A FORGOTTEN FREEDOM: PROTECTING FREEDOM OF SPEECH IN AN AGE OF POLITICAL CORRECTNESS

AUGUSTO ZIMMERMANN* AND LORRAINE FINLAY**

This article considers the challenges of protecting freedom of speech in an age of political correctness. After explaining the importance of free speech for democracy and why the most effective way of responding to hate speech is through the protection of free speech, the article then examines the original proposals contained in the Exposure Draft of the Freedom of Speech (Repeal of s 18C) Bill 2014 (Cth). The article concludes that the failure to repeal s 18C of the Racial Discrimination Act 1975 (Cth) is a missed opportunity, with the proposed amendments being a significant improvement over the existing legislation and providing for an appropriate re-orientation towards the protection of freedom of speech.

I INTRODUCTION

In recent years there have been numerous attempts to restrict and limit freedom of speech in Australia, most often in the name of encouraging tolerance, social harmony and 'responsible' public debate. Some examples have included the proposed consolidation of Commonwealth anti-discrimination laws in 2012,[1] the media reforms proposed by the Finkelstein Report,[2] and the mandatory internet filter proposed by former Minister for Broadband, Communications and the Digital Economy Senator Stephen Conroy.[3] Indeed, the Australian Human Rights Commissioner

* LLB, LLM, PhD (Mon) Senior Lecturer in Constitutional Law and Legal Theory, Murdoch Law School; Commissioner, Law Reform Commission of Western Australia. The authors wish to express their appreciation to Penny Bond for her comments and assistance with the final draft of this paper. This paper builds on a paper originally presented by Dr Zimmermann at the Annual International Law and Religion Symposium (Provo, UT, 9 October 2012) as well as on research originally presented by Dr Zimmermann in a presentation entitled 'Vilification Laws' at the *Free Speech 2014* symposium hosted by the Australian Human Rights Commission in Sydney on 7 August 2014.

** BA (UWA), LLB (UWA), LLM (NUS), LLM (NYU), Lecturer in Constitutional Law, Murdoch Law School.

1 See Human Rights and Anti-Discrimination Bill 2012 (Cth) – Exposure Draft.

2 Raymond Finkelstein, *Report of the Independent Inquiry into the Media and Media Regulation* (28 February 2012) <http://www.abc.net.au/mediawatch/transcripts/1205_finkelstein.pdf> ('Finkelstein Report'). For a critical analysis of the Finkelstein Report, see Joseph M Fernandez, 'The Finkelstein Inquiry: Miscarried Media Regulation Moves Miss Golden Reform Opportunity' (2013) 4 *The Western Australian Jurist* 23.

3 See, eg, 'Conroy Announces Mandatory Internet Filters to Protect Children', *ABC News* (online), 31 December 2007 <http://www.abc.net.au/news/2007-12-31/conroy-announces-mandatory-internet-filters-to/999946>; 'Conroy Backflips on Web Filter', *The Australian*, 9 November 2012, 3; Simon Cullen, 'Government Abandons Plans for Internet Filter', *ABC News* (online), 9 November 2012 <http://www.abc.net.au/news/2012-11-09/government-abandons-plans-for-internet-filter/4362354>.

Tim Wilson recently described freedom of expression as one of four foundational 'forgotten freedoms' that 'are being taken for granted and are consequently compromised'.[4]

The (then) Opposition Leader, Tony Abbott, appeared to signal renewed efforts to re-assert the importance of protecting freedom of speech in an address given to the Institute of Public Affairs in August 2012.[5] In this address he referred to freedom of speech as 'not just an academic nicety but the essential pre-condition for any kind of progress.'[6] He went on to observe:

> Freedom of speech is an essential foundation of democracy. Without free speech, free debate is impossible and, without free debate, the democratic process cannot work properly nor can misgovernment and corruption be fully exposed. Freedom of speech is part of the compact between citizen and society on which democratic government rests. A threat to citizens' freedom of speech is more than an error of political judgment. It reveals a fundamental misunderstanding of the give and take between government and citizen on which a peaceful and harmonious society is based.[7]

In terms of specific policy announcements, Abbott announced that a Coalition Government would repeal s 18C of the *Racial Discrimination Act 1975* (Cth) ('*RDA*') 'in its current form'.[8] Following the election, in March 2014, the Government released an Exposure Draft for community consultation outlining its proposed amendments to the *RDA* which the Attorney-General stated were 'an important reform and a key part of the Government's freedom agenda. It sends a strong message about the kind of society that we want to live in where freedom of speech is able to flourish and racial vilification and intimidation are not tolerated'.[9]

These proposed reforms proved highly controversial. After several months of public debate the Government announced in August 2014 that it would no longer pursue the amendments. This was done at a press conference announcing proposed new counter-terrorism measures, with the Prime Minister commenting:[10]

> When it comes to counter-terrorism everyone needs to be part of 'Team Australia' and I have to say that the Government's proposals to change 18C of the *Racial Discrimination Act* have become a complication in that respect. I don't want to do anything that puts our national unity at risk at this time and so those proposals are now off the table. This is a call that I have made. It is, if you like, a

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4 The four foundational freedoms outlined by the Human Rights Commissioner are freedom of association, religion, expression and property. See Tim Wilson, 'The Forgotten Freedoms' (Speech delivered at the Sydney Institute, 13 May 2014) <https://www.humanrights.gov.au/news/speeches/forgotten-freedoms>.

5 Tony Abbott, 'Freedom Wars' (Speech delivered at the Institute of Public Affairs, Sydney, 6 August 2012) <http://www.justinian.com.au/storage/pdf/Abbott_FreedomWars.pdf>.

6 Ibid.

7 Ibid.

8 Ibid.

9 George Brandis, 'Racial Discrimination Act' (Media Release, 25 March 2014) <http://www.attorneygeneral.gov.au/Mediareleases/Pages/2014/First%20Quarter/25March2014-RacialDiscriminationAct.aspx>.

10 Tony Abbott, George Brandis and Julie Bishop, 'Joint Press Conference' (Press Statement, 5 August 2014) <https://www.pm.gov.au/media/2014-08-05/joint-press-conference-canberra-0>. See also Jared Owens 'Tony Abbott Dumps Planned Changes to Section 18C of Racial Discrimination Act', *The Australian* (online), 5 August 2014 <http://www.theaustralian.com.au/national-affairs/tony-abbott-dumps-planned-changes-to-section-18c-of-racial-discrimination-act/story-fn59niix-1227014479772>; Emma Griffiths, 'Government Backtracks on Racial Discrimination Act 18C Changes; Pushes Ahead with Tough Security Laws', *ABC News* (online), 6 August 2014 <http://www.abc.net.au/news/2014-08-05/government-backtracks-on-racial-discrimination-act-changes/5650030>.

> leadership call that I have made after discussion with the Cabinet today. In the end leadership is about preserving national unity on the essentials and that is why I have taken this decision.

This article considers the challenges of protecting freedom of speech in an age of political correctness through an examination of the original proposals contained in the Exposure Draft of the Freedom of Speech (Repeal of s 18C) Bill 2014 (Cth) ('Exposure Draft'). These proposed reforms provide a useful case study by highlighting the conflict that can emerge between protecting freedom of speech and restrictions imposed through hate speech legislation. The article ultimately concludes that the failure to repeal s 18C is a missed opportunity, with the proposed amendments being a significant improvement over the existing legislation and providing for an appropriate re-orientation towards the protection of freedom of speech. It further contends that the most effective way of responding to hate speech is through the protection of free speech, with exposure through public debate and criticism being a more powerful long-term tool for combating intolerance than its attempted suppression through legal sanction.

II THE IMPORTANCE OF FREEDOM OF SPEECH

The history of freedom of speech can be traced back to the ancient Greeks, who believed that freedom of speech (*parrhêsia*) was a basic right of the citizen. Indeed, the Greeks believed 'a slave could not speak his mind but a free person could'.[11] What made the trial of Socrates so notorious is that it 'is the only case in which we can be certain that an Athenian was legally prosecuted not for an overt act that directly harmed the public or some individual—such as treason, corruption or slander—but for alleged harm indirectly caused by the expression and teaching of ideas'.[12]

Freedom of speech has long been recognised as a fundamental human right, and one that is a foundational requirement for the full realisation of other human rights. For example, the United Nations Human Rights Committee has described the importance of this freedom as follows:[13]

> Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions.

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11 Chris Berg, *In Defence of Freedom of Speech: From Ancient Greece to Andrew Bolt* (Institute of Public Affairs, 2012) 8.

12 Richard Kraut, *Socrates* (26 August 2014) Encyclopaedia Britannica <http://www.britannica.com/EBchecked/topic/551948/Socrates>.
According to Plato's *Apology*, the vote to convict Socrates was very close: had 30 of those who voted for conviction cast their ballots differently, he would have been acquitted. (So he was convicted by a majority of 59. Assuming, as many scholars do, that the size of his jury was 501, 280 favoured conviction and 221 opposed it). It is reasonable to speculate that many of those who opposed conviction did so partly because, however little they cared for what Socrates thought and how he lived, they cherished the freedom of speech enjoyed by all Athenians and attached more importance to this aspect of their political system than to any harm Socrates may have done in the past or might do in the future. The Athenian love of free speech allowed Socrates to cajole and criticize his fellow citizens for the whole of his long life but gave way — though just barely — when it was put under great pressure.

13 Human Rights Committee, *General Comment No 34*, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011) (citations omitted).

> Freedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.

In fact, freedom of expression is a necessary condition for the protection of minority interests and ought to be viewed as a mechanism against the concentration of power. It is a misconception to assume that free speech disadvantages minority groups and favours those with more power. As Tim Wilson correctly stated, 'anyone who has studied a skerrick of history knows that protecting free speech is about giving voice to the powerless against the majority and established interests'.[14] This so being, the less perceptible consequence of anti-discrimination laws is to prevent people 'from drawing distinctions that are not sanctioned by their government arbiters'.[15] The final result, as Dr Ben O'Neill of the University of New South Wales points out, 'is the loss of a liberal society—the establishment of governments that act in the name of "human rights" but use this to enforce mandated viewpoints and "acceptable" opinion'.[16]

III ELIMINATING HATE SPEECH

Absolute free speech under all circumstances can never be a possibility. There are easily demonstrable exceptions where reasonable limits to speech may provide greater service to freedom than open discourse. For example, speech advocating or inciting direct acts of violence and direct attacks on the physical integrity of another person should never be protected. Speech can also be controlled to a somewhat greater degree in times of national crisis such as in a time of war. This was clearly acknowledged by (then) Opposition Leader Tony Abbott in his *Freedom Wars* speech:[17]

> Freedom of speech can't be absolute. A persuasive case can be made to limit people's freedom to publish material that might breach national security, prejudice a fair trial, or deliberately mislead consumers about the performance of a particular product; but there is no case, none, to limit debate about the performance of national leaders. The more powerful people are, the more important the presumption must be that less powerful people should be able to say exactly what they think of them.

Amongst the most controversial questions about free speech is the proper treatment of hate speech. Many insults use coarse language in a highly derogatory way. Such insults contain language that can be deeply offensive and so have a negative effect on public communication by endangering the civility of discourse. However, the civility of discourse does not constitute a sufficient basis for general restrictions on the matter through which the free exchange of ideas are expressed. A democratic government, as Professor Kent Greenawalt puts it, 'may forbid uncivil remarks in formal settings like the courtroom, but expression in open public settings may not be curtailed on that basis'.[18]

It would be undemocratic, therefore, to argue that mere verbal insult should be punished in the same way as actual urgings of illegal violent action. In a real democracy citizens must have the

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14 Tim Wilson, 'Insidious Threats to Free Speech', *The Weekend Australian*, 5 April 2014, 17.

15 Ben O'Neill, 'Anti-Discrimination Law and the Attack on Freedom of Conscience' (2011) 27(2) *Policy* 3, 7.

16 Ibid.

17 Abbott, above n 5.

18 Kent Greenawalt, 'Free Speech in the United States and Canada' (1992) 55(1) *Law and Contemporary Problems* 5, 17 (citations omitted).

right to choose the words that best reflect their personal feelings and 'strong words may better convey to listeners the intensity of feeling than more conventional language'.[19] Above all, a true democracy requires that people must be strong enough to tolerate robust expressions of disagreement and personal opposition. As such, the government may even permit such things as a ban of some words on daytime radio or television, but it should not sustain any general prohibition of all forms of speech simply because they are thought to be offensive.

While the idea of inciting violence links the expression of thoughts to actions, the idea of hate speech links the expression of thoughts to no more than simply thoughts. This amounts to the fabrication of a new crime of opinion analogous to the crime that used to be committed by 'enemies of the people' in the former Soviet Union. Similarly, hate speech laws allow the government to demarcate the things that citizens are allowed to say. It is one of the great ironies of the recent past that neo-Marxists and post-modernists have convinced the governments of Western democracies to abandon the liberal vision of freedom of speech, whereas the oppressed people of countries with official Marxist ideologies have never achieved any reasonable form of free speech.[20]

The above fact underlines the importance of the debates prior to the drafting of the human rights declarations and covenants in the United Nations on whether there should be—when it comes to protection for freedom of expression—an exception for 'incitement to violence' or, more broadly, an exception for 'incitement to hatred' as the Soviet Union and its totalitarian bloc of communist nations maintained.[21] As Chris Berg points out, the drafting history of the protection of freedom of expression in these declarations:[22]

> ... does not leave any doubt that the dominant force behind the attempt to adopt an obligation to resist freedom of speech under human rights law was the Soviet Union ... When it came to draft the binding International Covenant on Civil and Political Rights, this was not the ascendant view. The Soviet Union proposed extending those restraints to 'incitement to hatred' ... Suddenly, States were responsible for the elimination of intolerance and discrimination.

Passed with the pretence of inhibiting intolerance, one of the most effective means by which free speech can be silenced is under the cover of laws against racial discrimination. A leading example is s 18C of the *RDA*, with the recent debate about repealing this section being an illuminating example of the significant restrictions that have been imposed on freedom of speech in Australia in the name of harmony and tolerance.

The proposal to repeal s 18C sparked debate that the proposed reforms amounted to 'a green light to racism'[23] and would send 'a dreadful message to the people of Australian that bigotry is okay'.[24] It was argued that the proposed reforms represented:[25]

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19 Ibid 16 (citations omitted).

20 Ibid 5 n 2.

21 Wibke K Timmermann, *Incitement in International Law* (Routledge, 2014), 109–15.

22 Berg, above n 11, 176.

23 Mark Dreyfus, 'Government Gives the Green Light to Racism' (Media Release, 25 March 2014) <http://www.markdreyfus.com/portfolio/media-releases.do?newsId=7962>.

24 Commonwealth, *Parliamentary Debates*, House of Representatives, 26 March 2014, 3202 (Joanne Ryan).

25 Victorian Multicultural, Faith and Community Organisations on Behalf of Their Communities, *Submission Regarding the Exposure Draft of the Freedom of Speech (Repeal of s 18C) Bill 2014* (11 April 2014) Ethnic

> [a] watering down or perceived dilution of the *RDA* [which] would send the wrong message to potential offenders that hate speech was becoming more acceptable in our society, opening the door to more abuse, and to potential victims that their right to live free from racial or religious vilification, abuse and intolerance was diminished.

This follows an all too familiar script, with claims of racism and bigotry being easy to throw around and proving incredibly effective in stifling public debate. However, supporters of the repeal of s 18C are certainly not condoning racism or promoting such behaviour. Nor do they fail to acknowledge the enormous harm that racial vilification or hatred causes both to individual victims and the broader community. The question surrounding s 18C is not whether Australians have the 'right to be racist' but rather whether they have the right to sue each other for racism, and where the legal bar should be set. As was observed by Tim Wilson:[26]

> This isn't a debate about whether racial vilification is socially acceptable or not. It's about where the law sits. And part of the problem is that it fuses the idea of social acceptability as speech and the law, when there should always be a reasonable separation between the two.

Of course, there will likely always be bigots and racists. This is the basic cost of living in a true democracy—a point which has been made by Salman Rushdie, the British novelist who was put under an Islamic sentence of death because he had insulted Muslim sensibilities:[27]

> The idea that any kind of free society can be constructed in which people will never be offended or insulted is absurd. So too is the notion that people should have the right to call on the law to defend them against being offended or insulted. A fundamental decision needs to be made: do we want to live in a free society or not? Democracy is not a tea party where people sit around making polite conversation. In democracies people get extremely upset with each other. They argue vehemently against each other's positions.

Rushdie goes on to conclude:[28]

> People have the fundamental right to take an argument to the point where somebody is offended by what they say. It's no trick to support the free speech of somebody you agree with or to whose opinion you are indifferent. The defence of free speech begins at the point when people say something you can't stand. If you can't defend their right to say it, then you don't believe in free speech. You only believe in free speech as long as it doesn't get up your nose.

In our view, broad legal prohibitions on racially offensive speech will never themselves be successful in actually eliminating racism from our society, and may even be counter-productive by not allowing such ideas to be exposed and challenged in the course of public debate. Exposing and criticising bad ideas goes a lot further to finally defeating them than simply trying to ban them. Racism must be confronted and defeated not by taking legal action against people, but by reasoned and open debate. As was famously noted by Brandeis J, 'the remedy to be

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Communities' Council of Victoria <http://eccv.org.au/library/Submission_regarding_the_Exposure_Draft_RDA_v2.pdf>.

26 Letter from the Australian Multicultural Council to the Human Rights Policy Branch, Attorney-General's Department, Barton, 16 April 2014, 5 <http://www.amc.gov.au/wp-content/uploads/2014/04/amc_submission_on_rda_exposure_draft_final.docx>, quoting *Sky News Channel: PVO News Hour* (12 March 2014).

27 Salman Rushdie, *Defend the Right to Be Offended* (7 February 2005) *OpenDemocracy* <http://www.opendemocracy.net/faith-europe_islam/article_2331.jsp>.

28 Ibid.

applied is more speech, not enforced silence'.[29] Legislation will ultimately not change the hearts and minds of racist individuals. Conversation and education are far more effective tools when you are trying to build a tolerant and harmonious society.

This point was eloquently stated by the Hon Ron Merkel QC when considering the need for racial vilification laws in Australia:[30]

> Civil libertarians in the US argue that attempting to bury racist speech underground may only make martyrs of the speakers and solidify the attitudes they express. History tells us that censorship invites—and incites—resistance. Nothing in our national experience suggests that silencing evil has ever corrected it. They add that to eradicate racism we need to listen to the words which are expressed, to delve beneath them, to find our own words of reply and explanation, before we can even begin to make the changes we seek.
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> On the other hand, for those who defend the right to such speech the lesson is clear. Those who seek to protect the right of racists to express their views have a corresponding duty to expose those views for the evil they represent. It is through the process of exposure and education rather than prohibition that we can achieve a tolerant and understanding community.

When ideas are forcibly repressed they cease being exposed and challenged in the course of public debate. Perhaps the most compelling evidence in support of this point is pre-Nazi Germany. The Weimar Republic of the 1930s had several laws against 'insulting religious communities' and these laws were fully applied to prosecute hundreds of Nazi agitators, including Joseph Goebbels.[31] Far from halting National Socialist ideology, those laws helped Nazis achieve broader public support and recognition, and ultimately assisted the dissemination of racist ideas. As Brendan O'Neill points out:[32]

> The Nazis turned their prosecutions for hate speech to their advantage, presenting themselves as political victims and whipping up public support amongst aggrieved section of German society, their future social base. Far from halting Nazism, hate speech legislation assisted it.

Naturally, nobody denies the harm of hate speech, but speech rights are most necessary for the weak, not the powerful. Conversely, the restriction of individual viewpoints is a serious infringement of democratic values, and the gains from hate speech laws are tenuous. Any benefits of such laws are outweighed by the chilling effects to freedom of speech and democracy. Under democratic theory, one might say, 'open discourse is more conducive to discovering the truth than is government selection of what the public hears. Free statement of personal beliefs and feelings is an important aspect of individual autonomy'.[33]

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29 *Whitney v California* 274 US 357, 377 (Brandeis J) (1927).

30 Ron Merkel, 'Does Australia Need a Racial Vilification Law?' (1994) 38(11) *Quadrant* 19.

31 Brendan O'Neill, 'How a Ban on Hate Speech Helped the Nazis', *The Weekend Australian*, 29 March 2014, 16.

32 Ibid.

33 Greenawalt, above n 18, 5.

IV THE CASE FOR REFORMING S 18C

Under the existing s 18C, it is unlawful for a person to do an act (other than in private) if the act 'is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people'[34] where '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'.[35] This is an extremely broad prohibition and represents an extraordinary limitation of freedom of speech. Human rights lawyer Julian Burnside QC argues 'existing racial discrimination laws go too far by making it an offence to upset people',[36] correctly stating that 'the mere fact that you insult or offend someone properly should not, of itself, give rise to legal liability'.[37]

There are four key issues identified in this paper with s 18C in its current form. The first is the inclusion of the words 'offend, insult, humiliate', which sets the harm threshold at a dangerously low level. The second is the test applied when judging conduct that arguably breaches s 18C, with judges considering the conduct in question not by reference to community standards but rather by the standards of the alleged victim group. The third is that s 18C fails to actually specifically address racial vilification, which is a curious omission given the original intent underpinning the introduction of the section. Finally, the overriding qualification that the acts in question must have been 'said or done reasonably and in good faith' if the s 18D exception is to be applied creates a potentially disproportionate chilling effect.

After considering these four specific issues, the article goes on to briefly consider possible constitutional considerations in relation to the implied freedom of political communication, as well as discussing Australia's international human rights obligations in relation to both freedom of expression and protecting against hate speech.

A *Removing 'Offend, Insult, Humiliate' from s 18C*

The inclusion of the words 'offend, insult, humiliate' in the present s 18C sets a harm threshold that is far too low. Indeed, when recommending the creation of a civil offence of 'incitement to racial hostility' before the introduction of the *RDA*, the Human Rights and Equal Opportunity Commission 'stressed that the threshold for prohibited conduct must be higher than "expressions of mere ill will" or conduct which results in "hurt feelings or injured sensibilities", as this can lead to a large number of trivial complaints'.[38] As was noted by David Marr, '[v]igorous public

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34 *RDA* s 18C(1)(a).

35 Ibid s 18C(1)(b).

36 'Human Rights Lawyer Says 18C Went too Far', *The Sydney Morning Herald* (online), 29 March 2014 <http://news.smh.com.au/breaking-news-national/human-rights-lawyer-says-18c-went-too-far-20140329-35q2y.html>.

37 Ibid.

38 Department of the Parliamentary Library (Cth), *Bills Digest*, Racial Hatred Bill 1994, 14 November 1994, <http://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/M7Z10/upload_binary/M7Z10.pdf>. See also, Human Rights and Equal Opportunity Commission, *Report of the National Inquiry into Racist Violence in Australia* (1991) 299–300 <https://www.humanrights.gov.au/sites/default/files/document/publication/NIRV.pdf>; Sally Frances Reid and Russell G Smith, 'Regulating Racial Hatred' (1998) 79 *Trends and Issues in Crime and Criminal Justice* 1.

discussion in a free society is impossible without causing insult and offence'.[39] To this end, the full costs of prohibiting conduct that is reasonably likely to 'offend, insult, humiliate' are unknown, with the chilling effect of these broad prohibitions being largely immeasurable.

The key words used in the existing s 18C, namely 'offend, insult, humiliate', are imprecise and largely subjective in nature. Attempts to define these words with any degree of precision 'become a circular and question-begging exercise'.[40] For example, courts have struggled to provide a sufficiently certain legal standard for decisively identifying 'insulting' speech, with Lord Reid concluding in *Brutus v Cozens* that '[t]here can be no definition. But an ordinary sensible man knows an insult when he sees or hears it'.[41]

In applying s 18C the courts have suggested that the words 'to offend, insult, humiliate or intimidate denotes profound and serious effects, not to be likened to mere slights'[42] and that reference to the Second Reading Speech by the Attorney-General suggests that the section should be applied 'in a way that deals with serious incidents only'.[43] At the same time, however, it has been emphasised that 'it is appropriate that the words be given their ordinary English meanings',[44] which quite clearly has the potential to incorporate 'mere slights' and extends the reach of the section well beyond the most serious incidents of racial vilification. For example, it was acknowledged in *Bropho v Human Rights and Equal Opportunity Commission* that the words of s 18C are 'open textured', 'sometimes used in ordinary parlance to describe a level of response to another person's conduct which is relatively minor' and 'a long way removed from the mischief to which Art 4 of CERD is directed'.[45] Indeed, it has been emphasised by the courts that '[i]t would be wrong ... to place a gloss on the words used in s 18C'.[46] There is a clear disconnect here between the intention of Parliament to only prohibit serious acts of racial hatred, and the express wording of the legislation which sets a much lower harm threshold through the use of words such as 'offend' and 'insult'.[47]

The potentially broad ambit of these words can be illustrated by some of the claims that have been made under s 18C. For example, in the recent case of *Hamlin v The University of Queensland*, the first complaint made was that an academic providing a mid-semester examination briefing for about 400 students 'did nothing to stop the lecture or advise ... that the laughter was inappropriate' when the lecture theatre 'erupted into laughter' after being advised that the Australian Medical Council had recommended that more indigenous content needed to

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39 David Marr, 'Bolt Had Right to Be Wrong but Not Rotten', *The Sydney Morning Herald* (Sydney), 20 October 2011, 13.

40 Dan Meagher, 'So Far So Good?: A Critical Evaluation of Racial Vilification Laws in Australia' (2004) 32 *Federal Law Review* 225, 232.

41 [1973] AC 854, 862.

42 *Jones v Scully* (2002) 120 FCR 243, 269 [102] (Hely J) (citations omitted).

43 Ibid (citations omitted).

44 Ibid. See also *Clarke v Nationwide News Pty Ltd trading as The Sunday Times* (2012) 201 FCR 389, 404 [65] (Barker J).

45 (2004) 135 FCR 105, 123–4 [67]–[68] (French J).

46 *Jones v Toben* (2002) 71 ALD 629, 651–2 [92] (Branson J). See also *Clarke v Nationwide News Pty Ltd* (2012) 201 FCR 389, 405 [70] (Barker J).

47 Meagher, above n 40, 231–2; Dilan Thampapillai, 'Inconsistent at Best?: An Analysis of Australia's Federal Racial Vilification Laws' (2010) 9 *Canberra Law Review* 106, 111–7.

be incorporated into the medical program at the University.[48] A further complaint in this case was that histology slides containing increased melanocytes (which are the cells responsible for dark pigmentation of skin) that were used at the medical school were labelled 'Aboriginal Skin', which the complainant alleged was 'falsely portraying all Aboriginal people as black'.[49]

Although in this particular case the application was ultimately summarily dismissed, the very fact that a claim could be made on the basis of these facts in the first place highlights the problems with the low harm threshold established by s 18C in two respects. Firstly, for a period of some six months the University of Queensland faced legal proceedings alleging racial discrimination. In many respects, 'the process is the punishment'[50] particularly in a context where an allegation of racism inevitably carries with it special opprobrium in the community. Secondly, there is no way to accurately measure the indirect chilling effect that such legislation may have, when legal action can be commenced based on occurrences that fall well short of the types of serious and egregious examples of racial hatred that the community would ordinarily view as justifying intervention by the State.

Further, there are 'a smaller but still significant number of cases [where] there has been a finding that s 18C has been offended without any harm threshold analysis or reasoning whatsoever'.[51] In a critical evaluation of cases brought under s 18C, Dan Meagher has identified at least five such matters,[52] concluding that the legal rule in s 18C is closer to a 'personal discretion to do justice'.[53] He observes that:[54]

> This practice alone gives the *appearance* of arbitrary and unprincipled decision-making. However it may be the regrettable but inevitable consequence of having to apply an indeterminate harm threshold to a range of controversies of varying degrees of seriousness.

Given the democratic imperative that citizens should be allowed to speak openly and publicly about their personal convictions, the present notion of 'being offended' as encapsulated in s 18C is dangerously emotive. According to the Hon James Spigelman QC, 'protecting people's feelings against offence is not an appropriate objective for the law'.[55] He reminds us that '[t]he freedom to offend is an integral component of freedom of speech. There is no right not to be offended'.[56] Spigelman also observes that there is no 'international human rights instrument, or national anti-discrimination statute in another liberal democracy, that extends to conduct that is merely offensive'.[57]

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48 [2013] FCCA 406, [10] (Jarrett J).

49 Ibid [36] (Jarrett J).

50 Malcolm M Feeley, *The Process is the Punishment: Handling Cases in a Lower Criminal Court* (Russell Sage Foundation, 1979).

51 Meagher, above n 40, 231.

52 The cases referred to are: *Rugema v J Gadsten Pty Ltd t/a Southcorp Packaging* [1997] EOC ¶92-887; *Combined Housing Organisation Ltd v Hanson* [1997] HREOCA 58; *Feghaly v Oldfield* [2000] EOC ¶93-090; *McMahon v Bowman* [2000] FMCA 3; *Horman v Distribution Group Ltd* [2001] FMCA 52.

53 Meagher, above n 40, 235–6 (citations omitted).

54 Ibid 235 (emphasis in original).

55 James Spigelman, 'Free Speech Tripped up by Offensive Line', *The Australian*, 11 December 2012, 12, quoting Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press, 2012) 106.

56 Spigelman, above n 55.

57 Ibid.

Although real tolerance demands reflection, restraint and a respect for the rights of other people to find their way to their own truth, in today's public discussion, 'the connection between tolerance and judgment is in danger of being lost due to the current cultural obsession with being non-judgemental'.[58] In a democracy, the citizen's right to speak publicly about his or her innermost convictions implies that those adhering to other convictions must also be free to present their arguments in an equally public manner. This is the basic cost of living in an authentic democracy.

The construction of a 'right' for people not to feel offended means the end of free speech and of the free exchange of ideas. John Stuart Mill explained why the suppression of free speech harms not only the speaker but all of humanity:[59]

> But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error ... We can never be sure that the opinion we are endeavouring to stifle is a false opinion; and if we were sure, stifling it would be an evil still.

Hate speech legislation is clearly designed to impose an environment of 'tolerance' that penalises any strong disapproval of a person's values or beliefs on racial, religious and/or politico-ideological grounds. However, nobody who lives in a democratic society should expect to be exempt from the possibility of facing criticism. Of course, it is understandable that advocates of a 'multicultural society' would prefer people to moderate their claims so as to avoid comments that might cause offence to others, but to require citizens to have their speech controlled in the name of 'tolerance' is to go too far. As correctly understood, democracy is firstly about the discussion of conflicting or opposing ideas—a fact that requires a certain freedom of unqualified speech, which is particularly critical when responsible citizens must decide on questions of political values, faith and truth. Accordingly, a citizen's personal opinion may not be the most politically correct, but he or she must still have the right to manifest it without the risk or threat of persecution, even if such opinion is found to be erring or 'offensive' to someone.

B *Judging Conduct by Objective Community Standards*

One of the changes proposed by the Exposure Draft was the express use of objective community standards to determine whether an act is reasonably likely to racially vilify or intimidate. That is, the proposed amendment provided that whether an act was reasonably likely to have this effect was 'to be determined by the standards of an ordinary reasonable member of the Australian community, not by the standards of any particular group within the Australian community'.[60]

Under the existing s 18C, judges have judged the conduct in question not by community standards but by the standards of the alleged victim group.[61] While the courts have regularly

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58 Frank Furedi, 'On Tolerance' (2012) 28(2) *Policy* 30, 31–2.

59 John Stuart Mill, *On Liberty* (John W Parker and Son, 2nd ed, 1859) 33–4.

60 Freedom of Speech (Repeal of s 18C) Bill 2014 (Cth) – Exposure Draft.

61 Anna Chapman, 'Australian Racial Hatred Law: Some Comments on Reasonableness and Adjudicative Method in Complaints Brought by Indigenous People' (2004) 30 *Monash University Law Review* 27, 31–2.

confirmed that the test to be applied is an objective one, in that the subjective effect on the individual complainant is not determinative, this objective test has not been defined as one of ordinary community standards but rather a test determined by reference to the effect on a particular racial, national or ethnic group.[62] That is, 'it is necessary first to consider the perspective under consideration, which is to say the hypothetical person in the applicant's position or the group of which the applicant is one'.[63] In *Clarke v Nationwide News Pty Ltd* this was referred to as the 'reasonable victim perspective'.[64] This 'reasonable victim' test further lowers an already minimal harm threshold, and adds a further element of imprecision and uncertainty, increasing the section's potential chilling effect on speech. The proposed use of ordinary community standards is a more appropriate test to be applied in this context.

C *Prohibiting Racial Vilification*

The Exposure Draft appropriately raised the harm threshold that would need to be met before an act would be considered unlawful. It would no longer be unlawful to 'offend, insult, or humiliate' someone because of their race. Instead, the draft amendment leaves the word 'intimidate' and it adds 'vilify' for the first time. The word 'vilify' is defined in this context as to 'incite hatred against a person or group of persons'. When the current s 18C provision was originally introduced, the Attorney-General informed the Parliament that the Racial Hatred Bill 1994 (Cth) ('Racial Hatred Bill') was 'about the protection of groups and individuals from threats of violence and the incitement of racial hatred'.[65] Given this background, it is curious that vilification was not originally included in the specific legislative provisions.

Indeed, there appears to be 'considerable dislocation that exists between the stated intent of the Parliament regarding the Racial Hatred Bill … and the provisions which ultimately constituted the [*RDA*]'.[66] This much was acknowledged by Bromberg J in *Eatock v Bolt* when it was noted that:[67]

> Both the words utilised in s 18C and the legislative context in which Part IIA was enacted, demonstrates that the mischief which those provisions seeks to address is broader than conduct inciting racial hatred and extends to conduct at a lower level of transgression to the objective of promoting racial tolerance.

Ultimately Bromberg J saw the competing human rights in this particular case as being freedom of expression and 'the right to be free of offence',[68] the latter of which is simply not an

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62 See, eg, *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615, [15] (Drummond J); *Jones v Scully* (2002) 120 FCR 243, 268–9 [98], 271 [108] (Hely J); *McGlade v Lightfoot* (2002) 124 FCR 106, 117 [46] (Carr J); *Eatock v Bolt* (2011) 197 FCR 261, 321 [253] (Bromberg J). See also Ibid; Brad Jessup, 'Five Years On: A Critical Evaluation of the *Racial Hatred Act 1995*' (2001) 6 *Deakin Law Review* 91, 104.

63 *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, 356 [13] (Kiefel J).

64 (2012) 201 FCR 389, 401–3 [50]–[59] (Barker J).

65 Commonwealth, *Parliamentary Debates*, House of Representatives, 15 November 1994, 3336 (Michael Lavarch).

66 Meagher, above n 40, 231.

67 (2011) 197 FCR 261, 310 [207] (Bromberg J). See also Sarah Joseph, 'Free Speech, Racial Intolerance and the Right to Offend: Bolt before the Court' (2011) 36 *Alternative Law Journal* 225.

68 *Eatock v Bolt* (2011) 197 FCR 261, 342 [350] (Bromberg J).

established or recognised human right at law. Amending the *RDA* so that it actually prohibits racial vilification and incitement of racial hatred more appropriately targets the legislation towards the type of behaviour it was initially designed to prevent.

D *Exceptions under s 18D*

The existing s 18D of the *RDA* provides for a range of exceptions to s 18C, with the overriding qualification that the acts in question must have been 'said or done reasonably and in good faith'.[69] The proposed amendments would have removed these requirements, and instead inserted a broader defence, with proposed sub-section (4) providing:[70]

> This section does not apply to words, sounds, images or writing spoken, broadcast, published or otherwise communicated in the course of participating in the public discussion of any political, social, cultural, religious, artistic, academic or scientific matter.

The removal of the 'reasonably and in good faith' qualification and the broad nature of the proposed sub-section (4) defence were controversial suggestions, and yet justified, both in light of the way that the existing qualification has been interpreted and the stated aim of strengthening the protection provided to freedom of speech. While these proposed reforms should not be debated through the prism of a single case, the decision in *Eatock v Bolt*[71] provides a clear demonstration of the subjective nature of the existing s 18D defence. In reaching the conclusion that Mr Bolt's conduct lacked 'objective good faith', Bromberg J relied upon a 'lack of care and diligence [as] demonstrated by the inclusion in the Newspaper Articles of the untruthful facts and the distortion of the truth which [his Honour] identified, together with the derisive tone, the provocative and inflammatory language and the inclusion of gratuitous asides'.[72] In this way, the existing qualifications of 'reasonably and in good faith' have become 'ambiguous terms of art a judge could use to decide some speech on political, social, or cultural topics didn't actually qualify for the exemption.'[73]

A law which disallows a person from voicing comments deemed 'offensive' to another person creates undue fear and intimidation on those who wish to express their ideas and opinions freely. Such laws pose a chilling effect on free speech, and this is certainly part of the reason some Australians are increasingly reluctant to join public conversations about controversial and sensitive issues involving, for example, race and religion. As Spigelman comments:[74]

> A freedom that is contingent on proving, after the event, that it was exercised reasonably or on some other exculpatory basis is a much reduced freedom. Further, as is well known, the chilling effect of the mere possibility of legal processes will prevent speech that could have satisfied an exception.

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69 *RDA* s 18D.

70 Freedom of Speech (Repeal of s 18C) Bill 2014 (Cth) – Exposure Draft.

71 (2011) 197 FCR 261.

72 Ibid 358 [425] (Bromberg J).

73 Chris Berg, 'Politics Stands in the Way of a Full 18C Repeal', *The Drum* (online), 25 March 2014 <http://www.abc.net.au/news/2014-03-25/berg-rda/5344302>.

74 Spigelman, above n 55.

It has been argued that the proposed sub-section (4) 'provides an exemption to the section so broad as to effectively nullify the prohibition against racial vilification or intimidation'.[75] Those criticising this proposed amendment have emphasised 'the need to limit freedom of expression to protect against the harm of racial vilification'.[76] Indeed, academic analysis of the existing s 18D has tended to argue that the existing exemptions are already overly broad and undermine the capacity of the *RDA* to protect against racial vilification.[77] This is not a view to which we subscribe. While it is certainly acknowledged that the right to freedom of expression is not absolute, restrictions to this freedom must be narrowly defined and 'may not put in jeopardy the right itself'.[78] In *General Comment No 34*, the United National Human Rights Committee re-emphasised that when imposing restrictions on the exercise of freedom of expression 'the relation between the right and restriction and between norm and exception must not be reversed'.[79]

When considering the existing s 18D and the proposed sub-section (4) it is important to keep in mind that these are not, strictly speaking, 'exceptions' to acts that are otherwise unlawful. Rather, the existing s 18C and the proposed sub-section (3) are themselves restrictions on the right to freedom of expression, and the qualifying sections seek to define the limits of those original restrictions. Viewed in this light, a broad qualification such as that outlined in proposed sub-section (4) is entirely appropriate. This point was made in relation to the existing s 18D by French J in *Bropho v Human Rights and Equal Opportunity Commission*:[80]

> Section 18D places certain classes of acts outside the reach of s 18C. ... It is important however to avoid using a simplistic taxonomy to read down s 18D. The proscription in s 18C itself creates an exception to the general principle that people should enjoy freedom of speech and expression. That general principle is reflected in the recognition of that freedom as fundamental in a number of international instruments and in national constitutions. It has also long been recognised in the common law albeit subject to statutory and other exceptions. ... Against that background s 18D may be seen as defining the limits of the proscription in s 18C and not as a free speech exception to it. It is appropriate therefore that s 18D be construed broadly rather than narrowly.

E *Constitutional Considerations*

Whilst the Constitution does not contain a comprehensive declaration of rights, some rights are deemed *implicit* in the basic law. The High Court of Australia has found an implied right to freedom of political communication as a means of invalidating legislation on constitutional

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75 See, eg, Central Australian Women's Legal Service, *Submission to the Attorney-General, Freedom of Speech (Repeal of s 18C) Bill 2014 – Exposure Draft* (April 2014) <http://cawls.org.au/wp-content/uploads/2012/04/CAWLS-submission-re-Freedom-of-speech-repeal-of-s.18C-Bill-2014-Exposure-draft.pdf> 4.

76 See, eg, Letter from All Together Now to George Brandis, Attorney-General, 17 April 2014, 4 <http://hrlc.org.au/wp-content/uploads/2014/05/All-Together-Now.pdf>.

77 See, eg, Luke McNamara and Tamsin Solomon, 'The Commonwealth *Racial Hatred Act 1995:* Achievement or Disappointment?' (1996) 18 *Adelaide Law Review* 259, 269–70; Jessup, above n 62, 107; Thampapillai, above n 47, 122.

78 Human Rights Committee, *General Comment No 34*, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011) [21].

79 Ibid (citations omitted).

80 (2004) 135 FCR 105, 125–6 [72]–[73] (French J).

grounds, holding that the right to speak freely on matters of public importance lies at the very foundation of our democratic system.[81] In *Australian Capital Television Pty Ltd v The Commonwealth*,[82] Mason CJ held that freedom of communication (and discussion) in relation to public and political affairs is an indispensable element in a democratic society. His Honour argued for the 'indivisibility' of freedom of communication as related to public and democratic issues:[83]

> Freedom of communication in relation to public affairs and political discussion cannot be confined to communications between elected representatives and candidates for election on the one hand and the electorate on the other. The efficacy of representative government depends also upon free communication on such matters between all persons, groups and other bodies in the community ... The concept of freedom to communication with respect to public affairs and political discussion does not lend itself to subdivision ... The consequence is that the implied freedom of communication extends to all matters of public affairs and political discussion ...

This argument was expanded in *Coleman v Power*,[84] where the majority argued that a law cannot, consistently with the implied freedom of political communication, prohibit speech of an insulting nature without significant qualifications. For example, McHugh J held that 'insults are a legitimate part of the political discussion protected by the Constitution'[85] and that, insofar as the insulting words are used in the course of political discussion, '[a]n unqualified prohibition on their use cannot be justified as compatible with the implied freedom'.[86] Gummow and Hayne JJ concurred and commented that '[i]nsult and invective have been employed in political communication at least since the time of Demosthenes'.[87] Kirby J also concurred and added that 'Australian politics has regularly included insult and emotion, calumny and invective',[88] and that the implied freedom must allow for all of this.

Just how offensive political communication can be was considered by the High Court in *Roberts v Bass*.[89] During the course of that judgment (which dealt with untrue allegations made against a member of the South Australian Parliament), Kirby J declared that the implied freedom of political communication protects insults, abuse, and ridicule made in the process of the political communication. His Honour stated: 'Political communication in Australia is often robust, exaggerated, angry, mixing fact and comment and commonly appealing to prejudice, fear and self interest'.[90] Of course, the natural implication of decisions such as *Roberts v Bass*[91] and *Coleman v Power*,[92] as observed by Nicholas Aroney, is that 'absent qualifications of the kind relied upon by the majority, laws which prohibit religious vilification will infringe the implied

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81 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Coleman v Power* (2004) 220 CLR 1.

82 (1992) 177 CLR 106.

83 Ibid 139–42 (Mason CJ).

84 (2004) 220 CLR 1.

85 Ibid 54 [105] (McHugh J).

86 Ibid.

87 Ibid 78 [197] (Gummow and Hayne JJ).

88 Ibid 91 [239] (Kirby J).

89 (2002) 212 CLR 1.

90 Ibid 63 [171] (Kirby J).

91 (2002) 212 CLR 1.

92 (2004) 220 CLR 1.

freedom of political communication'.[93] The same must also logically follow in relation to laws prohibiting offensive racial speech, such as s 18C.[94]

It is interesting to observe that the constitutional validity of the existing s 18C and s 18D has never been directly tested before the High Court of Australia.[95] When the current provisions were originally introduced, the Bills Digest produced by the Parliamentary Research Library noted that the Government appeared to rely on the external affairs power under s 51(xxix) of the Constitution to provide a source of power for the Racial Hatred Bill.[96] It expressly concluded that the provision that became s 18C was more vulnerable to constitutional challenge than other sections of the Racial Hatred Bill. This conclusion was primarily based on an assessment that the scope of s 18C extended beyond what was required by Australia under its existing treaty obligations, noting specifically that:[97]

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

Therefore, in addition to the potential constitutional problems arising from the implied freedom of political communication, it appears that there may also be issues relating to whether the specific provisions are supported by a valid constitutional head of power. The external affairs power appears to be the head of power that most directly and fully engages with the existing provisions. For the external affairs power to be validly relied upon where domestic legislation claims to give effect to an international treaty obligation, the legislation must be capable of being reasonably considered to be 'appropriate and adapted' to the treaty obligations.[98] As was noted by Barwick CJ in *Airlines of NSW Pty Ltd v New South Wales (No 2)*:[99]

> But where a law is to be justified under the external affairs power by reference to the existence of a treaty or a convention, the limits of the exercise of the power will be set by the terms of that treaty or convention, that is to say, the Commonwealth will be limited to making laws to perform the obligations, or to secure the benefits which the treaty imposes or confers on Australia. Whilst the choice of the legislative means by which the treaty or convention shall be implemented is for the

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93 Nicholas Aroney, 'The Constitutional (In)validity of Religious Vilification Laws: Implications for their Interpretation' (2006) 34 *Federal Law Review* 287, 313.

94 The conclusion that the low harm threshold under s 18C establishes a disproportionate 'overreach' that is problematic from the perspective of the implied right to freedom of political communication under the *Australian Constitution* is examined in more detail in, for example, Asaf Fisher, 'Regulating Hate Speech' (2006) 8 *UTS Law Review* 21, 43–5.

95 The interpretation of these sections has been before the High Court on two occasions, being special leave applications in Transcript of Proceedings, *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2002] HCATrans 132 (19 March 2002) and Transcript of Proceedings, *Bropho v Human Rights and Equal Opportunity Commission* [2005] HCA Trans 9 (4 February 2005). In the former, the constitutional issue was never raised. In the latter, special leave was refused by majority, although Kirby J would have granted special leave partly due to the possible significance of the constitutional issues potentially raised by the case.

96 Department of the Parliamentary Library (Cth), above n 38, 11–2.

97 Ibid 12.

98 *Airlines of NSW Pty Ltd v New South Wales (No 2)* (1965) 113 CLR 54, 86 (Barwick CJ); *Commonwealth v Tasmania* (1983) 158 CLR 1, 138 (Mason J), 259–60 (Deane J); *Richardson v Forestry Commission* (1988) 164 CLR 261, 289 (Mason CJ and Brennan J).

99 (1965) 113 CLR 54, 86 (Barwick CJ).

> legislative authority, it is for this Court to determine whether particular provisions, when challenged, are appropriate and adapted to that end. The Court will closely scrutinize the challenged provisions to ensure that what is proposed to be done substantially falls within the power.

As will be described below, the existing s 18C provision appears to go considerably further than the obligations imposed on Australia to protect against racial vilification and hatred under either the *International Covenant on Civil and Political Rights*[100] or the *International Convention on the Elimination of All Forms of Racial Discrimination.*[101] There appears to be a real issue as to whether s 18C in its existing form would be reasonably considered to be 'appropriate and adapted' to these treaty obligations. By contrast, the proposed amendments appear to be more directly tailored towards Australia's international human rights obligations and therefore fall more obviously within the scope of the external affairs power.

A complete analysis of the constitutional validity of the existing s 18C is beyond the scope of this paper. At the very least, however, it can be said that there must be serious doubts as to whether s 18C would survive a constitutional challenge in its present form. In our view, the low harm threshold set by the inclusion of the words 'offend, insult, humiliate' raises real questions both as to whether s 18C would be fully supported by the external affairs power and whether it infringes the implied freedom of political communication under the Constitution.

F *Australia's International Treaty Obligations*

Australia's international obligation to protect freedom of expression stems from art 19 of the *Universal Declaration of Human Rights*[102] and art 19 of the *ICCPR.* While art 19(3) expressly states that the exercise of this right carries with it 'special duties and responsibilities'[103] and it is acknowledged that the right is not absolute, it is also clear that any restrictions on the right must be strictly limited as 'any restriction on freedom of expression constitutes a serious curtailment of human rights'.[104]

It is not a coincidence that during debates prior to the drafting of the *UNDHR*, it was the Soviet bloc that proposed these types of 'hate speech' limitations to freedom of speech. Indeed, the formulation of 'hate crime' is analogous to the crimes of opinion committed by the 'enemies of the people' in communist countries.[105] Thankfully the Soviet bloc was defeated during those deliberations and the *UNDHR* recognises the right to freedom of opinion and expression. According to Chris Berg of the Institute of Public Affairs:[106]

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100 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

101 *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) ('*Racial Discrimination Convention*').

102 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) ('*UNDHR*').

103 *ICCPR* art 19(3).

104 Human Rights Committee, *General Comment No 34*, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011) [24].

105 Berg, above n 11, 175-6

106 Ibid 175.

> [T]he human rights movement to restrict hate speech and racial discrimination was an ideological power play by the Communist Bloc that was looking for human rights to approve the suppression of political dissent. The adoption of hate speech restrictions was not intended to liberate minorities (as many contemporary human rights advocates claim), but to restrain democrats.

It is acknowledged that Australia does also have international treaty obligations to protect against racial vilification and hatred. These are, however, strictly defined obligations. For example, art 20(2) of the *ICCPR* provides that '[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'.[107] Similarly, art 4(a) of the *Racial Discrimination Convention* provides that States Parties shall declare unlawful:

> all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof.[108]

Both of the above provisions are aimed at protecting against specific examples of racially motivated harm, namely racial vilification and hatred. Indeed, art 4 specifically provides that in implementing these obligations States Parties must show 'due regard to the principles embodied in the *Universal Declaration of Human Rights* and the rights expressly set forth in article 5 of this Convention',[109] which expressly includes the right to freedom of opinion and expression.

Under international human rights law, there is no general right to protection from being offended. Hence, in his 2012 Human Rights Day Oration to the Australian Human Rights Commission, Spigelman commented that '[n]one of Australia's international treaty obligations require us to protect any person or group from being offended. We are, however, obliged to protect freedom of speech'.[110] The existing s 18C and s 18D appear to extend well beyond the scope of Australia's international treaty obligations to protect against racial vilification and hatred. In particular, the use of 'offend, insult, humiliate' under s 18C and the 'reasonably and in good faith' qualification under s 18D are arguably more expansive than obligations imposed under an ordinary reading of the text of the above treaties.

There is a broader obligation under art 2 of the *Racial Discrimination Convention* that States Parties 'condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms ...'.[111] This is strikingly similar to the provision found in art 2 of the *Convention on the Elimination of All Forms of Discrimination against Women* which provides that States Parties 'condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a

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107 *ICCPR* art 20(2).

108 *Racial Discrimination Convention* art 4(a).

109 Ibid art 4.

110 James Spigelman, 'Human Rights Day Oration' (Speech delivered at the 25th Human Rights Award Ceremony, Australian Human Rights Commission, Sydney, 10 December 2012) <https://www.humanrights.gov.au/news/speeches/human-rights-day-oration-delivered-honourable-james-spigelman-ac-qc>.

111 *Racial Discrimination Convention* art 2.

policy of eliminating discrimination against women ...'.[112] Indeed, opponents of the proposed amendments have pointed to the similar phrasing used in both s 18C of the *RDA* and s 28A of the *Sex Discrimination Act 1984* (Cth) ('*SDA*'), which uses the wording 'offended, humiliated or intimidated' when defining sexual harassment.[113]

The art 2 obligations relating to the elimination of both racial discrimination and discrimination against women are similarly broad, and yet the domestic speech restrictions that are applied in relation to sexist speech are much more narrowly defined than those relating to racist speech. The domestic prohibitions established under s 18C of the *RDA* and s 28A of the *SDA* are not analogous. While both 'sexual harassment' and the behaviour prohibited under s 18C use similar phrasing such as 'offend' and 'humiliate', the contexts are entirely different. Firstly, sexual harassment is not generally prohibited under the *SDA*, but is subject to prohibition in specifically defined circumstances, such as in the workplace or educational facilities. Secondly, sexual harassment requires that the conduct in question is directed towards the person harassed and does not relate generally to acts done because of a person's gender. By contrast, s 18C provides a general prohibition on public acts and is therefore significantly broader in the restrictions it places on freedom of speech. As was observed when s 18C was originally introduced:[114]

> If men and women could bring complaints to the Human Rights and Equal Opportunity Commission on the basis that statements made in the media or elsewhere relating to the characteristics of members of one sex are offensive, then there would be a flood of complaints almost every day.

It is our view that the proposed amendments are consistent with Australia's international treaty obligations relating to the prohibition of racial vilification and hatred. In fact, the proposed amendments appear to be an improvement over the existing provisions in terms of meeting Australia's international human rights obligations, in that they are more appropriately tailored to our specific obligations under the *Racial Discrimination Convention* and more expansive in their protection of freedom of expression.

V CONCLUSION

Freedom of expression remains, in many respects, a 'forgotten freedom' in Australia. It is all too easily compromised, qualified and left undefended, particularly when the speech in question is offensive. Moreover, freedom of expression is a meaningless freedom if all that is protected is benign or sanitised speech. The true test of the freedom is whether we are prepared to protect offensive speech, knowing that we may also then invoke that same freedom to ourselves criticise ideas with which we disagree.

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112 *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) art 2.

113 See, eg, Geoffrey Levey and Dr Helen Pringle, 'Why the "Bolt Laws" Should Stay', *The Drum* (online), 28 November 2013 <http://www.abc.net.au/news/2013-11-27/levey-pringle-why-the-bolt-laws-should-stay/5118040>. See also, Explanatory Memorandum, Racial Hatred Bill 1994 (Cth) 10.

114 Department of the Parliamentary Library (Cth), above n 38, 11.

There is no doubt that hate speech has the power to cause significant harm but hateful ideas will never be defeated solely through laws banning their expression—they will just be hidden away from public view. In fact, the inability to directly and publicly confront these views ultimately weakens our society by allowing hateful views to persist unchallenged. This is the real tragedy of s 18C and the failure to proceed with its reform. If s 18C is meant to protect us from racism and bigotry then it has been wholly unsuccessful in this endeavour. Instead, the provision actually makes it harder to fight against racism and bigotry by attempting to entirely remove sensitive debates from the public arena.

In our view, there are many reasons to recommend the proposed amendments to s 18C. The existing section is potentially vulnerable to constitutional challenge as it sets the harm threshold far too low by prohibiting acts that are reasonably likely to offend, insult or humiliate. This problem is compounded when the conduct in question is judged by the standards of the alleged victim group, rather than by objective community standards. The low harm threshold potentially raises questions of constitutional validity, both in terms of the implied right to freedom of political communication and whether the legislation can reasonably be considered to be 'appropriate and adapted' to Australia's treaty obligations.

For the reasons outlined in this paper, it is important not to lose sight of the need to reform s 18C, even despite the recent retreat from this position by the federal government. Furthermore, reforming s 18C should be seen not as a sufficient step on its own, but merely as one step towards re-asserting the importance of freedom of expression in Australia. Ultimately, the failure to protect freedom of expression weakens our democracy, and limits our ability to fully realise other human rights.

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