Chapter 7

The Case against Changing Section 18C of the *Racial Discrimination Act*

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I acknowledge the traditional owners of the land on which we meet, the Boonwurrung and Woiwurrung peoples of the Kulin nation, who have cared for this land for generations and I pay my respects to their elders past and present.

I am honoured to have been asked to give this address, not only because of the presence of so many distinguished Australians at this conference, but also because the topic is one about which I care deeply. I realise that the viewpoint I advocate is probably not reflective of the prevailing views in this room, but I am comforted by the numerous affirmations I have heard by earlier speakers of the value of free speech . . . and tolerance.

On 5 August 2014, the Prime Minister, Tony Abbott, announced that the Government's plans to repeal or amend section 18C of the *Racial Discrimination Act 1975* (Cth) (RDA) and its related sections were now, to use his words, "off the table".[1] The following day, the Prime Minister, Tony Abbott, confirmed that the proposed changes to the Act would not be revived.[2] These announcements put an end, for the moment, to the Government's pre-election commitment to "repeal" section 18C of the Act "in its present form".[3] Nevertheless, there continues to be public debate about the legislation.

First principles

Freedom of expression is fundamental to a democratic society and indispensable for human progress. However, it has never been regarded as absolute and unlimited. In his famous essay, *On Liberty*, the philosopher, John Stuart Mill, drew a distinction between liberty and licence. He recognised that liberty does not mean the licence of individuals to do just as they please, because that would mean the absence of law and of order, and ultimately the destruction of liberty. The limits of freedom are reached when its exercise causes harm to others.

The argument over section 18C and its related sections has sometimes falsely been cast as a Manichean struggle between supporters and opponents of freedom of expression or, alternatively, between racists and anti-racists. It is neither. Almost all supporters of the legislation readily acknowledge the critical importance to our society of freedom of expression, and almost all opponents of the legislation readily acknowledge that racism is a destructive evil. The argument has been about the appropriate balance to be struck between freedom of expression and the freedom to live one's life without harassment, intimidation or denigration on account of the colour of one's skin or one's national or ethnic origin.

The need to balance freedom of expression with freedom from racial vilification is not a recent nor novel idea in Australia. In the Supreme Court of NSW as far back as 1949, Justice Leslie Herron, later Chief Justice, expressed regret at having to dismiss a defamation suit brought by a distinguished woman in the Jewish community following publication of a scurrilous polemic

against Australian Jews in a national newspaper. He found she personally had not been defamed, and the law at that time provided no remedy for group defamation based on race. Justice Herron suggested that this was a deficiency in the law that might be redressed by Parliament.[4]

Since that time, mass migration has made an extraordinary contribution to Australia's economy and overall development. According to the 2011 Census, more than 44 per cent of Australia's 22 million people were born overseas or have at least one parent who was born overseas. Australians speak 260 languages and identify with some 300 ancestry groups.[5]

It follows that Australia is, and has chosen to be, a multicultural society. Its viability as such demands that the ethnic communities that make up Australian society can live together in peace and harmony. Vilifying individuals or groups because of their race is inimical to that goal, and necessarily undermines Australia's fabric as a multicultural community, in a way that vilification on the basis of other immutable factors might not do. The whole community has an interest in preventing it from happening, or at least minimising it, and in counteracting it when it does happen. As the Australian Law Reform Commission put it more than twenty years ago:

> In a multicultural society people are entitled to be protected against serious attempts to undermine tolerance by creating or playing on racial hatreds between groups. Laws prohibiting such conduct protect the inherent dignity of the human person. Peace and social order are underwritten by values such as equality of status, tolerance of a wide variety of beliefs, respect for cultural and group identity and equal opportunity for everyone to participate in social processes which are respected and protected by the law. Laws prohibiting racial vilification indicate a commitment to tolerance, help prevent the harm caused by the spread of racism and foster harmonious social relations.[6]

There are those who believe that in an ethnically and culturally diverse society the threat to public peace and order posed by home-grown and imported forms of racism can, in every case falling short of threats or acts of physical violence, be left to sort itself out within the community. Good speech, they tell us, in the form of rational argument and public opprobrium, is invariably the most effective response to racial vilification.

Often, this might indeed be the case. But it is naïve to suggest that racial vilification – any more than defamation of an individual – is in *every case* capable of being rectified or neutralised by rebuttal. Even if it is only in exceptional cases that good speech is ineffective to counter racial vilification, this ought to be sufficient to justify providing the targets of racial vilification with a private legal remedy with which to defend themselves as a last resort, using their own resources. Those who contend that racial vilification can, in every case, without exception, effectively be countered by good speech seem to lack knowledge of, and insight into, the nature of racial vilification and the harm that it does.

Racial vilification and its harms

In using the expression, "racial vilification", I adopt the ordinary dictionary meaning of the word "vilify", that is, "to speak evil of, defame or traduce".[7] To engage in racial vilification is, therefore, to speak evil of, defame or traduce a person or group because of their race, colour or

national or ethnic origin. Note that the focus of this definition is on the effect on the target person or group.

This is to be contrasted with the concept of *incitement* to racial hatred, which focuses on the effect of expressions of racism on the wider community. The incitement of the community to hatred against a person or group can occur contemporaneously with vilifying the person or group, but is logically preceded by it. Incitement to hatred of a person or group is only possible once a basis has been established by speaking evil of, defaming or traducing that person or group.

The harms of racial vilification, as identified in research in Australia and elsewhere, extend well beyond mere hurt feelings or injured sensibilities. Those who believe that we can leave the task of combating racism exclusively to civil society understate the seriousness of these harms. The harms include:

Social exclusion and limitations on personal liberty

The targeting of individuals or groups because of immutable factors such as skin colour, ethnicity or national origin has nothing to do with the expression of opinions or ideas. One can change one's opinions and ideas. One cannot change one's genetic make-up or national or ethnic origin. Racial vilification is therefore a direct attack on the target's humanity and dignity. It can have a negative impact on the target's relationships with neighbours, work-mates, friends, acquaintances and others.

To belong to a racial or ethnic group which is the target of public expressions of racism can undermine and ultimately destroy the sense of safety and security with which members of the group go about their daily lives. Such targeting can thus deny its victims personal security and the liberty to live their lives because of the fear, even in the absence of provable threats of physical harm, that violent acts of racial hatred are more likely to occur in a social climate in which expressions of racism are free to proliferate.[8] Three national inquiries in Australia have concluded that such a fear is well-founded.[9]

The desire to avoid being continually confronted with vilifying speech, or by actual or potential perpetrators, places limits on the target's freedom to maintain broad support networks and circumscribing possibilities to form and maintain personal relationships. This may lead the target to resign from a job, leave an educational institution, move house and avoid public places.[10] There may also be knock-on effects upon sympathetic non-target group members, whose liberty to associate with those who are targeted by racial vilification is also constricted by a desire to avoid becoming targets themselves.[11]

Internalisation of racist messages

Despite conscious attempts to resist the messages of racist speech, the public repetition of racist themes and stereotyping results in individual victims, the perpetrators, and society as a whole, subconsciously learning, internalising and institutionalising the messages conveyed.[12] Speech which communicates inferiority and negative characteristics based on race tends to produce in its victims the very characteristics of "inferiority" that the speaker intends to ascribe to them, as victims internalise and come to believe, and then perform, the dehumanising characterisations attributed to them.[13]

Desensitisation of society as a precursor to violence

Historically, in other countries – and, to a limited degree, in Australia, particularly in relation to the Indigenous population – public expressions of racism have had the effect, often intended, of desensitising the general population to the humanity, dignity and human rights of members of the targeted group. This has been a precursor to discrimination, persecution, violence and, ultimately, genocide and other crimes against humanity.[14] To my knowledge, there has never been a genocide that was not preceded by a public campaign of racial vilification of the target group. For targeted group members, the premise of their political equality with other citizens is undermined[15] along with their basic sense of safety.

Silencing of targeted individuals and groups

Speaking back against expressions of racism is often not possible for its targets, or even appropriate. Verbal racist attacks should not be dignified with a response in circumstances where a response would imply that the target's very humanity is a legitimate matter for "debate."

Speaking back will rarely change a racist's basic attitudes. Although racism is said to spring from a belief that there are distinct human races with distinctive characteristics which determine the moral and other qualities of their individual members, the belief has no scientific basis. In fact, racism is rarely the product of any kind of purely cognitive process. People who propound racist beliefs are almost always motivated by emotional or psychological factors or by a supervening interest, and will therefore persist in such beliefs even when there is overwhelming evidence to the contrary. The so-called "reasons" proffered for racist attitudes towards entire ethnic or national groups are necessarily no more than rationalisations.[16]

The targets of racial vilification tend to curtail their own speech as a protective measure for a range of reasons:

- The target fears that a response may provoke further abuse.[17]
- If the speaker is in a position of authority over the target, the target's ability to respond in a meaningful way may be negated by the target's fear of victimisation, or lack of confidence to challenge the authority figure.[18]
- Continuing public, negative, stereotypical portrayals of a target group have been described as "incessant and cumulative assaults" on the self-esteem of members of the group. The "micro-aggression" enacted via racism produces a conviction in the target, usually well-founded, that counter-speech will not be given a fair hearing or taken seriously.[19]
- Members of the majority or dominant group in society "get a lot more speech than others." Members of relatively less powerful groups within the community do not operate from a level playing field.[20]

Damage to health of targets

There is a growing body of research that highlights the serious health effects racism can have on individuals, similar to other stress-induced disorders. Repeated exposure to it contributes to conditions such as hypertension, nightmares, post-traumatic stress disorder and, in extreme cases, psychosis and suicide.[21]

In summary, the harms of racial vilification are real. They are not imaginary or fanciful. To denigrate people because of the colour of their skin or their national or ethnic origin can be as

harmful in its effect on its targets and on society as a whole, especially an ethnically diverse society, as statements which defame individuals, breach copyright, promote obscenity, breach official secrecy, demonstrate contempt of court and parliament, or mislead or deceive consumers, all of which are prohibited, and widely accepted as rightfully prohibited, by law.

John Stuart Mill's "harm to others" principle is therefore clearly engaged by racial vilification. The only remaining question is whether the existing legislation is appropriately tailored to address the harms that it causes.

The scheme of the legislation

Section 18C of the Racial Discrimination Act is one of five sections which comprise Part IIA of the Act. The other sections are 18B, 18D, 18E and 18F. Section 18C makes it:

> 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.

Section 18B elaborates on the meaning of the words "because of . . . race, colour or national or ethnic origin". It provides:

> If:
>
> (a) an act is done for two or more reasons; and
>
> (b) one of the reasons is the race, colour or national or ethnic origin of a person (whether or not it is the dominant reason or a substantial reason for doing the act);
>
> then, for the purposes of [Part IIA], the act is taken to be done because of the person's race, colour or national or ethnic origin.

Section 18D sets out a series of exemptions to conduct that would otherwise be rendered unlawful by section 18C. To paraphrase, academic and artistic works, scientific debate and fair reports or fair comment on matters of public interest are exempt from liability under section 18C, provided that they are said or done reasonably and in good faith.

Section 18E provides for employers and principals to be vicariously liable for a contravention by their employees or agents respectively if the contravention occurs in connection with their duties, unless reasonable steps were taken to prevent the contravention.

Section 18F provides that the operation of State and Territory laws is unaffected by Part IIA of the Racial Discrimination Act.

The operation of Part IIA of the *Racial Discrimination Act* in practice

A contravention of section 18C potentially incurs a civil, not criminal, liability. One is not "guilty" of an "offence". There are no criminal penalties, such as imprisonment or fines.

Every key word and phrase in section 18C has been the subject of judicial interpretation: "otherwise than in private", "reasonably likely in all the circumstances", "offend, insult, humiliate or intimidate," "because of . . . race, colour or national or ethnic origin." The courts have given these words and phrases their ordinary, dictionary meanings. However, as is true of all legislation, some interpretation by the courts has been necessary in applying the section to

specific fact situations, and its operation needs to be understood in light of the decided cases. Some important conclusions can be drawn.

- *Scope of "offend" and "insult"*
  Section 18C does not prohibit generic offence and insult. The alleged contravention must have occurred "*because of the race, colour or national or ethnic origin*" of the complainant. Section 18C therefore does not apply if the alleged offence, insult, humiliation or intimidation arises because of the opinions or beliefs, rather than the race, of the complainant. Accordingly, no topic, or side of the argument on any topic, is placed "off limits" for discussion in any context. No case under Part IIA has been decided against a respondent simply because of the subject matter dealt with, or solely because the thesis presented has reflected negatively on a group of people because of their race.[22]
  This is as it should be. To offend or insult a person or group merely by confronting them with ideas or opinions which they perhaps find incompatible with their own belief systems, might hurt their sensibilities, but does not in any way impugn their human dignity. In a free society, ideas of any kind – including religious, political, ideological or philosophical beliefs – are, and should be, capable of being debated and defended. Robust statements or critiques of such ideas, no matter how passionately adhered to, are not prohibited by section 18C.
  In contrast, to offend or insult a person or group because of their "race, colour or national or ethnic origin" necessarily sends a message that such people, by virtue of who they are, and regardless of how they behave or what they believe, are not members of society in good standing. This cannot but vitiate the sense of belonging of members of the group and their sense of assurance and security as citizens. It is notable that the Commonwealth – which was then under a Coalition government headed by Prime Minister John Howard – intervened in one case, *Toben v Jones*, to defend the validity of Part IIA of the Racial Discrimination Act and specifically the use of the words "offend, insult, humiliate and intimidate" in section 18C.[23]
  Although the judgment of Bromberg J, in *Eatock v Bolt* [2011] FCA 1103, has been the focus of many of the criticisms of Part IIA of the RDA, it, too, confirmed expressly that the contravention of section 18C that was found to have occurred was not due to the overall topic or thesis of the respondents' publications.[24] The decision was based on a combination of findings of errors of fact and distortions of the truth[25] and of a lack of reasonableness and good faith.[26] There was no appeal against these findings.

- *Objective test*
  Section 18C does not enforce the subjective, and possibly capricious, perspectives of complainants about perceived harm. Not a single judgment has interpreted the section in that way. On the contrary, the courts have consistently held that the question of whether a publication is "reasonably likely" in all the circumstances to offend, insult, humiliate or intimidate because of race is to be decided by the court according to an objective test, and not according to the subjective perceptions of the complainant or witnesses. It is not necessary for a complainant to adduce evidence that anyone has in fact been offended, insulted, humiliated or intimidated. Such evidence, if led, is admissible but not

determinative. The court must make an objective assessment of the position itself, so that community standards of behaviour rather than the subjective views of the complainant are the decisive consideration.[27]

The judgment in *Eatock v Bolt* has been criticised for defining the relevant community standard as that of the reasonable member of the group which was the target of the alleged contravention, rather than the more generic reasonable person. The criticism is a serious one, but the point was never tested on appeal, possibly because, if a broader community standard had been applied in that case, it might not have altered the overall outcome.

- *Mere hurt feelings not prohibited*

  The case law has also demonstrated the falsity of claims that the words "offend" and "insult" provide a remedy for mere hurt feelings and trivial slights. The prohibition in section 18C has been found by the courts to be limited to those circumstances in which the offence, insult, humiliation or intimidation has "profound and serious effects, not to be likened to mere slights".[28] This means that section 18C of the Racial Discrimination Act has been interpreted by the courts as applying only to the kind of authentic harms which I outlined earlier.

- *Vexatious complaints*

  Fears that Part IIA of the Racial Discrimination Act would produce a plethora of trivial or vexatious complaints have likewise proved groundless. Complaints are lodged with the President of the Australian Human Rights Commission[29] who is obliged to inquire into and attempt to resolve the complaint by direct conciliation between the parties.[30] No complaint can come before a court until this process has been exhausted, and the President has issued a certificate that the complaint before him or her has been terminated.[31] The President may terminate a complaint "if the President is satisfied that the complaint was trivial, vexatious, misconceived or lacking in substance."[32]

  During the 2012-2013 financial year, complaints to the Commission under section 18C increased by 59 per cent. Fifty-three per cent of racial vilification complaints in that year were resolved at conciliation. Four per cent of complaints made under section 18C were terminated or declined for being trivial, misconceived or lacking in substance. And less than three per cent of racial hatred complaints proceeded to court.[33] As respondents are often well-resourced media corporations, there is no reason to assume that they are under undue pressure to compromise at or before a conciliation. As is true of all litigation, the legal costs to be incurred if the matter should proceed to court, and the risk of an adverse costs order if the other party should succeed, are considerations which prey equally on the minds of complainants and respondents and nudge them towards a compromise. Compulsory conciliation presents both parties with a face-saving opportunity to reach such a compromise.

- *"Reasonably and in good faith"*

  The exemption provisions in section 18D have also been judicially considered, especially

the threshold requirements that the act for which an exemption is claimed must be done "reasonably and in good faith". Whilst some judges have treated the words "reasonably" and "in good faith" as a composite concept, most judges have treated them as separate but overlapping requirements.

For an act to have been done "reasonably" under section 18D it must bear a rational relationship to the academic, scientific, artistic or other purpose which it is claimed renders the act exempt from liability. If offence, insult, humiliation or intimidation is caused on the basis of race, it must not be out of proportion to the fulfilment of that purpose.[34]

"Good faith" requires a respondent to have acted with sufficient honesty and conscientiousness to minimise the offence, insult, humiliation and intimidation suffered by the people likely to be affected by the respondent's conduct, and to avoid, for example, gratuitously inflammatory and provocative language, or contriving to smear a person or group.[35] Good faith may be tested both subjectively and objectively. The absence of subjective good faith should be sufficient to preclude a respondent from relying upon section 18D. But even if the respondent was subjectively honest and genuinely believed in the truth of the publication, the respondent might still fail to establish an exemption under section 18D if there is evidence of an ulterior purpose of racial vilification and, hence, of a lack of objective good faith.

For example, in two cases brought by my organisation, Holocaust-deniers claimed they were merely engaged in a good faith discussion of history. In each case, however, the court found that the so-called "discussion" was a thinly-disguised vehicle for smearing Jews as a group. The respondents thus failed to establish good faith defence under section 18D.[36]

It follows that publications whose subject-matter is reasonably likely to offend, insult, humiliate or intimidate a person or group on the grounds of race will be exempt as long as the language used is consistent with a genuine effort to lessen the offence, insult, humiliation or intimidation. To the extent that this requirement imposes a duty of care on the publisher, there would seem to be an overlap between the meanings of "reasonably" and "in good faith."

Given the breadth of the types of matters that section 18D exempts, the absence of the requirements of reasonableness and good faith would, in effect, permit even the most extreme expressions of racial hatred, no matter how tenuous the connection might be between those expressions and the academic, scientific, artistic or other purpose or purposes which it is claimed render those expressions exempt from liability.

The Exposure Draft introduced by the Government to reform Part IIA of the Racial Discrimination Act[37] proposed an exemption provision which would have removed any requirement of reasonableness and good faith. The mere fact that something has been said or written in the course of participating in a public discussion has never been accepted at law as a sufficient reason to exempt it from liability for defamation, breach of copyright and the like, but in the Exposure Draft it would have been accepted as a sufficient reason to exempt it from liability from racial vilification. The proposed exception was so broad that it could have applied even to conduct amounting to a threat of violence on the basis of race – which is a criminal offence with aggravating circumstances under State law[38] – if the threat was made in the course of participating in a public discussion. This was one of

the reasons the exemption provision in the Exposure Draft came in for heavy public criticism.

The experience of the Australian Jewish community

My organisation has dealt with most cases of racial vilification directed against the Jewish community by way of direct negotiations with the relevant publishers. The fact that publishers are aware that there is "a law against racial vilification" and do not, as a rule, identify, or wish to be identified, as racists is sufficient in most cases to resolve a potential complaint. Only if negotiations fail is the incident escalated into a formal complaint with the Human Rights Commission. It has been even rarer for my organisation to proceed to litigation under Part IIA of the Racial Discrimination Act but, when we have done so, the vilification has been egregious and we have usually been successful.

A complaint under Part IIA of the Racial Discrimination Act, which was brought to the Commission by my organisation against a global social media platform provider in 2012, went to compulsory conciliation. The platform provider ultimately removed or made inaccessible hundreds of crudely antisemitic racist images and comments. In the United States, efforts by Jewish organisations to have the same platform provider take similar action over substantially the same content failed.[39]

Both redress and public vindication have been important to us as a means of providing people in our community with reassurance about the essential fairness, tolerance and civility of Australian society and, thus, of preventing or counteracting the harms that public expressions of antisemitism would otherwise cause them. The removal of racist content also sends a signal that the content is socially unacceptable, and this can help to discourage the dissemination of racial prejudice.

Nevertheless, my organisation treats the option of making a complaint under Part IIA as a last resort. We also recognise that the principle means of counteracting racism in the long term is through public and school education. We consider legal and educative tools to be mutually complementary, not mutually exclusive. Indeed, by setting a standard for acceptable conduct, laws also serve an educative function.

Part IIA of the Racial Discrimination Act is not about censorship; it is about accountability. Exercising one's freedoms comes with duties and responsibilities. It involves being accountable when one infringes against another's freedom. Racial vilification is a form of infringement against another's freedom which can and should ordinarily be dealt with by non-legal means. However, a peaceful avenue for redress through the process of the law remains essential when all else fails.

Endnotes

1. "Tony Abbott dumps controversial changes to 18C racial discrimination laws", *Sydney Morning Herald*, 5 August 2014**:** http://www.smh.com.au/federal-politics/political-news/tony-abbott-dumps-controversial-changes-to-18c-racial-discrimination-laws-20140805-3d65l.html (viewed 17 August 2014).

2. "Tony Abbott says proposed Racial Discrimination Act changes won't be revived", *The Australian*, 6 August 2014: http://www.theaustralian.com.au/national-affairs/tony-abbott-says-proposed-racial-discrimination-act-changes-wont-be-revived/story-fn59niix-1227015125755 (viewed 17 August 2014).

3. Tony Abbott, "The job of government is to foster free speech, not to suppress it", *The Australian*, 6 August 2012: http://www.theaustralian.com.au/national-affairs/opinion/the-job-of-government-is-to-foster-free-speech-not-to-suppress-it/story-e6frgd0x-1226443377179 (viewed 17 August 2014).

4. Peter Wertheim, "Law against racial vilification steeped in Australian history," *Online Opinion*, 20 December 2013: http://www.onlineopinion.com.au/view.asp?article=15856 (viewed 17 August 2014).

5. *The People of Australia: Australia's Multicultural Policy*, 2011, Department of Social Services, 2: https://www.dss.gov.au/sites/default/files/documents/12_2013/people-of-australia-multicultural-policy-booklet_print.pdf (viewed 17 August 2014).

6. Australian Law Reform Commission, *Multiculturalism and the Law,* Report No 57 (1992), para 7.44: http://www.austlii.edu.au/au/other/lawreform/ALRC/1992/57.pdf?stem=0&synonyms=0&query=Multiculturalism and the Law (viewed 17 August 2014).

7. Macquarie Online Dictionary (viewed 17 August 2014).

8. Mari Matsuda, 1993. "Public Response to Racist Speech: Considering the Victim's Story". In *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment*, M. Matsuda, C. Lawrence, R. Delgado and K. Crenshaw (eds), 17-52. Colorado: Westview Press, at 17 and 22.

9. The ***National Inquiry into Racist Violence*** conducted by the Human Rights and Equal Opportunity Commission (the predecessor of the present Australian Human Rights Commission) in 1991, concluded that "the evidence presented to the Inquiry also supports the observation that there is a connection between inflammatory words and violent action": Human Rights and Equal Opportunity Commission, *Report of National Inquiry into Racist Violence in Australia* (1991), 144: http://www.humanrights.gov.au/publications/racist-violence-1991 (viewed 17 August 2014). The ***Royal Commission into Aboriginal Deaths in Custody*** (1991) also concluded that there is a clear nexus between racist language and violence and that expressions of racism are both a "form of violence" and a promoter of subsequent violence against Aboriginal people. Like the report of the National Inquiry into Racist Violence, it recommended that the Government legislate to provide civil remedies to

victims of racial vilification and also provide a conciliation mechanism for complaints, with exemptions for "*publication or performance of works of art and the serious and non-inflammatory discussion of issues of public policy*": Royal Commission into Aboriginal Deaths in Custody, National Report Volume 4 (1991), at 28.3.34 and 28.3.49 http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol4/26.html (viewed 17 August 2014). The Australian Law Reform Commission, in its ***Multiculturalism and the Law*** report (1992), concluded (with one dissenter) that prohibition of "racist abuse" is consistent with existing limits on freedom of expression, and that public expressions of racism are damaging to the whole community, not only minority groups, undermining the tolerance required for Australia to survive as a multicultural society: Australian Law Reform Commission, *Multiculturalism and the Law,* Report No 57 (1992), para 7.44: http://www.austlii.edu.au/au/other/lawreform/ALRC/1992/57.pdf?stem=0&synonyms=0&query=Multiculturalism and the Law (viewed 17 August 2014).

10. Mari Matsuda, Note viii, at 24-25.

11. *Ibid,* at 25.

12. Richard Delgado, 1993. "Words that Wound: A Tort Action for Racial Insults, Epithets and Name Calling". In *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment*, M. Matsuda, C. Lawrence, R. Delgado and K. Crenshaw (eds.), 89-110. Colorado: Westview Press, at 90-94.

13. *Ibid*, at 94-95.

14. Alexander Tsesis, *Destructive Messages: How Hate Speech Paves the Way for Harmful Social Movements*, New York University Press, 2002.

15. Cass Sunstein, "Words, Conduct, Caste", *The University of Chicago Law Review*, Vol.60, Nos. 3 and 4 (1993), 795-844, at 814.

16. Polycarp Ikuenobe, "Conceptualizing Racism and Its Subtle Forms", *Journal for the Theory of Social Behaviour*, Vol. 41, Issue 2, June 2011, 161–181.

17. Richard Delgado, "Words that Wound: A Tort Action for Racial Insults, Epithets and Name Calling" in M. Matsuda, C. Lawrence, R. Delgado and K. Crenshaw (eds), *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment*, Colorado, Westview Press, 1993, 89-110 at 95; and also Mari Matsuda, "Public Response to Racist Speech: Considering the Victim's Story" in M. Matsuda, C. Lawrence, R. Delgado and K. Crenshaw (eds.), *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment*, Colorado, Westview Press, 1993, 17-52 at 24-25.

18. *Ibid.*

19. Rae Langton, "Speech Acts and Unspeakable Acts", *Philosophy and Public Affairs*, Vol. 22, No. 4 (1993), 293-330, at 314-316.

20. Catharine A. MacKinnon, *Only Words*, Harvard University Press,1993.

21. Mari Matsuda, "Public Response to Racist Speech: Considering the Victim's Story", *Michigan Law Review*, vol. 87,, no 8 (1989), 2320-2381, at 2336; *APS supports retention of strong protections against racial vilification*, Australian Psychological Society, Media release, 28 April 2014: http://www.psychology.org.au/Content.aspx?ID=5775 (viewed 17 August 2014).

22. For example, in *Walsh v Hanson* (2000) HREOCA 8 (2 March 2000), a complaint had been made against Australian politician, Pauline Hanson, who co-wrote a book contending that Aboriginal people were getting welfare payments undeservedly for which other Australians were not eligible. Regardless of factual and methodological flaws in the book, Ms Hanson was found to have a complete defence under section 18D and the complaint was dismissed.

23. *Ibid*, at [19].

24. *Eatock v Bolt* [2011] FCA 1103, Summary of Judgment, para [30].

25. *Ibid*, Reasons for Judgment, paras [384]-[386].

26. *Ibid*, para [425].

27. *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615 at [15]; *Creek v Cairns Post Pty Ltd* [2001] FCA 1007 at [12]*; Jones v Scully* [2002] FCA 1080 at [98]-[101].

28. *Creek v Cairns Post Pty Ltd* [2001] FCA 1007 at [16] *per* Kieffel, J.

29. *Australian Human Rights Commission Act, 1986* (Cth), Section 46P.

30. *Ibid*, Subsection 46PF(1).

31. *Ibid*, Section 46PO 13.

32. *Ibid*, Subsection 46PH(1)(c).

33. Australian Human Rights Commission, *At a glance: Racial vilification under sections 18C and 18D of the Racial Discrimination Act 1975 (Cth)*: https://www.humanrights.gov.au/glance-racial-vilification-under-sections-18c-and-18d-racial-discrimination-act-1975-cth (viewed 17 August 2014).

34. *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105 at [79]-[82] *per* French J.

35. *Toben v Jones* [2003] FCAFC 137 (27 June 2003) at [45] *per* Carr J; *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105, 131.

36. *Jones v Scully* [2002] FCA 1080 (2 September 2002); *Jones v Toben* (includes explanatory memorandum) [2002] FCA 1150 (17 September 2002).

37. Freedom of speech (repeal of s.18C) Bill 2014—Exposure draft, Attorney-General's Department, http://www.ag.gov.au/Consultations/Documents/Attachment A.pdf (accessed 17.8.2014).

38. See, for example, section 21A(2)(h) of the *Crimes (Sentencing Procedure) Act*, *1999* (NSW), which provides that one factor that can be taken into account in sentencing is whether: "*the offence was motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability)*".

39. http://www.israelhayom.com/site/newsletter_opinion.php?id=7823 (viewed 17 August 2014).