Submission

Parliamentary Joint Committee on Human Rights: Inquiry into freedom of speech in Australia

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Executive summary

Section 18C, 18D and 18E of the Racial Discrimination Act are deeply flawed. In its current form the law is inconsistent with human rights, operates anathema to liberal democratic values and is utterly inconsistent with a free society. As recent cases have demonstrated, reform is needed.

The problems with the law cannot be fixed through procedural amendments alone. It is the test in law that justifies capturing expressions for consideration of complaints by the Australian Human Rights Commission, and potentially the Federal Court. Even the most efficient processes would still lead to frivolous complaints being made, considered and accepted. The test must be the primary focus of any amendment to fix the law.

This submission seeks to make a series of constructive suggestions about how the law can be reformed. Each proposal is based on addressing the legitimate concerns of those who defend freedom of expression, and those that want to protect vulnerable minorities from public intimidation and harassment.

In its current form 18C, 18D and 18E are not a protection of human rights for anyone. In its current form they provide a special legal privilege for people based on their race, colour or national or ethnic origin that is not afforded to the rest of the community.

Some have proposed that adding the terms 'hate speech' or 'vilification' would aid in this process. Such a suggestion may sound intuitively correct, but is false. Tests like 'vilification' and 'hate speech' are largely meaningless and bad tests in law. They provide a subjective and low-level restriction on expressions, while also capturing abuse and harassment. High-level offensive or insulting expressions can be vilifying and amount to 'hate speech'.

The correct test in law to protect freedom of expression and people from harassment is where an objective threshold is met. The correct test is not 'offend, insult or humiliate'. The correct test is harassment, which includes high-level, or serious, humiliation and denigration causing intimidation. Harassment does not make challenging ideas unlawful. Harassment stops one person using their freedom to diminish the worth of another alongside their own ability to exercise their freedom.

This author's enduring preference is reform option 1, then 4 and then equally 2 or 3.

Reform option 1: Full repeal proposal

Full repeal of section 18C, D and E of the Racial Discrimination Act to establish a test in law that is consistent for all people and does not grant special legal privileges to people based on their race, colour, national or ethnic origin that are not extended to others in society.

Allow state laws to be reformed where there is inadequacy of dealing with workplace and public harassment.

Extend restrictions on urging of violence provisions in the Commonwealth Criminal Code to cover other sections of society, ie people with a disability etc.

Or

Reform option 2: Objective conjunctive proposal

Amend Section 18C(1) of the Racial Discrimination Act as follows:

1. It is unlawful for a person to do an act, otherwise than in private, if:

   a. **a reasonable member of the Australian community objectively concludes the** act, in all the circumstances, **would seriously** offend, **seriously** insult, **seriously** humiliate **and** 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.

Or

Reform option 3: Objective intention proposal

Amend Section 18C(1) of the Racial Discrimination Act as follows:

1. It is unlawful for a person to do an act, otherwise than in private, if:

   a. **a reasonable member of the Australian community objectively concludes the** act, in all the circumstances, **would seriously** offend, **seriously** insult **or seriously** humiliate **to** 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.

Or

Reform option 4: Objective consistent comprehensive proposal

Full repeal of Sections 18C, 18D and 18E of the Racial Discrimination Act.

Insertion into another Act:

1. **Workplace harassment**

It is unlawful for a person to do an act in a workplace if a reasonable member of the Australian community objectively concludes the act seriously humiliates and seriously denigrates **causing** intimidation for another person, or group of people, on the basis of an attribute in section (4).

2. Public harassment

It is unlawful for a person, otherwise than in private, to do an act if a reasonable member of the Australian community objectively concludes the act seriously humiliates and seriously denigrates **to** cause intimidation for another person, or group of people, on the basis of an attribute in section (4).

3. Incitement to public harassment

It is unlawful for a person, otherwise than in private, to do an act if a reasonable member of the Australian community objectively concludes the act incites another person, or group of people, **to** seriously humiliate and seriously denigrate **to** cause intimidation toward another person, or group of people, on the basis of an attribute in section (4).

4. Attributes

A protected attribute includes:
1. age;
2. disability;
3. race, ethnicity, nationality or citizenship;
4. breastfeeding or family responsibilities;
5. sex, gender or gender identity;
6. marital or relationship status;
7. medical history;
8. pregnancy or potential pregnancy;
9. religion or religious belief;
10. sexual orientation.

Each protected attribute is taken to include:
(i) characteristics that people who have the attribute generally have or are generally assumed to have; and
(ii) in relation to a particular person - characteristics that the person has because they have that attribute.

5. Exemptions

An act does not amount to workplace or public harassment or incitement to public harassment if it is:
(i) a fair and accurate report of a public act.
(ii) a communication or dissemination of a matter that is subject to a defense of absolute privilege in proceedings for defamation.
(iii) a public act done in good faith for:
  (a) academic, artistic, scientific or research purposes.
  (b) any purpose in the public interest.

Note: Subsections (1), (2) and (3) makes certain acts unlawful. Section 46P of the Australian Human Rights Commission Act 1986 allows people to make complaints to the Australian

Human Rights Commission about unlawful acts. However, an unlawful act is not necessarily a criminal offence.

For the purposes of subsections (i) and (i), an act is taken not to be done in private if it:
(i) causes words, sounds, images or writing to be communicated to the public; or
(ii) is done in a public place; or
(iii) is done in the sight or hearing of people who are in a public place.

In this section "public place" includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.

The problem

Whatever its intentions, Section 18C, 18D and 18E of the Racial Discrimination Act are deeply flawed. Sections 18C, 18D and 18E are unnecessarily broad, place too low a restriction on freedom of expression and expose citizens to civil action simply for expressing an opinion.

The law is broken as has now been demonstrated in the Bolt case, the case against the QUT students and the complaints that were withdrawn against cartoonist, Bill Leak. It is also now clear that people are searching for ways to use the law as a weapon to resolve disputes that should be solved in the public square. An extensive discussion of the flaws of the law are highlighted through previously published articles attached at the end of this submission.

The sensible thing to do is amend the law and seek constructive reform recognizing the twin objectives:

1. That freedom of expression is essential in a free society and liberal democracy.
2. There is a limitation where expressions cross a line that leads to harassment or intimidation to the point that they no longer feel free to exercise their freedom.

There are a number of issues that have now arisen with the law:

1. The test to restrict freedom of expression is too low, established through the test of 'offend, insult, humiliate'. Expressions captured by such a test can include challenging ideas (offend), humour (offend, insult & humiliate) and expressions that may bring culturally-based shame (particularly humiliate).
2. The test is applied subjectively based on the attitude of a person from a sub-group, and not an objective test of a reasonable Australian.
3. The application of the law creates a special legal privilege for people based on their race, colour or national or ethnic origin that does not exist for others in society.
4. The process of the law leads the Australian Human Rights Commission to be bound to interpret the law as it stands in law leading to an invitation of cases; while the Federal Court has effectively read down the law and established a much higher test for a violation of the law. This process can be very damaging to respondents who can be burdened by legal costs even before the case is considered by a court, and costs and reputational damage if considered by a court.

To have a law that enjoys wide-spread public confidence that is consistent with the human rights of all and does not raise future cases that brings the law into disrepute requires all four problems to be addressed.

Protecting people against public harassment is an important objective. With the proper test law can be an appropriate tool in targeting mischief. With an inappropriate test, as established under 18C and 18D, it can compound problems. The lessons of history show that creating new unlawful offences and toughening penalties is not an effective deterrent. The most effective way to address harmful racial sentiment is to challenge prejudice in open debate, not create martyrs for those that express intolerance. We will not become a more accepting and tolerant society by promoting laws that imitate the very behavior they seek to change and push it underground.

Any reform also has to properly recognize context. Different standards should apply in the workplace, than in public. The test of sexual harassment in the Sex Discrimination Act demonstrates the importance of context. An expression of sexual interest in a workplace can amount to sexual harassment. In a bar or nightclub it can lead to a relationship.

Reform option 1: The consistent reform

A falsely perpetuated myth is that the introduction of section 18C, D and E was justified because it was supported by the conclusions of three preceding independent inquiries. These inquiries were:

1. *The Royal Commission into Aboriginal Deaths in Custody*.
2. The Human Rights and Equal Opportunity Commission's *National Inquiry into Racist Violence*.
3. The Australian Law Reform Commission's report into *Multiculturalism and the Law*.

This claim is false. None of the three independent inquiries recommended the current wording of the law. As outlined in my Forgotten Freedoms speech:[1]

> The *Royal Commission into Aboriginal Deaths in Custody* recommended that there should be a Federal civil offence against racial vilification but that it should exclude 'demonstrations against the behaviour of particular countries, publication or performance of works of art and the serious and non-inflammatory discussion of issues of public policy'.[2]
>
> The Royal Commission counselled for the definition of vilification to be based on the spirit of the *International Convention on the Elimination of all Forms of Racial Discrimination* which prohibits 'racial violence, discrimination or hostility'.[3]
>
> And there was the 1991 *National Inquiry into Racist Violence* by the Human Rights and Equal Opportunity Commission.[4]
>
> In this report, the Commission called for the creation of a civil offence against 'incitement of racial hostility',[5] 'an express prohibition of racist harassment',[6] as well as a Federal criminal offence against 'racial violence'.[7] The Commission also recommended the creation of an offence of 'incitement to racial violence'.[8]
>
> Finally, there was the Australian Law Reform Commission's 1992 report titled *Multiculturalism and the Law*, which examined the issue of racial speech.
>
> Recommending a civil offence, the Law Reform Commission supported 'making incitement to racist hatred and hostility unlawful'.[9] While it provided no explicit definition of racial hatred, it is clear that the intention was to focus predominantly on speech that could act as a precursor to violence.
>
> Even then, one Commissioner dissented the recommendation expressing 'the view that in a democratic and pluralist society freedom of expression is of special importance which may necessitate tolerance of obnoxious and hateful views which do not incite violence'.[10]

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[1] T Wilson, *The Forgotten Freedoms*. (2014) At https://www.humanrights.gov.au/news/speeches/forgotten-freedoms
[2] E Johnson QC, *Royal Commission into Aboriginal Deaths in Custody National Report Volume 4*, para 28.3.49. At http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol4/ (viewed 7 May 2014).
[3] Johnson, above, para 28.3.31.
[4] I Moss and R Castan QC, *Racist Violence: Report of the National Inquiry into Racist Violence in Australia*, Human Rights and Equal Opportunity Commission, AGPS Canberra (1991). At https://www.humanrights.gov.au/publications/racist-violence-1991 (viewed 7 May 2014).
[5] Moss and Castan, above, p 299.
[6] Moss and Castan, above, p 274.
[7] Moss and Castan, above, p 297.
[8] Moss and Castan, above, p 305.
[9] Australian Law Reform Commission, *Multiculturalism and the Law* (1992), para 7.47. At http://www.alrc.gov.au/report-57 (viewed 7 May 2014).
[10] Australian Law Reform Commission, above, footnote 87.

> Each of these inquiries clearly raises concerns about racism in Australia. But none come even remotely close to arguing for the wording of 'offend', 'insult' or 'humiliate' which later appeared in section 18C of the Racial Discrimination Act. Rather, they raised the need to deal with 'vilification', 'hostility', 'harassment' and 'violence'.

The inconsistency between the recommendations and final drafting of 18C, D and E was identified in the Parliamentary Library's Digest to the 1994 Bill:

> It is often argued that these three reports are the basis for the Commonwealth's proposed legislation, however, the *Racial Hatred Bill 1994* is in some respects completely contrary to the recommendations of these reports.[11]

The Digest continued that:

> In the case of civil offences, it was recommended that "incitement to racial hatred or hostility", or "racial vilification" or "incitement to racial hostility" be the subject of the civil offence. All of these descriptions involve a high threshold of serious conduct. The *Racial Hatred Bill*, however, establishes a civil offence with the significantly lower threshold of conduct which "offends, insults, humiliates or intimidates".[12]

When advocates for the law argue that there are other restrictions on freedom of expression as a justification for 18C they fundamentally misunderstand the nature of the law.

Each restriction on freedom of expression is based on a tension between freedom of expression and another human right. For example:

- Copyright is set at the tension between freedom of expression and the property rights afforded to artistic works (currently too heavily swayed in favour of the rights holder).
- Defamation is set at the tension between freedom of expression and a person's earned reputation (currently too heavily weighted in favour of a person's reputation).

The tension in restriction of freedom of expression in the case of 18C is between a person's freedom to express themselves, and another's freedom to be exercise their freedoms, such as expression, association or movement. That does not occur when expressions are offensive or insulting. Speech sits on a scale and low-level humiliation or low-level denigration is also not sufficient, unlike serious or severe humiliation or denigration. There is no freedom from offensive, insulting or humiliating speech, and cannot be if we continue to support free speech. These tests are subjective and provide no real guidance for individuals on whether their speech is within the bounds of the law, or for the Australian Human Rights Commission or Federal Court to decide whether a person's speech is within the bounds of the law.

Some have proposed that adding the terms 'hate speech' or 'vilification' would aid in this process. Such a suggestion may sound intuitively correct, but is false.

Table 1 outlines the tension of setting the line of restrictions on freedom of expression. Most people accept that the legitimate restriction on an expression is when it incites violence or intimidates another person into silence; but offensive expressions are not automatically intimidating, while all

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[11] Parliamentary Research Service, *Racial Hatred Bill 1994 Bills Digest* (1994), p 4.
At http://parlinfo aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillsdgs%2FM7Z10%22 (viewed 7 May 2014).
[12] Parliamentary Research, above.

intimidating expressions are highly likely to be offensive.

Tests like 'vilification' and 'hate speech' are largely meaningless and bad tests in law. They provide a subjective and low-level restriction on expressions, while also capturing abuse and harassment. High-level offensive or insulting expressions can be vilifying and amount to 'hate speech'.

The correct test in law to protect freedom of expression and people from harassment is where an objective threshold is met. The correct test is not 'offend, insult or humiliate'. The correct test is harassment, which includes high-level, or serious, humiliation and denigration causing intimidation. Harassment does not make challenging ideas unlawful. Harassment stops one person using their freedom to diminish the worth of another alongside their own ability to exercise their freedom.

In practice, harassment is not a matter for the Commonwealth. Such a test should be the responsibility of the States and Territories that already have laws to stop public harassment and intimidation.

Full repeal of section 18C would do nothing to limit the protection of people from harassment and intimidation. All it affords is a special legal privilege (as outlined in Table 2) on the basis of race, colour or national or ethnic origin that is not provided to others within society.

The absurdity of affording people special legal privileges is dangerous. It would be senseless to suggest that racist harassment is somehow worse than sexist harassment or harassment against people with a disability. Yet currently under Federal law a person can legally offend, insult, humiliate or intimidate a person on the basis of their sexual orientation or sex or gender freely; but if the basis of this act is justified in a person's ethnic origin there are limits about what can be said in response. An example of how this can work in practice was referenced in an article included in the attachments to this submission:

> "For example, last year Anthony Mundine did an interview on Channel 7's *Sunrise* program. During Andrew O'Keefe's interview Mundine said Aboriginality and the "choice" of homosexuality were incompatible and homosexuality shouldn't be shown on prime time television. The basis of his comment was "Aboriginal law".
>
> Mundine has probably taken too many blows to the head in the boxing ring and his comments are stupid and offensive. We can say both those things. And in a free and democratic country Mundine should be allowed to say stupid and offensive things.
>
> But that doesn't mean the basis of his offensive comments is wrong. Across the country I've met gay and lesbian Aboriginal Australians who have told me horrible stories of how they're treated.
>
> Not that poor treatment of gay and lesbian people is limited to Aboriginal culture. Many ethnic cultures engage in even more horrific treatment of gay and lesbian people, including in Australia.
>
> But if we want to harshly criticise the justification of Mundine's commentary we risk offending his ethnic origins. Because of 18C Australians have to cautiously discuss the topic, especially non-Aboriginal Australians.

> The example highlights a fundamental flaw of 18C. The assumption behind the law is that racism essentially comes from the dominant racial group against minorities. That isn't the case. Sometimes minorities judge each other horribly and harshly.
>
> One of the cheap party tricks of 18C's defenders is asking the leading question: "What is it that you want to say that you can't say?" The assumption is that you want to say something racist. That isn't the case. When Mundine made his despicable comments I censored my response because of 18C and the risk that I'd offend or insult his heritage.
>
> Would I have been let off because of 18D? Possibly. I can't say with confidence my comments would have been judged to have been in "good faith".[13]

Yet, the standard established under section 18C – offend, insult, humiliate or intimidate – could never be consistently applied across all groups. The consequence of what occurs when it does was demonstrated by the case against Catholic Archbishop Julian Porteous under section 17 of Tasmania's Anti-Discrimination Act.

Reform option 1: Full repeal proposal

Full repeal of section 18C, D and E of the Racial Discrimination Act to establish a test in law that is consistent for all people and does not grant special legal privileges to people based on their race, colour, national or ethnic origin that are not extended to others in society.

Allow state laws to be reformed where there is inadequacy of dealing with workplace and public harassment.

Extend restrictions on urging of violence provisions in the Commonwealth Criminal Code to cover other sections of society, ie people with a disability etc.

[13] T Wilson. 'Charlie Hebdo v 18C: no contest' (19/01/2015) *The Australian*. At http://www.theaustralian.com.au/opinion/charlie-hebdo-v-18c-no-contest/news-story/ccf2a26b84386ce41ce5c32706e2ab89.

Table 1 | Scale of free expression and safety

Severity		Offensive	Insulting	Humiliating	Denigrating	Harassing	Intimidating	Vilifying	'Hate speech'
Incite violence									
Urge violence									
Intimidate									
Denigrate	High								
	Low								
Humiliate	High								
	Low								
Insult	High								
	Low								
Offend	High								
	Low								
Civil									

Table 2 | Current Federal restrictions on expressions to protect safety

Severity		General	Age	Disability	Politics	Race / Ethnicity	Religion	Sex / Gender	Sexual orientation
Terrorism	Advocate								
Violence	Incitement								
	Urge								
	Intimidate								
Speech	Intimidate								
	Humiliate								
	Insult								
	Offend								

	Section 80.2A & 80.2B of the Commonwealth Criminal Code (Race, religion, nationality, national or ethnic origin or political opinion)
	Section 80.2C of the Commonwealth Criminal Code
	Section 11.4 of the Commonwealth Criminal Code
	Section 18C of the Racial Discrimination Act (Race, colour or national or ethnic origin)

Reform options 2 & 3: Minor reform

Minor reform would recognise the legitimate concerns of those in favour of reform and amend the test in the law and ensure a truly objective standard that the test is assessed against.

The current wording of the law is that:

> 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.

The recommended (**bolded and underlined**) reform to the law would be to establish a conjunctive test that recognises the test has to be more than just offensive, insulting or humiliating conduct and is elevated to intimidation:

> **Reform option 2: Objective conjunctive proposal**
>
> Amend Section 18C(1) of the Racial Discrimination Act as follows:
>
> 1. It is unlawful for a person to do an act, otherwise than in private, if:
>
>   a. **a reasonable member of the Australian community objectively concludes the** act, in all the circumstances, **would seriously** offend, **seriously** insult, **seriously** humiliate **and** 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.

Such a reform would:

1. Establish a truly objective standard for assessment of whether someone has breached section 18C.
2. Bring the test in law in line with the broad interpretation of section 18C of the Federal Court.
3. Formalise a singular test that requires recognition of an escalated act to violate section 18C against a standard that can be universally accepted.
4. Unsatisfactorily continue to give people special legal privileges on the basis of race, colour, national or ethnic origin that are not extended to other people in the community.

The current law states that the act must be deemed 'reasonably likely' to satisfy the test offence,

insult, humiliation or intimidation. This is resolutely subjective, and not a true objective standard.

After identifying the relevant group of people, the Australian Human Rights Commission in consideration of accepting a complaint, or a judge in the Federal court must determine how a reasonable member of that group would respond to the act. Not only is this hypothetical, it introduces a precarious level of subjectivity as the judge must surmise what is 'reasonable' from a particular frame of mind.

Modifying the objective standard to 'a reasonable member of the Australian community', allows for a more universal and precise determination. The test will not become inconsistent to the variable propensity of judges to conjure a mindset representative of a subgroup of society. An alternative **(bolded and underlined)** reform to the law would be to establish a test focusing on intention:

Reform option 3: Objective intention proposal

Amend Section 18C(1) of the Racial Discrimination Act as follows:

1. It is unlawful for a person to do an act, otherwise than in private, if:

   a. **a reasonable member of the Australian community objectively concludes the** act, in all the circumstances, **would seriously** offend, **seriously** insult **or seriously** humiliate **to** 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.

Such a reform would:

1. Establish a truly objective standard for assessment of whether someone has breached section 18C.
2. Bring the test in law in line with the broad interpretation of section 18C of the Federal Court.
3. Recognise that the intention of public acts is to diminish the exercise of another's freedom through intimidation.
4. Unsatisfactorily continue to give people special legal privileges on the basis of race, colour, national or ethnic origin that are not extended to other people in the community.

Reform option 4: Consistent, comprehensive reform

Consistent, comprehensive reform should establish a test that can operate across all people and properly differentiate between differing forms of harassment, including:

1. Workplace harassment
2. Public harassment
3. Incitement to public harassment

The proposal recommends full repeal of section 18C, D and E of the Racial Discrimination Act and the insertion of the following new sections in the relevant section of another Act:

Reform option 4: Objective consistent comprehensive proposal

Full repeal of Sections 18C, 18D and 18E of the Racial Discrimination Act.

Insertion into another Act:

1. Workplace harassment

It is unlawful for a person to do an act in a workplace if a reasonable member of the Australian community objectively concludes the act seriously humiliates and seriously denigrates **causing** intimidation for another person, or group of people, on the basis of an attribute in section (4).

2. Public harassment

It is unlawful for a person, otherwise than in private, to do an act if a reasonable member of the Australian community objectively concludes the act seriously humiliates and seriously denigrates **to** cause intimidation for another person, or group of people, on the basis of an attribute in section (4).

3. Incitement to public harassment

It is unlawful for a person, otherwise than in private, to do an act if a reasonable member of the Australian community objectively concludes the act incites another person, or group of people, **to** seriously humiliate and seriously denigrate **to** cause intimidation toward another person, or group of people, on the basis of an attribute in section (4).

4. Attributes

A protected attribute includes:

1. age;
2. disability;
3. race, ethnicity, nationality or citizenship;
4. breastfeeding or family responsibilities;
5. sex, gender or gender identity;
6. marital or relationship status;
7. medical history;
8. pregnancy or potential pregnancy;
9. religion or religious belief;

10. sexual orientation.

Each protected attribute is taken to include:
(i) characteristics that people who have the attribute generally have or are generally assumed to have; and
(ii) in relation to a particular person - characteristics that the person has because they have that attribute.

5. Exemptions

An act does not amount to workplace or public harassment or incitement to public harassment if it is:
(i) a fair and accurate report of a public act.
(ii) a communication or dissemination of a matter that is subject to a defense of absolute privilege in proceedings for defamation.
(iii) a public act done in good faith for:
(c) academic, artistic, scientific or research purposes.
(d) any purpose in the public interest.

Note: Subsections (1), (2) and (3) makes certain acts unlawful. Section 46P of the Australian Human Rights Commission Act 1986 allows people to make complaints to the Australian Human Rights Commission about unlawful acts. However, an unlawful act is not necessarily a criminal offence.

For the purposes of subsections (i) and (i), an act is taken not to be done in private if it:
(iv) causes words, sounds, images or writing to be communicated to the public; or
(v) is done in a public place; or
(vi) is done in the sight or hearing of people who are in a public place.

In this section "public place" includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.

Such a reform would:

1. Create a clear division between workplace harassment and public harassment.
2. Establish a new provision that covers incitement to public harassment. Such a provision can only be established if the test for public harassment is properly set to ensure it does not limit freedom of expression.
3. Establish a truly objective standard for assessment for workplace harassment, public harassment and incitement to public harassment that could be consistently be applied.
4. Bring the test of law into line with where it should be in the appropriate context.

Attachments | Select articles on the need to reform section 18C of the Racial Discrimination Act

Charlie Hebdo v 18C: no contest

This article was originally published in The Australian on 19/01/2015, and available at: http://www.theaustralian.com.au/opinion/charlie-hebdo-v-18c-no-contest/news-story/ccf2a26b84386ce41ce5c32706e2ab89

CHARLIE Hebdo would have been a legal publication in Australia. But it would have faced regular efforts to have it shut down or censored under state and federal laws.

In Australia the primary legal weapon used against *Charlie Hebdo* would have been section 18C of the Racial Discrimination Act, which makes it unlawful to offend, insult, humiliate or intimidate on the basis of race, colour, national or ethnic origin.

18C doesn't cover religion, but *Charlie Hebdo* published many cartoons on race as well as ethno-religious topics that could have been deemed offensive under it.

This is outlined in the explanatory memorandum to the bill that introduced 18C.

The memo said "it is intended that Australian courts would follow the prevailing definition of 'ethnic origin' … (which) involves consideration of one or more characteristics … this would provide the broadest basis for protection of peoples such as Sikhs, Jews and Muslims". It's this interpretation that led to former *Sydney Morning Herald* columnist Mike Carlton facing a complaint under 18C because of his disgraceful anti-Semitic language.

18C would have been used against *Charlie Hebdo* because it sets a low bar to restrict free speech. Administratively, 18C also makes it easy to take action; all you need is an aggrieved party and an arguable case.

Charlie Hebdo's publishers would then have been caught up in regular disputes and subsequent legal battles if they refused to back down. After significant cost and time, courts would have had to test whether each cartoon enjoyed exemptions under the impossibly opaque section 18D of the act, which requires publication to be undertaken reasonably and in good faith.

Many cartoons were satirical, but they were also designed to strongly provoke and didn't seek to minimise the offence caused. That may mean they wouldn't always be covered by the exemptions. Each one would have to be assessed on its merits.

Even if 18D did apply in all cases, that doesn't justify 18C. Section 18D doesn't protect free speech. Arguing it does is absurd. In practice, 18C declares you guilty, 18D allows you to profess your innocence.

Censorship doesn't just occur because a court silences a voice. Censorship also occurs because bad laws allow publications to be bullied through legal processes until their only viable option is to cower and self-censor.

Charlie Hebdo would have been destroyed through a thousand 18C complaints.

The *Charlie Hebdo* massacre is a tragedy, and it should be a reminder that we need to defend free speech even when speech offends and insults.

Offence and insult are subjective, emotional responses to the actions of others. Individuals can be offended and insulted by just about anything, even when it is not intended. For that reason, a law that prohibits speech that merely offends and insults sets the bar too low. Instilling these principles in law ultimately leads to self-censorship.

For example, last year Anthony Mundine did an interview on Channel 7's *Sunrise* program. During Andrew O'Keefe's interview Mundine said Aboriginality and the "choice" of homosexuality were incompatible and homosexuality shouldn't be shown on prime time television. The basis of his comment was "Aboriginal law".

Mundine has probably taken too many blows to the head in the boxing ring and his comments are stupid and offensive. We can say both those things. And in a free and democratic country Mundine should be allowed to say stupid and offensive things.

But that doesn't mean the basis of his offensive comments is wrong. Across the country I've met gay and lesbian Aboriginal Australians who have told me horrible stories of how they're treated.

Not that poor treatment of gay and lesbian people is limited to Aboriginal culture. Many ethnic cultures engage in even more horrific treatment of gay and lesbian people, including in Australia.

But if we want to harshly criticise the justification of Mundine's commentary we risk offending his ethnic origins. Because of 18C Australians have to cautiously discuss the topic, especially non-Aboriginal Australians.

The example highlights a fundamental flaw of 18C. The assumption behind the law is that racism essentially comes from the dominant racial group against minorities. That isn't the case. Sometimes minorities judge each other horribly and harshly.

One of the cheap party tricks of 18C's defenders is asking the leading question: "What is it that you want to say that you can't say?" The assumption is that you want to say something racist. That isn't the case. When Mundine made his despicable comments I censored my response because of 18C and the risk that I'd offend or insult his heritage.

Would I have been let off because of 18D? Possibly. I can't say with confidence my comments would have been judged to have been in "good faith".

Regardless, I don't fancy being hauled through the Human Rights Commission or a court for refusing to apologise. So it is to self-censor rather than criticise another's bigotry.

Chalk that up as a victory for social inclusion and harmony. 18C gives legal privileges to some to be bigots while we allow the law to intimidate others into self-censorship who want to respond.

Tim Wilson is Australia's Human Rights Commissioner.

Outing clear harassment doesn't need elaboration

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Free speech is being restricted by ill-defined anti-discrimination law that has taken the carefully targeted definition of workplace sexual harassment and applied it to public speech. The Tasmanian case against Catholic bishops over a booklet that argues against marriage for same-sex couples has highlighted the problem of how anti-discrimination law can restrict free speech.

Keeping the Tasmanian law intact in the lead-up to a plebiscite on the definition of marriage risks chilling debate so long as the law seeks to stop expressions that may "offend", "insult" or "ridicule". The impact would be nationwide. With a national media market it is possible a statement could be made in any state and then replayed in Tasmania and fall foul of the law.

The intention of the offending section 17 of the Tasmanian Anti-Discrimination Act is to stop people being bullied or harassed. But that isn't achieved by its current wording.

Its wording sets a test for restricting speech based on subjective and loose terms, particularly when we are talking about matters of personal morality.

We can't be free to debate important public policy issues when restrictions on free speech are so heavy-handed. The law needs to change.

The problem with Section 17 of the Tasmanian Anti-Discrimination Act has arisen because it was modelled on Section 28A of the Federal Sex Discrimination Act.

This should prompt the question: why is the Sex Discrimination Act uncontroversial, but not the Tasmanian law? The answer is straightforward.

Despite including the threshold of "offended, humiliated or intimidated", section 28A of the Sex Discrimination Act is designed to address workplace conduct. It wasn't designed to cover general expressions of opinion in public.

In her speech supporting the introduction of the Sex Discrimination Act, then senator and current Age and Disability Discrimination Commissioner Susan Ryan argued: "The Bill does not attempt to deal with all forms of sexual harassment which can be characterised as discriminatory in nature."

Instead, "it is linked to a belief that rejection of an unwelcome sexual advance, and unwelcome request for sexual favours or other unwelcome sexual conduct would disadvantage the person in relation to employment or educational studies".

The Tasmanian general anti-discrimination law took this test for workplace sexual harassment — a specific sort of prohibited conduct — and then applied it to all expressions in the public square.

On introducing the act, the then Tasmanian attorney-general, Judith Jackson, said: "Sexual harassment is prohibited under clause 17 … incorporat(ing) the definition of sexual harassment in the Sex Discrimination Act 1994."

Like the federal Act, the law at the time was designed to focus on sexual harassment that may lead to "loss of employment, loss of income or loss of accommodation" on the basis of issues

predominantly around gender. But in 2012 it was expanded to include many identity groups and went beyond predominantly workplace issues to deal with public expressions.

That is where the problem has arisen.

The same problem was also replicated with the design of section 18C of the Racial Discrimination Act. On introducing the Bill to include 18C, the then attorney-general, Michael Lavarch, said the requirement that "the behaviour complained about should 'offend, insult, humiliate or intimidate' is the same as that used to establish sexual harassment in the Sex Discrimination Act".

And like the Tasmanian law, it wrongly adapted a test for workplace harassment for public harassment. Workplace harassment and public speech are not the same thing, and should not have the same test.

In assessing the consequences of an expression, context always matters. Workplace harassment is different in nature because of the clear power relationships between employers, management and employees, and the degree that people feel compelled to stay silent or accept behaviour.

Workplace harassment isn't just sexual harassment. It can also include conduct that seriously - humiliates or denigrates.

The same does not equally apply in the public square.

Progressing sensible reform necessitates an alternative proposal that addresses the concerns of those who want freer speech and others who want to enjoy the protection of the law to stop unjustified harassment.

A term like "hate speech" might rhetorically sound clever, but it means little. One person's hate speech can easily be another's deeply held moral or religious belief.

The solution is to redraft the laws to define harassment to more carefully reflect the very different sorts of conduct they are intended to capture.

Workplace harassment should focus on seriously humiliating, seriously denigrating or intimidating behaviour. Public harassment should focus on two explicit types of acts.

First is conduct that intimidates. That captures conduct to make people feel unsafe and stop them exercising their freedom, such as deliberate abuse on public transport. Second is expressions designed to deny another person's humanity. That captures conduct designed to justify denying rights and freedoms to others because they are deemed less than human. This is a particular concern of the Jewish community after the experience of the Holocaust.

Because the definition of public harassment would be clear, it would not need to be accompanied with complementary exemptions of the type of speech that can be permitted, such as occurs under Section 55 of the Tasmanian Act, or 18D of the Racial Discrimination Act.

More importantly, these definitions would leave Australians free to debate important issues and ideas that may offend, insult or ridicule, but stop the unjustified harassment we all despise and is not consistent with free speech.

Tim Wilson is Australia's Human Rights Commissioner.

Another 'aberration' shows 18C is problem and must be changed

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State and federal governments should reform laws that make offensive acts unlawful and refocus them on protecting free speech and stopping workplace and public harassment.

This week a news story broke about a complaint made under section 18C of the Racial Discrimination Act by a Queensland University of Technology employee.

Section 18C makes it unlawful to "offend, insult, humiliate or intimidate" a person on the basis of their "race, colour or national or ethnic origin".

The complaint by the QUT employee is based around posts made by some of the students on a Facebook page that circulates campus gossip.

The posts were made after the students had been denied access to a computer lab in a centre that assists the entry and advancement of indigenous students. The posts were predominantly about the access policy to the lab.

The events that unfolded following the initial incident have led to *a complaint* under section 18C of the act, and the QUT employee is seeking $250,000 in damages, and has reportedly succeeded in having two parties settle for $5000 each.

As the matter is before the courts it would not be appropriate to comment on the validity of the case, including the nature of the language.

The issue isn't the case. The issue is the law.

Laws shouldn't make offensive and insulting speech unlawful. All that does is invite complainants to use the law as a weapon to resolve disputes better resolved through other means.

After its election in 2013 the Abbott government moved to reform the act. After a ham-fisted attempt through an unworkable proposal its plans were abandoned.

Those with a weathervane commitment to free speech opposed any reform on the basis that the principal concerns with the act resulted from a case against News Limited columnist Andrew Bolt. The issue is not the individuals surrounding complaints; again, the issue is the law.

Many are now starting to realise that laws that restrict what people can say merely because it is offensive, insulting, ridiculing or humiliating can only lead to dangerous censorship that stops important topics and ideas being debated.

When the test of lawful expression excludes offensive, insulting, ridiculing and humiliating acts on the basis of race it can lead to other topics being taken off the table as well.

At the time Abbott abandoned changing 18C he said the case was an "aberration" and that he "didn't believe that we are likely to see an Andrew Bolt prosecution again. If we do, let's rethink things".

It's time to rethink 18C.

The former prime minister was wrong to conclude that it takes a court decision to highlight the problems with the law.

As the QUT case highlights, the capacity to pursue a case is very serious, and can lead to people feeling compelled to settle disputes, particularly those without deep pockets for legal fees.

Now we don't have one case that justifies a rethink. We have two.

Running parallel to the QUT case is the case before the Tasmanian Anti-Discrimination Board against Catholic Archbishop Julian Porteous.

Porteous is facing a complaint under Section 17 of the Tasmanian Anti-Discrimination Act.

Section 17 uses nearly identical language to 18C but applies it against all minority groups, not merely against people on the basis of their "race, colour or national or ethnic origin".

Porteous faced a complaint after distributing the *Don't mess with Marriage* booklet.

The booklet states the Catholic Church's long-held view that marriage should only be a union between a man and a woman and provides the environment for raising children.

In the context of a forthcoming plebiscite on marriage for same-sex couples the case creates a risk that opponents to reform couldn't express their view without facing a complaint under section 17. And it wouldn't matter where you are in Australia.

A statement could be made in Western Australia and rebroadcast in Tasmania and a complaint could be made.

In response, the Tasmanian government has sensibly suggested amending the law to refocus it away from offensive, insulting and ridiculing speech.

The same should now be done with 18C, but unlike 2013 any proposal should take seriously the concerns of those the current law seeks to protect. Going back through the history of the development of 18C demonstrates how it can be done.

The introduction of 18C was preceded by three significant independent inquiries: The Royal Commission into Aboriginal Deaths in Custody, the Australian Human Rights Commission's National Inquiry into Racist Violence and the Australian Law Reform Commission's inquiry, Multiculturalism and the Law.

None recommended the current law. Instead they recommended the law tackle racially based harassment, hostility and violence.

On these pages last year I proposed an alternative wording for the Tasmanian law, but this could equally apply to 18C.

Both section 17 of Tasmania's law and 18C of the federal law were built off a bad adaptation of workplace sexual harassment provisions under the federal Sex Discrimination Act.

They've reapplied the narrow definition of workplace sexual harassment and replicated it across all public acts.

Instead the law should clearly define the specific nature of workplace harassment and public harassment. Workplace harassment should be conduct that is seriously humiliating, seriously denigrating or intimidating behaviour. Public harassment should be defined as a public act that intimidates or is designed to deny another's humanity.

If adopted, these laws would reflect the type of society we want — one where we are free to debate difficult and challenging ideas — but would equally allow all people, including minorities and marginalised communities, recourse to the law to protect themselves from workplace and public harassment.

Tim Wilson is Australia's Human Rights Commissioner.

Greens thought 18C was bad law

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The inquiry into reviewing section 18C of the Racial Discrimination Act should go back and look at the history that prompted the introduction of the law in the first place.

Section 18C was introduced in 1994 by then attorney-general Michael Lavarch. Lavarch said 18C was necessary because "three major inquiries have found gaps … the National Inquiry into Racist Violence, the Australian Law Reform Commission Report into Multiculturalism and the Law, and the Royal Commission into Aboriginal Deaths in Custody".

It's true. There were three inquiries. But before they're used as justification, they should be read. The royal commission didn't recommend the current law. It recommended a law prohibiting "racial violence, discrimination or hostility".

The ALRC inquiry recommended "making incitement to racist hatred and hostility unlawful". Even then one ALRC commissioner dissented, saying "in a democratic and pluralist society, freedom of expression is of special importance which may necessitate tolerance of obnoxious and hateful views which do not incite violence".

The Human Rights and Equal Opportunity Commission's inquiry into racist violence recommended a civil offence against "incitement of racial hostility", "an express prohibition of racist harassment", as well as a federal criminal offence against "racial violence". The commission also recommended the creation of an offence of "incitement to racial violence".

None recommended making offensive, insulting or humiliating speech unlawful.

That was the conclusion of the Parliamentary Library. In its bill digest it identifies "the Racial Hatred Bill 1994 is in some respects completely contrary to the recommendations of these reports".

The digest went on to say the standards set by these inquiries "involve(d) a high threshold of serious conduct … (yet 18C) establishes a civil offence with the significantly lower threshold".

These three reports recommended a law rightly focusing on harassment, hostility and violence. In arguing for the law, the then attorney-general also said "the bill places no new limits on genuine public debate. Australians must be free to speak their minds, to criticise actions and policies of others and to share a joke. The bill does not prohibit people from expressing ideas or having beliefs, no matter how unpopular the views may be to many other people."

That has now been proven false.

Similar sentiments were echoed in a 1994 article in *The Age* newspaper arguing for the law. According to its advocates, "most Australians would sympathise with the aims of the bill, namely to control racist violence, threats and harassment".

We can be sure that was true then, and remains true today.

They then said the law "will apply to the skinhead on the street yelling racist names and other insults at an Asian man, or a woman in traditional Islamic dress, not newspaper articles or anti-immigration pamphlets".

Any objective assessment says they were wrong, even if unintentionally.

It may appear the insidious nature of the law has been revealed only by recent cases. That's wrong. It was controversial when first introduced. A speech worth reading from the time was from West Australian Greens senator Christabel Chamarette. She said the broad scope of the law would "create a crime of words … tak(ing) the legislation across a certain threshold into the realm of thought police".

That's stronger than most criticism raised by 18C's critics today. How far the Greens have fallen. Having students from Queensland University of Technology being hauled in front of the Federal Circuit Court has turned the law into a point of ridicule. Thankfully, sanity prevailed when the court threw the complaint out.

Dragging Bill Leak to answer to the Australian Human Rights Commission for his cartoons is equally absurd. As has now been demonstrated, the problem with the law is not just the ridiculously low bar it sets on free speech by making it unlawful to "offend, insult, humiliate or intimidate" a person (though it is a serious problem) but that the poorly written law effectively declares someone in violation of 18C, and then requires them to prove their innocence that their offensive act was done in good faith, under section 18D.

Worse, by doing so, just about anyone can make a complaint and pursue it through the AHRC. At every stage, people have to lawyer up, and if they don't seek resolution, they then face a public debate about the lawfulness of their expressions.

That's the problem.

At its introduction, the government said 18C wouldn't restrict public debate. It clearly now is.
A sensible place to start with an inquiry into reform would be the inquiries that originally led to 18C's introduction.

Tim Wilson was formerly Australia's human rights commissioner and is now federal Liberal member for Goldstein.

About the author | Tim Wilson MP

Tim Wilson is the Federal Liberal Member for Goldstein, and was first elected on 2 July 2016.

Tim was formerly Australia's Human Rights Commissioner. In that role he worked with government to reform laws to stop and prevent terrorism, improving economic opportunities for indigenous Australians as well as standing up for marginalised communities from public harassment. Tim is also an advocate for protecting free speech and religious freedom.

He has a Bachelor of Arts (Policy Studies) from Monash University as well as a Masters of Diplomacy and Trade (International Trade) from the Monash Graduate School of Business. He has also completed executive education at the World Intellectual Property Organisation's Worldwide Academy and the Institut de Hautes Études Internationales et du Développment.

After University he worked in international aid and development across South East Asia, as a consultant, ran his own business, worked for radio stations and as a policy director at the Institute of Public Affairs. He's also served on major boards, including Monash University and Alfred Health.

Tim has been consistently recognised for his contribution to Australian public life including as one of *The Australian's* ten emerging leaders of Australian society in 2009.

His principle areas of policy interest are: foundational freedoms, health, trade, energy and the environment.