# 18C – TEN KEY POINTS TO GUIDE THE PERPLEXED

1. Sections 18C and 18D of the Racial Discrimination Act (RDA) balance the right to freedom of expression with the right for minority groups to be free of race hate speech. A similar balancing against the right of free speech occurs in defamation law and there is no campaign to abolish those laws. Most Australians believe in a fair go for all and mutual respect.

2. Section 18C of the RDA makes it unlawful to do an act, otherwise than in private, that is reasonably likely to offend, insult, humiliate or intimidate a person or group of persons by reason of their race, colour or national or ethnic origin.

   a. there is no contravention of section 18C unless the offence, insult, humiliation or intimidation is found to have **"*profound and serious effects, not to be likened to mere slights*"** (*Creek v Cairns Post Pty Ltd* [2001] FCA 1007 at [16] per Kieffel J);
   b. *"reasonably likely to"* has been construed without exception as an **objective test** not a subjective test thereby excluding the capricious perceptions of the complainant or witnesses (*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])); and
   c. "offend, insult, humiliate or intimidate" have been treated by the courts as a single descriptor, although there have been cases in which contraventions have been found only of "offend, insult".

3. Section 18D sets out a series of exemptions - academic and artistic works, scientific debate and fair reports or fair comment on matters of public interest are exempt from liability under section 18C if done "reasonably and in good faith".

   a. Section 18D was pleaded in *Eatock v Bolt* [2011] FCA 1103 (the Andrew Bolt case), but the Judge rejected this defence. The articles were found to contain "errors of fact" and "distortions of the truth". There was no appeal against those findings;
   b. The contravention of section 18C in the Andrew Bolt case was **not** due to the topic of the articles. See Summary of Judgment at para [30]); and
   c. Bill Leak would almost certainly have been able to successfully invoke s18D, in respect of his controversial cartoon. The complaint was withdrawn within a short time.
   d. Section 18D has prevailed over 18C on numerous occasions in the courts, ie 18D works in practice and not just in theory.

4. Sections 18C and 18D have been applied in court cases since 1995 without controversy, except among a limited number of people in the Andrew Bolt case and the QUT Case, which was thrown out late last year. (The complaint against Bill Leak never got to court).

5. Sections 18C and 18D continue to enjoy wide public support (75% plus), despite the sustained media attacks against these laws. See:

   (i) the Challenging Racism Research Project, University of Western Sydney, 2010:

https://www.westernsydney.edu.au/newscentre/news_centre/research_success_stories/australias_largest_study_on_racism_shows_public_supports_existing_racial_discrimination_act

(ii) a Nielsen poll published on 14 April 2014 which found that 88 per cent of respondents believe it should be unlawful to offend, insult or humiliate based on race: http://www.smh.com.au/federal-politics/political-news/race-hate-voters-tell-brandis-to-back-off20140413-zqubv.html

(iii) a poll conducted in February 2017 by Essential Research which found that more than 75% of Australians are opposed to any changes to section 18C https://theconversation.com/australians-believe-18c-protections-should-stay-73049

Section 18C was not an issue in the last Federal election. The government has no mandate to change it.

6. The 18 recommendations made by the Joint Parliamentary Committee on Human Rights, deal only with complaints handling and early dismissal processes and procedures. If adopted, as they should be, they will ensure no repetition of the problems associated with either the QUT case or complaint against Bill Leak.

7. There is no evidence that the percentage of vexatious or unmeritorious cases that are commenced under section 18C of the RDA is higher than under any other statutory regime for relief, such as the law of defamation, copyright, consumer protection and trade practices. Very few cases ever make it to court. In 2015-16, 77 s.18C complaints were made to the Australian Human Rights Commission but only 1 proceeded to court.

8. Under s.18C, the likelihood of offence, insult, humiliation or intimidation on the ground of race (the objective test) is gauged from the perspective of a reasonable member of the group which was the target of the alleged contravention, rather than that of the more generic reasonable person. Senator Fierravanti-Wells has proposed that the latter standard (the person on the Bondi tram) should apply. This would have serious problems:

   a. A generic "reasonable person" is not in a position to make a fair assessment of what is reasonably likely to offend, insult, humiliate or intimidate a particular minority group, because he or she by definition would not have sufficient background knowledge and insight into the particularities of a minority group that has allegedly been targeted with racism to make an informed assessment;
   b. If the complainant is a member of a minority community that happens to be unpopular in the wider community at the time of the complaint, that unpopularity might be a factor in applying the more generic community standard. That would be unjust. Section 18C is not needed to protect members of minority groups who are popular in the wider community. It is needed to protect members of vulnerable and, in particular, unpopular minorities;
   c. Under the existing law, the assessment is made by a reasonable member of the targeted community, that is, by a member of that community who is neither overly sensitive nor overly thick-skinned. This is both more logical and fairer.

9. MPs Tim Wilson and James Paterson have proposed replacing the words "offend, insult, humiliate" in s.18C with the word "harass", so that it would be unlawful only to "harass or intimidate" people because of their race. This is bad policy and bad politics. It would substantively change the section. It would have to substantially change the sections' construction by the courts, resulting in more litigation, not less. In addition:

    a. Harassing or intimidating other people is generally regarded as criminal behaviour. For example, Chapter XI of the Western Australian *Criminal Code Act 1913* makes it a criminal offence to "create, promote or increase animosity towards, or harassment of, a racial group or a person as a member of a racial group". If this is done with intent, the offence carries a 14-year prison sentence (section 77). If not, it carries a 5-year prison sentence (section 78);
    b. Citizens should be protected against harassment and intimidation by the State, not by having to expend their private resources via a s.18C case. Harassment and intimidation caused by racism is a social problem, not a private dispute.
    c. Replacing the words "offend, insult, humiliate" with the word "harass" would leave vulnerable minority groups without a remedy against serious and ugly forms of racist hate speech. (For examples, see Appendix to the submission made by Executive Council of Australian Jewry to the Parliamentary Inquiry into freedom of speech: http://www.ecaj.org.au/wp-content/uploads/2016/12/ECAJ-Submission-to-Parliamentary-Inquiry-into-Freedom-of-Speech-6-December-2016.pdf)
    d. The case law (including the QUT case) contradicts the contention that the use of the word "offend" in s.18C sets the bar too low – see 2a above;
    e. The word "offend" or "offensive" appears in a variety of other laws, including the criminal law, yet the effect is not considered to be controversial. Indeed, the words "offend", "humiliate" and intimidate" in section 18C were copied from the definition of sexual harassment in sub-section 28A(1) of the Sex Discrimination Act 1984 (Cth).
    f. The word "offensive" is also used in sections 471.12 and 474.17 of the Criminal Code 1995 (Cth), which make it unlawful to use a postal service or a carriage service to menace, harass or cause "offence". State criminal laws also proscribe certain types of "offensive" behaviour;

10. The Parliamentary Joint Committee on Human Rights was unable to reach a consensus, or even a majority opinion, in favour of either Senator Fierravanti-Wells' proposal or the Wilson/Paterson proposal, or indeed any other proposals for amending sections 18C and 18D. Its recommendations were all limited to suggested reforms to the complaints-handling process, rather than changing the legislation itself. This is the sensible way forward. The problems identified by the QUT case and the Bill Leak complaint all related to deficiencies in the process. The government's reforms should, as the Inquiry recommended, address the identified problems (ie the process), which have across the board support, not be distracted with an abstract ideological debate, divorced from the social realities. The reforms to the complaints-handling process can be reviewed in 2 or 3 years' time.