament is confined to legislating with respect to matters under specified heads of power. That said, the Commonwealth Parliament's plenary power to legislate under these heads of power is extremely wide. As to the State and Territory Parliaments, unless confined by the *Commonwealth Constitution*<sup>89</sup> or the respective State or Territory constitution,<sup>90</sup> their plenary powers to legislate are *unlimited in scope* and extend to *any matter*.<sup>91</sup> In summary, Commonwealth, State, and Territory Parliaments may make laws with respect to an extremely wide range of matters, including matters of great controversy. Further, the content of these laws may be what many would regard as extreme.<sup>92</sup>

The *Commonwealth Constitution* also provides for an executive answerable to Parliament<sup>93</sup> but who, in executing laws, may do acts that, likewise, many would regard as extreme. In discussing legislative and executive matters, the *Commonwealth Constitution* provides for Parliamentary privilege.<sup>94</sup> This is because members of Parliament must be able to fully, frankly and robustly discuss all matters before Parliament.<sup>95</sup>

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<sup>87</sup> Section 51 of the *Commonwealth Constitution* provides that the Commonwealth Parliament has the 'power to make laws for the peace, order, and good government of the Commonwealth' with respect to the various heads of power specified in s 51.

<sup>88</sup> *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 151 (Knox CJ, Isaacs, Rich and Starke JJ).

<sup>89</sup> Such as *Commonwealth Constitution* ss 114, 115.

<sup>90</sup> We are referring to "manner and form" provisions that may force State Parliaments to use certain procedures (special majorities, referendums, and the like) to legislate with respect to laws concerning the constitution, powers and processes of Parliament.

<sup>91</sup> 'A power to make laws for the peace, order and good government of a territory is as ample and plenary as the power possessed by the Imperial Parliament itself': *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 10 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ). The plenary power of the Tasmanian Parliament is not found in the *Constitution Act 1934* (Tas). However, it is found in the *Australian Constitutions Act 1850* (Imp) s 14, which provides that the Tasmanian Parliament has the authority 'to make laws for the peace, welfare and good government of Tasmania': see *Strachan v Graves* (1997) 141 FLR 283, 289.

<sup>92</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 122.

<sup>93</sup> *Commonwealth Constitution* ss 61, 64.

<sup>94</sup> *Ibid* s 49.

<sup>95</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 122.

It follows that, as sovereign, the Australian people must *also* be free to discuss controversial matters, or indeed any matter, fully, frankly and robustly.<sup>96</sup>

Put another way, it borders on absurdity to say that, under the *Commonwealth Constitution*, Parliament may *pass* outrageous laws, the executive may *do* outrageous things, and members of Parliament may *say* outrageous things. However, the people from whom Parliament, members of Parliament and the executive derive their authority may *not* speak outrageously.<sup>97</sup> If anything, in a democracy, a sovereign people must be free to speak even the unspeakable.<sup>98</sup>

To be clear, there are limits to freedom of expression. However, these limits are themselves strictly limited.<sup>99</sup>

Section 18C imposes a heavy restriction on freedom of expression, prohibiting even statements that offend another person or group of people on the basis of race, colour, ethnicity or nationality.

This is not simply a theoretical restriction. While it is difficult to measure the actual ‘chilling effect’ of any particular law on free speech, it is clear that s 18C *is* impacting public debate about important political issues. For example, the head of the Prime Minister’s Indigenous Advisory Council, Warren Mundine, recently observed that s 18C was embedding racial

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<sup>96</sup> Ibid 123. See also Lorraine Finlay, Augusto Zimmermann and Joshua Forrester, ‘18C is too broad and too vague, and should be repealed’, *The Conversation* (online), 31 August 2016 <<https://theconversation.com/section-18c-is-too-broad-and-too-vague-and-should-be-repealed-64482>>.

<sup>97</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 130.

<sup>98</sup> Ibid. See also Lorraine Finlay, Augusto Zimmermann and Joshua Forrester, ‘18C is too broad and too vague, and should be repealed’, *The Conversation* (online), 31 August 2016 <<https://theconversation.com/section-18c-is-too-broad-and-too-vague-and-should-be-repealed-64482>>. Indeed, this must be so with respect to *any* idea that may influence, or be the subject of, legislative or executive action. This must also be so with respect to *any* person or group of people who may influence, or be the subject of, legislative or executive action.

<sup>99</sup> See Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 130.

division, causing social frustration and contributing to the stifling of national debate on significant issues such as child abuse.<sup>100</sup>

(b) *The general nature of laws and discussions about them*

Section 18C imposes a burden on Australia's political system far greater than that of defamation (perhaps s 18C's closest analogue).<sup>101</sup> Specifically, s 18C purports to protect *groups* from offence, insult or humiliation. As we noted in *An Opportunity Missed?*:<sup>102</sup>

Legislative and executive action contemplated under the *Commonwealth Constitution* and respective State and Territory constitutions operates generally. That is, legislation rarely targets specific individuals.<sup>103</sup> Rather, legislation in all but rare cases concerns *groups* of people, ranging from small groups up to the entirety of Australia's population... Executive action may concern individuals directly, but often concerns groups.<sup>104</sup>

Hence, when discussing matters that may be subject to government action, it is common to make general statements about an issue. It is also common to refer generally to groups of people. Statements concerning groups may not apply to individuals in that group. However, that lack of specificity is the inherent price of discussions about proposed or past legislative or executive action.<sup>105</sup>

The 'chilling effect' of a law that makes unlawful offending, insulting, humiliating or ridiculing another person based on an attribute must not be underestimated. Much has been made of the

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<sup>100</sup> Joe Kelly, 'Need to act on 18C now, says Warren Mundine', *The Australian*, 31 October 2016.

<sup>101</sup> For a comparison of s 18C with other protective laws see Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 184-90.

<sup>102</sup> Joshua Forrester, Augusto Zimmermann and Lorraine Finlay, 'An Opportunity Missed? A Constitutional Analysis of Proposed Reforms to Tasmania's 'Hate Speech' Laws' (2016) 7 *The Western Australian Jurist* 275, 289-90. Please note that the footnotes in the quoted passage adopt the numbering used in this submission and not that used in the original article.

<sup>103</sup> Although a Parliament can enact a law targeting a specific individual: see *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24; (1996) 189 CLR 51, 64 (Brennan CJ), 73-4 (Dawson J), 109, 121 (McHugh J), 125 (Gummow J).

<sup>104</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 121.

<sup>105</sup> *Ibid* 121-2.



chilling effect of defamation law, and rightly so.<sup>106</sup> However, in defamation, one must only consider whether or not their comment affects *a particular individual's own reputation*.

Consequently, someone who wishes to comment on a political issue in which that particular person is involved may avoid mention of that person. By contrast, in our political system, it is far more difficult not to comment about *groups sharing certain attributes* in political issues. As noted above, in our system of representative and responsible government, there are often controversial issues concerning such things as race, colour, ethnicity, nationality and sexuality. Hence, making unlawful offending, humiliating, insulting or ridiculing another person based on an attribute has far more of a chilling effect.

(c) *The uncertainty of the terms used in s 18C*

Australia is a nation that places great importance on the rule of law. **A critical aspect of the rule of law is certainty.** People must know where a line is drawn so that they can avoid crossing that line. Hence, it is generally observed that **the rule of law necessitates the existence of clear, stable, general norms, which must then apply equally to everyone regardless of a person's social status or position.** By contrast, if laws are unclear or uncertain, people will be unsure of what the law requires of them and hence unable to properly obey the law. They will be left unable to conduct their affairs with a satisfactory level of legal security.

The RDA does not define 'offend', 'insult' or 'humiliate'. This itself is a serious defect in s 18C. Parliament should have defined these terms when s 18C was inserted into the RDA.

That said, case law has considered these terms, and confined them to serious instances of offence, insult or humiliation.<sup>107</sup> However, even if these terms are given this narrow

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<sup>106</sup> Australian Law Reform Commission, *Unfair Publication: Defamation and privacy*, Report No 11 (1979) 22-3 [37].

<sup>107</sup> We are assuming that the approach to interpreting these terms would be similar to the approach that Kiefel J took in *Creek v Cairns Post Pty Ltd*. That is, 'To "offend, insult, humiliate or intimidate" are profound and serious effects, not to be likened to mere slights': *Creek v Cairns Post Pty Ltd* [2001] FCA 1007; (2001) 112

interpretation, there is considerable uncertainty concerning their application to very different circumstances.<sup>108</sup> **A statement that one person thinks is seriously offensive is one another may think is “merely” offensive (or even inoffensive).**<sup>109</sup>

Interestingly enough, attempts to establish judicial criteria for ‘offensiveness’ with any degree of precision have ‘become a circular and question-begging exercise’.<sup>110</sup> Indeed, courts notoriously struggle to provide a sufficiently certain legal standard for decisively identifying “offensive” speech. Indeed, case law suggests that legal liability for “offence” risks not being the outcome of applying a sufficiently certain legal standard, but rather the view of the particular judge.<sup>111</sup> As mentioned above, the rule of law effectively requires the existence of clear and stable rules that must then apply equally to everyone regardless of status or position. Characterised in this way, the rule of law cannot be achieved if judges are not effectively guided in their decisions by rules of law that are both clear and easily understandable by the average citizen. That being so, Pasquale Pasquino points out:

[T]he person who judges exercises, in a sense, the most worrying power of all. In daily life it is not the legislator who renders judgement or passes sentence, but the judge... The judge protects

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FCR 352, 356 [16] (Kiefel J). French J in *Bropho v Human Rights and Equal Opportunity Commission* endorsed this view: see *Bropho v Human Rights and Equal Opportunity Commission* [2004] FCAFC 16; (2004) 135 FCR 105, 124 [69]-[70] (French J) (*Bropho*). We would note, however, that unlike the RDA, the Act provides two civil provisions: ss 17(1) and 19. Section 19 covers more severe speech while s 17(1) covers less severe speech. The presence of s 19 may count against narrowly interpreting s 17(1).

<sup>108</sup> We assume that, were s 18C interpreted broadly, our arguments would apply with greater force.

<sup>109</sup> Joshua Forrester, Augusto Zimmermann and Lorraine Finlay, ‘An Opportunity Missed? A Constitutional Analysis of Proposed Reforms to Tasmania’s ‘Hate Speech’ Laws’ (2016) 7 *The Western Australian Jurist* 275, 291. This is so even if an objective test is used to determine offence. Someone applying an objective, ‘reasonable person test’ may conclude an act was seriously offensive, whereas another person applying the same test to the same act may conclude that it was “merely” offensive (or even inoffensive).

<sup>110</sup> Dan Meagher, ‘So Far So Good?: A Critical Evaluation of Racial Vilification Laws in Australia’ (2004) 32(2) *Federal Law Review* 225.

<sup>111</sup> Augusto Zimmermann, *Western Legal Theory: History, Concepts and Perspectives* (LexisNexis, 2013), 83-102.

the citizen from the caprices and arbitrary will of the legislator, just as the existence of the law protects the accused from the caprices and arbitrary will of the judge.<sup>112</sup>

There are serious issues as to whether s 18C (either alone or in conjunction with s 18D) is too broad and too vague to be constitutional. In *An Opportunity Missed?*, we summarised our arguments concerning vagueness and overbreadth as follows:<sup>113</sup>

[F]irst, certainty is critical to the rule of law. As McLachlin J (in dissent) noted in *R v Keegstra* regarding the concept of vagueness:

As a matter of due process, a law is void on its face if it is so vague that persons ‘of common intelligence must necessarily guess at its meaning and differ as to its application’. Such vagueness occurs when a legislature states its proscriptions in terms so indefinite that the line between innocent and condemned conduct becomes a matter of guesswork.<sup>114</sup>

As to the concept of overbreadth, her Honour noted, relevantly:

Statutes which open-endedly delegate to administering officials the power to decide how and when sanctions are applied or licenses issued are overbroad because they grant such officials the power to discriminate – to achieve indirectly through selective enforcement a censorship of communicative content that is clearly unconstitutional when achieved directly.<sup>115</sup>

Her Honour noted:

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<sup>112</sup> Pascoale Pasquino, ‘One and Three: Separation of Powers and the Independence of the Judiciary in the Italian Constitution’ in J Ferejohn, J N Rakove and J Riley (eds), *Constitutional Culture and Democratic Rule*, (Cambridge University Press, 2001) 211.

<sup>113</sup> Joshua Forrester, Augusto Zimmermann and Lorraine Finlay, ‘An Opportunity Missed? A Constitutional Analysis of Proposed Reforms to Tasmania’s ‘Hate Speech’ Laws’ (2016) 7 *The Western Australian Jurist* 275, 292-6. Please note that the footnotes in the quoted passage adopt the numbering used in this submission and not that used in the original article. The arguments concerning vagueness are presented more fully in Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 192-7.

<sup>114</sup> *R v Keegstra* [1990] 3 SCR 697, 818 (‘*Keegstra*’) quoting Laurence Tribe, *American Constitutional Law* (Foundation Press, 2<sup>nd</sup> ed, 1988) 1033-4.

<sup>115</sup> *Keegstra* [1990] 3 SCR 697, 818 quoting Laurence Tribe, *American Constitutional Law* (Foundation Press, 2<sup>nd</sup> ed, 1988) 1056.

The rationale for invalidating statutes that are overbroad... or vague is that they have a chilling effect on legitimate speech. Protection of free speech is regarded as such a strong value that legislation aimed at legitimate ends may be struck down, if [it] also tends to inhibit protected speech.<sup>116</sup>

Second, legal theorists such as Ronald Dworkin and Lon Fuller have spoken to the need for certainty. Dworkin noted that a vague law ‘places a citizen in an unfair position of either acting at his peril or accepting a more stringent restriction on his life than the legislature may have authorized’.<sup>117</sup> Fuller noted that ‘The desideratum of clarity represents one of the most essential ingredients of legality’.<sup>118</sup> Fuller warned that:

[I]t is a serious mistake – and a mistake made constantly – to assume that, though the busy legislative draftsman can find no way of converting his objective into clearly stated rules, he can always safely delegate this task to the courts or to special administrative tribunals’.<sup>119</sup>

Fuller further warned that some areas of the law were unsuited to creating rules on a case-by-case basis.<sup>120</sup> We noted that one such area was political discussion, given its range and complexity.<sup>121</sup>

Third, vagueness and overbreadth are concepts useful to determining whether a law impermissibly infringes the implied freedom of political communication. They are readily applicable to an analysis under the modified test. The implied freedom of political communication is a restriction on lawmaking. It follows that laws that are too broad or too vague should be restricted.<sup>122</sup> Further, voiding laws for vagueness or overbreadth would create a “buffer zone” around the implied freedom of political communication as the concept of

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<sup>116</sup> *Keegstra* [1990] 3 SCR 697, 819.

<sup>117</sup> Ronald Dworkin, *Taking Rights Seriously* (Duckworth, 1977) 221-2.

<sup>118</sup> Lon Fuller, *The Morality of Law* (Yale University Press, 1964) 63.

<sup>119</sup> *Ibid* 64.

<sup>120</sup> *Ibid*.

<sup>121</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 194.

<sup>122</sup> *Ibid*.

vagueness has around the First Amendment of the US Constitution.<sup>123</sup> This discourages vague or overbroad legislation being enacted.<sup>124</sup>

Fourth, like freedom of expression at common law,<sup>125</sup> the common law principle of due process is of constitutional importance.<sup>126</sup> Common law due process includes the principle of certainty in the law. An individual must be certain what the law is in order to avoid unlawful conduct. Given that the common law informs the *Commonwealth Constitution*,<sup>127</sup> common law due process should inform whether a law impermissibly infringes the implied freedom of political communication.<sup>128</sup>

Fifth, vagueness and overbreadth have been employed with respect to both criminal and civil provisions. In *Taylor v Canadian Human Rights Commission*,<sup>129</sup> a Canadian Supreme Court case concerning a civil provision making unlawful communication likely to expose any person to hatred or contempt, McLachlin J noted:

[Hatred and contempt] are vague and subjective, capable of extension should the interpreter be so inclined. Where does dislike leave off and hatred or contempt begin? ... The phrase does not assist in sending a clear and precise indication to members of society as to what the limits of impugned speech are. In short, by using such vague, emotive terms without definition, the state necessarily

<sup>123</sup> See Note, 'The Void for Vagueness Doctrine in the Supreme Court' (1960) *University of Pennsylvania Law Review* 67, 75.

<sup>124</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 194-5.

<sup>125</sup> *Minister for Immigration & Citizenship v Haneef* [2007] FCAFC 203; (2007) 243 ALR 606 [113] (Black CJ, French and Weinberg JJ) ('*Haneef*'). See also *Evans v State of New South Wales* [2008] FCAFC 130; (2008) 168 FCR 576, 594 [72] (French, Branson and Stone JJ) ('*Evans*'); *Monis v The Queen* [2013] HCA 4; (2013) 249 CLR 92, 128 [60] (French CJ) ('*Monis*').

<sup>126</sup> Due process is one of the fundamental common law principles Australia has inherited. Its sources are not only 25 Edward I (1297) *Magna Carta* ch 29, but also 28 Edward III (1354), and 3 Charles I (1627) *Petition of Right*. As with the *Magna Carta*, the latter statutes are either received law in certain states, or applied by Imperial Acts legislation in other states.

<sup>127</sup> [*v Australian Broadcasting Corporation*] [1997] HCA 25; (1997) 189 CLR 520, 564 [(\*)].

<sup>128</sup> This appears to be a situation that Brennan J described in *Re Bolton; Ex Parte Beane*: 'Many of our fundamental freedoms are guaranteed by ancient principles of the common law or by ancient statutes which are so much part of the accepted constitutional framework that their terms, if not their very existence, may be overlooked until a case arises which evokes their contemporary and undiminished force.': see *Re Bolton; Ex parte Beane* [1987] HCA 12; (1987) 162 CLR 514, 520-1 (Brennan J).

<sup>129</sup> [1990] 3 SCR 892 ('*Taylor*'). *Taylor* was decided along with *Keegstra* [1990] 3 SCR 697. Like *Keegstra*, the Canadian Supreme Court split 4:3, holding in *Taylor* that s 13 of the *Canadian Human Rights Act* did not violate the Canadian *Charter of Rights and Freedoms*.

incurs the risk of catching, within the ambit of the regulated area expression falling short of hatred.<sup>130</sup>

We suggest that her Honour’s comments apply to s 17(1)’s [of the *Anti-Discrimination Act 1998* (Tas)] use of ‘offend’, ‘insult’, ‘ridicule’ and ‘humiliate’. Her Honour further noted:

[T]he chilling effect of leaving overbroad provisions “on the books” cannot be ignored. While the chilling effect of human rights legislation is likely to be less significant than that of criminal prohibition, the vagueness of the law means that it may well deter more conduct than can legitimately targeted, given its objectives.<sup>131</sup>

It is worth noting here another relevant Canadian Supreme Court case, *Saskatchewan Human Rights Commission v Whatcott*.<sup>132</sup> This case concerned s 14 of the *Saskatchewan Human Rights Code 1979* (‘Code’).<sup>133</sup> Section 14 in effect prohibited the publishing or display by various means material ‘that exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground’.<sup>134</sup> Section 3 of the Code listed prohibited grounds... colour, ancestry, nationality, place of origin, race or perceived race...<sup>135</sup> [We note here the similarity between s 14 and s 18C.]

Writing for a unanimous Canadian Supreme Court, Rothstein J held that ‘ridicules, belittles or otherwise affronts the dignity of’ was overbroad.<sup>136</sup> He remarked:

Restricting expression because it may offend or hurt feelings does not give sufficient weight to the role expression plays in individual self-fulfillment, the search for truth, and unfettered political discourse. Prohibiting any representation which “ridicules, belittles or otherwise affronts the dignity of” protected groups could capture a great deal of expression which, while offensive to most people, falls short of exposing its target group to the extreme detestation and vilification which risks provoking discriminatory activities against that group. Rather than being tailored to

<sup>130</sup> *Taylor* [1990] SCR 892, 961-2.

<sup>131</sup> *Ibid.*

<sup>132</sup> [2013] SCC 11; [2013] 1 SCR 467 (‘*Whatcott*’).

<sup>133</sup> Subsequent mentions of s 14 of the Code will be to just ‘section 14’ or ‘s 14’ as the case requires.

<sup>134</sup> *Saskatchewan Human Rights Code 1979* s 14(1)(b).

<sup>135</sup> Code s 2(1)(m.01) (definition of ‘prohibited ground’).

<sup>136</sup> *Whatcott* [2013] SCC 11; [2013] 1 SCR 467, 519-20 [107]-[111] (Rothstein J).

meet the particular requirements, such a broad prohibition would impair freedom of expression in a significant way.<sup>137</sup>...

The sixth and final point in our summary is that US or Canadian concepts concerning vagueness or overbreadth need not be imported into the modified test for s 17(1) [of the *Anti-Discrimination Act 1998* (Tas)] to be held unconstitutional. Sections s 17(1) and s 55 [of the *Anti-Discrimination Act 1998* (Tas)] may, in any event, be considered too complex, intrusive and/or uncertain to be considered reasonably appropriate and adapted to the end they serve.

As noted above, reasonable minds can and do differ concerning whether a remark is seriously offensive, insulting or humiliating as opposed to “merely” offensive, insulting or humiliating. The breadth and vagueness of these terms when applied to widely different circumstances creates considerable uncertainty about their application. Section 18C creates a heavy burden on the implied freedom of political communication.

We would also make two points concerning the heaviness of the burden that s 18D places on the implied freedom of political communication. The first is that s 18D uses terms that are themselves vague and potentially overbroad. For example, ‘reasonably’ has been held to mean an objective assessment of whether an act bears a ‘rational relationship’ to a protected activity and whether the act is ‘not disproportionate’ to what is necessary to carry out the activity.<sup>138</sup> This assessment, however, allows for the possibility that there was more than one way of doing things ‘reasonably’.<sup>139</sup>

As another example, ‘good faith’ in s 18D has been held in case law to impose a ‘harm minimisation’ requirement. That is, the good faith exercise of the exemptions provided in s 18D ‘will honestly and conscientiously endeavour to have regard to and minimise the harm it

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<sup>137</sup> Ibid 519 [109].

<sup>138</sup> *Bropho* [2004] FCAFC 16; (2004) 135 FCR 105, 128 [79] (French J).

<sup>139</sup> Ibid. See also Joshua Forrester, Augusto Zimmermann and Lorraine Finlay, ‘An Opportunity Missed? A Constitutional Analysis of Proposed Reforms to Tasmania’s ‘Hate Speech’ Laws’ (2016) 7 *The Western Australian Jurist* 275, 338.

will, by definition, inflict.’<sup>140</sup> However, considerable uncertainty is then created concerning whether an act alleged to breach s 18C is something that could have something that could have been expressed more sensitively.

To illustrate, in *Eatock v Bolt*,<sup>141</sup> Bromberg J held that the defences in s 18D did not apply to Mr Bolt’s article because, amongst other things, the ‘mockery’ and ‘inflammatory language’ that Mr Bolt used.<sup>142</sup> The ‘derisive tone’ had ‘little or no forensic purpose to the argument propounded’ and ‘in the context of the values which the RDA propounded and in the context of the values which the RDA seeks to protect’ are ‘not justified, including by an asserted need to amuse or entertain’.<sup>143</sup> Among the examples Bromberg J cited as language that is ‘not justified’ are the following (and, we note, the emphasis is Bromberg J’s):

- ‘*self-obsessed*’;
- ‘how *comic*’;
- ‘you’d swear this is *from a satire*’;
- ‘That way lies *madness*, where *truth is just a whim* and words mean nothing’;
- ‘a privileged white Aborigine *snaffles* that extra’;
- ‘...*a borrowing of other people’s glories*’; and
- ‘at its worst, *it’s them against us*’.<sup>144</sup>

We note that the examples do not use vile racial epithets. Reasonable minds can and would differ concerning whether these comments are derisory and unwarranted, or sharp but

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<sup>140</sup> *Bropho v Human Rights and Equal Opportunity Commission* [2004] FCAFC 16; (2004) 135 FCR 105, 131-2 [95] (French J). In *Toben*, Carr J stated that ‘...a reasonable person acting in good faith would have made every effort to express the challenge and his views with as much restraint as was consistent with the communication of those views’: *Toben* [2003] FCAFC 137; (2003) 129 FCR 505, 528 [44] (Carr J), 534 [78] (Kiefel J) and 554 [159]-[161] (Allsop J).

<sup>141</sup> [2011] FCA 1103; (2011) 197 FCR 261.

<sup>142</sup> *Ibid* 355 [414].

<sup>143</sup> *Ibid*.

<sup>144</sup> *Ibid*.



allowable. This itself creates uncertainty. However, even assuming the harm could be minimised, one then wonders *how much is enough?* Again, reasonable minds can and would differ. To illustrate, would harm be sufficiently minimised if the comment ‘how comic’ was changed to ‘how amusing’? Would the comment containing ‘snaffles’ sufficiently minimise the harm if ‘snaffles’ was changed to ‘grabs’ or ‘snaps up’? Our point is this: the harm minimisation approach itself creates considerable uncertainties.<sup>145</sup>

We will further illustrate with a very recent example. The Australia-Japan Community Network has lodged a complaint under s18C against the Uniting Church concerning a memorial placed at a Sydney church. This memorial is dedicated to women who the Japanese military used as sex slaves during the Second World War. According to the *7.30 Report*, there is a dispute about the memorial’s wording:

In my own opinion, the using “sex slaves” is not appropriate.

Because they were prostitutes sure, but they were paid really well.

Japanese Army is not involved in that sort of activities.

The Japanese Army involved were there for the comfort women.

The comfort women being treated properly what about the hygiene system is very important for comfort women as well as for the soldiers.<sup>146</sup>

Later in the report, reporter Hayden Cooper noted that, if the memorial could not be removed, then the Japanese complainants wanted its wording changed so it no longer singled out

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<sup>145</sup> In fairness to Bromberg J, he does cite examples where Mr Bolt employs stronger language like ‘*political Aborigine*’; ‘*professional Aborigine*’; ‘the choice to be Aborigine can seem almost *arbitrary* and *intensely political*’; ‘How much more of this *madness* can you take?’; and ‘it is also divisive, feeding a new movement to stress *pointless* or even *invented* racial differences’: *ibid* (emphasis in original). However similar issues apply concerning harm minimisation, and perhaps are even more starkly illustrated. For example, would the harm caused by ‘*political Aborigine*’ be sufficiently minimised if ‘self-proclaimed Aborigine’, ‘self-styled Aborigine’ or ‘soi disant Aborigine’ was used in its place? Again, reasonable minds can and would differ.

<sup>146</sup> Australian Broadcasting Corporation, ‘A memorial commemorating sex slaves of the Japanese Imperial Army in World War II has become the subject of a Section 18C racial discrimination complaint’, *7.30 Report*, 14 December 2016 (Emiko) <<http://www.abc.net.au/7.30/content/2016/s4592628.htm>>.

Japan.<sup>147</sup> According to Sumiyo Egawa of the Australia-Japan Community Network, ‘Do not specify a single race, just Japan or Japanese’.<sup>148</sup>

How is the harm minimisation approach to be applied here?<sup>149</sup> For example:

- This is a dispute about people who were euphemistically called “comfort women”. Some claim that “comfort women” were volunteers and were paid well. Others claim that “comfort women” were women and girls forced into sex slavery. Others still claim that some “comfort women” were volunteers while others were indeed sex slaves.<sup>150</sup> Should the memorial, in order to minimise harm, include the competing claims about “comfort women”?
- In order to minimise harm, could “sex slave” be expressed more sensitively? For example, “women provided forced labour, including sexual services”.
- In order to minimise harm, could reference to Japan be removed? Could the memorial be changed to commemorate all women who have suffered in war?

We would like to say that the foregoing is an *argumentum ad absurdum*. However, we do not think it is. The foregoing are indeed examples of what a “harm minimisation” approach requires. As can be seen, such an approach itself placed a heavy burden on the implied freedom of political communication.

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<sup>147</sup> Ibid (Hayden Cooper).

<sup>148</sup> Ibid (Sumiyo Egawa).

<sup>149</sup> We note that it should not simply be assumed that the s 18C claim will “fall at the first hurdle”. That is, that the memorial would not be reasonably likely to offend a reasonable representative of the Japanese community. This is because the test is whether the test concerns a relevant *sub-group*. There are sub-groups of Japanese, especially certain Japanese nationalists, who dispute the extent of war crimes that the Japanese military committed during the Second World War. There is a strong argument that this sub-group is in fact the relevant sub-group from whom the reasonable representative would be drawn.

<sup>150</sup> For a brief overview of these issues see Richard H Mitchell, ‘The Comfort Women: Japan's Brutal Regime of Enforced Prostitution in the Second World War by George Hicks’ (1997) 102(2) *The American Historical Review* 503.

The second point we make is that *truth is not an exemption under s 18D*. This is a critical defect not only in s 18D, but in the operation of s 18C generally. Any law that directly affects freedom of expression, over the range which s 18C covers, *must* have truth as a defence. Truth (or facts, or correct information, or however one conceptualises verity) is absolutely critical to the functioning of any democracy, including Australia's.<sup>151</sup> The ALRC noted the following with respect to the defence of truth in defamation that are also relevant to s 18C.

The very fact of self government, of individual responsibility for community affairs, imposes a greater need for freedom of speech. But there is no value in falsehood; intelligent participation in civic affairs depends upon correct information.<sup>152</sup>

Defamation law provides a defence of truth for good reason. A defamatory statement against a person, no matter how demeaning or how hurtful, cannot be remedied if it is true. The same principle should apply to s 18C. This is especially so given, as noted above, in Australia's political system, discussions about contentious issues involving groups are common.<sup>153</sup> Indeed, the absence of truth as an exemption is perhaps s 18C's greatest flaw. From the standpoint of constitutional validity, the absence of truth as an exemption means that s 18C's burden on the implied freedom of political communication is much heavier.<sup>154</sup>

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<sup>151</sup> Joshua Forrester, Augusto Zimmermann and Lorraine Finlay, 'An Opportunity Missed? A Constitutional Analysis of Proposed Reforms to Tasmania's 'Hate Speech' Laws' (2016) 7 *The Western Australian Jurist* 275, 326.

<sup>152</sup> Australian Law Reform Commission, *Unfair Publication: Defamation and privacy*, Report No 11 (1979) 19 [33].

<sup>153</sup> Joshua Forrester, Augusto Zimmermann and Lorraine Finlay, 'An Opportunity Missed? A Constitutional Analysis of Proposed Reforms to Tasmania's 'Hate Speech' Laws' (2016) 7 *The Western Australian Jurist* 275, 326.

<sup>154</sup> In *No Offence Intended*, we noted that the High Court in was prepared to find that the *Defamation Act 1974* (NSW) ('NSW Defamation Act') would have impermissibly infringed the implied freedom of political communication if it did not have a defence of a statutory defence of qualified privilege. Given that (i) the defences in the NSW Defamation Act included truth in the public interest, statutory and common law qualified privilege, fair comment on a matter in the public interest and fair report of parliamentary and similar proceedings; and (ii) s 18D's defences do not include truth (or statutory or common law privilege), provides some precedent for suggesting that s 18C would impermissibly infringe the implied freedom of political communication. See Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 209-11.

To illustrate the absurdity resulting from not having truth as an exemption in s 18D, consider the above example of the “comfort women” memorial. The Uniting Church cannot defend the s 18C claim on the basis that the Japanese military *in fact* forced women to be sex slaves during the Second World War. This is a rank travesty. But that’s the law at present.

(d) *The operation of s 18C*

In *No Offence Intended*, we noted the following about how complaints are handled by the AHRC under the *Australian Human Rights Commission Act 1986* (Cth) (‘AHRC Act’).<sup>155</sup>

(a) *A brief overview of the complaint process*

The AHRC Act provides the procedure for handling breaches of the RDA. This process is as follows:

- A complaint is lodged with the AHRC.<sup>156</sup>
- The complaint is referred to the AHRC President.<sup>157</sup>
- The AHRC President inquires into the complaint.<sup>158</sup>
- If the matter is not terminated,<sup>159</sup> the AHRC conducts a conference<sup>160</sup> with the aim of conciliating the complaint.
- If the matter is not conciliated at the conference or at some later point, the AHRC President may terminate the complaint.<sup>161</sup>
- If the matter is terminated for any reason then the person complaining may apply to the Federal Court or Federal Circuit Court alleging unlawful discrimination.<sup>162</sup>

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<sup>155</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 174-6. Please note that the footnotes in the quoted passage adopt the numbering used in this submission and not that used in the book.

<sup>156</sup> AHRC Act s 46P.

<sup>157</sup> AHRC Act s 46PD.

<sup>158</sup> AHRC Act s 46PF.

<sup>159</sup> The matter may be terminated prior to conciliation for reasons stated in AHRC Act s 46PH(1)(a)-(i).

<sup>160</sup> AHRC Act s 46PJ.

<sup>161</sup> AHRC Act s 46PH(i).

<sup>162</sup> AHRC Act s 46PO(1).

*(b) The powers of the AHRC*

The AHRC through the AHRC President has the following powers when handling a complaint:

- Require a person to provide relevant information<sup>163</sup> or produce relevant documents.<sup>164</sup>
- Direct the complainant(s) and the respondent(s) to attend a compulsory conference.<sup>165</sup>
- Direct any person able to provide relevant information,<sup>166</sup> or conducive to settling the matter,<sup>167</sup> to attend a compulsory conference.

If a person fails to attend to attend a compulsory conference as directed,<sup>168</sup> then they are subject to an offence of strict liability,<sup>169</sup> carrying a penalty of 10 penalty units.<sup>170</sup>

If a person refuses or fails to give information<sup>171</sup> or produce a document<sup>172</sup> then they are liable to a penalty of 10 penalty units.<sup>173</sup>

A person who knowingly gives false or misleading information to the AHRC, the AHRC President or any other person exercising powers or performing functions under the AHRC Act is liable for imprisonment for 6 months.<sup>174</sup>

*(c) The powers of the Federal Court and the Federal Circuit Court*

As noted above, if the AHRC President terminates a complaint then the person complaining may apply to the Federal Court or the Federal Circuit Court. The proceedings in these courts are civil (as opposed to criminal) proceedings and the civil standard of proof applies.

Ultimately, these courts have the power to order the following remedies:

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<sup>163</sup> AHRC Act s 46PI(2)(a).

<sup>164</sup> AHRC Act s 46PI(2)(b).

<sup>165</sup> AHRC Act s 46PJ(3).

<sup>166</sup> AHRC Act s 46PJ(4)(a).

<sup>167</sup> AHRC Act s 46PJ(4)(b).

<sup>168</sup> AHRC Act s 46PJ(1)(a).

<sup>169</sup> AHRC Act s 46PL(3).

<sup>170</sup> AHRC Act s 46PL(1). A single penalty unit equals \$170: Crimes Act s 4AA(1).

<sup>171</sup> AHRC Act s 46PM(1)(a).

<sup>172</sup> AHRC Act s 46PM(1)(b).

<sup>173</sup> AHRC Act s 46PM(1).

<sup>174</sup> AHRC Act s 46PN.

- Grant an interim injunction to maintain the status quo<sup>175</sup> or the rights of a complainant, respondent or an affected person.<sup>176</sup>
- Declare that a respondent committed unlawful discrimination;<sup>177</sup>
- Direct a respondent not to repeat or continue such unlawful discrimination;<sup>178</sup>
- Direct the respondent perform any reasonable action to redress any loss or damage the applicant suffered;<sup>179</sup>
- Order the respondent employ or re-employ the applicant;<sup>180</sup>
- Order the respondent pay damages for any loss or damage the applicant suffered;<sup>181</sup>
- Order a respondent to vary the termination of a contract or agreement to address the applicant's loss or damage;<sup>182</sup> and/or
- Declare that it would be inappropriate for any further action to be taken in the matter.<sup>183</sup>

The Federal Court and the Federal Circuit Court are not bound by technicalities or legal forms.<sup>184</sup> This measure no doubt facilitates the swifter resolution of proceedings. That said, it is likely that proceedings for breaching the RDA require the following:

- Each party state their case in sufficient detail.
- Each party produce documentary evidence and witness statements; and
- Each party examine and cross-examine witnesses at a hearing.

It has been said that civil proceedings are less serious than criminal proceedings, thereby imposing less of a burden on free speech. However, civil proceedings under the RDA impose burdens on free speech that, while different from the criminal process, are nevertheless serious.

Unlike criminal proceedings, a lower standard of proof is required. There is no prosecutorial

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<sup>175</sup> AHRC Act s 46PP(1)(a).

<sup>176</sup> AHRC Act s 46PP(1)(b).

<sup>177</sup> AHRC Act s 46PO(4)(a).

<sup>178</sup> Ibid.

<sup>179</sup> AHRC Act s 46PO(4)(b).

<sup>180</sup> AHRC Act s 46PO(4)(c).

<sup>181</sup> AHRC Act s 46PO(4)(d).

<sup>182</sup> AHRC Act s 46PO(4)(e).

<sup>183</sup> AHRC Act s 46PO(4)(f).

<sup>184</sup> AHRC Act s 46PR.

discretion on the part of the government to drop a case. Rather, it is up to those complaining to decide to bring proceedings. The respondent incurs costs in time, money and stress in meeting cases. Ultimately, if a remedy is awarded, it is enforceable by the government.

As Mason CJ, Toohey and Gaudron JJ noted in *Theophanous v Herald & Weekly Times Ltd*,<sup>185</sup> with respect to defamation ‘a civil action is as great, if not a greater restriction than a criminal prosecution’.<sup>186</sup> As Mark Steyn (who has been subject to proceedings under Canada’s former “hate speech” law regime) ‘the process is the punishment’.<sup>187</sup>

### 5.1.3 *A sweeping burden*

There are two ways that s 18C imposes a sweeping burden on the implied freedom of political communication. The first way concerns s 18C’s application to disputes over concepts that, largely or solely, are comprised of ideas. The second way is the extent to which s 18C affects the implied freedom of political communication and common law freedom of expression. We will examine each of these in turn.

#### (a) *Section 18C’s application to disputes over concepts comprised of ideas*

Section 18C applies to disputes over concepts that, largely or solely, are comprised of *ideas*. For example, are “race” and “ethnicity” scientific facts or, as the ALRC has observed, are they social, cultural and political constructs?<sup>188</sup> If race, ethnicity, or both, are social, cultural and political constructs then these constructs are, largely or solely, comprised of ideas. Even

<sup>185</sup> [1994] HCA 46; (1994) 182 CLR 104 (*Theophanous*).

<sup>186</sup> *City of Chicago v Tribune Co* (1923) 139 NE 86, 90 (Thompson CJ) cited in *Theophanous* [1994] HCA 46; (1994) 182 CLR 104, 130-1 (Mason CJ, Toohey and Gaudron JJ).

<sup>187</sup> Mark Steyn, ‘Free Speech! (Does Not Include Legal Bills and Career Ruin)’, *Steynonline* (online), 5 November 2016 <<http://www.steynonline.com/7588/free-speech-does-not-include-legal-bills>>.

<sup>188</sup> Australian Law Reform Commission, *The Protection of Human Genetic Information*, Report No 96 (2003) 922 [36.42].

supposing biology plays a role in the determination of race or ethnicity, then the extent to which it influences law and policy are ideas open to dispute.<sup>189</sup>

Somewhat curiously, the RDA does not provide definitions for ‘race’, ‘colour’, ‘ethnicity’ or ‘nationality’. The task of defining these terms has been left to the courts. This itself is unacceptable: in Australia’s system of government, it for Parliament to determine to whom laws apply. Leaving this task to the courts may mean that the judiciary, when defining race, colour, ethnicity or nationality may apply the law to groups of people that Parliament did not intend. This means that the judiciary is in effect legislating.<sup>190</sup>

When s 18C was introduced, the Explanatory Memorandum noted that Part IIA was intended<sup>191</sup> to employ definitions of ‘ethnic origin’ found in *King-Ansell v Police*<sup>192</sup> and *Mandla v Dowell Lee*.<sup>193</sup> The Parliamentary Research Service (rightly) objected to this approach:

If the Parliament ‘intends’ [to follow the definitions in *King-Ansell* and *Mandla*], it should state it in its legislation, rather than attempting to legislate by an Explanatory Memorandum, which is a government document that is neither passed nor approved by the Parliament. While the courts may take into account the Explanatory Memorandum if there is an ambiguity in the legislation, it is surely the Parliament’s role to pass legislation that is not deliberately ambiguous.<sup>194</sup>

Before going further, we pause to note that Parliament must, in any event, **reform the RDA by including definitions for race, colour, ethnicity and nationality.**

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<sup>189</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 131-2.

<sup>190</sup> For further discussion see *ibid* 132-4.

<sup>191</sup> Explanatory Memorandum, *Racial Discrimination Bill 1974* (Cth) 2.

<sup>192</sup> [1979] 2 NZLR 531 (‘*King-Ansell*’).

<sup>193</sup> [1983] 2 AC 548 (‘*Mandla*’).

<sup>194</sup> Parliamentary Research Service (Department of the Parliamentary Library), *Bills Digest: Racial Hatred Bill 1994*, 14 November 1994, 9.



Case law concerning s 18C has adopted the definitions of ‘race’ and ‘ethnicity’ in *King-Ansell* and *Mandla*. In *King-Ansell*, Richardson J stated as regards race:

The real test is whether the individuals or the group regard themselves and are regarded by others in the community as having a particular *historical identity* in terms of their colour or their racial, national or ethnic origin.<sup>195</sup>

He defined ethnicity as:

[A] segment of the population distinguished from others by a sufficient combination of shared *customs, beliefs, traditions* and characteristics derived from a common or presumed common past, even if not drawn from what in biological terms is a common racial stock. It is that combination which gives them an *historically determined* social identity in their own eyes and in the eyes of those outside the group.<sup>196</sup>

In *Mandla*, Lord Fraser of Tullybelton defined ‘ethnic group’ as follows:

For a group to constitute an ethnic group... it must, in my opinion, regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics. Some of these characteristics are essential; others are not essential but one or more of them will commonly be found and will help to distinguish the group from the surrounding community. The conditions which appear to me to be essential are these: (1) *a long shared history*, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive; (2) a *cultural tradition* of its own, including family and social customs and manners, often but not necessarily associated with religious observance. In addition to those two essential characteristics the following characteristics are, in my opinion, relevant; (3) either a common geographical origin, or descent from a small number of common ancestors; (4) a common language, not necessarily peculiar to the group; (5) a common literature peculiar to the group;

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<sup>195</sup> *King Ansell* [1979] 2 NZLR 531, 542 (Richardson J) (emphasis ours).

<sup>196</sup> *Ibid* 543 (Richardson J) (emphasis ours).

(6) *a common religion* different from that of neighbouring groups or from the general community surrounding it; (7) being a minority or being an oppressed or a dominant group within a larger community, for example a conquered people (say, the inhabitants of England shortly after the Norman conquest) and their conquerors might both be ethnic groups.<sup>197</sup>

However, as we noted in *No Offence Intended*:

The issue with incorporating religious, cultural, and historical factors is that each of these factors involves *ideas*. Put broadly, religion involves ideas concerning spirituality; culture involves ideas about how people should conduct themselves individually and socially; the history of a people involves ideas concerning their collective heritage and experiences. All of these ideas may be, and often are, contested.<sup>198</sup>

In *No Offence Intended*, we introduced the ‘body/idea’ distinction.<sup>199</sup> This distinction is meant to develop liberal political philosophy, including the ‘harm principle’. Essentially, the distinction is this: is what is being harmed a *body*, that is, someone or something physically; or what is being harmed, at heart, an *idea*? A law protecting someone or something from physical attack is justified. A law protecting an idea from attack is *not* justified except in limited circumstances.

For example, Sikhism is a religion comprised of *ideas* about spirituality. Sikhs are also an ethnic community, sharing a culture and history comprised of *ideas*. Laws *should not* prohibit these ideas being attacked. This is so even if Sikhs regard these ideas as fundamental to their identity and even if attacking these ideas cause them offence, insult or even humiliation.

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<sup>197</sup> *Mandla* [1983] 2 AC 548, 562 (Lord Fraser of Tullybelton) (emphasis ours).

<sup>198</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 135.

<sup>199</sup> Ibid 136-45. We emphasise that that the “body/idea” distinction is conceptually different from the “mind/body” distinction made by Descartes, as well as variants of the “mind/body” distinction, such as the ‘material/spiritual,... physical/mental, natural/human, animal/human, biological/social, biological/cultural’: John Tooby and Leda Cosmides, ‘The Psychological Foundations of Culture’ in Jerome H Barkow, Leda Cosmides and John Tooby (eds), *The Adapted Mind: Evolutionary Psychology and the Generation of Culture* (Oxford University Press, 1992) 21.

However, laws *should* prohibit Sikhs (like any other person)<sup>200</sup> and Gurdwara<sup>201</sup> (like any other property)<sup>202</sup> being physically attacked.

Of course, it cannot be overlooked that ideas concerning a particular race, colour, ethnicity or nationality are politically influential. In *Adelaide Company of Jehovah's Witnesses Incorporated v The Commonwealth*,<sup>203</sup> Latham CJ noted with respect to religious (specifically, Biblical) beliefs:

Such beliefs are concerned with the relation between man and the God whom he worships, although they are also concerned with the relation between man and the civil government under which he lives. *They are political in character, but they are none the less religious on that account.*<sup>204</sup>

In *Evans*,<sup>205</sup> the Full Court of the Federal Court noted 'Religious beliefs and doctrines frequently attract public debate and sometimes have political consequences reflected in government laws and policies'.<sup>206</sup> The same reasoning applies many aspects of ethnicity, nationality, colour, and race.

However, s 18C purports to limit discussion involving race, colour, ethnicity or nationality – concepts that are, largely or solely, comprised of ideas – by imposing legal liability for

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<sup>200</sup> The notion that all humans are equal in inherent worth is a salutary principle. The notion that all ideas are equal in inherent worth is untenable.

<sup>201</sup> A building in which Sikhs worship.

<sup>202</sup> The considerations for property are different from those concerning natural persons or ideas. Obviously, not all property is equal in inherent worth. However, the utility of property to the natural or legal persons who own then means that such property should be protected from physical harm by law. There are legal means to protect property from "verbal attack", such as laws against misleading or deceptive conduct. However, these laws operate in limited circumstances. For example, there is no law stopping John or Jane Citizen from saying in everyday conversation "Fords are crap cars". However, if Holden ran an advertising campaign saying "New Fords will explode after being driven 1,000 kilometres" then a claim for misleading or deceptive conduct would lie against Holden (assuming, of course, that new Fords do not explode after being driven 1,000 kilometres).

<sup>203</sup> [1943] HCA 12; (1943) 67 CLR 116.

<sup>204</sup> Ibid 125 (Latham CJ) (emphasis ours).

<sup>205</sup> [2008] FCAFC 130; (2008) 168 FCR 576.

<sup>206</sup> *Evans* [2008] FCAFC 130; (2008) 168 FCR 576, 578 [2] (French, Branson and Stone JJ).

offence, insult or humiliation. This is a sweeping intrusion into the implied freedom of political communication.

(b) *The extent to which s 18C affects implied and common law freedom of expression*

The second way that s 18C is sweeping is due to the extent it burdens both the implied freedom of political communication and common law freedom of expression. As to the implied freedom of political communication, s 18C burdens the freedom of *all Australians* to communicate about government and political matters. It should also be noted that the *Commonwealth Constitution* informs and is informed by the common law.<sup>207</sup> The extent to which common law freedoms are infringed is a factor when determining whether or not a law is proportional to its purpose.<sup>208</sup> Section 18C burdens the common law freedom of expression – a freedom which itself has constitutional significance<sup>209</sup> – of *every Australian*. This leads to an important question in the proportionality test: **does s 18C’s purpose justify restricting the freedom of *all Australians* to communicate about government and political matters, even considering the alternatives available?** This is a question to which we will return.

#### 5.1.4 *A summary of s 18C’s burden*

In summary, s 18C’s operation is direct, heavy and sweeping. Its application is far from straightforward and, in fact, is hopelessly confusing. This is unacceptable in a law that can be

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<sup>207</sup> [1997] HCA 25; (1997) 189 CLR 520, 564.

<sup>208</sup> *Attorney General (SA) v Corporation of the City of Adelaide* [2013] HCA 3; (2013) 249 CLR 1, 32 [44] (French CJ).

<sup>209</sup> *Haneef* [2007] FCAFC 203; (2007) 243 ALR 606 [113] (Black CJ, French and Weinberg JJ). See also *Evans* [2008] FCAFC 130; (2008) 168 FCR 576, 594 [72] (French, Branson and Stone JJ); *Monis* [2013] HCA 4; (2013) 249 CLR 92, 128 [60] (French CJ).

breached *by the mere act of speaking in public*. In *No Offence Intended*, we noted the following.<sup>210</sup>

The ALRC noted the following with regards to the complexity of defamation law and the need for simplicity:

If defamation defies simplicity it nonetheless demands it. Defamation is an inhibition of an important freedom, freedom of speech. Accepting that publication which affects reputation should be subject to legal sanction it is desirable that the limits of the restriction should be clearly stated. If people are unable to understand and apply the laws themselves one of two consequences may follow. Either they will publish the material without legal justification, effecting private damage, or else, in fear and uncertainty, they will restrain themselves from publication of material which might properly have been published and which the public is entitled to have...<sup>211</sup>

Given that s 18C concerns matters more general than individual reputation, we submit that the ALRC's comments apply with greater force to s 18C's complexity. When speaking publicly about an issue concerning race, colour, ethnicity or nationality, under s 18C and s 18D a person will need to undertake the following Rube Goldberg-like<sup>212</sup> exercise:

- Consider whether their act is public or private.
- Consider the circumstances in which they are acting, including their own race, colour, ethnicity or nationality.
- Consider whether their act is reasonably likely to offend, insult, humiliate or intimidate a person, group or sub-group of people. As to these groups or sub-

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<sup>210</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 190-2. Please note that the footnotes in the quoted passage adopt the numbering used in this submission and not that used in the book.

<sup>211</sup> Australian Law Reform Commission, *Unfair Publication: Defamation and privacy*, Report No 11 (1979) 28 [49].

<sup>212</sup> Rube Goldberg devices (named after cartoonist and author Rube Goldberg) are complex mechanisms that perform simple tasks: Rube Goldberg, *Rube Goldberg Biography* (20 December 2014) Rube Goldberg: Home of the Official Rube Goldberg Machine Contests <<http://www.rubegoldberg.com/about>>. To use such complexity to perform simple tasks is charming; to use it to regulate a fundamental freedom is perverse.

groups, they must consider whether a reasonable representative of that group would be reasonably likely to be offended, insulted, humiliated or intimidated.

- Consider whether their act falls within an exception. Hence:
  - For an act done for a scientific, artistic or [academic] purpose or other purpose in the public interest:
    - Consider whether the act is reasonable;
    - Consider whether the act is in good faith (and remember to take a harm minimisation approach);
    - Consider whether the act was in the course of any statement, publication, discussion or debate;
    - Consider whether the act was genuine;
    - For an act for another purpose in the public interest, consider whether the act is in fact in the public interest
  - For report of an event or matter of public interest:
    - Consider whether the report is reasonable;
    - Consider whether the report is in good faith (and remember to take a harm minimisation approach);
    - Consider whether the report is fair;
    - Consider whether the report is accurate;
    - Consider whether the report concerns an event or matter that is in fact in the public interest;
    - Note that truth is not an exemption;
  - For a fair comment on an event or matter of public interest:
    - Consider whether the comment is reasonable;
    - Consider whether the comment is in good faith (and remember to take a harm minimisation approach);
    - Consider whether the comment is fair;
    - Consider whether the comment is in fact comment;

- Consider the possibility that, if the comment is construed as a statement, then truth is not an exemption;
- Consider whether the event or matter is in fact in the public interest;
- Consider whether their comment is an expression of their genuine belief;
- Consider that, despite taking care to avoid offence, they may nevertheless be subject to state power for making a statement *that may not actually offend anyone*.<sup>213</sup>

If any or all of the foregoing exercise strikes one as odd, disturbing or even stupid then it should. This Kafkaesque farce is antithetical to any democracy worth the name, especially one with a common law legal tradition.

Before going further, we note that current AHRC President, Professor Gillian Triggs SC, has recently commented that.

‘We ... believe that [s 18C] has a very clear jurisprudence, it’s worked very well and that it would be a retrograde step to amend it because in a way that would put the jurisprudence right back to square one,’ ... ‘We feel that the better approach would be to clarify what the words actually mean according to the jurisprudence of the court.’<sup>214</sup>

We disagree. In our view, the case law has only added confusion to an already confusing provision. Section 18C must be scrapped, and replaced with a provision far narrower in scope and far more straightforward in its application. ‘Going back to square one’, in this instance, would be a welcome step.

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<sup>213</sup> Further, if someone spontaneously acts without such prior consideration, then they will need to go through the preceding steps of the exercise if they are concerned about their actions after the event.

<sup>214</sup> Rosie Lewis, ‘Gillian Triggs has no answers in QUT 18C race case’, *The Australian* (online), 13 December 2016 <<http://www.theaustralian.com.au/national-affairs/indigenous/gillian-triggs-has-no-answers-in-qut-18c-race-case/news-story/a9d7f8a9772db8ee6ca244f69cd8b376>>.

## 5.2 *Is s 18C's purpose legitimate?*

Section 18C's purpose is not compatible with Australia's system of representative and responsive government. In this system:

The provisions of the Constitution mandate a system of representative and responsible government with a universal adult franchise, and s 128 establishes a system for amendment of the Constitution in which the proposed law to effect the amendment is to be submitted to the electors. Communication between electors and legislators and the officers of the executive, and between electors themselves, on matters of government and politics is 'an indispensable incident' of that constitutional system.<sup>215</sup>

Applying the principles of statutory construction,<sup>216</sup> it appears that s 18C's purpose is, in part, to prohibit offence.<sup>217</sup> However, prohibiting offence is not an end compatible with Australia's constitutionally prescribed system of representative and responsible government, even if its overall purpose is to promote racial harmony, reduce racial hatred, or both.<sup>218</sup>

To reiterate and summarise what we argued in *No Offence Intended*,<sup>219</sup> in *Coleman v Power*,<sup>220</sup> McHugh J noted that insults can be used as weapons of intimidation that may have a chilling effect.<sup>221</sup> However, McHugh J also stated that '[t]he use of insulting words is a common enough technique in political discussion and debates'<sup>222</sup> and '...insults are a

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<sup>215</sup> *Aid/Watch Incorporated v Federal Commissioner v Taxation* [2010] HCA 42; (2010) 241 CLR 539, 556 [44] (emphasis and citations omitted) cited in *Wotton v Queensland* [2012] HCA 2; (2012) 246 CLR 1, 13 [20] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

<sup>216</sup> In *Saeed v Minister for Immigration & Citizenship* [2010] HCA 23; (2010) 241 CLR 252, 264-5 [31] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ) it was noted 'Statements as to legislative intention made in explanatory memoranda or by Ministers, however clear or emphatic, cannot overcome the need to carefully consider the words of the statute to ascertain its meaning'.

<sup>217</sup> For a detailed analysis of s 18C's purpose (including why prohibiting offence is a critical part of its purpose) see Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 124-6.

<sup>218</sup> *Ibid* 10, 131-45.

<sup>219</sup> *Ibid* 126-30.

<sup>220</sup> [2004] HCA 25; (2004) 220 CLR 1.

<sup>221</sup> *Ibid* 54 [105] (McHugh J).

<sup>222</sup> *Ibid*.



legitimate part of the political discussion protected by the Constitution. An unqualified prohibition on their use cannot be justified as compatible with the constitutional freedom.’<sup>223</sup>

Gummow and Hayne JJ stated ‘[i]nsult and invective have been employed in political communication at least since the time of Demosthenes.’<sup>224</sup> Kirby J stated:

One might wish for more rationality, less superficiality, diminished invective and increased logic and persuasion in political discourse. But those of that view must find another homeland. From its earliest history, Australian politics has regularly included insult and emotion, calumny and invective, in its armoury of persuasion. They are part and parcel of the struggle of ideas.<sup>225</sup>

In *Monis*, Hayne J stated:

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. And the greater the humiliation, the greater the insult, the more effective the attack may be. The giving of really serious offence is neither incidental nor accidental. The communication is designed and intended to cause the greatest possible offence to its target no matter whether that target is a person, a group, a government or an opposition, or a particular political policy or proposal and those who propound it.<sup>226</sup>

Offence, insult, ridicule and humiliation are inevitable incidents of discussion about government and political matters in Australia’s constitutionally prescribed system of representative and responsible government. As we noted in *An Opportunity Missed?*:

In discussions amongst electors about [politically controversial matters], views will differ sharply. Feelings will run high, and robust, heated discussion will occur. Positions will be attacked with all the logical and rhetorical weapons that opponents can muster, exposing them

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<sup>223</sup> Ibid.

<sup>224</sup> Ibid 78 [197] (Gummow and Hayne JJ).

<sup>225</sup> Ibid 91 [239] (Kirby J).

<sup>226</sup> *Monis* [2013] HCA 4; (2013) 249 CLR 92, 136-7 [85]-[86] (Hayne J).

to withering critical scrutiny if not outright scorn. Arguments will be lost, and lost badly. Feelings will be hurt and pride will be wounded. Offence and insult, and even ridicule and humiliation, are inevitable incidents of such discussion in a democracy.<sup>227</sup>

Prohibiting offence, insult, and even humiliation, are not compatible with Australia's system of representative and responsible government. Section 18C therefore fails this stage of the *McCloy* test.

### 5.3 *Is s 18C reasonably appropriate and adapted to achieve its purpose?*

To meet the third step, the law must be 'proportionate' to its purpose.<sup>228</sup> This means that the law must be suitable, necessary and adequate in its balance.<sup>229</sup>

#### 5.3.1 *Suitability*

All that is required is that there be a rational connection between the means used in s 18C and its purpose.<sup>230</sup> This requirement is met: while its approach is overkill, s 18C making unlawful offence, insult and humiliation has, at the very least, a minimal rational connection to the purpose of promoting racial harmony, reducing racial hatred, or both.

#### 5.3.2 *Necessity*

'Necessity' means that there is no obvious and compelling alternative and reasonably practicable means of achieving the same purpose that has a less restrictive effect on the freedom.<sup>231</sup>

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<sup>227</sup> Joshua Forrester, Augusto Zimmermann and Lorraine Finlay, 'An Opportunity Missed? A Constitutional Analysis of Proposed Reforms to Tasmania's 'Hate Speech' Laws' (2016) 7 *The Western Australian Jurist* 275, 300.

<sup>228</sup> *McCloy* [2015] HCA 34 [2] (French CJ, Kiefel, Bell and Keane JJ).

<sup>229</sup> *Ibid*.

<sup>230</sup> *Ibid* [80] (French CJ, Kiefel, Bell and Keane JJ).

<sup>231</sup> *Ibid* [2] (French CJ, Kiefel, Bell and Keane JJ).

When assessing the necessity requirement, we suggest that it is a mistake to focus on alternative drafting of the provision in question, or on one alternative law. Instead, the following should be considered:

1. Whether one or more laws serve the purpose that s 18C serves in a way less intrusive to the implied freedom of political communication; and
2. Whether one or more alternative measures (not necessarily laws) serve the purpose that s 18C serves.

Hence, in the case of s 18C, it is relevant to look at:

1. Existing criminal laws;
2. Existing anti-discrimination laws; and
3. Measures that may be undertaken in civil society.

*(a) Existing criminal laws*

A common complaint is that people are subjected to racial abuse in public, such as walking down the street or otherwise going about their business. However, there are already criminal laws in all States and Territories that serve the purpose of protecting people from such harassment and abuse.<sup>232</sup> These are laws of equal application, that is, they apply to all in the particular jurisdiction and are not limited to those who have a listed attribute.

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<sup>232</sup> See, for example, *Crimes Act 1900* (ACT) s 392; *Summary Offences Act 1988* (NSW) s 4; *Summary Offences Act* (NT) s 47; *Criminal Code 1899* (Qld) s 75; *Summary Offences Act 1953* (SA) s 7; *Police Offences Act 1935* (Tas) s 12; *Summary Offences Act 1966* (Vic), ss 17, 17A; *Criminal Code 1913* (WA) s 74A.

Another common complaint is repeated racial harassment aimed at a particular individual. However, criminal laws in all States in Territories prohibit stalking<sup>233</sup> – a law that is readily applicable in such situations.

*(b) Existing anti-discrimination laws*

A common complaint is discrimination or harassment that occurs in environments such as in the workplace, in places of education, or when trying to obtain accommodation or goods or services. However, present laws already cover such instances, not least including a suite of State, Territory and Commonwealth anti-discrimination laws.<sup>234</sup>

*(c) Measures that can be undertaken in civil society*

In *No Offence Intended*, we noted that just because a government does nothing does *not* mean nothing is done.<sup>235</sup> Civil society itself provides measures to combat racism. According to Martin Krygier, civil society is:

...comprised of multitudes of independent actors, going about their individual or freely chosen cooperative affairs, able to choose to associate and participate (or not) in an independent public realm, with an economy of disbursed actors and markets, undergirded by a socially embedded legal order, which grants and enforces legal rights.<sup>236</sup>

As regards offensive speech, non-state actors may challenge that speech with their own speech. They may use their common law freedom to assemble to magnify their voice and to

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<sup>233</sup> *Crimes Act 1900* (ACT) s 35; *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 13; *Summary Offences Act* (NT) s 189; *Criminal Code 1899* (Qld) ss 359B, 359E; *Criminal Law Consolidation Act 1935* (SA) 19AA; *Criminal Code Act 1924* (Tas) sch 1 s 192; *Crimes Act 1958* (Vic) s 21A; *Criminal Code Act 1913* (WA) s 338E.

<sup>234</sup> See, for example, Act ss 14, 15. As far as Commonwealth legislation is concerned, see RDA ss 11, 12, 13, 15; *Disability Discrimination Act 1992* (Cth) ss 35, 37, 39; *Sex Discrimination Act 1984* (Cth) pt II div 3.

<sup>235</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 204.

<sup>236</sup> Martin Krygier, 'Virtuous Circles: Antipodean Reflections on Power, Institutions, and Civil Society' (1997) 11(1) *East European Politics and Societies* 36, 75.

speak out on behalf of those who cannot speak for themselves. That is, in a common law legal system such as Australia's, the freedom to make racist or offensive speech is countered by those exercising common law freedoms of speech and assembly to refute such speech.<sup>237</sup>

Further, people who are harassed may also pursue more direct, cheaper and faster private solutions. For example, if racial slurs are used in online argument (such as on social media like Facebook or Twitter) then the best response is to report the slur. However, if there is sustained online harassment, then there is recourse to the law against stalking, which covers a wide range of conduct, including online conduct.<sup>238</sup>

Finally, the “marketplace of ideas” must be considered. This marketplace does most of its work in civil society. As we mentioned in *No Offence Intended*:<sup>239</sup>

There is much to be said for the concept of the “marketplace of ideas”. It is the best way to arrive at truth. Note that “best” does not mean “infallible” – and critics usually seize the marketplace concept’s lack of infallibility to attack it. But lack of infallibility does not mean this concept should be abandoned. Indeed, the marketplace concept is superior to all alternatives that have been tried. (To continue the marketplace metaphor, critics often advocate state-enforced “monopolies” which, when applied to ideas (as in many other areas), is a far worse alternative.)

An advantage of the marketplace concept that critics (and, alas, some advocates) overlook is the *discipline of competition*. This discipline is critical maintaining the strength of ideas – especially ideas that have merit. The need to respond to challenges keeps ideas alive and vital.

This is crucial to transmitting ideas across generations. The problem with closing off debate by

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<sup>237</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 154.

<sup>238</sup> *Criminal Code 1924* (Tas) s 192.

<sup>239</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 80-1 (emphasis in original). Please note that the footnotes in the quoted passage adopt the numbering used in this submission and not that used in the book.

“legislating truth” is that it leads to intellectual laziness. Once vital ideas defended by informed advocates become stale dogma enforced by unthinking zealots.<sup>240</sup>

As much as one might be tempted, “legislating truth” is *never* wise. Those who live in a liberal democracy much *always* be ready to defend their positions with reasoned argument, and not with threat of legal punishment.<sup>241</sup>

*(d) Enforcement of existing laws*

It could be argued that s 18C must supplement existing laws owing to them not being enforced. However, if this is the case, then the solution is to ensure State, Territory and Commonwealth agencies enforce existing laws. Here, civil society also plays a role:

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<sup>240</sup> To give a somewhat pointed example, during the Cold War, Irving Kristol observed with respect to socialism: ‘In the case of contemporary socialism, there are no Church Fathers – only heretics, outside the reach of established orthodoxies, developing doctrines for which socialist authority has no use at all. Not a single interesting work on Marxism – not even an authoritative biography of Karl Marx! – has issued from the Soviet Union in its sixty years of existence. If you want to study Marxism, with Marxist intellectuals, you go to Paris, or Rome, or London, or some American campus. There are no intellectual hegiras to Moscow, Peking or Havana. Moreover, the works of Western Marxist thinkers – and some are indeed impressive – are suppressed in socialist lands. Sartre’s Marxist writings have never been published in Russia, just as Brecht’s plays have never been produced there, and just as Picasso’s paintings have never been exhibited there. Socialism, apparently, is one of those ideals which, when breathed upon by reality, suffers immediate petrification. Which is why all those who remain loyal to this ideal will always end up bewailing another “revolution betrayed”’: see Irving Kristol, *Neoconservatism: The Autobiography of an Idea* (The Free Press, 1995) 301-2. We suggest that the better Marxist thought in the West resulted from Marxist theorists needing to respond to criticism with reasoned debate, rather than just sending the critic to a gulag. It is ironic (but ultimately unsurprising, when one thinks about it) that totalitarian regimes that routinely criticised liberal democracies for being soft could not tolerate even the slightest criticism.

<sup>241</sup> As Mark Steyn noted with respect to the European Union: ‘One reason why the Eutopian dream has fizzled across the Continent is because the entire political class took it for granted no right-thinking person could possibly disagree with them, so they never felt they had to bother arguing the case and, now they have to, *they can’t remember what the arguments were*. Those who subscribe to inevitablist theories of historical progress often make that mistake: the lazy Aussie republicans did in 1999, for example.’: Mark Steyn, ‘The lunatic mainstream had better start worrying fast’, *The Telegraph* (online), 15 June 2004 <<http://www.telegraph.co.uk/comment/personal-view/3607274/The-lunatic-mainstream-had-better-start-worrying-fast.html>> (emphasis ours). As he also noted with respect to Donald Trump’s election: ‘Trump didn’t win because he substituted “name-calling” for “political disagreement”. The exit-polling revealed that large numbers of people who didn’t “approve” of Trump personally nevertheless voted for him... because they agreed with him on policy, on trade and immigration and unwon wars, and his willingness to stick to his positions through a barrage of elite scorn. The derision didn’t work, and it will continue not to work. I made the point... that, because of political correctness and their hammerlock on the culture, the left hasn’t needed to argue - *and so gradually they’ve lost the ability to argue*. Thus: “Hater!” “Racist!” “Misogynist!”’: Mark Steyn, ‘Advice for the Loyal Opposition’, *Steynonline* (online), 15 November 2016 <[www.steynonline.com/7598/advice-for-the-loyal-opposition](http://www.steynonline.com/7598/advice-for-the-loyal-opposition)> (emphasis ours).

representative organisations can educate their constituents about relevant laws, and can monitor enforcement.

Another argument is that s 18C, being a civil provision, allows individuals to bring an action where an executive agency may not act. However, there are other civil laws that may serve in s 18C's place in the circumstances. In addition to the anti-discrimination laws noted above, civil claims can be made under defamation and intentional infliction of emotional distress.

### 5.3.3 *Adequacy in its balance*

This criterion requires a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.<sup>242</sup>

Two things should be noted from the outset. First, **the implied freedom of political communication is a strong freedom.**<sup>243</sup> In addition, **common law freedom of expression is a freedom of constitutional importance.**<sup>244</sup>

Second, **the onus is on those seeking to restrict the implied freedom of political communication to justify the law.** In s 18C's case, its proponents must meet a very high threshold. As noted above, this threshold is: **does s 18C's purpose justify restricting the freedom of all Australians to communicate about government and political matters, even considering the alternatives available?**

Section 18C's proponents have, on occasion, asked critics to justify the language they want to say that s 18C presently makes unlawful. With respect, this argument is entirely

<sup>242</sup> *McCloy* [2015] HCA 34 [2] (French CJ, Kiefel, Bell and Keane JJ) (citations omitted).

<sup>243</sup> See *Monis* [2013] HCA 4; (2013) 249 CLR 92, 141 [103]-[104] (Hayne J). See also *Coleman* [2004] HCA 25; (2004) 220 CLR 1, 49-50 [91] (McHugh J), 77 [195] (Gummow and Hayne JJ).

<sup>244</sup> *Haneef* [2007] FCAFC 203; (2007) 243 ALR 606 [113] (Black CJ, French and Weinberg JJ). See also *Evans* [2008] FCAFC 130; (2008) 168 FCR 576, 594 [72] (French, Branson and Stone JJ); *Monis* [2013] HCA 4; (2013) 249 CLR 92, 128 [60] (French CJ).

misconceived from the standpoint of both the implied freedom of political communication and Australia's common law legal tradition. The implied freedom of political communication is a restriction on lawmaking. It is up to those supporting the law to show it does not impermissibly infringe the implied freedom of political communication. In addition, the need for lawmakers to justify a law has long been part of the common law legal tradition. In the common law legal tradition, everyone is free to do anything unless prohibited by law.<sup>245</sup> As a corollary, if a law is to infringe a freedom then it must be justified. Hence, lawmakers (whether in Parliament or in the judiciary) have long provided rationales for their laws.

Hence, it is up to those supporting s 18C to show it does not impermissibly infringe the implied freedom of communication. They need to show that s 18C's restrictions are not disproportionate to the purpose it serves. Section 18C's opponents may, of course, provide arguments that s 18C is disproportionate. However, they are not obliged to make their case. Section 18C's supporters *are* so obliged. To claim otherwise is, in effect, asking an individual who wants to speak freely to justify themselves before doing so. You should not need a justification for wanting to exercise basic human rights and common law freedoms. No other human right or common law freedom is treated with this type of suspicion and disdain.

We will first examine the purpose s 18C serves, before examining the restrictions it places on the implied freedom of political communication.

*(a) The purpose that s 18C serves*

Section 18C's purpose is laudable, being to promote racial harmony, reduce racial hatred, or both, in Australia's multicultural society. Instances of racial hatred can harm its victims; s 18C may act to prevent these harms. Section 18C also helps prevent a climate of racial hatred in which minorities feel unsafe, and promote a climate of racial tolerance. In any event, s 18C

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<sup>245</sup> [1997] HCA 25; (1997) 189 CLR 520, 564.



encourages people to speak responsibly and thus enhance public debate. It will also overcome the “chilling effect” of racist speech. Further, having a law like s 18C has symbolic value: demonstrating to members of the community that racism will not be tolerated. Finally, s 18C helps protect Australia from sliding towards systemic racism of the kind seen in Nazi Germany and apartheid South Africa.

We now examine these arguments.

(i) *The harms that s 18C addresses*

Once again, we note that the implied freedom of political communication is a strong freedom. Further, common law freedom of expression is of constitutional importance. Neither should be infringed lightly, and evidence for their restriction must be clear, if not overwhelming.<sup>246</sup>

As to the harm that s 18C addresses, we note that the Royal Commission, the Inquiry and the ALRC Report were all mentioned in the second reading speech supporting the Bill inserting s 18C.<sup>247</sup> However, and as we noted above, *none* of these reports recommended a law as broad as s 18C, and the Inquiry specifically recommended *against* such a law.

Further, authors who have written on the harmful effects of racism do not argue for laws as extensive as s 18C. For example, Richard Delgado proposed a law where the plaintiff would need to prove that:

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<sup>246</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 130.

<sup>247</sup> Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 15 November 1994, 3336-7 (Michael Lavarch).

Language was addressed to him or her by the defendant that was intended to demean through reference to race; that the plaintiff understood as intended to demean through reference to race; and that a reasonable person would recognise as a racial insult.<sup>248</sup>

Delgado's proposed law requires intent, something that s 18C lacks. Further, the language must demean, which is a higher threshold to meet than offence, insult or even humiliation.<sup>249</sup>

Mari Matsuda's proposed law would have the following elements:

1. The message is of racial superiority;
2. The message is directed against a historically oppressed group; and
3. The message is persecutorial, hateful, and degrading.<sup>250</sup>

Again, Matsuda's requirements are far stricter than s 18C's.

Finally, there are issues with the evidence concerning racial hatred in Australia. The AHRC itself has noted that there has been very little qualitative research on the lived experience of racism in Australia.<sup>251</sup> In *An Opportunity Missed?*,<sup>252</sup> we noted that Katherine Gelber and Luke McNamara have attempted to address this in recent articles concerning the harms of

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<sup>248</sup> Richard Delgado, 'Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling' in Mari J Matsuda, Charles R Lawrence III, Richard Delgado and Kimberlé Williams Crenshaw (eds), *Words That Wound: Critical Race Theory, Assaultive Speech and the First Amendment* (Westview Press, 1993) 109.

<sup>249</sup> A comment may show a cherished belief to be wrong (and thus humiliate the believer) without the tone or content of the comment being demeaning.

<sup>250</sup> Mari Matsuda, 'Public Response to Racist Speech: Considering the Victim's Story' (1989) 87 *Michigan Law Review* 2320, 2357. See also Mari Matsuda 'Public Response to Racist Speech: Considering the Victim's Story' in Mari J Matsuda, Charles R Lawrence III, Richard Delgado and Kimberlé Williams Crenshaw (eds), *Words That Wound: Critical Race Theory, Assaultive Speech and the First Amendment* (Westview Press, 1993) 36.

<sup>251</sup> Australian Human Rights Commission, *Freedom from Discrimination: Report on the 40<sup>th</sup> Anniversary of the Racial Discrimination Act* (Australian Human Rights Commission, 2015) 6 [2.1] ('40<sup>th</sup> Anniversary Report').

<sup>252</sup> For our full critique of Katherine Gelber and Luke McNamara's work, see Joshua Forrester, Augusto Zimmermann and Lorraine Finlay, 'An Opportunity Missed? A Constitutional Analysis of Proposed Reforms to Tasmania's 'Hate Speech' Laws' (2016) 7 *The Western Australian Jurist* 275, 312-22.

hate speech.<sup>253</sup> However, we also noted that their analysis was unsatisfactory because, amongst other things:

- Certain statements they cite as evidence of hate speech do not meet their own definition of hate speech.<sup>254</sup>
- Certain statements they cite as evidence of hate speech are vague, conclusory and/or hearsay.<sup>255</sup>
- In any event, the sample size they use (101 people), while statistically significant, is still small and thus prone to a significant margin of error.<sup>256</sup>

As we noted in *An Opportunity Missed?*:<sup>257</sup>

In liberal democracies, John Stuart Mill’s ‘harm principle’<sup>258</sup> has long been influential in determining when it is appropriate for a government to make laws. However, Mill formulated

<sup>253</sup> Katherine Gelber and Luke McNamara, ‘Evidencing the harms of hate speech’ (2016) 22(3) *Social Identities* 324, 324; Katherine Gelber and Luke McNamara, ‘Anti-Vilification Laws and Public Racism in Australia: Mapping the Gaps Between Harms Occasioned and the Remedies Provided’ (2016) 39(2) *UNSW Law Journal* 488, 488.

<sup>254</sup> Joshua Forrester, Augusto Zimmermann and Lorraine Finlay, ‘An Opportunity Missed? A Constitutional Analysis of Proposed Reforms to Tasmania’s ‘Hate Speech’ Laws’ (2016) 7 *The Western Australian Jurist* 275, 314-5. Gelber and McNamara’s definition of ‘hate speech’ is as follows: ‘[W]e follow Parekh in emphasizing three defining characteristics. First, it is ‘directed against a specified or easily identifiable individual or... a group of individuals based on an arbitrary and normatively irrelevant feature’. Secondly, ‘hate speech stigmatizes the target group by implicitly or explicitly ascribing to it qualities widely regarded as highly undesirable’. Thirdly, ‘the target group is viewed as an undesirable presence and a legitimate object of hostility’’: Katherine Gelber and Luke McNamara, ‘Evidencing the harms of hate speech’ (2016) 22(3) *Social Identities* 324, 324 (citations omitted). However, certain statements they cite as evidence of hate speech simply do not meet this definition. For example: ‘I’ve been called names and like that when I was at school, those sorts of things’; ‘It’s just a negative picture that you see in [the media] which actually portrays just the bad things about India. It never portrays the good things’; ‘Look, any time I pick up the paper and there’s a story in there about Aboriginal people, it’s nearly always negative. That hasn’t changed and I don’t know whether it will’; and ‘We feel very disappointed about the media’s interest in reporting the negative side of China while there is so much... good news worth telling. There is a strong hostility and prejudice towards China behind the media reporting.’: Katherine Gelber and Luke McNamara, ‘Evidencing the harms of hate speech’ (2016) 22(3) *Social Identities* 324, 329, 331-2. As we noted ‘the statements are vague, and some are conclusory. No specifics are given. There is simply no basis for concluding that the conduct described in these statements meet Gelber and McNamara’s definition of hate speech.’: Joshua Forrester, Augusto Zimmermann and Lorraine Finlay, ‘An Opportunity Missed? A Constitutional Analysis of Proposed Reforms to Tasmania’s ‘Hate Speech’ Laws’ (2016) 7 *The Western Australian Jurist* 275, 315.

<sup>255</sup> Joshua Forrester, Augusto Zimmermann and Lorraine Finlay, ‘An Opportunity Missed? A Constitutional Analysis of Proposed Reforms to Tasmania’s ‘Hate Speech’ Laws’ (2016) 7 *The Western Australian Jurist* 275, 314-6. The examples given in the immediately preceding footnote are also evidence of vague and/or conclusory statements.

<sup>256</sup> Ibid 312.

<sup>257</sup> Ibid 321-2.

this principle when ‘harm’ did not have the expanded meaning that some would give it today. A government protecting against these expanded harms may undermine its liberal democratic basis. For example, a government may purport to protect people against expanded harms by prohibiting offensive speech. However, doing so may well choke the freedom of expression necessary for effective liberal democratic government.

Likewise, Commonwealth, State or Territory laws purporting to protect against expanded harms may impede communications necessary to Australia’s constitutionally-prescribed system of representative and responsible government. Hence, when determining whether or not a law impermissibly infringes the implied freedom of political communication requires assessing the *type* of harm that the law addresses. Laws prohibiting physical harm to people and property are more justifiable than laws prohibiting acts that offend, insult... or humiliate.

Of course, it cannot be overlooked that restricting freedom of expression *creates* harms. As we noted in *No Offence Intended*:<sup>259</sup>

The systematic degradation of entire populations under communist regimes through (amongst other things) restrictions on free speech exemplify how restrictions on speech corrode human dignity. Vaclav Havel, who spent much of his life as a dissident intellectual in communist Czechoslovakia, spoke of this as follows:

The manager of a fruit-and-vegetable shop places in his window, among the onions and carrots, the slogan: “Workers of the world, unite!” Why does he do it? What is he trying to communicate to the world? Is he genuinely enthusiastic about the idea of unity among the workers of the world? Is his enthusiasm so great that he feels an irrepressible impulse to acquaint the public with his

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<sup>258</sup> The harm principle is stated thus: ‘[T]he sole end for which mankind are warranted, individually and collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.’: John Stuart Mill, *On Liberty* (Penguin Classics, first published 1859, 1985 ed) 68.

<sup>259</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 74-5 citing Vaclav Havel, *The Power of the Powerless* (Hutchinson, 1985) 27-8.

ideals? Has he really given more than a moment's thought to how such a unification might occur and what it would mean?

I think it can safely be assumed that the overwhelming majority of shopkeepers never think about the slogans they put in their windows, nor do they use them to express their real opinions. That poster was delivered to our greengrocer from the enterprise headquarters along with the onions and carrots. He put them all into the window simply because it has been done that way for years, because everyone does it, and because that is the way it has to be. If he were to refuse, there could be trouble. He could be reproached for not having the proper decoration in his window; someone might even accuse him of disloyalty. He does it because these things must be done if one is to get along in life. It is one of the thousands of details that guarantee him a relatively tranquil life “in harmony with society,” as they say...

Let us take note: if the greengrocer had been instructed to display the slogan “I am afraid and therefore unquestioningly obedient,” he would not be nearly as indifferent to its semantics, even though the statement would reflect the truth. The greengrocer would be embarrassed and ashamed to put such an unequivocal statement of his own degradation in the shop window, and quite naturally so, for he is a human being and thus has a sense of his own dignity. To overcome this complication, his expression of loyalty must take the form of a sign which, at least on its textual surface, indicates a level of disinterested conviction. It must allow the greengrocer to say, “What's wrong with the workers of the world uniting?” Thus the sign helps the greengrocer to conceal from himself the low foundations of his obedience, at the same time concealing the low foundations of power...

We further noted:<sup>260</sup>

Robert Conquest wrote of the effect of Stalinist repression as follows: ‘In fact, the stage was reached which the writer Isaak Babel summed up, ‘Today a man only talks freely with his wife – at night, with the blankets pulled over his head’. Only the very closest of friends could hint to one another of their disbelief of official views (and often not even then). The ordinary citizen

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<sup>260</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 75 fn 240 citing Robert Conquest, *The Great Terror: A Reassessment* (Oxford University Press, 1990) 256.

had no means of discovering how far the official lies were accepted. He might be one of a scattered and helpless minority, and Stalin might have won his battle to destroy the idea of truth in the Soviet mind. ‘Millions led double lives,’ as the grandson of the executed Army Commander Yakir was to write later. Every man became in one sense what Donne says he is not – ‘an island’.

There is no doubt that racist speech can and does cause harm. However, given the foregoing, s 18C’s broad restriction of the freedom of *all* Australians to communicate about government and political matters is not justified, considering the alternatives available.

(ii) *Helping to preventing systemic racism*

As to s 18C’s role in helping prevent Australia from sliding into systemic racism of the kind seen in Nazi Germany or apartheid South Africa, we’ll repeat our observations in *An Opportunity Missed?*:<sup>261</sup>

[I]n *Whatcott*, Rothstein J noted the following:

The majority in *Keegstra* and *Taylor* [two Canadian cases concerning Canadian “hate speech” laws] reviewed evidence detailing the potential risks of harm from the dissemination of messages of hate, including the 1966 *Report of the Special Committee on Hate Propaganda in Canada*, commonly known as the Cohen Committee. The Cohen Committee wrote at a time when the experiences of fascism in Italy and National Socialism in Germany were in recent memory. Almost 50 years later, I cannot say that those examples have proven to be isolated and unrepeatable at our current point in history. One need only look to the former Yugoslavia, Cambodia, Rwanda, Darfur, or Uganda to see more recent examples of attempted cleansing or

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<sup>261</sup> Joshua Forrester, Augusto Zimmermann and Lorraine Finlay, ‘An Opportunity Missed? A Constitutional Analysis of Proposed Reforms to Tasmania’s ‘Hate Speech’ Laws’ (2016) 7 *The Western Australian Jurist* 275, 370-2. Please note that the footnotes in the quoted passage adopt the numbering used in this submission and not that used in the article.

genocide on the basis of religion, ethnicity or sexual orientation. In terms of the effects of disseminating hateful messages, there is today the added impact of the Internet.<sup>262</sup>

In *No Offence Intended*, we noted the following about comparing Canada to Nazi Germany:

We'll be blunt: the remarks of the Cohen Committee and Dickson CJ [in *Keegstra*] are astonishingly condescending to Canada's citizenry. They engage in speculation, 'slippery slope' reasoning and a *reductio ad Hitlerum*, all of which are historically suspect when applied to Canada. In the lead-up to the Second World War, with dire economic circumstances and fascism on the rise in Europe and elsewhere, *Canada did not go fascist*. Indeed, Canada, along with other nations with a common law legal tradition, fought to defeat fascism. In addition, after the Second World War the horrific results of fascism were widely known. With that experience, why was it a sound assumption that Canada (of all places) may well go backwards?<sup>263</sup>

Our point is this: there were substantial social, cultural, political and philosophical differences between Canada and Nazi Germany even in the 1930's.<sup>264</sup> Such differences also exist between Canada and the former Yugoslavia, Cambodia, Rwanda, Darfur, and Uganda. It should be noted that Canada's civil 'hate speech' law, s 13 of Canada's *Human Rights Act*, was repealed in November 2014. Since the repeal, Canada has not become a racist hellhole, to the complete surprise of absolutely no one.

Canada and Australia are both liberal democracies with common law legal traditions. As to Australia, it should be noted that, like Canada, it has fought against totalitarian ideologies such as fascism and communism. It should also be noted that, since Federation, Australia has done the following:

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<sup>262</sup> *Whatcott* [2013] SCC 11; [2013] 1 SCR 467, 505-6 [72] (Rothstein J).

<sup>263</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 83-4 (emphasis in original).

<sup>264</sup> It appears that social, cultural, political and philosophical differences between Canada and other members of the British Empire on the one hand, and Germany on the other, had been emerging for some time. Mervyn Bendle gives a fascinating account of the ideological dimension behind the First World War. In short, during the 19<sup>th</sup> century an anti-liberal 'Germanic ideology' had emerged in Germany. This ideology contained a narrative of Germanic supremacy and grievance, and was fundamentally at odds with the British Empire's predominantly liberal philosophy. These differences came to a head in the lead up to the First World War. After the First World War, this 'Germanic ideology' formed the basis of Nazi ideology. See Mervyn F Bendle, 'Beyond Good and Evil: Germany, 1914', *Quadrant* (online), 28 July 2014 <<https://quadrant.org.au/magazine/2014/07-08/beyond-good-evil-german-mind-1914/>>.

- Extended the franchise to women and Aborigines;
- Amended the *Commonwealth Constitution* so the Commonwealth Parliament could legislate with respect to Aborigines;
- Abolished the White Australia Policy;
- Decriminalised homosexuality in all States and Territories;
- Enacted a range of anti-discrimination legislation at the State and Commonwealth level;
- Pursued a largely successful policy of multicultural immigration.

Each of these successes were achieved without ‘hate speech’ legislation.<sup>265</sup> They speak to the strength of the arguments supporting them. They also speak to the political and philosophical ability of the Australian people to debate and enact them. Given this, the claim that ‘hate speech’ laws are necessary to prevent Australia from sliding into fascism is suspect given the historical evidence. (It is also, well, offensive to the Australian people.)

The historical evidence does not appear significant enough to justify restricting the freedom of all Australians to communicate about government and political matters to the extent that s 18C does, considering the alternatives available. In fact, we suggest that the historical evidence provides a compelling case for *rejecting* a law of s 18C’s scope.

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<sup>265</sup> Indeed, it should be noted that Weimar Germany *did* have ‘hate speech’ laws (specifically laws against ‘insulting religious communities’) and prosecuted members of the Nazi Party (including Joseph Goebbels) under them. The Nazis turned their prosecutions to their advantage, painting themselves as political victims: see Brendan O’Neill, ‘How a Ban on Hate Speech Helped the Nazis’, *The Weekend Australian*, 29 March 2014, 16 cited in Augusto Zimmermann and Lorraine Finlay, ‘A Forgotten Freedom: Protecting Freedom of Speech in an Age of Political Correctness’ (2014) 14 *Macquarie Law Journal* 185, 191. It also cannot be discounted that passing laws forbidding insulting religious communities encouraged intellectual laziness in Weimar Germany. That is, citizens of Weimar Germany relied on the law to stop extremists like the Nazis, instead of challenging them in debate... To give an example of an effective alternative approach, Great Britain’s tradition of freedom of expression allowed Nazi ideas to be *ridiculed*: see Mark Steyn, *Lights Out: Islam, free speech and the twilight of the west* (Stockade Books, 2009) 196. As Steyn noted ‘[I]f Adolf Hitler were to return from wherever he is right now, what would he be most steamed about? That in some countries there are laws banning Nazi symbols and making Holocaust denial a crime? No, that wouldn’t bother him: that would testify to the force and endurance of his ideas – that 60 years on they’re still so potent the state has to suppress them. What would bug him most is that on Broadway and in the West End Mel Brooks is peddling Nazi shtick in *The Producers* and audiences are howling with laughter’: *ibid* 195.



(iii) *Preventing a climate of racial hatred and promoting a climate of racial harmony*

The argument that laws against expressions of racial hatred help prevent a climate of racial hatred is related to the arguments that such laws help prevent harm and systemic racism.

Hence, what we have argued in the previous two sections is also relevant here (although we won't repeat them).

The argument that laws prohibiting expression of racial hatred prevent climates of hatred and discrimination appears plausible, and is certainly appealing. However, as we noted in *No Offence Intended*:

[A]rguments justifying restrictions on freedom of expression on the basis that its exercise creates a “climate” where people feel unsafe must be treated with caution. Restricting freedom of expression requires a clear-eyed risk analysis of the perceived threat. What is the source of the perceived threat? Is it a direct threat against an identified person or group of people? Or (at the other end of the spectrum) does the perceived threat stem from someone hearing comments they simply don't like? A person's emotional reaction can be disproportionate to the conduct about which they complain. Care must be taken to ensure that claimed threats are not vague, speculative, exaggerated, or contrived.<sup>266</sup>

A clear-eyed risk analysis would account for the evidence of the harm caused by expressions of racial hatred, and Australia's overall record of fighting racism. Given our arguments in the previous two sections, the argument that s 18C is necessary to prevent a climate of hatred appears speculative at best. Such an argument certainly does not justify a law of s 18C's breadth.

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<sup>266</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 85.

As to creating a climate of racial tolerance, this is an admirable goal. However, even while admirable, this goal does not justify s 18C's broad restriction of the freedom of *all* Australians to communicate about government and political matters, considering the alternatives available.

(iv) *Promoting responsible speech*

Arguments to the effect that "regulating" freedom of expression enhances public debate must be treated with extreme caution.<sup>267</sup> While superficially appealing, laws purporting to "promote the standard of debate" encounter the same difficulties with uncertainty as laws prohibiting expression of racial hatred. Once again, reasonable minds may differ concerning whether a particular statement was a forthright opinion on the one hand, or a coarse or unseemly statement that detracts from public debate on the other. Forcing a speaker to state their position more politely may in fact rob them of their freedom of expression. As Daniel Ward observed, such a position 'ignores the extent to which one's sentiments are inseparable from the manner in which they are expressed'. 'F\*\*k war' is simply not the same as 'Down with war.'<sup>268</sup>

(v) *Overcoming the chilling effects of expression of racial hatred*

As to the chilling effect of expression of racial hatred, we note what we said in *An Opportunity Missed?* with respect to s 19 of the *Anti-Discrimination Act 1998* (Tas):<sup>269</sup>

[I]n *Whatcott*, Rothstein J noted that hate speech<sup>270</sup> could silence groups affected by it:

<sup>267</sup> Joshua Forrester, Augusto Zimmermann and Lorraine Finlay, 'An Opportunity Missed? A Constitutional Analysis of Proposed Reforms to Tasmania's 'Hate Speech' Laws' (2016) 7 *The Western Australian Jurist* 275, 368 fn 332.

<sup>268</sup> Daniel Ward 'Scepticism, human dignity and the freedom to offend' (2013) 29(3) *Policy* 15, 19 citing *Cohen v California* 403 US 15 (1971).

<sup>269</sup> Joshua Forrester, Augusto Zimmermann and Lorraine Finlay, 'An Opportunity Missed? A Constitutional Analysis of Proposed Reforms to Tasmania's 'Hate Speech' Laws' (2016) 7 *The Western Australian Jurist* 275, 367-70. Please note that the footnotes in the quoted passage adopt the numbering used in this submission and not that used in the article.

[H]ate propaganda opposes the targeted group's ability to find self-fulfillment by articulating their thoughts and ideas. It impacts on that group's ability to respond to the substantive ideas under debate, thereby placing a serious barrier to their full participation in our democracy. Indeed, a particularly insidious aspect of hate speech is that it acts to cut off any path of reply by the group under attack. It does this not only by attempting to marginalize the group so that their reply will be ignored: it also forces the group to argue for their basic humanity or social standing, as a precondition to participating in the deliberative aspects of our democracy.<sup>271</sup>

Rothstein J repeatedly refers to the silencing effect of hate speech.<sup>272</sup> However, while this effect is repeatedly asserted, it is not demonstrated: Rothstein J does not offer any evidence supporting this claim. This is a problem that has been repeated in Australia where, in *Sunol*, Basten J asserted the following without providing evidence:

Conduct by which one faction monopolises a debate or, by rowdy behaviour, prevents the other faction being heard, burdens political discourse as effectively as a statutory prohibition on speaking. A law which prohibits such conduct may constrain the behaviour of the first faction, but not effectively burden political discourse; on the contrary, it may promote such discourse.<sup>273</sup>

We grant that the silencing effect of hate speech is plausible, and that hate speech no doubt *has* silenced individuals. However, the onus is on those supporting the law that infringes the implied freedom of political communication to establish that the infringement is permissible. Further, with laws like s 19, they must establish that the infringement is permissible even though the law restricts the freedom of expression of *everyone in the jurisdiction*. Repeatedly asserting there is a silencing effect does not overcome the apparent paucity of evidence that this

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<sup>270</sup> Once again, it should be noted that Rothstein J uses 'hate speech' in a narrowly confined way: see *Whatcott* [2013] SCC 11; [2013] 1 SCR 467, 497-8 [44]-[46] (Rothstein J).

<sup>271</sup> Ibid 507 [75] (Rothstein J) (citation omitted).

<sup>272</sup> Ibid; see also ibid 517 [104], 522 [117] (Rothstein J).

<sup>273</sup> *Sunol* [2012] NSWCA 44; (2012) 289 ALR 128, 146-7 [86] (Basten JA) (citation omitted)... Cass Sunstein has spoken in favour of a regulated "marketplaces of ideas": see Cass Sunstein, *Democracy and the Problem of Free Speech* (Free Press, 1993) 18-9, 251-2. With respect, Sunstein's arguments do not overcome the difficulties we have noted concerning uncertainty. Indeed, his belief in the capacity of government to effectively regulate freedom of expression demonstrates a naivety only a technocrat could have.

effect happens to a significant extent,<sup>274</sup> let alone to the extent that it justifies universally restricting freedom of expression of everyone in (in s 19's case) Tasmania.<sup>275</sup>

Finally, Canada and Australia are liberal democracies with common law legal traditions. Each has well-developed civil societies. Each also have numerous groups organised by such attributes as race, colour, ethnicity, nationality, sex, sexuality, disability and religion whose purpose is to defend their members' interests and advocate on their behalf.<sup>276</sup> The fact that these organisations regularly and unflinchingly engage in public debate counts against the suggestion that minorities are silenced.

In summary, there does not appear to be sufficient evidence suggesting that expression of racial hatred chills discussion in Australia to an extent that it justifies s 18C.

(vi) *Protecting multiculturalism in Australia*

Multiculturalism is a long-standing and largely successful policy of Australian government. However, it is, nevertheless, *still a policy*. As we noted in *No Offence Intended*:

It is true that Australian governments have pursued policies promoting multiculturalism for a considerable period of time. However, to contend that laws impinging the implied freedom of political communication are justified because multiculturalism is government policy, or that Australian society is multicultural, is to put the cart before the horse. The freedom of political communication extends to *all* matters that may be subject to government policy and action.

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<sup>274</sup> This contrasts with the "chilling effect" of defamation law, for which there is evidence from media outlets: see Australian Law Reform Commission, *Unfair Publication: Defamation and privacy*, Report No 11 (1979) 22-3 [37].

<sup>275</sup> Rothstein J did note that the Saskatchewan legislature was entitled to make the law based on a 'reasonable apprehension of societal harm as a result of hate speech': see *Whatcott* [2013] SCC 11; [2013] 1 SCR 467, 529 [135] (Rothstein J); for Rothstein J's discussion of reasonable apprehension of harm more generally see *ibid* 526-9 [128]-[135] (Rothstein J). However, once again, the Australian Constitution does not contain the prohibitions on discrimination that are found in the Canadian Constitution. Further, as noted above, care must be taken concerning what constitutes 'hate speech' and harm.

<sup>276</sup> In *No Offence Intended*, we noted that a large number of groups participated in AHRC hearings leading up to the publication of the 40<sup>th</sup> Anniversary Report: see 40<sup>th</sup> Anniversary Report 55-8 cited in Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 141 fn 522.

This includes multiculturalism. Hence, the freedom of political communication extends to all aspects of multiculturalism, including (but not limited to) the following, all of which are contentious and prone to heated debate:

- The number of immigrants accepted, and from where immigrants will be accepted.
- The level of integration expected of immigrants.
- The level of integration expected of existing ethnic populations.
- The provision of welfare and other government support to immigrants.
- Whether or not someone's race, colour or ethnicity entitles them to particular government benefits or support.
- Issues facing first and subsequent generations of immigrants.
- Whether multiculturalism should continue as a policy.<sup>277</sup>

As to preventing discrimination, it appears that (and it gives us no joy in saying this) the implied freedom of political communication extends to expression advocating even racially discriminatory policies. As we noted in *An Opportunity Missed?*:<sup>278</sup>

[U]nder the *Commonwealth Constitution*, the Commonwealth Parliament has plenary powers to legislate under its various heads of power. Provided a matter falls under a head of power, the Commonwealth Parliament can pass laws that discriminate on virtually any basis.

Commonwealth laws presently discriminate on bases such as age and mental capacity.<sup>279</sup>

However, there is nothing stopping the Commonwealth Parliament passing laws that

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<sup>277</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 207 (emphasis in original).

<sup>278</sup> Joshua Forrester, Augusto Zimmermann and Lorraine Finlay, 'An Opportunity Missed? A Constitutional Analysis of Proposed Reforms to Tasmania's 'Hate Speech' Laws' (2016) 7 *The Western Australian Jurist* 275, 365-7 (emphasis ours). Please note that the footnotes in the quoted passage adopt the numbering used in this submission and not that used in the article.

<sup>279</sup> See, for example, the *Commonwealth Electoral Act 1918* (Cth) s 93(1)(a) regarding the age qualification for voting; *Criminal Code* (Cth) div 7 regarding legal capacity to commit a crime.

discriminate on bases such as race,<sup>280</sup> sex<sup>281</sup> or sexuality.<sup>282</sup> As also noted above, State and Territory Parliaments also have the plenary powers to make laws subject to the *Commonwealth Constitution* and manner and form provisions. Unless so restrained, State and Territory Parliaments may also pass laws that discriminate on bases such as age, mental capacity, race, sex, sexuality and religion.

Given this, and given that the Australian people are sovereign, the implied freedom of political communication extends to matters where Australian Parliaments may pass discriminatory laws. That is, Australians may discuss, and indeed may advocate, discriminatory views, policies and laws. The fact that Australians can do this is relevant to whether s 19 [of the *Anti-Discrimination Act 1998* (Tas)] (and similar hate speech laws) impermissibly infringe the implied freedom of political communication.

It is no answer to say that treaties like the *Convention on the Elimination of All Forms of Racial Discrimination*... prohibits Australia from passing discriminatory laws. This is because, while Australia is a signatory to these treaties, it remains a sovereign state in the international system. Australia may therefore make laws that (say) breach the Convention, but are nevertheless constitutionally valid and enforceable upon Australians.<sup>283</sup> That Australia breaches the Convention by doing this entails no consequence for it other than sanctions from other states in the international system and from international bodies. In any event, even if the Australian government complies with the Convention, the implied freedom of political communication extends to the Australian *people* advocating discriminatory views, policies and laws. By such advocacy, and the democratic processes which the *Commonwealth Constitution* provides, the Australian government may ‘change course’ on the Convention and other treaties.

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<sup>280</sup> *Commonwealth Constitution* s 51(xxvi), providing for special laws for people of any race, makes this explicit. Historically, the laws and policies implementing the White Australia Policy can be taken as an example of the Commonwealth Parliament enacting (and the Commonwealth executive enforcing) racially discriminatory laws.

<sup>281</sup> For example, the historical restrictions on women serving in certain roles in the military.

<sup>282</sup> *Ibid* s 116 may prohibit laws being passed that discriminate on the basis of religion.

<sup>283</sup> Whatever the effect of international law on the development of the common law or on constitutional interpretation (and we venture no view here), the power to make laws binding on Australians ultimately resides in the Commonwealth Parliament under the *Commonwealth Constitution*. Hence, the Commonwealth Parliament may, by express provision, override the common law and inconsistent international law.

To be absolutely clear, we are *not* saying that Australians *should* advocate discriminatory views, policies and laws. We are saying that, given the lawmaking powers of Commonwealth, State and Territory Parliaments and the principles of popular sovereignty, Australians *can* do this. No doubt many will feel uncomfortable that the *Commonwealth Constitution* and State and Territory constitutions allow this. The solution is to amend these constitutions.

The foregoing underlines the fact that the implied freedom of political communication is a strong and wide-ranging freedom. However, the fact that multicultural policies can be changed or even abolished, or racially discriminatory policies advocated, means that civil society must always be ready to defend multiculturalism and racial equality.

(vii) *The symbolic value of prohibiting racist speech*

As to s 18C's symbolic value, we echo Warren Sandmann: it is hardly a supportable proposition to restrict a constitutionally important freedom like freedom of expression on the grounds of symbolism.<sup>284</sup> Indeed, this argument cuts both ways: *restricting* a fundamental freedom *also* has symbolic value – it's just that the symbolism is decidedly unedifying.

(b) *The nature of the burden*

As we noted above, the nature of the burden s 18C places on the implied freedom of political communication is *direct, heavy* and *sweeping*. We have presented detailed arguments above. However, to briefly summarise, s 18C's burden is:

- *Direct* because it directly affects often-contentious communications about government and political matters at the Commonwealth, State and Territory level.
- *Heavy* because:

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<sup>284</sup> Warren Sandmann, 'Three Ifs and a Maybe: Mari Matsuda's Approach to Restricting Hate Speech Laws' (1994) 45 (3-4) *Communication Studies* 241, 251. Sandmann's comment was in regard to restricting the First Amendment of the United States Constitution. However, for the reasons noted above, freedom of expression in Australia has similar constitutional significance.

- The Australian people are sovereign. Given the very broad plenary powers of Commonwealth, State and Territory Parliaments, the freedom of Australians to discuss laws their Parliamentary representatives make must be broader still.
  - Laws generally affect groups. Discussing present or proposed laws often involve discussing the groups affected by those laws. Having a law restricting the discussion of certain groups is far more intrusive than laws like defamation, that protect individual reputation.
  - Section 18C's terms are too broad and too vague. Even given how case law has interpreted terms like 'offend', 'insult' and 'humiliate', there is considerable uncertainty about their application. Reasonable minds can and will differ whether, viewed objectively, an act was seriously offensive or "merely" offensive (or even inoffensive).
  - Section 18D's exemptions create more uncertainties. The requirement that an act be reasonable creates uncertainties about whether an act was 'disproportionate' to its purpose. The requirement that an act be in good faith creates uncertainties about how the resulting 'harm minimisation' approach is to operate. How much must harm be minimised? And how much harm minimisation is sufficient?
  - Section 18C's operation increases the burden on the implied freedom of political communication. AHRC investigation and conciliation costs time, money and stress to both complainant and respondent. Such costs are increased if a matter then proceeds to the Federal Court or the Federal Circuit Court.
- *Sweeping* because:



- Section 18C purports to protect race, colour, ethnicity and nationality.  
These are concepts that are, largely or solely, comprised of *ideas*. People and property must be protected from physical attack. However, by contrast, ideas must be open to attack.
- Section 18C purports to restrict the freedom of communication about government and political matters of *every Australian*.

The burdens that s 18C imposes are greatly disproportionate to the purposes it serves. It fails this stage of the *McCloy* test.

## **6. The constitutional validity of s 18C making unlawful intimidation**

In these submissions, we have primarily dealt with s 18C's use of 'offend', 'insult' and 'humiliate'. However, we must also examine s 18C's use of 'intimidate'.

It should not be thought that removing 'offend', 'insult' and 'humiliate' and simply leaving 'intimidate' will cure s 18C's problems. Even if s 18C was confined to acts that 'intimidate' on the grounds of race, colour, ethnicity or nationality, it would not be supported by the external affairs power.

It should be kept in mind that that intimidation entails the element of *threat*. In addition to equality before the law, Article 5 also guarantees 'The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual, group or institution'.<sup>285</sup> There should indeed be laws against unlawful intimidation.<sup>286</sup> However, this prohibition should apply to all equally.

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<sup>285</sup> Article 5(b).

<sup>286</sup> All Australian jurisdictions prohibit threatening behaviour against persons or their property, for good reason. Prohibiting expression suggesting imminent physical danger to persons or property is a long-standing and well-accepted limit to freedom of expression.

### 6.1 *The ‘reasonable representative test’*

As we noted above, the reasonable representative test involves taking into account:

- The race, colour, ethnicity and/or nationality of the audience; and
- The race, colour, ethnicity and/or nationality of the speaker.

This creates the same issues with intimidation as it does for offence, insult and humiliation.

That is:

- A reasonable representative of a group from a certain race, colour, ethnicity or nationality may regard an act as intimidating. However, a reasonable representative from another race, colour, ethnicity or nationality may *not* regard that same act as intimidating.
- A speaker of a certain race, colour, ethnicity or nationality may be regarded as intimidating a person or group. However, a speaker of another race, colour, ethnicity or nationality may *not* be regarded as intimidating that person or group.

Once again, a person’s legal liability under s 18C depends upon the race, colour, ethnicity or nationality of themselves and/or their audience. This breaches the principle of equality before the law without distinction as to race, colour, ethnicity or nationality that is guaranteed under Article 5.

### 6.2 *Section 18D*

As noted above, s 18D’s exemptions may more readily apply to certain vocations or ‘classes’ than others. Hence, those routinely engaged in academic, artistic or scientific work are benefitted, *including being more able to intimidate others because of their race, colour, ethnicity or nationality*.

The foregoing suggests that there should be law against intimidation or similar conduct. However, the law should be one of equal application.

## 7. A proposed alternative law against racial hatred

We are firmly of the view that, given the problems with ss 18C and 18D, the entirety of Part IIA of the RDA must be repealed. The question then arises concerning what replaces s 18C. There are a number of alternatives. The Commonwealth Parliament could enact a law against racial harassment that applies to certain contexts. Such a law would work in a manner similar to that found in the *Disability Discrimination Act 1992* (Cth) ('DDA').<sup>287</sup> That is, racial harassment in employment, education and in relation to the provision of goods and services could be prohibited. That said, unless harassment is tightly defined, the law may encounter difficulties with the implied freedom of political communication. For example, with respect to prohibiting harassment in education, would this chill the robust exchange of ideas about race, colour, ethnicity or nationality, especially at tertiary institutions? To take another example, would prohibiting harassment in employment unduly (pardon the pun) chill "water cooler discussion" in the workplace about matters concerning race, colour, ethnicity and nationality?

The approach we took in *No Offence Intended* was to suggest an alternative law:<sup>288</sup>

(1) It is an offence for a person, with intent to incite enmity or violence against a person or persons included in a group of people by reason of their racial identity, colour, ethnicity or nationality, to –

(a) publish or distribute written matters;

<sup>287</sup> See the *Disability Discrimination Act 1992* (Cth) pt 2 div 3.

<sup>288</sup> See Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 214-5. We note that the *Criminal Code Act 1995* (Cth) ss 80.2A and 80.2B already prohibit urging violence against groups or members of groups. However, our proposed provision has slightly wider scope, in that targets the urging of enmity as well as violence.

(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,

that advocates -

(d) that persons of a particular racial identity, colour, ethnicity or nationality have more inherent worth than other humans;

(e) that persons of a particular racial identity, colour, ethnicity or nationality have less inherent worth than other humans; or

(f) enmity towards persons of a particular racial identity, colour, ethnicity or nationality.

Penalty: \$20,000 or six months imprisonment

(2) In subsection (1):

**enmity** means either:

(a) Hatred creating an imminent danger of violence; or

(b) Contempt creating an imminent danger of violence.

**ethnicity** means the definitions of ethnicity given in *Mandla v Dowell Lee* [1983] 2 AC 548 and *King-Ansell v Police* [1979] 2 NZLR 531.

**intent** means either:

(a) The person's purpose or desire is to incite enmity or violence; or

(b) The person knows or foresees that it is virtually certain that doing an act described in subsection (1)(a), (1)(b) or (1)(c) will incite enmity or violence.

***racial identity*** means a person of a particular racial descent who identifies as that race and is accepted as such by the community with whom he or she associates who identifies by that race.

***violence*** and ***violent***:

(a) includes actual or threatened unlawful damage to property;

(b) excludes acts not involving:

(i) actual or threatened unlawful physical violence against a person or persons; or

(ii) actual or threatened unlawful damage to property.

We note the following about this proposed law:

- It is based on clause 28. However, it takes into account the limits imposed by the external affairs power and the implied freedom of political communication.
- It is a criminal provision. The Commonwealth Director of Public Prosecution would prosecute breaches of the law, and would need to prove each element beyond a reasonable doubt.
- The law targets the person whose conduct is intended to create enmity towards a person or group of people. This is a more appropriate target than the feelings of the people subject to the conduct.
- The law incorporates the tests in *King-Ansell* and *Mandla* by reference. However, Parliament would be enacting a definition for courts to follow.
- The law still, in effect, protects ideas. However, and importantly, it applies to a far narrower range of conduct than s 18C. In any event, people should be protected from violence being incited against them regardless of the ideas they hold.
- The law prohibits incitement to enmity. We have used ‘enmity’ deliberately, as it connotes the severity of the conduct required to breach the law. Portraying a group as

an enemy suggests one wants them destroyed. We have defined enmity to mean hatred creating an imminent danger of violence, or contempt creating an imminent danger of violence. This means that hatred and contempt that does not create an imminent danger of violence isn't prohibited. However, given the importance of freedom of expression, and the risk that an overbroad law may be unjustly applied, we have erred on the side of freedom.

- The law does not have defences, save those in the Commonwealth's *Criminal Code* (in which we assume such a law would be inserted). However, and again, the law applies to a narrow range of conduct. Further, intent must be proved, which further narrows the conduct to which the law applies.

The law does not protect against such things as people being racially insulted on the streets or in their neighbourhoods. However, as noted above, existing laws of equal application, such as public order offences and stalking already provide sufficient protection.

## **8. The Australian Human Rights Commission's role**

Recent matters have highlighted problems in the present processes and structure of the AHRC. These matters are the case of *Prior v Queensland University of Technology*<sup>289</sup> and the Bill Leak matter.

### *8.1 Prior v Queensland University of Technology*

There are two issues that emerge from *Prior*. First, Judge Jarrett summarily dismissed the applicant Cindy Prior's claims against three respondents, who were students at the

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<sup>289</sup> *Prior v Queensland University of Technology & Ors*, Federal Circuit Court of Australia Case no. BRG990/2015 ('*Prior*').

Queensland University of Technology.<sup>290</sup> To dismiss a case in the Federal Circuit Court, a claim (amongst other things) must have no reasonable prospect of success.<sup>291</sup>

The summary dismissal of Ms Prior's claims against the three QUT students raises the question why the AHRC did not reject these claims but instead proceeded to conciliation. The AHRC Act provides that the AHRC President may terminate a complaint if (amongst other bases) the President is satisfied:

- That the alleged unlawful discrimination is not unlawful discrimination<sup>292</sup> (and we note that, in the AHRC Act, a complaint under s 18C falls within the definition of unlawful discrimination),<sup>293</sup> or
- The complaint was trivial, vexatious, misconceived or lacking in substance.<sup>294</sup>

It is the first-listed ground that concerns us here. In order to make a determination that the alleged unlawful discrimination is not unlawful discrimination, the President should consider:

- The text of the relevant statute (in this case s 18C);
- How case law has interpreted the relevant statute; and
- If the claim were litigated, whether it would have a reasonable prospect of success.

Nick Cater has noted that, in the period 2001-2005, the AHRC rejected 30% of s 18C complaints. In the period since, that figure has dropped to about 5%.<sup>295</sup> Given that, during this time, case law has not broadened s 18C's scope, and that it is fairly safe to assume the

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<sup>290</sup> *Prior v Queensland University of Technology* [2016] FCCA 2853.

<sup>291</sup> *Federal Court Rules 2001* (Cth) r 13.10(a).

<sup>292</sup> AHRC Act s 46PH(1)(a).

<sup>293</sup> *Ibid* s 3 (definition of 'unlawful discrimination').

<sup>294</sup> *Ibid* s 46PH(1)(c).

<sup>295</sup> Nick Cater, 'Tim Soutphommasane's 'grievance industry' sees bigots everywhere', *The Australian* (online), 23 August 2016 <<http://www.theaustralian.com.au/opinion/columnists/nick-cater/tim-soutphommasanes-grievance-industry-sees-bigots-everywhere/news-story/bfd5162bff06cf8dd86bc06059ff1e80>>.

Australian people have not become markedly more racist, it is reasonable to infer that the AHRC has relaxed its standards for determining whether a complaint under s 18C has merit.

Remarks by Professor Triggs SC support this inference. On the ABC's *7.30 Report*, she stated that 'the [AHRC's] first obligation is to accept the complaint and then to investigate it and conciliate it'.<sup>296</sup> In response to a question to the effect that the AHRC would have been aware that Ms Prior's case would not have had a reasonable prospect of success Professor Triggs SC responded:

Well, we could have made that judgement about what a court might do but that misunderstands our role.

Our role is not a court. We are there to, in effect, stop matters going to the court.

We have about 20,000 complaints a year, or matters a year. And we try, our job is to investigate and conciliate them and that's why we come back to the threshold point.

It's a very low threshold.<sup>297</sup>

Later in the interview, *7.30 Report* presenter Leigh Sales asked this question:

I don't mean to labour this point but I just want some clarity around it. If your job is to try to prevent things from ending up in court, then let me ask again, why is it not the responsibility of the Human Rights Commission to make an assessment that this is not going to be successful in court, so therefore why are we wasting time about whether people can agree or disagree or whatever?<sup>298</sup>

To which Professor Triggs SC replied:

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<sup>296</sup> Australian Broadcasting Corporation, 'Human Rights Commissioner Gillian Triggs joins 7.30 to discuss the debate over Section 18C of the Racial Discrimination Act', *7.30 Report*, 7 November 2016 (Gillian Triggs) <<http://www.abc.net.au/7.30/content/2016/s4570705.htm>>.

<sup>297</sup> Ibid.

<sup>298</sup> Ibid (Leigh Sales).



Because the primary function is to achieve a conciliation.

In other words, we have 20,000, 22,000 matters coming through every year. Of course we don't want them going to court mainly because most Australians can't afford to go near the Federal Court.

So we are trying to persuade them for one side to acknowledge that perhaps a statement was unacceptable, for another to perhaps apologise.

That's mainly how these matters are resolved. We thought that would be the case here [with the Prior matter].<sup>299</sup>

With all due respect to Professor Triggs SC, she appears to fundamentally misconceive her role and the relevant threshold. As noted above, the AHRC President's statutory role includes terminating a claim of alleged unlawful discrimination if satisfied that it is not unlawful discrimination. This means applying the relevant case law regarding both s 18C and summary dismissal. By discharging this role, the AHRC President performs an important "filtering" function. Cases where there is no reasonable prospect that s 18C has been breached are terminated prior to conciliation.<sup>300</sup> This leaves substantial matters to conciliation. It is *not* the AHRC President's role to conciliate so that someone who hasn't breached s 18C may 'acknowledge that perhaps a statement was unacceptable'. Proceeding to conciliation in these circumstances is a waste of time and resources for (at least) the AHRC and the respondent.

The second issue that arises from the Prior case is that the AHRC breached its statutory obligation to notify the student respondents that there was to be a conciliation conference.

Section 46PJ(3) of the AHRC Act provides that 'If the President decides to hold a conference, the President must, by notice in writing, direct each complainant and each

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<sup>299</sup> Ibid (Gillian Triggs).

<sup>300</sup> At this point, if a complainant is not satisfied with the AHRC President's decision to terminate the complaint, the complainant can commence proceedings in the Federal Court or Federal Circuit Court: see AHRC Act s 46PO(1).

respondent to attend the conference’.<sup>301</sup> In addition to its statutory obligation, the AHRC should notify each respondent of a conciliation conference as a basic requirement of procedural fairness.

However, the AHRC did not do this. Instead, it appears to have left this task to the Queensland University of Technology, another respondent to Ms Prior’s complaint. Indeed, an AHRC officer made this snippy and unintentionally ironic remark:

A file note by commission officer Ting Lim on July 28 states she advised the university’s solicitor that QUT “has known about this complaint for over year ... it’s not the fault of the commission that the QUT has waited a week before the (conciliation conference) to notify the students.”<sup>302</sup>

However, the AHRC’s failure to notify the student respondents in the QUT matter does not appear to be a one-off event. Of great concern is that it appears that the AHRC *routinely* breaches its statutory obligation to directly notify respondents about conciliation conferences:

The AHRC has not commented on the [QUT] directly but says respondents are sometimes not notified in situations where it is not clear if the complainant wishes to continue with the proceedings against them, so as to not cause the respondent unnecessary concern.<sup>303</sup>

Professor Triggs SC has confirmed this practice (emphasis is ours in the following passage):

Ms Triggs said last night she could not comment on the individual case but “*generally*, the commission notifies all respondents about complaints made against them to gain their version of the facts and to invite participation in conciliation wherever appropriate”. “*There will be*

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<sup>301</sup> Ibid s 46PJ(3).

<sup>302</sup> Hedley Thomas, QUT students demand apology from Human Rights Commission in race case’, *The Australian* (online), 30 April 2016 <<http://www.theaustralian.com.au/higher-education/qut-students-demand-apology-from-human-rights-commission-in-race-case/news-story/6afd0c478acd990050a663e7cd746c0f>>.

<sup>303</sup> Hedley Thomas, ‘Watchdog kept 18C respondent in the dark about QUT complaint’, *The Australian* (online), 8 February 2016 <<http://www.theaustralian.com.au/national-affairs/indigenous/watchdog-kept-18c-respondent-in-the-dark-about-qut-complaint/news-story/b5aa4706ba62548bd20353bd1682f31b>>.

*times however when this is not possible,” she said. “It might be, for example, that the contact details of the respondent’s employees are not available to the commission. In such a case, the employer or organisation may prefer to advise the relevant individuals of the complaint that has been made against them. Especially in the early stages of a complaint, the commission may accept an undertaking by the employer or other respondent to notify the individuals concerned. In some cases, the employer choses to resolve the issue before its employees are notified in order to avoid unnecessary stress.”*<sup>304</sup>

We make the following points about this practice. As to notifications about a *conciliation conference*:

1. As noted above, the AHRC is statutorily obligated to notify each respondent directly.
2. The AHRC is purporting to delegate its statutory obligation to a respondent to a complaint. In circumstances where the interests of various respondents may vary sharply, this is inappropriate even if a respondent undertakes to notify another respondent.
3. There may be circumstances where the AHRC encounters difficulty finding a respondent but (say) an employer knows how to contact them. In these circumstances, the AHRC President should exercise their power under s 46PI of the AHRC Act to obtain this information from the employer. Once this is done, the AHRC may then notify the respondent directly.

As to notifying respondents about a *complaint* (which would occur earlier than a notification about a *conciliation conference*):

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<sup>304</sup> Australian Associated Press, ‘QUT students claim human rights ‘discrimination’’, *Brisbane Times* (online), 30 April 2016 <<http://www.brisbanetimes.com.au/queensland/qut-students-claim-human-rights-discrimination-20160429-goit14.html>>.

1. The AHRC is not statutorily obliged to notify a respondent about a complaint as opposed to a conciliation conference. However, principles concerning procedural fairness suggest that the AHRC should notify each respondent about a complaint.
2. There is a considerable stigma that attaches to an allegation of racism. Indeed, it is no exaggeration to say that an official finding of a breach of the RDA is the modern equivalent of being forced to wear a scarlet letter.
3. Further, where (say) a respondent is an employee of a respondent employer:
  - a. The version of events of the employee may well differ from that of the employer.
  - b. The interests of the employee may well differ from the employer.
4. If the RDA is to play an educative role (as was intended), it makes no sense for respondents not be notified at the earliest possible time (namely, when a complaint is first made), with the attendant risk that a respondent won't be educated about the effect of their actions. This notification should occur routinely in all cases, before the AHRC even considers whether the complaint may be 'trivial, vexatious, misconceived or lacking in substance'.<sup>305</sup> Doing so both enhances the educative effect of the law, but is also a matter of basic fairness in terms of allowing a person to know when their words or actions have led to a complaint.

We have recommended that Part IIA of the RDA be repealed. However, this would still leave the remaining provisions of the RDA as well as other human rights statutes on foot.<sup>306</sup>

Whatever complaints arise under the RDA or other human rights legislation, the AHRC should be statutorily obliged to notify each respondent about the complaint as soon as

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<sup>305</sup> AHRC Act s 46PH(1)(c).

<sup>306</sup> In addition to the RDA, there is the DDA and the *Sex Discrimination Act 1984* (Cth).

possible after the complaint has been filed and before any further action is taken on the matter.

## 8.2 *The Bill Leak matter*

On 4 August 2016, *The Australian* newspaper published a cartoon by its cartoonist, Bill Leak. The cartoon depicts three Aboriginals. An Aboriginal police officer stands behind an Aboriginal boy before an Aboriginal man holding a beer. The police officer says to the man: ‘You’ll have to sit down and talk to your son about personal responsibility’, to which the man replies ‘Yeah righto what’s his name then?’.

Later that day, the AHRC’s Race Discrimination Commissioner, Dr Tim Soutphommasane, posted the following statement on his Facebook page, along with Mr Leak’s cartoon:

We shouldn't accept or endorse racial stereotyping of Aboriginal Australians, or of any other racial group. If there are Aboriginal Australians who have been racially offended, insulted, humiliated or intimidated, they can consider lodging a complaint under the Racial Discrimination Act with the Commission. It should be noted that section 18D of the Act does protect artistic expression and public comment, provided they were done reasonably and in good faith.<sup>307</sup>

There are two points we wish to make with respect to Dr Soutphommasane’s Facebook statement. The first concerns actual or apparent bias. The Race Discrimination Commissioner is a senior position in the AHRC. The AHRC is responsible for handling complaints alleging breaches of s 18C. As noted above, the AHRC President’s role is to terminate a matter if the alleged unlawful discrimination is not unlawful discrimination. The AHRC President often delegates this task to other AHRC officers. The Race Discrimination Commissioner is not

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<sup>307</sup> Tim Soutphommasane, *Facebook* (online), 4 August 2016 <[https://www.facebook.com/permalink.php?story\\_fbid=1219825684746926&id=653778944684939](https://www.facebook.com/permalink.php?story_fbid=1219825684746926&id=653778944684939)>.

directly responsible for handling complaints. Nevertheless, given the position's seniority, the Race Discrimination Commissioner is in a position to influence the AHRC President and their delegates. At the very least, the Race Discrimination Commissioner is in a position where the public perception is that he has that influence and speaks on behalf of the AHRC.

The test for bias in decision-makers exercising public power is whether the relevant circumstances are such as would give rise, in the mind of a fair-minded and informed member of the public, to a reasonable apprehension of a lack of impartiality on the part of the decision-maker.<sup>308</sup> Dr Soutphommasane's position as Race Discrimination Commissioner, his seniority within the AHRC, combined with his Facebook statement, at the very least creates an arguable (and, in our view, a strongly arguable) claim of bias on the AHRC's part with respect to an s 18C complaint lodged against Mr Leak's cartoon. This is because:

- The first sentence Dr Soutphommasane's statement (the "topic sentence" of the statement, as it were) is strong, unequivocal and declarative: 'We shouldn't accept or endorse racial stereotyping of Aboriginal Australians, or of any other racial group'.
- After this strong, unequivocal and declarative sentence, Dr Soutphommasane then invites Aboriginal Australians to consider lodging a complaint with the AHRC.
- The reference to s 18D later in the statement is equivocal: 'It should be noted that section 18D of the Act does protect artistic expression and public comment, provided they were done reasonably and in good faith'. This sentence does not overcome the strength of the first sentence. Indeed, in context, the final statement appears to suggest that Mr Leak may not have met the proviso.

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<sup>308</sup> *Webb v R* (1994) 181 CLR 41, 50-3 (Mason CJ, McHugh J), 57 (Brennan J), 71-5 (Deane J), 87-8 (Toohey J).

In any event, given the AHRC President's statutory role in investigating complaints, and terminating complaints that do not constitute unlawful investigation, the AHRC should scrupulously avoid *any* appearance of bias. This is especially so given that the AHRC is dedicated to protecting *all* human rights, including the right to procedural fairness.<sup>309</sup>

The second point is not unrelated to the first. Dr Soutphommasane's Facebook statement also gave the appearance of touting for business for the AHRC that would ultimately benefit Aboriginal complainants. This is inappropriate for someone in Dr Soutphommasane's position because:

- Benefits may be awarded for a breach of s 18C, including (but not limited to) apologies, corrections and monetary compensation.<sup>310</sup>
- Dr Soutphommasane's imprimatur may encourage Aboriginals to think that, should they lodge a claim against Mr Leak under s 18C, they are likely to succeed.
- Dr Soutphommasane occupies a senior position within the AHRC, namely Race Discrimination Commissioner. For a bureaucrat to invite claims is inappropriate. We note that under s 13(10)(a) of the *Public Service Act 1999* (Cth), an employee of the Australian Public Service must not, amongst other things, use their status or power 'to gain, or seek to gain, a benefit or an advantage for themselves or *any other person*'.<sup>311</sup>

As presently structured, the AHRC's functions appear to be advocacy as well as investigation and conciliation. This structure is unsustainable, as the AHRC's advocacy function risks giving rise to the appearance of bias when it engages in its investigation and conciliation

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<sup>309</sup> Article 10 of the *Universal Declaration of Human Rights* provides that 'Everyone is entitled in full equality to a *fair* and public hearing by an independent and *impartial* tribunal, in the determination of his rights and obligations and of any criminal charge against him' (emphasis ours). Article 14(1) of the ICCPR provides, (amongst other things) that All persons... [i]n the determination... of [their] rights and obligations in a suit at law... shall be entitled to a *fair* and public hearing by a competent, independent and *impartial* tribunal established by law' (emphasis ours).

<sup>310</sup> AHRC Act s 46PO(4).

<sup>311</sup> *Public Service Act 1999* (Cth) s 13(10)(a) (emphasis ours).

function. The advocacy function should be legislatively and physically separate from the investigative and conciliation function.<sup>312</sup> Hence, the present AHRC should be split into two new entities that have different enabling statutes and occupy separate premises. One entity should be dedicated to advocacy concerning human rights issues; the other should handle complaints made under the Commonwealth's various human rights statutes. Provided officers in each of these new entities understand their roles and the importance of procedural fairness, the proposed structure should avoid the perception of bias.

## 9. Conclusion

The Commonwealth Parliament must be aware of the limits that the *Commonwealth Constitution* places on laws prohibiting expressions of racial hatred. Section 18C is itself too broad and too vague to be constitutional. The external affairs power does not support s 18C, as the law greatly exceeds the limits of relevant Articles of the Convention and the ICCPR. Section 18C's also impermissibly infringes the implied freedom of political communication as its burden on this freedom is direct, sweeping and heavy. The Commonwealth Parliament should have a law against expressions of racial hatred, but it must be far more narrowly focused than s 18C. We have suggested a law directed against intentional incitement to racial enmity and violence.

Recent incidents have highlighted problems with how the AHRC operates. As a consequence, we have recommended that the AHRC be split into two new entities whose existence is statutorily and physical separate. One entity would advocate human rights issues; the other would handle complaints made under the Commonwealth's various human rights statutes.

The entity responsible for handling complaints must directly notify respondents that a

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<sup>312</sup> We note that, in *Brandy v Human Rights and Equal Opportunity Commission* [1995] HCA 10; (1995) 183 CLR 245, the High Court held that certain functions of the then Human Rights and Equal Opportunity Commission encountered separation of powers issues. There appears to be the need for a further refinement of the AHRC's tasks.



complaint has been made against them. The entity would also terminate unmeritorious complaints early.

We suggest that the proposed reforms would remove unconstitutional fetters on freedom of expression. They would also improve procedural fairness in the administering of the Commonwealth's human rights statutes.