SUBMISSION TO THE PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS ON FREEDOM OF SPEECH IN AUSTRALIA

6 December 2016

Dr Bede Harris
Senior Lecturer in Law
Charles Sturt University

I Introduction

1. This submission examines ss 18C and 18D of the *Racial Discrimination Act 1975* (Cth) and their consistency with freedom of speech.

2. Part II of the submission discusses the foundation upon which freedom of speech and all other rights rest, and the need to balance rights against each other. Part III discusses the need for the law to balance ss 18C and 18D on the one hand and freedom of speech on the other. Part IV discusses the specific interests served by s 18C. Part V discusses the concept of 'insult' and the importance of protecting people from the emotional harm occasioned by insult. Part VI discusses the way in which the prevention of emotional harm must be balanced against the values served by freedom of expression, in particular the values of truth-seeking and self-fulfilment. Part VII discusses the limitation of the operation of s 18C to events occurring in private. Part VIII examines the adequacy of the exemptions to s 18C liability provided by s 18D. Part IX contains a new versions of ss 18C and 18D, re-drafted so as to take into account the arguments contained in this submission.

II The theoretical basis of human rights

3. A fundamental problem with debate on human rights in Australia is the failure – in some instances deliberate – of participants to consider specific rights as aspects of an overall theory of human rights. It is wrong to think that there are free-standing rights to expression, movement, equality, exercise of religion *et cetera* which can be justified independently of each other. Legal protection of each individual right is justifiable only by an over-arching theory of rights, be it the Kantian idea that all human beings are entitled to equal dignity,

Mill's idea that each person is entitled to individual self-fulfilment and that the only justification for limiting rights is to protect the right of another or Rawls' idea that rules for a society designed in a truly objective manner by people who were uncertain as to what their gender, race, religion, ability or other status would be in that society, would be such as to protect fundamental rights for all.

4. Seen in this light, the answer to the question 'Why do you have a right to freedom of expression?' does not yield an answer which is unique to that freedom. It yields the same answer that would be given if the same question was posed in relation to any other right or freedom, which is 'Because it is necessary to protect freedom of expression in order to protect human dignity and self-fulfilment.' It is therefore impossible properly to discuss freedom of expression and the limits that should be placed on it without considering the interaction between that freedom and all others, because they all require protection and all exist to serve the same ultimate value. Freedom of speech thus has no greater, nor any lesser, importance than any other right or freedom.

5. It follows that in considering any particular legislative provision, such as ss 18C and 18D of the *Racial Discrimination Act 1975* (Cth), one must balance freedom of expression against other rights and freedoms. By 'rights and freedoms' is meant the full range of rights and freedoms that need to be protected in order to secure human dignity and self-fulfilment, as reflected in documents such as the *Universal Declaration on Human Rights* 1948 (the UDHR), the *International Covenant on Civil and Political Rights* 1966 (the ICCPR) and the *International Covenant on Economic Social and Cultural Rights* 1966 (the ICESR). The Commonwealth Constitution is deficient in so far as it fails to provide constitutional protection for all these rights, but notwithstanding that, they must be taken into consideration in assessing to what extent freedom of speech should be limited.

6. Because human rights involve issues which are universal, this submission draws upon case law both from Australia and from overseas jurisdictions.

III Section 18C, freedom of speech and human rights

7. The prohibition contained in s 18C(1) is as follows:

> (1) It is unlawful for a person to do an act, otherwise than in private, if:
>
> > (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and

(b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

8. From this it is evident that the purpose of the section is to protect people from suffering a particular form of discrimination, namely discrimination taking the form of harmful conduct directed against a person because of their background. The acts prohibited by s 18C are prohibited because they amount to differential negative treatment based on race (the word 'race' being used as shorthand in this submission for 'race, colour or national or ethnic origin'). Thus s 18C seeks to protect the right to equality or, to express it negatively, the right not to be discriminated against, a right protected by Article 7 of the UDHR and Article 26 of the ICCPR.

9. More broadly, however, the types of conduct listed in s 18C(1)(a) would amount to breaches of other rights even in the absence of a discriminatory motivation: By making it unlawful to 'offend, insult [or] humiliate' a person, the Act protects the right to dignity, referred to as a right to honour by Article 12 of the UDHR and Article 17 of the ICCPR. This concept is discussed further below. By making it unlawful to intimidate someone, the Act protects the right to bodily integrity (referred to as security of the person in Article 3 of the UDHR and Article 9 of the ICCPR).

10. The issue therefore is how to strike a balance between these rights and the right to freedom of speech, which is itself protected by Article 19 of the UDHR and Article 19(2) of the ICCPR.

11. 'Freedom of speech' (more usually referred to nowadays as 'freedom of expression') is a broad concept. The terms of reference of this inquiry state that it 'includes, but is not limited to, freedom of public discussion, freedom of conscience, academic freedom, artistic freedom, freedom of religious worship and freedom of the press.' One might doubt the inclusion of freedom of conscience and freedom of religious worship, as these protect different activities from those protected by freedom of speech (although modes of religious worship include, but are not limited to, speech). Nevertheless the terms of reference are useful in so far as they recognise that freedom of speech includes expressive activity other than verbal communication and that it includes expression engaged in for purposes other than political debate.

12. In addressing the issue of what restrictions should be placed on freedom of speech, one must refer to the proportionality test used by the courts in determining whether limitations of constitutional rights are justified. The current formulation of the test is contained in *McCloy v New South Wales* (2015) 325 ALR 15 at [3] (per French CJ, Kiefel, Bell and Keane JJ) and is to the effect that a limitation on a right will be constitutional if it is suitable (in that it is

rationally connected to its purpose), necessary (in that there is no other reasonably practicable means of achieving the objective of the law) and adequate in its balance (in that there is balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom).

13. For the purposes of this submission it is evident that s 18C is suitable, in so far as it is rationally connected to the purposes of the *Racial Discrimination Act 1975* (Cth) because it is obviously directed towards preventing racial discrimination. However attention needs to be paid to whether the restrictions contained in s 18C and the exemptions contained in s 18D strike an adequate balance between the purposes they serve and the restrictions they impose on freedom of expression (having regard to the interests served by that freedom). It is also necessary to explore whether these provisions go no further than is necessary to serve their purpose.

14. Given the breadth of activity encompassed by freedom of speech identified in Paragraph 11 of this submission, determining what interests the freedom protects requires that these be defined at the highest level of abstraction. I would submit that these are self-fulfilment by the speaker and the propagation of ideas. It is against these interests that countervailing interests served by competing rights protected by s 18C must be balanced.

IV The interests protected by s 18C

15. What then are, in the context of s 18C, the countervailing interests served by the restrictions on freedom of expression in that section, and is an adequate balance struck between them and the interests served by freedom of speech?

16. The word ‘intimidate’ means to frighten someone into submission. The fact that inspiration of fear is the key element of intimidation implies that the person subject to intimidation must be afraid of some form of adverse conduct – in other words, is being subject to a threat. I would therefore submit that the word ‘intimidate’ should be replaced by the word ‘threaten’ so as more clearly to identify the harm that s 18C seeks to prohibit. The prohibition against threatening conduct obviously serves an important purpose – that of protecting the security of the person - which outweighs the minimal restriction it imposes on freedom of speech. There is therefore no doubt that it would be valid under the proportionality test. It is however anomalous that s 18C does not also prohibit incitement to violence. While it is true that such acts would already be prohibited by State and Commonwealth criminal law, the same could be said for threats which, from a criminal law point of view, would amount to battery. Therefore, for sake of comprehensiveness, I would recommend that s 18C should also

expressly prohibit incitement to violence. I would also recommend that these prohibitions be put in a separate sub-section to that relating to conduct which offends insults or humiliates because whereas the causing of offence, insult or humiliation may, in certain instances, be justifiable as an unavoidable consequence of the exercise of free speech (as is discussed later in this submission) threatening and intimidatory conduct never is, and thus the section ought to address this type of conduct separately.

17. The words 'to offend, insult, [and] humiliate' have attracted the greatest controversy in the debate on s 18C. To 'offend' means to wound the feelings of a person. To 'insult' means to act or speak towards someone with disrespect. Since a feeling of offence is a *consequence* of insult, the same legislative effect could probably be achieved simply by using the word 'offend' on its own, because one can conceive of various forms of insult, all of which would lead to feelings of offence. To 'humiliate' someone is to cause them to feel shame or loss of self-esteem – in other words, to think less of themselves. This is a different feeling from that of offence – in some circumstances a person may feel offended without thinking less of themselves, while in others feelings of offence will encompass humiliation. In other words, offence and humiliation overlap but are not synonymous. Given the relationship between these three terms, the phrase could be redrafted as 'offend or humiliate' without any diminution in scope. However, nothing is lost by retaining the word 'insult' even if it is not strictly necessary (other than to draw attention to what is perhaps the commonest way in which speech causes offence), and so this submission proceeds on the basis that all these words are retained.

18. Those opposed to the inclusion of 'offend, insult, [and] humiliate' in s 18C take the view that protection of people against these emotional harms carries the potential of imposing too great a restriction on freedom of speech because it is an inevitable consequence of vigorous debate in a free society that people may feel offended by statements with which they disagree. Yet this is to ignore the reality of emotional harm. If freedom of speech can be curtailed when it inspires the emotion of fear in a person (when they are intimidated), why should conduct leading to feelings of offence or diminished self-esteem not be prohibited? Defamation law limits freedom of speech where the plaintiff's reputation is diminished in the minds of the parties to whom defamatory material is published. But *why* (in the absence of any quantifiable economic loss consequent upon diminution of reputation) should that diminution be actionable? What form of harm does the plaintiff experience? The answer is that the harm takes the form, at least in part, of the emotional reaction – including an element of humiliation - caused in the mind of the plaintiff by his or her knowledge that his or her reputation has been diminished. So if the emotional harm caused by defamation is recognised

as wrongful and as justifying remedies which limit and freedom of speech, why should the law not similarly recognise the reality of the emotional harm caused by offence, insult and humiliation, and limit freedom of speech in those instances too?

V The concept of insult – the example of South African law

19. Apart from defamation, English common law provides no remedy for emotional harm. The tort of intentional infliction of emotional harm (originating in the case of *Wilkinson v Downton* [1897] 2 QBD 57 and recognised in Australian law in *Bunyan v Jordan* (1937) 57 CLR 1) does not provide a remedy for emotional harm *per se* – it provides a remedy only in cases where mental harm leading to actual psychiatric injury has occurred.

20. However, the idea that the law should provide a remedy for emotional harm in general and for insult in particular, is well established in legal systems based on Roman law. A good example of this is provided by South Africa where, under the law of delict, the *actio injuriarum* (the action for harm) which protects three personality interests: three distinct interests: *corpus* (bodily integrity), *fama* (reputation) and *dignitas* (dignity). The action to remedy infringements of *corpus* has its obvious equivalent in English common law actions for assault and battery, and the action to remedy *fama* parallels the English common law action for defamation (to the extent that South African law has incorporated many English common law principles relating to these torts). However, the action to remedy *dignitas* has no equivalent in English common law.

21. Reference to South African law is therefore of particular usefulness to this inquiry, because that legal system has built up a considerable body of case law on what constitutes insult and how to determine the limits of liability for insult.

22. Through the development of case-law, the *actio injuriarum* has been extended to allow recovery of damages for impairment of *dignitas* in a wide range of circumstances, including breaches of privacy and, relevantly for this discussion, insult. The most recent formulation of the test for liability is contained in *Delange v Costa* 1989 (2) SA 457 (A), in which the court held that for liability to be established, the plaintiff must show that the defendant performed an intentional act which led the plaintiff subjectively to experience loss of dignity and that the conduct complained of would have offended the dignity of a person of ordinary sensibilities – in other words, that the conduct was offensive to dignity from an objective point of view. The objective nature of the test was emphasised by the court in the following passage (per Smalberger JA at 862 A-G):

> In determining whether or not the act complained of is wrongful the court applies the criterion of reasonableness...This is an objective test. It requires the conduct complained of to be tested against the prevailing norms of society (ie the current values and thinking of the community) in order to determine whether such conduct can be classified as wrongful. To address the words to another which might wound his self-esteem but which are not, objectively determined, insulting (and therefore wrongful) cannot give rise to an action for *injuria*.

23. The objective test in cases brought for impairment of dignity in South Africa thus plays the same role as does the reasonableness test in defamation law (in South Africa, Australia and all common law jurisdictions), because it requires the court to ask whether the conduct complained of was such that a reasonable person would have found it insulting in the same way as, in defamation cases, the courts determine the question of whether the publication was such that a reasonable person would have found it defamatory. The reasonableness requirement thereby plays the key role of filtering liability, and ensures that the action cannot be brought by the hyper-sensitive litigant. It is therefore not true, as some opponents of s 18C have argued, that the prohibition on conduct which will offend, insult or humiliate is subjective. The inclusion of the phrase 'reasonably likely' in s 18C clearly imposes an objective test of reasonableness.

24. It is also significant to note that the action for impairments of dignity taking the form of insult co-exists with a justiciable Bill of Rights in South Africa which offers far broader protection to freedom of expression (see s 16 of the *Constitution of the Republic of South Africa Act No. 108 of 1996*) than is provided by the implied freedom of political communication under the Australian Constitution, and under which the courts balance the right to protection of dignity against freedom of expression (see, for example, *Cele v Avusa Media Ltd* [2103] All SA 412 (GSJ) at [42] per Kathree-Setiloane J).

25. An important limitation on the action for impairment of dignity is that it is available only where insult is directed against a person or persons. This was made clear in *S v Tanteli* 1975 (2) SA 772 (T), where the court held that an *injuria* had not occurred where an insult had been directed against the complainant's language. Nicholas J held (at 775 C-H) that

> ..there was in the present case no basis for finding that the complainant's *dignitas* (his proper pride in himself) was impaired at all. The attack was not, and was not understood as being, an attack against the complainant personally. It was an attack upon his language. Undoubtedly, the complainant found that to be hurtful and offensive in a general sense; but it did not, in relation to the person of the

> complainant, have that degrading, insulting or ignominious character which is a requisite of an *injuria*.

In the same vein, the court in *Church of Scientology in SA (Incorporated Association Not For Gain) v Reader's Digest Association (Pty) Ltd* 1980 (4) SA 313 (C) held that a magazine article critical of a philosophy (as distinct from the members believing in it) could not be the subject of a defamation action. Both these cases illustrate the important distinction that must be made between insulting statements made about religions, languages and political ideologies, and those referring to people. To permit an action in the former instances would impose a disproportionate restriction on freedom of speech, particularly political speech. If permitted in the specific case of religion, it would amount to a resurrection of laws prohibiting blasphemy, which is surely incompatible with freedom of speech, and possibly with the non-establishment and non-observance clauses of s 116 of the Constitution.

26. I would therefore recommend that the phrase 'offend, insult, [and] humiliate' in s 18C be retained, but that the section be re-drafted so as to make it clear that it is only conduct directed towards persons that is prohibited.

VI Balancing emotional harm and freedom of speech

27. Proceeding on the basis that prevention of conduct which offends, insults or humiliates a person constitutes an interest warranting limitations on freedom of speech, how does one strike the correct balance between prevention of those harms and limitation of the freedom so as to achieve proportionality? The criterion of reasonableness discussed earlier does not do that – it serves to determine what types of conduct a reasonable person would consider to be insulting. The different question which must now be addressed is whether conduct which is objectively insulting should nevertheless be permitted because to prohibit it would disproportionately limit freedom of speech.

28. Before addressing the question identified in the previous paragraph, it is necessary to emphasise that, as was stated in Paragraph 16 above, the balancing of freedom of expression against the right of a person not to be threatened or to have violence incited against them is unproblematic: The prohibition of speech amounting to threats or incitement to violence will always be justified under the proportionality test, because the purpose of preventing such harms will always outweigh the interests served by freedom of speech or, to put it differently, freedom of speech is never more important than the prevention of such conduct and the limitation that prohibition places on freedom is minimal in comparison to the interest the prohibition protects.

29. As indicated in Paragraph 14 above, at its most general, freedom of speech (noting that 'speech' is shorthand for a wide range of expressive conduct) serves the interests of self-fulfilment by the speaker and the propagation of ideas, the latter benefitting both the speaker and the hearer. To what extent ought the right to free expression be limited by the legitimate interest of others not to experience the emotional harm caused by speech which is offensive, insulting or humiliating? How ought the law to balance the competing interests served by freedom of speech on the one hand and those served by the prohibitions in s 18C on the other? Fundamental to addressing this is a recognition that it is an inevitable consequence of political debate that people will, on occasion, experience emotional harm as a result of speech by others. The question therefore becomes under what circumstances do the interests served by freedom of expression outweigh the right of others not to experience emotional harm?

30. Here the interest of propagation of ideas and truth-seeking served by freedom of speech is critical. In *On Liberty*, John Stuart Mill advanced the following argument for not suppressing free speech (see *J.S. Mill 'On Liberty' in Focus* Grey, John and Smith, G. W. (eds), London, Routledge, 1991, at 37):

> ..the opinion which it is attempted to suppress by authority may possibly be true. Those who desire to oppress it, of course deny its truth; but they are not infallible. They have no authority to decide the question for all mankind, and exclude every other person from the means of judging. To refuse a hearing to an opinion because they are sure that it is false, is to assume that *their* certainty is the same thing as *absolute* certainty. All silencing of discussion is an assumption of infallibility.

31. This reasoning is reflected in numerous decisions on the right to free speech under the First Amendment to the United States Constitution. In *West Virginia State Board of Education v Barnette* 319 U.S. 624 (1943), 642 Jackson J held

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion...

Similarly in *Street v New York* 394 U.S. 576 (1969), 592 Harlan J held that it

> ...is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas themselves are offensive to some of their hearers.

In *Texas v Johnson* 491 U.S. 397 (1989), 414 Brennan J stated

> If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit expression of an idea simply because society itself finds the idea offensive or disagreeable.

Finally, in *Collin v Smith* 578 F.2d (7th Cir. 1978) at 1210 (*cert. denied* 439 U.S. 916 (1978)) Pell J held

> The result we have reached is dictated by the fundamental proposition that if these civil rights are to remain vital for all, they must protect not only those society deems acceptable, but also those whose ideas it quite justifiably rejects and despises.

The principle underlying these dicta has often been referred to as that of 'viewpoint neutrality' (see, for example, *Cornelius v NAACP Legal Defense & Education Fund* 473 U.S. 788 (1985), 806 per O'Connor J) – in other words, that whatever valid grounds there may for limiting freedom of speech, mere disagreement with the viewpoint of the speaker is not one of them.

32. Restrictions on freedom of speech which impermissibly target the viewpoint of the speech can however be contrasted with those which target the *manner* in which that viewpoint is communicated. This type of speech is characterised by American First Amendment scholar Rodney Smolla ('Rethinking First Amendment Assumptions About Racist and Sexist Speech' 47 (1990) *Washington and Lee Law Review* 171,183) as consisting of words

> ..conveying no cognitive message other than the static level of cognition required to use language. What I mean by "language of emotion" is language that requires no more thought than the ability to spell; language that states no fact, offers no opinion, proposes no transaction, attempts no persuasion.

An obvious example of this is racist epithets, which convey no meaning and are thus often described as 'meaningless abuse'. Denying them the protection of freedom of speech would neither impede truth-seeking nor amount to viewpoint suppression. The speaker is still left free to convey their ideas without using epithets which are unnecessary for the communication of those ideas and whose sole effect is to inflict gratuitous harm. The use of racist epithets is the most obvious example of conduct which consists of meaningless abuse. Another is the racist tirades unleashed against migrants, most commonly on public transport.

There may be others, and it would be up to the courts to identify them on a case by case basis. The key point is that a limitation on such speech easily satisfies the proportionality test. It serves the important social interest of protecting people against offence, and because the prohibition is directed towards the manner of communication rather than the idea communicated, the limitation is minimal and goes no further than is necessary to achieve its objective.

33. How should the above be reflected in a re-drafting of ss 18C and 18D? I would submit that two changes to the provisions would ensure that, in applying them, the courts drew the distinction between the viewpoint of speech and the manner in which that viewpoint is conveyed. The first change, in s 18C, would be to refer to acts performed in a *manner* which is reasonably likely to offend, insult or intimidate. The second would be to include in s 18D an express statement that conduct may not be proscribed under s 18C solely because of the idea or opinion it conveys. Other aspects of s 18D are considered later in this submission.

VII Private *versus* public conduct

34. Section 18C(1) prohibits offensive conduct where the conduct is performed 'otherwise than in private'. The term 'otherwise than in private' is defined in s 18C(2) in such a way as to effectively require that the act be performed in public for it to amount to a breach of s 18C(1).

35. Given the importance of protecting people from emotional harm, there is no good reason to restrict liability for acts causing such harm to conduct which takes place in public. While difficulties of proof may arise in the case of conduct which occurs in private, there is no reason in principle why such conduct ought not to be unlawful under the Act. I would therefore recommend that the private / public distinction be removed from s 18C.

VIII The s 18D exceptions

36. Section 18D creates certain exceptions to breaches under s18C as follows:

> Section 18C does not render unlawful anything said or done reasonably and in good faith:
>
> (a) in the performance, exhibition or distribution of an artistic work; or
>
> (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or

(c) in making or publishing:

(i) a fair and accurate report of any event or matter of public interest; or

(ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

37. As indicated in Paragraphs 30-32, it is of key importance in striking the balance between the right not to suffer emotional harm on the one hand and freedom of speech on the other that the latter not be rendered unlawful because of the political ideas contained therein. Freedom of speech cannot properly be protected unless the law is viewpoint-neutral. Therefore, in order to ensure that s 18C is not held to be breached on the basis of viewpoint, I recommend that s 18D be re-drafted so as to state that no-one may be found to be in breach of s 18C solely because of any political, academic, artistic or scientific idea or opinion they express. This would provide a broader defence than is currently provided by the sub-section. Such an amendment would also remedy the puzzling and anomalous absence of any specific mention of political speech.

38. I would also recommend the deletion of the term 'public interest' from ss 18D(b) and (c). The inclusion of that term adds nothing to the defence, and although it may be given an interpretation benign to freedom of speech (as embracing any speech in which the public might be interested), it also creates a risk that speech which would otherwise fall within the scope of the exceptions might be denied protection if the term was interpreted so as to enable courts to decide cases on the basis of a court's view of the necessity of the arguments made by the plaintiff, and thus whether it was in the interests of the public to hear it. This risk was realised in the case of *Eatock v Bolt* [2011] FCA 1103 (per Bromberg J at [440] – [446]) where it was held that the s18D exemption did not apply because, in the view of the court, the respondent could have made his argument about the claiming of Aboriginal identity without referring to specific individuals. With due respect to the court, this decision establishes a precedent which requires speakers to tailor the content of their arguments to what a court might find necessary, which is surely a matter which should be up to the speaker to decide in a political system based on freedom of speech. If the speaker wishes to communicate a political idea, and does so without resorting to meaningless abuse, it should not be for the law to determine the manner in which he or she does so.

39. The words 'in good faith' and 'genuine' in s 18D are problematic. Apart from casting on the defendant a burden which by its nature is extremely difficult to discharge, their inclusion leads to a situation where speech which might otherwise enjoy the protection of s 18D is denied it because of the motivation of the speaker. These requirements were interpreted by

the court in *Bropho v Human Rights and Equal Opportunity Commission* (2004) 131 CLR 105, where French J held [at 96] that

> Want of subjective good faith, ie, seeking consciously to further an ulterior purpose of racial vilification may be sufficient to forfeit the protection of s 18D. But good faith requires more than subjective honesty and legitimate purposes. It requires, under the aegis of fidelity or loyalty to the relevant principles in the Act, a conscientious approach to the task of honouring the values asserted by the Act. This may be assessed objectively.

French J further held [at 102] that

> A person acting in the exercise of a protected freedom of speech or expression under 18D will act in good faith if he or she is subjectively honest, and objectively viewed, has taken a conscientious approach to advancing the exercising of that freedom in a way that is designed to minimise the offence or insult, humiliation or intimidation suffered by people affected by it. That is one way, not necessarily the only way, of acting in good faith for the purpose of s 18D. On the other hand, a person who exercises the freedom carelessly disregarding or willfully blind to its effect upon people who will be hurt by it or in such a way as to enhance that hurt may be found not to have been acting in good faith.'

With due respect to French J, the first dictum raises the difficulty that requiring speakers to have fidelity to legal principles contained in legislation amounts to a significant limitation on freedom of speech and to viewpoint discrimination because it means that the speaker is protected only in so far as he or she enunciates views in accordance with those if the state as manifested in the legislation it has enacted. What of a speaker who *opposes* the *Racial Discrimination Act 1975* (Cth) and the policies underlying it? What room is left to them to express dissent?

40. The second dictum by French J demonstrates that by imposing the requirement that the speaker take care to minimise the degree of insult or offence caused by their speech, s 18D qualifies the exemption it supposedly provides to liability under s 18C, by denying protection to speech simply because it is motivated by ill-will. As was held by Douglas J, speaking in the context of the First Amendment in the United Sates in *Terminiello v Chicago* 337 U.S. 1 (1949), 4:

> A function of free speech under our system of government is to invite dispute. It may indeed best serve its purposes when it induces a condition of unrest...or even stirs people to anger.

To penalise ill-will arguably imposes a more stringent restriction on rights than does would a bare prohibition on freedom of speech because it effectively punishes the speaker's *attitudes* and thus, in reality, his or her freedom of thought. This contradicts a fundamentally important value, enunciated by Holmes J in *United States v Schwimmer* 279 U.S. 644 (1929), 654-5 as follows:

> If there is any principle of the Constitution that more imperatively calls for attachment than any other is the principle of free thought - not free thought for those who agree with us but freedom for the thought that we hate.

41. I would therefore argue that the motivation of a speaker is ought not to be a ground for outlawing speech. Engaging in expressive activity in order to make mischief, to be provocative or even to give vent to malice is part and parcel of democracy, however much one might wish things to be otherwise yet, to take one example, in *Toben v Jones* [2003] FCAFC 137 (per Carr J at [43] – [45]) the defendant was found to have breached s 18C because what he had said was 'deliberately provocative and inflammatory.' For the law to discriminate between speech which is motivated by considerations which are in some way 'pure' *versus* speech which is somehow tainted by negative motivation is invidious. The requirement also gives rise to a significant degree of imprecision as to the location of the line between speech which is prohibited and that which is permitted, as shown by that statement by French J in *Bropho* [at 81] that the same statement on genetic differences of people of different races made at an academic conference would be saved by s 18D but not if made at a political meeting.

42. The requirements of good faith and genuineness have led to the defendants being found liable for breaches of s 18C on the basis of advancing views on history, as in *Jones v Scully* [2002] FCA 1080, *Toben v Jones* [2003] FCAFC 137 and *Jones v The Bible Believers Church* [2007] FCA 55. Much as one might disagree with the views of Holocaust-denial propounded by the speakers in those cases, it is surely not the role of the law to determined historical controversies, or to be used as a tool by one or other party in such controversies to suppress the views of their opponents. As Powell J stated in *Gertz v Robert Welch Inc.* 349 U.S. 576 (1969), 592:

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.

To take some contemporary examples, how would the law determine cases in which a Palestinian stated at a rally that the Jewish people were racists and occupiers because of their establishment of the state of Israel or where a Jewish Australian had stated at a counter-rally that Palestinians were terrorists because of their attacks against Jewish settlements? Both statements are offensive, but which is the law to say is 'right' and which 'wrong'? Under current interpretations of the good faith and genuineness provisions in s 18D, these statements would be protected only if the speakers could prove that he or she was not actuated by malice and had not spoken in a manner which was 'deliberately provocative and inflammatory' (to use the terminology adopted in *Bropho*). Or, to take another example, what if, prior to the Soviet Union's admission in 1990 that its forces massacred Polish officers at Katyn in 1940, a person motivated by malice against Russians had made a statement that Russians had engaged in a war crime, thereby causing offence to Russians? Would it have been legitimate for such a person to have been found in breach of a provision such as s 18C prior to 1990, simply because of his bad motive? Leaving aside arguments on history, what of a statement that 'Catholics are anti-gay bigots' because, in following their beliefs, they reject same-sex marriage? Ought that statement to be outlawed? It could be seen as speech which is 'deliberately provocative and inflammatory', but which in a free society ought to be protected nonetheless.

43. The problem with s 18D is that a person exercising freedom of speech, even in the context of an academic or political argument, is left in the perilous position of wondering how much malice is too much, and how provocative they can be before losing the protection offered by s 18D and thus falling foul of s 18C. The requirements of good faith and genuineness set an impossibly imprecise test, creating a chilling effect on speech and compelling speakers to engage in self-censorship. For this reason, these requirements should be removed from the Act.

44. Finally in this regard, I submit that the limits placed on the s 18D exemptions by the requirements of good faith and genuineness – which effectively broaden the range of speech proscribed under s 18C – do not satisfy the requirement of balance between the importance of the purpose served by a measure restricting freedom of political communication and the extent of the restriction it imposes on the freedom contained in *McCloy v New South Wales* (2015) 325 ALR 15. This is because, as indicated in the arguments above, the combined

effect of ss 18C and 18D is to deny protection to speech which must be protected in order to secure the freedom of speakers to communicate ideas and the hearers to decide for themselves the truth thereof.

IX A suggested re-draft of ss 18C and 18D

45. In light of the arguments raised in this submission, I would recommend that ss 18C and 18D be re-drafted so as to read as follows:

Section 18C Offensive behaviour because of race, colour or national or ethnic origin

(1) It is unlawful for a person to threaten or incite violence against another person or group of people because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

(2) It is unlawful for a person to do an act directed towards a person if:

(a) the act is done in a manner which is reasonably likely, in all the circumstances, to offend, insult or humiliate another person or a group of people; and

(b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

Section 18D Exemptions

Section 18C(2) does not render unlawful anything said or done:

(a) in the performance, exhibition or distribution of an artistic work; or

(b) solely because of an idea or opinion contained in any statement, publication, discussion or debate relating to any political, academic, artistic or scientific matter; or

(c) in making or publishing:

(i) a fair and accurate report of any event or matter; or

(ii) a fair comment on any event or matter.